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 I.

TORONTO

THE CARSWELL CO., LIMITED, LAW PUBLISHERS,

1899.

GENERAL ORDER.

HILARY TERM, A.D. 1896.

FORECLOSURE SUIT—ASSESSMENT OF DAMAGES.

It is ordered, that when a Bill shall be filed for the foreclosure and sale of mortgaged premises, and a Motion shall be made for an Order that such Bill be taken *pro confesso* for want of a plea, answer or demurrer, the Court may, on making such Order, also assess the amount due, or order a reference to determine the same, and decree a sale, provided at least fourteen days' notice of such Motion be given to the opposite party, together with a copy of the affidavit upon which such Motion is based and upon which such assessment is to be made.

A TABLE OF THE NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

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A.

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ERRATA.

Page 32.—Foot note, for "7 Ex.", read "7 Eq."

" 34.—Foot note, for "7 Ex.", read "7 Eq."

" 168.—Foot note, for "DeG, J. & S. 373," read "2 DeG., J. & S. 373."

" 588.—For "J. G. Stevens, Jr.", read "J. M. Stevens."

CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK.

BARCLAY v. McAVITY.

1894.

June 1.

Patent—Combination of Old and New Inventions—Infringement—Agreement by Licensee to Sell—Sale of Competing Article—Measure of Damages.

A patent for an apparatus which combines a particular invention by the patentee with other things which are not his invention is not infringed by an apparatus which does not include the patentee's particular invention.

Plaintiff was the patentee of a lubricator, and by an agreement with the defendants gave them the exclusive right to manufacture and sell the article within a specified area, in consideration of a royalty payable upon each lubricator when sold. The defendants agreed to manufacture the lubricator in sufficient numbers to supply the trade, and to use every reasonable means to secure its sale. The defendants duly manufactured the lubricator, kept it in stock for sale, and supplied all orders for it. They also manufactured and sold another lubricator not under patent and not an infringement of the plaintiff's invention. This and other lubricators in the market were sold so much cheaper than the plaintiff's could be manufactured and sold at that the latter had a very limited sale. The plaintiff contended that the manufacture and sale by the defendants of another lubricator was a breach of covenant by them to use every reasonable means to secure the sale of his invention.

Held, that there had been no breach of the agreement.

Semble, that if the article sold by defendants had been an infringement of plaintiff's patent his damages would be the royalty payable under the agreement. If it were not an infringement, but its sale a breach of the agreement, the damages would be as on an ordinary breach of covenant.

A licensee under a patent cannot question its validity. But he may shew that an article sold by him in competition with the patent is not an infringement of it.

This was a suit by the plaintiff for an account by the defendants of royalties due by them as licensees of a patent owned by the plaintiff. The facts are fully set out in the judgment of the Court. The argument was heard on the 4th of April, 1894.

Weldon, Q.C., and *McLean*, for the plaintiff.

C. A. Palmer, Q.C., and *A. H. Hanington*, for the defendants.

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1894. June 1. BARKER, J.:—

The plaintiff, who is a resident of Boston and an engineer by profession, on the 24th of April, 1880, obtained letters patent in Canada for an invention called "Barclay's Improved Lubricator for Steam Engines," which patent is still in force by virtue of extensions granted by the Commissioner of Patents. By an agreement under seal, bearing date the 1st of January, 1883, between the plaintiff and the defendants and one Thomas McAvity, since deceased, who then composed the firm of T. McAvity & Sons, doing business at St. John, the plaintiff gave the sole and exclusive right to the defendants to manufacture and sell the said lubricators for the province of New Brunswick, Quebec, and Ontario trade to the end of the term for which the patent was granted and during any extension, the lubricators to be manufactured by the defendants, to be stamped "Barclay's Patent," and to be numbered, the numbers commencing at 1001. The defendants were to make quarterly returns of the machines manufactured, to keep books showing the sales, and to pay the plaintiff a license fee of $3.75 upon each lubricator made by them, which royalty was payable quarterly in cash. Provisions for terminating the agreement are contained in the instrument, but as they were never acted upon it is unnecessary to notice them more particularly. The 7th clause of the agreement is as follows: "The parties of the second part (the defendants) agree to manufacture said lubricators in sufficient quantities to supply the trade, and to use every reasonable means to secure the sale of said goods. In the event of said parties of the second part not manufacturing said lubricators in sufficient quantities, and not using every reasonable effort to secure the sale of said goods, then the said party of the first part shall have the right to bring a bill in equity for the purpose of adjusting all matters in dispute between the parties."

The defendants commenced the manufacture of the plaintiff's lubricator under this agreement, and paid the

royalty (which was reduced to $2.75 by a subsequent arrangement) up to June, 1887. The sales began to fall off after this, on account, as the defendants say, of so many similar lubricators being for sale at much less cost, some of them at about one-tenth of the price. In June, 1887, the plaintiff came to St. John and saw the defendants, and found, according to their account, only some $25 due him for royalty. It seems that for some time previous to that, as well as since, the defendants had been manufacturing and selling a lubricator known as the "McShane" lubricator, not under any patent; and it is in reference to this machine that the chief matter in dispute has arisen, the plaintiff claiming that this McShane cup is the same, or at least a colourable imitation of his invention; and for this reason, as well as others which will be more especially noticed hereafter, the defendants must account to him for the agreed royalty on these cups. This bill was accordingly filed for that purpose. The case was heard before me without a jury, and I had the advantage, not only of seeing the rival lubricators, and having them explained to me by the witnesses, but I had the exceptional advantage of seeing them practically tested and in actual operation.

It was conceded on the argument that the case of *Clark* v. *Adie* (1) correctly laid down the law as to the relation of the plaintiff as patentee and the defendants as his licensees. At page 425 of the report Lord Cairns says: "Therefore as between the appellant, the licensee, and the respondent Adie, the patentee, (whatever strangers might have to say as to the validity of this patent) the question of validity must be taken as that which the appellant is unable to dispute. So far as he is concerned he must stand here admitting the novelty of the invention, admitting its utility, and admitting the sufficiency of its specification; but, on the other hand, he is of course entitled to have it ascertained what is the ambit, what is the field, which is covered by the specification as properly construed

(1) 2 App. Cas. 423.

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and he is entitled to say: Inside of that field I have not come; so far as I have worked I have worked outside the limit which is covered by it, as properly construed, and therefore I am not bound to make any of those payments which are stipulated in my license as payments to be made for working the patent. In this respect the appellant, the licensee, stands here upon the same issue as would arise between a patentee and an alleged infringer upon the question of the fact of infringement. The question which your Lordships have to consider is the same which, in an ordinary action for an infringement of a patent, you would have to determine upon that one particular issue going to the fact of infringement, and assuming all the other issues, which ordinarily are raised upon a patent action, to be found for the plaintiffs."

Taking this as a starting point, the sole question of fact to be determined is this, Is the McShane cup, so called, an infringement of the plaintiff's patent? If so, the defendants must account to the plaintiff for the royalty due; if not, the plaintiff's action must fail, so far at all events as it rests upon this ground. In the specification to the plaintiff's patent he says: "My improvements relate to lubricators for steam engines wherein the oil is caused to flow in regulated quantities by means of *steam pressure*. (The italics are mine). The invention consists in the perforated bottom of cup, whereby may be obtained a general pressure on the oil without any condensing tube in the cup." He then goes on, with the use of drawings, to illustrate the construction and operation of the lubricator; one drawing showing the perforated bottom inside the oil cup, and the other or alternative design showing this perforated bottom in an adjoining chamber. The specification describes, by reference to these drawings, how the steam, when admitted to the bottom of the cup by the steam pipe, strikes the imperforated middle of the bottom, and is thus diffused under the oil so as to exercise a more general pressure, while the oil is forced out drop by drop, or in a stream, as required. The claim which the plaintiff made in the specification is

as follows: "Having thus described my invention, what I claim as new is: 1. In a lubricator, the combination with the oil cup, having a discharge pipe at the top of the inner perforated bottom and steam supply pipe (d), substantially as and for the purposes described. 2. In a lubricator, the perforated bottom placed either inside the oil cup or in an adjoining chamber formed on or attached to the steam pipe, substantially as and for the purpose set forth."

It was admitted by the plaintiff as a fact, well known to those whose business or reading familiarized them with such things, that long before the plaintiff's patent was applied for, automatic lubricators were in common use. Some of the witnesses speak of twenty different kinds. Though differing in details, they all, according to the testimony of the witnesses on both sides, work by hydrostatic pressure except the plaintiff's, which, though capable of working by hydrostatic pressure, will, as is claimed for it, work equally well by the direct application of steam pressure; or, as the plaintiff himself says in his specification, "My improvements relate to lubricators for steam engines wherein the oil is caused to flow in regulated quantities by means of *steam pressure*." All these machines, though structurally different, work on the same principle. Speaking generally, they consist of a cup filled with oil communicating with a pipe leading into what is called the sight feed, which is filled with water. The steam pipe connecting with the bottom of the machine is so arranged that the steam will condense in the tube, creating a column of water, which forces up the oil in the cup—the oil being so much lighter—through the pipe into the sight feed, up through the water there, and so escapes through the top connection into the steam pipe, where it is vaporized and taken up by the steam, in which it is held in suspension in its passage through the engine. So far as the evidence in this case furnishes me with a guide to a correct conclusion—and so far as that evidence is expert testimony I do not think it is a very reliable guide—it has never been claimed that any of these lubricators would work except by hydrostatic pressure; for otherwise, as the pressure of

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steam at the top of the machine where it was connected with the steam pipe was exactly equal to the steam pressure at the bottom where it was connected with the same pipe, the oil would not flow, the one pressure downwards neutralizing the other equal pressure upwards. It required, therefore, the hydrostatic pressure created by the water in the condensing tube to lift the oil and cause it to flow. Of all the witnesses produced before me—and they were all men of experience in such matters—there was not one who had ever, before the experiments made as a result of this investigation, seen a lubricator such as these I have been speaking of, work except by hydrostatic pressure, and in fact I am correct in saying, as to the majority of these witnesses, they had never heard of such a thing. In fact James Fleming and one other witness, after giving their opinions that neither cup would work without hydrostatic pressure, returned to the stand next day and acknowledged that, so far as the plaintiff's machine was concerned, they were all wrong, because in the meantime they had actually seen it working, and working satisfactorily, under these conditions. Speaking from my own observation of the plaintiff's lubricator and that spoken of as the McShane one, and the opportunity I had of comparing the two, and speaking as one with a very imperfect knowledge of such matters, I should have said that, with the exception of the perforated diaphragm used in the Barclay cup, there was a striking resemblance between the two cups. I do not refer solely to the half-union coupling, the check valve or the loose head, about which so much was said, for, though they were alike in both cups, I think the evidence all went to show that these were devices in use long ago, and that they are not covered in any combination by the plaintiff's patent; in fact in his claim, which I have set out elsewhere, he does not mention any one of the three. The same remark will apply to the glass for the sight feed, which was also put forward as a point of resemblance between the two instruments. I allude rather to their general features and to the similarity of principle upon which they appear—

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at all events to an ordinary observer—to work. It, however, cannot be denied that there is one substantial difference between the two. I allude to the perforated bottom or diaphragm peculiar to the plaintiff's lubricator, and which he in his specification says is his invention, and by means of which, to use his own words, "he obtains a general pressure on the oil without any condensing tube in the cup." This bottom, or diaphragm, is solid in the centre, but perforated elsewhere; "the perforation," in the words of the specification, "being distributed more towards the outer portion, so as better to equalize the pressure of the steam on the oil, and thereby regulate the flow of oil through the water gauge." The plaintiff, in his evidence, speaking of this perforated bottom, says "it is the main feature of his invention so far as the bottom is concerned, the steam striking on that metal." In another place, in answer to a question put by myself, he says: "It (that is this diaphragm) is part of my patent. I did it for this: supposing I open the centre of that, it would be no better than these others (meaning these other lubricators), because the oil is much heavier than steam; if only three inches of oil, it is much heavier than the steam, and it would fall down; the steam would go up instantly and be diffused, and that is why I put these perforations in the bottom, that is let inside about one-eighth of an inch, and I have my cups working under 300 pounds pressure, with a diaphragm like that." This evidence is in entire harmony with the specification of the patent, and shows that the important and essential part of the plaintiff's lubricator was this perforated bottom; this was, as he says, his invention; and without it, as he himself explains, his machine would be no better than the others.

There are practical advantages claimed for a lubricator like the plaintiff's working without hydrostatic pressure. It is said to work more promptly, especially if the oil, from a low temperature or other cause, is sluggish; and the absence of water in a condensing tube avoids the danger from frost, where the instruments are exposed, as for instance, on locomotives in the winter time. And

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it is, I think, clear that the plaintiff did claim in his specification, and that he has claimed since, that the important feature of his so-called improvement was that his lubricator would do its work by means of steam pressure, as distinct from the ordinary hydrostatic pressure, and that this result was proved by the perforated diaphragm, which he describes as his invention. A book, issued by the plaintiff advertising his lubricator and giving numerous testimonials as to its value, was put in evidence, part of it by Mr. Weldon and part of it by Mr. Palmer. No objection was made to it on either side, Mr. Weldon apparently desiring such advantage as might attach to the various testimonials, and the other side desiring such advantage as might attach to other statements in the pamphlet. As the defendants are not in a position in this suit to deny the utility of the plaintiff's patented invention, I need not allude to the testimonials. My attention is called to these words on the outside covers, which I may assume are the plaintiff's own words as part of his advertisement: "This is the first oil-cup that will work regularly by means of steam pressure." There are some affidavits, or rather verified testimonials, in which this feature is especially dwelt upon, not only as being entirely novel, but as being at the same time most useful. I do not attach much importance to this evidence, and only refer to it to corroborate a view which is, I think, easily demonstrable from the other evidence and the patent papers themselves, that the essential feature of the plaintiff's patent was what I have said, and that the result was due to what he called his invention, that is, the perforated diaphragm. During the progress of the trial the two instruments were experimented upon, and it was demonstrated practically that they would not work alike. While the plaintiff's cup would work, as he claimed for it, without hydrostatic pressure, the McShane cup would not, except with the addition of a check valve or some device of that nature, which is no part of the machine itself, and it would not work then satisfactorily. I myself afterwards witnessed an experiment with the two cups. They

were piped to the same steam pipe in the same way under the plaintiff's own directions, and the test was made in presence of the plaintiff and his counsel and the defendants and their counsel; and the result of the test was that the plaintiff's cup worked without fault, and the McShane cup ceased working altogether in a few minutes, very clearly demonstrating to my mind that there were material differences between the two; so material, in fact, that on the assumption that the object sought to be obtained was a lubricator which would work regularly by means of steam pressure, the one was a success while the other was a total failure. To what cause is this difference in results to be attributed? Some of the witnesses explained it on the theory of the eduction of the steam; others would not venture an opinion. I am bound to say the events of this trial have not increased what little reliance I had upon expert testimony; and if I reject this theory of eduction for the plaintiff's own theory, he at all events cannot complain, even though the practical experience of the future should demonstrate that we were both in error. He refers the success of his lubricator to the perforated bottom, which he says he invented; and he says that his cup and the McShane one are alike except in this. As the McShane cup has no perforated bottom, it follows logically, from the plaintiff's view, that the McShane cup is a failure, so far as regards its practical operation by direct steam pressure, for the reason that it has no perforated bottom like that of the plaintiff's, or any contrivance to take its place.

The defendants put in evidence a Canadian patent, issued to one Richard Scott Little, dated December 20, 1871, for what was called "Little's Improved Automatic Lubricator for Steam Engines"; and they say that when this patent expired and the invention became public property the McShane cup was introduced, having been modelled principally on that, and partly after the Sefurth cup. The tube into which the oil flows from the cup is inside the cup, branching right and left at the bottom, so as to be adjustible for twin sight feeds. The cup and in-

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side tubes are cast together, and as the bottom of the tube is necessarily solid and in the centre of the bottom of the cup, the plaintiff contended that this in effect was identical with the solid centre of the diaphragm in his cup, and that it was intended for the same purpose. The evidence, however, showed that this was a necessary result of casting the cup in one piece; that it was never intended for any such purpose as that suggested, as the McShane cup was never worked except by hydrostatic pressure; and the actual test showed that this did not produce the same result as must, I think, under the evidence on the plaintiff's own showing, be attributable to the perforated bottom in his cup.

According to my construction of the plaintiff's specification, and on the evidence of the facts before me, I find the following established:—

1. That the only thing invented by the plaintiff, or claimed to be invented, is the perforated bottom as used.

2. That the patent only covers it alone and in combination with the other parts of the instrument as described, none of which were in fact new or claimed to be so.

3. That the sole usefulness of the lubricator arising from the invention itself, or in the combination specified or covered by the patent, is that it will work by direct steam pressure. It is difficult to see how a patent covering a combination producing a certain result can be infringed by a combination which does not produce that result at all, and where no part of the combination is new, or, if new, is not used.

In *Dudgeon* v. *Thomson* (2), Lord Cairns says (3): "that which is protected is that which is specified, and that which is held to be an infringement must be an infringement of that which is specified." At page 39 he says: "I must ask your Lordships, in the first place, to satisfy your minds as to what it is which is the principal characteristic, the essential feature, of the appellant's invention, as specified in his patent." In my opinion the

(2) 3 App. Cas. 34. (3) At p. 44.

essential feature of the plaintiff's invention, as specified, is by use of the perforated bottom to operate the lubricator by direct steam pressure. If the defendants, by making the McShane cup, had striven to produce the same result some strength might have been given to the plaintiff's argument. They, however, not only did not seek to accomplish the same result, but with their combination they cannot do so. The pith and substance of the plaintiff's invention is, in my opinion what I have said, and I think the defendants have not infringed it. They have not only not taken a different road to the same end, but they have taken a different road to a different end. See *Clark* v. *Adie* (4). In the same case, before the Lord Justices, reported in 10 Ch. App. 667, Lord Justice James, in speaking of *Murray* v. *Clayton*, says (5): "There was in that machine (a brickmaking machine) a movable board on to which the bricks (or rather lumps of clay to be burnt into bricks) were by the same motion which divided and formed the bricks transferred; and we could not find anything in the patent which did not include that as a part and material part of the invention, and we therefore held that a machine which left out that part was not an infringement." This language, I think, applicable to this case. The perforated bottom is put forward as the material part of the whole invention. It is not used in the McShane cup, nor is there any device substituted for it which is capable of doing the work attributed to it, or producing the result the plaintiff had in view, and which having accomplished he now puts forward as the chief value of his lubricator. I find that there is in fact no infringement of the plaintiff's patent shown by the evidence.

Mr. Weldon, however, contended that, quite apart from this question, it was not competent for the defendants during the continuance of the license to manufacture or sell any other lubricators than those of the plaintiff—and this result followed as a legal consequence of the terms

(4) 2 App. Cas. 314. (5) At p. 676.

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of the instrument itself, quite outside of any question of infringement. The argument addressed to me on this point was substantially as follows: As the plaintiff has by the license assigned to the defendants the exclusive right to manufacture and sell his lubricator in the three provinces mentioned, and the defendants had covenanted, by section 7 of the agreement, to use every reasonable means to secure the sale of the same, the defendants were debarred from manufacturing or selling any other lubricator which would be a competitor with that of the plaintiff; otherwise the plaintiff's lubricator might be driven out of the market by the competition, and the plaintiff deprived of any royalty as well as any right to manufacture within the area covered by the license. No authority was cited for this position, nor have I been able to find any, where a negative covenant of this kind has been implied in an agreement like this. I am not quite sure that the bill puts this question forward as a ground of relief, but as no question was raised I must deal with it. It is not disputed that the defendants have always had on hand for sale the plaintiff's lubricator, or that they have not used all reasonable means to secure the sale of these instruments, unless by the manufacture and sale of the McShane cup they have been guilty of a breach of this agreement. The facts seem to be that the plaintiff's lubricator is rather an expensive machine; the cost of manufacture is $7.84, and if you add $2.75, the royalty, it brings the cup up to $10.59, irrespective of profit. The cost of the McShane cup is about one-half this sum. It is, therefore, a natural result of trade, if lubricators answering practically all the purposes of these high-priced ones can be obtained, as the evidence shows, for $2 or $3 each, that there would be little or no demand, as Mr. McAvity says, for the more expensive article; and so we find that there has been in later years comparatively little demand for the McShane cup, and still less for the Barclay one. The practical effect of Mr. Weldon's contention would be to compel the defendants to abandon this part of their business. It would be useless to manufacture the plaintiff's cup when

its high price prevented its being sold; and it can scarcely be expected that the defendants could sell other lubricators subject to a royalty greater than the selling price of the machine. The effect, therefore, would be to deprive the defendants of doing this class of business at all. I can scarcely think there was any such intention on the part of either of the parties to the contract. The plaintiff knew there were rivals in the field at the time, and I think he must be taken to have assumed the possibility of that happening which by a very ordinary rule of trade has actually happened. I can understand how much weight might be given to Mr. Weldon's contention if it had happened that the defendants, finding the royalty higher than they could afford to pay and make a profit out of the sale of the plaintiff's lubricator, had taken active means to drive it out of the market by substituting the McShane or any other cup for it, in order to avoid the liability for the royalty, because that possibly might be a breach of the covenant to use all reasonable means for the sale of plaintiff's cup; but I am unable to see how such a result would follow where the defendants, in the ordinary course of their business, sold such lubricators as their customers called for, the plaintiff's among the rest. I think the fair and legitimate construction of the agreement is that the plaintiff, being bound for the preservation of his monopoly to manufacture the invention in Canada, was willing, for the stipulated royalty, to give the exclusive right to the defendants, well knowing that the lubricators never would be sold except at a profit to the manufacturer, and, that in determining that question, the results of competition must be taken into consideration. The defendants only undertook to make the plaintiff's lubricator in sufficient quantities to supply the trade; and if this supply was reduced by the manufacture of cheaper instruments which the trade preferred, and which could as well be manufactured by any one as by the defendants, they have done all they agreed to do. It would, I think, be a most unreasonable means for forcing the sale of plaintiff's lubricator to deprive the defendants of the right to

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sell any other kind, especially as this object would be defeated by other people selling the other lubricators of a similar character which were actually then on the market, or might afterwards be placed there. If Mr. Weldon's contentions were correct, it would be altogether useless wasting time in endeavouring to show an infringement; for the mere fact of defendants selling any lubricator other than the plaintiff's would create a liability, unless the amount to be recovered would differ in the two cases, as I think it would. In the case of an infringement, the plaintiff recovers the royalty because in fact defendants have used his property, for which by the license they were to pay at a fixed and agreed rate. But that would not, in my opinion, be the rule for estimating the damage in the case of a mere breach of covenant. To hold otherwise would be to import into the contract an agreement that for a breach of it, by selling machines in which the plaintiff had not the slightest interest, defendants must pay him as damages at the rate of $2.75 a machine—a position which, I think, is entirely untenable. Suppose, for instance, there is any such covenant as that contended for, and an action at law were brought for the breach of it—and this would be the proper form of remedy—the plaintiff could only recover such damages as he could show he had actually sustained. To recover the $2.75 per machine would involve showing that the persons to whom the defendants sold would not only not have gone to some other dealer than the defendants to get what they required, which, of course, they could easily do, but also that they would have actually purchased a Barclay lubricator from the defendants, upon which the royalty would have accrued to the plaintiff. It would be a novelty in business to find a man who desired to purchase a lubricator, and who could get one to suit his purpose for $2 or $3, going to defendants' place of business, and finding that he could only get a Barclay one there at a cost of $15 or $20, taking it rather than go into a shop around the corner to get what he wanted. As I have already said, I do not think the bill points to this as a distinct ground

of relief; and if it did, there is no evidence before me to sustain the contention put forward.

There remains another point made by Mr. Weldon. He sought to assimilate the defendants' position as licensees to the plaintiff as patentee to the position of a tenant to his landlord, and to carry the analogy to the extent of applying to the defendants the doctrine of encroachment as it prevails between a landlord and his tenant. It is true that Lord Blackburn, in *Clark* v. *Adie* (6), likens the position of a licensee of a patentee to that of a tenant of a landlord (7), but he does not extend the analogy beyond this, that the licensee cannot dispute the title of the patentee to his invention—and this involved its novelty as well as its utility—any more than a tenant could, during the tenancy, dispute his landlord's title to the land under lease. I am, however, unable to discover anything in what this Judge said, or upon principle, to lead one to hold that the doctrine of encroachment would apply any more than the doctrine of distress. What is the underlying principle of this doctrine? Willes, J., in *Whitmore* v. *Humphries* (8), explains it thus (9): "The rule is based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's; and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively." Upon whom have the defendants encroached? If upon the plaintiff, it is only as infringers of his patent rights.

(6) 2 App. Cas. 423.
(7) At p. 435.
(8) L. R. 7 C. P. 1.
(9) At p. 5.

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There can be no other encroachment that I am able to discover. The fact that defendants were licensees under plaintiff did not afford them an opportunity to make and sell the McShane lubricator, which, I presume, is the encroachment. They could as well have done it without. To apply this rule as to encroachments by a tenant to a case like this would, I think, be contrary to the principles upon which the rule rests, and would be carrying the analogy spoken of by Lord Blackburn, not only beyond the limits prescribed by him, but beyond any limit warranted by the circumstances.

The result is that in my opinion the plaintiff must fail so far as he claims royalty on the McShane lubricator. There will be, unless the parties agree upon the amount, as I understand they can, a reference to ascertain the amount due the plaintiff from the defendants for royalty under the agreement, excluding from the computation all royalty on the McShane machines.

I will reserve the question of costs until after the reference, or, in case the parties agree upon the amount until after a memorandum of the amount is filed in Court. I will then hear the parties as to the costs, should they desire it.

SMITH v. THE HALIFAX BANKING COMPANY.

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Pleading—Demurrer—Res Judicata.

A bill is not demurrable on the ground of *res judicata*, unless it appears in the bill itself that the matters alleged in it were in controversy and were adjudicated upon in the former suit.

Where a bond given with a mortgage in pursuance of an agreement to secure a debt has been held valid in an action thereon, the defence of *res judicata* will lie to a suit to set aside the bond, mortgage and agreement.

A bill must allege facts and not conclusions of law.

This was a demurrer to the plaintiffs' bill. The bill and grounds of demurrer are fully stated in the judgment of the Court. The argument was heard May 17th, 1894.

McLeod, Q.C., and *Teed*, in support of the demurrer.

Blair, A.G., and *J. H. Dickson, contra.*

1894. June 1. BARKER, J.:—

The bill was filed in this cause for an injunction to restrain the defendants from issuing an execution or proceeding upon a judgment at law they had obtained against the plaintiffs in this Court, and for a decree declaring a certain agreement, bond, and mortgage entered into by the plaintiffs to the defendants void, on the ground that they were obtained from the plaintiffs by undue pressure brought to bear upon them by the defendants. The facts set out in the bill, and upon which the relief is sought, are as follows: In the year 1885, the defendants, at their Hillsboro branch, discounted, as they allege, several notes of one Alonzo Smith, a brother of the three plaintiffs, amounting in all to about $19,000, bearing the plaintiffs' indorsements, which, the plaintiffs alleged, so soon as they were called upon for payment, and which they allege in the bill in this cause, were forgeries.

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When the notes matured, and the plaintiffs had repudiated all liability on the ground that their signatures had been forged, the defendants commenced some ten actions at law against the plaintiffs to recover the amount of the notes, to which actions the plaintiffs set up the forgery as a defence. The venue in these actions was laid in Albert. About the time they were ready for trial an agreement was entered into between the plaintiffs and defendants, under the direction of their attorneys, by which confessions were to be given in the several causes ; and the claims involved in all the suits were settled by the plaintiffs agreeing to secure to the defendants the sum of $9,500, and interest, by their bond and mortgage, payable in yearly instalments, spread over a period of ten years. This agreement, which was dated July 15, 1886, and is signed by the plaintiffs and defendants, and by their respective attorneys, is set out at length in the bill, and will be more particularly referred to later on. In performance of this agreement the plaintiffs secured to the defendants the sum of $9,500, as settled upon, by their bond and mortgage, dated October 14th, 1886, which mortgage was duly registered on the same day. The plaintiffs having failed in paying the first instalment when it fell due on their bond, the defendants, on the 11th of June, 1888, commenced an action at law against the plaintiffs for its recovery. To this action the following pleas were pleaded:—

1. "That the bond was not the defendants' deed."

2. "That the bond was executed and delivered by the defendants to the plaintiff company in consideration of the plaintiff company then agreeing to forbear to prosecute one Alonzo Smith on a charge of feloniously forging certain promissory notes with intent to defraud."

3. "That before the execution and delivery of the said bond to the plaintiff company, one Alonzo Smith had feloniously forged the names and signatures of the defendants, as makers and endorsers of certain promissory notes to and in favour of the plaintiff company with intent to defraud, which the plaintiff company well knew, and upon which said promissory notes suits at law were brought by said plaintiff company against the said defendants, and the defendants had set up as a defence thereto

that the said promissory notes were feloniously forged by the said Alonzo Smith ; whereupon the plaintiff company, well knowing that the said promissory notes had been so feloniously forged as aforesaid, threatened to prosecute said Alonzo Smith upon said charge of having feloniously forged said promissory notes as aforesaid, unless the said defendants would, among other things, agree to execute and deliver said bond to the plaintiff company ; and the defendants thereupon, in consideration that the plaintiff company would forbear to prosecute the said Alonzo Smith upon the said charge of feloniously forging said promissory notes as aforesaid, agreed, among other things, to execute and deliver said bond to the plaintiff company, and afterwards, in pursuance of said agreement, and in consideration of the said plaintiff company forbearing to prosecute said Alonzo Smith for feloniously forging said promissory notes as aforesaid, the defendants executed and delivered the said bond to the plaintiff company ; and so the defendants say that the said consideration for the said bond was and is illegal, and such bond is wholly null and void."

4. "That for a long time previous to, and up to and including the date of the execution of the said bond to the plaintiff company, the said plaintiff company carried on a general banking business at Hillsboro, in the County of Albert, and Province of New Brunswick; and during the time the said plaintiff company carried on such business as aforesaid, at Hillsboro aforesaid, in the said County of Albert, and before the execution and delivery of the said bond to the plaintiff company, as hereinafter mentioned, one Alonzo Smith, a brother of the said defendants, had feloniously forged the names and signatures of the defendants, as makers and indorsers of certain promissory notes with intent to defraud; and the said plaintiff company, well knowing the names and signatures of the said defendants to be feloniously forged, received the said promissory notes from the said Alonzo Smith at their said banking office at Hillsboro ; and the said plaintiff company had commenced actions at law against the said defendants to recover the sum of $19,000, the amount of the said notes so received from the said Alonzo Smith,

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and so feloniously forged as aforesaid; and the defendants had set up as a defence to the said actions that the said promissory notes had been so feloniously forged by the said Alonzo Smith with intent to defraud; and the said actions stood for trial at the July circuit of the Supreme Court for the said County of Albert for the year 1886; but before the said actions were brought on for trial, the said plaintiff company, being the plaintiffs in the said actions on the said promissory notes against the said defendants, so commenced against them as aforesaid, by threatening to prosecute the said Alonzo Smith upon the said charge of having feloniously forged said promissory notes as aforesaid, and by promising to forbear from such prosecution, induced the defendants, by such threats and promises as aforesaid, and in consideration that they would not prosecute the said Alonzo Smith on such charge, to agree, among other things, to secure to the plaintiff company the payment of the said sum of $9,500 by the execution and delivery by the defendants to the plaintiff company of a bond conditioned to pay the said sum of $9,500 in ten annual equal instalments of $950 each; and the defendants, in pursuance of such agreement and in consideration of the plaintiff company compromising the feloniously forging of the said promissory notes so received as aforesaid from the said Alonzo Smith, and upon which actions had been brought as aforesaid, and agreeing to forbear from prosecuting the said Alonzo Smith for such feloniously forging of said promissory notes as aforesaid, the defendants executed and delivered the said bond to the plaintiff company, which is the said bond in the declaration mentioned; and so the defendants say that the said consideration for the said bond was and is illegal, and such bond is wholly null and void."

The bill then goes on to allege that this action on the bond was tried in St. John, on the 10th, 11th, 12th, and 14th days of January, 1889, when a verdict was given for the defendants—that is the bank. Afterwards a new trial was ordered by the Court, on the ground of the improper reception of some evidence. Their judgment was, however, reversed on appeal to the Supreme Court of Canada, and so the verdict stood.

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It is to restrain proceedings on this judgment, and to set aside the agreement, bond, and mortgage above mentioned that this suit was brought. The defendants demurred to the bill, alleging five grounds, but they may be stated under two heads :—

1. Want of equity.

2. The matters made a ground for relief are *res judicata*, as they were all determined against the plaintiffs in the action on the bond.

The difficulties in the way of raising by demurrer, instead of by plea or answer, the question of *res judicata* are pointed out by Lord Cranworth in *Moss* v. *Anglo-Egyptian Navigation Co.* (1). For, unless it appears from the allegations in the bill that the grounds now put forward as entitling the plaintiff to the relief prayed for were actually put forward in the action on the bond, and the facts to sustain those grounds were actually at issue between the parties in that action, and adjudicated upon as necessary for the determination of the matters at issue between the parties, a demurrer would not lie upon this ground ; but additional facts would require to be averred by way of plea or answer in order to properly raise the question. This is not always an easy question to settle, and, although I have arrived at the conclusion that the demurrer should be allowed, I cannot say that I have not reached that conclusion without some hesitation. In the case which I have just mentioned the plaintiff had filed a second bill after having the first one dismissed, the same cause of action being involved in both actions. Lord Cranworth there said (2) : "If there had been an averment that all these facts averred in the bill were true, and also that they had been averred in the former suit and proved, then I am inclined to think the demurrer would have been good." Why would this be so ? Evidently, I think, because in that case it would appear in the bill itself that the identical facts relied on to support the second bill had been averred and proved in the first action, and by dismissing the bill the Court had adjudicated upon them ;

(1) L. R. 1 Ch. App. 108. (2) At p. 115.

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in which case, as the learned Judge says, the question having been once adjudicated upon could not be again brought in question, except by a bill of review in the same Court, or by appeal to a higher Court. If, therefore, it does not appear on the face of this bill that matters are alleged as ground for relief which were actually in controversy between the parties in the action on the bond, and adjudicated upon in that action adversely to the plaintiffs, and as necessary for the determination of the issues there raised, then, I think, to so much of the relief sought a demurrer would lie. In *Barrs* v. *Jackson* (3), Vice-Chancellor Knight Bruce says (4) : "Lord Ellenborough certainly, and the Court of King's Bench in *Outram* v. *Morewood* (5), decided most accurately with reference to the pleadings in that action at common law, that an allegation on record, upon which issue has been once taken and found, is between the parties taking it conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found."

The Attorney-General rather conceded on the argument that the plaintiffs by the judgment on the bond were estopped from averring either that the plaintiffs' names had been forged or that the bond and agreement had been obtained by the threats or means averred in the 2nd, 3rd, and 4th pleas in the action at law ; but he contended that grounds of relief were alleged in this bill quite separate and distinct from those necessarily or actually involved in the determination of the action at law, and so far as these are concerned the bill was free from objection. I shall refer to this later on ; but, for the purpose of this distinction, as well as for the purpose of showing the identity of the matters in controversy in the action on the bond and those put forward here, it is necessary to dissect the bill and see exactly what it does aver. The first section avers that Alonzo Smith, the plaintiffs' brother, feloniously forged the names and signatures of the plaintiffs to these nineteen notes ; the third section alleges

(3) 1 Y. & C. C. 586.

(4) At p. 597.

(5) 3 East, 346.

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that to the actions brought on these notes against these plaintiffs by the defendants they "set up as a defence to the said actions and each of them that the said promissory notes and each of them were so feloniously forged as aforesaid with intent to defraud, and the said actions and each of them stood for trial at the July Circuit Court for the County of Albert; but before the said actions were brought on for trial the said defendants, by threatening to prosecute the said Alonzo Smith upon the charge of having feloniously forged said promissory notes as aforesaid, and by promising to forbear from prosecuting the said Alonzo Smith for so feloniously forging the said promissory notes aforesaid, and by working upon the fears of the said plaintiffs for the safety of their brother, the said Alonzo Smith, and by other undue, illegal and improper pressure, induced the plaintiffs to enter into a certain agreement which is set out as part of the bill." The 4th section avers as follows: "That afterwards, on the 14th day of October, 1886, the said plaintiffs, in consequence of said threats (that is those set out in sec. 3, by which plaintiffs were induced to enter into the agreement to give the bond and mortgage), and other threats to prosecute the said Alonzo Smith upon said charge of so feloniously forging the said promissory notes as aforesaid, and of other undue, illegal and improper pressure brought to bear by defendants upon plaintiffs, and by working on the fears of the said plaintiffs for the safety of their said brother, Alonzo Smith, and in consideration of the defendants promising to forbear to prosecute the said Alonzo Smith upon said charge of so feloniously forging said promissory notes as aforesaid, executed the mortgage," etc. The 5th section alleges that on the same day, October 14th, 1886, the plaintiffs executed the bond for $9,500 as collateral to the mortgage, and aver that they were induced to do this by the same threats as were alleged as to the mortgage—the allegations in this particular in the two sections, 4 and 5, being identical, and in the same language. The 12th section is as follows: "That the plaintiffs were induced to enter into said agreement, mortgage and bond for the purpose of preventing a prosecution by defendants of their brother, the said Alonzo

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Smith, upon the charge of feloniously forging the promissory notes hereinbefore in this bill referred to, and in consequence of the threats of the defendants to prosecute their said brother, Alonzo Smith, on the said charges, and the promises of the said defendants not to prosecute him if said agreement was entered into and mortgage and bond executed." If we make a comparison between the 2nd, 3rd, and 4th pleas in the action on the bond and the allegations in the 3rd, 4th, and 12th sections of this bill, it is impossible, I think, to say they are not identical; they allege first the forgeries, and then, as an inducement to enter into the agreement, bond and mortgage, and the consideration for them, the alleged threat to prosecute Alonzo Smith and the alleged promise to forbear to prosecute. The 12th section of the bill alleges this threat and promise only as the inducement. I shall, however, not overlook the words, "other undue, illegal and improper pressure brought to bear by defendants upon plaintiffs," contained in the extracts from the other sections of the bill; and to these I shall have occasion to refer when dealing with another point in the case. Having shown the complete identity of the issues of fact raised in the action at law with those tendered by that part of the bill to which I have referred, let us see what the bill alleges was done with these issues. Section 6 alleges that the said cause was tried on the 10th, 11th, 12th and 14th days of January, and a verdict was given in favour of defendants. When a pleader alleges in a pleading that a cause was tried, he must be taken to allege that the issues raised in the cause were tried; and in my opinion, when a pleader alleges in a pleading that a cause was tried and a verdict given in favour of defendants, he must be taken to allege that the issues joined in the cause were tried and found in the defendant's favour. Now, it is, in my opinion, impossible for these issues to have been tried and found in defendants' favour so as to entitle them to a verdict and judgment for the amount in dispute, without necessarily negativing the existence of the threats and promises relied on as a defence to that action, and now put forward as a foundation for this. In my opinion, it sufficiently appears, from the allegations and averments

in the plaintiffs' bill, that the defence in the suit at law, and the attack in this, rest upon precisely the same facts; that these facts have already been adjudicated upon, and were necessarily adjudicated upon, in the action at law for its determination, and therefore upon well settled principles they must be considered as concluded between these parties as to the same subject matter.

The bill alleges that a new trial in the action on the bond was ordered by the Supreme Court of New Brunswick, but that on appeal to the Supreme Court of Canada this decision was reversed for the reason, as the bill alleges in sec. 6, that the pleas in that action averred that the defendants (the bank) knew that the notes were feloniously forged by Alonzo Smith, and therefore the evidence on that point which this Court thought inadmissible had been properly received. The judgment of the Court of Appeal is not published,* but on the argument, the Attorney-General used before me what counsel for both parties agreed was a correct copy of the Chief Justice's judgment, concurred in by the other members of the Court. After dealing with the evidence which, it was contended, had been admitted improperly, and all of which related exclusively to the matters arising out of the defence raised by the 2nd, 3rd, and 4th pleas, the Chief Justice says: "There was then no improper admission of evidence, and the jury have found that the notes were not forged, and that no threats were used. How, then, the Court below concluded that there should be a new trial is a mystery to me. I agree with the learned Chief Justice that there was evidence on which the jury might have found in favour of either party on this question." The original case of *The Halifax Banking Company* v. *Smith* (6) was also cited before me. From this it appears that the case was tried before Mr. Justice *Tuck*, and from his judgment, given on the motion for a new trial, I cite the following passage: "At the trial in St. John, in January, 1889, two questions were left to the jury, namely—First, Did the defendants indorse the promissory notes in question or authorize their names to be

(6) 29 N. B. 462.

*See 18 Can. S. C. R. 710.

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indorsed? Second, When the defendants signed the agreement, were they free and voluntary agents, or did they execute it under undue pressure exerted by the plaintiffs, or their duly authorized agents? To the first question five of the jurors answered 'Yes,' and to the second, five said that they were free and voluntary agents, and that they did not execute under undue pressure exerted by the plaintiffs or their duly authorized agents. Upon this finding a verdict was rendered for the plaintiffs." I refer to these two judgments only to show that the allegations in the bill, as I interpret them, correspond, as one would expect, exactly with the facts in reference to the matters submitted to the jury's consideration in the action at law and their findings upon them. Taylor, in his work on Evidence, says (7): "So a verdict negativing any right which a defendant sets up in his plea will estop him from asserting that right as plaintiff in a subsequent action against his former opponent," and he illustrates the doctrine by the case of a defendant pleading a set-off and failing in establishing it, citing *Eastmure* v. *Laws* (8), and *Rigge* v. *Burbidge* (9); see also *Henderson* v. *Henderson* (10); *Farquharson* v. *Seton* (11); *Partridge* v. *Usborne* (12); *Nelson* v. *Couch* (13); *Midland Ry. Co.* v. *Martin* (14). The case of *Howlett* v. *Tarte* (15), cited by the Attorney-General, is not, I think, at variance with the principle of these cases. Williams, J., in that case says: "I think it is quite clear, upon the authorities to which our attention has been called, and upon principle, that if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel." And he illustrates the principle in this way (16): "Suppose a defendant, in an action for an instalment due on a bond, set up a release or coverture, and issue taken upon it, and found against the defendant, the doctrine of estoppel would prevent

(7) 7th ed. s. 1699.
(8) 5 Bing. N. C. 444.
(9) 15 M. & W. 598.
(10) 3 Hare, 100.
(11) 5 Russ. 45.
(12) 5 Russ 195.
(13) 15 C. B. N. S. 99.
(14) 1893, 2 Q. B. 172.
(15) 10 C. B. N. S. 814.
(16) At p. 821.

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that defence being set up in an action for a second instalment." See also *Jewsbury* v. *Mummery* (17).

This bill, however, seeks to set aside the agreement and mortgage as well as the bond ; and unless the argument of *res judicata* will reach these as well as the bond which was the subject of the other action, there would remain a relief sought by this bill not covered by this ground of demurrer. It distinctly appears by the bill that the bond and mortgage were given to secure the same debt ; that they were one and the same transaction, made at one and the same time, by and between the same parties, in pursuance of the one agreement, for one and the same purpose, for the same consideration, and induced by the same threats and promises and under precisely the same pressure and influence. In the notes to the *Duchess of Kingston's Case* (18), it is said: "It is, however, well settled, first, that a judgment in one suit will be conclusive in every other where the cause of action is the same and can be sustained by the same evidence ; and next, that a question which has been judicially determined cannot be freed from the estoppel by a change in the form in which it is presented for adjudication. A defendant who fails to plead or prove that the bond was procured by fraud in a suit on the mortgage will be precluded by the judgment from relying on the fraud as a defence to a suit on the bond : *Lewis* v. *Menzell* (19) ; while in *Burke* v. *Miller* (20), a recovery on a note was, conversely, held conclusive that it was due in a suit on a mortgage given as a security for its payment." This is, I think, the principle acted upon in *Priestman* v. *Thomas* (21), and many other cases, and should govern this ; otherwise we should have the anomaly of a bond, the validity of which was challenged on the ground of undue pressure, being held good, while the mortgage, to which the bond was collateral, was held bad on the ground of precisely the same undue influence.

I come now to the position contended for by the Attorney-General, that the bill alleged an undue influence

(17) L. R. 8 C. P. 56.
(18) 3 Smith's L. C. 789 (Am. Ed.).
(19) 2 Wright, 222.
(20) 4 Gray, 114.
(21) 9 P. D. 70 and 210.

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exerted by the defendants on these plaintiffs in procuring this bond and mortgage, which was neither actually raised by the pleadings in the action on the bond nor necessarily determined in the findings on the issue joined in that case. It is true that in the sections of the bill to which I have already referred, except the 12th, as well as in the 8th, it is alleged that the plaintiffs were induced to give this bond and mortgage in consequence of the threats to prosecute and promise to forbear, and other undue, illegal and improper pressure brought to bear upon the plaintiffs. I must, however, reject these general words as in any way aiding the plaintiffs. A bill must allege facts ; it must allege what the pressure was; some facts which, if proved, would in law amount to an undue pressure. These general words, therefore, if alone in the bill, would be bad pleading, and must be so treated in conjunction with a specific allegation. On the argument, I asked the Attorney-General if he would point out to me exactly the undue influence or pressure to which he alluded, outside of that produced by the threat to prosecute, and his reply was : " The undue influence is this, that the bank exercised an undue influence on the plaintiffs by a threat that they would prosecute Alonzo Smith for the forgery ; " and he cited *Davies* v. *London Provincial Marine Ins. Co.* (22) and *Williams* v. *Bayley* (23), as showing the distinction between the two cases. If any such distinction exists, it is perhaps sufficient for the determination of this case that the bill alleges no such case as I have pointed out. I can understand that there might be some technical distinction between the case where the person influenced is, as in this case, the same person whose name has been forged, and a case where the persons are different. The plaintiffs in this case knew that their names had been forged by their brother, or at all events they have always alleged that ; and they not only allege it in this bill but swear to it. They themselves, therefore, had personal knowledge of the fact, and did not need to make inquiry. Yielding, under such circumstances, to a threat to prosecute, accompanied by a promise of forbearance in

(22) 8 Ch. D. 469. (23) 1 E. & I. App. 200.

case the demand was acceded to, is, in my opinion, aptly described as stifling a prosecution. If, on the contrary, the plaintiffs had not been the persons whose names had been forged, and they had, therefore, no knowledge whether in fact a forgery had been committed, and they had then, in order to shield their brother, yielded to threats that he would be prosecuted, when perhaps no such action was contemplated, this might appropriately be termed an undue pressure. It is, however, in my opinion, not necessary to discuss these fine distinctions for the purposes of this case, for the bill does not, I think, allege any other pressure or undue influence than the threats and promises to which I have alluded, and which were all in issue at the trial at law; neither do I think it was intended to do so. The bill in this suit, being an injunction bill, is not only sworn to by the plaintiffs, but it is supported by their joint and several affidavit, which is attached to it. In this affidavit each of the plaintiffs deposes as follows: "That I entered into said agreement and executed said mortgage and bond, which this suit is brought to set aside, in consequence of the threats of defendants, through their agents, to prosecute the said Alonzo Smith criminally for so forging said promissory notes, and to save him from being so prosecuted."

There is another allegation in the bill to which I must refer, though not much attention was given to it on the argument. The 9th section alleges that in consequence of the threats and promises, as set out in reference to the bond and mortgage, no investigation was ever made by the plaintiffs, or either of them, to ascertain whether in fact Alonzo Smith owed the defendants the sum of $19,000, or any sum; and it then goes on to allege that from circumstances that have since transpired (but which are not mentioned), the plaintiffs believe that Alonzo Smith did not owe the money, and the notes were given to the defendants without any consideration, and an account and discovery was prayed of this indebtedness. I am unable to see the plaintiffs' equity as to this. In the first place they base their bill on the fact that their names were forged, in which case they would not be liable on the

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notes, or be in any way interested in the account between Alonzo Smith and the defendants. If the bond, agreement, and mortgage are set aside, as prayed, the plaintiffs are under no liability on them and they would have no interest in the dealings between the bank and Alonzo Smith on that ground. If the bond and mortgage are not set aside, the plaintiffs' liability on the bond has matured into a judgment, and it must be immaterial in that case, so far as anything appears on the bill, whether Alonzo Smith owed the bank or not. It is true that, by the terms of the agreement, the plaintiffs were, in executing the bond and mortgage, subrogated to and stood in the position of the defendants, as creditors of the said Alonzo Smith, who, it appears by the bill, had assigned his property for the benefit of his creditors; and they were entitled to receive the dividends, which the bank would otherwise have got. I can discover nothing in the bill which would entitle plaintiffs to any such account as they pray, except under the terms of the agreement I have just mentioned. To claim under that would, however, be to ratify as good what by the rest of the bill the plaintiffs repudiate as bad, and so no such claim is intended to be set up. The other grounds for setting it up seem to me to be untenable. I think the demurrer should be allowed.

Demurrer allowed with costs, and costs of suit.

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September 19.

Practice—Demurrer After Answer—Judgment Creditor—Fraudulent Conveyance—Allegations in Bill to Set Aside.

A defendant who has answered a bill cannot demur to it after its amendment upon a ground of demurrer to which the bill was originally open.

Semble, a bill in a suit by a judgment creditor to set aside a conveyance made by the debtor to a third person, on the ground of fraud, is sufficient if it avers that before the commencement of the suit execution upon the judgment was sued out and that it was avoided by the conveyance, though it does not aver a return to the execution.

Black v. *Hazen* (1), discussed and distinguished.

This was a demurrer to the plaintiff's bill. The bill and grounds of demurrer are sufficiently stated in the judgment of the Court. The argument was heard August 20th, 1894.

Lawson, in support of the demurrer:—

The bill should show that the plaintiff issued execution upon his judgment, and that the sheriff made a return of *nulla bona* before the commencement of the suit: *Black* v. *Hazen* (1). The amendment to the bill did not cure this defect, as it only alleges that an execution was issued on a date previous to the commencement of the suit, and does not show when it was executed and returned.

Blair, A.G., and *Geo. L. Wilson*, *contra*:—

The defendants having answered, it is now too late to demur, as the same ground of demurrer was open and available on the original bill: Daniell Chan. Pr. (2); *Attorney-General* v. *Cooper* (3); *Ellice* v. *Goodson* (4). It is not necessary to allege a return to the execution previous to the commencement of the suit:

(1) 2 Han. 272.
(2) 4 Am. Ed. pp. 409, 582.
(3) 8 Hare, 166.
(4) 3 M. & C. 653.

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Neate v. *Duke of Marlborough* (5); *Bennett* v. *Musgrove* (6); *Mountford* v. *Taylor* (7). It is enough to show that a *fi. fa.* has been sued out. But we contend that the plaintiff's position as a creditor, though he had not proceeded to judgment at all, would entitle him to have a fraudulent conveyance set aside, on the principle laid down in *Reese River Mining Company* v. *Atwell* (8).

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A bill was filed in this cause in April last by the plaintiff, as a creditor of the defendant, Stephen P. Waite, to set aside a certain conveyance of some real estate in the parish of Andover, in Victoria County, on the ground of fraud. The deed in question was made by Waite to Geo. W. Murphy, one of the defendants, and the father-in-law of Waite, and is dated the 20th day of May, 1890. The bill alleges that on the 21st day of May, 1890, Murphy and his wife conveyed the land in question to Emily Waite, wife of Stephen P. Waite; that in June, 1892, Waite and his wife mortgaged the property to the defendant, Benjamin Kilburn, for the sum of $500; and that on the 27th day of June, 1892, Waite made an assignment of all his real and personal property to the defendant Beveridge in trust for the benefit of his creditors. The bill then alleges facts and circumstances relied on as showing fraud in Waite in making the transfer, and charges that it was made without consideration, and for the purpose of hindering and delaying creditors; and by its prayer asks for a declaration that the conveyance from Waite to Murphy, and that from Murphy back to Waite's wife, are fraudulent and void; the bill also prays for an account of the amount due on the mortgage to Kilburn, a sale of the land and premises, and payment out of the proceeds, first of the amount due on the mortgage, and then the plaintiff's claim. The 18th and 19th sections of the bill allege that the plaintiff obtained a judgment in the County Court of York against Waite on the 21st day of August, 1893, for $308.70, a memorial of which was then

(5) 3 M. & C. 407.
(6) 2 Ves. Sen. 51.
(7) 6 Ves. 788.
(8) L. R. 7 Ex. 347.

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(that is, when the bill was filed,) on record in Victoria County, and that this was the only memorial on record of any judgment against Waite. Though this bill was only filed on the 16th day of April, 1894, it was stated by counsel that it had been served some time before that. On the 10th April the defendant Kilburn filed an answer; and on the 12th of the same month the other defendants filed their answer. On the 9th day of May last, after hearing all the parties, I made an order, on the application of the plaintiff, allowing him to amend his bill by adding to the 19th section thereof the following words: "For which amount" (i.e., the amount of the plaintiff's judgment), "with interest, an execution was issued out of the County Court for the County of York on the 21st day of August, A.D. 1893, and was sent to James Tibbits, Esquire, sheriff of the County of Victoria, who received it on the 23rd day of August, A.D. 1893, and the said James Tibbits, sheriff as aforesaid, afterwards, at the request of the plaintiff's solicitor, executed the said execution and made a return of *nulla bona* thereto"; and as part of the order I allowed the defendants 20 days after service, in which to answer the amendment, if required. Instead of availing themselves of this privilege, the defendants, on the 8th day of June last, filed a general demurrer to the amended bill upon the following grounds: "That the plaintiff's amended bill does not disclose any right in the plaintiff to equitable relief, inasmuch as it does not allege that the plaintiff had, before the commencement of this suit, exhausted his remedy at common law upon his judgment obtained in the County Court of the County of York against the defendant Stephen P. Waite, as referred to in the said amended bill, in that it does not show that the plaintiff has issued an execution upon the said judgment, and that before the commencement of this suit any such execution had been returned *nulla bona*."

The answers put in to the original bill admit the making of the conveyances and the recovery of the judgment by the plaintiff, and that he is the only creditor who has a memorial of judgment on file against Waite; and they all admit the allegations in the bill, that the land in ques-

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tion is not included in the assignment for the benefit of creditors, and they say it was not intended to be included, as Waite at that time had no interest in it. The defendants do not pretend that Waite has now, or had at the commencement of this suit, any property whatever with which to satisfy the plaintiff's judgment; and the only defence they set up is that the conveyance to Murphy and the assignment from him to Waite's wife were made *bona fide* and are in no sense fraudulent.

The demurrer was heard before me at the August sittings, and on the argument the defendants' counsel relied solely upon the case of *Black* v. *Hazen* (9), as being conclusive in his favour; the argument being that this suit could not be maintained until all legal remedies had been exhausted, and that the bill should have alleged that the execution in the plaintiff's judgment had been returned *nulla bona* before this suit was commenced; and that the allegation as to the return of the execution was vague and uncertain.

In reply to this the Attorney-General contended, first, that as a matter of practice the defendants, after having answered the original bill, could not demur to the amended bill, the alleged ground of demurrer being open and available in the original bill; and second, that the plaintiff, being a creditor of Waite, could maintain a bill like this without having a judgment at all on the principle laid down in *Reese River Mining Co.* v. *Atwell* (10), and similar cases. It seems to be a settled practice that a defendant who has answered an original bill cannot demur to an amended bill upon any cause of demurrer to which the original bill was open. *Attorney-General* v. *Cooper* (11); *Ellice* v. *Goodson* (12), and other cases, support this practice. Assuming, for the purpose of the argument, that an averment such as that contended for by defendants' counsel is necessary, the defect was as apparent on the face of the original bill as the amended one. The amendment set up no new case, and prayed for no different relief than that originally asked for. If the bill is bad because it does not allege a return of the execu-

(9) 2 Han. 272.
(10) L. R. 7 Ex. 347
(11) 8 Hare, 166.
(12) 3 M. & C. 653.

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tion before the suit was commenced, it must be equally bad as originally framed, when it contained no allegation that execution had issued at all. The case of *Black* v. *Hazen*, relied on by the defendants, has, in my opinion, no application to this case. In that case there was no question of a fraudulent conveyance ; the bill only sought an enforcement of the lien alleged to have been created by the memorial, and there was nothing to show any difficulty in the way of realizing under an execution in the ordinary manner. In this case the alleged fraudulent conveyances stand in the way of the plaintiff's rights, and it has always been held that in a case of fraud the party complaining could come into this Court and have the fraudulent conveyance set aside, so that he might reap the fruits of his judgment and execution, whereby he had acquired a lien on the land : *Neate* v. *Duke of Marlborough* (13). In *Malloch* v. *Plunkett* (14), a case similar in its facts to this, Spragge, Vice-Chancellor, says : "The proper course for the plaintiff was to come to this Court in the first instance ; not to sell at law with an evident cloud upon the title, purchase at one-twentieth of the value, and then come to this Court as purchaser." Mowat, Vice-Chancellor, expressed his approval of this course in *Kerr* v. *Bain* (15). In *Black* v. *Hazen* (16), the plaintiff's memorial was registered before any conveyance of the property had been made to the defendant, who therefore took subject to the lien created by the memorial, and the validity of the transfer by Hazen was not in any way attacked. But here the memorial was not registered until after the conveyance to Murphy had been made. This would be a cloud upon the title which it is right to have removed before any sale takes place. In *Smith* v. *Hurst* (17), a somewhat similar objection was made to that raised by this demurrer, but it was overruled by the Vice-Chancellor, who cites as an authority the following passage from Mitford on Pleading, in which Lord Redesdale says: "Courts of Equity will also lend their aid to enforce the judgments of Courts of ordinary jurisdiction ;

(13) 3 M. & C. 407.
(14) 9 Gr. 556.
(15) 11 Gr. 423.
(16) 2 Han. 272.
(17) 10 Hare, 30, at p. 48.

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and therefore a bill may be brought to obtain the execution, or the benefit of an *elegit*, or a *fi. fa.*, when defeated by a prior title, either fraudulent or not, extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In any case, to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *fi. fa.*, he must show that he has sued out the writs, the execution of which is avoided, or the defendant may demur; but it is not necessary for the plaintiff to procure returns to these writs." See Mitford on Pleading, p. 126.

This authority is, I think, opposed to the defendants' contention, and goes to show that the allegation in the amendment is sufficient. It is, therefore, unnecessary to discuss how far the case of *Reese River Co.* v. *Atwell* (18) is applicable here, or where the bill is not filed on behalf of creditors. The principle of that case, as well as the relief obtainable, are discussed and explained by Mr. Justice *Strong* in *McCall* v. *McDonald* (19), a case similar to this in its main features.

Here it is admitted that the plaintiff obtained his judgment and issued his execution before the suit was commenced, and, according to the passage cited from Lord Redesdale, that is sufficient to give him a complete title to maintain the suit.

The demurrer must be overruled with costs, the defendants to have ten days from settlement of the order to answer amendment to bill.

(18) L. R. 7 Eq. 347.

(19) 13 Can. S. C. R. 247.

HALL v. SLIPP.

1894.
September 19.

Ex parte STEPHEN B. APPLEBY, RECEIVER.

Allowance to Receiver.

While, as a general rule, a commission of five per cent. on receipts is allowed to a receiver appointed by the Court, the allowance will be increased where unusual work is required, or diminished where the receipts are large or the trouble in their collection is insignificant.

This was an application for the passing of the accounts of Mr. Stephen B. Appleby, who was appointed receiver of the estate of George W. Slipp, pending the hearing and determination of a suit brought by the creditors of Slipp to set aside a trust deed of his property; and also to settle the commission and expenses of the receiver. Mr. Appleby, having filed his accounts and served copies thereof upon the solicitors in the cause, together with a statement of his claim for disbursements and personal services, the matter came on for hearing on the 11th of September, 1894. The facts are stated in the judgment of the Court.

Mr. Appleby, in person.

Blair, A.G., and *Carvell*, for the trustees.

Pugsley, Q.C., *C. A. Palmer*, Q.C., and *A. H. Hanington*, for the creditors.

1894. September 19. BARKER, J.:—

I was desirous, before deciding upon the receiver's accounts, to see upon what principle compensation to such officials has usually been allowed. I regret that in a matter of such general interest I had not an opportunity of conferring with some of my brother Judges, because, while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made

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a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.

In *Day* v. *Croft* (1) the Master of the Rolls had occasion to consider this question, and from his judgment one is warranted in saying that while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant. The Master of the Rolls in that case said, at page 491: "There is no general rule which universally prevails as to the allowance to a receiver. Where the receipts consist of rents of freehold and leasehold estates, five per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents on account of the sums being extremely small, or of the payments being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than five per cent. is allowed. . . . It cannot, therefore, be considered as an universal or general rule that five per cent. should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection." See also Seton on Decrees, at p. 425, where he says five per cent. is the maximum allowance. It appears in this case that the gross receipts amount to $8,761.65, of which $512.45 was paid to the receiver by the trustees; $28.85 was cash in the store; $4,906.85 is the proceeds of a sale of the stock, and $3,313.50 is the amount of accounts collected. The receiver has charged in his account all the expenses incurred by him, so that any commission he may be allowed is his own profit. Under the authority here mentioned—and I may say that, so far as I am aware of the practice in such cases in this Court, the same general rule has been adopted—I am bound only to allow the receiver five per cent. unless there are special circumstances to bring this

(1) 2 Beav. 488.

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case within the exceptions to that rule. Five per cent. on $8,761.65 would amount to $438.08—a sum so insignificant in comparison with the amount claimed by the receiver that it is evident his figures are unreasonably large, or else the circumstances must be most exceptional in their character to warrant the charge.

The claim of the receiver is as follows :—

6 months' care and responsibility of property at $75	$450 00
45 days' service at $10	450 00
27 days' service at $20	540 00
800 letters written at 75c.	600 00
General services in managing the estate and settling the accounts not enumerated in above	350 00
	$2,390 00

Instead of five per cent., this sum amounts in round figures to over twenty-six per cent. of the gross receipts. It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result ; and I think it only right to point out that it is a mistake to suppose that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

Objection was taken to some charges of rent paid by the receiver, but the evidence, I think, shows that he had the sanction of Judge *Palmer* for this expenditure. As to the items charged for night watchmen, and costs incurred in suits brought for the recovery of debts, and which have proved of no benefit to the estate, I think, under the circumstance disclosed in the evidence, these also must be allowed. As to the first, Mr. Appleby seems to have thought employment of the watchmen a necessary precaution for the safety of the stock, and in this he says Mr. Carvell concurred ; and as to the other, the receiver had Judge *Palmer's* general authority for the institution of suits in his discretion, and I am unable to say

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the receiver exercised a wrong discretion in bringing the actions. All these charges will therefore be allowed. Coming, then, to the receiver's own compensation, what are the special circumstances which take this case out of the general rule I have mentioned? Beyond the special circumstances which render the employment of night watchmen necessary, I see no more responsibility involved in the care of this property than there would always be in looking after personal property; and, beyond the suits brought, and the costs of which I have allowed, I see no greater trouble involved in the settlement of the outstanding accounts than there would ordinarily be in cases of this kind. They always involve the examination of books, and necessarily the expenditure of some time. Neither is this a case requiring special skill. There was no trouble in collecting the amount paid by the trustees, or the cash in the store. The goods, which were sold at auction, appear to have been all paid for practically at one time; I presume by the auctioneer. The only real trouble, if there was any trouble at all, must have been in collecting the $3,313 of accounts, many of which are small, and no doubt would give a large amount of trouble in proportion to the sum involved. The receiver has been allowed disbursements of every kind, the expenses of night watchmen and clerk hire, in making up inventory, etc.; and I think an allowance of five per cent. on the $512.45, $28.85 and $4,906.85, in all $5,448.15; and of ten per cent. on the small accounts, amounting to $3,313, will be a liberal allowance. These two sums amount to $603. In addition to this, for the 27 days absent from home at Hampton, and elsewhere, I will allow a further sum of $200. This, added to the $603, makes $803 in all, at which sum I fix the receiver's compensation. Of this he has already been paid $500, leaving a balance of $303.

This does not include expenses of coming here on this application.

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1894.
October 16.

Landlord and Tenant—Building Erected for Trade Purposes—Right of Removal—Injunction.

The lessee of land under a lease renewable from term to term at his option, affixed to the soil a dwelling-house with a shop in the lower storey.

Held, that his acts under the circumstances furnished evidence of his intention to annex the building to the freehold, and that its removal by him was restrainable by injunction.

Doran v. *Willard* (1) and *Fowler* v. *Fowler* (2) distinguished.

This was a suit by a landlord for an injunction to restrain his tenant from removing a building erected by the latter during his term. The facts are fully stated in the judgment of the Court. Argument was heard the 19th of September, 1894.

Pugsley, Q.C., and *W. W. Allan*, for the plaintiff.

Earle, Q.C., and *R. Barry Smith*, for the defendant.

1894. October 16. BARKER, J.:—

The bill was filed in this case to restrain the defendant Rowe from removing a house from a lot of land in the city of Moncton, of which he was the tenant under the plaintiff. I granted an *ex parte* injunction at the commencement of the suit, which, in an application to dissolve, and after hearing the parties, I continued until the hearing, for reasons which I gave when disposing of that motion. On the hearing before me it appeared that the facts are as follows: By an indenture, dated August 16th, 1890, the plaintiff demised to the defendant Rowe a lot of land on the south side of Main Street, in the city of Moncton, for a term of 12 years, at a yearly rent of $125, payable quarterly. At the expiration of this term the lessee has the right to extend the term for eight years on paying an additional rent of $5 a year, and on the expiration of the eight years to further extend the term for

(1) 1 Pug. 358. (2) 2 Pug. 488.

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five years on paying an additional $5 a year, and so on, at the expiration of each five years, to extend for another five years on paying an additional rent of $5 a year; so that the lessee really has the right to a perpetual lease if he chooses to pay the advanced rent. The lease contains a covenant for the payment of the first twelve years' rent, a covenant against carrying on noxious trades, or the sale of liquors, a proviso for re-entry for non-payment of rent in arrear sixty days; and upon such re-entry the lessor is to have and hold all buildings and improvements thereon standing. Rowe entered into possession under the lease and paid the rent. The lot of land in question is in the central and business portion of Moncton, and has a frontage of about 20 feet on Main Street and extends back about 80 feet. The lot when Rowe leased it was vacant. He soon afterwards erected a two-storey wooden house upon it, and it is in reference to the removal of this house that this suit arises. Before commencing to build, an excavation for a cellar under the main building was made about 20x38 feet, and extending the entire width of the lot on the street line, at which part the excavation was about five feet deep, while at the rear it was about three. Part of the earth so excavated was removed from the lot altogether, and part was used in filling in an old cellar, a part of which was on this lot, and the remainder on an adjoining lot, owned also by the plaintiff. In the cellar so excavated, mudsills eight inches square were placed, fastened together at the ends; and on these stood a number of posts about six or seven feet in height, arranged at intervals all around. These posts were spiked to the mudsills, and on top of them rested the sills of the main house, which were also spiked to the posts. So that the mudsills, posts and house were all fastened together and formed one structure. The house was then erected in the ordinary way. As an addition to the house, Rowe removed from some other place a wooden building to the rear of this lot, and placed it on blocks on top of the ground. He widened it some six feet so as to make it cover the whole width of the lot, raised the roof and connected the roof with the roof of the main house, giving the whole structure the outside appearance

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of one building. The size of this added building, when completed, was about 20x16, and it had three storeys, two of which were used in connection with the lower storey of the main building, and the third as a part of the upper storey of the main building. The main building was finished as follows : The lower storey was used by Rowe as a shop, in which he carried on his business as a plumber, and in connection with which he also used the two lower storeys of the back building ; while the upper storey of the main building and the upper or third storey of the other building were together finished as a tenement. They consisted in all of seven rooms, four in the front and three in the rear, besides a water-closet also in the rear building. The front building was completely finished, plastered, painted, the walls papered, and direct communication made with the back building, in which the kitchen and two other rooms were. This tenement was supplied with water from the street main, and the water-closet was connected with the Main street public sewer ; the water pipes and sewerage pipes necessary for these purposes having been put in by Rowe when constructing the house, and as necessary for its convenient use and occupation. He also placed in the cellar a furnace, from which hot air was conducted to the upper part of the house through registers. This tenement was occupied by a tenant until recently at a rental of $20 a month. The spaces between the upright posts in the cellar were filled in by two-inch planks placed outside of the posts, and kept in position by being fastened where required, or by the pressure of the earth where that means availed for the purpose. It was stated in evidence that this was a usual way of building such houses by those who built dwelling houses, on their own land, and that the usual life of mudsills such as these, exposed as they were, was about twelve years, when they would require renewing, and that it was a simple job to remove the plank sides of the cellar, and substitute brick or stone. It also appeared in evidence that the removal of houses of this description was not unusual, and that it could be done without much difficulty. In the case of this one the back building required to be torn apart and disconnected from the front,

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and the posts supporting the front building required to be torn apart and disconnected from the house sills, and the water and sewerage piping disconnected. By means then of jackscrews and other appliances the building could be raised and moved, the permission of the City Council for the necessary occupation of the street for the purpose being first obtained. Rowe in his evidence stated that the total cost of this building was about $1,800.

The defendant Rowe claims the right as between himself and his landlord, the plaintiff, to remove this house and buildings at any time during his term, and this is the sole question involved in this suit. Judicial decisions both in England and elsewhere have varied so much in determining the limits within whch the maxim "quicquid plantatur solo, solo cedit" should be applied as between landlord and tenant, that one cannot, except in very plain cases, feel altogether free from doubt. It does, however, seem clear that of all the classes of cases in which this question of fixtures can arise, Courts have allowed the greatest latitude and indulgence in favour of tenants as against their landlords. Lord Ellenborough laid down this rule in *Elwes* v. *Maw* (3), and it has never been departed from. Neither can it be said at the present day that the maxim to which I have referred is one of universal application. Other considerations than a mere affixing to the soil, enter into the determination of the various cases which arise. Take, for instance, all that class of fixtures known as trade fixtures. There are numerous instances to be found where, though affixed to the soil, in the sense in which that phrase is used in the authorities, and actually intended to be so affixed during the demised term, they are nevertheless removable by the tenant. The various kinds of machinery used for the purposes of trade, and the buildings used as accessories and which require an affixing to the soil for their use, are familiar instances of this. In this present case, I have myself no doubt that the front and main building was to all intents and purposes affixed to the soil, and that the added building, with which it was structurally connected and as a part of

(3) 3 East, 88; 2 Smith's L. C. 169.

which it was used, became also affixed to the soil, though it rested upon blocks not let into the soil. Mr. Earle frankly admitted this proposition, and I shall therefore not elaborate it. Neither is this a case of trade fixtures. As pointed out by Kindersley, V.C., in *Whitehead* v. *Bennett* (4), there is a great difference between buildings used for the purposes of trade, and trade fixtures. This proposition was also frankly admitted by Mr. Earle; so I need not waste time in discussing questions which, it is conceded, do not arise in the case. We have, therefore, to deal with the case of a tenant's rights to remove buildings erected by himself which are not trade fixtures, and which were affixed to the soil by the tenant when he built them and so remain. I have carefully examined all the cases cited at the hearing, and many others in addition; and I have not been able to find one where it has been held, in the absence of contract between the parties, or some right established by statute, that a tenant had a right to remove such buildings, except where they were assessory to trade fixtures which were removable; for instance, buildings affixed to the soil, but used for the protection of trade fixtures, or for some other purpose connected with them, and to aid in their use; in which latter cases, if I read the authorities correctly, it is immaterial whether the buildings be large or small, or built of wood or stone. Take the case of *Wake* v. *Hall* (5), cited by Mr. Earle, as an illustration. There the buildings were of brick or stone, and with foundations sunk to a considerable depth (see page 296). Though this was not a case of landlord and tenant, it was sought to have it governed by the principles applicable to that relation. Lord Selborne, at page 301, is thus reported: "Not much light for the determination of this question is (in my judgment) derivable from the law of removable fixtures. Buildings of this character are certainly not removable fixtures, as between landlord and tenant, without a contract to that effect (unless they come within the 3rd section of 14 & 15 Viet. c. 25), whether they are erected for trade or for any other purpose. I do not dwell upon this

(4) 27 L. J. (N. S.) Ch. 474.

(5) 7 Q. B. D. 295.

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(which I have always understood to be clear law), because it is very satisfactorily dealt with by the able judgment of Vice-Chancellor Kindersley in *Whitehead* v. *Bennett* (6). . . . As between landlord and tenant, the tenant makes the buildings which he erects part of that land in which he has himself an estate in possession, the reversion being in the landlord. It is by virtue of his tenure of the land, and of the terms of that tenure, that he is (on the one hand) enabled to erect such buildings, and (on the other hand) prevented from pulling them down. He cannot commit waste, and that is the only reason, that I am aware of, why he cannot pull them down and remove them during his term."

In *Bunnell* v. *Tupper* (7), decided in a country where it is recognized, as I shall hereafter point out, that the conditions are the same as with us and different from those which exist in older and longer settled countries, the doctrine to which I have alluded is affirmed. After citing Lord Ellenborough's classification of cases in *Elwes* v. *Maw* (8), Burns, J., in delivering the judgment of the Court, says : "If the barn in this case had been erected by a person who was merely a lessee of the premises, then the question would be whether the erection was for the purpose of a trade or for agricultural purposes, for there is a distinction to be drawn in this respect, even in the third case (landlord and tenant) put by Lord Ellenborough. If the erection is for agricultural purposes, then it is, as between landlord and tenant, a question whether the building is attached to the soil or not ; and if resting upon the soil merely by its own weight, or not attached to the soil in any way, the question is to be decided favourably to the tenant, and the question is not whether the erection was intended to be temporary or so long as the tenant enjoyed the premises, or to enable him the more advantageously to carry on the business of farming. We know that farming operations cannot properly be carried on without sufficient barns; but if a tenant who takes a farm without a sufficient barn, being under no obligation to build and leave a barn at the end of his term, yet,

(6) 27 L. J. (N. S.) Ch. 474. (7) 10 U. C. Q. B. 414. (8) 3 East, 38.

for his own convenience and to render the farm beneficial to him, does build a barn and attaches it to the freehold, he cannot afterwards remove it. If he takes care not to attach it to the soil, then it evinces an intention on his part that he never intended it to be more than a personal chattel ; and, though it be necessary to enable him the better to carry on his farming occupations, yet, as his occupation of the property is but temporary, the barn will be considered as but ancillary to the person, and not to the property. In the case of trade fixtures erected by the tenant, though they be erected as attached to the freehold, yet they are considered as personal property, on the ground that they are ancillary to the trade carried on by the person, and not ancillary to the freehold." In the same case, at page 422 of the report, the Court say : "In the case of the tenant occupying for purposes of trade, physical annexation does not constitute the erection part of the freehold ; neither does it do so in the case of the owner who puts up erections as ancillary to the trade. In the case of the agricultural tenant, his intention whether the building shall be treated as a part of the freehold is evinced by the fact whether there be a physical annexation." This case was decided nearly forty years ago, and at that time the difference between the methods of affixing buildings to the soil in this country and in England was pointed out in the same way as was done by the Supreme Court of this Province in *Doran* v. *Willard* (9). In *Van Ness* v. *Pacard* (10), a similar question came before the Supreme Court of the United States. In that case a tenant built a house two storeys high on a lot in the City of Washington ; there was a stone cellar foundation under the main building and a shed attached. The tenant, who was a carpenter, erected the building with a view to carrying on his business as a dairyman, and as a residence for his family and servants engaged in the business. After reviewing English authorities and alluding to the distinction drawn by them between trade and agricultural fixtures, Story, J., says (11): "Then, as to the residence of the family in the house, this resolves itself into

(9) 1 Pug. 358. (10) 2 Peters, 141. (11) At p. 148.

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the same consideration. If the house were built principally for a dwelling house for the family independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception."

Applying the principle of these cases to the present one, I should feel justified in holding that the building in question was not removable by the defendant Rowe, and that the plaintiff had a right to have him restrained from doing so. I am, however, referred to the cases of *Doran* v. *Willard* (12) and *Fowler* v. *Fowler* (13), which are of course binding upon me; and it is argued that these cases settle it as law that it is always a mere question of intention whether the alleged fixtures will be held to be so or not. These were not cases of landlord and tenant, though they are in accord with *Bald* v. *Hagar* (14). In *Doran* v. *Willard*, the Court extended rather than narrowed the doctrine by which buildings are said to be affixed to the freehold, and the obvious distinction between the case of a tenant for years and the owner of the soil is pointed out. If you substitute the agreement to purchase the lot in that case for the lease in this case, the circumstances of the two are almost identical, except that the building here has the characteristics of permanence in a much greater degree. All that that case decides is that where a party owning land builds on that land, with an apparent intention that the building should become part of the land, it will become so whether it is affixed or not. So, in *Fowler* v. *Fowler*, it was held where the structure was not affixed that the intention would govern. I am unable, however, to see in either of these cases, or in *Holland* v. *Hodgson* (15), on which they were decided, anything to warrant the proposition that where buildings, as in this case, have been in fact affixed to the freehold they would still retain their character as chattels because it was the tenant's intention when he built them that they should

(12) 1 Pug. 358.
(13) 2 Pug. 488.
(14) 9 U. C. C. P. 382.
(15) L. R. 7 C. P. 328.

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do so. There, of course, may be cases where an understanding, express or implied, might exist between the landlord and tenant by which such buildings would not become part of the freehold ; but, in the absence of that, I am unable to see how it can be said, in a case like this, that the tenant who does affix to the freehold buildings not trade fixtures has not thereby, as the Court, in *Bunnell* v. *Tupper* (16), say, evinced his intention that they should be so affixed and become part of the land.

In *Whitehead* v. *Bennett* (17), an authority which has the endorsement of Lord Selborne in *Wake* and *Hall* (18), and which has ever since been considered settled law, it appeared that a lease was made for twenty-one years from September, 1852, of certain real estate, upon which the tenant erected certain brick buildings, which were used by him for the purpose of his business. In 1857, and during the term, the tenant was about removing the buildings as in this case, whereupon an injunction was applied for to restrain him. In deciding this motion, Kindersley, V.C., after alluding to the broad distinction between trade fixtures and buildings used in trade, says : "Suppose the case of a building or utensil which, by the rule of law, a tenant might remove as a trade fixture, if there is anything which is a mere accessory or adjunct to it, and has no other existence or purpose, then, if you may remove the principal thing, you may also remove the accessory. Among the many cases upon this subject, there is not one which has determined that, even in the most favourable circumstances of landlord and tenant, a tenant has a right to remove any building which he has erected merely because it is used only for the purposes of trade ; and if the argument used in this case is allowed to prevail, it can only do so in such a manner as may be followed up to its legitimate consequences ; and it would be laying down a rule that whatever a tradesman erected, however substantial and however firmly let into the freehold, yet, if the identity is preserved, the tenant might remove it. Such a rule is established nowhere. Not only is there no such decision, but there is not even a dictum

(16) 10 U. C. Q. B. 414. (17) 27 L. J. (N. S.) Ch. 474.

(18) 7 Q. B. D. 295.

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that can bear any such construction." It is true that in that case the buildings in question were built of brick or stone, and may have been incapable of removal without a destruction of the fabric, and in no other way than by taking down the structure and removing it as so much building material. However much the difficulty or expense in the way of removal may be a factor in determining the intention of the party who erected the structure, this is not, to my mind, the *ratio decidendi* of this case. The principle, in my opinion, applies equally to a case like the present, where the building in question is simply a dwelling house with the lower storey used as a shop, admittedly affixed to the freehold, not a trade fixture, and built in the way such houses are usually constructed in this country by owners of the land for their own occupation, and with the additional element, which was wanting in *Whitehead* v. *Bennett*, that the tenant held an absolute right to hold the land in perpetuity. I should myself come to the same conclusion under the rule laid down by Lord Blackburn in *Holland* v. *Hodgson* (19). At page 334 he says: "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two conditions, as indicating the intention, viz., the degree of annexation and the object of the annexation." And at page 335 the same learned Judge says: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus

(19) L. R. 7 C. P. 328.

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lying on those who contend that it is a chattel." This case was one of mortgagor and mortgagee; but, assuming that the rule laid down is applicable to the relation of landlord and tenant, how has the defendant Rowe here disproved the *prima facie* case against him arising from the building being affixed to the soil? How has he discharged the onus of proof that the building, though admittedly affixed to the soil, still retains its character of a chattel removable at his will? For reasons which I have already mentioned, and which I need not recapitulate, I think he has not done so. On the contrary, I think, and so find, that, in affixing the buildings to the land as he did, the defendant Rowe intended them to become part of the land and remain there. It was the only way in which he could make the land useful. In arriving at this conclusion, I do not wish it to be said that I have ignored the declarations of Rowe as he gave evidence of them in reference to removing the building, at or about the time the parties were negotiating as to the terms of the lease. That such declarations were made is denied by the plaintiff; but, assuming that they were made as the defendant Rowe states, I am unable to attach any weight to them in view of his actions. If he intended building a house removable at will, I can only conclude that he either abandoned that intention, or else that, without being aware of the results, he erected it in a manner which defeated his intention as expressed. I am unable to see how a dwelling house erected by a tenant for years on the demised premises in the way this one was can retain its character as a removable chattel, simply by the declaration of the tenant, before the building was erected, of his intention that such should be the case.

In my opinion this building is not removable by the tenant Rowe.

As a second point, Mr. Earle contended that the plaintiff was sustaining no damage by the removal, and that for this reason no injunction would be granted. Some evidence was given by Rowe that he intended, as a security to the plaintiff for his rent and taxes, replacing this building by another to be used as a photograph saloon. I do not attach any importance to this. Neither do

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I think the case of *Doherty* v. *Allman* (20) applicable to this one. If the building erected by Rowe was not removable without plaintiff's consent, as in my opinion it was not, I think he had a right to come here and have the removal prevented. This was the course adopted in *Whitehead* v. *Bennett* (21), and other cases.

Mr. Earle also contended that plaintiff was estopped by acquiescence from asking the intervention of this Court. I intimated to him at the argument that I thought the plaintiff has not been guilty of much laches. In about nine or ten days after he was first made aware of Rowe's intention to remove the building he applied for the injunction. The chief complaint was, that when the plaintiff was first made aware of Rowe's intention, he did not in any way protest or assert any right; and that if he had done so Rowe would not have disconnected the two buildings or made the other preparations for removal. What Rowe did, he did as claiming a right, and not because plaintiff did not assert his rights. It is not usual for persons to advertise to their opponents their intention to apply for an injunction when the only effect would be to hasten the accomplishment of the act sought to be restrained. I think there was no acquiescence.

I think the injunction restraining the defendant Rowe from removing the building in question should be made perpetual, and plaintiff must have a decree accordingly, with costs.

(20) 3 App. Cas. 709. (21) 27 L. J. (N. S.) Ch. 474.

AHEARN v. AHEARN ET AL.

1894.
October 16.

Deed—Estate—Provision Inconsistent with Estate Granted by Premises and Habendum—Construction.

Land was conveyed by A. and wife by deed for the expressed consideration of £25 to their daughter and her husband and "their heirs forever, and to them only." "To have and to hold to them and their heirs only, to their sole use and benefit and behoof forever. And be it remembered that the said (grantees) shall not sell, grant nor bargain the said lot of land nor any part or portion thereof, but that it shall be kept to the true intent and meaning of within."

Held, that the grantees took an estate in fee simple.

This was a suit brought by the plaintiff, as widow of Richard Ahearn, for an admeasurement of her dower in a piece of land formerly belonging to her husband under a conveyance to him and his former wife Martha, from one Jonas Fitzherbert. The only point was whether this conveyance vested in Richard and Martha Ahearn an estate in fee simple, or a life estate, as it was admitted that in the former case the plaintiff would be entitled to dower. The deed in question is sufficiently recited in the judgment of the Court.

A. B. Connell, for plaintiff.

D. McL. Vince, for defendants.

1894. October 16. BARKER, J.:—

The only point involved in this case is the construction to be placed on a certain deed from one Jonas Fitzherbert and Abigail Fitzherbert, his wife, to Richard Ahearn and Martha Ahearn, his wife, set out at length in section two of the defendants' answer. The bill was filed for an allotment of dower in the land conveyed by this deed; and at the hearing counsel for both parties admitted that the only point to be determined was whether this conveyance operated so as to convey the fee in Ahearn and wife, as contended by the plaintiff, or only a life estate, as contended for by the defendants. In the first case

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it was admitted that the plaintiff was entitled to dower, and in the second case it was admitted that the bill must be dismissed. The conveyance in question is dated August 4th, 1856, and, for an expressed consideration of £25, the receipt of which is acknowledged in the deed, conveys the land by the following language: "Have granted, bargained, sold, released, aliened and confirmed, and by these presents do grant, bargain, sell, release, alien and confirm unto the said party of the second part, and to their heirs forever, and to them only, that piece or parcel of land," etc.; (here follows the description of the premises) "together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part in law or in equity of, in and to the above bargained premises, to have and to hold to the said party of the second part and their heirs only, to their sole use and benefit and behoof forever. And be it remembered that the said Richard Ahearn or the said Martha Ahearn shall not sell, grant nor bargain the said lot of land, nor any part or portion thereof, but that it shall be kept to the true intent and meaning of within."

Mr. Vince contended that by a true construction of this conveyance, as well as by the evident intention of the grantors, a life estate only was created in the grantees, with a remainder over to their heirs as though they had been mentioned by name; and as indicating this intention, he relied upon the absence of the word "assigns"; and also upon the fact, which was admitted, that the grantee, Martha Ahearn, was a daughter of the grantors; and also upon the last clause in the instrument, which was, as he contended, a restraint upon alienation by the grantees.

It was not very strenuously urged that the words in the granting clause of the deed, if uncontrolled by other parts of the instrument, were not apt and sufficient words to convey an estate in fee to the grantees. The language is, I think, technically accurate for that purpose. A con-

veyance to A. and his heirs creates a fee, and if you add the words "and to them only," as here, it is still a conveyance to A. and his heirs, and that conveys an estate in fee. Watson, in his Equity treatise, p. 181, says: "An estate in fee simple is properly created by a limitation to a person and his heirs. The word 'assigns' is usually added, but is not necessary. Unless the word 'heirs,' being the proper word of limitation, be used, a life estate only will, as an almost universal rule, be created under a deed." See *Holliday* v. *Overton* (1).

It must be assumed, therefore, that when the word "heirs" is used, all intention of creating only a life estate is negatived. Particularly is that the case where the habendum clause corresponds, as it does here, to the granting clause. This conveyance professes to be made, and I must take it as having actually been made, for a valuable consideration, and as an ordinary purchase, and not in any way, as Mr. Vince contended, as a gift from the grantors to their daughter and for her benefit. If, however, the fact were as he contends, the argument would, I should think, be stronger, in evincing an intention to benefit the daughter by giving her the more valuable estate than merely one for life. The construction is, however, not to be arrived at by such considerations. See *Archer* v. *Urquhart* (2); *Meyers* v. *Marsh* (3); *Owston* v. *Williams* (4). In these two last mentioned cases the habendum clause was inconsistent with the premises or granting clause; the latter, however, was held to prevail. In *Owston* v. *Williams* (4), Robinson, C.J., says: "But no doubt it has been a rule very early laid down, that a deed is to be construed most strongly against the grantor, and that when he has by the premises in the deed most plainly granted an estate to A. and his heirs, he cannot retract that disposition by using words in the habendum utterly inconsistent with the grant of such an estate." The same learned Judge in *Meyers* v. *Marsh* (3), in speaking of the same rule, says: "This rule, it is said, is a consequence of the maxim, that deeds shall be construed most strongly against the grantor, and therefore that he

(1) 15 Beav. 480.
(2) 23 Ont. 214.
(3) 9 U. C. Q. B 242.
(4) 16 U. C. Q B. 405.

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shall not be allowed to contradict or retract, by any subsequent part of the deed, the gift made in the premises. And it is in many books given as the common illustration of this rule, that if land were given in the premises of a deed to A. and his heirs, habendum to A. for life, the habendum is void, because it is utterly repugnant to and irreconcilable with the premises."

It seems clear, therefore, both upon principle and authority, that even where the habendum clause is repugnant to the granting clause, the latter prevails as determining the nature of the estate created. *A fortiori* would this be the case where these two clauses agree, and the only reason for cutting down their effect is based upon a provision such as that found in the concluding part of this conveyance, and by which the grantees are sought to be restrained from selling the land in question.

Watson, at page 200 of his Compendium, lays down this rule : "A tenant in tail cannot, any more than a tenant in fee, be restrained by any condition, proviso, limitation or otherwise from exercising his right of alienation, unless in those cases in which estates have been granted by the crown to particular families in tail as a reward for services, or by the country by special acts of parliament;" for which the author cites a number of authorities, to which may be added *Doe dem. Baxter* v. *Baxter* (5), which is identical in principle, though not in its facts. See also *Lairo* v. *Walker* (6), where a similar clause was held void as being altogether repugnant to the grant.

I think this conveyance carried the fee to the grantee and not a life estate, in which case, as admitted by counsel, plaintiff is entitled to her dower.

(5) 4 All. 131. (6) 28 Gr. 216.

LE BLANC v. SMITH.

1894.
October 19.

Practice—Death of Plaintiff—Dismissal of Bill—Costs—Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 98.

Where, on the death of a sole plaintiff, the Court, on the application of the defendant, orders that the legal representatives revive the suit, or, in default, that the bill stand dismissed, such dismissal will be without costs.

This was an application made under the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 98 (1), for an order that the legal representatives of the deceased plaintiff revive the suit, or, that the bill be dismissed. The facts fully appear in the judgment of the Court. Argument was heard October 16th, 1894.

C. A. Palmer, Q.C., and *Welsh*, for the motion.

A. I. Trueman, contra.

1894. October 19. BARKER, J.:—

The summons was issued in this suit on the 13th of January, 1893; the bill was filed and served on the 20th of March, 1893, and the answer was filed and served on the 27th of May, 1893. The plaintiff died on the 11th of June, 1893, since which time no step has been taken. This is an application made under sect. 98 of the Supreme Court in Equity Act, 1890 (1), for an order that the legal representatives of the deceased sole plaintiff should revive the suit within a limited time, or, that the bill should be dismissed. The only question which arises is, whether the bill should be dismissed with, or, without costs. Notice of motion was served upon the administratrix of the deceased plaintiff, and upon his children, and they appeared

(1) "When a suit abates by the death of a sole plaintiff, the Court, upon motion of any defendant made on notice served on the legal representative of the deceased plaintiff, may order that such legal representative do revive the suit within a limited time, or that the bill be dismissed; on the death of one or more of several plaintiffs or defendants in any suit, where the cause of action shall not survive, it shall only abate as to the person or persons so dying."

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by Mr. Trueman, as counsel, and objected to any order dismissing the bill with costs. My attention was turned to several authorities, which, with some others, I have examined. The result has been that I think Mr. Trueman's contention is correct; and the order must be made in the terms asked for by him. The section in question is copied from English Chancery Order xxxii., No. 4, passed the 8th of May, 1845. See Morgan's Chancery Orders (2). The principal cases relied on were *Chowick* v. *Dimes* (3), decided in 1840; *Lee* v. *Lee* (4), decided in 1842, and *Hill* v. *Gaunt* (5), decided in November, 1860. In the first of these cases the Master of the Rolls made the order without costs, and in *Lee* v. *Lee* (4), the Vice-Chancellor refused to make any order at all. Both, however, agree in thinking that no costs should be given. At all events the Vice-Chancellor in the latter case, after reviewing all the cases, gives what seems to my mind unanswerable reasons for the rule which I have intimated as the correct one. It is to be recollected, however, that in both of these cases the main question was whether the Court could make any such order at all. No doubt it was owing to this difference of opinion that the order of 1845 was passed. That settled the power of the Court to make the order, and no doubt would have also settled this question of costs if the consensus of opinion in the two cases I have mentioned had not rendered it unnecessary. Then came the case of *Hill* v. *Gaunt* (5) in 1860, and there Vice-Chancellor Wood holds expressly that the practice is to make the order without costs, and says that the Lord Justices had so held, although I cannot find any report of such a case. In a note to the above order in Morgan (2), in which the author cites *Hill* v. *Gaunt* as his authority, he says: "When executors decline to proceed with the suit the dismissal will in all cases be without costs"; the last two words being italicised. This is, to my mind, entirely according to the reason of the thing.

Mr. Palmer sought to draw some distinction between a case where the property, or fund, to which the suit

(2) Ed. 1862, 509.
(3) 3 Beav. 290.
(4) 1 Hare, 617.
(5) 7 Jur. (N. S.), 42.

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related was in the custody of the Court, or the moving party, as here, in which case he contended that the costs could be taxed and made in some way a charge on the property. I see no reason for drawing any such distinction, neither do I think the authorities, upon which he relied, sustain that view.

There will be an order that the legal representatives of the deceased plaintiff do within one month from service of this order upon them revive this suit against the defendant; or, in default thereof, that the plaintiff's bill do stand dismissed out of this Court without costs.

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(No. 2. See ante, p. 1.)

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October 31.

Practice—Two offers to suffer judgment for different sums—Amount recovered less than first offer—Costs—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 130—Common Law Procedure Act (c. 37, C. S. N. B.), ss. 127, 128.

Where two offers to suffer judgment were made at different dates, and the plaintiff recovered a sum less than the first offer, he was allowed costs of suit up to the date of the second offer.

The defendant may make more than one offer to suffer judgment.

This was an application by the plaintiff to vary an order of Mr. Justice Barker. The facts are stated in the judgment of the Court.

Argument was heard the 23rd of October, 1894.

Weldon, Q.C., for the plaintiff.

Palmer, Q.C., and *A. H. Hanington*, Q.C., for the defendant.

1894. October 31. BARKER, J.:—

An offer to suffer judgment for $50 was filed in this case on the 22nd day of June, 1892, and a second offer for $75 was filed on the 17th day of August of the same year,

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neither of which was accepted, and a final decree was made for $36. In August last an application was made to me by the defendants for an order that they should have their costs incurred after the 22nd day of June, 1892; and after hearing the parties I made an order to this effect. It did not appear on that application that a second offer had been made, and the motion was disposed of altogether on the basis of there being only the one offer. It seems that when the costs came to be taxed the plaintiff's attorneys were reminded that a second offer had been made, and accordingly this application was made to vary my previous order, by directing that the plaintiff should have his costs up to the date of the last offer instead of the first. A somewhat important question of practice under the Act relating to offers to suffer judgment now arises, so far as I am aware, for the first time.

It may be stated as a rule of general application both in Courts of law and equity that costs follow the result, and although there may be cases where, for reasons to which it is not necessary to refer to particularly, this Court will deprive even a successful litigant of his costs, the general rule is as I have stated. In *Millington* v. *Fox* (1), cited on the argument, Lord Cottenham said that he was very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title might be, or however proper it might be to dispute it, it was but right that the party who really had the right should be reimbursed as far as giving him the costs of the suit could reimburse him; but, there was another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which were essential to enable the parties to vindicate and establish their rights. Mr. Palmer referred me to this case as an authority by which I ought to be governed, and argued that, inasmuch as the sum recovered was less than the $50 for which a judgment was first tendered, all subsequent litigation was unnecessary, and therefore the defendants should not be put to any of the costs of it. If I could bring my mind to the conclusion

(1) 3 M. & C. 338.

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that both offers remained operative, and that, as between the two, I had a discretionary power, I confess the argument would have great weight ; but as, for reasons which I shall presently give, I think the question of costs is to be determined upon the basis of the last offer, and of it alone, I do not think the principles of the case cited apply here. In making the previous order I thought—and I remain of the same opinion—that this was a case where the defendants had a right under the Supreme Court in Equity Act, 1890 (2), to file an order to suffer judgment under sect. 127 of chap. 37 C. S. (3). Now, this is not a case where the plaintiff is deprived of his costs by the exercise of any discretion which the Court may have in the matter. On the contrary, by the rule to which I have already alluded he is entitled to his full costs, except so far as he may be deprived of them as a result of the offers made to suffer judgment by default. I do not say that cases may not arise in this Court where offers to suffer judgment may have been filed and not accepted, where the plaintiff might not be deprived of his costs altogether;

(2) 53 Vict. c. 4, s. 130. "Sections one hundred and twenty-seven, one hundred and twenty-eight, one hundred and thirty-one of chapter 37 of the Consolidated Statutes, relating to Proceedings and Practice in the Supreme Court, shall apply to all causes and proceedings under this Act, so far as the same can be made applicable."

(3) S. 127. "Whenever any defendant in any action, wherein debt or damages only are sought to be recovered, shall file in the office of the Clerk of the Pleas an offer and consent in writing, signed by the defendant or his attorney in the record, to suffer judgment by default, and that judgment shall be rendered against him as debt or damages for a sum by him specified in the said writing, the same shall be entered of record, together with the time when the same was tendered, and the plaintiff or his attorney may, at any time within ten days after he has received notice of such offer and consent, file as aforesaid a memorandum in writing, of his acceptance of judgment for the sum so offered as debt or damages, and judgment may be signed accordingly with costs ; or, if after such notice, a Judge shall for good cause grant the plaintiff a further time to elect, then the plaintiff may signify his acceptance as aforesaid, at any time before the expiration of the time so allowed, and judgment may be rendered upon such acceptance, as if the acceptance had been within ten days as aforesaid. S. 128. Whenever in the final disposition of any such action, such offer and consent shall have been made by the defendant, and the plaintiff shall not recover a greater sum than the sum so offered, not including interest on the sum recovered in debt or damages from the date of such offer, the defendant shall have judgment against the plaintiff for his costs by him incurred after the date of such offer, and execution shall issue therefor ; and the plaintiff, if he shall recover any debt or damages, shall be allowed his costs only up to the date of such offer or consent."

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but where no such order is made, and where he would be entitled to his full costs except for the offer, then, in my opinion, the costs should be regulated by the Act, and not otherwise. In construing the Act, however, it is, I think, useful to recollect that its operation is to deprive the plaintiff of a right to full costs which he otherwise had, and it should, therefore, be held only to apply to such cases as by a fair construction of its provisions are clearly within them. It was not seriously contended on the argument that more than one offer could not be filed under the Act. In fact the plaintiff is asserting rights and seeking benefits under the second one, and the defendants, who made it, could scarcely be expected to argue against its validity. I myself see no reason upon principle why offers should not be repeated, and I can well imagine cases—for example, mistakes in calculation or ignorance of facts pertinent to the question of damages—where all beneficial results of the Act might be rendered nugatory unless a new or amended offer could be made. In *Miller* v. *Lakeman* (4), the Court pointed out that the proper course in that case would have been for the defendant to have renewed his offer. The original Act, 18 Vict. c. 10, which introduced this practice, is entitled "An Act Concerning Tender in Actions at Law and Suits in Equity"; and if one may speculate as to the true construction of this Act by any points of similarity which may exist, either in its provision or its objects, and those which relate to tender or pleas of payment of money into Court, it violates no rule to hold, that as such pleas may be amended, so may an offer to suffer judgment be amended by making a new one: See *Domett* v. *Young* (5). It is, however, contended by Mr. Weldon that while it is quite competent for a defendant to make a second offer, it must be in substitution of the first, and that only one can be operative. This is, I think, the true construction of the Act, and one of which the defendant ought not to complain, as it imposes no burden upon him which in making the offer he does not consent to take. By making an offer the defendant in effect says: I admit that the plain-

(4) 6 All. 510.

(5) 1 C. & Mars. 465.

tiff is entitled to recover so much money against me, and I am willing that he shall enter up a judgment against me for that sum with his costs up to this time, and I keep this offer open for ten days from notice of it. It is, however, to be understood that if not accepted the offer is not to be evidence against me; and, if the plaintiff recovers less than the amount for which I now offer a judgment, he shall only have his costs against me to the date of the offer, and I shall be entitled to mine after that date. Putting the Act and offer together, this is exactly what they mean. Now, this offer is entirely a voluntary thing on the defendant's part, and it is made solely for his own advantage. He pays nothing, and does not offer to pay anything; and, when the offer is thus made, the Act, without any consent of the plaintiff, takes away from him his right to full costs unless he recover a sum greater than that mentioned in the offer. Mr. Palmer's argument will be most clearly stated by an illustration. It is this: Suppose a defendant at three different stages of a suit files, first, an offer for $50; second, an offer for $100; and third, one for $150, no one of which is accepted ; if the plaintiff recovers less than $150, but more than $100, he is only entitled to costs up to the date of the last offer ; if, however, he recovers less than $100, and more than $50, he will only be entitled to his costs up to the date of the second offer; and if less than $50, then only to the date of that offer. In other words, in applying the Act to a sole offer, he says precisely what the Act does ; but in applying it to the third offer, instead of reading the Act as saying that in case it is not accepted, and a less sum is recovered, he shall be deprived of his costs incurred after that date, he reads it with a very elaborate variation altogether in the defendant's interest. If the defendant chooses to increase the plaintiff's chances of being deprived of his full costs by filing offers for an increased amount, he ought not to complain if the rights of himself and plaintiff are eventually determined by the same offer. To hold otherwise would be to make the parties' rights altogether different under a first or a subsequent offer. Under a first offer, if unaccepted, the plaintiff may recover less damages, but he must always recover as much costs as if he

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accepted ; but under a second or subsequent offer, he would not only recover less damages, but he might recover less costs than if he accepted. I do not think it is a fair meaning to the Act to say that in any case as to costs the parties should be in any worse or better position by an offer being refused ; the plaintiff may be in a worse position as to damages, but of that he takes the risk ; but I can see no reason whatever for placing the defendant in a better position than by the last offer he himself consents to be.

In my view of the Act, if the defendant chooses to make a second offer he must be taken to have abandoned the previous one; and in the disposal of the case the rights of the parties as to costs must be determined on the basis of the last offer alone. This not only carries out what I think is the intention of the Act, but it is in my view equitable to the parties, and is in conformity with the practice as to pleas relative to questions of a similar character, because there could only be one plea of payment of money into Court, and by it alone would the parties' rights be determined.

My previous order will, therefore, be varied by directing that the plaintiff have his costs up to August 17, 1894, the date of the last offer, and that the defendants have their subsequent costs.

There will be no costs of this application.

WARNER v. GIBERSON.

1894.

December 7, 18.

Administration — New Brunswick and Maine Assets — Creditors in both Countries—Expense of Administration suit in New Brunswick—Conflict of Laws.

A person, deceased, died domiciled in this Province, leaving personal property here and in Maine. Administration of the estate was taken out in both countries by the same person. The proceeds of the Maine property were brought by the administratrix to this Province. The deceased was indebted to creditors in both countries. An administration suit was brought in this Province against the administratrix by the New Brunswick creditors. By a decree of the Maine Probate Court the Maine assets were ordered to be distributed among the creditors of the deceased in accordance with the provisions of a Maine statute. The effect would be that the Maine creditors would be paid their share of the whole estate without contributing to the costs of the administration suit in this Province.

Held, that the costs of the administration suit could not be charged against the Maine assets, and that their distribution must be in accordance with the Maine law.

F. Whitfield Giberson, a resident of and domiciled in New Brunswick, died in May, 1891, intestate, leaving personal estate in New Brunswick valued at $400, and personal estate in the State of Maine valued at $2,318. His widow Almeda Giberson, the defendant, took out letters of administration in the Probate Court of Victoria County, New Brunswick, and also was granted administration by the Probate Court of Aroostook County, in Maine. The property in Maine was sold for $2,200 by a contract made and completed at St. John, New Brunswick, and this sum was placed in a bank in that city. The deceased was indebted at the time of his death to creditors in New Brunswick and Maine. An administration suit was commenced in the Supreme Court in Equity in this Province against the administratrix by the plaintiff as a creditor of the deceased. A reference was made to Mr. Hugh H. McLean, a referee of the Court, to take accounts and ascertain what property had come into the hands of the defendant. On the motion to confirm his report, exception was taken to it by the plaintiff on the ground that it did not charge the defendant with the proceeds of the Maine property on deposit in the bank

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at St. John, and submitting that it should be amended in that respect. On the 8th of March, 1894, Mr. Justice *Palmer* delivered judgment, part of which is as follows:

"The plaintiff contends that the referee should report that the defendant has all the money in her hands as administratrix in this Province. I think this would be clearly unjust. The defendant should account as administratrix to the creditors of the estate for all the money that she can have available by any process of law, without leaving herself liable in any other country for it. In other words, an administrator in this Province is only chargeable with reference to the property beyond the jurisdiction of the Province, or for so much of it as can by reasonable diligence be brought within the Province without incurring liability. Therefore, in order to charge her with the assets in Maine, it would be necessary to show that she could receive it and have it distributed here without being held liable to account again for it under the law of Maine. The report, therefore, should be amended by stating that she had $400 that came to her hands under the administration granted in this Province, and the sum of $2,318 as administratrix in Maine. The effect of this will be that she will be charged at once with $400, and she will be ultimately charged with whatever may remain of the property in Maine when she or any of the creditors or next of kin are enabled to close up the administration there and show that the money still remains in her hands; and I think that, unless there is some local law in Maine to the contrary, the whole sum there received will, after paying legal charges, be allowed to be administered here, which is the domicile of the intestate. The effect will be that I will order that the report of the referee be amended by finding that the defendant as administratrix in this Province has in her hands $400 of assets collected here, and that she received as administratrix in Maine assets collected there of $2,318, which latter is subject to the laws in force there; and that the amount remaining over for administration here cannot be ascertained until it is disposed of by the Court there. Costs of all parties to this application to be paid out of the estate." On the 10th day of March, 1894, the matter was

again brought before Mr. Justice *Palmer*, in presence of counsel in the cause, by the referee, who asked for instructions concerning costs, whereupon the Court made the following order: "Order—This order will form part of the order I made the other day, that is to say, that all these parties were here, and that I made this order to amend the report and then confirmed it. I order that the costs of the referee be taxed, and then the costs of all the other parties to the reference be paid out of the $400."

In July, 1894, the Probate Court in Maine made a decree ordering that the sum of $1,836.45, being the balance of the proceeds of the Maine property chargeable in the hands of the defendant after deducting certain legal expenses and other charges, be proportionately distributed among the Maine creditors of the deceased in accordance with the provisions of a statute of that State regulating the distribution of estates in that State of deceased persons not resident therein, and the balance thereafter to be remitted to the defendant as foreign administratrix. The provisions of the Maine statute are as follows: "Sec. 37. If such person died insolvent, his estate found in this State shall, so far as practicable, be so distributed that all his creditors here and elsewhere may share in proportion to their debts; and to this end his estate shall not be transmitted as aforesaid until all his resident creditors have received the proportion they would have had if the whole estate applicable to the payment of creditors, wherever found, had been divided among all said creditors in proportion to their debts without preferring any one kind of debt to another; and in such case, no foreign creditor shall be paid out of the assets found here until all the resident creditors have received their proportions as herein provided.

"Sec. 38. If there is any residue after such payment to the citizens of this State, it may be paid to any other creditors who have proved their debts here, in proportion to the amount; but no one shall receive more than would be due to him, if the whole estate were divided ratably among all the creditors as before provided; and the balance, if any, may be transmitted to the foreign executor or administrator."

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By this decree the Maine creditors would receive $670.19 as their proportion of the estate, and the sum of $1,166.76 would remain in the hands of the administratrix for New Brunswick creditors. The New Brunswick creditors and the administratrix now applied to Mr. Justice *Barker* in the form of a special case agreed on by counsel, stating the facts, the judgment of Mr. Justice *Palmer* and the decrees of the Maine Probate Court, and asking for directions. The creditors claimed that to allow the Maine creditors to be paid in accordance with the decree of the Maine Probate Court would relieve them from sharing in the expense of the administration suit, and asked that the costs thereof should be proportionately borne by the Maine assets.

C. J. Coster, for the plaintiff and other creditors :—

The distribution of personal property, wherever situate, is to be regulated according to the law of the testator's domicile at the time of his death : Williams on Executors (1).

In *Hervey* v. *Fitzpatrick* (2), where a foreign administrator remitted part of the assets to England to be sold and the proceeds to be carried to the account of the deceased's estate, and came to England, it was held by Wood, V.C., that he could be sued in an English Court of Equity by a person next of kin to the deceased who had taken out administration in England in respect of those assets, and that the Court had the right to deal with them by appointing a receiver if there was danger of their being removed from the jurisdiction of the Court.

Barnhill, for the administratrix :—

The administrator under a foreign grant has a right to hold the assets of the deceased received under it against the home administrator even after they have been remitted to this country: Williams on Executors (3). The proceeds of the Maine property must be administered in accordance with the Maine Statute of Distributions relating to estates in Maine of deceased persons resident

(1) 6th Ed. pp. 444 and 1401. (2) Kay, 421. (3) 9th Ed. p. 1525.

elsewhere. See *Dorsay* v. *Connell* (4). I would also submit that the question has been concluded by the judgment of Mr. Justice *Palmer*.

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This matter comes before me in a somewhat informal manner, and it is possible that I may have mistaken some of the facts. Should that prove to be the case I shall be glad if the counsel will correct me.

This was an administration suit under Sec. 101 of the Equity Act of 1890. It seems the defendant was appointed administratrix in New Brunswick and also in Maine, where the deceased had assets. An order was made sending the matter to a referee, and after hearing the evidence he made a report in February last by which he found that the intestate left personal estate in Maine valued at $2,318, and personal estate in New Brunswick valued at $400. The estate in Maine was sold by the administratrix, the contract for which was made in St. John, and the purchase money, which was also paid here and amounts to $2,220, was by agreement of all parties paid into the Bank of New Brunswick here to the credit of this cause, where it now remains. The intestate died insolvent, being indebted to Maine creditors in the sum of $2,281.51, to New Brunswick creditors in the sum of $9,054.06, and in the further sum of $7,025.81 to Messrs. Stetson, Cutler & Co., of which firm there are members resident both in Maine and New Brunswick. It also appears that by the law of Maine, where a man dying intestate and insolvent, as Giberson was, his estate is divided *pro rata* among all his creditors, wherever they are; and in accordance with this provision a decree was made by the Probate Court in Maine in July last by which it appeared that a balance of $1,836.45, then in the administratrix's hands in Maine, was ordered to be distributed as therein mentioned to the Maine creditors—each getting his proportion—and the balance was to be remitted to the foreign administratrix; that is, as I understand it, it

(4) 22 N. B. 564.

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would come to the administratrix here for distribution under the Maine law among the creditors here. The total amount thus ordered to be paid to the Maine creditors is $670.19, leaving $1,166.26 to come here for distribution. This division is made up on a basis of the Maine claims amounting to $7,535.85, and the foreign or New Brunswick claims to $10,050.08. The amount allowed to Stetson, Cutler & Co. in Maine being out of the $1,836.45 was $528.98.

In March last, and before the decree of the Maine Probate Court was made, this matter came before Judge *Palmer* on the referee's report as to the special facts reported by him, and it was then contended by the plaintiff that the defendant, as administratrix here, had in her hands the money in the bank, and that as such she should be charged with it. Judge *Palmer* gave judgment on the 8th March last, but he did not concede to the plaintiff's view. He says : "The effect will be that I will order that the report of the referee be amended by finding that the defendant, as administratrix in this Province, has in her hands $400 of assets collected here, and that she received, as administratrix in Maine, assets collected there of $2,318, which latter is subject to the laws in force there ; and the amount remaining over for administration here cannot be ascertained until it is disposed of by the Court there. Costs of all parties to this application to be paid out of the estate." And the report as amended stood confirmed. On the 10th March Judge *Palmer*, on the matter being again mentioned, in presence of counsel, ordered as follows : "This order will form part of the order I made the other day ; that is to say, that all these parties were here, and that I made this order to amend the report and then confirmed it. I order that the costs of the referee be paid out of the $400 to be taxed, and then the costs of all the other parties to the reference be paid out of the $400."

I am asked now to order the costs of this application to be paid out of the money in the bank. I presume that the $400 in the hands of the administratrix here is insufficient for the purpose ; and it is said that unless this is done the bulk of the expense of administering the whole estate will fall on the New Brunswick creditors.

I think Judge *Palmer* has himself settled this question, and I have no power, if I wished, to vary it.

I understand by Judge *Palmer's* judgment that this money in the bank belongs to the Maine administration, and is subject to the laws in force there ; in fact he says so in so many words ; and in disposing of the costs he ordered them paid out of the estate, by which he would mean the estate here ; in fact he must have meant that, because he only utilized the $400 for the purpose, leaving the other fund intact. Now that the administratrix here will receive from Maine the $1,166.26 under the July decree there will be ample to pay the costs, though of course this will not relieve the New Brunswick creditors.

In *Dorsay* v. *Connell* (5), it was held that where administrations are granted in different countries each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority ; and the administrator under a foreign grant has a right to hold the assets received under it against the home administrator even after they have been remitted to the country of the domicile of the deceased. This Court would apply the same rule, and, as the fund in the bank belongs to the estate to be administered in Maine, it ought not to be lessened by the payment of costs incurred in administration here.

It was said that the money had been in some way saved or secured for the Maine creditors by means of the suit, and therefore the cost of it ought to be a charge upon it. There is nothing before me to show this ; and if this be the fact perhaps the Court in Maine might recognize the claim.

From the facts before me, I think Judge *Palmer* decided the whole question by his previous judgment. As I have already said, I have no power to interfere with it if I thought it wrong. I should myself have come to the same conclusion.

Herrey v. *Fitzpatrick* (6), cited by Mr. Coster, does not apply here. There the proceeds were only

(5) 22 N. B. 564.

(6) Kay, 421.

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retained in England until it could be determined at the hearing if the person alleged to be the foreign administrator really was such and entitled to the assets. Judge *Palmer* in this case determined that this money was to be administered in Maine, and there is no question as to the authority of the defendant as administratrix in Maine.

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November 20.
December 18.

Executor de son tort—Administrator—Following Trust Property—Lapse of Time—Practice—Parties to Suit—Bill—Multifariousness.

If property held by an executor *de son tort* has been disposed of by him and the proceeds invested, the beneficial owners may follow the substituted property into the hands of a third person not a purchaser for value without notice.

Where an executor *de son tort* is sued by an administrator time runs only from the grant of administration.

An executor *de son tort* sold property and invested the proceeds in land, and conveyed it to his daughter by a deed to which his wife was not a party. After his death a suit was brought against the widow and daughter to have the land charged with the trust affecting the original property.

Held, that the widow was properly joined in the suit.

The objection of multifariousness set up by a defendant who is concerned only in a portion of the subject matter of the suit is a question of discretion to be determined by considerations of convenience, with regard to the circumstances of the case.

John Dunlop died on the 26th day of March, 1877, intestate, leaving him surviving several children, and possessed of both real and personal property. No one applied for letters of administration to his estate until the 2nd day of May, 1893, sixteen years after his death, when his son, the plaintiff, William J. Dunlop, was duly appointed administrator by the Judge of Probate for King's County. Immediately after the death of John Dunlop, James H. Dunlop, another son, took possession of all the personal property of the deceased, which consisted of furniture and farm stock and implements of the value of about $600, and converted and disposed of the same to his own use, except about $50 worth of furniture, which is now in plaintiff's possession as administrator. John Dunlop at

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the time of his death was indebted only in a very small sum, not exceeding $100, none of which was paid by James H. Dunlop, but about $56 of the amount, owing to one George H. White, was paid by the plaintiff. The bill alleged that none of the children of John Dunlop ever got any portion of the personal property from James H. Dunlop, and that he converted all, or substantially all of it, into money, and that with this money and some of his own he purchased a farm in King's County from one William Whalen for the sum of $1,100, which farm was conveyed to him, James H. Dunlop, by deed dated the 27th day of February, 1889 ; that on such purchase James H. Dunlop took possession of this farm and continued to occupy it until his death in August, 1891, and that since that time the defendants, Amanda E. Dunlop, his daughter, and Elizabeth Dunlop, his widow, have been in possession of this farm, and that they still occupy it. In August, 1891, and immediately before his death, James H. Dunlop conveyed this farm to his daughter, Amanda E. Dunlop, for an expressed consideration of $1 and of his natural love and affection for her, but in this conveyance his wife did not join. James H. Dunlop left some personal property, but it was all subject to a mortgage to Robert F. Dunlop for more than its value ; under which mortgage Robert took possession of the property and sold it, but the proceeds were insufficient to pay the amount secured. Letters of administration of the estate of James H. Dunlop were granted to his widow, Elizabeth Dunlop, on the 14th day of February, 1893. The bill, which was filed against Amanda E. Dunlop and Elizabeth Dunlop in her own right and as administratrix of her husband's estate, concluded with a prayer for an account of all the property of John Dunlop which came into the possession of James H. Dunlop, and for payment of the value thereof; and in case the personal property of James H. Dunlop proved insufficient to satisfy the amount, then that the amount be charged upon and payable out of the farm purchased from Whalen and conveyed to Amanda E. Dunlop by her father, and that such conveyance as against the plaintiff should be cancelled and set aside as voluntary and without consideration.

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To this bill the defendant Elizabeth Dunlop in her own right demurred, alleging as grounds the following :—

1. The plaintiff is not entitled to the relief prayed for or any relief.

2. Plaintiff's remedy is barred by lapse of time.

3. The defendant has no interest in the suit.

4. Bill is multifarious.

5. Plaintiff has a complete remedy at law.

6. Another suit pending for some of the distinct demands improperly confounded together in this suit.

White, S. G., for the administrator.

F. W. Stockton, and *Byrne*, for the defendant Elizabeth Dunlop.

1894. December 18. BARKER, J. :—

(His Honor recited the facts of the case as stated above, and proceeded as follows.)

For anything I know to the contrary these defendants may have a complete answer to this suit on the merits ; but, assuming, as I must for the purposes of this demurrer, that the facts as alleged in the bill are true, it would be unfortunate if the power of this Court were found to be inadequate to compel the restoration in some form or another by the representatives of James H. Dunlop of the property of John Dunlop which he wrongfully converted to his own use, and the benefit of which his widow and child, the defendants in this suit, are now enjoying in the use of the farm purchased in part by the proceeds of the property.

Before discussing the main questions involved in the case, and which really include the first, second and fifth grounds of demurrer, I shall dispose of the remaining three.

The third ground of demurrer is that the defendant demurring (whom I shall hereafter speak of as the defendant) has no interest personally in this suit, and therefore she should not have been a party. It is so simple a matter for a defendant who professes to have no interest

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in a suit to put his admission on record by disclaimer that I do not attach much weight to the objection when stated as ground of demurrer. It must, however, in some way appear by the bill that there is a substantial ground for making Elizabeth Dunlop a defendant. Some interest which she has must be affected or some right which she has must be bound by the decree which may eventually be made. I think this does sufficiently appear in this case. This bill seeks to establish that the Whalen farm was in part purchased with trust funds in the hands of James H. Dunlop, and to charge the amount upon that farm superior and prior to any right of dower in the land which the defendant might have. Now, that is a question directly affecting her interest in the land, and one which could not be determined without her being a party. The plaintiff may fail in establishing his main proposition ; but if he does, it would follow, I think, that any interest in the land which, as James H. Dunlop's widow, she might have would be subject to that of the plaintiff. If the property had been conveyed to James H. Dunlop as trustee, so that its character as trust property appeared on the instrument, his wife would have taken no interest. Not only is that not the case here, but the fact whether it is constructively trust property is questioned. It is not enough for the defendant to argue that if this is trust property she would have no dower in it, and at the same time deny that it was trust property. I think the bill discloses enough to warrant this defendant being made a party.

The fourth ground of demurrer is that the bill is multifarious. I do not think there is anything in this point. The rule laid down in *Campbell* v. *Mackay* (1) is that where all the plaintiffs have a common interest in the whole of the matter comprised in the bill, the objection of multifariousness set up by defendants, who are concerned only in a portion of the subject-matter, is a question of discretion, to be determined upon considerations of convenience with regard to the circumstances of each particular case. And in *Pointon* v. *Pointon* (2)

(1) 1 M. & C. 603.

(2) L. R. 12 Eq. 547.

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the question is said to be, whether the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit. I cannot see any subject involved in this case necessary for the relief sought which cannot be fully and properly dealt with in this suit.

The sixth ground of demurrer is based on the allegations in the third section of the bill. The action there spoken of as pending is simply one for a partition of John Dunlop's real estate, a question in which the plaintiff as administrator has no interest whatever. I do not see the object of introducing this matter into the bill ; but whether or not some matters in question in this suit are being litigated in that I cannot tell. For the purposes of this motion it is enough to say that the allegation in the bill relied on discloses no such facts. It was objected that this point could only be raised by plea. On that I express no opinion, as it is sufficient to say that the allegation in the bill gives no support to the objection.

The other points involved in the remaining grounds of demurrer call for more serious consideration. The first step in the inquiry is to determine the relative rights and liabilities of the different parties. There can be no doubt, I think, that James H. Dunlop, by intermeddling and dealing with the property of John Dunlop as it is said he did, rendered himself liable as an executor *de son tort*. As such he would be liable to account for the property of which he took possession to the properly appointed administrator, and it was his duty to do so so soon as such administrator was appointed. The personal estate of an intestate is in the hands of his regularly appointed administrator in trust for the creditors and next of kin, and its character cannot, I think, be altered by the fact that an unauthorized person takes possession of it before the grant of letters of administration. The executor *de son tort* holds the property fixed with the same trust and subject to the same trust as if in the hands of the appointed administrator, though the rights, liabilities and privileges of the two may not in all respects be precisely alike. James H. Dunlop voluntarily assumed the position of executor *de son tort* ; and when

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he assumed control of the property and dealt with it he knew he was not dealing with his own property, and he must be taken to have known that it was trust property for the benefit primarily of creditors of the estate, and secondarily of the next of kin. In *Hill* v. *Curtis* (3), a case in many respects similar to this, it was sought to make the defendant liable for property he had received from the executor *de son tort* on the ground that this constituted him also an executor *de son tort*. Wood, V.C., there says (4): "In this Court such a person might be followed as holding trust moneys with knowledge of the trust, but an executor *de son tort* he is not"; and at page 101 the same Judge says: "The only manner in which relief could be had against the elder Curtis would probably be to file a bill charging him with having taken possession of trust property with knowledge of the trust and seeking to follow that property in his hands. George Curtis, the elder, might be held to be a constructive trustee if he was found in possession of the property with knowledge of the trust." I cite these passages to show that property in the hands of an executor *de son tort*, though the possession was obtained by a quasi tortious act, does not lose its character of trust property. On the contrary, it retains it, so that if traced in the hands of a third person to whom the executor *de son tort* had delivered it, such third person, having knowledge of the trust, would become a constructive trustee and be held accountable for the property to the beneficial owner.

The property here no longer exists in specie. It was many years ago sold by James H. Dunlop and converted into money and the money invested in the Whalen farm. What is the effect of this? And can the trust property be followed in its altered condition? Numerous cases might be cited on this point, but a passage from Sir George Jessel's judgment in *Knatchbull* v. *Hallett* (5) will answer my purpose. At page 708 he is reported as follows: "The modern doctrine of Equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if

(3) L. R. 1 Eq. 90. (4) At p. 97. (5) 13 Ch. D. 696.

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the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is therefore no distinction between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested, together with money belonging to the person in a fiduciary position, in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it." That is precisely the case here. He goes on: "Now, what is the position of the beneficial owner as regards such purchaser? I will first of all take his position when the purchase is clearly made with what I will call, for shortness, the trust money, although it is not confined, as I will presently show, to express trusts. In that case, according to the now well-established doctrine of Equity, the beneficial owner has a right to elect either to take the property purchased or to hold it as a security for the amount of the trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust* or beneficial owner can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust-money laid out in the purchase"; (precisely this case) "and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. That is the modern doctrine of Equity. Has it ever been suggested, until very recently, that there is any distinc-

tion between an express trustee or an agent or a bailee, or a collector of rents, or anybody else in a fiduciary position ? I have never heard until quite recently such a distinction suggested."

There can, therefore, be no doubt that the doctrine of following trust assets is applicable to very many cases where there is no express trust. The case of *Clegg* v. *Edmondson* (6) was cited on the argument in reference to another branch of this case—the lapse of time ; but it bears also immediately upon the point now under discussion. The bill in that case was filed for the purpose of fixing a trust for the benefit of the plaintiffs upon two leases of mines and for an account, etc., upon the ground that the defendants were under the circumstances proved in evidence trustees for the plaintiffs. The bill was dismissed on the ground of delay ; and in reference to that feature of it I shall have occasion to notice it later on. Lord Justice Turner there said (7) : "We have to deal in this case not with a direct but with a constructive trust," etc.; and Lord Justice Knight Bruce, in the same case, said (8): "The trust, however, by which I thus assume James Collinge to have been affected as to the lease, was what lawyers call a constructive trust, not one declared or expressed, and there are some considerations applicable to the former that are inapplicable to the latter, as various authorities show." Though lapse of time was considered to be a bar to the relief sought in that case, it was conceded that but for that the plaintiff would have had a decree. Upon the principle of these cases (and many others to the same effect might be cited), I think it clear that if this bill had been filed against James H. Dunlop in his lifetime and after he had purchased from Whalen, the money for which he was accountable would have been charged on the land, always assuming that lapse of time would afford no answer to a proceeding for that purpose.

The next question is, has this right been lost by the conveyance of the land to the defendant Amanda E. Dunlop ? Story lays down the rule thus (9) : "The general

(6) 8 DeG. M. & G. 787.
(7) Ibid, p. 808.
(8) Ibid, p. 812.
(9) Story's Eq. Jur. s. 1258.

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proposition, which is maintained both at law and in equity upon this subject, is that if any property in its original state and form is covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right (not being bona fide purchasers for a valuable consideration without notice), any more valid claim in respect to it than they respectively had before such change." And in *Pennell* v. *Deffell* (10), Lord Justice Turner says: "It is, I apprehend, an undoubted principle of this Court that, as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." It is impossible in any sense to regard the defendant Amanda Dunlop as a purchaser for value. The bill alleges that she was then—that is in June, 1893, when the bill was filed—an infant about two years of age. So that the conveyance to her, which was made in August, 1891, immediately before her father's death, must have been made soon after her birth. In addition to this, the expressed consideration is $1 and love and affection ; while the bill alleges, what I must take against the defendant as true, that this conveyance was not made for valuable consideration. The land, therefore, in her hands remains fixed with the same trust as that to which it was subject while the title remained in her father.

Having traced the liability thus far, we come now to consider whether any rule of Equity requires this Court to say that the right to enforce it has been lost. It is said the demand is a stale one. If by "stale" we mean that a long period has elapsed since the transaction complained of took place, then the objection is well founded. This Court, in the exercise of its jurisdiction in cases of this kind, may act by analogy to the Statute

(10) 4 DeG. M. & G. 373, at p. 388.

of Limitations in determining whether the remedy is barred, or it may so determine on the ground of delay or acquiescence. In *Clegg* v. *Edmondson* (11), already cited, Lord Justice Turner assigns, as an important factor in determining that lapse of time and delay in asserting their rights by action were fatal to the plaintiff's case, the peculiar nature of the property in dispute—property which required money for its development; and was, as mining property must always be, more or less liable to mishaps or occurrences materially depreciating its value. Under such circumstances the Court there thought nine years too long a period without the plaintiffs asserting their rights in some more tangible way than by mere verbal protests and assertion of claim. This present case, I think, is in no way analogous to that just cited so far as this point is concerned. It is a well recognized rule in this Court that the Statute of Limitations has no reference to cases of express trusts, or fiduciary relationships, and it is equally true that in no case of breach of trust, whether express or implied, does this Court apply the statutory limitation of time except by analogy, as fixing a reasonable period in the particular case within which the alleged right should be enforced by action. In *Obee* v. *Bishop* (12), Lord Justice Turner says: "Courts of Equity in dealing with equitable debts are not bound by the Statute of Limitations, and, although they have in many instances adopted a rule grounded on an analogy to that statute, they do not extend that analogy to demands arising out of breaches of trust." An action of account, such as *Knox* v. *Gye* (13), illustrates the application of the statute by analogy. But even supposing the statutory limit of six years either bound this Court or was adopted by it as a rule, has this time expired? I think not. An administrator's title to the personalty does not vest until the grant of letters: *Woolley* v. *Clark* (14). Until the letters of administration were granted to the plaintiff in May, 1893, there was no one lawfully representing John Dunlop's estate or in whom

(11) 8 DeG. M. & G. 787.
(12) 1 DeG. F. & J. 137.
(13) 5 E. & I. App. 656.
(14) 5 B. & Ald. 744.

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the personal property which he left at his death vested. If at that date the property existed as he left it, there can be no doubt that the plainiff as administrator could have recovered it. Does it alter the case that James H. Dunlop had more than six years before that converted it into money and invested in a farm? The statute would not run until there was some one in a position to sue. The statute does not begin to run either in cases of contracts or torts until an administrator is appointed. *Murray* v. *East India Co.* (15) is an authority for the first proposition, and *Pratt* v. *Swaine* (16) is an authority for the last. In *Burdick* v. *Garrick* (17) a bill was filed against an agent who had occupied a fiduciary position for an account. The principal died in November, 1859, and administration was granted to the plaintiff in October, 1867, who filed the bill in 1868. The Lord Chancellor, after showing that the debt did not accrue until after the principal's death, says: "In that case the debt could not be recovered, because letters of administration were not taken out until 1867, and I take the law to be, that if the statute has not begun to run during the lifetime of the intestate, then it does not begin to run until letters of administration to his estate have been taken out."

The Statute of Limitations, even if applicable to a case like this under any circumstances, affords no answer to the action.

This, I think, disposes of all the objections argued. Some of them could perhaps be more satisfactorily determined at the hearing, but I have thought it right to give my reasons at length on the main questions involved now that the parties might appeal if they wished.

The demurrer will be overruled with costs, the defendant demurring to have the right to answer in one month.

(15) 5 B. & Ald. 204. (16) 8 B. & C. 285. (17) L. R. 5 Ch. 234.

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November 20.

Memorials and Executions Act, C. S. N. B. c. 47, ss. 9 & 16, and Registry Act, C. S. N. B. c. 74, s. 4—Unregistered Trust Deed—Registered Judgment—Execution—Priority—Resulting Trust contained in Creditors' Deed—Validity.

A memorial of judgment when registered, or a writ of execution when filed with the sheriff, only affects such interest in land as the debtor then has, and therefore does not postpone the title of a trustee thereto under a creditors' deed previously executed by a number of the creditors, though not registered.

A resulting trust in favour of the debtor, after all his creditors have been paid in full, contained in a creditors' deed does not render it fraudulent and void.

Property, including a lot of land, was conveyed by A. to B. by deed in trust for the former's creditors. The deed was executed by some of the creditors and was then registered. It was subsequently discovered that the certificate of acknowledgment was defective, and a new certificate was endorsed on the deed. Between the date of registration and the indorsement of the second certificate a creditor obtained and registered a judgment against the debtor, and seized the land under a writ of fi. fa. A sale of the land being advertised by the sheriff, the trustee filed a bill praying for a declaration of his title, and, as consequential relief, for an injunction.

Held, that the trustee's title to the land was not displaced by either the registered judgment or the writ of execution, and that he was entitled to the declaration prayed for.

Semble, that before a sale of the land by either party took place the right to sell should not be in doubt so as to prejudice the sale.

Previous to June 26, 1893, one Daniel N. Baldwin and one J. Alexander Fullerton carried on business as tanners and curriers at Albert, in the County of Albert, as co-partners, under the name of Baldwin, Fullerton & Co. Having become involved and unable to meet their liabilities, Baldwin, on the 26th day of June, 1893, executed a trust deed for the benefit of his creditors to the plaintiff. When he made the assignment he owned a lot of land in Albert County, in which Fullerton had no interest, and this lot, together with all his other property, real and personal, he assigned to the plaintiff upon the trusts declared in the deed of assignment for the benefit of his individual creditors as well as those of the firm. This deed was duly executed by the plaintiff, who appears as a beneficiary under it, and also by one Murray, and James W. Fullerton, two other creditors ;

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and the acknowledgment of these three, as well as of Baldwin, appears to have been taken before one William C. Pipes, a justice of the peace for Albert County, on the 27th day of June, and the deed and certificate of acknowledgment were registered in the office of the Registrar of Deeds for Albert on the 28th day of June, 1893. In consequence of informalities in the justice's certificate of acknowledgment, a second certificate of the same acknowledgment was endorsed on the deed on the 29th day of July, 1893, and the deed thus certified was re-registered on the 31st day of July. Between the dates of these two registries, that is on July the 1st, 1893, the defendant John Fullerton obtained a judgment in the County Court of Albert against Baldwin and his partner for the sum of $241.97, and on the same day a memorial of this judgment was registered. On the 26th day of July, 1893, a fi. fa. was issued on this judgment to the defendant Woodworth, who is sheriff of Albert, and under this execution he levied upon the lot of land owned by Baldwin and assigned by the trust deed, and advertised it for sale to take place on the 28th day of March, 1894. This bill was accordingly filed, and on the 10th day of March last Mr. Justice *Hanington* granted an injunction order restraining the sale by the sheriff, which order it is now sought to make perpetual. The plaintiff by his bill prays for a declaration that the said deed of assignment is good and valid as against the said judgment and memorial and writ of fi. fa., and that the plaintiff, as such trustee, is as against the said judgment, memorial and writ, the holder of whatever interest in the said lot of land Baldwin was entitled to at the time of the execution of such deed of assignment; and as consequential relief the plaintiff prayed for an injunction restraining the sale by the sheriff.

The argument was heard October 24, 1894.

Powell, for the plaintiff.

Chandler, for the defendants.

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(His Honor recited the facts of the case as stated above, and proceeded as follows.)

It was contended on the part of the plaintiff that the registry of the memorial after the first and before the second registry of the trust deed was such a cloud upon the title as to materially interfere with a sale of the property, and that he therefore had a right to come to this Court for a declaration as to his rights so that doubts might be removed, and he thus be enabled to get the best possible price for the property for the benefit of the creditors.

Several objections were urged by Mr. Chandler against any decree being made. While he did not dispute the jurisdiction of this Court to make a declaratory decree, even where no consequential relief was sought, it was urged that in this case where no fraud was charged, where the registry fully showed the instruments under which all parties claimed and where the sheriff only sought to sell such interest as Baldwin had in the land at the time the memorial was filed, a bill such as this would not be entertained, but the purchasers under the sheriff and under the plaintiff respectively should be left to try out their competing titles by an action at law. No doubt this course could be adopted, but there are considerations which seem to me in a case like this to render it in the interest of all parties that the jurisdiction of the Court should be exercised. The plaintiff comes here as representing the creditors of Baldwin, of whom Fullerton is himself one; and though he (Fullerton) may now assume an attitude in a sense hostile to the deed, it does not necessarily follow that he may not later on come in under it and participate with the other creditors in the benefit of its provisions. It certainly cannot injure the defendant Fullerton to have a decision in his favour, for that assures him payment in full of his judgment; while on the contrary, if the decision should be adverse to him, he as a creditor derives a direct benefit from the enhanced value of the land consequent upon all doubts being removed as to the title to be given to a purchaser. The plaintiff is bound to sell the property so as to realize for

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the payment of the debts, and it needs no argument to show that any serious dispute as to the validity of the title the trustee is in a position to give must necessarily depreciate the marketable value of the property. In cases where the validity of a conveyance is questioned on the ground of fraud similar reasons induce this Court to exercise its jurisdiction; and I can see no reason why in a case like this the same remedy should not be applied for a similar evil, though no fraud be charged and the judgment and memorial are in no way attacked beyond settling whether they do or do not create a lien on the property. In *Truesdell* v. *Cook* (1), *Strong*, V.C., says: "I find no authority for saying that the existence of an unregistered deed, passing no interest and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner, that there would be a great want of remedy if this Court could not decree cancellation in such a case." In *Shaw* v. *Ledyard* (2), *Mowat*, V.C., says: The first objection was, that the bill does not allege any privity between the plaintiff and the defendants, or any fraud by the defendants, and that the bill, in the absence of such privity or fraud, will not lie. I am against this objection. No authority was cited in its support, and certainly reason is opposed to it. If two strangers, even through a mere mistake of fact or law, claim a man's property and put on registry an instrument setting forth such claim, or purporting to deal with it, such a claim, however unfounded, must prejudice the sale of the property, and may create embarrassment otherwise; and I would be very sorry, unless compelled by the authorities, to hold that the owner is in such a case without remedy. But a deed by a sheriff in his official capacity professing to convey what he has no right to convey, presents grounds for relief which may not apply to a transaction between two entire strangers." See also *Ross* v. *Harvey* (3); *Russell* v. *Russell* (4); *Weir* v. *Niagara Grape Co.* (5).

(1) 18 Gr. 532.
(2) 12 Gr. 382.
(3) 3 Gr. 651.
(4) 28 Gr. 419.
(5) 11 Ont. R. 700.

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I come now to the substantial questions involved in the case. In the first place, it is said this trust deed is fraudulent and void under the Statute 13 Eliz. cap. 5, as being intended to hinder and defeat creditors, for which proposition *Whitman* v. *The Union Bank of Halifax* (6) is relied on. So far as we can judge from the very meagre report of the reasons given by the majority of the Judges in this case for the conclusion at which they arrived, it was because they held that fraud under the statute was made out in a deed by whose provisions creditors on assenting to the deed were compelled to release their claims, and unless they did assent were excluded from all benefit under it, and as to any surplus of the funds remaining over after paying assenting creditors, there was a resulting trust in favour of the debtor. Accepting this as a correct exposition of the law, the present assignment is not, I think, within it. This deed contains no resulting trust in favour of the debtor, and, though it contains the ordinary release, it provides distinctly that the trust funds are available even for creditors who do not execute the deed. It is true that the deed provides for preferences and gives some priority to the debtor's individual creditors over those of the partnership; but in no event does he reserve any benefit to himself until the creditors are all paid in full, and then only by legal inference. The deed is, I think, not at all open to the objection made to it.

Another ground urged by Mr. Chandler at the hearing received close attention. As the first registry of the trust deed was invalid in consequence of the defective certificate of acknowledgment, and the memorial was filed before the second registry, it was contended that the lien on the property was complete by the memorial, and the deed to the plaintiff conveyed the property to him subject to the lien in favour of Fullerton. It is not necessary in the view I take of this case to express any opinion as to the validity of the first registry of the trust deed. If it were a good and valid registry, the defendant Fullerton would acquire no lien by his judgment,

(6) 16 Can. S. C. R. 410.

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because all of Baldwin's interest in the property would have been vested in the plaintiff. This is a fact admitted ; but it is because the plaintiff practically admits and the defendants positively assert that the first registry is of no effect that any question arises. I shall, therefore, deal with the case on the assumption that the first registry was altogether inoperative, as having been made without a valid certificate of acknowledgment. It is clear to my mind that as against Baldwin the deed of assignment conveyed to the plaintiff the land described in it. When the creditors signed it, and when in fact they had notice of the trust created by it in their favour, it ceased to be a mere disposition of the property by Baldwin, revocable at his will. Those executing had released their claims against Baldwin, and accepted in lieu thereof such rights as they were entitled to under the deed. Quite irrespective altogether of registry Baldwin by his assignment had conveyed all his interest in the property to the plaintiff ; a conveyance which he himself could not have defeated except by a conveyance to a purchaser for value without notice and registered prior to the first deed ; a transaction which, though good as to the innocent purchaser, would nevertheless be a fraud as to Baldwin. The rights in real estate which are leviable under an execution and salable by a sheriff thereunder have, I think, been determined by judicial decision. In *Miller* v. *Duggan* (7), the present Chief Justice of Canada, in a dissenting judgment, which is, I think, altogether applicable to our Registry Act, differing as it does most materially from that of Nova Scotia in reference to which that case was determined, has dealt exhaustively with this question. He points out the difference between a purchaser and incumbrancer for valuable consideration, and a judgment creditor; how the former has contracted for a particular interest in the land, while the right of the other against it has no foundation in contract, but is only a part of the remedy; and he holds in a positive way that the charge of the judgment creditor is to be subordinated to all equities to which the land was subject in the hands of the judgment debtor at the date of registra-

(7) 21 Can. S. C. R. 33.

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tion ; that the absence of notice is immaterial, and that a judgment creditor was only entitled to avail himself for the purpose of satisfying his debt of just what his debtor owns, subject to all equitable claims of third persons, and no more. In *Wickham* v. *The N. B. Ry. Co.* (8) a similar question arose in reference to our own Act. In that case Lord Chelmsford says (9) : "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. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take." Again, in *Whitworth* v. *Gaugain* (10), the Vice-Chancellor says : "The more I consider the case, the more satisfied I feel that I stated the general principle correctly in *Langton* v. *Horton*, when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it." It was upon the same principle that the Supreme Court of this Province, in an appeal from the Judge who recently presided over this Court, in *Chute* v. *Grattan*, decided in Trinity term last that a mortgage made in pursuance of an agreement to secure money laid out in buildings took priority to a judgment rendered after the agreement and registered before the mortgage. See *Rolleston* v. *Morton* (11) ; *Benham* v. *Keane* (12); *Dolphin* v. *Aylward* (13) ; *Eyre* v. *McDowell* (14) ; *Beavan* v. *Earl of Oxford* (15). By sec. 9 of cap. 47, C. S., it is only the land of the person against whom the execution issues that is bound, and by sec. 16 of the same chapter

(8) L. R. 1 P. C. 64.
(9) At p. 75.
(10) 3 Hare, 416.
(11) 1 Dr. & W. 171.
(12) 1 J. & H. 685.
(13) 4 E. & I. App. 486.
(14) 9 H. L. C. 619.
(15) 6 DeG. M. & G. 492.

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the sheriff's deed conveys only the interest of the execution debtor. By force, therefore, of these sections, if the debtor has already conveyed away all his interest, he has none upon which the execution can operate.

Sec. 4 of cap. 74, Con. Stat., only avoids conveyances as against subsequent purchasers for valuable consideration. It was admitted by Mr. Chandler, and, I think, must be taken as long since settled by authority, that a purchaser at sheriff's sale is not a purchaser for valuable consideration. In addition to the cases already cited, see *Doe dem. Black* v. *Cogswell* (16), and *Doe dem. Roop* v. *Trentowsky* (17).

As a result of these authorities, I think there remained no interest in Baldwin in the land seized and advertised by the sheriff at the time the memorial was filed, and there was therefore nothing upon which the memorial could operate so far as this land is concerned.

The plaintiff is therefore entitled to the decree asked for. Declare that the conveyance from Baldwin to the plaintiff, dated June 26, 1893, is good and valid as against the judgment obtained against Baldwin by Fullerton, a memorial of which was filed July, 1893, and that the plaintiff, as trustee under the conveyance to him, holds the land mentioned therein free from any lien or charge created by the said memorial or execution, and in no way subject thereto.

Order that defendants be perpetually restrained from selling or proceeding to sell the said land under the said execution. There will be no costs, the plaintiff being entitled to his costs out of the estate.

(16) 3 P. & B. 44.

(17) 5 All. 636.

1895.

February 5.

In re FAIRLEY ESTATE.

Will—Construction—Pecuniary legacies—Residuary Estate—Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 174.

Where a testator had agreed to sell land, but had not executed a conveyance of it to the purchaser, and died, leaving a will, by which he gave several pecuniary legacies to certain relatives, to be abated proportionately in the event of his estate being insufficient to pay them, and then gave all the rest of his estate to the children of A.

Held, that the pecuniary legacies were not a charge upon the residuary estate in the event of the personalty not being sufficient, and that the conveyance of the land in question should be made by the residuary legatees.

This was an application by petition under the Supreme Court in Equity Act, 1890 (53 Vic. c. 4), s. 174 (1), for an order of the Court enabling and compelling the execution of a deed of conveyance by the heirs of Scott Fairley, deceased, and certain infant legatees named in his will, of a tract of land sold by the deceased to Alexander Gibson. The facts are fully stated in the judgment of the Court.

Geo. F. Gregory, Q.C., for the applicants.

1895. February 5. BARKER, J.:—

Scott Fairley, the testator, died in October, 1893, possessed of both real and personal estate and leaving a will dated July 11, 1893. In April, 1889, he entered into a written agreement with Alexander Gibson for the sale of a large tract of land in Northumberland for the price of

(1) "The Court on petition of the executor of the estate of any person who may have died before the performance of any contract made by him in his lifetime, or of any person interested in such contract, and on hearing the parties may by order enable and compel the specific performance thereof by any infant heir or other person. Every conveyance made pursuant to an order under this or the next preceding section may be executed in the name of any such infant by any person the Court shall authorize and direct, and shall be as effectual as if made by such infant when of lawful age."

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$22,500. A part of the purchase money was paid by Gibson before Fairley's death, but no conveyance was ever executed except of some timber licenses. At the time of Fairley's death there remained some $12,351.19 due on account of the purchase money, which amount Gibson wishes to pay and have the conveyance to him completed according to the contract. An application was made to me by the executors of Fairley, under sec. 174 of 53 Vic. cap. 4, relating to proceedings in the Supreme Court in Equity, for an order enabling and compelling the specific performance of the contract of sale by certain infants and others interested in the property, and for the authority and direction of some person to make the necessary conveyance for these infants. I directed all persons who might have any interest in the property under the will to have notice of the application, none of whom appeared at the hearing. The only question is as to the persons by whom the conveyance should be made. The testator, after directing the payment by his executors of all his debts, funeral and testamentary expenses, gives several pecuniary legacies to his nephews, brothers, and other relatives, and then devises his dwelling house and land belonging to it (some seven acres, but no part of the tract agreed to be sold to Gibson) to a nephew, Justus W. Fairley. The will then proceeds: "Fifth, and in the event of my estate being insufficient to pay the said several legacies, the same shall be abated or reduced proportionately. Sixth, I give and bequeath all the rest, residue and remainder of my estate to the children of my brother Justus Fairley." The principal question in settling the title is whether the pecuniary legacies are charged upon the real estate. An argument may be advanced in favour of the charge from the fifth clause in the will, and giving to the word "estate" in that clause a sufficiently extensive meaning to include real as well as personal estate. I am, however, disposed to think that the word "estate" in this clause refers simply to that portion of the general estate out of which the legacies are primarily payable, that is, the personal estate. I cannot discover any intention in this clause on the part of the testator to charge the real estate in aid of the per-

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sonalty with the payment of these legacies. The real estate is not given to the executors who are to pay these legacies ; a fact of great importance in determining the testator's intention in such cases. The executors are directed in reference to James Fairley to set apart and invest a sum sufficient to produce an annuity for his benefit of $250 a year during his life. Presumably they are to do this only with the property which is given them and under their control ; and, as I have already pointed out, the real estate is not given to the executors here at all. The pecuniary legacies are all dealt with alike, and what is true of one of them is also, I think, true of all. I think it a proper construction of the will that the pecuniary legacies are payable out of personalty, with an abatement pro rata in case of deficiency, and that the residuary estate, both real and personal, passes to the children of Justus Fairley, the word "estate" in the residuary clause of the will being construed as covering both real and personal estate, thus leaving the whole estate disposed of by the will.

It would seem from a statement in the petition that the balance due by Gibson on his purchase, together with the other personal estate in the hands of the executors, would be sufficient to pay these legatees in full, in which case no question can arise. I think the conveyance should be made by the children of Justus Fairley, and, to avoid all question, that it be joined in by the heirs at law of Scott Fairley, the testator.

The order will be as follows :—

That on payment of the balance of the purchase money by Gibson, the property in question be conveyed to him by Alexander Thomas George Johnson Fairley, Josephine Dora Fairley, Scott M. Fairley, and Eri Festus Fairley, infant children of Justus Fairley ; and by Justus Fairley, James Fairley, and Margaret Cameron; and by Christian S. Fairley, Leila Ada Fairley, and John Wesley Fairley, infant children of Sarah A. Fairley; and by Sarah A. Fairley. And further order that such conveyance be executed in the name of the infant children of Justus Fairley by their father, the said Justus Fairley, and in the name of the infant children of the said Sarah

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A. Fairley by their mother, the said Sarah A. Fairley, which said Justus Fairley and Sarah A. Fairley are hereby authorized and directed to execute such conveyance in the name of the said infants respectively.

The costs to be paid out of estate.

1895.

March 19.

BARNABY v. MUNROE, *et al.*

Practice—Suit for foreclosure—Parties—Administrator—Disclaimer—Dismissal of Bill—Costs—Unnecessary Recitals in Bill—Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 22.

As a general rule the administrator of a deceased mortgagor should not be made a party to a foreclosure suit.

Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed with costs.

Disclaimer is as applicable where a defendant has no interest as where he has an interest which he is willing to abandon.

Where an administrator improperly made a party to a foreclosure suit did not disclaim and the cause proceeded to hearing he was equitably dealt with by being allowed costs, on the dismissal of the bill, up to and including his answer.

Where the administrator of a mortgagor was improperly joined in a foreclosure suit costs thereby incurred were not allowed to the plaintiff.

Where a bill in a foreclosure suit was of unusual length from the insertion of needless recitals and repetitions contrary to the provisions of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 22, the clerk was directed to tax the costs of the bill on the basis of twelve folios.

The facts in the case so far as material to the points decided are stated in the judgment of the Court. The argument was heard March 1st, 1895.

Skinner, Q.C., and *MacRae*, for the defendant, Munroe:—

The personal representative of a mortgagor should not be made a party to a foreclosure suit except where he has an interest in the equity of redemption, and if improperly joined is entitled to have the bill dismissed as against himself with costs: Daniell Ch. Practice (1); *Bradshaw* v. *Outram* (2); *Duncombe* v. *Hansley* (3); Story

(1) 3 Ed. 280. (2) 13 Ves. 234. (3) 3 P. Wms. 333.

Eq. Pleading (4) ; *Wilson* v. *Hornebrook* (5). Any surplus money arising from the sale of the mortgaged premises passes to the heir as real estate : *Bourne* v. *Bourne* (6) ; Williams on Executors (7) ; Coote on Mortgages (8).

A. H. Hanington, Q.C., for the plaintiff :—

That the defendant is a necessary party to the suit is well established : *Mecker* v. *Tanton* (9) ; *Grace* v. *Mountmorris* (10); *Scholefield* v. *Heafield* (11); *Beale* v. *Symonds* (12); *Christophers* v. *Sparke* (13); *Cholmondeley* v. *Clinton* (14). The defendant took out administration as a creditor in order to sell the equity of redemption and pay the testator's debts, and therefore should be joined in the suit. If he insists that he has no interest in the subject matter of the suit he should have disclaimed and not answered, and costs of answer will not be allowed him. See *Maxwell* v. *Wightwick* (15) ; *Clarke* v. *Wilmot* (16) ; 1 Dan. Ch. Pr. (4th Am. Ed.) (17); *Rackham* v. *Siddell* (18); *Vale* v. *Merideth* (19) ; *Appleby* v. *Duke* (20).

Skinner, in reply:—

Disclaimer only applies where the defendant has an interest in the subject matter of the suit which he is willing to abandon.

1895. March 19. BARKER, J. :—

The bill was filed in this case for the foreclosure of two mortgages given by one John Sweet to the plaintiff and for a sale of the mortgaged premises. The bill alleges that Sweet, the mortgagor, died in February, 1894, having first duly made his last will, by which he devised his interest in the mortgaged premises to his two children, who are defendants in this suit. The plaintiff also

(4) 9th Ed. SS. 196, 200.
(5) 1 Han. 165.
(6) 2 Hare, 35.
(7) 6th Am. Ed. 689.
(8) 4th Ed. pp. 258, 259.
(9) 2 Ch. Ca. 29.
(10) 2 Dr. & W. 432.
(11) 7 Sim. 667.
(12) 16 Beav. 406.
(13) 2 Jac. & W. 223.
(14) 2 Jac. & W. 1. at p .134.
(15) L. R. 3 Eq. 210.
(16) 1 Phil. 276.
(17) Pp. 706, 710.
(18) 1 McN. & G. at p. 625.
(19) 18 Jur. 992.
(20) 1 Hare, 303.

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alleges that the persons named as executors in the will refused to act, whereupon letters of administration *cum testamento annexo* were granted to the defendant Munroe, who, as such administrator, is made a party to this suit. The other two defendants did not appear, and the bill was taken *pro confesso* against them. The bill does not allege that the defendant Munroe ever claimed any interest in the equity of redemption or in the suit, or that he had any, unless by reason of his being administrator the law would clothe him with some interest which would render it necessary to make him a party to this suit. The evidence at the hearing showed that at the time of his death Sweet owed about $180 outside of the mortgage money ; that he had absolutely no property except his interest in these mortgaged premises, and that Munroe obtained the letters of administration as a creditor. Munroe entered an appearance and answered, and the matter came to a hearing. There are, however, but two questions involved—(1), whether Munroe should have been made a party, and (2), if not, upon what terms as to costs the bill should be dismissed as against him.

As to the first point, I do not think Munroe should have been a party. It is not desirable that there should exist any doubt upon a question of practice so likely to arise. So far as my experience goes, I have never known an instance where an administrator of a mortgagor has been made a party to a suit to foreclose the mortgage and sell the premises. He has no interest whatever in the equity of redemption. If he had claimed an interest the plaintiff might have deemed it prudent to make him a party so as to get his disclaimer or foreclose him, but there is nothing of that kind here. I do not say that no case can arise where an administrator would not be a proper party ; on the contrary, I can easily imagine such a case ; but I do say, however, as a general rule that he is not a proper party, and that there is nothing in this case warranting a departure from that general rule. This is, I think, a well-established practice, and if wrong must be rectified by a Court of Appeal. I think the bill must be dismissed as to the defendant Munroe. This brings me to the second point ; and that is, upon what terms as to costs the order should be made.

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The case of *Wilson* v. *Hornbrook* (21) is in many of its features similar to this. There the defendant Hornbrook neither had nor claimed to have any interest in the mortgaged premises. Though the plaintiff knew this when he issued his summons, he made him a party. Hornbrook appeared and put in what seems to have been intended for a disclaimer, though it was a rather informal one. The plaintiff then moved to have his bill amended by striking out Hornbrook as a defendant, and this he was allowed to do on payment of costs. Whether a party disclaiming is entitled to his costs or not depends upon circumstances. The case I have just cited would have warranted me in making the same order in this case as the Chief Justice made in that, provided Munroe had disclaimed and the plaintiff had then moved to amend. I think I have a right to assume with that practice established that if Munroe had disclaimed, the plaintiff would have followed the course adopted in *Wilson* v. *Hornbrook*, paid Munroe his costs and had his bill amended, and as a result of the disclaimer been relieved of all possible question as to Munroe's interest. Of course if he had, notwithstanding the disclaimer, gone down to a hearing in order to have Munroe foreclosed, as was done in *Davis* v. *Whitmore* (22), he could have done so; but, unless under exceptional circumstances, he would have been compelled to pay Munroe's costs incurred subsequent to the disclaimer, as well as those before. In answer to the plaintiff's contention that the defendant Munroe should have disclaimed, it was answered (1), that the defendant could not disclaim, and (2), if he could, that his answer amounted to a disclaimer. I am unable to see any reason why the defendant should not disclaim. A disclaimer is as applicable where the party in fact has no interest as when he has an interest which he is willing to abandon. In Mitford on Pleading, 319, it is said: "A disclaimer is where a defendant denies that he has or claims any right to the thing in demand by the plaintiff's bill and disclaims, that is renounces all claim thereto." Daniell Ch. Prac. (23) is to the

(21) 1 Han. 167. (22) 28 Beav. 617. (23) 4th Am. Ed. p. 706.

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same effect. I therefore see no difficulty in the way of Munroe disclaiming, unless he was unwilling to place himself in the position of abandoning some right or interest which by law he might possibly have, but which he asserted as a matter of law he did not have, and as a matter of fact he did not claim, and therefore desired a decision on the question. He can scarcely take such an unusual course at the plaintiff's expense. This brings me to the other point: Does the answer of Munroe amount to a disclaimer, and could it be so treated? Daniell, at page 707 (24), says: "In order to entitle the defendant to be dismissed with costs, the disclaimer should state that the defendant 'does not and never did claim, and that he disclaims all right and title to the subject matter of the suit.'" And the form of disclaimer given in Daniell, page 2113, is as follows: "I have not and do not claim, and never had or claimed to have, any right or interest in any of the matters in question in this suit, and I disclaim all right, title and interest, legal and equitable, in any of the said matters," etc. As the defendant Munroe's interest was precisely the same when the suit was commenced as when he answered, the above would be the form proper to be used, and in so disclaiming he would, as a rule, be entitled to costs to that time. In *Ford* v. *The Earl of Chesterfield* (25), the Master of the Rolls says (26): "The result is that in my opinion, the effect of all the late authorities is this: First, that in suit for foreclosure or redemption of mortgages, where a defendant disclaims in such a manner as to show that he never had and never claimed an interest, at or after the filing of the bill, then he is entitled to his costs. Secondly, if a defendant, having an interest, shows that he disclaimed or offered to disclaim before the institution of the suit, there also he is entitled to his costs. Thirdly, that where a defendant having an interest, allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, in that case he is not entitled to his costs." The defendant here comes under the first of these rules, for he never had any interest and never

(24) 4th Am. Ed. (25) 16 Beav. 516. (26) At p. 520.

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claimed to have any. If therefore he had disclaimed so as to entitle himself to costs, the form I have given from Daniell would have been proper for the purpose. As to the defendant's answer, it does not of course profess on its face to be a disclaimer, and I presume was never really intended to be. Sec. 5, which is the only part of the answer at all relied on as in substance amounting to a disclaimer, is as follows: After admitting Sweet's will and the granting of letters of administration to Munroe, it proceeds: "But I allege and say that, as administrator *cum testamento annexo* of the estate of the said John Sweet, I have in no way interfered with or intervened with the real estate of the said John Sweet or any part thereof. And that by said last will and testament the mortgaged land and premises were specifically devised to his, the said John Sweet's two daughters mentioned in the will, namely, Emily Ann, and Julia, and that no estate and property in the said mortgaged lands and premises now vest in me or ever did vest in me. I have not at present, and never did have any other interest in the estate of the said John Sweet, deceased, than as administrator of his personal estate, with the last will and testament of the said John Sweet annexed thereto." I do not think this is a disclaimer of anything. It is simply a claim that, as a matter of law, as administrator Munroe would have no interest. At all events, I think the plaintiff was quite justified in not treating it as a disclaimer, for if the defendant intended really to disclaim there was a very simple method of doing it, and he cannot complain if the plaintiff failed in taking the course which he probably would have done, and which was done in *Wilson* v. *Hornbrook* (27), had there been no doubt as to the character or effect of the answer.

In my opinion, therefore, the defendant Munroe either should have allowed the bill to be taken *pro confesso* against him without answering when he ascertained no relief was sought in any way against him; or else, if he wished to obtain his costs of appearance, he should have disclaimed, as he neither had nor claimed to have any interest. He will therefore be equitably dealt with

(27) 1 Han. 167.

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if he is placed in the same position as to costs as if he had disclaimed. The bill will therefore be dismissed against the defendant Munroe, with costs up to and including his answer only, to be paid by the plaintiff.

It is obvious that by the course adopted in making Munroe a party, the plaintiff's costs have been largely increased. The principle by which mortgagees are often entitled to add the expense of litigation arising out of their security to the mortgage money, as being a necessary expenditure, does not, I think, apply here. I see no reason why the defendants, who are entitled to the equity of redemption, should have this additional charge upon the premises. They were in no way a party to it, or the cause of it, and so far as they were concerned they allowed the bill to be taken *pro confesso*. I think that the plaintiff's costs of suit should be taxed as though Munroe had never been a party and the bill had been taken *pro confesso*, as it has been, against the other defendants.

There is one other matter connected with this suit to which I feel it my duty to make some reference. Having had an opportunity of perusing the plaintiff's bill in this case, my attention was directed to what seemed to be its unusual length. The type-written copy to which I refer contains nineteen pages of about three folios to the page, or fifty-seven folios in all. Now, this suit is one of the simplest form possible. Two mortgages were given by the same mortgagor to the plaintiff on the same piece of property; the mortgagor died leaving a will by which he devised the equity of redemption to his two daughters, who, with the husband of one of them, are made defendants. Now, no case can be stated more entirely free from complications. Sec. 22 of 53 Vic. c. 4, whose provisions have practically been in force for the last forty years, provides that the bill shall contain a brief narrative of the material facts, adhering as nearly as possible to the brevity of the form given, and that documentary evidence shall not be inserted at large, but any material part of it may be referred to in a concise manner. The form to which reference is made, and to the brevity of which the statute requires practitioners to

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adhere, is a foreclosure bill, and without a description of premises, contains three or four folios. This is rather a startling difference between the model and the copy. The description of the mortgaged premises in this case is about five folios in length, and, strange to say, it is copied three times—once in the usual allegation that the plaintiff is mortgagee of the premises; a second time in the first mortgage, which is inserted in full, with all its covenants and power of sale; and a third time in the second mortgage, which is also set out in full, with its covenants and power of sale. In addition to this, the will of Sweet is set out in full, even to a clause disposing of a lot in the cemetery. Now, no one would be more disposed than I to give latitude to counsel in the exercise of their judgment and discretion as to the allegations to be introduced into a pleading, or the precise form in which those allegations should be made; but in a case like this, where both the letter and spirit of the statute seem to have been disregarded, and where there exists, so far as I can discover, no reason for making the bill about five times as long as is usual, I think I should be disregarding my duty if I did not express my entire disapproval of such a course. The clerk reports to me that a similar case came before Mr. Justice Fraser, and he directed the costs to be taxed on the basis of the bill containing ten folios. I am glad to have a precedent which is so entirely in accord with my own views, and I shall therefore direct the clerk to tax the plaintiff's costs on the basis of the bill containing only twelve folios, unless the plaintiff's solicitor is able to satisfy him that the setting out in full of the documents I have described and the repetition of the description of the premises as I have mentioned were reasonably necessary for the plaintiff's case.

The decree will be as follows:—

1. The bill will stand dismissed as to the defendant Munroe, with costs up to and including his answer, to be paid by the plaintiff.

2. The bill to be taken *pro confesso* against the other defendants.

3. The amount due on the mortgage for principal,

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insurance premiums and interest up to the 1st March, 1895, is assessed at $660.

4. The usual reference to sell, all parties having leave to bid.

5. The plaintiff's costs to be taxed as though Munroe had never been a party to the suit, and as though the bill had been taken *pro confesso* against the other defendants.

6. The plaintiff's costs to be taxed on the basis of the bill being only twelve folios in length, subject to what I have above directed.

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In re CUSHING'S ESTATE.
Ex parte BETHIA J. CUSHING.

Realty forming Part of Partnership Assets—Conversion—Dower.

Realty purchased by partners with partnership funds for partnership purposes must be regarded as personal estate in the absence of an agreement between them to the contrary, and consequently is not subject to dower.

This was an application under The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 237, by Mrs. Bethia J. Cushing, widow of Andre Cushing, for an admeasurement of her dower in lands owned by her late husband. The facts and argument of counsel are fully stated in the judgment of the Court.

The argument was heard January 28th, 1895.

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

Weldon, Q.C., for the devisees of Andre Cushing.

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This was an application made to me under The Supreme Court in Equity Act, 1890 (53 Vic. c. 4, s. 273), for an order for admeasurement of dower in certain

lands of which it is alleged the late Andre Cushing died seised, and in which it is claimed the applicant as his widow has a right of dower. As to some of the properties mentioned in the petition there is no dispute as to the widow's right, and therefore as to these there will be the usual order as asked for. As to the remaining portions of the property, Mr. Weldon, who appeared for all the parties interested, contended that a bill should be filed, and that this summary procedure was inapplicable to a case like this. I decided, however, to go on, and if it turned out that the interests of all parties could only be protected by having a bill filed, I could then direct that course to be adopted. As I have arrived at the conclusion that this application must fail as to these latter properties, there is no difficulty in disposing of the whole matter on this petition, unless my decision should be reversed on appeal, in which case, for reasons which will appear hereafter, a bill would, I think, be necessary in order that the accounts of the partnership might be taken and the interests of all parties be ascertained and protected. From the evidence before me the facts are as follows : Previous to May, 1870, but at what precise time does not appear, Andre Cushing and G. Byron Cushing entered into partnership, under the name of Andre Cushing & Co., for the purpose of carrying on the business of sawing and manufacturing lumber at St. John. In May, 1870, an arrangement was made between the firm and one Theophilus Cushing, who was a brother of Andre Cushing and the father of Byron, for the purchase by them of what is known as the Union Point Mill property, and accordingly this property was conveyed to Andre Cushing and G. Byron Cushing by deed dated May 1st, 1870, which deed was duly registered in March, 1871. The mill which was on the property at the time of the purchase was destroyed by fire on the 23rd of May, 1870, a few weeks after the purchase. The firm erected a new mill on the property, and this has been operated by them ever since its completion in 1872, in the way I shall presently mention, for the purposes of their business. In December, 1880, Andre Cushing & Co., also for the purposes of their business, purchased what is known as the

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Godard Mill property, and a conveyance of it was made to Andre and Byron Cushing on December 8th, 1880, which was registered January 4th, 1881. These two properties adjoin each other, and since the purchase of the one last mentioned, they have been used as one, solely for the purposes of the business, in piling and storing lumber and in such other ways as were found necessary or convenient for carrying on the firm's business to advantage. The consideration mentioned in the first conveyance is $25,000, and in the last $1,500. Both sums, as well as the cost of the new mill, are charged in the firm's books against the partnership. The evidence, I think, shows, and I have no hesitation in finding as a fact, that these two properties were purchased with partnership funds for the purposes of the firm's business, and that they have always been used, and solely used, in carrying on the firm's business and for the purpose of the partnership as it has from time to time been carried on, there having been no difference either in the manner of using the premises or in the purposes for which they were used down to the death of Andre Cushing, or indeed down to the present time. It also appears that Andre Cushing and G. Byron Cushing were equally interested as partners, each having a one-half interest in the partnership assets. The petitioner was married to Andre Cushing September 11, 1883. He died March 17, 1891, leaving a will by which he devised all his real and personal property to his children, except a legacy of $100 to his wife and the use during her life of his dwelling house and furniture, she being, as he alleges in his will, provided for by her own separate property. Byron Cushing died some two or three years before Andre Cushing, intestate, leaving a widow and several children surviving, all of whom are of age. One of the sons, George S. Cushing, on his father's death, went into the business as representing his father's estate, and the business continued to be carried on under the firm name, precisely the same as before, by Andre Cushing, with George S. Cushing representing his father's interest, until Andre Cushing's death in March, 1891; and since that time it has been continued by George S. Cushing under the firm name, with the

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consent of Andre Cushing's children, and for the benefit of all interested, that is as to one-half, for the benefit of those entitled under Andre Cushing's will, and the other half for the benefit of Byron Cushing's estate. The partnership business has never been wound up, neither has there ever been since Byron Cushing's death any division of profits, but each party has drawn on the basis of an equal interest. The present position of the partnership affairs, or its position at the date of Andre Cushing's death, is not shown. It does, however, appear by the evidence that at the time of Byron Cushing's death there was ample personal property belonging to the partnership to pay the liabilities, thus leaving the real estate intact. I do not think the evidence shows clearly that the debts of the firm existing at the date of Byron Cushing's death have absolutely all been paid. If they have been, new liabilities of the firm, or created under the firm name, were made for the purpose. In fact the business, by the consent of all persons who had an interest in it, was continued after Byron Cushing's death precisely as before, except that for his personal services and supervision were substituted those of his son.

Two answers were set up to this application. One was that there was some anti-nuptial agreement between Mr. and Mrs. Cushing, that he on his part should not interfere with her property or claim any interest in it, and that she on her part should not claim any interest in his; and that acting on this arrangement Mrs. Cushing, with her husband's consent, had made a will by which she disposed of all her property for the benefit of her children, the issue of her first marriage. It is unnecessary to speculate upon the effect of such an agreement, because the evidence not only fails in establishing it, but Mrs. Cushing absolutely denies all knowledge of it in every way, and disproves its existence. This defence, therefore, entirely fails. The other ground put forward relates solely to the two properties I have spoken of,—the Godard Mill property and the Union Point Mill property. In reference to these, it is contended that they were purchased by the firm of Andre Cushing & Co. with partnership funds, and that they were solely used and

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owned for partnership purposes, in which case the widow would have no right of dower. And this is the substantial question which arises for decision in this case.

Mr. Weldon contends that by the law as enunciated by English authorities the wife has no dower in that part of her husband's real estate which is partnership property and used by the partners for partnership purposes, unless there exists some agreement between the partners by which the property is discharged from the trusts to which it would otherwise be liable. Of course, in this case, no such agreement exists; we are, therefore, relieved from all discussion as to that point. The doctrine by which real estate held by or for partners for partnership purposes has been held as, in equity, converted into personalty is to be found in earlier decisions than *Darby* v. *Darby* (1); but, as that case is so frequently cited in modern cases as accurately laying down the rule, it will be safe to adopt it. In that case, Kindersley, V.C., says (2): "Now, it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is, that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule; and it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnerships property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he should retain his own share of it in specie." That the principle of this case and the rule there laid down have been applied in numerous cases—

(1) 3 Drew. 495.

(2) At p. 503.

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some of them of comparatively recent date—is beyond all doubt. Mr. Skinner conceded this, but sought to distinguish the present case for reasons which it will be convenient to have in mind before referring to some of the later authorities. In the first place, he contends that *Darby* v. *Darby* (3) is distinguishable, because the partners were there dealing in real estate, buying and selling it for profit as so much stock-in-trade. An examination of the case shows that it was decided upon no such ground as that, but that in deciding it the Vice-Chancellor was simply applying to real estate held in partnership a principle of the general law of partnerships. The opening sentences of the judgment answer this objection. The other point made by the petitioner's counsel is entitled to more consideration. It may be stated thus: Admit for the sake of argument that the general principle is correctly stated, it can have no application to a case where there exists no necessity for the conversion,—where the partnership debts are all paid, or, if not, the personal assets are ample for the purpose, and therefore the reason for an equitable conversion of the real estate has ceased to exist, and the object for which the implied trust for sale was raised has also ceased to exist. In which case it was contended the real estate would reassume its original qualities, the widow would have her dower, and the devolution of the property would be in the same channel as though no partnership had ever existed. Whatever support such a doctrine may find in American decisions, or perhaps in some early English cases, I cannot find any in authorities which are to-day recognized as binding. *Thornton* v. *Dixon* (4) and *Bell* v. *Phyn* (5), cited by Mr. Skinner, are instances of the earlier English cases; but these have not been followed for very many years. In *Phillips* v. *Phillips* (6), these cases were cited, but even at that time, in 1832, they were not followed. In that case counsel made much the same argument as is presented here. At page 653 counsel is reported as arguing that, although the real estate

(3) 3 Drew. 495.
(4) 3 Brown C. C. 198.
(5) 7 Ves. 453.
(6) 1 M. & K. 649.

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purchased with the partnership property was converted into personalty for the purposes of the partnership, yet when those purposes were served the property resulted in its original character of real estate to the heir. (See also page 655). What does the Master of the Rolls say, in answer to this? "With respect to the second question,—whether the freehold and copyhold property purchased with the partnership capital, and conveyed to the two partners and their heirs for the purposes of the partnership trade, is to be considered as personal estate only for the payment of the partnership debts, or is generally to be considered, to the extent of a moiety, as personal estate of a deceased partner,—I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate: and in the case of *Fereday* v. *Wightwick* (7), I had no intention to confine the principle to the payment of the partnership demands. Lord Eldon has certainly, upon several occasions, expressed such an opinion; the case of *Townsend* v. *Devaynes* (8) is a clear decision to that effect; and general convenience requires that this principle should be adhered to." I have not overlooked the fact that the decision of the Master of the Rolls in the case of *Phillips* v. *Phillips* (9) was questioned in several cases, and finally overruled in *Taylor* v. *Taylor* (10), but it was on another point in the case altogether, and had no reference whatever to the question for which I cite it. Watson, in his Equity Compendium published twenty years after the decision in *Taylor* v. *Taylor* (10) was given, cites *Phillips* v. *Phillips* (9) as authority for the following text: "An estate purchased with partnership property for partnership purposes is not subject to dower, unless there is a distinct agreement that it shall be the separate property of one partner, to whom it is con-

(7) 1 R. & M. 45.
(8) 1 Montag. Law of Partn. Appen. 97, and 1 Roper's H. & W. Jacob's edit. p. 346, n.
(9) 1 M. & K. 649.
(10) 3 DeG. M. & G. 190.

veyed, and that he shall be a debtor to the partnership for the purchase money" (11). It is very clear that the Master of the Rolls in *Phillips* v. *Phillips* (12) altogether disclaims the idea that the principle of equitable conversion of the real estate into personalty is confined, as the petitioner here contends, to the payment of partnership debts. On the contrary, he says it continues to be partnership property and to have to every intent the quality of personal estate. It is, as Kindersley, V.C., puts it, "a conversion out and out."

The case of *Attorney-General* v. *Hubbuck* (13) and on appeal (14), has a direct bearing upon the point under discussion. The question arose there as to a claim by the Crown of some £22,000 for probate duty, and the property in reference to which the duty was claimed was real estate which had been purchased by partners and used for partnership purposes. It could only be made liable for the duty because it was personal property, and both Courts held it liable on that ground. In this case the same argument as in *Phillips* v. *Phillips* (12) was advanced, but without avail. At page 494 of the report, in 10 Queen's Bench Division, it will be seen that the defendant's counsel, after admitting the general doctrine that real estate purchased by a partnership for partnership purposes became converted into personalty, and that the interest of a deceased partner's estate in such realty was only a share in the proceeds of such conversion, goes on to argue that the ultimate facts may be looked to in order to determine the rights of parties, and if it eventually turn out that an actual conversion of the real estate is unnecessary for the purposes of the partnership, it remains real estate with all its incidents. He then illustrates his argument by cases of express trusts for sale and cases of a similar character, where such a principle obtains. Pollock, B., answers this argument in this way: "Now, it may be well in the first place to observe that the contention of the Crown is founded on the fact of this being partnership property, because many cases

(11) P. 350. Ed. 1873.
(12) 1 M. & K. 649.
(13) 10 Q. B. D. 488.
(14) 13 Q. B. D. 275.

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have been cited to us bearing on the general question, which has sometimes had to be considered, whether there has been a conversion or not in cases other than cases of partnership. In those cases it may be that the true rule is that you must look to what actually took place in order to see whether there has been a conversion." After referring to the judgment of Kelly, C.B., in *Attorney-General* v. *Lomas* (15), he proceeds: "I do not think it necessary to refer further to that case and many other cases that have been cited, because they are cases where the rule, upon which the contention of the Crown in this case has been put, in no way applies. The contention of the Crown is that this is a case of partnership and of partnership property, and if the property be not partnership property, cadit questio." It will be seen, therefore, that the equitable conversion into personalty of the real estate purchased by partners for partnership purposes in no way depends upon an actual necessity for its conversion in order to wind up the partnership or pay the partnership debts, but that it is an incident of the partnership itself, and is only to be avoided by some agreement between the partners as a result of which the real estate will be freed from the implied trust for sale with which the law fixes it as arising out of the contract of partnership itself. Bowen, L.J., in the case last cited (16), after citing the passage from *Darby* v. *Darby* (17), which I have above quoted, says: "If that is so as regards all the partnership property, land, when it is brought into and made part of the partnership property, becomes of course personalty, that is to say, its devolution will be affected by the fact that it has been brought into the partnership accounts and assets. How is the character of personalty which has once been impressed upon land to be withdrawn or altered and the land remitted to its original character of realty? It seems to me that in the case of partnership property land can be remitted to its original character only by virtue of such an agreement made between the partners as withdraws the land

(15) L. R. 9 Ex. 29.
(16) Attorney-General v. Hubbuck, 13 Q. B. D. 275, at p. 290.
(17) 3 Drew. 495.

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from the partnership assets and puts an end to the implied trust for sale. . . . But it seems to me clear, whatever may be the law as to these questions, that the time when the death takes place is the moment at which it has to be decided whether the property in question is realty or personalty." See also *Waterer* v. *Waterer* (18).

The decisions in Ontario are entirely to the same effect: *Wylie* v. *Wylie* (19); *Sanborn* v. *Sanborn* (20); *Conger* v. *Platt* (21); *In re Music Hall Block* (22). In the latter case, Ferguson, J., held that the assignee, under the Insolvent Act of 1875, could give a good title to the insolvents' real estate held by them as partnership assets, though the wives did not join, as they had no inchoate right of dower in the lands, as such land must be considered as converted into personalty.

I must concede that in the United States, or at all events some of them, a somewhat different rule prevails. Bates, an American author, in his work on partnership, published in 1888, at section 297, thus sums up the doctrine: "The great point of difference between the English and American law is the degree of conversion. In England it seems to be now settled that a partner's share in the assets of the firm is personal property for all purposes, no matter of what it consists; and that, after satisfying partnership liabilities and equities, the balance is still divisible as personalty, and goes to the representatives and not to the heir, and is not subject to dower. But now, the unanimous American doctrine is that after the partnership demands are satisfied the unexhausted surplus is real estate. The basis of absolute or partial conversion into personalty is the presumed intention, and equity will not go further and convert it into personalty for additional purposes, such as the mere purpose of division, unless the intention to convert for more than partnership purposes appears. Hence, in this country the widow has dower out of a partner's share in the surplus, and the share goes to the heir and not to the executor."

As I view the evidence in this case, Andre Cushing,

(18) L. R. 15 Eq. 402.
(19) 4 Gr. 278.
(20) 11 Gr. 359.
(21) 25 U. C. Q. B. 277.
(22) 8 Ont. 225.

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as surviving partner, on the death of Byron Cushing, continued the partnership business, the representatives of Byron assenting to their share of the capital being retained for the purpose. The partnership transactions have never yet been wound up, and I see no reason why the trust for sale does not exist as much to-day for the purposes of winding up the partnership as ever it did. The petitioner's right of dower did not become complete until her husband's death, and there is nothing to show how the partnership business then stood. I do not see how under any circumstances, even under the American rule, an application like this could be sustained until the accounts of the partners and of the partnership had been taken and the surplus capital settled upon and determined. I do not, however, rest my decision upon this ground at all, but upon the principle and authority of the cases to which I have referred, and which, as I understand them, are altogether adverse to the right claimed by the petitioner in these two properties in question.

There will, therefore, be no order made as to these two pieces of land which are the first and second pieces described in the third paragraph of the petition, but there will be an order made as to the remainder of the properties.

As each party has succeeded in part, there will be no order as to costs.

DOHERTY v. HOGAN *et al.*

1895.

April 26.

Practice—Foreclosure—Foreclosure and Sale—Title of Mortgagor in Dispute.

A mortgagor will be foreclosed though he may have had no interest in the premises to mortgage, but, in such an instance, a sale will not be ordered.

It is not desirable, where any substantial question is suggested as to the title which a purchaser might get under a sale made in pursuance of a decree of the Court, to order one.

This was a suit for foreclosure of a mortgage and sale of the mortgaged premises. The facts are stated in the judgment of the Court. Argument was heard on the 5th of April, 1895.

Le B. Tweedie, for the defendants:—

Defendants never had any interest in the property to mortgage, as the conditions under which the title could possibly vest in the defendant's wife were never performed. A mortgage by them cannot therefore be subject to foreclosure.

[BARKER, J.:—As you have given a mortgage, it should be foreclosed in order to perfect the title.]

If an order is made it should be for foreclosure only, and not for foreclosure and sale. See *James* v. *James* (1); *Redmayn* v. *Forster* (2); *Cox* v. *Toole* (3).

Wm. Pugsley, Q.C., for the plaintiff:—

The order should be for foreclosure and sale in the usual way.

1895. April 26. BARKER, J.:—

The bill in this suit was filed for the foreclosure of a mortgage from the defendants Rosa Hogan and her husband to the plaintiff, dated August the 29th, 1882, and for a sale of the mortgaged premises. The defendants have put in an answer admitting the making of the mortgage, but in effect stating that they had no interest in the premises when they gave the mortgage. They also con-

(1) L. R. 16 Eq. 153. (2) L. R. 2 Eq. 467. (3) 20 Beav. 145.

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tended that the proper parties were not before the Court. The conveyances in evidence show that the premises in question were conveyed by one Edward Hogan to the defendant Edward Hogan, junior, by deed dated February the 1st, 1868. Edward Hogan, junior, conveyed to William Smith on January 16th, 1877; William Smith conveyed to John Hogan July 11th, 1877. The defendant Rosa Hogan did not join in the conveyance to Smith; but by an instrument executed by her alone, and dated July the 11th, 1877, she released her dower to William Smith, and he then conveyed the premises to John Hogan by deed July the 11th, 1877. John Hogan died leaving a will, which was admitted to probate October the 1st, 1878, and by this will he gave this piece of property to the defendant Rosa Hogan upon certain specified conditions, which the defendants say they never fulfilled. The will provided that in case the conditions were not fulfilled, the executors were to sell the property, and out of the proceeds pay Rosa Hogan the amount of three notes which she held of the testator's, and pay the balance over to his (the testator's) father and mother for their support. The defendants contend that, as there was a dispute as to the title or interest of Rosa Hogan when she gave the mortgage, in consequence of the non-performance by her of the conditions subject to which the property was devised to her, a sale of the premises should not be decreed, but that the defendants should be foreclosed only. It is not desirable in a case where a substantial question is suggested as to the title which a purchaser might get under a sale made in pursuance of a decree of this Court to order one. I do not say that the evidence before me does more than raise a possible question; in fact the matter was not very exhaustively gone into. The plaintiff is entitled to foreclose the defendants, and he will then be in a position to deal with the property as he pleases. This course will meet all the objections raised. There will therefore be a decree of foreclosure only.

1895.
April 26.

THE HALIFAX BANKING COMPANY v. SMITH.

Practice—Bill—Amendment—Costs—Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 100.

The costs of an application by plaintiffs, who were in no default, for leave to amend their bill to introduce facts which occurred after the commencement of the suit, were ordered to be costs in the cause.

This was an application by the plaintiffs for leave to amend their bill to introduce facts which occurred after the commencement of the suit.

1895. April 16. *Teed*, for the motion.

Blair, A. G., *contra*:—

Amendment should only be allowed upon costs to the defendant whose rights are involved in the application, and who appears here at the instance and for the convenience of the plaintiffs.

1895. April 26. BARKER, J.:—

An application was made on the part of the plaintiffs under the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 100, for an order allowing them to introduce into the original bill, by way of amendment, a statement of facts which have taken place since the commencement of the suit. The defendant does not deny the plaintiffs' right to make the amendment, or that it can be properly made, but contends that, like any other order to amend, it must be made on payment of costs. I think this application is not to be treated as an ordinary application to amend. The plaintiffs are in no default in any way, but only asking for the benefit of a provision to which they are entitled, and which was made to obviate the necessity for filing a supplementary bill. The costs are, I think, a part of the ordinary costs incident to the litigation, and will therefore be costs in the cause.

1895.

May 21.

CUNNINGHAM v. MOORE.

Deed—Agreement to Maintain Vendor—Breach—Vendor's Lien—Specific Performance.

A farm was conveyed by an aged couple to their daughter, and on the same day she and her husband entered into a written agreement with the vendors to board them on the farm and to pay them an annuity in consideration of the conveyance.

Held, (1) that the vendors had a lien on the land for the performance of the agreement.

(2) That the Court could not decree specific performance of the agreement.

The facts in the case are fully stated in the judgment of the Court. Argument was heard the 29th of April, 1895.

Skinner, Q.C., and *A. I. Trueman*, for the plaintiffs.

The defendants did not appear.

1895. May 21. BARKER, J.:—

The plaintiffs on the 6th July, 1891, executed a conveyance of a farm in the county of Kings to the defendant, Matilda Moore, for an expressed consideration of $400, which conveyance was registered shortly after. At the same time the defendants Matilda Moore and William Moore, her husband, executed an agreement to the plaintiffs, which is as follows :

"Agreement made this 6th day of July, A.D. 1891, between William Moore of Black River, parish of Simonds, and county of St. John, and Matilda, his wife, of the one part, and John Cunningham, of the parish of Westfield and county of Kings, and Catharine, his wife, of the other part, witnesseth, that the said William Moore and Matilda, his wife, for and in consideration of a farm deeded to them by John Cunningham and Catharine, his wife, agree to furnish such board, washing and lodging, fuel, attendance, care and clothing and other necessaries as the said John Cunningham and Catharine, his wife, may at any time hereafter require ; that the said Wil-

liam Moore and Matilda, his wife, will pay the sum of ten dollars to each of them yearly. That the said William Moore and Matilda, his wife, will at all times furnish the said John Cunningham and Catharine, his wife, with a suitable home on the farm at present occupied by them; also that the stock shall remain as at present, or as near as may be, on the farm at present owned by them, to be kept there and used to pay necessary expenses of burying them. In testimony whereof, the parties hereto have set their hands the day and year above written.

(Signed) WILLIAM MOORE.
(Signed) MATILDA MOORE."

This agreement was also registered. It appeared by the evidence that the plaintiffs were upwards of seventy years of age, with no one living with them to assist in the work, and that the defendant Matilda Moore was their daughter. No money was paid as a consideration for the conveyance, and none was ever expected, except as specified in the agreement. The object of it on the part of these aged people was to secure a maintenance for the remainder of their lives on their farm, as mentioned in the agreement. The defendants, soon after the deed was made, went to live on the farm, and continued there until the latter part of 1893, when they removed to another farm a short distance away. It appears by the evidence that during this period the support furnished the plaintiffs was altogether inadequate—that the cash payment was not made as agreed, and that the requirements of the agreement were altogether disregarded by the defendants, who seemed to have behaved to the plaintiffs in a very heartless manner. The bill prayed (1) for a decree that the deed had been obtained by fraud, and that it be set aside on that ground; (2) that the agreement was a charge on the farm; (3) and that the defendants be decreed to carry out the agreement, and for an injunction preventing defendants from trespassing on the premises or conveying the same. At the hearing the defendants did not appear, though they all answered the plaintiffs' bill. It was contended that the conduct of Mrs. Moore to her parents, the disregard of her and her husband to the plain-

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tiffs' wants, and their own obligations under the agreement, and the manner in which they had dealt with the property, afforded sufficient evidence to warrant me in concluding that they obtained the property fraudulently and without any intention of supporting the plaintiffs. In my opinion the evidence does not establish any such fraud, and I think that ground of relief does not exist. Neither am I able to decree specific performance, because there is no way of enforcing it. The plaintiffs are, I think, entitled to a decree that they have a lien on the land for the performance of the agreement. It is a well-settled principle that the vendor of real estate has a lien on the land for the purchase money, unless there is some agreement express or implied that he shall not have. The performance of this agreement represents the purchase money, and unless the circumstances negative the intention to preserve the lien I must hold that it exists. I do not attach any value as evidence to the statement of the plaintiff that he supposed that he had such a lien, but rely altogether upon the documents and undisputed facts. In *Mackreth* v. *Symmons* (1), Lord Eldon says (2): "Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and vendee and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract though perhaps no actual contract has taken place, a lien shall prevail; in one case for the whole consideration; in the other for that part of the money which was not paid."

In the same judgment, when speaking of the effect of taking a security for the purchase money, Lord Eldon says (3): "The more modern authorities have brought it to this inconvenient state—that the question is not a dry question upon the fact whether a security was taken, but it depends upon the circumstances of each case whether the Court is to infer that the lien was intended to be reserved,

(1) 15 Ves. 329. (2) At p. 337. (3) At p. 350.

or that credit was given, and exclusively given, to the person from whom the other security was taken." Lord Redesdale states the law in the same terms (4): "It lies on the purchaser to show that the vendor agreed to rest on the collateral security; *prima facie* the purchase money is a lien on the land."

There can be no doubt of the general principle, and no difficulty in enforcing it between the immediate parties. The next question is, does the principle apply to a case like the present? In my opinion it does. It has been applied in England in cases where the consideration for the conveyance was an annuity to be paid to the vendor by the vendee—a case, I think, not different in principle from this. In *Tardiff* v. *Scrughan* (5), the evidence showed that a man and his wife, far advanced in life and having two daughters, agreed to convey their real property to their two daughters as tenants in common in fee, in consideration of an annuity of £20, to be secured to them and the survivor of them, and in consideration of the payment of the father's debts, and the annuity was to be secured by bond. It was so secured; the property was given up; the daughters paid the annuity for some time. One of them died, and the husband then disputed his liability to pay it any longer, and the question was whether the parents had a lien on the property for the annuity, and it was held that they had.

The same principle was acted upon in *Matthews* v. *Bowler* (6). Both of these cases are commented upon by the Lord Chancellor in *Dixon* v. *Gayfere* (7), where the principle is not denied, though the facts in that case did not warrant its application. As to the first, he says (8): "The parents were giving up the property to their children, and probably they only meant to give it up by way of a settlement"; and as to the last he says (8): "There a poor person had some small ground rents, and gave them up in consideration of fifteen shilling a week during her life, evidently meaning

(4) Hughes v. Kearney, 1 Sch. & Lef. 132.
(5) Cited in Blackburn v. Gregson, 1 Bro. C. C. 423.
(6) 6 Hare, 110.
(7) 1 DeG. & J. 655.
(8) At p. 662.

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that the fifteen shillings should be paid out of the ground rents."

It is impossible, I think, for one to read this agreement and not conclude that it was never the intention of the parties that the farm should be sold during the lives of the plaintiffs, because they were to be furnished a home on the farm, that is to say, they had a right to live there during their lives; and there is quite as much reason for saying that the board and maintenance to which by the agreement they were entitled were to be got from the farm, as for saying that the weekly payment of fifteen shillings in *Matthew* v. *Bowler* (9) was payable out of the ground rents.

In *Paine* v. *Chapman* (10), the facts were almost identical with the facts here. An old lady made a conveyance to her grandson for which he was to maintain her, provide her with washing, lodging, wearing apparel and other necessaries. Spragge, V.C., says (11): "Such arrangements are not at all infrequent in this Province, and they have occasionally been the subject of suit in this Court. They are generally of this nature: An aged person, who has become too infirm any longer to manage his farm, conveys it to some near relative, who is, in consideration of it, to maintain him during the remainder of his life, and generally upon the property conveyed" (as is the case here), "an arrangement very beneficial usually to the grantee." The Vice-Chancellor's language describes most accurately this present case. In that case the grantee gave a bond, and in this one a written agreement. The Court found no difficulty in sustaining the lien in that case. The Vice-Chancellor says: "I cannot see that such an arrangement affords any indication of an agreement between the parties to it that the aged grantor should trust to the personal engagement, in whatever form, of the grantee for his support at a time of life when he has become incapable of supporting himself. I think rather that he would be considered, not by lawyers only, but popularly, as having a claim upon the land for his support."

I am glad these authorities so entirely concur with

(9) 6 Hare, 110 (10) 6 Gr. 338. (11) At p. 341.

what in this case seems the plainest equity. The defendants in this case seem to have disregarded not only their own agreement but also all filial obligations; and, in violation of both, gave the plaintiffs but stinted support when they occupied the farm; and have since gone away to the United States, leaving these old people to shift for themselves as best they can. There will be a declaration that the plaintiffs have a lien on the land conveyed in the deed to Matilda Moore, set out in the bill, for all sums agreed to be paid to the plaintiffs by the defendants William and Matilda Moore by the agreement of the 6th of July, 1891, and for the cost and expense of the board, washing, lodging, fuel, attendance, care, clothing and necessaries and home agreed to be furnished the plaintiffs by the said defendants William and Matilda Moore.

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May 7.

DOUGLAS v. SANSOM *et al.*

Mistake—Mortgage—Misdescription of Premises—Evidence of Intention—Rectification—Assignment for Benefit of Creditors—Anticipating Judgment Creditor—Filing Assignment—The Bills of Sale Act, 1893 (56 Vic., c. 5)—Execution of Creditors' Deed—Expiration of Stipulated Time—Communication of Deed to Creditors—Creditor Acting upon It—Power to Revoke—Suit to Set Deed Aside—Trustee Not Appearing—Inquiry as to Interests of Creditors.

Though in order to secure the rectification of an instrument the clearest evidence is required to be adduced, yet, if one of the parties to it denies that there is any mistake, the Court will consider all the circumstances surrounding the making of the instrument, and whether it accords with what would reasonably and probably have been the agreement between the parties, and, if satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, will rectify it.

A voluntary assignment in good faith by a debtor for the benefit of his creditors is valid though it defeats the expected judgment of a particular creditor.

Quære, whether an assignment of goods and chattels for the benefit of creditors is within The Bills of Sale Act, 1893 (56 Vic., c. 5).

A trust deed for the benefit of creditors is irrevocable if it has been communicated to a creditor, and acted upon by him so as to alter his position, though he has not executed it.

Whether a creditor may execute or accede to a creditors' deed after the expiration of the stipulated time for its execution depends upon the circumstances of each case.

A suit was brought by a judgment creditor to set aside a trust deed for the benefit of creditors, or to subject it to a charge in his favour, and for other relief at the expense of the trust property. The trustee and the debtor were the only defendants, and the former allowed the bill to be taken against him *pro confesso*. It did not appear whether any of the creditors had acted upon the trust deed before the plaintiff issued execution upon his judgment.

Held, that if they had, their rights should be protected; and an inquiry was directed to that end.

Whitman v. *The Union Bank of Halifax* (1) commented on.

The facts in this suit and the argument of counsel fully appear in the judgment of the Court.

Argument was heard the 6th of March, 1895.

Geo. F. Gregory, Q.C., and *Bliss*, for the plaintiff.

Wesley Van Wart, Q.C., for the defendants.

(1) 16 Can. S. C. R. 410.

1895. May 7. BARKER, J.:—

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The circumstances which have led to the litigation in this case are briefly these: The defendants, John E. and Robert S. Sansom, were partners, carrying on a milling business at Stanley under the firm name of J. E. & R. S. Sansom. In June, 1894, they were indebted to the plaintiff, a merchant, doing business at the same place, in the sum of about $2,000. The plaintiff brought an action for the recovery of this amount, and on the 11th of July, 1894, recovered a judgment against the two Sansoms for $2,237.70, a memorial of which was registered the same day with the Registrar of Deeds for York County, and at the same time a fi. fa. was issued and delivered to the sheriff of York for execution. In addition to this sum, the defendants Sansom owed the plaintiff the sum of $5,843.90, which amount was secured by a mortgage from them to him on certain real estate in York County. This mortgage bears date August 11, 1893, and was registered November 10, 1893. On the 6th day of July, 1894, Sansoms made an assignment of all their property for the benefit of their creditors to the defendant Morrison. It is alleged by the plaintiff that in drawing the mortgage a piece of property known as the Cross Creek mill property was, by a mistake of his solicitor, omitted from the description of the premises. The plaintiff also claims that the assignment for the benefit of creditors is void as having been made with intent to delay and defeat creditors, and for other reasons to which I shall refer more particularly hereafter. The prayer of the bill is, that the trust deed may be declared void and set aside; that the mortgage may be reformed and made to cover and include the Cross Creek mill property; or, that it be decreed that the trust deed of this property is subject to the charge of $5,843.90 by way of mortgage, and that the whole property is subject in the hands of the defendant Morrison to plaintiff's judgment for $2,237.70; or for such other relief as might be right in the premises.

To this bill the defendant Morrison put in no answer, and the bill has been taken *pro confesso* against him. The other defendants have, by their answer, denied all fraud connected with the deed of assignment, and also,

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in a general way, that there was any mistake as to the premises upon which the mortgage was given.

It will be convenient to dispose of the question as to reforming the mortgage first. The principle upon which this Court acts in such cases is, I think, accurately laid down by *Armour*, C.J., in *Clarke* v. *Joselin* (2), as follows: "No doubt, in order to secure the rectification of an instrument, the clearest evidence, 'irrefragable evidence,' as Lord *Thurlow* said, is required to be adduced; but it is not meant by that to be laid down that, because one of the parties to the instrument chooses to deny that there is any mistake in it, the Court must stay its hand. No doubt the writing must stand as embodying the true agreement between the parties, until it is shown beyond reasonable doubt that it does not embody the true agreement between them. The Court must in such case, as in the case of any other disputed fact, consider all the circumstances surrounding the making of the instrument, and whether it accords with what would reasonably and probably have been the agreement of the parties, gauge the credibility of the witnesses, pay due regard to their interest in the subject matter and weigh their testimony; and if, having done all this, the Court is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, the Court ought to rectify it."

In *Russel* v. *Darcy* (3), a case similar to this in its principal features, the value of parol evidence relatively to that furnished by the acts of the parties is pointed out; but in that case the deed was rectified against the assignee. See also *In re Boulter* (4) and *Forrester* v. *Campbell* (5).

It appears by the evidence that a short time before the mortgage transaction took place, Sansoms, who were then largely indebted to the plaintiff for money lent and advances, had under discount at the Bank of Nova Scotia certain drafts drawn by them on one Sorel, of Boston, with whom they had dealings, amounting to some $1,900. Sorel having failed, these drafts were dis-

(2) 16 Ont. 78.
(3) 6 Gr. 165.
(4) 4 Ch. D. 241.
(5) 17 Gr. 379.

honoured; and there is no doubt that this loss, with their other liability, very considerably embarrassed the Sansoms; so much so that they found it necessary to obtain further assistance, and applied to the plaintiff for it. He at first declined to assume any further liability. John Sansom, who seems to have had altogether to do with the negotiations, came to Fredericton in order to try and borrow money on the security of their property; but having failed in doing so, he again applied to the plaintiff, urging him to assist them, and offering to give him security. The plaintiff eventually agreed to assume the amount of the Sorel drafts, and a small note of some $300, which, with the other indebtedness of Sansoms to him, would in all amount to about $7,000; and for this sum, according to the plaintiff's account of the transaction, he was to get a mortgage from the Sansoms. On the faith of this he endorsed Sansoms' note to the bank for the Sorel debt; but when the mortgage had been drawn, and was sent to Sansoms for execution, a dispute arose as to the amount; Sansoms contending that the mortgage was to be for some $5,800, and that the sum of $1,200, for which they had become liable to the plaintiff in the ordinary way of business, was not to be included in the security. It is unnecessary to discuss the evidence on this point, because the plaintiff, having become liable for the Sorel drafts, was compelled to agree, or at all events he did agree, to take the security for $5,800, instead of the $7,000, as he says, was originally arranged. I have no doubt whatever that the plaintiff and Mr. Bliss, his solicitor, who acted for him and knew all about the transaction, both understood it as a part of the arrangement that this Cross Creek mill property was to be included with the other properties in the mortgage. The fact that the plaintiff expected to get a security for $7,000 instead of $5,800 would be a reason for taking what seems to have been perhaps the most valuable piece of property of the whole lot. I have no doubt whatever that Sansom at the time, in order to get the assistance which the plaintiff gave him, would have executed a mortgage including this property willingly and without hesitation. Unfortunately, however, no sufficient description of the properties for drawing the

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conveyance was then available. John Sansom had not the deeds with him at the time, and therefore, as was most natural, Mr. Bliss, who was to prepare the security, asked Sansom for information as to the properties, so that he could get the particulars of them from the records. This Cross Creek mill property had been purchased from a man by the name of Brener, and was included in what was spoken of as the Brener deed. Mr. Bliss at the time took down in writing a memorandum of this property, as given by John Sansom, in reply to his application for information as to the properties upon which the mortgage was to be given. The memorandum of this property, as thus taken down by Mr. Bliss, is as follows :

"N. B. Land Co. to Robt. Brener—Brener to Beckwith—Beckwith to Caroline Brener.

Caroline Brener to Robert S. Sansom and John E. Sansom.	Deed. Recorded a few weeks ago; 100 acres, including mill site (lot 16, Cross Creek.)

Lease of mill site to Humble, sublease to Sansom.
Fee simple to Sansom."

In the vicinity of this Cross Creek mill, which is a steam mill, the Sansoms had a water-power mill. Mr. Bliss, not having sufficient information as to the machinery in these two mills to determine whether they would pass as fixtures by a mortgage of the freehold, and therefore, anticipating the necessity of a chattel mortgage for the purpose, made specific inquiry as to the machinery. Mr. Bliss, at the same time, took down from John Sansom's answer to this inquiry, the following memorandum as to the machinery of the Cross Creek mill, or the new mill, as it was spoken of in distinction to the other, or old mill.

"New Mill—On the Cross Creek stream.
Steam—On Brener property.
Engine and Boiler—100 horse-power.
Rotary Saw Mill—McF., T. & A.
Two Shingle Machines—McF., T. & A."

There was a similar memorandum as to the machinery in the other mill. The initials McF., T. & A. are the initials of the firm of McFarlane, Thompson & Anderson, who furnished the machinery. To me it seems quite impossible to arrive at any other conclusion than that John Sansom knew perfectly well that this information was being asked for in order that Mr. Bliss might be able to draw the mortgage. This was, in fact, the sole object of the inquiry. Besides this, when Mr. Bliss spoke of the possible necessity for a bill of sale, so as to cover the machinery for fear it might not pass as a fixture, Sansom said it had always been taxed as part of the mill. His objection was not that the machinery was not to be included in the security, but that a bill of sale was unnecessary for the purpose. John Sansom's own account of this part of the transaction does not differ very materially from that of Mr. Bliss. He says "We went to the office of Black & Bliss, and Mr. Bliss asked me what property we had, and he took this memorandum" (i.e., the memorandum I have spoken of), "and he also asked me what machinery there was; and he said he would have to draw a bill of sale or a chattel mortgage of the machinery; and I said, No, we always considered it was real estate, once bolted down in the mill; and I told him he would find everything in the records in the record office, and to take as much as they wanted to, and also this 300 acres I spoke of." The 300 acres was another property altogether. At another place he is asked, "What do you say this memorandum was given to Mr. Bliss for?" and he answered, "He was to go to the record office and see the property was right; we did not have the bounds of the property with us." His evidence then proceeds:

Q. There are boilers and machinery; what about these?

A. He asked what machinery we had in the mills; just that way; and he said it will be necessary to draw out a chattel mortgage for the mill machinery.

Q. Then it was given for the purpose of taking security upon it?

A. I just named it over when he asked me what machinery there was in the mills, and he took it down.

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Q. Can you give us no better explanation than that of why you should rattle off this specific property to him ?

A. He asked me what machinery was in the mill.

(By Court—You were giving him the property upon which you were giving the security ; is that the fact ?

A. Yes.

Q. And it was for that purpose you gave him this ?

A. Yes ; it was the object.

Q. So as to put him in possession of the particulars of the properties upon which he could draw this mortgage ?

A. Yes.

Q. That was your object in giving it to him.

A. Yes.)

I think this evidence of itself would be quite sufficient to warrant a decree rectifying the mortgage. Even if Sansoms were only giving, as in one part of John Sansom's evidence he seems to intimate was the fact, a list of the properties from which the plaintiff was at liberty to select such as he wished to have included in his security, I should be quite prepared to hold that when he had selected this Cross Creek mill property as one, the contract would be as binding upon Sansom as though it had been originally mentioned, and that if by mistake it were omitted in drawing the mortgage, the mistake could be rectified, in case nothing had intervened in the meantime to alter the existing relations between the parties. The evidence, however, fully satisfies my mind that all parties intended this property to be included. There are other circumstances corroborative of this view. In the fall of 1893, and some time after the mortgage had been given, an insurance for $1,500 was placed on this Cross Creek mill by Sansoms, and by them made payable to the plaintiff. Now, the plaintiff had nothing whatever to do with this property, except by virtue of this mortgage ; and to make the insurance payable to him seems quite irreconcilable with any other view than that they, or at least the one who actually did the business, at that time supposed the plaintiff to be the mortgagee of it. There is another fact which fortifies the plaintiff's contention. After the plaintiff had obtained his judgment, the San-

soms were examined for disclosure; and Mr. Bliss swears that on that examination John Sansom, when asked what encumbrances were on the property when he assigned to Morrison, said that Douglas (i.e., the plaintiff) had a mortgage, that is, this mortgage now in question, and he said that was on the Stanley land and the Cross Creek mill. At the same examination, when Robert was making his statement, Mr. Bliss says Robert said that he had left this matter in John's hands, and that John came down to Fredericton and negotiated with Douglas to make arrangements to provide for their paper then coming due. The Sansoms did not know at this time that Mr. Bliss had discovered the mistake—in fact he had only discovered it a short time before. They both now say that they knew when the mortgage was executed that this property was not included. The Sansoms have not denied that they stated in their previous examination precisely as Mr. Bliss testified. It necessarily follows that either John Sansom then stated what was false, or else he was under the impression that this property was included; in other words, he was under precisely the same mistake as the plaintiff was. And if John was authorized, as Robert swears he was, to negotiate about the matter, he (Robert) would be bound by John's agreement. They both got the benefit of plaintiff's advance, and should carry out the arrangement upon which it was based, and as it really and in fact was made.

The defendants Sansom have sought to set up two answers to the plaintiff's claim. First, that the plaintiff agreed to take security only on the Stanley mill and wild lands; and another, by way of a counter equity, that he agreed to make further advances, which he refused to do. As to the first, it is clear by the evidence that whatever conversation took place as to security, referred to the indebtedness existing before the Sorel failure; and, as to the second, there is no evidence to support it at all. It would be a strange thing that the plaintiff, when assuming a new and specified liability, and having already an indebtedness of $1,200, for which he had no security, should at the same time agree to make further advances without any specific arrangement for them at all. Hav-

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ing the positive testimony of the plaintiff and Bliss, corroborated as it is in the way I have pointed out, and having defendants' own action as to the insurance, and their statements under oath at their previous examination, I am clearly of opinion that it was the agreement and understanding that this Cross Creek property was to be included in the mortgage, and that its omission was a mutual mistake. So far, therefore, as this branch of the case is concerned, I think, the plaintiff is entitled to a decree in his favour.

I come now to the other part of this case, which relates to the validity of the trust deed, and the rights of the plaintiff as an execution creditor. It is claimed, in the first place, that the deed is void under the authority of *Whitman* v. *The Union Bank of Halifax* (6) ; a decision never regarded with much favour by the profession, and, unfortunately for those who desire to follow it, unaccompanied by reasons so as to enable one to gauge its exact scope. It is sufficient to say that, between this deed and the one under discussion in *Whitman* v. *Union Bank of Halifax*, there are differences which, in my opinion, are sufficient to take it out of that case. I see no reason whatever for saying that the deed is fraudulent and void either in law or fact, subject, of course, to what the plaintiff's rights may be. It provides for an equal distribution of the assets among the creditors, who should execute, and contains no express trust in favour of the debtor as to any residue ; and the fact of the indebtedness of the Sansoms at the time to various creditors is not only in proof, but the plaintiff has himself alleged it in his bill. Neither do I think there is anything in the fact that the assignment was made on the eve of the recovery of judgment by the plaintiff. That is a most common occurrence in such cases; and where the evidence of *bona fides* is clear, as I think it is in this case, and where the intention in making the deed is not to defeat and delay creditors, that intention is not defeated and the deed rendered void, by the fact that one creditor more vigilant or more exacting than the others, is thereby prevented by means of an execution from levying his

(6) 16 Can. S. C. R. 210.

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debt in full upon the assets, and leaving for the other creditors but the remnants of a sheriff's sale.

Another objection to the deed was that it was void inasmuch as it covered chattels ; and, though filed as a bill of sale, it had not the affidavit required by Sec. 5 of 56 Vic. Cap. 5. This and one or two other sections of this Act seem to be substantially copied from the Chattels Mortgage Act of Ontario (see *Robertson* v. *Thomas*) (7) : and whether an assignment for the benefit of creditors, such as this, is such a sale as is contemplated by the Act, is a question which has been much discussed in Ontario; and, though the weight of judicial opinion there seems to be in favour of that view, the point can scarcely be said to be settled even there : *Whiting* v. *Hovey* (8) ; and on appeal (9); *Archibald* v. *Hubley* (10).

The point is not an important one in this case, for there does not seem to have been any goods or chattels in Sansoms' possession to assign. Besides this, I think Mr. Van Wart furnished a good answer to the objection by pointing out that the assignment was accompanied by delivery and a continued change of possession. Morrison says that, immediately on signing the deed on the 7th of July, he telegraphed Munroe, of Stanley, to act as his agent, and go and enter into possession and take an inventory of what property Sansoms had, and that he wrote him a letter the same night. The books were immediately taken possession of, and a man was sent out to collect debts. Munroe reported to Morrison that there was little or nothing to take; that he found Humble owned nearly everything, and there were only two or three things, which he had a memorandum of, but which were worth nothing to speak of—some $2 or $3. Morrison says he leased the mills to Humble for $40 a month. Besides this, the deed was recorded in the registry office, and filed as a bill of sale, and public notice of the assignment given shortly after it was made. Considering the nature of the property, Morrison seems to have done all

(7) 8 Ont. 20.
(8) 13 Ont. App. 7.
(9) 14 Can. S. C. R. 515.
(10) 18 Can. S. C. R. 116.

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he could to take possession of it ; but, as I said before, there does not seem to have been any goods or chattels to assign. I think, therefore, this objection to the validity of the deed has been answered.

In dealing with this branch of the case, I confess to some embarrassment by the position assumed by the defendant Morrison. Apparently indifferent as to the results of the suit, as well to himself as to the creditors whom he is supposed to represent, he has permitted to be taken *pro confesso* against him a bill which alleges that the assignment to him is fraudulent and void, and that a mortgage from his assignors to the plaintiff contained an erroneous description. While a trustee does in most cases, under the provisions of Rule 9, Sec. 88, of 53 Vic. cap. 4, represent his *cestui que trust*, the rule is by no means of universal application (see Morgan Chan. Orders 335, and cases there cited). In this case the major argument addressed to me was that the relation of trustee and *cestui que trust* never existed between the defendant Morrison and Sansoms' creditors ; but, as that is a fact dependent, it may be, upon circumstances quite beyond the knowledge of Morrison, I could not well hold that he represented them, without deciding first that he was their trustee ; and if it be true, as Mr. Gregory contends, that he is not their trustee, then he certainly cannot represent them in this suit. In *Smith* v. *Hurst* (12), it will be seen a somewhat similar objection arose ; and it was met by reserving the rights of creditors and directing an inquiry, so as to protect the trustee. In that case, however, the Vice-Chancellor had sufficient material before him to declare the deed void as to the plaintiff. Here I have not ; and if I did not think the creditors, who are not parties to this suit, and who—for the present at all events—I must assume are not represented by Morrison, will have ample opportunity to protect their rights by means of the inquiry I shall direct, and of which they will have notice, I should feel obliged to order this bill to be amended by making the creditors or some of them parties.

The deed being established as good, and free from

(12) 10 Hare, at p. 46.

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the objections urged against it, the next question which arises is, what are the plaintiff's rights as execution creditor. It will be well to bear in mind some dates in discussing this branch of the case. The trust deed is dated July the 6th, 1894, and registered on the following day. Plaintiff's judgment was signed July 11th, 1894, and a memorial was filed and an execution issued on the same day. Van Wart, the only creditor who had executed it up to the time of the hearing before me in March, 1895, some nine months after the deed was made, did in fact execute it some time between July 25th, 1894, and the first week in August of that year. The trustee Morrison is not a creditor. In addition to this, notice of the deed was communicated to the creditors by advertisement about July 20th, and a special notice to each of them about the same time. By the terms of the deed, the net residue after payment of charges was to be divided and paid unto creditors who should, within ninety days from the date of the assignment, duly execute the same, and file their claims with the trustee. It appeared at the hearing that some small claims had been filed, but by whom, or for what amount, or at what time, was not shown. Under this state of facts, Mr. Gregory contended that when the plaintiff's execution was delivered to the sheriff, on July, 11th, the assignment was a mere mandate by the Sansoms for the distribution of their property, and revocable by them at will; that Morrison held the property as trustee for them, and not for their creditors, between whom and himself there existed at that time no relation of trustee and *cestui que trust*. In which case it was alleged the execution would operate as a revocation of the deed, or of the directions contained in it for the distribution of the assignors' property, and would create a lien upon the property prior to the right which any creditor could acquire under the deed. Such would be the result, in my opinion, provided the position of the parties be as Mr. Gregory asserts. It is clear, as I have already said, that if Mr. Gregory's contention be correct, that the relation of trustee and *cestui que trust* has never been created between Morrison and Sansoms' creditors, he cannot, as their trustee,

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represent them in this suit, and that I ought not to make any decree prejudicial to their rights, without in some way giving them an opportunity of asserting them. The reference that I shall make for this purpose is somewhat wider in its range than would by the plaintiff's contention be proper. He contends that creditors under a deed like this acquire no rights by the communication of the deed to them; that actual execution of the deed, or an accession to it, so as to amount to the same thing, is necessary. And he also contends that, under any circumstances, his execution would attach upon the trust property, subject only to the rights of those creditors who had actually executed or acceded to the deed within the ninety days. As I do not agree entirely with either of these propositions, I shall give my reasons, so that the plaintiff can, if he wishes, have the matter set right on appeal before the reference is proceeded with.

The first point has been the subject of much discussion, and, though there are no doubt authorities which support the plaintiff's view, the weight of authority is, I think, the other way. The power of the assignor to revoke a deed such as this, up to such time as the creditors had acquired rights under it, was established by cases prior to *Garrard* v. *Lauderdale* (13); but in that case it appeared that the deed had not been communicated to the creditors, and this was held not to make any difference. In *Acton* v. *Woodgate* (14), the Master of the Rolls says: "In the case of *Garrard* v. *Lauderdale*, it appears to have been considered that a communication by the trustees to creditors of the fact of such a trust would not defeat the power of revocation by the debtors. It appears to me, however, that this doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised."

In *Johns* v. *James* (15), Bacon, V.C., at page 745, says the sole point for decision was that the statement of claim was bad, because it did not state that the

(13) 3 Sim. 1. (14) 2 M. & K. 492. (15) 8 Ch. D. 744.

deed in question had been communicated to the plaintiff. At page 751, *James*, L.J., says: "I think there is no case which has been cited which in the slightest degree shakes the authority of *Garrard* v. *Lauderdale*, as explained and acted upon in *Acton* v. *Woodgate*." The only explanation of *Garrard* v. *Lauderdale* (16) in *Acton* v. *Woodgate* (17) was as to the communication of the deed, in the passage I have quoted.

In *Griffith* v. *Ricketts* (18), the Vice-Chancellor says: "Nor could the deed be revocable against the creditors of Edmund Griffith (the assignor), if any, between whom and the trustees such communications had taken place as would give them an interest under the deed. The question of revocation must at least be confined to the surplus proceeds of the estate comprised in the deeds, which would remain after satisfying the claims of Cook, Harford, and such other creditors, if any, as had acquired an interest under the deed."

In *Glegg* v. *Rees* (19), Lord Hatherley says: "But, upon principle, there can be no doubt, that, if the transaction is simply between the assignor and the assignee, no creditor can take advantage of the deed unless it has be communicated to him." In *Kirwan* v. *Daniel* (20), the Vice-Chancellor, in speaking of the immateriality of notice, as put forward in *Garrard* v. *Lauderdale*, says: "The case to that extent was, I believe, a case of first impression; and the decision was certainly a surprise on those in whose favour it was pronounced. The argument was, that the deed, *per se*, gave no interest to the creditors; and if that were admitted, then it was said a simple notice to the creditor of a deed, which, *per se*, gave him no interest, could not enlarge the effect of the deed. That may be true, so far as the effect of the deed is concerned; but the argument omits the material consideration, that, although the notice may not alter the effect of the deed, it may alter the position of the creditor; and Courts, both of law and equity, have repeatedly decided that where a creditor on whose behalf a stake

(16) 3 Sim. 1.
(17) 2 M. & K. 492.
(18) 7 Hare, 307.
(19) L. R. 7 Ch. 71.
(20) 5 Hare, 500.

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has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and a debtor to that creditor; and those cases have been decided on the ground that the creditors may, on the faith of the notice, have forborne to sue."

In *McAllister* v. *Forsyth* (21), *Strong*, J., in speaking of a deed and circumstances very similar to those of this case, says, at page 19: "What, then, was the effect of this deed before any creditor acceded to it? Nothing can be better established by authority than the proposition that a trust deed of this kind, whereby a debtor conveys to a trustee for the benefit of creditors, does not constitute the trustee a purchaser until some creditor has had notice of the deed, and has, either by some positive act or declaration, or by silent acquiescence, acceded to it. Until it is shown that a creditor has such notice the deed is considered by a Court of Equity a mere deed of management, revocable by the debtor at will, and the assignee is held to be a trustee for the assignor only. There is scarcely any doctrine in the whole law of trusts in support of which such a long list of authorities can be cited as this. From the cases of *Wallwyn* v. *Coutts*, *Garrard* v. *Lauderdale*, down to *Smith* v. *Hurst*, and *Steele* v. *Murphy*, decisions are to be found affirming this principle. It makes no difference that the creditors are named in the deed or in a schedule to it; until they, or some one of them, has notice of the deed, it is revocable, and the assignee held to be a mere trustee for the assignor. So soon, however, as the fact of the execution of the deed has been communicated to a creditor who, though he may not execute it, does not repudiate it, a binding, irrevocable trust is created, which constitutes the trustee a purchaser for value. If the trustee is himself a creditor, the deed is binding and irrevocable, and the trustee a purchaser for value from the time of its execution."

See also, per Wightman, J., in *Harland* v. *Binks* (22); *Goodere* v. *Manners* (23).

(21) 12 Can. S.C.R. 1. (22) 15 Q.B. 713. (23) 5 Gr 115.

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At the hearing, Mr. Gregory pointed out that in *Biron* v. *Mount* (24) there was no reference as to those creditors to whom the deed had been communicated. The terms of the reference, as stated at page 645 of the report, seem to me quite wide enough to include such persons; but if they are not, there is a great distinction between that case and this. The trustees in that case were creditors, and in such a case the deed becomes irrevocable on execution: *Siggers* v. *Evans* (25). In this case Morrison is not a creditor, and, therefore, it is a material fact whether the deed was communicated or not. In *Smith* v. *Hurst* (26), the assignee did not execute as a creditor, and the reference does call for a report as to communication of the deed to creditors. I do not say that this is by any means the only reason for making the reference one way or the other. Each case must be governed largely by its circumstances and the precise nature of the relief sought. If, however, it be true, as the authorities which I have mentioned in my opinion unmistakably hold, that the communication of such a deed to a creditor, whose position has in some way been altered in consequence, the deed thereby becomes irrevocable, it must be an essential fact to be established in this case, for upon its determination the rights of the plaintiff largely depend.

As to the other point, I think the weight of authority is altogether against regarding the time within which creditors are to come in under the deed as absolute. I know that Mr. Justice *Palmer*, when he presided in this Court, held otherwise, in a case in which I was counsel for some of the parties interested, and I should act upon the same principle.

Biron v. *Mount* (27); *Nicholson* v. *Tutin* (28); *Johnson* v. *Kershaw* (29); *Whitmore* v. *Turquand* (30); *Raworth* v. *Parker* (31); *Spottiswoode* v. *Stockdale* (32); *In re Baber's Trusts* (33), and other cases, support the doctrine I have stated. Of course, if the creditor has refused to come

(24) 24 Beav. 642.
(25) 5 E. & B. 367.
(26) 10 Hare, 30.
(27) 24 Beav. 642.
(28) 2 K. & J. 18.
(29) 1 DeG. & Sm. 260.
(30) 3 DeG., F. & J. 107.
(31) 2 K. & J. 163.
(32) Coop. 105.
(33) L.R. 10 Eq. 554.

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in, has acted hostilely to the deed, he has precluded himself; but, if he has not, he may be allowed the benefit of the deed, though the time has expired; but whether he is so allowed or not must be determined on the particular circumstances of each case.

Joseph v. *Bostwick* (34) was cited as an instructive case on this point. It was decided before *Whitmore* v. *Turquand*, and is not much assistance, because it was unnecessary in that case to decide the point. The Commercial Bank, which was the plaintiff's competing creditor in that case, had no rights under the deed, because it had acted hostilely to the deed throughout, and therefore, upon all the cases, must be taken as having precluded itself from coming in under it, or as having any rights under it.

The plaintiff has, I think, shown enough to entitle him to an inquiry, and, until that has been made, I shall reserve all further consideration, as well as costs.

(34) 7 Gr. 332.

ROBERTS v. HOWE *et al.*

1895.
June 24.

Practice—Answer and Disclaimer to Whole Bill—Costs.

A defence and disclaimer to whole bill cannot be put in, and where this is done defendant will not be allowed costs on bill being amended.

This was a suit for foreclosure of a mortgage and sale of the premises comprised therein. The facts may be stated very briefly. The land originally was the separate property of Margaret Howe, wife of Jacob Howe, and was mortgaged by them to the plaintiff. Upon the death of Margaret Howe the present suit was brought against her surviving husband and others, including three sons of the deceased and their wives. The defendants appeared by the same solicitor and joined in their answer to the bill. In one paragraph of the answer, the defendants, including the married women, set up the defence that the mortgage had been paid. In the same paragraph the married women disclaimed any interest in the mortgaged premises, or in the equity of redemption. The plaintiff joined issue upon the defence of payment, but did not reply to the disclaimer. On the motion to set the cause down for hearing, it was contended for the female defendants that, they having disclaimed, the bill should be dismissed as against them with costs. The Court ordered that the matter stand over until the hearing. The suit coming on for hearing, argument was heard on the 20th of June, 1895.

J. A. Belyea, and *A. W. Ebbett*, for the defendants:—

We submit that the bill ought to be dismissed as against the female defendants with costs. We answered as well as disclaimed in order to prevent the bill being taken *pro confesso* in case the disclaimer was overruled. This is the usual and necessary practice. See Grant Ch. Practice, 187.

W. B. Wallace, for the plaintiff :—

Defendants cannot set up a defence to whole bill,

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and also disclaim to whole bill. The answer and disclaimer must be to separate and distinct parts of the bill: Mitford on Pleading (1). If the bill is ordered to be dismissed as against the female defendants, it must be without costs. By answering as a defence, they prevented me from giving effect to their disclaimer. Then, I submit that, as husband and wife are but one person, they could only answer jointly. Here the female defendants have set up a separate defence by their disclaimer. This can only be allowed on a Judge's order: 1 Daniel Ch. Prac. 181. As they can only answer jointly, two sets of costs will not be allowed: 1 Daniel Ch. Prac. 730; *Garey* v. *Whittingham* (2). As a consequence of their disclaimer I would be entitled to a decree of foreclosure against them. But I could not have asked for that in view of their defence that the mortgage had been paid. See *Perkin* v. *Stafford* (3). Then costs are in the discretion of the Court: Grant Ch. Prac. 435.

1895. June 24. BARKER, J.:—

I disposed of all the points in this case at the hearing except as to the costs of the three defendants who disclaimed. The bill was filed for the foreclosure of a mortgage and a sale of the mortgaged premises, and the three defendants who disclaimed are the wives of three other defendants, who, it is admitted, have an interest in the equity of redemption, and are proper parties to the suit. These female defendants, with other defendants, all appeared by the same solicitor, and all joined in an answer, in which they all, including the disclaiming defendants, set up as an answer to the bill that the mortgage had been paid. The plaintiff filed a special replication, joining issue with the defendants as to the payment. The matter was brought before me at an early stage of the case, and soon after the answer had been filed; but I thought it best to let it stand till the hearing, as any costs these defendants were entitled to under the circumstances were so trifling that a little delay in disposing of the question could not inconvenience anyone.

(1) Am. Ed. 1876, pp. 111 and 411.
(2) 5 Beav. 268.
(3) 10 Sim. 562.

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These defendants here have chosen to put forward, by their answer, a defence to the whole bill, and at the same time to put in a disclaimer to the whole bill. The two things are inconsistent; and, though the disclaimer might possibly overrule the defence, or at all events be taken as preventing the defence from being set up, the defendants should not have complicated matters by so unusual a course. Lord Redesdale, in his work on Pleading, p. 320, says: "If a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer." I think if the defendants wished to disclaim, and get their costs of doing so, they should not have so complicated it by setting up a defence to the suit so that the plaintiff's benefit of the disclaimer should be in any way prejudiced. The equity of the case will, I think, be met by permitting the plaintiff to amend his bill and pleadings by striking out the names of the defendants, Hannah Howe, Mary Howe, and Sarah Howe, without costs.

In re ANNIE E. HATFIELD, *an Infant.*

Infant, Custody of—Parent and Child—Right of Parent to Custody—Character of Parent—Agreement to give Custody to Grandmother.

1895.

June 28.

To defeat the right of a father to the custody of his child, as against its maternal grandmother, his habits and character must be open to the gravest objections. The Court must be satisfied, not merely that it is better for the child, but essential to its safety or welfare in some very serious and important respect, before it will interfere with the father's rights.

A father cannot, as a rule, by mere agreement, deprive himself of his right to the custody of his child, or free himself from his parental obligations.

Semble. If, in consequence of an agreement by a father to give up the custody of his child to a third person, the latter has incurred pecuniary liability, the Court will protect him.

This was an application on the petition of William Hatfield, father of Annie E. Hatfield, an infant, to rescind so much of an order made by Mr. Justice *Palmer*, dated the fifth of May, 1893, as gave the custody of the infant to her maternal grandmother, Elizabeth Ann Elliott. The order, after appointing Hatfield guardian of the person and estate of the infant, directed that she should remain in the possession and under the control of her grandmother until the further order of the Court. Certain circumstances, which it is unnecessary here to recite, as they sufficiently appear in the judgment of the Court, having supervened, the father now asked that the order be rescinded. Gilbert, Q.C., for the petitioner, stated that he could not ask the Court to restore the child to Hatfield, but that he was entitled to have the order rescinded. This was necessary in case proceedings by *habeas corpus* were taken. A summons having been granted, argument was heard the 21st of May, 1895.

George G. Gilbert, Q.C., for the petitioner.

C. N. Skinner, Q.C., and *Knowles*, for the grandmother.

1895. June 28. BARKER, J.:—

In this case Mr. Justice *Palmer* made an order on the 5th of May, 1893, by which it was provided that the infant, who was then a little over two years of age, having been born the 8th of February, 1891, should, until

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further order, be placed in the custody of Elizabeth Ann Elliott, its maternal grandmother, the father to have access to his child, as by the order directed. It does not appear upon the face of this order that it was made by consent of all parties; but, from the evidence, I should assume that if this were not the case, there was no serious objection raised to it. Indeed, it seems to have been a good arrangement for all parties interested. I am now asked to rescind that part of the order by which the custody of the infant is given to Mrs. Elliott. The application is made by William V. Hatfield, the father, and it is based upon the ground that circumstances have entirely changed since the order was made. At that time, the child's mother being dead, he had no one to take care of the child. The father has now married again, and alleges that he is able to take care of his child, and has a home ready for it, where it can be properly cared for and brought up. It was put forward as an additional ground that the applicant had been denied access to the infant, and that attempts were being made by the grandmother either to alienate the affections of the child from her father, or to influence her against going out with him when he came to visit her. I think the evidence does not sustain either of these charges. On the contrary, the evidence shows that Mrs. Elliott's attentions to the child have been most kind and considerate in every way, and her care of it from the mother's death, a few days after its birth, down to the present has been all that could possibly be desired. I had no doubt on the argument as to the order I ought to make; but, as one naturally, in cases like this, feels pressed with a sense of responsibility, I thought it better to delay giving judgment until I had carefully considered the evidence of the witnesses examined before me. I have no hesitation in saying that the order asked for should be made.

It cannot be doubted that *prima facie* the father is entitled to the custody of his child. More than this, I think the authorities are very plain and positive that the habits and character of the father must be open to the gravest objection to defeat this right. In *Ex parte*

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In re ANNIE E. HATFIELD, an Infant.

Barker, J.

Fynn (1), Sir J. Knight Bruce uses the following language (2): "The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and in a sense, on condition of performing those duties; but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance; nor could a Court of justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed; he may be all this without rendering himself liable to judicial interference; and in the main it is, for obvious reasons, well that it should be so. Before this jurisdiction can be called into action between them, it must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be suspended or interfered with. If the word "essential" is too strong an expression, it is not much too strong." This case is cited with approval by Lord Coleridge in *Re Goldsworthy* (3). I quote this passage at length, because it was contended that the evidence showed that the applicant's character was of that description which would warrant this Court in refusing him the custody of the child. I can only say that in my opinion this charge against the father altogether failed. It has also been contended, and endeavored to be shown by the evidence, that the applicant had "given his child" to her grandmother, as the expression was, and that by this act, as well as his consent to the previous order, he had abandoned all right to her custody or control. Mrs. Elliott's

(1) 2 DeG. & S. 457. (2) Page 474. (3) 2 C. P. D. 75.

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evidence on this point is contradicted by that of the applicant; but, if her account of the conversation relied on were accepted as correct, it would not establish the proposition for which it was offered in evidence. The rights and liabilities of parent and child, and their relative duties and obligations, are not of so trivial a nature that they can, in this free and easy manner, be got rid of. If, in consequence of any such arrangement, Mrs. Elliott had assumed liabilities or incurred expenses on account of the infant, this Court would, no doubt, find some means of protecting her; but that is not the case here, as provision, the sufficiency of which is not questioned, was made by the order of this Court, now under consideration, for the infant's support out of the infant's own estate. Neither do I think there is anything in the alleged consent of W. V. Hatfield to the order of Mr. Justice *Palmer*. It was clearly an order of a temporary character, and has served a very useful purpose. It was, however, quite competent for the father to come to this Court and, under the altered circumstances, seek to enforce his parental right, suspended as it was by the previous order. *Hamilton* v. *Hector* (4).

It has not been suggested that the infant's stepmother is not a person in every way suited to take the care of the child. The evidence is indeed, so far as it goes, quite the contrary; and, while one may well appreciate the feelings of regret with which Mrs. Elliott may regard a separation from her grandchild, it cannot be doubted that it is in the infant's interest that the change should be made now rather than when she has become older, and less easily controlled.

The order will be made in this respect as asked for. There will be no costs. I will make no order for Mrs. Elliott to give up the child, as I assume that will be done without objection. Neither will I make any order as to any allowance to the father as guardian for maintenance. If that is desired a special application can be made for the purpose.

(4) L. R. 6 Ch. 701.

NOTE.—See The Queen v. Gyngall, [1893] 2 Q. B. 232.

1895.
June 28.

BARCLAY v. McAVITY.

(No. 3. See ante, p. 59.)

Practice—Offer to suffer judgment—More than one issue in controversy—Plaintiff succeeding on one issue—Amount recovered less than offer—Plaintiff entitled to general costs of cause up to date of offer—The Supreme Court in Equity Act, 1890 (53 Vic. c. 4), s. 130.

Where an offer to suffer judgment was not accepted in a suit involving several issues, and the plaintiff succeeded upon but one issue entitling him to damages less than the amount of the offer, he was allowed costs of whole suit up to the date of the offer.

Plaintiff was the owner of a patent known as "Barclay's lubricator," and by an agreement with the defendants gave them the exclusive right to manufacture and sell the article within a specified area in consideration of a royalty payable upon each lubricator when sold.

The defendants duly manufactured the lubricator, kept it in stock for sale and supplied all orders for it. They also manufactured and sold another lubricator known as the "McShane lubricator," which the plaintiff claimed was a colorable imitation of his invention.

In a suit brought by the plaintiff for an account he claimed royalty on each McShane lubricator sold by the defendants, in addition to royalties alleged to be due him from the sales of his own invention.

In their answer to the bill the defendants denied that the McShane lubricator was an infringement of the plaintiff's patent, and that there was any royalty due him. Subsequently they offered to suffer judgment for $50. The offer not being accepted they filed another for $75. This offer was also not accepted, and the suit proceeded to hearing. The Court found that the McShane lubricator was not an infringement of the plaintiff's invention, but found that there was $36 royalty due by the defendants from the sale of the Barclay lubricator. In view of the

amount being less than the amount of the first offer to suffer judgment, the question arose whether the plaintiff could only recover costs of suit up to the time of the first offer. Upon the question being referred to the Court, it was held that the plaintiff was entitled to costs up to the date of the second offer. See *Barclay* v. *McAvity* (1). The further question was now raised, whether the plaintiff should be allowed any costs except those referable to the issue upon which he had succeeded.

The matter having been referred to the Court, argument was heard June 14th, 1895.

Weldon, Q.C., and *McLean*, for the plaintiff.

C. A. Palmer, Q.C., and *A. H. Hanington*, Q.C., for the defendants.

1895. June 28. BARKER, J.:—

In this case the defendants filed an offer to suffer judgment, which was not accepted, and in the final disposition of the suit the plaintiff had a decree in his favor for a sum less than the amount offered. The order which was made as to costs, and which stands, allows the plaintiff to have his costs up to August 17th, 1892, the date on which the offer to suffer judgment was filed, and the defendants the subsequent costs. The bill was filed for an account of certain sums claimed by the plaintiff as royalty under a license, or agreement, made between the parties, by which the defendants were authorized, on payment of the royalty, to manufacture and sell a patent lubricator known as "Barclay's lubricator." The plaintiff also claimed that the defendants had manufactured and sold another lubricator known as the "McShane lubricator," which he alleged was practically the same thing as the plaintiff's lubricator—in fact a colorable imitation of it—and that on that as well as on some other grounds put forward, the defendants were liable, under the agreement, to account to him for the royalties on the McShane machines as well. In

(1) Ante, p. 59.

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fact the substantial litigation arose out of this latter claim for, as to the other, there never was any serious dispute. The plaintiff failed in sustaining his claim as to the McShane lubricator. In taxing the costs an objection was raised to the clerk allowing the plaintiff any costs, which were referable solely to the claim upon which the plaintiff had failed, and this is the question brought informally before me by counsel, so that I might express an opinion for the clerk's direction.

By sec. 130 of 53 Vic. c. 4, sections 127 and 128 of chapter 37, Con. Stat. are made applicable to suits in Equity. The offer to suffer judgment by default in Equity must be a general one, as section 129 of the above chapter only relates to actions at law. The offer, therefore, relates to the whole cause of action, and to the cause of action as a whole. If it were accepted and a decree made upon it for the amount tendered, the parties would be concluded as to all matters in dispute under the bill, and by the express terms of sec. 127, the plaintiff would, I think, be entitled to his general costs, and the suit would thus be finally disposed of. I do not see that a defendant is any worse off if he has to pay these same costs in case the suit is proceeded with and some portion of the relief sought by the plaintiff is decided against him. This would, of course, not furnish a guide in placing a construction upon the Statute, but where the apparent meaning of the Statute involves this construction, the result may be looked at in determining whether the apparent meaning is correct or not. When the question of costs was before me in this case, I expressed the opinion that this section 127, when applicable at all, deprived this Court of any discretion as to the question of costs; at all events, in all cases where the parties were given costs at all. The section itself provides how the costs of the parties shall be borne as between themselves. And in doing this, it is disposing of *all* the costs of the suit—treating the suit as involving one cause of action, in reference to which the offer must relate. It provides that, in a case where the offer is not accepted, and the plaintiff has not recovered a greater sum than the

sum so offered—that is, has not recovered a greater sum on all grounds of claim in the whole suit than the sum offered as compensation for the same claims—the costs of the suit are to be divided, and the defendant is to have judgment against the plaintiff for costs incurred after the offer; and the plaintiff, if he recover anything at all, shall be allowed his costs up to the date of the offer. I do not think you can import into the sections words which will make it necessary that the plaintiff should recover something on every head of claim, or cause of action, in order to entitle him to his costs of that claim. As I have already pointed out, section 129, as to offers relating to separate causes of action, does not apply to suits in this Court, but the construction contended for would practically impose the conditions of that section upon the plaintiff without giving him the benefit of any separate offer. There is no order of this Court that the defendant shall have all the costs of any particular matter in dispute, or that the plaintiff shall not have them, except so far as these are governed by the offer. I think the plaintiff's general costs of the cause up to the date of the offer are to be taxed, and the defendants' subsequent costs, quite irrespective of the results of particular grounds of claims one way or the other.

I do not myself think there were separate causes of action involved in the case—the relief was under one agreement, and the royalty was only claimed on the McShane lubricator, because in contemplation of law, or in point of fact, it was the plaintiff's cup. Be that as it may, the offer was general, and by law it could only be general, and must be so dealt with.

1895.
August 6.

WILEY v. WAITE, ET AL.

(No. 2. See ante, p. 31.)

Practice—Interrogatories—Answer—Exception for insufficiency.

When substantial information is given by the answer to an interrogatory, the Court discourages exceptions for insufficiency, and will not require minute and vexatious discovery.

A bill to set aside certain conveyances made in 1890 by the defendant W., as fraudulent and void, alleged that after their execution the defendant built a dwelling house upon the land from money obtained from a surrender of one life policy taken out in 1879 and the hypothecation of another taken out in 1883 on the life of his wife; and that the policies were effected and maintained by the defendant when in insolvent circumstances. The defendants were required by the interrogatories to give an exact state of W.'s business at the time the policies were effected and at the several times the premiums were paid. Having only partially answered, they contended on an exception to the sufficiency of the answer that the discovery sought was not pertinent and material to the suit.

Held, that the interrogatories were proper, and that the defendants must answer according to the best of their information.

Exceptions to answers:

The facts fully appear in the judgment of the Court.

Argument was heard June 14th, 1895.

Blair, A.-G., and *Geo. L. Wilson*, for the plaintiff.

Lawson, for the defendants.

1895. August 6. BARKER, J.:—

The answer to certain interrogatories based upon section 11 of the plaintiff's bill, as amended, was excepted to on the ground of insufficiency. The object of this suit is to set aside as fraudulent against the plaintiff, who is a judgment creditor of the defendant Waite, two conveyances made in 1890—one by defendant Waite to defendant Murphy, and the other by Murphy to Waite's wife. Section 11 of the Bill, in a general way, alleges that soon after these conveyances had been made, the defendant Waite

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commenced to build upon the land in question an expensive dwelling-house, and that a portion of the money necessary for the purpose was derived from the surrender of one life policy and the hypothecation of another on the life of Waite's wife, both of which policies were effected originally and kept alive afterwards by the moneys of Waite, who, it is alleged, was insolvent, not only when the first policy was taken out, but continually afterwards.

I think the first exception must be overruled, as, in my opinion, the interrogatories to which it relates have been substantially answered.

In *Reade* v. *Woodrooffe* (1), the Master of the Rolls says: "I am very desirous that the suitors should come to the real subject in dispute as early as possible, and when I see that the substantial information is given though not strictly and technically, I have always discouraged exceptions; but where information is refused. it is the duty of the Court to enforce it." At page 425 the M. R. in the same case is thus reported: "The first objection made is the difficulty of giving the discovery asked which is searching and minute. But if I find that the defendant has given a substantial answer I shall not require of him a minute and vexatious discovery." It is true that in one or two particulars the questions are not answered with exact precision, but they are substantially answered, and in my opinion, the exception should be overruled on the authority I have just quoted.

This exception will be overruled with costs.

Second Exception:—

The interrogatories to which this exception relates are directed to the assignments of the life policies, that is, the surrender of the one and the assignment of the other, when the money was borrowed from the company. The plaintiff did not directly ask the defendants if they had any copy of these assignments, but he did require them to "set forth with particularity the words in which such

(1) 24 Beav. 421.

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assignments were made and by whom," etc. The plaintiff not only asked the defendants for a full statement of the terms and conditions of the assignments, but also asked to state their *terms, if they were in writing.* In answering, the defendants do not say whether or not they have copies of the assignments, or, if not, whether they have made any effort to obtain them; neither do they say that the assignments were in writing, though this must be so inferred because they do say they were signed; and they mention the names of the witnesses. Though I think, in strictness, the defendants should have distinctly stated whether or not they had copies of the assignment, I am fully impressed with the idea that the defendants had no desire to withhold information and that they have in fact given full information or as full as they can. More than this, I can well understand them in the absence of any distinct question as to having copies of the assignments they may have neglected giving information on that point and been led into thinking their answer was sufficiently full and explicit in reply to the interrogatory which asked for the terms of the assignments if they were in writing. It is a simple matter for defendants in answering to give the best information they have or can obtain, that is in cases where the circumstances are such as to render it incumbent upon them to seek information which they do not themselves possess, and to pledge their oath that they have done this. I think the exception must be allowed, but under the circumstances without costs.

Third Exception:—

This exception must be allowed with costs. The Bill alleges that the defendant Waite was insolvent at the time the policies were taken out and that he has always been insolvent ever since. Based upon that allegation the plaintiff has asked for the exact state of Waite's business affairs when the policies were taken out; the gross value of his assets and liabilities at that time and at the several times when the premiums were paid. As one of these policies was taken out in 1879 and the other in 1883, the informa-

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tion asked for relates to transactions occurring many years ago. I mention this because this Court, while it will compel a full disclosure and permit a searching examination as to matters relevant to the question in dispute, will not countenance interrogatories which it would be unnecessarily vexatious or onerous to answer. It is claimed here that not only are these interrogatories oppressive and vexatious, but that they relate to irrelevant matters. The Bill was filed to set aside conveyances made in 1890, and it is said that it is immaterial to that issue whether Waite was insolvent in 1879 or not - eleven years prior to the making of the conveyances which are attacked and in all probability long before the plaintiff became a creditor of Waite. The evidence may, however, be relevant to the case now made by the Bill; and while the Court will protect defendants from the necessity of answering unnecessarily vexatious or oppressive interrogatories, they must, when they submit to answer, do so fully and so as to satisfy the rules by which the Court is governed. See *Earl of Gengall* v. *Frazer* (2); *Kennedy* v. *Dodson* (3). Beyond stating that Waite's liabilities at the time of effecting the insurances were about $15,000, and that his liabilities at that time greatly exceeded his assets, these interrogatories are not answered at all, nor is any reason given for not doing so. The defendants allege that Waite at the same time was not insolvent or in insolvent circumstances. As to the period between the date of the first insurance in 1879 down to June, 1892 when Waite made his assignment for the benefit of his creditors, no information whatever is given in response to the interrogatories. One would think that if anything like a reasonably regular set of books had been kept by Waite, the amount of his assets and liabilities for each year could be given at least approximately. There is nothing in the answer to show that this cannot be done easily, and I must conclude that it can be. At all events the plaintiff is, I think, entitled to the best information the defendants can give, and they have practically given none. The first exception will be overruled with costs, and the second and

(2) 2 Hare, 99.

(3) [1895] 1 Ch. Div. 333.

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third will be allowed, but the second without costs. The plaintiff's costs of the third exception and the defendants' costs of the first will be taxed—the less amount deducted from the greater and the balance certified by the clerk, and such balance is to be paid to the party entitled by the other party.

The defendants are to have 30 days from the date of settling minutes of this order, within which to put in a further answer to section 11 of the plaintiff's Bill as amended.

SHIELDS v. QUIGLEY.

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August 6.

Practice—Partition Suit—Defendant not Appearing at Hearing—Answer Unsupported by Evidence and Considered Unnecessary—Costs.

Where in a partition suit one of the defendants did not appear at the hearing, and his answer was unsupported by evidence, and was assumed by the Court to be unnecessary, he was held not entitled to any costs.

The facts appear in the judgment of the Court. Argument was heard May 8th, 1895.

C. E. Duffy, for the plaintiff.

Jordan, Q.C., for the defendants.

1895. August 6. BARKER, J.:—

This was a suit for the partition of some lands at Grand Falls, and there is but one question involved. The defendant, Elizabeth Quigley, is the widow of the late Michael T. Quigley, who died seised of the lands sought to be partitioned. She has raised no objection to being made a party to the suit, but seeks compensation for her right of dower. A portion of the dwelling house is on land owned by Elizabeth Quigley in her own right, and her counsel asked that as a compensation for her right of dower, she should be allowed to occupy the premises during her life. This

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would practically prevent any partition until after her death, and then the same difficulties in the way of partition would exist as to those who may succeed to her rights. Taking the valuation of the land in question as fixed by Elizabeth Quigley and her dower interest would be very small and worth very little, but I think she underestimates it. The property at the outside does not seem to be worth over $1,000 or $1,200, though Elizabeth Quigley's estimate is probably not half that amount. I think $50 would be ample compensation for the widow's dower. The costs of this proceeding have been largely increased by her action, and in consideration of that and her action as to the estate, I shall deprive her of all costs in this suit except $25. I think the defendant, William H. Quigley, is not entitled to any costs. His answer was altogether unsupported by evidence; he did not appear at the hearing, and I must assume it was unnecessary. There will be the usual order for a sale of the premises; the plaintiff's costs, in which will be included costs of sale, will be taxed and paid out of the proceeds to plaintiff's solicitor; the sum of $25 will be paid for the costs of Elizabeth Quigley to her solicitor; a further sum of $50 will be paid to Elizabeth Quigley in full compensation for her dower, and the balance of proceeds will be equally divided between Melvina Shields, William H. Quigley, Michael J. Quigley, and Martha Ann Williams.

1895.
August 27.

NEW BRUNSWICK RAILWAY CO. AND BROWN v. KELLY.

Practice—Counsel Fee on Hearing—Retirement of Judge after Hearing—Allocatur by Different Judge—58 Vict. c. 14, s. 3—Interlocutory Injunction—Defendant Unsuccessfully Opposing Motion—Dissolution Order Silent as to Costs—Costs in the Cause—Application for time to Plead, Answer or Demur—Costs of Application—Judge's Order—Construction.

A suit was heard before one of the Judges of the Supreme Court. Before judgment on appeal reversing his decree was delivered he retired from office. After the judgment on appeal a counsel fee on the hearing was allowed by one of the Judges to the successful party; reliance for his authority was placed upon section 3, chap. 14 of 58 Vict. (1)

Held, that there was power to allow the fee without the Act.

A suit was brought for an injunction and other relief, and application was made for an interlocutory injunction. The defendant opposed the motion, which was refused with costs. On appeal the motion was allowed. At the hearing of the suit a decree was made in plaintiff's favor. On appeal the decree was reversed, the bill was dismissed with costs, and the injunction order dissolved.

Held, that the defendant was entitled to the costs of opposing the interlocutory application as costs in the cause.

Defendant moved to have bill dismissed for want of prosecution. Before judgment was given refusing the motion, the defendant was served with the bill. As it would be unnecessary to answer if his motion were allowed, defendant obtained time by Judge's order until after judgment on the motion was given in which to answer. The order directed the costs of application to be costs in the cause. The suit proceeding to hearing, defendant was successful.

Held, that he was entitled to the costs of his application for time to answer, as costs in the cause in accordance with the order.

These were cross motions for review of clerk's taxation of costs. The facts are fully stated in the judgment of the Court. Argument was heard August 20th, 1895.

Blair, A.-G., for the plaintiffs:—

The judgment of the Supreme Court dismissed the bill in the suit with costs, but made no order as to costs when

(1) Whenever it shall happen that a Judge shall by reason of death, resignation or otherwise, cease to hold his office, before granting any allocatur or certificate for costs to which any party may be entitled in any proceeding, either at law or in equity, any other Judge may on application grant such allocatur or certificate as fully and in all respects the same as such first mentioned Judge could have done if then holding office.

dissolving plaintiffs' injunction. The defendant cannot contend in view of these specific directions, that he would be entitled to costs of opposing the motion for injunction as costs in the cause. The proceedings in connection with the injunction were unsuccessfully opposed by the defendant and should not carry costs because it was dissolved on the dismissal of the suit. The plaintiffs also invite the Court to consider the propriety of the fiat of Mr. Justice *Tuck*. The defendant justifies it under the recent Act 58 Vic., c. 14, s. 3. But to do so would be to give the Act a retroactive operation, as the hearing for which the counsel fee was allowed took place before Mr. Justice *Fraser* previous to the passing of the Act. The language of the section is plainly not retroactive, and if such an effect was intended more explicit words would have been used. See *Moore* v. *Irvine*.(2)

C. E. Duffy, for the defendant :—

As defendant was successful in the end in having the injunction order dissolved, he is entitled to the costs of opposing the interlocutory application as part of the general costs of the cause.

[BARKER, J.—Your difficulty appears to be that you have no order allowing you costs.]

The allocatur of Mr. Justice *Tuck* is allowable under the late Act. It is not necessary that it should be given a retroactive effect, for defendant was unable to apply for a counsel fee any sooner than he did, or until after the judgment of the Court of Appeal, and the Act was then in force.

Blair, in reply.

Cross motion by defendant.

C. E. Duffy, for the defendant :—

The clerk improperly disallowed costs of defendant in applying for time to plead, answer or demur when the order granting time directed them to be costs in the cause.

(2) 2 Exch. 40.

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NEW BRUNSWICK RAILWAY CO. AND BROWN v. KELLY.

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Blair, A.-G., for the plaintiffs :—

The defendant is not entitled to ask for costs of an application which was clearly for his own benefit. The order was intended to meet the event of the plaintiffs being successful in the suit, when they would plainly be entitled to the costs of resisting the application.

Duffy, in reply.

1895. August 27. BARKER, J. :—

The clerk's taxation of the defendant's costs in this suit is sought to be reviewed both by the plaintiffs and the defendant, and cross motions for that purpose were made. It seems that the defendant brought an action against the plaintiff, Brown, who was a servant of the Railway Company, for trespass upon certain land which both the company and the defendant claimed, and in this action the present defendant received a verdict. The bill in this suit was then filed for the purpose of restraining further proceedings in the action of trespass, and of obtaining a declaration that the conveyance of the land in question to the plaintiff company should have priority on the registry to the conveyance to the defendant. An interlocutory injunction was applied for on notice before the Chief Justice to restrain the proceedings at law, but on hearing the application he dismissed it with costs. This order was reversed on appeal, and, subject to the condition of first paying the costs of the action at law, further proceedings in it were restrained. The cause came down to a hearing before Mr. Justice *Fraser*, who made a decree in the plaintiffs' favor. This decree was reversed on appeal; the plaintiffs' bill dismissed with costs, and the injunction order dissolved. Mr. Justice *Fraser's* judgment was only given a short time before his resignation in order to accept the position of Lieutenant-Governor, and the judgment on appeal was only given in Trinity Term last, over a year later. The defendant's counsel then for the first time being in a position to ask for a counsel fee on the hearing, applied to Mr. Justice *Tuck*, who granted him a fiat for

$120 for that service. In taxing the defendant's general costs of the cause, the clerk allowed this counsel fee, and also the costs of opposing the motion to the Chief Justice for the injunction. It is to the allowance of these items that the plaintiffs object.

I think Mr. Justice *Tuck* had ample power to grant the fiat, and that the clerk was right in allowing it. The Attorney-General contended that the only authority by which he could grant it was derived from the Act 58 Vic. c. 14, s. 3, and that this Act had no retroactive effect so as to include this case. I shall not stop to consider the effect of this Act, for in my opinion there is ample authority for granting the fiat without this Act. I do not think it necessary that a counsel fee should be granted by the Judge before whom the cause is heard, or that he is the only person authorized to grant it. Of course he naturally is the Judge to whom an application would be made, and I imagine the circumstances would be quite exceptional where any other Judge would act. In *Nicholson* v. *Temple* (3), the Court came to the conclusion that under the provisions of sec. 50, cap. 51, Con. Stat., no other Judge than the one before whom the cause was actually tried could give a certificate for costs. They, however, arrived at that conclusion, because they thought the language of the section was so positive as to indicate a clear intention on the part of the Legislature to confine the authority to act to the Judge who had presided at the trial. Had it not been for that the provisions of cap. 118, Con. Stat., sub-sec. 2 would have been ample to confer the authority upon any Judge. In the case of *Bradshaw* v. *The Foreign Mission Board*, decided by the Supreme Court of Canada, in the present year, but not yet reported, that Court held that under sec. 85 of 53 Vic. c. 4, a new trial could be moved for before any Judge of this Court when the Judge before whom the trial had taken place had resigned. Perhaps the right to a new trial and the right to costs are not in all respects so similar that the same rule would

(3) 21 N. B. 192.

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govern in enforcing them. At all events the decision of the Supreme Court in the Bradshaw case is in favour of giving such a construction to such Acts as will not defeat parties' rights, but give the authority for the purpose rather than deny it. Sub-section 2 of chap. 118, Con. Stat., provides that "authority to a justice of any Court to do an act, shall empower any other justice of the same Court to act in his stead when necessary." And sec. 1 of the same chapter provides that in the construction of Acts of Assembly, that shall be the rule unless it is inconsistent with the manifest intention of the Legislature Now, this counsel fee is allowed under chapter 119, Con. Stat., which contains the table of taxable fees, and under the heading "Counsel," it is provided that a "*fee at the discretion of the Court*" be taxed on the hearing. If the words had been "*at the discretion of the Judge*," I should have thought there was no such manifest intention of the Legislature, shown as to prevent the application of sub-section 2. But the Court always exists, and can speak through and by any one of its Judges, who, in a case like this, evidence by means of a fiat how the discretion of the Court has been exercised. I think the clerk was right in allowing this fee.

I also think the clerk was right in allowing the defendant the costs of opposing the motion for the injunction before the Chief Justice. It is true there is no specific order giving these costs to the defendant, but when the plaintiffs' bill was dismissed with costs, the costs of opposing that application were taxable as part of the general costs of the cause. When the Court reversed the order of the Chief Justice refusing the application for an injunction, the parties were in the same position as though the Chief Justice had made the order which the Court on appeal made; in which case the defendant would have been in the position of a party who had unsuccessfully opposed a motion for an injunction. Certain rules have been laid down in respect to costs of interlocutory proceedings being or not being "costs in the cause," and those costs not within these rules are not taxable to the successful party without a special order: *Daniell Ch. Pr. 1378.* One of

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these rules is, that where a bill is dismissed with costs, a defendant is entitled to his costs of unsuccessfully opposing a motion for an injunction as "costs in the cause." See *Stevens* v. *Keating* (4). In that case the Lord Chancellor says: "I consider that the injunction was granted on an assumption of right which has been ultimately disproved. In the course of this case I made an order disposing only of that part of it which related to the keeping of the account, not thinking it expedient to make any order with respect to the costs of the former motions as asked by the defendants. The bill has since been dismissed with costs, and the question I am now called upon to decide is, whether in a cause where an injunction has been obtained which turns out to have been improperly granted, and the plaintiff has thus got a right which he cannot maintain, the defendant is entitled to the costs of the motion in which he unsuccessfully resisted the granting of the injunction." And the Vice-Chancellor's order disallowing these costs was reversed. This disposes of the plaintiffs' part of this application.

As to the defendant's motion the facts are these: He gave notice on the 16th October, 1891, of a motion to have the plaintiffs' bill dismissed for want of prosecution, to be heard at St. John on the 27th of October. The motion was made on that day, but the argument was adjourned to be heard at Fredericton on November 3rd. Judgment was given in January, 1892, when the application was dismissed with costs. In the meantime, on November 16th, and while this application was pending, the defendant was served with a copy of the bill and interrogatories. Being desirous of avoiding the expense of putting in an answer, which would be useless in the event of his succeeding in his motion to dismiss the bill, and at the same time not wishing to prejudice his right to answer by delay, the defendant in December, 1891, took out a summons from the Chief Justice for time to answer; and on the 7th of that month an order was made giving the defendant until the expiration of 15 days from the time when judgment should be given on the motion to dismiss, to demur, answer or plead; and the Chief Justice by his order directed the costs of that

(4) 1 McN. & G. 659.

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application to be costs in the cause. The clerk disallowed these costs to the defendant, on the ground, as was stated to me on the argument, that the extension of time for answering was an indulgence to the defendant, for which he should pay rather than receive costs; and that under these circumstances the true construction of the Chief Justice's order was, that if the plaintiffs on the final determination of the suit got their general costs of the cause these would be included, but that if the defendant succeeded he would not get them. I think the more prudent course in the case of an order where the terms of it are so plain, is for the clerk to tax in accordance with the provisions of the order without putting a construction upon it, founded upon speculation as to the considerations, by which the Judge was governed in making it. I do not concur in the view that granting the time was necessarily an indulgence for which the defendant should have paid costs. I do not know upon what material the Chief Justice acted in making the order, but there is nothing before me nor was anything suggested in the argument to lead me to suppose it was not as convenient for the defendant to put in an answer before the expiration of the 30 days as after. The granting of the time was as much in the plaintiffs' interest as in the defendant's, for if the answer had been put in and the motion to dismiss had succeeded, the plaintiffs would have had the additional costs of the answer to pay. On the other hand, if the motion to dismiss did not succeed, the delay in answering was unimportant. I can well understand how in making the order for the costs to be costs in the cause, the Chief Justice may have considered that course to be equitable, so that the party who eventually succeeded in the suit should get the costs of this proceeding, which was as much for the benefit of one party as the other. I think the clerk should not have disallowed these costs.

The plaintiffs' motion is refused; the defendant's motion is allowed, and the clerk is directed to allow to the defendant his costs under the Chief Justice's order of the 7th of December.

In re BETHIA J. CUSHING.

1895.
August 27.

Dower- Admeasurement—Report of Commissioners—Difficulty in Setting off Part of Premises as Dower—Failure to Report Value—Amendment—Supreme Court in Equity Act, 1890 (53 Vic. c. 4), ss. 250, 254.

Where commissioners to admeasure dower reported that it was difficult and not advisable to set off the widow's dower in the premises, the report was referred back to them to state what the value of her dower was in the premises.

This was a petition by Bethia J. Cushing for admeasurement of her dower in lands belonging to the estate of her deceased husband, the late Andre Cushing. The Court having appointed commissioners for the purpose of making the admeasurement, their report came on for consideration August 23rd, 1895. They reported concerning one lot of land with dwelling house and barn that it was not advisable to apportion the petitioner's dower therein. They further reported that the land and dwellings were worth an annual rental of $400. Section 250, sub-sect. 4, of the Supreme Court in Equity Act, 1890 (53 Vic. c. 4), provides that where, from any cause, the commissioners find it difficult to make an admeasurement they may make a special report, showing the value of the widow's dower in the premises.

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

Weldon, Q.C., for the devisees of Andre Cushing.

1895. August 27. BARKER, J.:—

The commissioners' report in this matter must go back for amendment. They have specified what seems to be sufficient reasons for not making an admeasurement, but they have not, as required in that case to do, reported the *value of the widow's dower in the premises*. They have reported what the annual rental is, but that is not

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what is required. The Act authorizes the value of the dower to be reported, and when that report is confirmed, the amount becomes a lien on the land specified by the Court, on the report being registered. This amount, by section 254 of The Supreme Court in Equity Act, 1890 (53 Vic. c. 4), can be recovered at law from the owners, or by enforcement of the lien, but, when paid, the lien is discharged. The report, as it is at present, is entirely informal, and, if registered, would convey no positive information to any one as to the extent of the lien. The commissioners have not reported as to the arrears of dower, except to leave the Court to make some kind of a calculation on figures not very precise.

The report will be referred back to the commissioners, with directions to report:

1. The amount due for arrears of dower, specifying up to what time they are allowed.

2. The value of the widow's dower in the premises.

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September 3.

JOHNSTON v. JOHNSTON.

Husband and Wife—Wife Compelled to Live Separate and Apart from her Husband—Restraint of Husband's Marital Rights in Wife's Separate Property.

A married woman being the owner in fee at the time of her marriage of a lot of land, was compelled to live separate and apart from her husband, not wilfully and of her own accord.

Held, that while such separation continued she was entitled to an injunction restraining her husband from enjoying any marital rights in the property, or interfering with its use and occupation by her.

The facts in this case appear in the judgment of the Court.

Argument was heard May 8th, 1895.

Geo. W. Allen, for the plaintiff.

C. E. Duffy, for the defendant.

1895. September 3. BARKER, J.:—

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The plaintiff in this suit files a bill against the defendant, her husband, by which she seeks to have him restrained from cutting any growing wood or timber upon certain property owned by her, and from removing any timber or wood and from selling or disposing of the same; and also from cutting the hay or farming the said property, and from occupying the same. The bill alleges that the plaintiff, at the time of her marriage to the defendant, in December, 1865, was the owner in fee of certain lands and premises in the Parish of St. Mary's, in the County of York, which she and her husband occupied from that time until the 11th day of February, 1890, at which time she left her husband in consequence, as she alleges, of his cruel treatment, and since that time, as the bill alleges, the plaintiff has been living separate and apart from her husband, and supporting herself. The cause was heard before me, and the plaintiff and defendant were both examined as witnesses in addition to some of the children.

No doubt a wife seised as her separate property of lands may restrain her husband as the tenant for life from committing waste; and if the relief sought in this case were confined to this, it would be unnecessary to consider all that part of the evidence upon which reliance is placed as entitling plaintiff to a declaration that she was justified in leaving her husband and living apart from him. The bill, however, seeks to restrain the defendant from occupying the premises, and, in fact, from exercising any privileges in connection with them, which by virtue of any marital right he might be entitled to enjoy. And this relief is based upon the existence of such actions and conduct on the defendant's part towards his wife as rendered the separation involuntary on her part. I have read the evidence carefully, and had the advantage of seeing the witnesses under examination, and I have come to the conclusion, though with some hesitation, that the plaintiff was justified in leaving the defendant, and that the separation is not wilful or voluntary on her part. The

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defendant seems to have been in the habit of constantly using most profane and indecent language to his wife, calling her by names, from the use of which any respectable man would shrink, and, according to the preponderance of the evidence, he did at times use personal violence to her, and according to the plaintiff's evidence, told her to leave the house and never return. The defendant admits that he accused his wife of endeavoring to poison him, and while giving his evidence, adhered to the opinion that she did try to poison him. There does not seem to be a particle of evidence to support any such charge; and the man who could imagine it as to his own wife, and, for years afterwards adhere to his belief in her guilt, can scarcely get much credit for sincerity when he asserts that he, notwithstanding all this, desires his wife to return to him. Without going through the evidence at length, I have arrived at the conclusion, and so find, that the plaintiff was, at the commencement of this suit, living separate and apart from her husband, not wilfully and of her own accord.

The plaintiff is, I think, entitled to a perpetual injunction against the defendant against committing waste on the premises in question, and to an injunction against the defendant, so long as she continues to live separate and apart from the defendant, not wilfully and of her own account, restraining him from using or occupying the said premises, or selling or disposing of the produce thereof, or in any way interfering with the plaintiff's use, enjoyment or occupation of the same.

WATERS v. WATERS.

1895.
September 17.

Deed—Agreement to Maintain Vendor—Death of Vendee—Performance of Agreement by Plaintiff at Request of Vendee's Widow—Interest of Vendee's Infant in Premises—Plaintiff's Lien.

A farm was conveyed by an aged couple to their son in consideration of his agreement to board them on the farm. On the death of the son in their lifetime, leaving a wife and infant daughter, his brother, the plaintiff, at the request of the widow and the parents, took possession of the farm and performed the agreement.

Held, that the plaintiff was entitled to a lien on the land for money expended by him in making permanent improvements thereon and in the performance of the agreement.

In 1874, Nelson H. Waters entered into an agreement with his son, Isaac Waters, to convey to him in fee a farm and dwelling, in consideration of the latter boarding and maintaining him and his wife on the premises during the remainder of their lives. On the 20th of May of that year the property was duly conveyed to Isaac Waters, who at the same time executed a bond in a penal sum for the performance of his part of the agreement. Soon afterwards he went into possession of the premises, and continued to occupy them until the time of his death in August, 1883. His parents survived him, as also did his wife and an infant daughter. The widow endeavored to manage the farm and board the parents of her late husband, according to his agreement with them, but found the arrangement an unsatisfactory one. With the consent of Nelson H. Waters, she prevailed upon the plaintiff, who was a son of Nelson H. Waters, to take over the farm as owner and perform the agreement. No conveyance was executed of the farm to the plaintiff. At the time of this transaction the daughter of Isaac Waters was about two years of age. The plaintiff, after entering into possession of the property, laid out, from time to time, a considerable sum of money in its improvement, and, by his own labor, greatly enhanced its value. He also faithfully observed

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the terms of his brother's agreement with his parents, until the time of their death. The father died on the 28th of March, 1888, and the mother died on the 7th of November, 1894. The plaintiff now filed a bill against the widow and daughter of Isaac Waters, praying that they be decreed to execute a conveyance to him of the property, or, in the alternative, that the money expended by him in maintaining Nelson H. Waters and wife, and in improving the premises, be declared a lien thereon. Argument was heard August 23rd, 1895.

W. Watson Allan, for the plaintiff:—

[BARKER, J.:—I would like you to address your argument to the difficulty that the infant defendant was not, and could not be, a party to the agreement under which the plaintiff has acted.]

The circumstances of this case fairly bring it within the well-known class of contracts known as "family arrangements," in which the Courts have held that a person's interest in property may be bound by an agreement to which he is not a consenting party by reason of infancy or some other cause, if the agreement was made to prevent or put an end to litigation, and to preserve the peace and property of families. See *Williams* v. *Williams* (1). By the agreement in this case family litigation was avoided. On the death of Isaac Waters, his father would have been entitled to ask the Court to restore the property to him, and, in all likelihood, would have sought such relief if the arrangement with the plaintiff had not been made. If Nelson H. Waters could have insisted on this relief against the infant it is difficult to see wherein she can be prejudiced by the same relief at the instance of the plaintiff. In *Brooke* v. *Lord Mostyn* (2), Turner, L.J., says:—"That this Court has power to compromise the rights and claims of infants and persons under disabilities where those rights and claims are merely equitable, has not been, and cannot be, disputed."

(1) 2 Ch. App. 294. (2) DeG., J. & S. 373.

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The defendants did not appear.

1895. September 17. BARKER, J.:—

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In this case, I think, the plaintiff is entitled, under the circumstances and facts alleged in the bill, and proved against the infant defendant, to a lien on the land for the money expended in permanent improvements and in the support and maintenance of his father and mother after Isaac Water's death. I am disposed to think that the transaction is not, as was contended for by the plaintiff, what is known as a "family arrangement" even under the extended definition given to that phrase by Turner, L.J., in *Williams* v. *Williams* (3). There was here no doubtful right to be compromised, no dispute or litigation to be settled, and the honor of the family was in no way involved. Neither did the agreement that the plaintiff, on the death of his brother should, in consideration of his furnishing to the parents during the remainder of their lives, the support and maintenance which was the consideration for the conveyance to Isaac Waters, and then be entitled to the land, in any way, so far as I can see, have anything to do with preserving the land. It simply transferred it from one person to another in consideration of his discharging a liability. The agreement would, of course, bind the defendant, Elizabeth Waters, so far as her right of dower is concerned, but it is in reference to the infant's rights that the difficulty arises. So far as the plaintiff seeks to have a conveyance of the land to him decreed, I think his case must fail. I think he is entitled to a lien for his expenditure.

The bill alleges, and it is in evidence, that it was a part of the agreement between Isaac Waters and his father, Nelson, when the original agreement was made, and in consideration of which the property was transferred to Isaac, that he should provide his parents with support and maintenance *upon the farm and premises* during their lives. An agreement such as this is treated as the purchase

(3) 2 Ch. App. 304.

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money for the transfer of the land, and unless there is a clear evidence of a contrary intention, the grantors would have a lien on the land for the performance of the agreement. See *Cunningham* v. *Moore* (4). There is no evidence of any such intention here. On the contrary, we find that the support is to be furnished *on the premises*, a provision inconsistent with any change of possession or ownership by Isaac Waters so long as the lives of his parents existed. I should think that Nelson Waters and his wife had a lien on the land for the performance by Isaac of his obligation. Under these circumstances, where the plaintiff, at the instance of the defendant, Elizabeth Waters, who had a dower interest, and at the instance of Nelson Waters, who had the lien, paid off this lien which was for a part of the purchase money, and thus discharged *pro tanto* an obligation of Isaac Waters, binding upon the defendant as his heir, and thus preserving to her the property, he is, I think, in equity, entitled to a lien for his expenditure.

There will, therefore, be a declaration that the plaintiff is entitled to a lien on the land mentioned in section 6 of the bill for the amount expended by him in permanent improvements thereon, and in the support and maintenance of Nelson H. Waters and Ann Waters, less a fair amount as rent. There will be a reference to inquire:—

1. What is the value of the permanent improvements put by the plaintiff upon the said land since he took possession in April, 1884.

2. What is the cost of the board, lodging, support, maintenance and attendance furnished by the plaintiff to Nelson H. Waters and Ann Waters after Isaac Waters' death.

3. What is a fair and reasonable amount to be allowed as rent of the said premises since April, 1884.

Further directions are reserved until Referee has reported.

(4) Ante, p. 116.

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1895.
October 15.

Driving Dam—Overflow of River—Damage to Riparian Owner—Plaintiff Assisting in Building Dam—License—Acquiescence—Prescriptive Right to do Damage.

A dam was constructed above the female plaintiff's land by the defendants for the purpose of driving their logs, with the result that the stream widened its banks where it flowed through the plaintiff's property and caused injury to it. The plaintiff's husband had assisted in building the dam as an employee of the defendants, and at the time was the owner of the land now owned by the plaintiff.

Held, that the plaintiffs were not estopped from seeking to restrain by injunction further injury to the property and claiming damages for the injury done.

The circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it considered.

Gradual and increasing damage to the land of a riparian owner from log driving operations and from an overflow of water caused by defendants' driving dam, extending over a number of years, will not give a right, either by prescription or under the Statute of Limitations, to commit further acts of additional damage.

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

Argument was heard April 30th, 1895.

White, S.-G., and *Allison*, for the plaintiffs:—

The defences of acquiescence and prescriptive right are inconsistent and cannot be allowed. If acquiescence is relied on there can be no pretence of a right by lapse of time. Acquiescence would mean an assertion by plaintiff of her rights and an admission of them by the defendants. The defendants must elect between the two defences. There can be no acquiescence by a married woman, nor can laches be imputed to her: *Lench* v. *Lench* (1); *Lord Mountford* v. *Lord Cadogan* (2). In *Blandford* v. *Marlborough* (3), it is laid down that the inattention or laches of a married woman cannot hurt or affect her right. Nor

(1) 10 Ves. 512, at p. 517. (2) 19 Ves. 635. (3) 2 Atk. 542.

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can the acts of the husband be taken as an acquiescence by his wife. See *Cresswell* v. *Dewell* (4); *Bateman* v. *Davis* (5). A married woman is only able to convey property by an acknowledged deed and will not be permitted to effect the same result by lying by: *Kerr* v. *Corporation of Preston* (6). Acquiescence must be founded on a full knowledge of the facts and a perception of the consequences that will ensue: *La Banque Jacques Cartier* v. *La Banque D'Epargne de la Cite de Montreal* (7). It is also necessary that the person relying on estoppel by acquiescence should have acted in ignorance of the title of the other man and that the other man should have known of that ignorance and not mentioned his own title: *per* Cotton, L.J., in *Proctor* v. *Bennis* (8). Acquiescence to deprive the plaintiff of her legal rights must amount to fraud. Here none of the elements of fraud are present. See *Willmott* v. *Barker* (9), where Fry, J., very exhaustively treats of this phase of acquiescence. The prescriptive right set up by the defendants has no foundation in fact and does not rest upon any well-considered conception of the law. A right to do damage cannot be acquired by repeated acts of insensible and increasing aggravation. This principle is very learnedly discussed by Lindley, L.J., in *Lemmon* v. *Webb* (10), and on appeal (11). In cases like the present, lapse of time only becomes material and operative after it is ascertained that the acts complained of are injurious: *Attorney-General* v. *Leeds Corporation* (12).

E. McLeod, Q.C., and *M. G. Teed*, for the defendants:—

It has not been shewn that the property is the wife's separate estate. She cannot hold it as such under Cap. 72 C. S., for it excepts property received by a married woman from her husband: *Doe dem. Chambers* v. *Douglas* (13). Neither has she a separate estate in equity in the absence of evidence of an intention to exclude the husband. If she

(4) 4 Giff. 456.
(5) 3 Madd. 98.
(6) 6 Ch. Div. 463.
(7) 13 App. Cas. 111.
(8) 36 Ch. Div. 740, at p. 760.
(9) 15 Ch. Div. 96.
(10) [1894] 3 Ch. Div. 1.
(11) [1895] App. Cas. 1.
(12) 5 Ch. App. 583.
(13) 23 N. B. 484.

has a separate estate, then she is as a *feme sole* with regard to it and may bind it by her acts. See *Fitzpatrick* v. *Dryden* (14). The case of *Kerr* v. *Corporation of Preston*, *supra*, is not in point. The corporation there was acting under statutory powers and could not exceed them by any device. The defendants rely upon the plaintiff's acquiescence and laches as barring her right to the interference of a Court of Equity. In *Birmingham Canal Company* v. *Lloyd* (15), it was held that a laches of two years was sufficient to defeat an application for an injunction under circumstances similar in character to this. The same rule is laid down in *The Rochdale Canal Company* v. *King* (16), and in *Ware* v. *Regent's Canal Company* (17), where Lord Chelmsford says (18): "I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which, though not amounting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury." Any contribution by the plaintiff to the acts producing the injury complained of will defeat her right to an injunction: *Gould* on Waters (19). The case of *Proctor* v. *Bennis*, *supra*, is distinguishable. The plaintiff there had not assented to the act complained of, but had only neglected to prosecute his action. In our case there has not only been delay but acquiescence in the acts now alleged to be injurious. We are not urging an estoppel against the plaintiff, but acquiescence. If we were setting up estoppel we would have to allege that the defendant acted ignorantly and was misled by the plaintiff. In acquiescence the defendant may be fully aware of the circumstances under which he is acting and yet be entitled to rely upon the plaintiff's acquiescence in his acts. In addition to acquiescence the defendants have now a title by prescription. These defences are not incompatible in the sense that failing in one we can set up the other.

(14) 30 N. B. 558.
(15) 18 Ves. 515.
(16) 2 Sim. (N. S.) 78.
(17) 3 DeG. & J. 212.
(18) At p. 230.
(19) P. 711.

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White, in reply:—

Acquiescence is inoperative unless the defendants have been misled and induced to alter their position by it. The defendants are not within this rule.

1895. October 15. BARKER, J.:—

The bill alleges that the female plaintiff is owner of a certain lot of land in the County of Albert, through which a brook, known as "Prosser Brook," flows for a distance of some 200 rods. That when the grant of this land was made in 1871 this brook was not more than six or eight feet wide, and altogether inadequate in its natural state for the purpose of logs being driven upon it, except for a few days during the spring freshets. That the defendants, Wright & Cushing, carry on lumbering operations on lands owned by them on this brook, and above the plaintiff's land and for the purpose of driving their logs, have for some years past maintained a driving dam which was erected on the lot next above that owned by the plaintiff, by the use of which they have driven large quantities of logs down the brook through the plaintiff's land, widening the brook very greatly, and injuring and tearing away the plaintiff's interval. And the plaintiff prayed that the defendants, Wright & Cushing, might be restrained from so using the said brook and driving dam as to overflow the plaintiff's interval, or so as to injure or destroy the bank; and the plaintiff also asked for a decree that the defendants pay her for the damage already done. The defendants by their answer, while they admit that the stream has widened, deny that it has widened to the extent alleged by the plaintiff, and they also deny that the widening which has taken place is much greater than would have resulted from the natural flow of the stream. They also set up that the plaintiff by her acquiescence is estopped from obtaining the relief asked for.

The evidence shows that about the year 1876 a driving dam was built on this brook by the defendant Cushing and one Clark, since deceased, who, under the name of Cushing & Clark, were lumbering there at that time. The dam was

actually built by the plaintiff Elisha Mitten, husband of the female plaintiff, and one John C. Geldart, Mitten being at that time the owner of the lot now owned by his wife. This dam was burnt three or four years afterwards, and about 1883 a second dam was built some 70 rods further down the stream on the lot of land next adjoining the plaintiff's lot and above it on the stream. The first dam was about twelve feet high and the last one about fourteen feet. There can be no doubt that the brook is much wider now than it was in 1876; and I think the evidence fully establishes the fact that the widening has been mainly caused by the driving operations on the river. It was contended by the defendants that the evidence showed that the first dam was built over twenty years before the commencement of this suit, and that the defendants having succeeded to the rights of Cushing & Clark by purchase, had in some way acquired a right to use this driving dam as they have done. There are, I think, many answers to this proposition, but as it rests upon the assumption that the twenty years had elapsed when this suit was commenced in March, 1894, it is as well to see what the evidence is on this point. To establish any such right, involving as it does the appropriation of another's property without compensation, the evidence should be clear and beyond reasonable doubt. The weight of evidence on this point is, I think, entirely against the defendants' contention. Both Geldart and Mitten, who actually did the work, fix 1876 as the year, and the former assigns a very good reason for remembering the date. Prosser confirms their statement; and the defendant Cushing and one other witness who fix an earlier year are by no means positive. Whatever defence there is which is based upon a twenty years' user, must, I think, fail, because the evidence does not establish it. The evidence, I think, shows 1876 to have been the year when the original dam was built. The main defence relied on was that by reason of the plaintiff, Elisha Mitten, assisting in building the original dam, and by his acts since that time, the plaintiff had so acquiesced in the use of the dam, or so licensed it, that this Court would not restrain the defendants from the

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future use of a right so acquired. The acts which are relied on as establishing this defence are the working of Mitten in building the first dam, his assisting in repairing the second one, his assisting in driving logs down this stream for many seasons, and the license to Ronald Mitten to brow logs on his intervale in 1893. There is no doubt that the plaintiff, Elisha Mitten, in addition to working on the dam as one of the contractors with Cushing & Clark for its construction in 1876, did nearly every season from that time to the present, when there was any lumbering going on on the stream, either work at the driving or in getting his own logs in the stream, to be driven down through his own land, by means of the driving dam. The evidence, however, does establish that on many occasions during that period he complained of the injury being done to his land, though it is not clear that these complaints were ever made direct to the defendants or were ever communicated to them.

So far as regards the plaintiff's working in building the dam in 1876, the case closely resembles *Wood* v. *The Carleton Branch Railway Company* (20), and *Smith* v. *Crandall* (21), in both of which cases it was held upon grounds which seem to me quite applicable to this case, there was no such license as that contended for. There is another reason in this case, because the dam upon which the plaintiff, Elisha Mitten, worked, was burnt two or three years afterwards, and was never rebuilt. The one to which all the existing cause of complaint is referable, is another and a different structure altogether, not built by the plaintiff, of a greater capacity, and upon an altogether different site. How any license which might possibly be inferred from the plaintiff having assisted in building a dam in 1876 could be made to do duty for a totally different dam in a totally different place, built some years after the first had ceased to exist, I am unable to see. It is true the plaintiff hauled some logs which were used in repairing the latter dam in 1887, but that cannot be con-

(20) 1 Pug. 244. (21) 1 Kerr 1.

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strued into any such license. If the plaintiff's acts in assisting in the driving operations year by year are relied on as equivalent to a license to drive the logs as they were in fact driven it would, in my opinion, be revocable, and an injunction in the terms asked for could in no way be complained of by the defendants.

As I understand the doctrine of acquiescence by which a man is deprived of his legal rights, its corner stone is fraud—that is to say, the acts of the party against whom the estoppel operates must have been of such a nature and done under such circumstances as to make it fraudulent in him to set up his legal rights against a person prejudiced by his acts. In *Willmott* v. *Barker* (22), Fry, J., thus lays down the rule as to acquiescence (p. 105): "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts

(22) 15 Ch. Div. 96.

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which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it; but, in my judgment, nothing short of this will do." Now, instead of these elements all existing in this case, it seems to me that all the more material ones are absent. In what has the plaintiff acquiesced? Was it in the erection of the first dam in 1876 by reason of his being one of the contractors for the work? This cannot be; for, in addition to the other reasons I have given, the dam was not built on the plaintiff's land; he had no right to forbid its erection—his assent was neither required nor asked; it was not built in any way as the result of the plaintiff's assent or encouragement, express or implied. If the estoppel does not arise as to the construction of the dam, does it arise by reason of its use? The defendants in the seventh section of their answer make the following admission: "We believe it is practically possible to drive logs down said Prosser brook in the manner and to the amount in which our logs have been driven for the past six seasons, driving them without widening said brook each driving season." Now, there can be no acquiescence without knowledge; and to impute to the plaintiff the knowledge that the use of the dam in driving the logs would necessarily widen the brook by tearing away portions of his interval, and thus make him a consenting party by reason of his working as he did, is to construct a liability on a theory which, after many years' experience the defendants admit, has no foundation. When did it become fraudulent in the plaintiff to set up his rights against these defendants? There is nothing in the evidence to suggest that in the use of the dam, any more than in its construction, the defendants were in any way influenced by anything which the plaintiff did, or anything which he abstained from doing. While the defendants' operations on the brook were each year alike in kind, they varied in degree, and the damage to the plaintiff's land was increasing each year. I am unable to see how the non-assertion of a right to damage for wrong-

fully tearing away a half acre of the plaintiff's interval one year can be construed into a license to appropriate by similar means another half acre the following year. Especially is this the case where, according to the defendants' admission on the record, it was practically possible to drive their logs by the use of the dam without widening the brook.

In *Lemmon* v. *Webb* (23), the Lord Chancellor shows the impossibility of acquiring a right either by prescription or the Statute of Limitations in the case of growing trees, and I think a similar principle would govern in this case so far as any relief is based upon these grounds. Another act relied on by the defendants was the license to Roland Mitten in 1893 to brow logs on the plaintiff's interval. It seems that the defendants had a contract with this Roland Mitten to get out some lumber for them, and it was part of the agreement that defendants were to pay for the browing privilege. The agreement between the plaintiff and Roland Mitten is as follows: "Party of the first part agrees to allow party of the second part to brow logs he may get out this coming winter of 1893 and 1894 wherever he may require brow room on her (plaintiff's) farm, and party of second part to have privilege of removing same till middle of May, 1894, for $25, receipt of which is hereby acknowledged." The argument is that the plaintiff knew that the lumber thus browed on his land must be driven by the use of the dam through his lot and contribute to any injury which might be caused by the driving operations, and therefore it was an implied license to drive it irrespective of the extent of the injury. I am unable to give any such effect to this agreement. In the first place, it is not made with the defendants at all; but if it were, I do not see that it has any bearing on this case, except possibly as to a question of damages. It could not operate as a license for future years. In my opinion there is nothing in the evidence to show any intention to assent, or any actual assent on the plaintiffs' part, either to

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the construction of the dams or the manner of using them, so as to deprive them from asserting their rights and restraining the defendants from using the dam hereafter to their injury. Neither do I think the evidence discloses anything which is to lead me to suppose that the defendants in what they did were acting on the faith of any such assent. Nor am I able to find any evidence showing that the defendants have in any way whatever been induced to act, or have acted, in any way by reason of anything the plaintiff did or abstained from doing and which would be rendered prejudicial to them by the assertion of plaintiffs' rights.

The only remaining question to be determined is the damage. In assessing these the plaintiffs' action may fairly be considered. Having regard to this and to the other considerations suggested by the evidence and bearing upon this point, I think $100 is a reasonable sum, that is $50 for the damage done in the spring of 1894, and which is assessed under the agreement made when the interlocutory injunction was applied for, and $50 for the other years.

There will be a decree, therefore, in favor of the plaintiffs with costs, directing the defendants Wright and Cushing to pay the sum of $100 and costs, and that a perpetual injunction be awarded to restrain the defendants Wright and Cushing, their servants, agents and workmen, from using the driving dam in the plaintiffs' bill mentioned in driving logs down Prosser's brook so as to injure and damage the plaintiffs' land in the said bill mentioned.

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Transfer—Bank Shares—Right to Redeem—Intention of Parties—Admissibility of Evidence to Contradict Terms of Deed of Transfer.

Although collateral evidence is admissible to shew that notwithstanding the plain terms of an absolute transfer of property, it was intended that the transferor should have a right of redemption, the evidence must be of the clearest and most conclusive character to overcome the presumption that the deed of transfer truly states the transaction.

The facts in this suit fully appear in the judgment of the Court.

Argument was heard August 9th and 12th, 1895.

Blair, A.-G., for the defendant:—

The case which the plaintiff sets up is that the instrument in question does not truly state the intention of the parties and that collateral evidence is admissible to modify its terms. The authorities are clear that such evidence is admissible, but it must be of the most conclusive and unquestionable character, and the onus of satisfying the Court rests upon the plaintiff. If the plaintiff is correct in his contention that the assignment was accompanied with a secret trust in his favor, a fraud has been committed against his creditors, and the Court will refuse him relief. If there is a right of redemption, it belongs to the plaintiff's trustees for the benefit of his creditors.

C. J. Coster, for the plaintiff:—

The suit has been properly brought. If the plaintiff succeeds, any benefit from the suit will enure to his creditors. This is also an answer to the contention that the plaintiff is asking relief from his own fraud.

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I hoped that, in view of the peculiar circumstances of this case and the intimate relations which up to a com-

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paratively recent period existed between the parties, a settlement of the matters in dispute might have been arrived at. All attempts in that direction having failed, the duty is imposed upon this Court of disposing of the matters in controversy.

It appears by the evidence that the plaintiff for many years previous to March, 1887, had been extensively engaged in mercantile business in this city and elsewhere in the Province, and finding himself at that time burdened with liabilities aggregating over $300,000, which he was unable to pay, he made an assignment in trust for the benefit of his creditors to the two defendants Earle and Atkinson, and his son George K. McLeod, who was afterwards, on some new arrangement, removed from the position of trustee. This assignment bears date March 24th, 1887, and professes to convey not only the property mentioned in a schedule annexed, but all the personal property which the plaintiff then had, except some vessels. The trust funds were to be appropriated, first, in payment of Geo. K. McLeod all sums owing to him or for which he was liable; second, to the defendant C. W. Weldon all sums owing to him or for which he was liable; and third, to the Bank of Montreal the sum of £2,550. The remainder was to be divided *pro rata* among such of the creditors as might come in and execute the deed. It was asserted on the argument, and there is some evidence to support the assertion, that shortly before this assignment was made, the plaintiff had transferred to his son Geo. K. McLeod the bulk of his available assets as a security for an indebtedness then existing, and for a further liability then assumed on his father's account; so that, in fact, the assets conveyed by the trust deed were of comparatively little value—so small, in fact, that the trustees practically realized nothing, and practically did nothing under the assignment. Be this as it may, some two years later, as the result of some proceedings instituted in this Court to set aside certain conveyances made by the plaintiff, a new arrangement was entered into by which Geo. K. McLeod assigned assets which he held to certain persons in trust;

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the business was carried on by him; and, as a result, he realized for the creditors some $175,000. At the date of the plaintiff's assignment he was indebted to the defendant Weldon on a promissory note for $450, and on a sterling Bill of Exchange for £650, drawn on and accepted by T. C. Jones & Co., of Liverpool, who suspended payment about the same time. These two sums, amounting in round numbers to $3,600, Mr. Weldon was compelled to pay. There was some evidence to show that Weldon's professional firm was then under some liability on the plaintiff's account to Linklater & Co., of Liverpool, for professional services; but, in my opinion, the evidence shows that the transaction as to the bank stock which is now in dispute, related solely to the two sums I have mentioned, and had no reference whatever to any other liability.

In November, 1884, the plaintiff borrowed from W. W. Turnbull $20,000, for which he gave his own promissory note, and, as a security, assigned seventy-eight shares of the capital stock of the Bank of British North America. This note was renewed from time to time and payments made on account, until the date of the trust deed, when the amount of the loan had been reduced to $11,300, for which Turnbull held as security fifty-five shares of the capital stock of the Bank of New Brunswick, which had been substituted for those of the Bank of British North America. The plaintiff, being desirous that Mr. Weldon should not lose anything by reason of his failure, executed to him an assignment of his interest in these fifty-five shares in the following form:

"Know all men by these presents, that I, George McLeod, of the city of Saint John, in the Province of New Brunswick, merchant, for and in consideration of the debt and sum of money due and owing from me to Charles W. Weldon, of the said city, barrister-at-law, and in part payment thereof, and in consideration of the sum of one dollar to me paid by the said Charles W. Weldon, have bargained, sold, assigned and transferred to the said Charles W. Weldon fifty-five shares of the capital stock of the Bank of New Brunswick, which said fifty-five shares

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have been transferred to W. W. Turnbull, of the said city, merchant, and now stand in his name in the books of the said bank, as security for the payment of $11,360.44 secured also by a promissory note of the said Geo. McLeod, payable on the 31st day of March instant. To have and to hold the said fifty-five shares (subject to the payment, of the said note) unto the said Charles W. Weldon, his executors, administrators and assigns, absolutely. And I appoint the said Charles W. Weldon my attorney, irrevocable, to ask, demand, recover and receive the said fifty-five shares, and to give effectual releases and discharges, and to use the name of me, the said George McLeod, and generally to do all such things as shall or may be necessary for the purpose of giving effect to this transfer. In witness whereof, I, the said George McLeod, have hereunto set my hand and seal this 24th day of March, A.D. 1887.

"Sg'd GEO. McLEOD [L.S.]

"Signed, sealed and delivered in the presence of "Sg'd ALLAN O. EARLE."

This transfer, though dated the same day as the trust deed, was delivered so as to take priority to it. On the 28th April, 1887, about a month later, Weldon paid Turnbull the amount due him $11,414.59, and the shares were transferred to him by Turnbull. The facts so far are not disputed. The plaintiff, however, alleges that notwithstanding the transfer of the shares is absolute on its face, and for an expressed consideration and purpose, it, in fact, was intended to be merely a mortgage or pledge of them, leaving an outstanding equity of redemption in the plaintiff and a liability to account in Weldon; and, accordingly, he has filed this bill asking for an account, with a view of redeeming the shares, which have apparently increased in value since the transaction took place in 1887. The bill, after setting out the plaintiff's ownership of the shares and his hypothecation of them to Turnbull in 1883, alleges in the third section as follows: "That, afterwards, it was agreed between the plaintiff George McLeod

and the said Charles W. Weldon, that the said Charles W. Weldon should pay off the amount due the said William Wallace Turnbull, and take an assignment of said stock from the said William Wallace Turnbull as security for the amount paid to the said William Wallace Turnbull as aforesaid, and also as a security for any amounts due the said Charles W. Weldon by the said George McLeod." And the fourth section of the bill alleges that in pursuance of said agreement, the said George McLeod executed a transfer of his equity of redemption in said stock to the said Charles W. Weldon in the words and figures following; then the assignment I have already given is set out at length. The bill then prayed for an account of what remained due for principal and interest in respect of the moneys advanced and lent by the said Weldon to the plaintiff, or otherwise due Weldon on the pledge of the said fifty-five shares, and that he, the said plaintiff, be allowed to redeem the stock on the payment of the balance (if any) due thereon. Mr. Weldon, by his answer, denies any such agreement as that alleged in the bill, and claims that the transfer of the shares is an absolute one, and was so intended to be at the time; and he denies all right of redemption on the plaintiff's part, and all liability to account on his, except possibly for the value of the shares at the date of the transfer. The parties are, therefore, at issue as to the real nature of the transaction between them. Though it is in a sense a question of fact whether, according to the real intention of the parties, the transaction was a mortgage or an absolute sale, it must be remembered that this Court has well-defined rules and principles by which it is governed in determining questions of this nature. In the first place, where a plaintiff attempts to set up a parol agreement altogether at variance in its terms and effect from a writing executed under his hand and seal, without alleging either fraud or mistake, he undertakes to satisfy the Court beyond all reasonable doubt that the writing does not truly represent the transaction. A reference to two or three authorities on this point will illustrate the extent to which this rule has been applied. In *Matthews*

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v. *Holmes* (1), the subject is fully discussed, and one of the learned Judges who took part in that decision goes so far as to say that in no case can a conveyance, absolute on its face, be held to be a mortgage on naked parol evidence, corroborated neither by writings nor by surrounding circumstances. And in this same case, as reported in 9 Moore 413, the Judicial Committee of the Privy Council lay down the doctrine that the onus rests altogether upon the plaintiff, not only to rebut the presumption that the title, as appearing in the written instrument, is in perfect accordance with the intention of the parties, but he must also establish to the satisfaction of an appellate Court that the judgment of the Court below, adverse to his contention, is erroneous.

In *McMicken* v. *The Ontario Bank* (2), Gwynne, J., says (page 575): "In Rose *v.* Hickey, decided in this Court in 1880, we held that the evidence necessary for this purpose must be of the *clearest* and *most conclusive* and *unquestionable* character." These were two cases, of which many examples are to be found in the books, where a deed, absolute on its face, was sought to be reduced to a mortgage. And in such cases it will be seen that the rule to which I have alluded imposes a somewhat difficult task upon those who come here for relief. Courts, at all events in modern times, have found no difficulty in such cases in admitting the collateral evidence in order to show for what purpose and upon what consideration the deed was made. In the present case, these purposes and considerations are expressed upon the face of the deed itself, and in such a case the rule applies with even greater stringency. This distinction is alluded to in *Barton* v. *Bank of New South Wales* (3). The conveyance in that case recited that it had been agreed between the parties that the said "William Barton shall convey to the said Bank of New South Wales the three parcels of land hereinafter described in manner herein after expressed, and *that the said debt shall be reduced by the sum of four hundred pounds.*"

(1) 5 Gr. 1. (2) 20 S. C. R. 548. (3) 15 App. Cas. 379.

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Lord Watson, in giving judgment, says: "Now, undoubtedly, the terms of the conveyance may be qualified by collateral evidence; but, in order to set aside the arrangement which the parties have assented to by executing and receiving the deed, very cogent evidence is required in a case like the present. Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reason for making it and the considerations for which it is granted are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution." The principle here put forward seems especially applicable to the present case. The assignment of the shares sets forth an indebtedness from the plaintiff to Weldon in consideration of which, and in *part payment of which*, the plaintiff bargains, sells, assigns and transfers the shares to Weldon *to hold absolutely*. It is, therefore, not merely a transfer of the shares, but it is a transfer made for a specific purpose set out on the face of the instrument itself, and one which is inconsistent with that now sought to be established. The cases which I have cited were all determined by Courts whose decisions are binding upon this Court, and it will be seen that they apply with strictness the rule which has so long been acted upon in cases like the present, and which precludes this Court from interfering between the parties, except when the evidence is of the clearest and strongest character. This being the rule by which this Court is governed, let us refer to the evidence and see whether the plaintiff has brought himself within it. Returning to the bill we find that the relief sought is based on an alleged agreement by the defendant Weldon with the plaintiff, that he would pay off the amount due Turnbull and take the assignment of the shares as a security for that amount and for his own claim. This involved on Weldon's part the payment

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of $11,414 in addition to the $3,600 which he was then called on to pay by reason of the failure of plaintiffs, and T. C. Jones & Co., and the only advantage which he derived was the value of the plaintiff's interest in the shares, which Weldon estimated at about $100, which Turnbull proves to have been about that amount, but which the plaintiff estimates at about $1,500. In addition to this, according to the plaintiff's account of the transaction, he retained a right to redeem the shares, a right which he is seeking in this action to enforce. The Court has a right to reasonably clear evidence of an agreement involving so serious an obligation. It rests upon the plaintiff's own testimony, and his account of the interview between him and McLean, which is relied on as establishing the agreement, is as follows: "Mr. McLean came to my house and told me that Mr. Weldon sent him, and that he advised me to make an assignment, and that as they could not openly act for me he would get Mr. Earle to draw it up. And I said to Mr. McLean, if that is so, I would like to protect Mr. Weldon, as he was liable to pay for me some $3,400, the amount of a bill of exchange, and that I had borrowed from Mr. Turnbull some $11,000 on those fifty-five shares of Bank of New Brunswick stock, on which there was a margin then, as I estimated, of about $1,500. I told this to Mr. McLean, and that Turnbull would not have loaned me more than $11,000 on them unless there was a margin; and as I desired to protect Mr. Weldon—the stock was appreciating in value—that he could hold it, and that if I could not pay him any other way, that when the stock was sold it would go, in a large measure, to liquidate the amount he had to pay for me. Then Mr. McLean went and saw Mr. Weldon and came back and said that Mr. Weldon was much pleased at my desire to protect him and would take a transfer of the stock. Then Mr. Earle drew it up, I believe, though I have no recollection of that part of it, but I believe he did." In another part of his evidence, he says: "I just said, Mr. McLean, if I should not be able to pay Mr. Weldon in any other way he could hold the stock in the meantime, but if I should be able to pay Mr. Weldon when I got through

the trouble, and was able to redeem, I would do so; and in the meantime he was to hold it. Then he went away and came back and said that Mr. Weldon would take the stock on these terms." Now, if Mr. Weldon had actually assented to this arrangement precisely as it is here set out, it is open to question whether it would amount to an agreement such as is alleged in the bill; but, assuming that it would do so, I am unable to see how Weldon ever became bound by any such arrangement. I think it is clear from the evidence that McLean went to see the plaintiff as solicitor for the Bank of Montreal, a creditor of the plaintiff for some $26,000, and that he did not go at all in the interests of Weldon. McLean swears to this; Weldon swears to the same thing, and as I read the plaintiff's evidence McLean did not represent to him that he came in any way in Weldon's interest. What the plaintiff says is that McLean said Mr. Weldon sent him and that he advised him to make an assignment. This does not mean that Weldon sent him to secure his debt. In fact, according to the plaintiff's own evidence, as I have above given it, he was the person who first spoke of securing Weldon. McLean said nothing about it at all until afterwards. The offer of security proceeded entirely from the plaintiff, and in no way, as I can discover from the evidence, as the result of any application on Weldon's behalf. The fact that McLean was at the time the professional partner of Mr. Weldon would in no way constitute him as Weldon's agent in reference to a matter which was entirely private, and in no way connected with the partnership business. The evidence disproves anything like a special authority in the case, and I am unable to see how, under these circumstances, Weldon could be bound by any such arrangement, even supposing all took place as the plaintiff says, provided it in fact never was communicated to Weldon and he never assented to it. The offer to secure Weldon seems to have been quite voluntary on the plaintiff's part, and indicates what he says was the fact, a strong desire to secure Mr. Weldon against loss on his account. McLean's account of the transaction differs from plaintiff's. After detailing his

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negotiation with the plaintiff in reference to the Bank of Montreal getting security, he says as follows in reference to Weldon's claim:—"At that time he (plaintiff) said, there is a claim due Mr. Weldon, and he said 'I will give him the stock I have in the Bank of New Brunswick, which Mr. Turnbull has.' I said that is a good thing, I am sure he would like it. He said that Mr. Turnbull had a claim against it, but he thought there would be a good margin on it. Then I told Mr. Weldon about it, and he, after making up the amount and seeing what was in it said, 'there is nothing in it,' and he said 'I will have to borrow to pay the stock up and I don't want the stock.' Then I saw Mr. McLeod and told him what Mr. Weldon said, that he did not think there was much in it; then he said there was something in it, and that he thought Mr. Weldon might as well have it. Then I saw Mr. Weldon again and urged him to take it, and then he said, 'I might as well take it.'" That Mr. Weldon considered the plaintiff's interest in the shares of little value is also proved by his declarations to Mr. Earle when the assignment was delivered to him.

The only other direct evidence bearing on the case is that of Mr. Earle, who, in preparing the trust deed and this assignment, acted as the plaintiff's solicitor, and who was also one of the trustees under the creditors' deed. The evidence is undisputed that the instructions for drawing the transfer of the shares were given to Mr. Earle by the plaintiff, without any interference in any way either from Mr. Weldon, Mr. McLean, or anyone else. The instrument was never seen by Mr. Weldon until it was delivered to him as an executed document, by the plaintiff's directions. Mr. Earle says that the plaintiff told him nothing about the shares being held as security, or anything about any agreement on Weldon's part to pay off Turnbull's claim. On the contrary, he says he drew the document precisely as the plaintiff told him, and that the plaintiff told him the shares were to be taken *in part payment of the indebtedness*. Whatever expectations as to redeeming these shares the plaintiff may have entertained; whatever expectations he may have been justified in entertaining, either by what

actually took place between him and McLean, or from the intimate friendship and close business and other relations, which for so long a period had existed between him and Mr. Weldon, one cannot but be impressed with the idea that if there existed an enforceable and binding agreement such as that upon which the plaintiff now relies, he would at the time have communicated it to Mr. Earle, who was then not only acting as his solicitor, and under his instructions preparing an assignment showing quite a different state of facts, but also because the plaintiff was then handing over all his property to him as one of his trustees for the benefit of his creditors under an assignment amply comprehensive in its terms to include such an equitable right as is now claimed. No reason has been suggested for making an assignment in terms other than those actually understood and agreed upon at the time; and as Lord Watson, in the case I have already cited, says: "It is difficult to conceive the reason why the parties, having the intention to stand in the same relation to each other as if the deed had been an ordinary mortgage, should take the trouble of inventing an arrangement in which there is not one particle of truth according to the theory of the appellant, and inserting it in the deed for the simple purpose—their Lordships can conceive no other object—of hampering themselves in carrying it out."

There are two other parts of the evidence which must not be overlooked. The one is an alleged conversation between the plaintiff and Mr. Weldon about two years after the transfer was made, and the other is a conversation between Mr. Weldon and Mr. Geo. K. McLeod. The plaintiff says that about two years after this transaction took place he told Mr. Weldon that Mrs. McLeod had received a remittance from a vessel she was interested in, and that he thought it would be better to redeem a portion of the stock —some $3,000 or $4,000—and Mr. Weldon said: "It is all right; when you are in a position to redeem it, you can have it, and Mr. Weldon said she had better let it stand over till the whole thing was fixed up; and I said, Mr. Weldon, you are protected under the arrangement that

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took place in the Equity Court under the agreement by which my son George K. undertook to pay some fifty-five thousand dollars to Mr. Jones, Bank of Montreal, Mr. Weldon and Mr. E. McLeod as trustees; and then he said, 'It is all right, I will keep a strict account of it, but the dividends hardly pay the interest on the amount, but when you are in a position to redeem the whole amount you can have them all," it is difficult to assign any very exact value to this conversation, supposing it to have taken place precisely as plaintiff says. He did not allude to the original arrangement as the basis of his right to redeem, but rather puts forward as a reason why he should be permitted to do so, that Mr. Weldon was protected under the agreement made in the equity suit. Neither does Weldon put forward any absolute claim to the shares. Possibly the intimacy which, even at that time, existed between the parties found no necessity for drawing those sharp lines of strict legal right which the altered conditions of to-day seemed to have called into active service. It is sufficient to say that Mr. Weldon denies that any such conversation ever took place, and there are no attendant circumstances from which one can derive any aid in gauging the truth by probabilities.

Both Mr. Weldon and Geo. K. McLeod agree as to the conversation which took place between them. Mr. McLeod says that the conversation was not specially on the subject of the shares, but "that the trend of it was that any margin in the stock should go in reduction of the amount he had to pay him," that is the $1,200 note which Geo. K. McLeod gave at that time to Weldon on account of his father's indebtedness. I do not attach much importance to this evidence one way or the other. It may be argued from it that Mr. Weldon admitted a liability to account, or perhaps, more accurately, a willingness to account, for the margin; but it is open to the remark, on the other side, that he must have been dealing with this margin as his own, as he, in the plaintiff's view, was accountable for it to him, whereas he was, without any reference to him at all, assenting to Geo. K. McLeod getting it to assist him.

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I have gone through the evidence in order to see whether it was of that clear and cogent character which this Court requires before it will interfere in the plaintiff's favor. I am asked by the plaintiff to declare that when he, under his hand and seal, stated that the consideration for the transfer was his indebtedness to Weldon, it really was not only that but an onerous undertaking on Weldon's part in addition, that when he wrote that he had bargained and sold the shares, he had in fact only pledged them, that when he deliberately declared in the transfer that Weldon was to hold these shares absolutely, the fact was that he was only to hold them conditionally, and that when he declared in positive terms that the shares were transferred in part payment of the debt then existing, they were, in fact, transferred merely as a security for the whole debt then existing and a further one to be incurred. The authorities which I have cited say that to entitle the plaintiff to relief, the evidence in his favor must be of the *clearest, most conclusive and unquestionable character*—must be *strong enough to overcome the presumption that the parties truly set forth in the deed the causes which led to its execution;* and that it is only subject to this condition that this Court will interfere. In my opinion, the evidence in this case falls short of satisfying this condition, and the plaintiff has not brought himself within the rule by which this Court is governed, and his case, so far as it rests upon any right of redemption in these shares, must fail.

The plaintiff is, however, entitled to a reference in order to ascertain the value of his interest in these shares at the time they were transferred to Weldon, and that amount must be credited the plaintiff on account of the indebtedness. It appears that Mr. Weldon has received from T. C. Jones & Co's estate and the plaintiff's trust estate and from Geo. K. McLeod certain amounts on account of this indebtedness—enough, it is said, to pay the indebtedness in full without reference to these shares. There can be no reason for Mr. Weldon getting more than his payment in full, and if there should, on taking the account, be found to be a surplus, Mr. Weldon must account for it to

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the plaintiff, or to the defendants, Earle and Atkinson, his trustees, as may be determined hereafter.

An objection was taken by the Attorney-General that the plaintiff had no interest in the matter in dispute in this suit, and that the right to the money, if recoverable, or to the shares, if redeemable, could only be enforced by the plaintiff's trustees. Under the circumstances of this case, I think the plaintiff can file a bill in his own name. He alleges that he requested his trustees to bring this suit, and they declined to do so. The plaintiff has an interest in the realization of assets transferred by him for the benefit of his creditors, and if his trustees refuse to adopt the necessary means for that purpose, he has, I think, such an interest as would enable him to sustain a bill with that end in view. The trustees are parties to this suit, and in a position, so far as anything appears to the contrary, to claim whatever benefit may result from the litigation.

There will be a reference to inquire and report:—

1. What was the value on the 24th day of March, 1887, of the plaintiff's interest in the fifty-five shares of the capital stock of the Bank of New Brunswick.

2. To state the account between the plaintiff and the defendant Weldon as to the indebtedness existing when the shares were transferred—that is the note for $450 and the bill of exchange for £650—and report what amount, if any, is due by the plaintiff thereon after crediting the value of plaintiff's interest in the shares as a payment on account as of March, 24th, 1887.

Reserve question of costs and further directions till after report.

In re MARTHA A. FOXWELL'S ESTATE.

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Practice—Application by Trustees for Advice—Circumstances under which Advice may be Given—Advice Refused—The Supreme Court in Equity Act, 1890 (53 Vic. c. 4) s. 212.

The Court will not as a rule under section 212 of the Supreme Court in Equity Act, 1890 (53 Vic. c. 4) (1), determine the rights of competing parties to a fund in the hands of trustees. The section is intended to enable the Court to advise executors and trustees in matters of discretion vested in them.

This was an application under the Supreme Court in Equity Act, 1890 (53 Vic. c. 4) s. 212 (1), by the trustees and executors of the estate of the late Martha A. Foxwell for advice and directions respecting the administration of certain assets.

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

The argument was heard September 17th, 1895.

W. B. Wallace, for the applicants:—

The view favored by the trustees and executors is that the money in question should be applied in payment of the debts of the late Richard J. Foxwell. It is difficult to see what right the children have to the money. At common law the right to sue on the policies of life insur-

(1) Any trustee, executor or administrator shall be at liberty without the institution of a suit to apply by petition to the Court for the opinion, advice or direction of the Court on any question respecting the management or administration of the trust property, or the assets of any testator or intestate, notice of such application to be served upon, or the hearing thereof to be attended by all persons interested in such application, or such of them as the Court shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject matter of the said application; provided, nevertheless, that nothing herein shall extend to indemnify any trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

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ance clearly vests in the legal personal representatives of Richard J. Foxwell. No interest passed to his wife by reason merely of her being named in the policy. Any interest she took could only be by his will. See *Cleaver* v. *Mutual Reserve Fund Life Association* (2). By his will all his real and personal estate was left to her subject to the payment of his debts. The Act to secure life insurance to wives and children (58 Vic. c. 25) cannot affect the rights of the creditors as it was not in force at the time of Richard J. Foxwell's death.

1895. October 15. BARKER, J.:—

This was an application under sec. 212 of the Supreme Court in Equity Act, 1890 (53 Vic. cap. 4), for advice to the executors and trustees under the will of Martha A. Foxwell. I had occasion to consider this section on an application made to me in *In re Manzer's Estate* before this Court had its own official reporter. As the views I expressed in that case are those by which I intend to be governed until a Court of Appeal shall decide that I am wrong I think it better to give them to the reporter for the benefit of those who may hereafter wish to apply under the section.

Reading the section casually it seems much more comprehensive than it really is. Judging from some applications under it which have come under my own observation, one would think that the section was considered as constituting this Court a standing counsel for trustees and executors on questions of every kind that might come up in the discharge of their duties. This is not so. It is true that the practice of Judges has not been uniform, and that cases have arisen, not within the section, but where the parties agreed to accept the Judge's decision as final. Soon after the section had been introduced into this Province I recollect being engaged as counsel in an application under it which involved the construction of a will. The late Chief Justice of Canada, to whom the application

(2) [1892] 1 Q. B. 147.

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was made, refused to entertain the motion on that ground. The same rule was adopted in *Re Evans* (3), and other cases. In *In re Hooper* (4), the Master of the Rolls stated that the object of this clause was to assist trustees in the execution of the trusts *as to little matters of discretion* and not to determine questions of construction. *In re Lorenzo* (5), the Vice-Chancellor says: "My understanding of that section of the Act is, that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se*. It is true that, in some cases, the Court has (unadvisedly as I think), upon a petition under this section, given its opinion on questions affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done." *In re Mockets Trusts* (6); *Re Bunnett* (7); and *In re Williams* (8), are all to the same effect. Considering that in cases properly stated under the section the opinion of the Court is only a protection to the trustee, and that such opinion is not subject to appeal, it is advisable that the section should not be acted upon except in cases clearly within its provisions.

This present case is not, I think, within the section as construed by the above authorities. The facts are simply these: Martha A. Foxwell died March 5th, 1895, leaving several children surviving—her husband, Richard J. Foxwell, having died November 11th, 1894. About the 11th January, 1894, the husband conveyed his real estate to Regan, who at the same time conveyed it to Mrs. Foxwell so that when the husband died he was possessed of little or no property. Mrs. Foxwell left a will by which the present applicants were appointed executors and trustees; and by this will, speaking generally, she devised all her property in trust for her children, making special pro-

(3) 30 Beav. 232.
(4) 29 Beav. 657; 7 Jur. N. S. 595.
(5) 1 Drew. & S. 401.
(6) 6 Jur. N. S. 142.
(7) 10 Jur. N. S. 1098.
(8) 1 Chy. Chamb. Rep. 372.

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visions to which it is unnecessary to refer particularly as they have no bearing on the case before us. The applicants in their petition state that Foxwell had his life insured for the sum of $2,000 by two policies of $1,000 each, under which his wife was the sole beneficiary. Of this insurance money Martha A. Foxwell collected some $1,100, which she used in payment of liabilities of her husband. She also took and appropriated to her own use what little personal property her husband left. By his will she was the sole devisee, his debts being charged on the property. This will was never proved and only recently came to the knowledge of the applicants. The applicants then go on to state that claims against Richard Foxwell and Martha Foxwell amounting to $1,413 have been filed with them, all of which, except $289, are for work and materials provided for the buildings on the real estate conveyed to the wife in January, 1894. And that this $289 is made up of $175 chargeable to Martha, $53 chargeable to Richard, and $61 to both estates, whatever that may mean. The applicants, who, it must be recollected, are the trustees and executors of Martha Foxwell, further state they have received the balance of the insurance money, $894, and say that if they were authorized and directed to use this sum in the payment of the said debts, including some $227 incurred for probate fees and funeral expenses, it would be beneficial to the interests of the parties. They therefore ask for an order directing them as to the use and appropriation of this $894. Martha Foxwell, by her will, directed her trustees, as soon as possible after her decease, to pay off a mortgage for $1,000 due the Hanford estate, adding these words, "it being also my desire and direction that $1,000 accruing to me from my late husband's life insurance be appropriated, invested and used by my said trustees for such payment."

I am at a loss to see how the section under which this application is made has any bearing upon this case. The trustees have no discretion to exercise, nor is there any question as to managing the trust estate. It does not rest with them whether the money will go to pay the debts

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generally, or be appropriated to paying off the Hanford mortgage. The rights of each are definitely fixed by law and if they could be settled in a summary application like this, or if the section covered any such case, I know of no case possible to arise where executors and trustees could not come here for direction. If the rights of competing parties to a fund in the hands of a trustee are of such a doubtful nature that the trustee cannot act with safety without the Court's direction, the proper course is to file a bill making all the parties interested in it parties to the suit, and by a decree in such a suit all are bound. I do not mean to suggest that this case presents any doubt or difficulty sufficiently formidable to warrant such a course, because the Court has shown its disapproval of such suits, except where the doubt was a substantial one, by directing the trustees to bear the cost themselves. It is sufficient to say that the case as presented is not within the section, and the application will therefore be refused without any expression of opinion whatever as to the course the trustees should adopt.

LAMÈ v. GUERETTE, ET AL.

1895.

October 1

Practice—Inquiry Before Suit of Defendant's Interest—Equivocal Reply—Disclaimer to Bill—Cause Proceeding to Hearing—Dismissal of Bill as Against Disclaimant—Costs.

Defendant being asked by the plaintiff if he claimed any interest in certain machinery upon premises mortgaged to the defendant made use of equivocal language not amounting to a disclaimer. Upon being made a party to a suit for the recovery of the machinery he disclaimed. The plaintiff did not accept the disclaimer, and the cause proceeded to hearing.

Held, that the bill should be dismissed as against the defendant, but without costs.

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

Argument was heard September 17th, 1895.

Laforest, for the defendants:—

Where articles supplied are sold according to a particular description, they must answer that description:

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Jones v. *Just* (1). And where an article is ordered for a particular purpose there is an implied warranty that it shall be reasonably fit and proper for the purpose. See *Jones* v. *Bright* (2). The machinery supplied here was defective and not according to contract, and gave the defendant Remi Guerette a right to an action for damages. Under these circumstances specific performance will not be decreed against the defendant. It is an established principle of the Court that it will not decree specific performance of an agreement if the party seeking it has not performed his part of the agreement: *Lamare* v. *Dixon* (3); *O'Rourke* v. *Percival* (4). The bill should be dismissed as against Gilbert Guerette with costs.

Earle, Q.C., for the plaintiffs, confined his argument to commenting upon the facts of the case.

1895. October 15. BARKER, J.:—

The plaintiffs and the defendant Remi Guerette, on the 13th of April, 1893, entered into an agreement at Levis, in the Province of Quebec, by which the plaintiffs agreed to manufacture and furnish for the defendant a steam engine, boiler and machinery for a mill, to be delivered to the defendant at Baker Brook, in the County of Madawaska, in this Province, at a stipulated time. The price which the defendant agreed to pay was $1,700, payable as follows: $700 on delivery of the goods, and the balance $300 per month, commencing three months after delivery without interest. By the terms of the agreement the property in the goods was to remain in the plaintiffs until payment in full of the contract price; and in default by the defendant in paying the price according to the agreement, the plaintiffs had the right to have the machinery and materials returned to their factory at Levis; and any sum which might have been paid on account was in such case to be considered for the hire and usage of the machinery. The plaintiffs also "bound themselves to

(1) L. R. 3 Q. B. 197.
(2) 5 Bing. 533.
(3) 6 E. & I. App. 414.
(4) 2 Ball & B. 58.

guarantee good quality and good working to the machinery and materials." The engine and boiler were set up by the defendant on a mill site leased by him at Baker Brook; and on the 14th of October, 1893, and shortly after the machinery had been set up, the defendant Remi Guerette, executed to his brother, the defendant Gilbert Guerette, a mortgage of the premises to secure the sum of $1,031. The plaintiffs were paid $600 on account of the purchase money, but none of the monthly payments were paid. Accordingly in November, 1894, one Carrier, an agent of the plaintiffs, by their directions made a demand upon the defendant Remi Guerette for the balance of the money or a return of the goods. The defendant, however, was unable to pay, or at all events did not pay anything, and refused to allow the goods to be taken away. A point was made that in demanding payment Carrier mentioned a much larger sum than was actually due. Whether this was actually the case or not it is evident to me from the evidence that Remi Guerette had no money to pay, and that the reason for his not paying the balance had nothing to do with the amount demanded.

The defendant Gilbert Guerette answered and disclaimed all interest, and the only question raised by him is as to his costs. It was, I think, a prudent course to adopt before filing their bill, for the plaintiffs to endeavor to ascertain whether the defendant Gilbert Guerette claimed any interest in this machinery or not. An examination of the mortgage itself, without knowing precisely the condition of the machinery as to its being affixed to the soil or not, would not convey any accurate knowledge as to whether it would or would not pass to the mortgagee. If for any reason the defendant Gilbert Guerette claimed no interest in it, it was a simple matter for him to have said so when Carrier applied to him. There is a dispute between the witnesses as to what was actually said on this point at that time, but I think there is ample in the defendant's own admission, as proved by him at the hearing and stated in his answer, to have warranted the plaintiffs in making him a defendant in this suit. In section 11 of

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his answer he says: "I did not deliver up said goods and machinery, nor did I consent to deliver up the same, nor did I ever say that the said goods and machinery were my property, but what I did say was, that I could not deliver up said goods and machinery, and that if *I had any right to the same it was by virtue of the said mortgage*." Of course this was nothing more than was known beforehand. No prudent practitioner after receiving so diplomatic an answer would ever have thought of omitting Gilbert Guerette from the list of defendants. It might be questionable whether under these circumstances the defendant Guerette ought not to be compelled to pay costs rather than get them. See *Deacon* v. *Deacon* (5). The plaintiffs have, however, filed a replication and brought this defendant to a hearing, and I think the equities of the parties will be best met by the usual order, as was done in *Cash* v. *Belcher* (6), under somewhat similar circumstances. The bill will be dismissed as against the defendant, Gilbert Guerette, without costs.

The only point made by the defendant, Remi Guerette, was, that under the circumstances detailed by the witness, this Court would not interfere as the plaintiffs have prayed by their bill. The relief asked for by the bill is, that the defendants be restrained from preventing the plaintiffs from resuming possession of the engine and machinery, and that the defendant, Remi Guerette, be compelled specifically to perform that part of his agreement by which he undertook, in case of default, to return the goods to the plaintiffs at their factory at Levis. And the circumstances relied on as defeating the plaintiffs' right to relief was, that they were themselves in default, first, in not having delivered the machinery at the stipulated time, and second, in having furnished machinery inferior in quality and insufficient for the work for which it was intended. To accede to their contention would, in my opinion, practically render useless to the plaintiffs those provisions in the contract, by which as a security for their money they

(5) 7 Sim. 378. (6) 1 Hare, 310.

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retained their title to the goods and a right to have them returned in case of default. Are the plaintiffs compelled to permit their property to be used and deteriorated in value until the defendant chooses to take some means of having the damages which he claims assessed, and that under a contract which provides for this use the part payment shall be a compensation? When that time comes the property may be valueless and worn out, and then if the defendant could not pay the purchase money which the evidence seems to point out as not unlikely, the plaintiffs would be no better off than though they had sold the goods in the usual way, passed the property by sale and delivery, and relied simply upon the defendant's ability to pay. There is no question as to the defendant's default in payment of the purchase money, and it is his own agreement that in that case the goods shall be returned. I do not think he has shown any reason for preventing the plaintiffs from taking possession of their own goods, which have not been paid for according to the contract, and which, in that event, the defendant undertook to return.

The plaintiffs are, I think, entitled to an injunction restraining the defendant Remi Guerette from preventing them taking possession of the engine, boiler and machinery.

The defendant, Remi Guerette, must pay the plaintiffs' costs.

MOORE v. MOORE.

1895.

November 22.

Mother and Child—Purchase in Name of Child—Resulting Trust—Advancement—Presumption.

Where a mother makes a purchase in the name of her child, there is no presumption that an advance was intended. In such a case, it is a question of evidence whether there was an intention to advance.

This was a suit brought by the female plaintiff, Christina Moore, wife of Joseph Moore, to have certain lands, purchased by her in the names of her two children, George Edward Moore and John Carlisle Moore, declared to be hers. The facts are fully stated in the judgment of the Court. Argument was heard the 1st of November, 1895.

Bliss, for the plaintiff :—

There was here a resulting trust to the plaintiff within the meaning of the well-known rule that where property is purchased in the name of a stranger the benefit results to the purchaser. See *Dyer* v. *Dyer* (1). The only question is whether the trust is rebutted by the presumption in equity that a purchase is intended as an advancement where the purchaser is under an obligation to maintain the person in whose name the purchase is made. The plaintiff is clearly not under such an obligation, and consequently the presumption does not apply. The English authorities contain no sanction for such an extension of the presumption. In *In re De Visme* (2) it was expressly decided that where a married woman had, out of her separate property, made a purchase in the name of her children, no presumption of advancement arose. See also *Bennett* v. *Bennett* (3). Section 102 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4) gives the Court power to vest the title of the property in the plaintiff.

The defendants did not appear.

(1) 1 L. C. 223. (2) 2 DeG. J. & S. 17. (3) 10 Ch. D. 474.

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The defendants in this case are the infant children of the plaintiffs Joseph and Christina Moore. One of the defendants is twelve years old and the other only four. No appearance has been made for the defendants, and the case has been proved against them in the ordinary way. It seems that in June, 1892, the plaintiff Christina Moore purchased from Sophia Storie Montgomery-Campbell two lots of land in the City of Fredericton, for which she paid from her own separate property the sum of $640. This lot, by the directions of Mrs. Moore, was conveyed to her son John Carlisle Moore, one of the defendants, by the name of John Moore, who is described in the deed as "the infant son of Joseph Moore and Christina Moore, his wife." Mrs. Moore, having decided to build a dwelling house and found that these two lots were not large enough for the purpose, in December, 1893, purchased three more lots adjoining the other two from Mr. Campbell, for which she paid $860, also out of her own separate moneys. The conveyance of these lots, by Mrs. Moore's directions, was made out to the defendant George Edward Moore. Mrs. Moore then proceeded with the erection of a house and outbuildings, which extend over a portion of the whole five lots, and which have cost some $12,000. It is alleged in the bill and in proof before me that Mrs. Moore, in purchasing these lots and in directing the conveyance to be made to her infant children, and in paying the purchase money, had no intention of making them the purchasers or giving them a beneficial interest therein, or of making an advancement to them, but did so under the belief that, as she had paid the purchase money out of her own separate estate she was the owner of the lots of land and had the full right to them with power to sell or mortgage them. It is also alleged and proved that Mrs. Moore only found out her mistake as to the effect of the deeds having been made to her children just before filing this bill, when she was desirous of borrowing some money by mortgage of these lots and the house she had built on them.

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The question to be determined is whether, under the circumstances, there is a resulting trust in favor of the female plaintiff, who contracted for the purchase of the lots and paid the purchase money. In *Dyer* v. *Dyer* (1), the Lord Chief Baron says: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advances the purchase money." No doubt, the existence of any such resulting trust may be rebutted by circumstances, as when the purchase money has been paid by a father and the conveyance taken in the name of a child, a presumption arises that an advancement was intended. See *Sidmouth* v. *Sidmouth* (2); *Sayre* v. *Hughes* (3); *Bennett* v. *Bennett* (4). In the latter case Lord Jessel points out the principle upon which the doctrine rests, and holds the presumption I have mentioned does not arise where the investment is made by the mother in the name of her child as here, though in such a case very little evidence beyond the relationship is wanted in order to constitute the transaction a gift. It is clear to my mind, from the facts and circumstances of this case, that Mrs. Moore never intended parting with the beneficial ownership of the lots in question, and that her directions to have the conveyances taken in the name of her infant children were given in ignorance of the effect upon her own power of disposal.

In *Childers* v. *Childers* (5), a bill was filed to establish the plaintiff's title to a piece of land which the father (the plaintiff) had conveyed to his son in order to give him a qualification as bailiff. The deed was registered, but the son never heard of the transaction and died soon afterwards. In this case the evidence showed that the plaintiff never intended to part with the beneficial ownership and that he executed the conveyance under the impression that

(1) 2 Cox 93. (2) 2 Beav. 447. (3) L. R. 5 Eq. 376.
(4) 10 Ch. Div. 474. (5) 1 DeG. & J. 482.

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it would have no other effect than giving the qualification. In that case a question arose as to the illegality of a conveyance made for the purpose of qualifying a person for the office of bailiff, and after discussing this point, Lord Justice Knight Bruce, at page 494, says: "My conviction, I acknowledge, is that if at the time of executing the conveyance of October, 1855, the mortgage had not existed and the plaintiff had been legally and beneficially seised in fee simple of the lands comprised in it, there would have been nothing illegal, nothing contrary to the policy of the law in the deed or transaction, and I should have thought him *on the ground of trust or mistake, or on both grounds*, entitled substantially to the relief prayed by the bill."

So in this case, for similar reasons, I think the plaintiffs are entitled to the relief asked for. There will be a declaration that the defendants are seised of these lots as trustees for Christina Moore, and that the plaintiffs are entitled to the usual vesting order in favor of the plaintiff Christina Moore. See sections 2 and 7, Trustee Act, 1850; *Collinson* v. *Collinson* (6).

(6) 3 DeG. M. & G. 409.

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December 3.

In re ARMSTRONG, AN INFANT.

Infant, Custody of—Parent and Child—Right of Father—Welfare of Infant —The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), ss. 182, 183.

In determining whether the custody of an infant child ought to be given to the mother as against the father, under sections 182 and 183 of The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), the Court will take into consideration the paternal right, the marital duty of husband and wife so to live that the child will have the benefit of their joint care and affection, and the interest of the child.

If both the parents have disregarded their marital duty in the above respect, the Court will award the custody of the child to the father, unless it is satisfied that it would not be for the child's welfare.

This was a petition under sections 182 and 183 of The Supreme Court in Equity Act, 1890 (53 Vict. c. 4) (1), presented by Mrs. Helen Armstrong, wife of William Armstrong, for the custody of one or more of her infant children. The material facts of the case are fully stated in the judgment of the Court. Argument was heard November 5th and 6th, 1895.

A. B. Connell, for the petitioner.

Wesley Van Wart, Q.C., for the father.

1895. December 3. BARKER, J.:—

This was an application under sections 182 and 183 of 53 Vict. c. 4, by Helen Armstrong, wife of William Arm-

(1) Section 182: It shall be lawful for the Court, upon the petition by the next friend or mother of any infant or infants under sixteen years of age to order that the petitioner shall have access to such infant or infants, at such times and subject to such regulations as the Court shall deem proper; or to order that such infant or infants shall be delivered to the mother and remain in or under her custody or control, or shall, if already in her custody or under her control, so remain until such infant or infants shall attain such age, not exceeding sixteen years, as the Court shall direct, and also to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise as the Court shall deem proper.

183. Whenever any application shall be made to the Court for the custody or control of an infant or infants, or for access to any infant or infants, it shall be the duty of the Court to take into consideration the interests of such infant or infants, in deciding between the claims of the parents of such infant or infants.

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strong, and mother of four infant children, for an order for the custody of one or more of them and for access to those who may remain in the custody of the father. I have delayed in giving judgment in order that I might, before acting in so important a matter, have an opportunity of satisfying myself of the principles by which the Court should be governed in exercising the power given to it by the sections in question.

Section 182 is substantially a copy of section 1 of 36 and 37 Vict. c. 12 (Imp.), entitled "An Act to amend the law as to the custody of Infants." In determining applications under this Act in England Courts have taken into consideration three matters—the paternal right, the marital duty, and the interests of the infant. In *In re Taylor* (2), Lord Jessel says: "It is quite plain that the two latter considerations were the grounds which induced the Legislature to interfere. The father had already sufficient protection by the common law. His rights were certainly large enough. Marital misconduct of a gross character, if it injured the children, was certainly provided for before, and therefore what the Legislature intended to provide for was the protection of the wife and children, for the petition was to be the wife's; and the child, of course, must have its interests protected and cared for; in other words, the only alteration in the law was that you could have the custody of the children given to the wife; that is to say, she was the only person who acquired new rights; but, of course, in deciding who is to have the custody of the children, you must have a great regard to the interests of the children."

The same principle was acted upon in a case before Pearson, J., *In re Elderton* (3), and by Lord Justice Turner in *In re Halliday's Estate* (4). Speaking of the marital duty, Pearson, J., in the case above cited, says: "Now let me consider what is the nature of the marital duty? I say most distinctly that persons who choose to enter the sacred bonds of marriage not only undertake to

(2) 4 Ch. Div. 157. (3) 25 Ch. Div. 220. (4) 17 Jur. 56.

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conduct themselves to one another so that they shall fulfil the vows which they have taken at the altar, but also take upon themselves a responsibility towards such children as they may have, so to live that those children may have the benefit of the joint care and affection of both father and mother; and neither of them is entitled so to act as to deprive the children of that which they have thus guaranteed to them." As to the primary right of the father to the custody of his infant children there can be no doubt. I had occasion to consider it and act upon it in *In re Hatfield* (5). Where, however, the contest is between the parents, the Court is bound by the statute to consider the infants' interests—their welfare is, I think, the first principal object to be borne in mind. Lindley, L.J., in delivering the opinion of the Court in *In re McGrath* (6), says: "The duty of the Court is, in our judgment, to leave the child alone," (the child in this case was in the care of a legal guardian) "unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." In *The Queen* v. *Gyngall* (7), Lord Esher, after citing with approval the language of Lord Justice Lindley, which I have just quoted, adds: "The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child." See also *In re Corum* (8). Accepting this as an authoritative declaration of the considerations by which the Court should be governed in determining applications of this kind let us see what the circumstances of this present case are.

(5) *Ante*, 142.
(6) [1893] 1 Ch. Div 143.
(7) [1893] 2 Q. B. 232.
(8) 25 N. B. 404.

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Mr. and Mrs. Armstrong were married in July, 1886, and have four children—the eldest a boy eight years old, the second and third girls of the ages of four and six, and the youngest a boy about two or three months old. At the time of his marriage, Armstrong, his mother, sister and brother Charles were all living together, and Mrs. Armstrong went to live in the family. About two years afterwards she left her husband and went back to her father's, where she remained some seven months. She refused to return unless a separate house, was supplied her, and as an inducement to do so Armstrong had the house converted into two separate tenements, one of which was occupied by him and his wife, and the other by his mother, sister and brother. They continued to live together until the 29th of January last, when Mrs. Armstrong again left and went to her father's, where she has since remained. So far as one is able to extricate the facts from the mass of contradictions in this case, one cannot but feel shocked at the tone of morality which seems to have prevailed in this family. And where one is driven to decide whether in the interests and welfare of these children they should be entrusted to the care of the father or of the mother, it looks about like a choice of evils. The wife has asked for the custody of the two youngest children, from whom she has been separated for about ten months. I have concluded to refuse this application, though I cannot say that this conclusion was reached without hesitation.

Mrs. Armstrong had visitsd her husband's family before her marriage. When she became an inmate of it, she did not go as a stranger or in ignorance of the temper and dispositions of those with whom she was to be in close and constant association. The experiment was not a successful one; jealousies arose, bickerings resulted, and, unless the evidence is grossly untrue, epithets which are models of indecent language were freely interchanged between the daughter-in-law and mother-in-law. It is said that the applicant was the sole disturbing element in this household, and that until her advent it had been one of peace and happiness. At all events, if Mrs. Armstrong's evidence is

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to be accepted, and on this point it is substantially uncontradicted, her mother-in-law must for some time previous have presided over a household where freedom of speech was without limit, and where her own example may not have been without its imitators. Women do not use the foul epithets attributed to old Mrs. Armstrong, for the first time when they get to be sixty. When the applicant, therefore, married and went to live as a member of her husband's household, she not only voluntarily assumed a position in itself surrounded by difficulties, but one which necessarily brought her into constant contact with those to whom vulgar oaths and obscene language were by no means strangers. It is perhaps not to be wondered at that a separation took place in two years. It is not necessary to review the incidents which led up to this step being taken. It would only be relevant to the discussion as showing whether in leaving her husband she was neglectful of her marital duty. She, however, took her only child with her and cared for it for the seven months she was away—an arrangement in which the husband apparently concurred. From the time of her return until the second separation in January last, or rather until July or November, 1894, no very serious trouble took place between Armstrong and his wife, except what I shall presently allude to. There were difficulties between her and the other family though living separately, and no doubt unhappy scenes between her and her husband. I pass by these because my judgment is based on other considerations. In November, 1894, the husband had occasion to go from home for a day or two on business. While away a rumour or a warning reached him to the effect that his wife was more intimate than she should be with a man named Buchanan, who was then living with him as a servant. On his return home, about 9 o'clock in the evening, he says that, finding the main part of the house in darkness, and seeing through the window the servant maid alone in the kitchen, he stealthily entered the house and discovered his wife and Buchanan in a compromising position on a lounge in the front hall of the main house, where he was able to see what was being done by

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the light of a self-feeder stove. An altercation ensued, in which Buchanan was roughly handled. Mrs. Armstrong positively denies this charge of infidelity. She admits that her husband came into the house substantially as he describes. She admits that the fight ensued, but says that it was occasioned simply by the rumour her husband had heard; and she says that when he came in the house she was sitting in the hall with her feet on the stove knitting, and Buchanan was lying on the lounge. As a set-off to this charge, the wife accuses her husband with having been guilty of adultery, not only once, but on three separate occasions—once in the fall of 1891, once in July, 1893, and again during the haying season of that same year. She swears to having herself witnessed the act on each occasion, and gives the place and the names of the females implicated—persons employed as servants in the house. Armstrong says these charges are absolutely false, and gives quite a different account of the occurrences alluded to. It is, I think, significant to note the different effect produced on the husband and wife by these charges of immorality framed by each against the other. Mrs. Armstrong, having given her account of the Buchanan episode, and the altercation which ensued, says: "I was so frightened I thought it was tramps in the house, and I started for the bedroom where my husband's money was kept, and as I was going in the bedroom I heard his voice up-stairs, and just at that time a team drove into the back door. I came to the stairs and I said there is some one at the door, and they stopped and came down stairs. The hired man walked first. My husband came down. I was standing in the kitchen. He made a race for me. I started to run in the washroom and he grabbed me by the hair of the head with both hands and threw me to the floor. I got away from his clutches and went up the back way. I walked down the front stairs and went out doors and stood in the cold with slippers on. He came out and asked me to come in, and I said, 'I will come in if you promise not to abuse me any more,' and then he said he would not. I walked into the kitchen and I felt something hanging down by my head;

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it was my hair, torn out by the roots, hanging from the pug in the back." I confess it appears to me highly improbable that a husband, hearing a mere rumour such as I have mentioned, as a basis for making so grave an accusation against his wife, should come home, and finding nothing whatever in proof of it, should, without inquiry or warning, first violently assault and beat the man, and then assault his wife, tear a quantity of hair from her head and otherwise ill-treat her. Conduct so brutal and so unwarranted under the circumstances might possibly come from an exceptionally hot-tempered, cruel or vindictive person; but the evidence does not show Armstrong to be such. If, however, his account is accurate, and it be true that when he came home he found his wife and Buchanan in criminal intercourse the assault is explained, and the seeming cruelty to his wife is not without some show of justification; for, under such grave provocation, one is not apt to deliberate or measure his conduct, as if under no excitement. Now let us see how Mrs. Armstrong acted when the scene was changed and her husband was the offending and she the injured party—not once, but on three separate occasions. Her protest is of the mildest character. The immediate cause of the first separation was some misunderstanding about cooking at a frolic, and of the second, some dispute about work in the barn, but four years rolled by after he was discovered with one girl, and two years after he was discovered with the others, and yet no great estrangement resulted from it. Worse than that, two years after the first occasion, the youngest child was born, and if her evidence is to be believed, she continued to share her husband's room as his wife up to a short period before she left in January last. It is not necessary for the matter in hand that I should determine which of the parties has spoken falsely. It is certain, however, either that Mrs. Armstrong has fabricated these charges and deliberately perjured herself in order to support them, or else she has too free and easy notions of morality generally, and of the marriage tie and marital obligations especially, to make her influence a desirable one for a young child.

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I cannot pass by this phase of the case without some notice of a piece of evidence given by Armstrong. He says that his wife, some four or five years ago, when speaking of a man by the name of Parent, who had lived as a servant in the house, said that he (Parent) was a d—d sight better man than Armstrong was, that she had slept with him and would sleep with him again. Mrs. Armstrong denies ever having said anything of the kind. If Armstrong is correct, and his wife actually made this statement, and he believed it, he does not seem to have resented it or shown that he stood on any higher plane of morality than he assigns to his wife. If the statement is not true, then Armstrong is guilty of the grossest perjury; and if she did make the statement, and he did not believe it, then to have mentioned it at all is unmanly and ungenerous in the extreme.

At the close of the case, Mrs. Armstrong was called to rebut certain statements. One was that of which I have just spoken. Another, some evidence by a witness Cody, to which I have not referred, and another was a statement of Charles Armstrong, to the effect that he, on one occasion, heard Mrs. Armstrong tell her son to call his father "a damned whore-master." There is other evidence showing the description of language which Mrs. Armstrong has been in the habit of using and which she has not denied. "Damn" seems to have been in common use—"damned old whore," as applied to her mother-in-law; "damned whore-master," as applied to her husband; "damned bastard" and "son of a bitch," as applied to Charles Armstrong, and expressions equally gross and revolting as applied to others.

On or about the 25th of July, 1894, Armstrong says he came home, after a short absence, and finding some fault with the manner in which his servant man had done some work, he said to his wife, "Why don't you show the man how to do the job?" She said, "Damn you, why are you not home earlier than this? You were to some whore-house." That riled me, and that was the 25th July, 1894, and that night she went up-stairs and left these children in my care, and I have never roomed with her after that."

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The dominant matter to be considered here is the welfare of the infants. As Lord Justice Lindley says, the duty of the Court is to leave them alone unless the Court is satisfied that it is for their welfare that some other course should be taken. It is not disputed in this case that Armstrong is and has always been most kind and affectionate to his children, and that he has ample means for their maintenance and education. At his request, the youngest child, in February last, was taken by his sister Mrs. Watt to be cared for. Mr. and Mrs. Watt were both produced as witnesses before me. They have been married eleven years, but have no children. They both express great fondness for the child and desire to retain it. They are also comfortably off. On the other hand, Mrs. Armstrong is without a home or means of support except such as her father may supply her. He seems a most respectable looking man, has means, and expresses his willingness to support and educate the child without expense to the father. He is, however, under no obligation or duty to do this as the father is. He is a man over sixty years af age, and so far as ability to contribute to the physical comfort and education of the child, it is no greater than that of his father. I think, so far as the moral welfare of the child is concerned, it is at least as well assured in the father's custody as in the mother's. The applicant has not satisfied me that it is for the welfare of this child that any change should be made as asked. The application will, therefore, be refused, but without costs. The mother is entitled to access to her children at all proper times, and there will be an order that she have access to them at least once a fortnight.

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Practice—Illegal Agreement—Defence of Illegality Not Raised by the Pleadings—Stifling Competition at Public Sale—Agreement Between Intending Purchasers Not to Bid Against Each Other—Purchase for Joint Benefit.

Though the defendant has not pleaded the illegality of an agreement by his answer, if its illegality is disclosed by the pleadings the Court will not enforce it.

An agreement between two intending purchasers of Crown land lumber licenses to two lots, neither wanting the whole of the lots, not to bid against each other at their public sale, but that one should bid them in for their joint benefit, is not illegal.

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

Argument was heard November 21st, 1895.

A. A. Stockton, Q.C., and *Phinney*, Q.C., for the defendant:—

The agreement is illegal as tending to stifle competition at a public sale, and is therefore void. This rule is well established and frequently enforced. Its need and soundness is peculiarly apparent under the present circumstances. The interests injuriously affected belong altogether to the public. See Greenhood on Public Policy (1). The rule has never been applied in New Brunswick, but a similar principle was recognized in *Pratt* v. *Tapley* (2). The rule is very clearly enunciated in *Gibbs* v. *Smith* (3) under circumstances identical with those here. *Jones* v. *North* (4) appears to trench upon the doctrine. This decision has never been regarded with favor. See Pollock on Contracts (5), where that learned author remarks that it is a case not free from difficulty. As an agreement contrary to public policy it will be adjudged void. *Hilton* v. *Eckersley* (6).

(1) p. 180.
(2) 3 Pug. 163.
(3) 115 Mass. 592.
(4) 19 Eq. 426.
(5) 3rd ed. 328.
(6) 6 E. & B. 49.

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Blair, A.-G., and *M. G. Teed*, for the plaintiff:—

It is too late now to raise the question of the validity of the agreement. It is not raised in the answer, nor does it appear in the pleadings. Admitting that the objection is in time, it does not seem to be founded upon any well-authenticated rule. Apparently it has not been recognized by English or Canadian authorities, for none have been cited. The rule has no application to the circumstances here. The agreement between the parties was that the purchase should be made for their joint benefit. This distinguishes it from an agreement by which an intending purchaser is induced to withdraw his competition in consideration of a money payment or some other reward. The Courts are no longer astute to scrutinize contracts on the ground that they offend against public policy. See *Egerton* v. *Earl of Brownlow* (7), and *Printing Company* v. *Sampson* (8), where Jessel, M.R., says: "You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract."

Phinney, in reply.

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The bill was filed in this case for the specific performance of a verbal agreement alleged to have been made between the plaintiff and defendant in reference to some Crown land lumber licenses. The agreement had reference to two lots of land sold at a Crown land sale in Fredericton on the 29th of August, 1893, one of which was spoken of by the witnesses as the Birch Ridge lot, and the other as the McLean Brook lot. It is in reference to the latter that the chief dispute has arisen. The alleged agreement is that the defendant purchased these licenses for the benefit of himself and the plaintiff; that the plaintiff was to have that part of the Birch Ridge lot south of the Birch Ridge road, and the defendant the remainder of the lot; and so far as the McLean Brook lot was concerned, the

(7) 4 H. L. C. 1. (8) 19 Eq. 462.

plaintiff alleges he was by the agreement to have all south of the southern line of the Basil settlement lots, and the land north of that was to go to defendant. The price was to be divided on the basis of mileage to each. The plaintiff alleges that in accordance with this arrangement the defendant purchased these lots in his own name as was agreed; that he paid his proportion of the price for the Birch Ridge lot, and tendered his proportion of the price paid for the other. The defendant admits that he bought the lots in on joint account, but denies that the McLean lot was to be divided as the plaintiff claims. Before discussing the questions of fact in dispute I will determine some legal points. The defendant contended that this agreement would not be enforced, as it was one contrary to public policy as tending to prevent competition at a public sale. Two answers were made to this: first, that no such defence was set up in the answer; and second, that the evidence showed no such agreement. In looking at the allegations in the bill and answer, I think the facts are sufficiently stated to raise the question. It is not a defence which arises outside of the contract to defeat its operation, but one which goes to show that it was always void and incapable of being enforced. In *Scott* v. *Brown* (1) Lindley, L.J., says: "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. *It matters not whether the defendant has pleaded the illegality or whether he has not.* If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of *Lord Mansfield* in *Holman* v. *Johnson*" (2).

Several cases were cited in support of the defendant's contention, though they are not, I think, applicable to this case. *Hilton* v. *Eckersley* (3); *Egerton* v. *Earl of Brown-*

(1) [1892] 2 Q. B. 724. (2) Cowp. 343. (3) 6 E. & B. 64.

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low (4); and *Pratt* v. *Tapley* (5), are only cases where a well-recognized principle was held applicable to a particular set of circumstances, quite different from those which exist here. In *Gibbs* v. *Smith* (6) the Court say: "An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced." This is substantially what the parties did in this case. Neither of these parties wanted the whole use of these lots; and although both went to the sale for the purpose of bidding on both lots, I can see no reason why they should not agree as they did, that one should purchase the whole and divide afterwards. It may be said that this prevents competition. Perhaps it does, but that is not the object of the arrangement, though to some extent it may be a result. In *Phippen* v. *Stickney* (7), a case very similar in its facts to this, the agreement was upheld. See also *Kearney* v. *Taylor* (8). In *Galton* v. *Emuss* (9), a bill was filed for the specific performance of an agreement much like this, in which the consideration mentioned was the agreement not to bid. *Knight Bruce*, V.C., there says: "Two men equally desirous of purchasing an estate become acquainted with each other's intention and agree not to bid one against the other. It is merely a contract that one of them shall not become a competitor for the estate. There is no authority produced to show that such a contract is illegal, nor is any intention of fraud or misrepresentation suggested as between the two parties." In this case there was an upset price fixed for the lot—$8—and the evidence shows that the plaintiff had instructed Mr. Winslow to bid the lot up to $40, but in consequence of his withdrawal the lot was sold at $8. *In re Carew's Estate* (10) was a case

(4) 4 H. L. C. 1.
(5) 3 Pug. 163.
(6) 115 Mass. 592.
(7) 3 Met. 384.
(8) 15 How. 494.
(9) 8 Jur. 507.
(10) 26 Beav. 157.

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very similar. There the sale was made under the Court with a reserved bid. Two persons agreed not to bid against each other, and that one should purchase it and then divide it between them. The reserved price was £600 —the purchaser bought at £650, though he was willing to go as high as £1,500. The agreement was upheld, and the M. R. says: "I am not aware of any case or of any principle that such an agreement is inequitable." See also *Jones* v. *North* (11), cited at the argument. I hold, therefore, that this agreement was in no sense one entered into to prevent competition or for any illegal purpose, and that it is perfectly good.

The next question to be determined is whether the plaintiff has made out the agreement so as to entitle him to the relief he seeks. The difference between the parties arises on two points. The defendant says that by the agreement he was to have the right of peeling all the hemlock bark on both lots. That is the sole dispute as to the Birch Ridge lot. In reference to the other there is also a dispute as to the division. The defendant's contention is that the lot was to be divided by a north and south line, running parallel to what is called the Munroe line, while the plaintiff contends the division line was to be the southern line of the Basil settlement lots, which is an east and west line at right angles to the Munroe line. Neither of these lines would divide the block into equal areas—the division contended for by the defendant would give him a greater acreage than he would get by the other. The parties agree that each was to pay a proportion of the price based upon mileage—that is to say, if by the division one got a third of the area of the block he was to pay one-third of the price per year. It was in consequence of this that the defendant complained that the amount paid him by the plaintiff as his share of the Birch Ridge lot license was not enough, because by the division he had less land than the plaintiff had.

The plaintiff's account of the transaction is as follows: He says that he told the defendant that he wanted all that

(11) 19 Eq. 426.

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part of the Birch Ridge lot to the south of the Birch Ridge road, and all of the McLean brook lot to the south of the southern line of the Basil settlement lots, extended westerly beyond the Munroe line; that the defendant assented to the first, but would not agree to the division of the other, and that they then agreed to leave it to John Stephenson, who was then looking at the plans in the C. L. office, to fix the division line of the McLean brook lot, and he then and there fixed the southern line of the Basil settlement lots up to the Munroe line as the division line, the plaintiff occupying to the south and the defendant to the north; and that the defendant agreed to this arrangement, and bid in the lot subject to it. He says the sale of the Birch Ridge lot took place in the forenoon, and of the other in the afternoon—there being an interval of some hours between the two—and that he left by the train immediately after the sale, and met the defendant by appointment on the train from St. John to Moncton on their way home. That he had before this obtained from Stephenson a statement of the amount he was to pay as his proportion estimated on the mileage to which he was entitled on the division agreed upon. That the amount of the Birch Ridge lot was about $16, and for the other about $17. He paid the defendant for the first, and says that when he offered to pay the other the defendant refused to take it, because it gave him (the plaintiff) more land than by the arrangement he was entitled to. He says the defendant then produced a plan of the lots, and pointed out as the line of division agreed on, an east and west line parallel with the south line of the Basil lots, but some distance to the south of it. It was then agreed, he says, to leave it to Stephenson, who was present when the agreement was made, to say which was the division line originally agreed upon. The plaintiff further says that he applied to Stephenson, who confirmed his view of the agreement, and in a letter to the defendant, written in September or October of that year, he communicated to him what Stephenson had said. The plaintiff also says that there was nothing whatever said between him and the defendant

as to the hemlock bark, and that there never was anything said as to a north and south division line until a year afterwards, when some negotiations for a settlement were in progress, shortly before this suit was commenced.

This account by the plaintiff is entirely corroborated by the evidence of John Stephenson, who is a Crown Land surveyor, and entirely conversant with the land in question. He swears positively that when the parties did not agree as to a division line it was at the defendant's suggestion left to him to settle, and that when he fixed it at the southern line of the Basil settlement lots, they both assented to it. He also swears that he heard nothing of a north and south line, and nothing about any reservation of the bark.

The defendant in his answer says that he proposed a division of the McLean Brook lot by a north and south line as I have mentioned, specifying the lots which such a division would give, which he understood the plaintiff assented to; and in section 8 he alleges and declares that the understanding and agreement as to the division was that it was to be by this north and south line. In his evidence the defendant fails in proving any such agreement. On the contrary, he says there was no agreement at all as to how the lot was to be divided. At the close of his evidence I myself put this question to him:

"You say positively, as I understand you, that while it was understood and agreed between you and Irving that you should bid this lot in in your name on joint account, it never was agreed to between you, and you never did agree where the dividing line was to be between you. Did you ever come to any determination—any agreement between you as to where the dividing line should be?" His answer was "No."

The point in dispute is thus narrowed down to this: The plaintiff and Stephenson prove an agreement for a specific division of the land, and deny that there was any reservation as to the bark. The defendant, on the other hand, puts forward in his answer an agreement which he

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does not prove, and he swears that no agreement as to the division was ever made, and that he reserved to himself the right to the bark on the whole lot. I confess that the defendant's account seems improbable in view of the surrounding circumstances. In the first place, as to the bark. I should infer from the evidence that the whole tract is of comparatively little value, but whatever the value is, it consists as much in the bark as in the lumber, or substantially so. It seems to me altogether improbable that in that case the plaintiff should agree to pay a proportion of the price based on acreage if the defendant was to have all the bark. Take the Birch Ridge lot by way of illustration. It was divided about equally. It does not seem a very business-like transaction that the plaintiff was to pay as much for the lumber on his half as the defendant was for the lumber on his half and the bark on the whole lot in addition, when there is no suggestion that one part of the tract was better than another. It was urged as most unlikely that the defendant would, after having entered into an agreement with Millers to deliver them all the bark, consent to an arrangement by which the plaintiff would get a portion. I attach no importance to this, because the agreement between the defendant and Millers does not bind him to buy in any land at all, but only to give them the bark on such land as he might purchase. The land was open to public competition, and Millers had no better right than anyone else, by reason of their having been licensees before that.

Now, as to the division. On this point also I think the probabilities are with the plaintiff. I can imagine how a misunderstanding might, under some circumstances, arise as to which of two lines had been agreed upon as the true dividing line, though it is not easy to conclude how two intelligent business men such as this plaintiff and defendant are, acquainted with the lands, with the plans before them, and with a full knowledge of what they wanted and why one division was preferable to another, could be under any misapprehension or mistake as to whether the line agreed upon was a north and south line or an east and west one

It seems to me even more difficult to understand how these same men should arrange for this purchase to be made as it was, without first definitely settling upon the division. This was the most important element in the whole arrangement. That course was followed as to the Birch Ridge lot. What reason can be suggested for not following it as to the other lot? There was ample time for the purpose, for some hours elapsed between the sale of the two lots. The very fact that the division proposed by the plaintiff was not acceded to by the defendant, one would naturally think, would make the plaintiff at all events especially particular to have that question settled before assenting to the purchase being made in defendant's name, and thus giving him the sole control.

The defendant's testimony on this point is not in all respects quite satisfactory. After describing what took place between him and the plaintiff as to the line, and their disagreement over it before the sale, he says: "Then some one sang out 'they are going to begin the sale,' and we started, and he (plaintiff) says to me, 'I expect you to give me the other,'" that is the division insisted upon by the plaintiff, "and we parted this way, that I was to bid the block in, and at the close he was to come forward and pay his share, and I said, 'I won't quarrel with you about a few rods of ground,' and we never came to any final decision." It might be argued that if the defendant purchased with a notice that the plaintiff would expect his own division, the defendant virtually assented to it, and it might also be argued that it was impossible for the plaintiff at the close of the sale to come forward and pay his share, unless there had been a previous agreement as to the division, for without that being settled his share could not be computed. However, he says they came to no final decision. In another part of his evidence he says he asked Stephenson if he remembered what the bargain was at the Crown Land office, that is, as to the division. One would naturally infer from this two things: First, that Stephenson was present and knew all about it; and second, that there was a bargain of some kind. And in another part of his evi-

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dence, when speaking of his final interview with Stephenson and Smallwood with a view to some arrangement of the dispute, he says: "Mr. Stephenson, if it was the last words I had to speak this moment, and if I was going to leave the earth this moment, that is the way I understood the bargain to be at the Crown Land office, for it to be a dividing line north and south on the same course as the Monroe line, and I say the same now." When cross-examined on this same point he is asked this question:

"Q.—Do you say he bound himself not to bid against you and you to bid it in, but no agreement between you as to how the block was to be divided, do you say that is the fact?

"A.—Yes.

"Q.—Then as to the division, it was altogether at large?

"A.—Yes."

Unless we credit the defendant with using very inapt language to convey his idea and describing what took place between him and the plaintiff as a "bargain," because he assented to it and the plaintiff did not, it is difficult even now to define the defendant's position. I, however, accept his sworn statement that there never was any division agreed upon or settled before the sale or since, as being his recollection of the facts, and I have dealt with the case on that basis. I think the plaintiff must succeed.

There only remains the question of damages for the bark peeled and logs cut by the defendant in this disputed lot. I assess these at $110.

There will therefore be a decree that the plaintiff is entitled to the benefit of the license in the McLean brook lot, so far as the land south of the southern line of the Basil settlement lots is concerned, and an injunction as prayed. The amount to be paid by the plaintiff as his proportion I imagine can be agreed upon, but if not there must be a reference to determine it.

BELYEA, TRUSTEE OF THE ESTATE OF DANIEL L. PATTON, DECEASED, v. CONROY ET AL.

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December 16.

Trust—Wrongful Appropriation of Trust Property for Purposes of Trustee's Own Business—General Assignment by Trustee—Following Trust Property—Refusal of Co-Trustee to Join Suit—Costs.

C. wrongfully appropriated merchandise in his possession as one of the trustees of P.'s estate for the purposes of his own business. Subsequently it came into the hands of the defendants under a general assignment to them by C. for the benefit of his creditors. A suit having been brought by the plaintiff, as one of P.'s trustees, against C. and the defendants, for the recovery of any assets of the P. estate in their hands, the defendants offered to give up the merchandise to the plaintiff if he could identify it. This could not be done, nor could its value be determined by the plaintiff or the defendants until an enquiry was made by a referee of the Court.

Held, that the defendant trustees were not liable for the costs of the suit.

Where a trustee refusing to join with his co-trustee in a suit for the recovery of trust property was made a defendant to the suit, costs thereby incurred were not allowed against him.

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

Argument was heard November 19th, 1895.

Earle, Q.C., for the plaintiff.

Skinner, Q.C., for the defendant Conroy.

G. C. Coster, for the defendant Dever.

Ashe, for the defendant Haley.

The defendant, William Pugsley, appeared in person.

1895. December 16. BARKER, J.:—

The only question to be determined in this case is one of costs. The facts are these: The plaintiff and the defendants, Dever and Conroy, are trustees under the will of Daniel Patton. By the provisions of that will the business was to be carried on for a limited time after Patton's death. As that involved the undivided attention of one of the trustees, and as Conroy had been a clerk with Patton for several years prior to his death, and was therefore con-

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versant with his business, this Court, on the application of the trustees, made an order September 3rd, 1892, that the defendant Conroy be employed specially for the purpose at an annual salary of $900 in addition to any sum he might be entitled to receive by way of commission. Conroy continued in this management until about the first of August, 1893, having about a month before this gone into business on his own account, and the Patton business was then discontinued. Conroy continued his business only a few months, and on the 19th of May, 1894, he made an assignment for the benefit of his creditors to the defendant Haley and one John M. Driscoll, who took possession of the assets assigned to them. Proceedings were afterwards taken for the removal of Driscoll as a trustee and the appointment of the defendant Pugsley in his place, and an order was made to that effect. In the meantime the plaintiff had derived information leading him to believe that Conroy had become largely indebted to the Patton estate, and that he had used funds in his hands as a trustee of that estate in the purchase of goods which had gone into his own business. The plaintiff thereupon, as trustee of the Patton estate, filed this bill against Conroy, Haley, and Pugsley as Conroy's trustees under his assignment and against Dever as a trustee of Patton estate, but who for reasons set forth in his answer, and to which it is unnecessary now to refer, refused to be a plaintiff in this suit. When the cause came on for hearing I directed a reference to inquire as follows:—

1. An account of all dealings between Conroy and the Patton estate, and to report how that account stood.

2. An account of all property belonging to the Patton estate then or at any time in the hands of Haley and Pugsley as trustees of Conroy, and report the nature and value of it, and if it had been sold, to report when and in what manner, and its value.

I also directed as part of the same reference that if in taking the first account the Referee should find a balance due by Conroy, he was then to enquire and take an account of all property or assets in the hands of Haley and Pugsley

as such trustees, purchased by Conroy with trust moneys of the Patton estate, and the nature and value of it. The Referee reported (1) that Conroy was indebted to the Patton estate, in the sum of $2,805.05; (2) that goods belonging to the Patton estate of the value of $216 came into the hands of Haley and Pugsley as trustees of Conroy, and that they disposed of them; (3) that Haley, as trustee of Conroy, had before the appointment of Pugsley as trustee, collected the sum of $399 belonging to the estate of Patton, and that among the assets handed over by Conroy to his trustees as his own, were debts amounting in all to $1,048.96, which actually were due to the Patton estate, and which have not been collected. No exceptions were filed to this report, and on motion it has been confirmed.

The evidence shows that the plaintiff at a very early period notified Haley and Driscoll of his claim, and not to distribute or dispose of the Conroy assets as he had reason to believe they belonged to the Patton estate. This notice was served upon Mr. Pugsley immediately after his appointment. They, however, did go on and dispose of the estate, and according to Mr. Pugsley's account distributed at least some of the proceeds. I think the defendants Pugsley and Haley are both personally liable to pay the plaintiff this $216, and there will be an order to that effect. Haley is, I think, liable to pay the $399 collected by him, and there must be an order to that effect also.

In determining the question of costs it must be remembered that all this litigation has been caused by Conroy. He has not only misled his co-trustees of the Patton estate but his own trustees. The bill in this case charges nothing against the defendants Pugsley and Haley, except simply that as trustees of Conroy they had assets in their hands belonging to the Patton estate which they were proceeding to sell; that is, that some of the goods in their hands as part of Conroy's assets, were goods really purchased by Conroy with trust funds of the Patton estate, and so liable to be followed by the plaintiff. At no time did the plaintiff claim specific goods in the hands of Pugsley and Haley. He could not do so, for it is said, and not disputed, that it

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was equally impossible for the plaintiff by an examination of the Patton estate books to trace such goods, if there were any, and that it was equally impossible for the trustees of Conroy to trace them from his books, without personal explanations by himself, which were not forthcoming until the investigation before the Referee had nearly concluded. When that fact became known all parties concurred in the Referee finding as he did on that head of enquiry. And at the outset of the trouble, and I think before this suit was begun, the defendants Pugsley and Haley offered to give up any specific goods in their hands belonging to the Patton estate, but none such was claimed, and none such could be, for the reasons I have mentioned. I mention this to show that, at all events so far as these goods are concerned, neither Pugsley nor Haley has done anything to cause the litigation; on the contrary, it seems to me they did all that could reasonably be expected of them to render it of as little expense as possible. The position of Haley as to the $399 is said to be somewhat different. It seems that Haley knew that this sum was money originally due by the Campobello Company to the Patton estate. He, however, says that this company also owed the Conroy estate, and that Conroy was trying to get the matter arranged, and finally told him that he had arranged the debt with the Patton estate or their portion of it, and that this $399 was coming to them (Haley and Driscoll) as his trustees, and it was accordingly collected by them. I think the plaintiff cannot complain if Haley trusted in this to the statement of the plaintiff's own co-trustee Conroy, who had been selected as the principal business man of the trust, and who is still a trustee, and taking part in the management. I do not see why Haley should not have trusted Conroy's statement as soon as that of any other of the trustees. Certainly his position gave him better means of knowledge than the others had, and at that time there was nothing, so far as was pointed out to me, leading Haley to suppose Conroy was not to be relied upon. I do not think either Pugsley or Haley should be made personally responsible for the costs of this litigation.

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The plaintiff also claimed that he was entitled to tax against the defendant Dever such additional costs as have been incurred by the plaintiff by reason of his not having joined as a co-plaintiff, but appears as a defendant. These costs, however, could not amount to very much. Mr. Dever had reasons for the course he took, and I think he was at liberty to do as he has at his own expense, for he has not asked for costs.

Something was said about appropriating any commissions Conroy may be entitled to towards payment of what the defendants Pugsley and Haley might be compelled to pay, but that is a question which does not arise at present.

There will be a decree against the defendant Conroy for the payment to the plaintiff of $2,805.05, and the costs of this suit, and against the defendants Pugsley and Haley for the payment of $216, and against the defendant Haley for $399.

1896.
January 7.

ALBERT JONES AND JOHN McGINTY, ADMINISTRATORS OF JAMES T. KENNEDY, DECEASED, v. RUSSELL.

Patent—Sale of Interest in Invention and Improvements—Improvements Not Amounting to a New Invention—Construction of Agreement.

Defendant was the inventor and owner of a patented snow plough, and by an agreement with K. sold to him a one-half interest in the invention and all improvements that subsequently might be made. The invention proving unsatisfactory, defendant constructed a new plough, which was an improvement in many important respects upon the original invention, and sufficiently dissimilar to it as not to be an infringement, and had it patented as a new invention. In a suit by K.'s administrators to secure to them a one-half interest in the new patent, the defendant contended that the plough was a new invention and not an improvement of the old invention.

Held, that it did not amount to more than an improvement within the meaning of the agreement.

This was a suit by the plaintiffs as administrators of the estate of the late James T. Kennedy to enforce an agreement made between him and the defendant for the sale of a one-half interest in a patent owned by the defendant, and all improvements thereof, and for an account of royalties alleged to be due them. The facts are fully stated in the judgment of the Court. Argument was heard July 17th, 1895.

Weldon, Q.C., and *C. A. Stockton*, for the plaintiffs.

J. A. Belyea, for the defendant.

1896. January 7. TUCK, J :—

On the twenty-first of September, 1883, the defendant had invented a new and useful improvement on snow ploughs for which he had applied for letters patent in the Dominion of Canada, and in the United States. Being in need of money, he applied to James T. Kennedy for pecuniary assistance to the extent of one thousand dollars Mr. Kennedy agreed to furnish the assistance upon certain terms, and on the day above-mentioned the parties entered into an agreement whereby the defendant granted,

bargained, sold and assigned to James T. Kennedy, his executors, etc., one undivided half in and to the patents and caveats then obtained or that might thereafter be obtained and filed in this and all other countries, together with all improvements which might thereafter be made or had upon said snow plough. The agreement contains many other clauses, but this is the important one as affecting this suit. The defendant afterwards, on the 15th of August, 1884, took out letters patent in Canada for his invention; and on the 10th of June, 1884, he obtained letters patent in the United States. In 1884 the defendant assigned to Kennedy one undivided half of all his right, title and interest in the said letters patent, for the term of years for which they were granted.

By the bill filed in this cause, in addition to the above statement of facts, the plaintiffs allege that the snow plough was constructed; that the defendant has received large sums of money for royalty; that the defendant granted to several railway companies the right to make and use the snow plough on the roads operated by these companies in the United States, and that large sums for royalty have been received by the defendant for licenses to use the invention, both in the United States and Canada for which he refused to account to Kennedy in his lifetime and since his death has refused to account to the plaintiffs. It is also alleged that the defendant has received other profits from the snow ploughs for which he has refused to account. Then comes the important allegation, as regards the question to be determined in this action. It is alleged that the defendant subsequently petitioned the commissioner of patents for the Dominion of Canada praying for the grant of a patent for alleged new and useful improvements in railway wing snow ploughs, and on the 24th of February, 1888, he obtained letters patent for this invention; and that although a demand has been made upon the defendant he has refused to transfer to the plaintiffs as administrators of the late Mr. Kennedy an undivided half interest in this last named patent.

The plaintiffs claim that the last named patent relates to the snow ploughs in which James T. Kennedy was

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interested by virtue of the agreement before in part recited, and that the wing snow plough is simply an improvement upon the original plough, which is called the "Eagle Wing." The defendant denies this, and says that the wing plough is not in any respect an improvement on, nor was it sought or intended to be an improvement on any railway snow plough, and that it is an original invention. The main question in dispute between the parties is chiefly one of fact, the proper solution of which depends upon the evidence. The legal construction to be put upon this agreement is also to be determined.

The plaintiffs ask that it may be decreed that the defendant be directed to execute to the plaintiffs an undivided half of the invention patented under the letters of the 24th of February, 1888; that the defendants be ordered to render an account of all royalties and moneys paid for the use and licenses of all the letters patent, and all sales made of snow ploughs, etc., etc., and that the plaintiffs be restrained by an injunction order from transferring or in any way disposing of the patent and letters granted on the 24th February, 1888.

Mr. Russell's patent of the 24th of February, 1888, is for alleged new and useful improvements in "railway wing snow ploughs." His patent of the 15th of August, 1884, is for alleged new and useful improvements in snow ploughs. In his testimony Mr. Russell calls his first plough the "Eagle Wing"; the second he calls the "Wing Elevator Plough." Is the second any more than an improvement upon or addition to the first, or is it a distinct and separate invention? The defendant claims for the Wing Elevator beyond what is found in the Eagle plough:—

First,—the one piece chisel-shape steel bit, cutting horizontally the width of the road bed—ten feet;

Second,—the steel flanges, each constructed to cut the ice, and to be firmly bolted to the outside grade timbers;

Third,—the link straps and grips to hold the saw-tooth joints, in connection with the backbone, at the centre of the grade timbers;

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Fourth,—the derrick posts with back stays and turn buckles and swinging gaff to support the wings carrying the elevators;

Fifth,—a solid bottom constructed with timber 5 x 12 on its edge, and thoroughly secured with iron bolts;

Sixth,—the pockets twenty-four inches deep, so constructed as to receive the wings carrying the elevators, thus cleaning bridge guards, target posts and all platforms;

Seventh,—the swivel hatches on deck in rear of pilot house to support the tops of the wings, and to be adjusted from within the pilot house by five single shive blocks;

Eighth,—in the truck frames, the double-bearing journals, one being on the inside of the wheel and one on the outside, thus enabling the forward truck to withstand a pressure of 100 tons; also in the pipe boxes, double housings, with curving wheels;

Ninth,—the male and female double flange couplings, the centre plates being safe to run without the ring pin;

Tenth,—the machinery constructed to carry wings and elevators. The racks and using couplings, two vertical shafts carrying dead pulleys; two vertical shafts, each carrying quarter bevelled cog gear wheels on one end, and the driving wheels on the other end. Also pauls and heavy brackets to hold the rack when extended to sixteen feet. His claims for the Eagle Wing are:—

First,—the twelve-inch sponsing on the sides.

Second,—the oscillating power bar.

Third,—the circular socket joint.

Beyond doubt there is a vast difference between the two ploughs, and that one is a great improvement on the other. But I am satisfied that having invented the Eagle Wing helped the defendant to invent the other. The starting point is the same, a snow plough; and certain portions of the first are to be found in the second. According to the defendant's evidence the ploughs do different kind of work. What can be done with the one cannot be done with the other. Mr. Russell explained at length

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wherein one plough differed from the other, and the kind of work each could do. He did say that there is not a particle of resemblance between the two. But this was only a figure of speech, for his own description of each showed the contrary. I saw the plan or model of each, and discovered points of resemblance. He said that they are no more alike than a grocer's delivery waggon is like a four-horse coach; and yet both of these go on wheels.

He said: "This plough, the Eagle Wing, will open the road, but has no business in front of the engine. I will explain why. For instance, the road is open from here to Moncton. I start out behind them to widen the road. I run for a few miles and find there is so much snow the engines cannot haul her. I clap her right on a siding and get behind her and put her ahead and take the snow. That is why she will work on all the roads, but the Wing Elevator plough has no business forward of the locomotive except in extreme cases."

Judge.—"If she does not go forward of the locomotive where does she go?" A.—"Behind. Her wings are to widen the road."

Judge.—"It requires first that plough (Eagle) and then the other?" A.—"First to open the road."

Judge.—"The first plough you say goes forward of the locomotive and takes the snow out, and then this one goes out?" A.—"The first to ten feet, and this one to sixteen feet. She takes everything up and throws it from twenty to sixty feet."

The witness in effect said that the two ploughs are distinct, because the work done by the one cannot be done by the other. Then there is this important distinction, that in the first the road is opened by the plough being put in front of the locomotive; the other is not fit to be put in front of the locomotive (although it may be so put), but behind for the purpose of widening the road. The first opens the road to the extent of ten feet, and the second to sixteen feet.

On cross-examination the witness said that by closing the wings of the "Wing Elevator" it could be put in front and do the work of the "Eagle Wing"; and that the Wing Elevator is often so used, when a regular opening plough cannot be had. The witness was asked, "if with the exception of some changes is not the principle the same; don't you work them on the same principle?" A.—"The formation is what makes the principle." Q.—"But is it not the same?" A.—"Somewhat the same, but the grade is lower very much and made straight."

It is evident that shortly after having obtained patents the defendant became dissatisfied with the first plough. He built only one of them. After he had prepared plans and specifications of the Wing Elevator he had a conversation with the plaintiff McGinty, in the course of which Mr. Russell said: "I showed him the plans for the Wing Elevator plough, for the Trolley plough, and for other hings, more than any man in Canada could handle alone. I told him this and said: 'The Eagle Wing can set right on her eggs, I shall have nothing more to do with her'; the consequence was she did set there; and the consequence was there was only one plough of that kind built. Of course there are a great many things about her that required alteration. I built that plough to throw the snow high of the cuttings, what no plough ever did before, and she did it."

The truth in short is this, that Mr. Russell got an advance of one thousand dollars, or more, from Mr. Kennedy when he needed the money, and agreed to sell him one-half the patent in the Eagle plough and all improvements thereon; built only one of them, then becoming dissatisfied with this plough dropped it, prepared plans and specifications of an improved plough, got out a patent for it and said to the plaintiffs, who represent Kennedy, "You have no share or interest in this second invention, and I shall not give you one-half or any part." I think this conduct on the part of Mr. Russell (however sincere he may be) was not honest, and was not in accordance with the letter or spirit of his agreement with James T. Kennedy.

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It is common knowledge that when persons have turned their attention to a particular class of invention they are likely to go on and invent and likely to improve the nature of their invention, and continually to discover new modes of attaining the same end. I have no doubt that both Mr. Russell and Mr. Kennedy had this in view when they entered into the agreement in September, 1883; and when the defendant said he would assign to Kennedy one undivided half of all patents that might thereafter be obtained for his invention, together with all improvements that might be made on the snow plough, they both had in mind and meant to express it by the language used, an improvement on the snow plough to the full extent of that effected by the Wing Elevator. I think this is the fair construction to be put upon the words of this agreement. I am not prepared to say whether or not the Wing Elevator may technically be called an improvement on the Eagle Wing. But I am convinced that it is so upon the true construction of the agreement between the parties. Mr. Kennedy's object would naturally be to protect himself in the event of Mr. Russell inventing a plough which would be a great improvement on the first one. Otherwise he might be placed in the very position the defendant is now seeking to place his representatives, having paid his thousand dollars to get nothing in return.

I was pressed very strongly by Mr. Belyea, counsel for the defendant, to consider this case from the standpoint of the patent of the Wing Elevator being an infringement on that of the Eagle Wing; and he cited a number of cases bearing on infringement, such as *Clark* v. *Adie* (1); *Curtis* v. *Platt* (2); *Proctor* v. *Bennis* (3); *The Ticket Punch and Register Company (Limited)* v. *Colby's Patents (Limited)* (4); and *Dudgeon* v. *Thomson* (5).

The learned counsel puts the question, Was the Wing Elevator an infringement on the patent of the Eagle Wing?

(1) 10 Ch. App. 676; 2 App. Cas. 423.
(2) 3 Ch. Div. 135.
(3) 36 Ch. Div. 740.
(4) 11 Times Law Reports, 262.
(5) 3 App. Cas. 44.

If so, he argues, the plaintiff, of course, would be entitled to it, but if it is not an infringement this action must fail. If I thought this case depended upon the question of infringement or no infringement I would agree with this argument. All of the cases above cited are ample authority for Mr. Belyea's contention that the patent of the Wing Elevator is not an infringement on that of the Eagle Wing. There may be a patent for an improvement in an old machine, or even for an addition thereto, without such patent being an infringement of a previous one of that machine.

But I rest my decision on an entirely different ground. I think the fair construction of the agreement is, that James T. Kennedy was to have one undivided half in any patent the defendant might obtain for an improvement on the Eagle Wing snow plough, and therefore it is immaterial whether or not such patent is an infringement of a former one.

I am therefore of opinion that it must be decreed that the defendant be directed to execute to the plaintiffs an undivided half of the invention patented under the letters of the 24th February, 1888, and that an account be taken by one of the referees of all royalties and moneys paid for the use and licenses of all the letters patent, and of all sales made of snow ploughs, built or constructed by him, and to pay to the plaintiffs the amount found due to them after such accounting.

I reserve the question of costs for further consideration.

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January 24.

Practice—Application to set Cause down for Hearing—Service of Affidavit—The Supreme Court in Equity Act, 1890 (53 Vic. c. 4), s. 94—Costs.

An affidavit used on taking out a summons to set a cause down for hearing, returnable on the 24th of the month, was served on defendant's solicitor on the 18th instant. The Supreme Court in Equity Act, 1890 (53 Vic. c. 4), s. 94, requires that affidavits shall be served six days at least before the day the motion in which they are to be used is heard.

Held, that the service was insufficient and that the summons should be dismissed with costs.

This was an application by the plaintiff to have the cause set down for hearing. The summons was taken out on the 17th of January, and was returnable on the 24th instant.

Mullin, for the defendant:—

The affidavit upon which the summons was granted was served on the defendant's solicitor on the 18th instant. By section 94 of the Supreme Court in Equity Act, 1890 (53 Vic. c. 4), copies of affidavits must be served "six days at least" before a motion in which they are to be used can be heard. "Six days at least" means six clear days, or days exclusive of the service and of the day of return. The Act not having been complied with the application must be dismissed on the usual terms.

R. W. Hanington, for the plaintiff:—

Plaintiff was unable to effect an earlier service owing to the absence of the defendant's solicitor. Under the circumstances costs should not be allowed.

BARKER, J.:—The affidavit has not been served in time, and the application must be dismissed with costs (1).

(1) See Grumble v. Perley, 1 All. 376.

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January 24.

Mortgage—Rate of Interest—Covenant by Assignee of Equity of Redemption to pay Principal and Interest at 7 per cent.—Judgment—Merger—Practice—Foreclosure Suit—Appearance—Motion to take Bill Pro Confesso—Subsequent Motion to Assess Damages.

The assignee of the equity of redemption in a mortgage on May 31st, 1884, executed his bond to the mortgagee conditioned to pay him $2,200 (this being the balance due on the mortgage) in one year, and "in the meantime and until the said sum is fully paid and satisfied, pay interest thereon or upon such part thereof as shall remain unpaid, such interest to be calculated from the first day of June, 1884, at the rate of seven per cent. per annum." In a suit for foreclosure of the mortgage:

Held, that, assuming that as against the assignee the land was chargeable with the debt and interest according to the terms of the bond the mortgagee was only entitled after the 1st of June, 1885, to the statutory rate of interest.

Before the above foreclosure suit was brought the mortgagee recovered judgment against the defendant on the bond.

Held, that the bond being merged in the judgment, the defendant thereafter could only be charged with the statutory rate of interest on judgment debts, and consequently no higher rate from then could be charged against him in the foreclosure suit.

Where defendant appears to a foreclosure suit, the plaintiff cannot have the damages assessed on motion to have the bill taken *pro confesso*. The proper practice in such a case is to have the damages assessed upon a subsequent motion with notice.

In 1849 William Howard and wife executed a mortgage of certain lands and premises in the city of Saint John to Jacob Frieze, to secure to him the payment of an indebtedness of twelve hundred pounds. The mortgage was several times assigned, and eventually to the plaintiff Louisa C. Hanford by assignment bearing date the 22nd of July, 1871. In 1881 the equity of redemption in the mortgage became vested in the defendant William B. Howard. On the 31st of May, 1884, the sum of £550 remained due on the mortgage. In consideration of an extension of time for payment of this balance and as an additional security to the plaintiff, the defendant executed to her his bond, bearing date the 31st day of May, 1884, in the penal sum of $4,400, conditioned to pay the plaintiff the sum of $2,200 on the 1st day of June, 1885, and "in

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the meantime, and until the said sum of two thousand two hundred dollars is fully paid and satisfied, pay interest thereon or upon such part thereof as shall remain unpaid, such interest to be calculated from the first day of June, 1884, at the rate of seven per cent. per annum." No part of the balance of the principal money was paid by the defendant, but the interest thereon at the rate of seven per cent. was regularly paid by him up to the 1st day of June, 1893. The plaintiff thereupon brought an action at law against the defendant upon his bond, and on the 30th of May, 1894, recovered judgment for the sum of $2,200 and interest due at that date. Foreclosure proceedings were subsequently instituted, and the defendant appeared. Application was now made to have the bill taken *pro confesso* for want of a plea, answer or demurrer. The notice of motion stated that the Court would be moved that the bill in the cause be taken *pro confesso* for want of a plea, answer or demurrer, and for a decree as prayed in the plaintiff's bill.

January 21, 1896. *J. Roy Campbell*, for the plaintiff.

1896. January 24. BARKER, J.:—

This was a motion to take the bill *pro confesso* for want of a plea, answer or demurrer and assess the amount due on the mortgage, and for the usual order of sale. Before discussing the principal question involved in the motion, I desire to call attention to a point of practice. The notice of motion in this case is simply to take the bill *pro confesso*. According to the practice where there is an appearance, the only order obtainable on such an application is one in accordance with the notice, and then the amount is assessed and a decree made under section 186 of the Supreme Court in Equity Act, 1890 (1). I am not quite sure that the practice has been uniform; but in a recent case at the Fredericton sittings before my brother *Van Wart*, the question arose, and the practice as I have stated it now was settled; and it was ascertained that this was in accordance with the practice laid down both

(1) 53 Vic. c 4.

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by the Chief Justice and Mr. Justice *Fraser*. No objection is raised here and I will make the order in this case, but in future the practice as I have above stated it will be followed.

The main question arising here is whether the plaintiff is entitled to interest at the rate of seven per cent. or only at the rate of six per cent. The mortgage in question was made in 1849, and none of the parties to this suit are parties to the original bond and mortgage, both the mortgage and equity of redemption having been assigned several times until the parties to this suit became the persons solely interested. On May 31st, 1884, the defendant, who was then owner of the equity of redemption, as a further security for the debt and in consideration of the time of payment being extended, gave his own bond to the plaintiff Louisa C. Hanford for the sum of $2,200, the balance of principal then due, conditioned to pay that sum on the 1st June, 1885, that is in one year, "and in the meantime and until the said sum of $2,200 is fully paid and satisfied, pay interest thereon or upon such part thereof as shall remain unpaid, such interest to be calculated from the first day of June, 1884, at the rate of seven per cent per annum," etc.

By section 2, cap. 127, R. S. C., it is provided that "where interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per centum per annum." It is contended that by the terms of the defendant's bond he has agreed to pay interest at the rate of seven per cent. on the principal after it became due on the 1st of June, 1885. It is by no means clear that in assessing what is due as a charge upon the land in question, I am at liberty to consider this bond, given, as it seems to have been, as a collateral security merely, for the land has never been charged with the debt and interest according to the terms of this bond. In that case there can be no doubt as to the proper rate of interest being only six per cent. But, assuming that as against this defendant the land is chargeable with the debt and interest according to the terms of his bond, are its terms such as to make it a contract for

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the payment of seven per cent. interest after default? I think they are not, and that this case is not distinguishable from *St. John* v. *Rykert* (2), and *The People's Loan and Deposit Company* v. *Grant* (3). My attention was called to the words "in the meantime" as showing an intention to include within the contract not only the year previous to 1st June, 1885, but all the subsequent time until the principal was fully paid. Similar words are used in the contract mentioned in *In re European Central Railway Company* (4). Yet in that case the excessive interest was not allowed. In cases where a different construction has prevailed, of which *Popple* v. *Sylvester* (5) may be cited as an illustration, the words of the agreement have clearly referred to the payment of interest on the principal after it had become due as well as before. I do not think this bond does do that in the light of the decisions to which I have referred.

There is another ground upon which I think the plaintiff is only entitled to interest at six per cent. It appears that some time before this suit was brought the plaintiff obtained a judgment against the defendant on this bond, so that the debt, so far as he is concerned, is merged in the judgment, and judgments only carry interest at the rate of six per cent. If the case is to be dealt with on the assumption that this bond represents the debt charged on the property interest would only be allowed at six per cent.: *In re European Central Railway Company* (4); *Ex parte Fewings* (6). The result in this case is practically the same. I think the plaintiff is only entitled to calculate the interest due at the rate of six per cent., which, with the principal, and the costs of the judgment and memorials, will be the amount at which I assess as due on the mortgage.*

(2) 10 Can. S. C. R. 278.
(3) 18 Can. S. C. R. 262.
(4) 4 Ch. D. 33.
(5) 22 Ch. D. 100.
(6) 25 Ch. D. 339.

* By General Order of Hilary Term, 1896, it is ordered, that when a Bill shall be filed for the foreclosure and sale of mortgaged premises, and a Motion shall be made for an Order that such Bill be taken *pro confesso* for want of a plea, answer, or demurrer, the Court may, on making such Order, also assess the amount due, or order a reference to determine the same, and decree a sale, provided at least fourteen days' notice of such Motion be given to the opposite party, together with a copy of the affidavit upon which such Motion is based and upon which such assessment is to be made.

In re HOPPER INFANTS.

1896.
February 25.

Practice—Power of Court to order sale of infant's interest in land—Proceeds not exclusively for infant's benefit—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 175.

Section 175 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4) (1) refers to the exclusive interest of an infant in land, the proceeds of which on its sale will be solely for the infant's benefit.

Application was made under the above section for an order for the sale of an infant's interest in land inherited from his father with the intention of using part of the proceeds to pay debts of the deceased owner.

Held, that the Court had no power to make the order.

This was a petition under section 175 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4) (1), by the mother of Mary Gertrude Hopper and Albert W. Hopper, infants, as their next friend, for an order for the sale of an equity of redemption in certain mortgaged freehold premises to which they were entitled as the heirs of their deceased father, the late Wellington S. Hopper, who died intestate. The facts fully appear in

(1) Section 175:—"An infant seized of or entitled to any interest, either as *cestui que trust* or otherwise, in real estate, or entitled to any term of years in any lands, may by his next friend or guardian, petition the Court for an order to sell or dispose of the said property, which shall proceed in a summary way on affidavits to enquire into the merits of such application; and if the disposal of such property, or any part thereof, be necessary for the support of such infant, or for his education, or if the interest of the infant will be substantially promoted by such disposal on account of any part of the said property being exposed to waste or dilapidation, or being wholly unproductive, or for any other reasonable cause, the Court may, on the filing of a bond by such guardian or next friend, or other person approved by the Court, in case he be not already a lawfully appointed guardian, with such sureties and in such form as shall be directed, order the letting for a term of years, the sale or other disposal of such real estate, or interest, by such guardian or next friend, in such manner and with such restrictions as shall be deemed expedient, but not in any case contrary to any last will or conveyance by which such estate or term was devised or conveyed to such infant."

Section 177:—"Upon any order for the sale of any property being made as aforesaid, the infant to whom the same shall belong shall be considered, so far as relates to such property, a ward of the Court, and the Court may make such order for the investment, disposal and application of the proceeds of such property, and of the increase and interest arising therefrom, as shall secure the same for the infant's benefit."

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the judgment of the Court. The petition was heard February 21st, 1896.

Barnhill, for the petitioner.

1896. February 25. BARKER, J.:—

On looking into this case I cannot, as I at first thought I might, make the order asked for. It is an application by infants acting by their mother as next friend for an order for the sale of an equity of redemption in a piece of land in Albert county, owned by the infants. The order is asked for under section 175 of the Supreme Court in Equity Act, 1890 (2), and the ground put forward is that the land is exposed to dilapidation, that the disposal of the property is necessary for the infants' support, and that their interests would be substantially promoted by such sale. The affidavits show that Wellington S. Hopper, the infants' father, died in March, 1895, intestate, leaving him surviving his widow, who now petitions, and these two infant children, who are now of the ages of seven and three respectively. The only property of any kind which the father left was a farm said to be worth some $1,200, subject to a mortgage on which there is now due $619.50. He was also indebted to various persons in sums amounting in all to $224, all of which debts remain unpaid. I do not know whether letters of administration of the estate have been taken out or not; but the object apparently is that from the proceeds of this proposed sale are to be paid the $224, and whatever balance there may be is to go to the infants. On making an order such as is asked for, the next friend is obliged to enter into a bond for the proper application of the money, and the Court is authorized by section 177 to order, and in fact always does order, how the money is to be disposed of. Now, I have no power to order this $224 to be paid to creditors to be paid to the administrator for the purpose. It is stated that these debts are due, that they are all that are due, and that there is no personal estate. This is, however, only an ex parte statement, even if made

(2) 53 Vict. c. 4.

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by the administrator. There has been no settlement of the estate in the Probate Court, and all these things should, I think, be adjudicated upon and finally determined; and this Court would then know exactly what to sell, and see that the proceeds of what was sold as the infants' property should go to the infants' benefit.

If this equity of redemption must be sold to realize money for the payment of the creditors, the proper place to apply is the Probate Court. The deficiency of personal estate and the validity of the debts can be adjudicated upon there, and the real estate if necessary sold and the interests of all parties protected.

*Application refused.**

* See *Re Hibbard*, 14 P. R. (Ont.)

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1896.

February 25.

Practice—Discovery—Production of documents—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), ss. 59 and 61.

Section 59 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4) (1) does not empower the Court to order the production of documents discovered to be in the possession or power of one of the parties. The section is limited to discovering whether documents are in his possession or power. If admitted to be, their production may be ordered under section 61 (2).

The Court will not ordinarily compel a plaintiff to produce documents in his possession or power although the defendant swears that he cannot fully answer without their production. If the plaintiff on request refuses to produce them, he cannot complain of the insufficiency of the defendant's answer.

This was a summons taken out under section 59 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), by the defendant, John Montgomery, for an order for the production by the plaintiff, W. Hamilton Hegan, of

(1) Section 59:—"Any party to a suit or proceeding may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the Court or a Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit or proceeding, or make such order, either generally or limited to certain classes of documents, as may in their or his discretion be thought fit."

(2) Section 61:—"It shall be lawful for the Court or a Judge, at any time during the pendency of any suit or proceeding, to order the production

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a book of account and money orders alleged to have been delivered to him by the defendant and to contain information necessary to be known to the defendant before he could fully frame his answer to the bill. The facts sufficiently appear in the judgment of the Court. On the return of the summons, February 18th, 1896,

C. J. Coster showed cause, and

Currey, Q.C., argued in support of the summons.

1896. February 25. BARKER, J.:—

The bill in this case alleges that the defendant during the period between April, 1894, and August, 1895, acted as the plaintiff's solicitor and agent, and received large sums of money on the plaintiff's account. That on the 9th April, 1895, the plaintiff executed a release of all claims against the defendant, and that at the time this release was executed the defendant was acting as the plaintiff's confidential legal adviser, and that he, the plaintiff, had no independent advice. The bill alleges that this release was obtained by fraud, and that the defendant made extortionate charges against the plaintiff, which were involved in the settlement, and it was prayed that the release might be set aside, and an account was asked for. On the 11th of January last, on the defendant's application, I granted a summons calling upon the plaintiff to show cause why he should not produce certain papers alleged to be in his possession, including a statement of account between the parties, some orders and a book of account, which he alleged he had delivered to the plaintiff about the 6th of April, 1895. The defendant's affidavit, on which this summons was issued, stated that it was impossible for him to fully answer the plaintiff's bill unless the book of account and orders were produced for the purpose. At the return of the summons the plaintiff's affidavit was read, in which he denies that he has any such papers

upon oath by any party thereto, of such of the documents in his possession or power relating to any matter in question in such suit or proceeding, as the Court or Judge shall think right, and the Court or Judge may deal with such documents when produced in such manner as shall appear just. The costs of such application and production to be in the discretion of the Court or Judge."

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in his possession or control, and seeks to show that such papers as had been delivered to him had been afterwards taken from his vault by the defendant. I shall not analyze these affidavits now, for I think, for reasons which I shall presently state, that it is unnecessary to do so. I may say, however, that from reading all these affidavits, and which will be filed for future reference, I am not at all satisfied that these papers, or some of them, are not in the plaintiff's control, or where he can easily have access to them. I think, however, the summons should not have been in the terms this one was. The correct practice is, I think, to apply for an order under section 59 of The Supreme Court in Equity Act (53 Vict. c. 4), and in obedience to that the plaintiff would be obliged to discover under oath such papers as he had in his possession relating to the matter in question or deny that he had any. If that affidavit were insufficient, a summons might then be taken out requiring further affidavits to be produced by the plaintiff. When the documents are shown by the affidavit of the party to be in his possession, then under section 61 an application may be made for their production. See *Daniell* Chan. Prac. 1823.

On giving the matter consideration I have concluded to make no order on this application. It is not usual to order production of documents until they are required for evidence. In this case the defendant says he cannot answer fully without the production of certain accounts and books which the plaintiff has in his possession. If this be true, and the plaintiff on request refuses to produce them, it is, I think, the practice of this Court not to treat an answer insufficient by reason of the plaintiff's own act. In *Penfold* v. *Nunn* (3) the Vice-Chancellor says:—"The defendant says that he cannot put in his answer without an inspection of these documents. He is, however, at liberty, to call upon the plaintiff to produce them; and if the plaintiff refuses, he cannot complain that the answer is insufficient." *Kelly* v. *Eckford* (4) is to the same effect.

(3) 5 Sim. 409.

(4) 5 Paige, 548.

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I do not, of course, know what the defence is; but it may be possible that no better account will be required, if an account is given at all, than the defendant is able to give with the material at his command. If at any later stage the defendant thinks he is entitled to an inspection of documents in the plaintiff's possession or control he can apply again.

This application will be refused, but under the circumstances, without costs.

1896.

March 17.

JONES v. HUNTER.

Landlord and tenant—Easement—Implied grant—Landlord derogating from grant.

A store, two rooms and cellar connected with the store by hatchway and stairs were leased to the plaintiffs "with the privileges and appurtenances thereunto belonging." The rooms communicated with the store, and a door in one of the rooms opened off an alleyway leading from the street to the rear of the premises. A coal shute to the cellar also opened off the alleyway, which was sufficiently wide to allow coal being carted to the shute. The alleyway was part of the lot upon which the demised premises were, and was in the ownership and possession of the defendant lessor at the date of the lease. For many years previous to the lease the door off the alleyway had been used by occupiers of the premises, including the defendant who was in occupation at the date of the lease, and coal had always been carted by them to the shute. The defendant now sought to build upon the alleyway to the extent of blocking up the alleyway door and preventing access to the shute by carts. In an injunction suit to restrain the defendant from erecting the building he contended that the alleyway door was not necessary for the convenient use of the premises; that coal could be put in the cellar by way of the front door and hatch, and that a right to the use of the alleyway did not pass in the absence of an express grant.

Held, that the tenant was entitled to the unimpaired use of the alleyway since it was in use at the date of the lease as an easement belonging to the premises.

This was a motion by the defendant to dissolve an ex parte injunction granted by Mr. Justice *Tuck* on the application of the plaintiffs. The facts are fully stated in the judgment of the Court. Argument was heard February 22nd, 1896.

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

The terms of the agreement contained in the lease cannot be contradicted or added to unless there has been mutual mistake, when it may be rectified. There is here no pretence that there has been such mistake. The words of grant cannot be enlarged by implication. A right of way must be given in express terms. A grant of appurtenances will not pass it except it be a way of necessity. See *Woodfall* (11th ed.) p. 131. The use of the alleyway is not indispensably necessary to the tenant, and its obstruction cannot be said to be more than a trifling inconvenience.

C. J. Coster, for the plaintiffs:—

The alleyway is an easement appurtenant to the premises within the meaning of the word "appurtenances." See *Koogstra* v. *Lucas* (1). We claim the unimpaired use of the alleyway as an easement necessary to the reasonable enjoyment of the premises and in use at the time of the lease: *Wheeldon* v. *Burrows* (2) and *Hinchliffe* v. *The Earl of Kinnoul* (3). The rule that a grantor will not be allowed to derogate from his grant is in point. The expression "privileges thereto belonging" in the lease will include the use of the coal shute. The word "demise" implies a covenant for quiet enjoyment. See *Baynes* v. *Lloyd* (4). Closing up the coal shute and door is a breach of the covenant.

Gilbert, in reply.

1896. March 17. BARKER, J.:—

This is an application to dissolve an *ex parte* injunction granted by Mr. Justice *Tuck* to restrain the erection of a certain building over a portion of an alleyway leading from Brussells street in a lot of land owned by the defendant, upon which stands a building, a part of which is under lease to the plaintiffs. The lease in question, which is dated January 2nd, 1896, demises to the plaintiffs "the shop or store belonging to the said Mary

(1) 5 B. & Ald. 830.
(2) 12 Ch. D. 31.
(3) 5 Bing. N. C. 1.
(4) [1895] 1 Q. B. 820.

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Jane Hunter (the defendant), situate fronting on Brussells street in the city of Saint John aforesaid, now in her possession and occupation as a liquor store, and also two small rooms immediately in the rear of the said shop and premises, also the cellar underneath the shop, with the privileges and appurtenances thereto belonging." At the date of the lease there was an alleyway seven feet wide adjoining the shop and a part of the lot owned by the defendant, through which access was had to the back part of the lot. There was a coal shute opening on this alleyway by means of which coal carted in by the alleyway was put into the cellar under the shop; and there was also a door opening to the alleyway from one of the small rooms. There was also a door communicating between the two small rooms, and another connecting between one of them and the shop. Such was the condition of the premises when leased; and the evidence shows that this condition had existed for many years; the door opening to the alleyway having been in use by the occupiers of the premises, including the defendant herself, for over twenty-five years; and the alleyway having been used by the tenants and occupiers of the premises. The defendant is now engaged in erecting a building upon the alleyway, occupying about five feet of it in width, and extending back so as to entirely block up the door by which access is had to the small room. The part of the alleyway which remains, and which is some two or three feet in width, is, of course, too narrow to admit of the passage of carts, and coal which was formerly carted to the coal shute must now be wheeled in or the use of the shute discontinued. There is no material dispute as to these facts. The defendant, however, alleges that the door leading to the alleyway is in no way necessary for the convenient use of the demised premises; that the small room into which it opened was used by her as a kitchen; and that in the shop there is a hatchway and stairs leading into the cellar, through which, it is said, coal can be put into the cellar. It is to restrain the erection of this building on the alleyway that this suit was instituted.

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The defendant contends that neither by express grant nor implication did a right to use the alleyway pass to the plaintiffs by the lease, and that the defendant's property in the alleyway is in no sense subject to any easement in favor of the plaintiffs. They, on the contrary, contend that, as incident to the use of the demised premises, they have a right to the use of the alleyway as it existed when the lease was made, and a right of access to it by the door so long in use—that these rights not only pass by implication as incident to the enjoyment of the premises demised, but expressly, as included in the word "privileges."

It is a well-settled and long-recognized principle that a grantor shall not be allowed to derogate from his own grant. If he desires to reserve rights he must do it in the grant itself—such, at all events, is the general rule. This doctrine, laid down in *Palmer* v. *Fletcher* (5), and adhered to in all modern cases on the subject, is thus stated by Thesiger, L.J., in *Wheeldon* v. *Burrows* (6). "Two rules are deducible from the cases. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted." At another part of the same case the same learned Judge says:—"In the case of a grant you may imply a grant of such continuous and apparent easements, or such easements as are necessary to the reasonable enjoyment of the property conveyed and have in fact been enjoyed during the unity of ownership."

In *Allen* v. *Taylor* (7), *Jessel*, M.R., says:—"There can be no doubt that the law as laid down by *Palmer* v. *Fletcher* is the law of the present day; that is, that where a man grants a house in which there are win-

(5) 1 Lev. 122. (6) 12 Ch. D. 49. (7) 16 Ch. D. 355.

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dows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or *quasi* easements. All that is now, I take it, settled law."

In *Russell* v. *Watts* (8), *Cotton*, L.J., says:—

"When a man grants a thing he must be considered as granting that which is necessary in the proper sense of the word for the enjoyment of that which he grants, and he cannot derogate from his own grant; he cannot do that which will destroy or render less effectual that which he has granted." See also *Attrill* v. *Platt* (9).

Applying these principles to this case, how does it stand? The defendant, who as owner of the whole premises was in the use and occupation of this alleyway, shop and rooms, used the coal shute for getting her coal into the cellar now demised to the plaintiffs; she used the door for access to and from the public street by means of the alleyway, and without the use of the alleyway the door was of no use whatever, and she had her coal carted up the alleyway in the usual manner to the shute. These rights were apparent. They had been exercised and enjoyed for years, and at the time of the lease the defendant, who was then occupying these same premises, was using this door, alleyway and shute in connection with these premises precisely as the plaintiffs claim the right to do. And yet, if the building in course of erection be completed the value of the alleyway is materially depreciated, and access to it, even in its altered state, by means of the back door is gone altogether. In the cases cited the easements in question were rights to light. It might be said that the same rule does not prevail where the easement is an

(8) 25 Ch. D. 572.

(9) 10 Can. S. C. R. 425.

affirmative one and discontinuous as a right of way, as prevails where the easement is negative in its character and continuous, such as a right to light.

In *Polden* v. *Bastard* (10), it is said:—"The cases recognize this distinction, and it is clear law, that, upon a severance of tenements, easements used as of necessity or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass." This was a case where the owners of the dominant and servient tenement were claiming under the same will, and the easement was the right to use a pump. There is, however, a distinction between this case, which involved a construction of a will under which the owners of both tenements claimed—neither being prior in title to the other—and where a landlord makes a lease of a portion of premises and subsequently by his own act in reference to the remainder of the premises destroys and injures the demised premises as they were enjoyed when he leased them.

In *Hall* v. *Lund* (11), where a lease was under consideration, the doctrine is affirmed that the state of the premises at the time of the lease and the manner in which they have been used were to be regarded in determining what passed. And it is there held, on the authority of *Ewart* v. *Cochrane* (12), that where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights. These may not be easements in the strict sense of the term, but "rights founded on a particular grant," as Channell, B., in the case just cited puts it. They come within the rule laid down by Lord Thesiger, and are "easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."

(10) L. R. 1 Q. B. 156. (11) 1 H. & C. 676.
(12) 4 Macq. Sc. App. 117.

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The coal shute seems to be of no use whatever for any other purpose than for getting fuel into this cellar for the use of those entitled to its occupation; and for that purpose the defendant herself always used it. It is no answer to say that coal and wood can as well be brought in by the front door and put into the cellar by the hatchway in the shop; or that the fuel, though no longer capable of being carted up the alleyway and dumped at the shute, can now be dumped in the street and wheeled through the narrow passage which the defendant proposes leaving for the purpose. It is equally no answer to say, as to the access by the door, that for all practical purposes the front door is sufficient and the back room is no longer to be used as a kitchen, but as a portion of the shop. These are questions upon which the plaintiffs are under no obligation to submit to the defendant's views. If she desired to reserve the right of building over the alley and blocking up the access by the way of the back door, she should have done it expressly by the lease. Not having done so, she is now, in my opinion, precluded from doing so, both on principle and on authority.

I think this motion must be refused with costs.

THOMAS v. GIRVAN.

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March 17.

(No. 1. Post, p. 314.)

Transfer of mortgage—Conversion of interest into principal—Finding of fact by Referee.

At the request of the mortgagor the defendant took a transfer of a mortgage and paid off the principal and interest.
Held, that, in the absence of an agreement, interest could not be charged on the sum paid for interest.
The findings of a Referee on questions of fact will not be disturbed though the evidence is contradictory and might warrant different findings where they may depend upon the credibility of witnesses.

This was a motion to confirm the report of the Referee in this suit, to which exceptions had been filed by the plaintiff. The facts fully appear in the judgment of the Court. Argument was heard February 25th, 1896.

A. A. Stockton, Q.C., for the plaintiff.

C. A. Palmer, Q.C., for the defendant.

1896. March 17. BARKER, J.:—

The bill was filed in this case to redeem premises mortgaged by the plaintiff to one James D. Phinney for $150, payable with interest at the rate of 12 per cent. per annum, which mortgage was assigned to the defendant Girvan at the plaintiff's request on the 3rd October, 1887. The plaintiff contended that this mortgage had been paid in full by certain cash payments and by other dealings. I directed a reference to ascertain the amount due, and the Referee has reported that the sum of $237.42 was due on this mortgage on December 23rd, 1895. To this report the plaintiff filed exceptions as to two items—(1) as to an item of $14.25 paid to Phinney, the mortgagee, by Girvan, the assignee, for interest and for allowing to Girvan interest on that interest; and (2) for not allowing the wages of Lloyd Thomas, the plaintiff's son, as a payment on account

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of the said mortgage. The amount involved in the last exception is some $51, so that the whole amount involved in the exceptions is not very great. The principle, however, is of importance.

The Referee has found that the defendant Girvan paid to Phinney, the mortgagee, on October 3rd, 1887, on taking an assignment of the mortgage, the principal sum of $150, and $14.25, the interest then due, computed at the rate of 12 per cent. per annum, and that he paid this sum at the request of the plaintiff, and the Referee allowed this $14.25 as a charge on the premises, and also interest thereon at the rate of 6 per cent. per annum. At the argument the objection to the allowance of the $14.25 was withdrawn. The only point for consideration raised by the first exception is the interest allowed on this interest.

To sustain this charge I do not think it is sufficient to show simply that the assignee paid the money and took the assignment at the request of the mortgagor. There must, I think, even between the mortgagor and assignee, be an agreement that the interest then paid is to be converted into principal and bear interest. In Coote on Mortgages, 869, it is said:—"So upon an assignment of a mortgage the interest cannot be converted into principal without the consent of the mortgagor, and the rule of the Court is strict on this point." In *Cottrell* v. *Finney* (1), where the mortgage had been assigned at the plaintiff's request—in fact he joined in the assignment—and the assignee had paid the principal, interest and costs, James, L.J., says:—"It has not been contended before us, and, as I understand, it was not contended in argument before the Vice-Chancellor, that the sum paid for interest and the sum paid for costs upon that occasion could be converted into principal so as to bear interest. The modern practice of the Court in this respect is well settled, although it certainly differs very much from some old cases which I have before me, in which it seems to have been held as a matter of course that upon a reason-

(1) L. R. 9 Ch. 541.

able transfer of a mortgage security to a transferee all sums paid were converted into principal." After referring to the case of *Lord Chesterfield* v. *Lady Cromwell* (2), where a somewhat different doctrine was laid down, James, L.J., proceeds thus:—"There seems to me to be a great deal of good sense in that judgment, although the rule of the Court is now otherwise, and accordingly it has not been contended before us that the transferee can have anything more than what was actually paid for interest and costs, without interest upon it."

This, I think, disposes of the first exception, which must be allowed so far as the item for interest on the $14.25 is concerned.

As to the other exception, it is simply a question of evidence. The plaintiff and defendant Girvan had other dealings between them beside this mortgage which resulted in the plaintiff owing him some $260.27 on a promissory note. The question was simply whether the wages of the plaintiff's son were to be credited on the note or the mortgage. The Referee found from the evidence that they were to be credited on account of the note. From an equitable standpoint it does not seem to make much difference, as the plaintiff owed both amounts, and if the whole $51 were credited on the mortgage there would still be a considerable sum due, so even the question of costs would not be affected. There are some contradictions here, and there are expressions which perhaps might warrant a finding either way. The Referee is an officer of the Court and specially authorized to find the fact as to this very dispute. He has seen the witnesses, and had all the advantages of hearing them give their testimony and explaining their accounts, advantages which are considered of considerable value. As an American Court forcibly describes it:—"The manner of a witness, his intelligence, acuteness of perception and opportunities of observation, all are matters which influence the Master, but cannot be fully transferred to

(2) 1 Eq. C. Ab. 287.

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the report. Very often the testimony presented to us in paper books seems not to warrant the findings; but we know full well there probably was much at the hearing to induce belief or disbelief, which does not and cannot find its way to the printer. Besides, there is more or less abbreviation, lack of emphasis and error in the most accurate transcripts of testimony": *Brotherton* v. *Reynolds* (3). I should not as a rule feel called upon to disturb the finding of a Referee on a bald question of fact, involving simply the credit to be given to one witness or another, as his means of judging correctly in such a case are better than any the Court can have from simply perusing the evidence as returned. See *Day* v. *Brown* (4). This exception must be overruled.

As to the costs, I think there should be none. Each party has virtually succeeded—one on one exception and one on the other—and the amount involved is altogether too small to increase the costs any more than is absolutely necessary. The simplest and most equitable manner of disposing of the question will be to let the costs of one exception pay the costs of the other. There will be no costs to either party of this motion. The order will be to amend the Referee's report by reducing the amount found due on the mortgage on 23rd December, 1895, $237.42, by the interest on $14.25 from October 3rd, 1887, to December 23rd, 1895, which the Referee improperly allowed. This interest amounts to $6.94. This will leave the amount due on the mortgage on December 23rd, 1895, to be $230.48 instead of $237.42, as reported. The report will, therefore, be amended by making the amount due on the mortgage for principal and interest up to December 23rd, 1895, to be $230.48, and in all other respects it will stand confirmed.

There will be no costs to either party of these exceptions.

(3) 164 Pa. 134.

(4) 18 Gr. 681.

In re STEEN'S ESTATE.

1896.
March 17.

Practice—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 213—Sale of land to pay for past expenditures upon trust property.

The Court has not power under section 213 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4) (1) to order the sale or disposal of land held in trust for an infant, to pay for past expenditures upon the trust property.

This was a petition under section 213 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4) (1), by the executors and trustees of the estate of Janet E. Steen, deceased, under her last will and testament, for an order for the sale of one lot of land and for authority to mortgage another belonging to the estate. The facts are fully stated in the judgment of the Court. The application was heard February 21st, 1896.

H. H. Hansard, for the petitioners.

A. I. Trueman, for the guardian.

1896. March 17. BARKER, J.:—

This is an application made on the petition of John A. Campbell, James McLean and Walter H. Living-

(1) Section 213. "Any person or persons who may be seized of, possessed of or entitled to real estate, leasehold estate, or any interest in land, upon trust for the use and enjoyment or for the benefit *in præsenti* or *in futuro* of any other person or persons, may petition the Court or a Judge for an order to sell and dispose of the said property, and the Court or Judge shall proceed in a summary way on affidavits to enquire into the merits of such application, and if the disposal of such property, or any part thereof, be necessary for the support of the *cestui que trust* or *cestuis que trustent*, or if the interest of the *cestui que trust* or *cestuis que trustent* will be substantially promoted by its disposal, on account of the property or any part of it being exposed to waste or dilapidation, or being wholly unproductive, or for any other reasonable cause, the Court or Judge may, on the filing of a bond by the trustees or trustee, as the case may be, with such sureties, and to such person or persons, and in such form as shall be directed, order the letting for a term of years, the sale or other disposal by such trustees or trustee of such real estate, leasehold estate or interest in land so held by them or him in trust, in such manner and with such restrictions as shall be deemed expedient."

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stone, as executors and trustees under the last will and testament of Janet E. Steen, for an order for the sale of one piece of land and for authority to mortgage the remaining property owned by them as such trustees for the sum of $1,000. The application is made under section 213 of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), in which it is provided that the Court shall proceed in a summary way on affidavits to inquire into the merits of the application, and if the disposal of the property be necessary for the support of the *cestui que trust*, or if his interest will be substantially promoted by its disposal, on account of the property being exposed to waste or dilapidation, or being wholly unproductive, or for any other reasonable cause, the Court or Judge may direct it to be leased or sold. Janet E. Steen, by her will, gave all her property to these petitioners in trust as follows:—"In trust for all or any of my children or child who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry, his or her heirs, executors, administrators or assigns respectively." The will then reads thus:—"I declare that my trustees may pay or apply the whole or any portion, at their discretion, of the income or the capital of the share to which any child shall for the time being be entitled in expectancy, and would, if of full age, be entitled in possession under the trusts hereinbefore declared for or towards his or her maintenance, education, advancement or benefit." There are two infant children, two sons, one born in June, 1876, and the other in September, 1881, of whom Peter Campbell was appointed guardian by this Court. The petitioners then go on to state that the net annual income of the whole property does not exceed $297.73. Among the annual charges is one of $234 for interest on mortgages. In the 9th section of the petition the applicants state that as executors and trustees under the said will they, on the 31st of January last, owed debts amounting in all to $1,343.02, a list of which they gave; of which one, amounting to $755.47, was due Mr. Campbell, the guardian, for the support of these infants.

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What the remaining items are for does not appear, except that one is for taxes and another for water rates. The claim of Mr. Campbell is then set out, by which it appears that he has charged for the support of William J. Steen, the younger son, $200 a year since May 11th, 1890, when it is said he was appointed guardian, and the same sum for the support of the elder son, Alexander McLaren Steen, since October 9th, 1891, when it is said he was appointed his guardian. These charges amount in all to $1,997, of which it appears the trustees have paid $1,241.53, leaving a balance of $755.47.

The petition then goes on to state that the income for the present year will not be sufficient to pay the indebtedness outside of the guardian's claim, and that among the properties held by them one is an undivided half interest in a farm which is wholly unproductive, and from which the timber, which represents its only value, is being stolen and carried away. As to this farm, the trustees say that, in their opinion, it would be in the infants' interest to sell it, but that it would not be expedient to sell any portion of the other property, as it would sell for little or nothing above the mortgages. They therefore ask for authority to sell the timber land and to mortgage the remaining property for $1,000, and with the proceeds to pay Peter Campbell his debt, the other debts and the costs of this application.

I must say that the involved state into which this whole matter seems to have drifted, and the spirit and tenor of the whole petition, led me to think that this application was made in the interests of the guardian and trustees rather than that of the infants. I cannot see how the infants will be benefited in the slightest degree by the proposed arrangement. The money cannot be wanted for the infants' support, because it is not proposed to expend a dollar of it in that way. It is true that it is proposed to spend a portion of it in paying Mr. Campbell, the guardian, $755.47, the balance which he claims, and this represents the past support and maintenance of these infants. On inquiry as to the order of this Court for an allowance to these infants,

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it was told me that Mr. Justice *Palmer* had made one allowing $400 a year for the purpose, and I felt if Mr. Campbell had on the faith of this order incurred the liability and made the expenditure, all possible assistance should be given him in securing it. I have, however, never been able to get that order from the guardian or anyone else. It is an order said to be signed by Judge *Palmer* himself. I have, however, been furnished by the stenographer with a copy of the proceedings on the 3rd, 8th and 10th days of May, 1890, and of October 3rd and 19th, 1891, the several times when this matter was before the Court. It is difficult to tell precisely what order was made in May, but from the discussion which took place, it is evident that there never was any intention whatever of making any order allowing more than the net income for the support of these children. By the stenographer's report of what took place on October 19th, 1891, it appears that Mr. Fotheringham was relieved of his guardianship, his account allowed, and Mr. Peter Campbell was appointed guardian of the person of Alexander McL. Steen. A motion was then made by Mr. Coster, who was counsel for trustees, *that the net income* of the estate be paid to Peter Campbell by the trustees for the education and maintenance of the infants until further order of the Court, and the report then says, "and then it will be in the discretion of the trustees."

Mr. Trueman, who seems to have been present as counsel for Mr. Campbell, then said: "I will consent that the words be words of limitation at present, until further order, and that the trustees be confined to the income of the estate." To this the Judge assented, and directed an order to be drawn up in these terms. It seems almost impossible that any order allowing any specific sum or anything beyond the net income for the infants' maintenance can have ever been made. It must be remembered that the title to these lands was not in the infants; it was in the trustees, and the guardian was only entitled to get per year what the infants were entitled to get, and they were not entitled to receive more than the Court ordered them, or what the trustees might allow them in the exercise of any power given by the

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will; for with that it does not seem there was any intention to interfere in any way. If the order of the Court was what I assume it must have been, the indebtedness to Mr. Campbell should never have existed —at all events it is not due to any order this Court has made. If it is the result of any agreement or arrangement with the trustees themselves in the exercise of any discretion they may have under the will, the matter must be settled between Campbell and them. There is another serious objection to this application. These infants have separate interests in this trust fund; and the power to the trustees to use the capital for the child's maintenance is only as to the share of the particular child. One child might require it and the other not. It was never the testator's intention that the whole capital should go to the support of one child. In any such application as this the terms of the trust must not be disregarded; and it would be a separate inquiry as to the requirements of each infant. I am now, however, not only asked to disregard all that, but after the expenditure has been all made on the infants' account, and the question all settled two or three years ago, to decide that it is now necessary for these infants' support that the money which some one else determined two years ago was necessary should be paid. As to the other debts incurred by the trustees, I assume they are for expenditures on the trust property, though it is not so stated. The section under which this application was made is not applicable to such a case. If the trustees, in the administration of their trust or the management of the trust estate, require the advice of the Court for their protection, they are entitled to it in a case properly stated for the purpose. And I see no substantial difference between an expenditure by the trustees in repairing the trust property or in educating and supporting a *cestui que trust*, where as trustees they have power to do both, and it is only a question of accounting and showing that the trust money has been properly expended.

This application is refused.

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Common Schools Act—Sectarian education—Employment of members of a religious order as teachers—Use of religious dress—Religious instruction before and after school hours—Practice—Breach of duty by public officers—Form of suit—Information—Amendment of bill.

It is not a violation of the provisions of the Common Schools Act of New Brunswick against sectarian education in the public schools for school trustees to employ as teachers sisters of a religious order of the Roman Catholic Church, and permit them while teaching to wear the garb of their order.

The fact that such teachers contribute all their earnings beyond what they use for their support to the treasury of their order for religious purposes does not affect their right to be employed in the public schools of the province.

The holding in a school room before and after school hours of Roman Catholic religious exercises by a teacher who is a sister of a religious order of the Roman Catholic Church for the benefit of Roman Catholic scholars does not render such school sectarian.

A suit to restrain public officers from the commission of wrongful acts, in breach of public trust and which injuriously affect the public as a whole should be on behalf of all the public and by information by the Attorney-General *ex relatione*.

A bill may be turned into an information by the Attorney-General by amendment upon his consent being obtained.

The facts in this case and argument of counsel fully appear in the judgment of the Court.

Argument was heard December 10th, 11th and 12th, 1895.

C. N. Skinner, Q.C., and *G. W. Fowler*, for the plaintiffs.

L. A. Currey, Q.C., and *R. A. Lawlor*, for the defendants.

1896. March 17. BARKER, J.:—

The bill in this case alleges that the plaintiffs, William Rogers, Andrew Norman DesBrisay, Thomas Edwin Carter, John Alexander and Samuel Gammon, are seized in fee as joint tenants of a lot of land in the town of Bathurst, in the county of Gloucester, and that they

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hold the same in trust for the sole use of Fowler Loyal Orange Lodge, No. 123, and to permit that lodge to use and possess the said land, and to erect a building thereon, to be used as an Orange hall or otherwise as the lodge might determine. That a building was erected on the lot, which is used as proposed. That the defendants in the year 1893 made an assessment upon the school district No. 2, to the amount of $1,600 for district school purposes, of which sum $10.80 was laid and levied on the land held by the plaintiffs. That in the year 1894 the defendants made a further assessment for district school purposes upon the said district for the sum of over $1,000, of which sum $10 was laid and levied on this lot held by the plaintiffs. That there are over fifty ratepayers in the district, of which a small majority are Roman Catholics, though the largest amount of assessable property in the district is owned by Protestants. That the defendants, for a period exceeding five years, have conducted the common schools in district No. 2, and enforced the assessment laid on the ratepayers for that purpose, and that they intend to continue conducting the schools and levying the assessments necessary for the purpose in the future as they have during the past five years. The bill in the 8th, 9th and 10th sections alleges that the defendants have not, during the past five years, conducted the schools as non-sectarian schools, that they are not now so conducting them, and that it is their intention to continue to conduct them as sectarian schools. In section 14 it is alleged that during the past five years and upwards, the defendants conducted and maintained the schools of the district "in the interests of the Roman Catholic Church, and for the purpose and with a view and intention to promote and secure the prosperity of the said the Roman Catholic Church, and assist in the spreading, maintaining, inculcating and securing the supremacy of the teachings of the religion and doctrines of said church, and imbuing the minds of the children of Protestant parents being taught in said school district No. 2, in said schools, with the doctrines, policy and teaching of said church, and

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to bring the children of such Protestant parents under the influence of the religion, doctrines and modes of belief taught by the religious teachers and priests, bishops and ecclesiastics of said church." In the 15th section it is alleged that the defendants are now conducting these schools for the same purposes and with the same intention as is set out above; and in section 16 it is alleged that the defendants purpose and intend to continue conducting and maintaining these schools for the same purposes and with the same intention. The bill then goes on to allege specific facts to show how the schools have been and at present are carried on as sectarian schools. These will necessarily be more fully stated when I come to deal with the evidence, but they may be briefly stated thus: (1) The renting by the defendants of the convent school-house from the Bishop of Chatham, which building it is alleged "is a sectarian school-house and sectarian building, built by the ecclesiastical authorities of the Roman Catholic Church for the purposes of promoting the interests of the said church and teaching therein the religion and doctrines of the said church to such pupils as may attend school therein," and it is alleged in this connection that Protestant parents are compelled to send their children to these schools taught in the convent school-house, or otherwise provide for the education of their children at their own expense in addition to paying their school taxes. (2) The employment by the defendants, at the instance and request, as is alleged, of the Roman Catholic Bishop of Chatham and other ecclesiastics of the Roman Catholic Church, of Sisters of Charity as teachers in these schools, which sisters, it is alleged, "are a body of persons and an 'order' in connection with the Roman Catholic Church, and part of such church for the purpose of teaching the religion of said church, set apart and separate from the world in all senses except for teaching, and it is the duty of said sisters, under the guidance of the rules of this order and the ecclesiastical authorities of said church, to teach both the elements of a secular education, and in connection there-

with, and at the same time a religious education as well." (3) The wearing by the sisters the garb or dress of their order while teaching "to denote their calling and connection with the said Roman Catholic Church, and that they are so set apart and a part of the order so belonging to the said Roman Catholic Church, and assisting in the teaching of the doctrines and religion thereof." (4) That these sisters are not known or called by their ordinary names, but "by names that designate them as a religious and teaching order in said church, and as a part of the intellectual force of said church for the purpose of advancing, spreading and maintaining the religion of the said Roman Catholic Church in said school district No. 2." (5) That the sisters, while employed as teachers, are subject to the control of the superiors of their order and the ecclesiastical authority of the priests and bishops of the Roman Catholic Church, and that the teaching of the sisters is directed by such control and authority. (6) That the salaries paid to the sisters under their contracts with the defendants, though nominally theirs, in reality belong to their order, by whom they are maintained under the direction of the ecclesiastical authorities of the Roman Catholic Church. (7) That it was agreed by the defendants and the Roman Catholic bishop, when the arrangement for the employment of the sisters was originally made, that the Bible should be excluded from the schools taught by them, and that in pursuance of such agreement the Bible has not been read. (8) That the defendants permit the priests and other ecclesiastical authorities of the Roman Catholic Church to interfere in the conduct, teaching and management of the schools, and that "these schools are carried on under the supervision, dominance and will of the priests attending to and looking after the religious interests of the Roman Catholic Church in the school district." (9) That the defendants permit the sisters to teach the religion of the Roman Catholic Church, and the prayers of that church, to be used and offered during school hours. The bill then alleges that the renting of the convent school-rooms, the alleged arrangement with the bishop as to the exclusion of the

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Bible, and the employment of the sisters as teachers, were all done with the design of maintaining sectarian teaching in the schools, and "with a view," as it is expressed in section 30, "and for the purpose of inculcating, teaching, spreading and enforcing the religion and doctrines and teachings of the Roman Catholic Church." It is also alleged in the bill that as a result of the manner in which these schools had, by the permission of the defendants, been conducted, the Protestant children were not only prevented from attending them, but the Protestant ratepayers had been compelled to sustain a private non-sectarian school in addition to paying the taxes levied on them. The specific relief prayed for was as follows: "That the defendants be restrained from renting said Roman Catholic convent school buildings for school purposes in said school district No. 2, and from conducting said schools, or any of them, therein; and from engaging and employing said 'sisters' as teachers of said schools, or any of them, in said school district No. 2; and from allowing the doctrines and religion of the Roman Catholic Church being taught in said schools, or in any of said schools, in said district No. 2; and from allowing the prayers of the said Roman Catholic Church being used in said schools, or any of them, in said school district No. 2 during the school hours, and from conducting said schools, or any of them, in said school district No. 2 as sectarian schools, or in any way other than according to law."

It is unnecessary for me to refer particularly to the answer, for beyond correcting some errors in the bill as to the assessment and about which there is no dispute, it is simply a denial of the substantial facts put forward and an allegation that the defendants are carrying on these schools according to law.

Before discussing the main questions involved in this case, there are two preliminary objections which it is as well to dispose of. It was contended that this bill should have been filed by the plaintiffs, on behalf of themselves and others in the same interest, and second, that the suit should have been in the name of the Attorney-General *ex relatione*. As to the first objection,

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it is to be remarked that these plaintiffs have neither alleged nor proved any damage or invasion of right peculiar to themselves, and not common to all others holding the same views; and the averment of substantial injury is not that the plaintiffs, but that the Protestants had been compelled by the defendants' action to support a private sectarian school. I intimated on the argument that the objection, if well taken, could be met at the hearing by an amendment, and if the plaintiffs desire to amend they are at liberty to do so. *Reese River Silver Mining Co.* v. *Atwell* (1).

The second objection is, I think, fatal to this suit. In *Evan* v. *The Corporation of Avon* (2), the M. R. says that where there is a public trust for the benefit of all the inhabitants, the proper form of suit in the event of a breach of trust is by an information by the Attorney-General at the instance of all or some of the persons interested in the matter. The whole of the money collected by the defendants for school purposes, and of which the amount paid by the plaintiffs is a part, is held in trust for the whole body of inhabitants entitled to school privileges in the district, and not for any particular number or class. Neither can it be said that the interests of the Crown are not involved. Considering the nature of the school regulations; the powers and position of the Board of Education by whom they are made, and the various other ways in which the rights and interests of the Crown are involved in the administration of the School Act as called in question in this suit, and which will become more apparent as the discussion proceeds, this case is one in which, in my opinion, the Attorney-General should be a party. There is, however, I think, no objection even at the hearing to convert a bill into an information by the Attorney-General by way of amendment, if the Attorney-General consents. *Caldwell* v. *Pagham Harbour Reclamation Co.* (3).

(1) L. R. 7 Eq. 347.

(2) 29 Beav. 144.

(3) L. R. 2 Ch. D. 221.

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If is, however, desirable for the convenient determination of this case by a Court of Appeal that I should pass upon the facts and express my opinion on the case upon its merits. Before doing so it will be convenient to see upon what principle this Court acts where an injunction restraining the action of a public body is asked for as here. In *The Attorney-General* v. *The Mayor of Newcastle-upon-Tyne* (4), *Lindley*, L.J., says: "It has been decided that an action at law may be maintained against a municipal corporation upon a contract under its corporate seal, and that judgment in such an action may be recovered against the corporation, even although there may be no funds or other property properly applicable to satisfy the judgment. On the other hand it is clearly settled that a corporation will be restrained by injunction from misapplying its corporate property; and that a municipal corporation will be restrained from applying its borough fund to purposes not authorized by the Municipal Corporations Act or by some other Act of Parliament. The same principle applies to other funds obtained under the provisions of other Acts of Parliament for purposes defined by those Acts." See *Attorney-General* v. *Aspinwall* (5); *Attorney-General* v. *Mayor of Norwich* (6).

Now there is no difficulty here in determining as to the defendants' intention, for they admit that it is their intention to appropriate the school funds in their hands in carrying on and maintaining these schools as they have done in the past, not wilfully or with any such improper design as that with which the plaintiffs charge them in their bill; but because such a course is right and lawful. To enable the plaintiffs to succeed they must therefore establish, that the schools in question as they are being carried on are not non-sectarian schools, and that in applying school funds raised by assessment on the property of plaintiffs and other ratepayers for the support of such schools, they are misappropriating these funds, and so guilty of a breach of trust. There are, of course, other considerations by which this Court

(4) 23 Q. B. D. 492. (5) 2 My. & Cr. 613. (6) 2 My. & Cr. 406.

is governed in granting or withholding the extraordinary remedy asked for, but these will be dealt with more conveniently later on.

From the outline of the bill which I have given it will be seen that the defendants are charged with having done all that they have done in reference to these so-called convent schools in Bathurst since 1890, *i.e.*, renting the class rooms in the convent building, employing the sisters as teachers, allowing the use of the rooms for religious exercises of a sectarian character before and after school hours, and other acts of a similar kind, with the deliberate design, as the bill states it, "of inculcating, teaching, spreading and enforcing the religion, doctrines and teachings of the Roman Catholic Church," or as Mr. Fowler, with somewhat less formality put it on the argument, with the intention of using the School Act as a mere cover for carrying on schools for religious teaching that would be in fact and effect completely under the control of the church and in which the authority of the trustees would be a mere shadow while the substance remained with the priest. I have given the evidence on this branch of the case the most careful consideration, all the more so because I knew that the allegation in the bill had been prepared by those to whom the facts in their minutest details must have become known from the exhaustive investigation made in 1893 by the present Lieutenant-Governor when a member of this Court, and I therefore assumed no evidence likely to sustain the allegation had been overlooked. I do not know that it is material to this case whether any such design existed or not, provided no attempt was ever made to carry it into effect; or, if made, that it failed altogether in accomplishing its object. I can only say that in my opinion the evidence entirely fails in proving any such design or intention as that alleged against the defendants, either on their part or that of any one else who took part in the transactions. It is disproved by every witness put on the stand who had any knowledge of the subject and was questioned about it; and unless I am to consider their positive assertions as altogether overbalanced by sur-

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rounding and attendant circumstances I must hold this part of the plaintiffs' bill as disproved. What are these circumstances? The evidence shows that about the year 1864 the Sisters of Charity—members of the same order as those now in the employ of the defendants—commenced teaching in Bathurst village, a district near to Bathurst town, but separate and distinct from it. Though they resided in the village, they taught also in the town, occupying rooms in a building which had been purchased from one Baldwin, and been fitted up for the purpose. This arrangement continued until May, 1871. In the fall of that year, sisters of Notre Dame came from Montreal and took charge of these schools, and so continued for about nineteen years, down to 1890, when the present arrangement was entered into. Soon after Father Barry's appointment as priest in charge at Bathurst town, finding the then existing arrangements inconvenient, he had additions made to the Baldwin property so that the sisters could reside there as well as teach. This property, originally an hotel, but now converted into a convent building and used for school purposes, is the building in which are the class rooms rented by the defendants. Previous to the passing of the Common Schools Act in 1871, and which came into force at the beginning of the following year, the Legislature had annually made special money grants to assist certain denominational schools—some sixteen in all are mentioned in the journals of the House of Assembly for 1871—and among them are these Bathurst schools. These special grants were then discontinued. Notwithstanding this the Roman Catholic inhabitants continued to support their convent schools from 1871 to 1890, and, in addition, to pay the school rates levied on them yearly, for general school purposes under the Act. It is, of course, well known that the school law was distasteful to the Roman Catholic inhabitants of the province. Its constitutionality was tested before the highest tribunals here and in England—assessments levied under it upon Roman Catholic ratepayers in many instances could only be collected by resort to extreme measures, and in many cases these assessments

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were sought to be got rid of altogether. After the lapse of nineteen years matters had very considerably changed—the school system had become one of the permanent institutions of the country—its advantages were apparent in the increased and marvellously improved school accommodation on all sides, and in the efficient and marvellously improved methods of teaching. A *modus vivendi* has been found in St. John, and other places similarly situated, whereby the advantages of the public schools were being enjoyed by all creeds apparently without friction. Besides this, the Roman Catholics in the town of Bathurst were finding the support of the conventual school in addition to their general school tax a somewhat onerous burthen—the Notre Dame sisters had insuperable objections to teaching under the School Act—their rules prohibited them even in their own schools from teaching boys, so these must necessarily go to the public schools; and, in addition to everything else, they demanded, in case they remained, a substantial advance in salary. These facts and circumstances seem to me to furnish ample reason for supposing that the Roman Catholics of Bathurst then concluded that it was their wisest and perhaps their only feasible course "to come in under the Act," as the phrase goes, and place all the schools in the district under the control of the trustees. This would give some ninety additional children for whom school accommodation must be provided by the trustees, and if the grammar school building was insufficient for the purpose, it does not seem an unnatural thing that the class rooms in the convent building, rendered vacant by the change, should be rented for the purpose. Neither does it seem to me an unnatural thing that such additional teachers as might be required should be selected from the Sisters of Charity, as was actually done. Unlike the Sisters of Notre Dame, they had no objections to teaching mixed schools or teaching under the school law as some of them had been doing in Nova Scotia. Teaching was their profession, and their proficiency no one has called in question. The evidence, in my opinion, shows that in what was done in 1890, when the changes were made,

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there was an honest intention in all who took part in making them to adopt the school law, and strictly and scrupulously to work under its provisions. At the same time it would be doubting the sincerity of the Roman Catholics in what they had done during the previous nineteen years, to suppose that they were willing or for a moment intended to abandon any right or privilege to which they attached any importance, provided it could be secured and enjoyed without infringing the law or violating the regulations. If the law has been violated in any of its essential requirements, I see no reason whatever for supposing it to have been done intentionally; much less can I find in the evidence any warrant for saying that such violation was but the natural result of the dishonest design with which the defendants and others are charged.

The plaintiffs' counsel at the hearing formulated nine propositions upon which they relied. These, with two or three exceptions, are substantially the same as the grounds put forward in the bill, and they contain the reasons why the plaintiffs say that these schools are sectarian schools. Now, what is a sectarian school? I should say, one in which the particular religious tenets of some sect are taught. Chief Justice *Leonard*, in the case of *Nevada* v. *Halleck* (7), says: "It is what is taught, and not who are instructed, that must determine the question. If the instruction is of a sectarian character, the school is sectarian." Judge *Dean* of the Supreme Court of Pennsylvania, in the case of *Spires* v. *The Treasurer, etc., of Gallitzin District*, decided in 1882, says: "Therefore any school established and controlled by a sect which teaches or propagates the peculiar or special doctrines of that sect is a sectarian school." In *Ex parte Renaud* (8), the late Mr. Justice *Fisher* gives the following definition of a denominational school: "It is a school under the exclusive government of some one denomination of Christians, and where the tenets of that denomination are taught." These definitions are, perhaps, not altogether exhaustive, but they are sufficiently so for the purposes of this discussion.

(7) 16 Nev. 385. (8) 1 Pug. 273.

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The plaintiffs' first proposition is that the defendants rented a building from the Roman Catholic authorities which is known as a sectarian building—is the home of the sisters and a part of the church property, and as much a church building as a church edifice itself. It is but right to say, not only as to the renting of these class rooms, but also as to some of the other matters complained of, it was not very strongly urged that of themselves they sectarianized the schools; but the argument was that they were parts of a whole scheme or general course of conduct and action which did produce that result. These class rooms were held under a verbal arrangement from 1890 to 1892, subject, I think, to a nominal rent. In 1892 the defendants entered into the following lease, which is still in force:—

"This indenture, made this first day of September, in the year of our Lord one thousand eight hundred and ninety-two, between the Reverend Thomas F. Barry, of Bathurst, in the County of Gloucester, and Province of New Brunswick, of the one part, and the Trustees of School District Number Two, of the Parish of Bathurst, in the County and Province aforesaid, of the other part. Witnesseth, that the said Thomas F. Barry does hereby lease and demise to the said Trustees of School District Number Two, in the Parish of Bathurst, the three class rooms in the upper flat, together with the hall, stairs, and the entrance thereto, in the building in the Town of Bathurst, being an erection on the property formerly owned by the late Thomas Baldwin, and now in the custody of the said Reverend Thomas F. Barry.

"To have and to hold from the day of the date hereof from year to year, the said Trustees paying to the said Reverend Thomas F. Barry the yearly rent of thirty dollars.

"In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

"(Sgd.) THOS. F. BARRY, Pt. [L. S.]

"(Sgd.) J. E. O'BRIEN, [Corporate Seal],

"Sec. School District No. 2, Bathurst."

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It is not suggested that in these class rooms there was anything improper. The furniture belongs to the defendants, and these rooms are fitted up in all respects as ordinary school rooms are. It is not easy to see how the name of a building, in a part of which are class rooms under lease to trustees of schools, and used for public school purposes, can render the schools sectarian. It is no more logical to say that schools like these in question are *ex necessitate* sectarian because the building in which they are taught is used like this is as a convent, than it is to say that a school taught in a room fitted up for the purpose in a barn or a temperance hall is *ex necessitate* non-sectarian. Regulation 10 (I cite from the Manual of 1892) provides for the leasing of rooms in a building, and enacts that they "shall be under the supervision and control of the trustees, for school purposes, during school hours, and at such other times as the necessities of the school may require." It is well known that the St. John Board of School Trustees have had under lease and in use for school purposes for many years a building owned by the trustees of the Leinster Street Baptist Church, and which is, in fact, structurally a part of the church edifice itself. It has never been thought, so far as I am aware, that such an arrangement was not fully warranted by the regulation I have just cited, or that the peculiar tenets of the Baptist denomination were being day by day taught to the school children by the name, or the design, or the use of the building within which they were assembled.

The second proposition is that the defendants employed the Sisters of Charity as such, because they are Sisters of Charity and Roman Catholics, for church purposes, and to carry on the mission work of the church.

I can scarcely think that the mission work of the Roman Catholic Church in Bathurst was so carelessly or inefficiently looked after, under Father Barry's supervision, as to require the aid of the trustees of schools, and induce a misappropriation of trust funds for the purpose. It is in no sense illegal to employ

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Sisters of Charity as teachers in the public schools. If they comply with the requirements of the law they are as much entitled to employment as any one else. And, in my opinion, where a Sister of Charity is so employed, and discharges the obligation into which she has entered with the trustees, it is mere impertinence in any Court to inquire whether she is or is not engaged in the mission work of her church at times when she is not engaged in school duties. As to anything like mission work or actual sectarian or religious teaching in the schools during school hours, it is absolutely and positively disproved by the teachers themselves and by every witness who was at all competent to speak on the point. It seems quite beside the question what the negotiations were which resulted in the employment of the teachers. Concede, if you choose, that their employment was directly due to the influence of the Bishop of Chatham and those acting with him, what does it amount to? If it be legitimate to employ sisters as teachers, surely it cannot be wrong in any one to use his influence to have them so employed. The important question here is what they did while so employed. Did they impart sectarian teaching during school hours, or did they violate either the law or the regulations? If not, what useful purpose can be served by inquiring into all the previous negotiations or discussing whether, in entering into their teachers' contracts with the defendants, they were influenced by this priest or that? The contracts under which the sisters are teaching are in the form provided in Regulation 2, the last clause of which provides that both parties to the contract shall be in all respects subject to the provisions of the chapter of the Consolidated Statutes relating to schools, and any Acts in amendment thereof and in addition thereto, and the regulations thereunder made by the Board of Education. If an action were brought by the teacher for her salary, what evidence is there to sustain as a defence that she had violated either the Act or the regulations, or that she was teaching a sectarian school? I am unable to see any.

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The eighth and ninth propositions are similar in character to the second, and I can deal with them more appropriately here. It is put forward as the eighth point that the sisters were engaged by the defendants through the church authorities and the superior of the order, remained under their control, were supported by the order, and could not accept independent employment, but their actions were subject to the direction of their superiors. The ninth point is, that Protestants have a right to send their children to any and all of the schools of the district without having them brought under the influence of Roman Catholic teaching and sectarian education, as they necessarily are in these convent schools.

No one will dispute the existence of the right of Protestants substantially as stated in this last proposition. It begs the whole question, however, because it assumes that the schools in question are sectarian, which is the whole point in controversy. It appears by the evidence that the Sisters of Charity now teaching are members of an order, the mother house of which is in Halifax. As a condition of membership they make certain renunciations of property, and of course agree to be governed by the rules made for the proper management of the order and its affairs. The salaries received by them are devoted primarily to their support and maintenance; and any surplus goes into the general treasury of the order; and where there is a deficiency the same treasury is drawn on to make it up. These facts were dwelt upon at some length as exemplifying how completely these sisters were under ecclesiastical control, and how little under the control of the trustees. The obvious answer to this is that by law the trustees have precisely the same control over them as over any other teachers; and the church authorities do not have, nor do they assume to have or exercise any control over these teachers as to their school work. In what possible way can the ultimate destination of a teacher's salary, or its possible appropriation for religious uses, sectarian in their character, render the school taught by such teacher a sectarian

school? In the case of *Hysong* v. *Gallitzin Borough School District et al* (9), cited at the argument—a case identical with this in all its material features—the Court say:—"Nor does the fact that these teachers (Sisters of St. Joseph) contribute all their earnings beyond their support to the treasury of their order, to be used for religious purposes, have any bearing on the question. It is none of our business, nor that of these appellants, to inquire into this matter. American men and women of sound mind, and twenty-one years of age, can make such disposition of their surplus earnings as suits their own notions. We might as well, so far as any law warranted it, inquire of a lawyer, before admitting him to the bar, what he intended to do with his surplus fees, and make his answer a test of admission."

The plaintiffs also attach much importance to the defendants' action in reference to the school accommodation provided in 1890, as indicating a design to make concessions to the Roman Catholics wholly unwarranted, and involving the district in unnecessary expense. It is said that the grammar school bulding was sufficiently large to accommodate all the school children; and, with perhaps one additional teacher, the whole work could have been easily done. More than that, it is alleged that the class rooms in the convent building are not, as the trustees knew when they leased them, up to the requirements of the regulations in the height of ceiling and other particulars. I am not convinced that the grammar schol building is ample for the purpose, but if I were, I should not consider it the province of this Court to supervise the action of the defendants in any such particular. At all events, the circumstances would require to be very exceptional in their character to warrant it.

It is the spirit and policy of the school law that all such matters should be in the discretion of the trustees under the Board of Education. The ratepayers

(9) 164 Penn. St. 629.

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who provide the money have ample means of protecting themselves against unnecessary extravagance, and are not likely to be very slow in adopting them. The occupation of the two buildings—the teaching of the parallel grades, and the general arrangement, have the sanction of the Chief Superintendent; and so far as the expense is concerned, the defendants' action has received the approval of the ratepayers, and the trustees, who incurred it, have been re-elected. Of the three trustees, two are Roman Catholics, and one a Protestant—an apparently fair arrangement for a population about two-thirds Roman Catholic. The plaintiffs, however, find even in this a ground of complaint; and it is asserted that Mr. O'Brien, the Protestant trustee, and who has been for some years past Secretary of the Board, was a mere tool in the hands of his colleagues and their friends—clay in the hands of the potter. Mr. Skinner speaks of Mr. O'Brien "as a Protestant or a Catholic as he may be wanted to act, or as he wants to act himself—a gentleman of character and shrewdness, who acts with a semblance of doing justice to the Protestants when he is simply assisting the Catholic majority on the Board of Trustees to handle matters just as they please." Evidence was given as to Mr. O'Brien's history. It seems he was born a Roman Catholic, but afterwards became a member of the Church of England, to which church he still belongs; his wife is a Roman Catholic, and of his six children one-half is Roman Catholic and the other Protestant. One would suppose that a gentleman whose religious balance was so admirably adjusted had especial qualifications for a position in which the rule of the road required such strict observance:

> "Steer straight as the wind will allow; but be ready
> To veer just a point to let travellers pass.
> Each sees his own star—a stiff course is too steady
> When this one to Meeting goes—that one to Mass."

It is quite possible that Mr. O'Brien may have made mistakes, and in some respects disappointed the expectations of many of the ratepayers, but these are questions between him and them with which this Court

has no right to interfere, unless, as an officer of the defendants, he has committed them to some unlawful act or course of action.

The third, fourth, fifth and sixth points, which relate to the religious exercises in the schools, may be stated under two heads:—(1) That the schools are sectarian by reason of the religious exercises immediately before the opening of the school in the morning and immediately after the closing of the session in the afternoon; and (2) because, by defendants' permission, these particular schools are closed on certain holy days of the Roman Catholic Church—not regular holidays as fixed by the regulation. The facts which bear upon the first point are these:—Previous to November, 1893, Reg. 20, sec. 6, provided as follows:—"The hours of teaching shall not exceed six each day, exclusive of at least an hour allowed at noon for recreation." The sisters, as well as the defendants, construed this rule as meaning that the noon hour was not one of the school hours, and religious exercises were, therefore, permissible during that hour; and as a fact, catechism was taught at the noon hour. To remove all doubt on the question, the Board of Education, on the 10th November, 1893, amended this section by enacting that the term "school hours" should include all the time between the opening and close of the school for the day. The noon teaching was then discontinued, and was not in practice when this suit was commenced. How this religious teaching is conducted is described by Sister Mary Stephen in her evidence. She has been teaching in the school since 1891. She has charge of the primary department; teaches the first and second grades; has a mixed school, the children varying in age from five to eight years, of whom a small number are Protestants. Her school hours extend from 9.30 a.m. to 3 p.m. She says that she takes the Roman Catholic children into the class room for instruction from about ten minutes to 9 until the school bell rings at 9.25 or 9.30, when all the children come in, the roll is called, and the school work for the day begins. When the afternoon session closes at 3 o'clock, the Protestant

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children leave. About ten minutes are then spent by the Roman Catholic children in the repetition of the Lord's Prayer or other prayers taken from the Roman Catholic prayer book. By Regulation 23, section 8, it is made the duty of the teacher, "subject to the arrangements of the Board of Trustees, to see that the school house is kept in proper order in respect of cleanliness, neatness, heating and ventilation; and especially *that the school room is ready* for the reception of pupils at least *twenty minutes* before the time fixed for opening the school." It was contended that the occupation of these class rooms for the half hour before opening the school in the morning was a direct violation of this regulation, because it is impossible that the teacher can perform the duty thereby imposed upon him, of having the room ready for the reception of pupils twenty minutes before the time fixed for opening the school, without having the right to occupy the room for the purpose, which the use of it by the sisters prevented. More than that, it is said that by a fair construction of the regulation, any pupil has the right of entering the room at any time during the twenty minutes before the opening of the school, which Protestant children are prevented from doing by the Roman Catholic religious services going on there at that time. It is impossible to expect children to arrive at school on scheduled time, as one expects a railway train to do; and it was argued that this regulation recognized that fact, and the provision of the twenty minutes was made to meet it. I do not feel called upon to express an opinion on this point for reasons which I shall presently state, though I must confess to having been much impressed with the plaintiffs' argument. The bill in this case does not ask for relief in consequence of the infringement of a regulation or in consequence of the school property being used by defendants' permission, for illegal purposes. There is no such allegation in the bill. The sole ground put forward is that the schools, as carried on, are sectarian, and in endeavoring to establish that proposition the plaintiffs put forward, among other things, this viola-

tion of the regulation and improper use of the class rooms as rendering the schools sectarian. I can understand how it might be contended that the use of school property for any purposes other than school purposes is illegal *per se*, quite irrespective of any effect on the schools. That point, however, does not arise here, for the use of the class rooms for the purpose of religious teaching is only questioned, and its legality denied, because such use renders these convent schools sectarian schools. The argument is simply this—that the Roman Catholic religious teaching prefixed to the school work in the morning and affixed to it in the afternoon, virtually and practically become part and parcel of the school work for the day, and thus sectarianize it. I cannot state the contention better than by an extract from Dr. Inch's evidence, given in his examination by Mr. Skinner:—

"Q. When it comes to your knowledge that the school rooms are used immediately before and immediately after the opening and dismissal of the school respectively for the purpose of teaching the doctrines of some particular church, whereby the children of any other church must either be brought under that teaching, and the influence that it inculcates, or be sent away, is it allowed to go as a matter of right by the Board of Education?

"A. I wish to say that I have no disposition to evade at all in regard to this matter. I may say this: that as Superintendent of Education, I have not thought it my duty to prohibit the use of a school building for religious meetings, or other moral meetings, after the close of school hours, provided that the trustees unanimously consented to the use of the building for such purposes. As a matter of fact, throughout the whole Province school buildings are used for holding religious meetings, political meetings, and temperance meetings, in various places, and I have not thought it my duty, even if I had the authority to do so, to interfere in such cases as that, and so it would be in the case of the teaching the Roman Catholic catechism,

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I would not feel, after school hours, that it was my duty to interfere.

"Q. Take, for example—supposing a building is used for a school, and the school is dismissed at 4 o'clock, and after that hour, and what is generally the case when religious meetings are held in school houses, they have nothing to do at all with the pupils as such, or any connection with the school as such, would you not consider it a very different matter from a teacher sending away a portion of his or her pupils and keeping the other portion as a continuation of the school, so to speak, and teaching religion? Is there not a great difference in a matter of that kind?

"A. I do not see essentially there is a very great difference.

"Q. What do you mean by 'essentially'?

"A. If you called the meeting at 6 o'clock.

"Q. For the public?

"A. For the public, or children, or any one who chose to go, essentially to my mind it does not differ from having the meeting at 4 o'clock for the same purpose—just on the dismissal of the school—to my mind it does not essentially differ.

"Q. If you had sent away a portion of your scholars, and retained another portion, does it not bring up to the mind of those sent away the thought that they are excluded from that which the other pupils get? It must inevitably bring that right up, does it not? You would have to accede to that, I fancy?

"A. In the same way that they may be said to be excluded from a place of worship on Sunday or at other times. Their parents do not wish them to attend.

"Q. Would you say that is just the same as if church on Sunday held at that school house and the children excluded from that?

"A. It differs from it in the fact that the public generally attend in the one case and they are not supposed to attend in the other.

"Q. Is there not a marked difference in the mind of a child and must not the child be influenced to either

have an abhorrence of the religion they are sent away from so as not to be taught it, or that they are excluded from something—some benefit—that they ought to reap? One or the other must be brought to them?

"A. I think, naturally, few children would draw such an inference."

After some questions as to objective teaching, the examination proceeds:—

"Q. Then the state of things described as existing here are very strong objective lessons from the teaching in connection with the school hours, although immediately after?

"A. I think the pupils of more mature mind at any rate would be drawing inferences no doubt—thinking something of the matter—calling their attention to the subject at least, no doubt about that.

"Q. When these things (it must from the existing state of things and circumstances we are talking about) arise in the presence of the pupil, so to speak, must they not so far as the particular pupil is concerned turn that school into a sectarian school as contra-distinguished from a non-sectarian school?

"A. I do not think that follows.

"Q. Why not?

"A. Because I draw a distinction between the work done up to the dismissal of the school and whatever may take place after that. The question, as I understand it, is, 'do I think that the allowing of religious instruction after school hours would make the school a sectarian school?'

"Q. No—(Question repeated).

"A. I would have to answer that in the negative from my standpoint. I think the very fact that there is a distinction drawn that some of the pupils at the request of their parents remain and others do not remain at that time, would tend to emphasize the distinction of religious belief in the community no doubt, but the fact that they are not allowed to give this religious instruction until after the school hours have closed would emphasize the fact that it is forbidden and that it is no part of the school work at all.

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"Q. Is not that to that extent a mere evasion of the non-sectarian principle of the School Act?

"A. I do not think I can answer that question. Of course it appears to me that you ignore altogether the fact that certain compromises were made to meet individual views, and for what was supposed to be the general good, and would stand squarely perhaps upon all the original principles of the thing, there might be some question raised, but to my mind, *under the School Law and the Regulations as they exist to-day, it is not regarded by the Board of Education as an evasion at all.* I could not answer that question otherwise."

At another part of the examination the question is asked:—

"Q. I do not object to the school houses being used for political or religious meetings in the usual way; but what we do object to is that the Protestant pupil is brought up to the verge of Catholic teaching and then told to go away, and we say, that impresses the child that it is something horrible—that is not intended, but that is the effect, we say, of telling him to go away—and if he has confidence in his teacher, does not that exclusion of him from something, have effect upon him as being an exclusion from some benefit, or otherwise, and tend to destroy the intellect of the child with reference to its future aspirations, and so on?"

"A. I do not agree with you."

It is evident from this that the Board of Education are not only fully conversant with these grounds of complaint, but that they do not consider the religious teaching outside of actual school hours as involving a violation of either the law or the regulations, or as in any way having the effect attributed to it by the plaintiffs. This Board, composed as it is of the Governor, the Executive Council, the Chancellor of the University of New Brunswick, and the Chief Superintendent of Education, is invested with the fullest powers under the School Act. As the late Chief Justice Ritchie, in *Ex parte Renaud* (10), says:—"It, on behalf

(10) 1 Pug. 273.

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of the inhabitants of the Province at large, is responsible for the general working of the system." I should require a very clear case before restraining the defendants from continuing a practice which has the approval of the Board of Education, especially when its determination involved distinctions so subtle and refined as many of these suggested by Mr. Skinner in the examination, from which I have just given extracts. The legal question to be decided is this: Are the schools converted from non-sectarian to sectarian schools by the religious teaching before and after school hours? The use of the class rooms for the purpose and the alleged violation of Regulation 23, are but evidences of that fact. It seems to be conceded that no such result would follow if a substantial period intervened between the school hours and the closing of the religious teaching in the morning and its commencement in the afternoon. Is not this distinction almost too refined? The hours for opening and closing the schools are fixed and well known; and children of fourteen years of age and under, who are sufficiently astute to acquire a knowledge of the distinctive teachings of the Roman Catholic Church, by the method suggested, are certainly entitled to be credited with knowing the precise time at which they are expected to be at school in the morning, and the precise time at which they are at liberty to leave in the afternoon. Having this knowledge, I am unable to see how a child by seeing some of his fellow-scholars remain for religious teaching at the close of the school while he is at liberty to go away, can be in any more danger of thereby imbibing Roman Catholic doctrines, than if he saw the same scholars going to the same room for the same purpose an hour later. What period of time is the Court to fix between the closing of school and beginning of prayers, at which the sectarian influence ceases and the prayers become innocuous? Regulation 22 gives to any teacher the privilege of opening and closing the daily exercises of the school by reading a portion of Scripture (out of the common or Douay version as he may prefer), and by offering the Lord's prayer; but no teacher can compel any pupil to be pre-

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sent at these exercises against the wish of his parent or guardian. Now this is something authorized to be done *in* school hours, and part and parcel of the daily school work. Suppose a Roman Catholic teacher in the exercise of this privilege reads the Douay version, and the Protestant pupils withdraw, or a Protestant teacher reads from the common version, and the Roman Catholic pupils withdraw, the sectarian influence—whatever it may amount to—is to my mind, much more marked than in the case of Protestant pupils at the close of the school for the day, going home and leaving their Roman Catholic fellow-pupils in the class to be instructed in their catechism.

I come now to the sixth ground relating to holy days. The facts bearing on this point are as follows: During the school year there occur three church festivals—Ascension Day, Corpus Christi, and one other which, I think, was not mentioned. These are, according to Roman Catholic rules, holy days of obligation. The sisters, as well as the Roman Catholic children, were therefore under a duty to attend religious services on these days. To meet this difficulty the trustees consented, so far as the convent building schools were concerned, that on these three days they should be closed, and three Saturdays—not teaching days—substituted in their place. This course the defendants justify under Regulation 20, sub-section 3. That regulation provides that all week days, except Saturdays and some special days mentioned, are teaching days; and by sub-section 3 it is provided that the Board of Trustees are authorized, under certain circumstances, to change teaching days into holidays, and to require the school to be kept in operation on Saturdays instead. These circumstances are (*a*) to allow a teacher to visit another school; (*b*) the illness or other unavoidable absence of the teachers; (*c*) *other extraordinary circumstances which may render the substitution desirable or necessary in the judgment of the Board of Trustees.* It is said that extraordinary circumstances did exist which justified the defendants in consenting to these substitute days. The circumstances are

these: A very large majority of the children attending these schools are Roman Catholics, and while the teachers might be compelled to teach, if required to do so by the trustees, the children of Roman Catholic parents would not have attended. It was, therefore, thought better to use the substitute days, when all would attend. Besides this, it was said that under section 15 of the Act, the amount apportioned to the trustees is based upon the average number of pupils in attendance at each school as compared with the whole average number of pupils attending the schools of the county, and the length of time in operation; and if the teachers were compelled to teach on these three holy days to but a small percentage of pupils, the large majority of scholars would not only lose three days' schooling, but the average for the purposes of section 15 would be materially reduced.

The point is not put forward in the bill as a ground for holding the schools sectarian, or in any way as a cause of complaint; and I think in strictness Mr. Currey's objection to my considering it should prevail. There is, however, nothing in it. I am not sure that the regulation was intended to provide for a change like this one, practically permanent in its character, and thus amending the regulation so far as this Bathurst district is concerned. No doubt the change was made to meet the wishes of the Roman Catholic majority on a religious question. It has, however, much to be said in its favour—it in no way impaired the efficiency of the schools—it in no way altered their character. At most it is a matter of administration which must be left to the defendants, under the supervising power of the Board of Education.

I pass on to the seventh ground, in which it is alleged that the schools in the convent building are sectarian because the sisters wear the distinctive garb of their order during school hours.

It is not denied that Regulation 21 in terms meets this objection; but it is said that this regulation is *ultra vires*, because, in permitting the garb to be worn, it is permitting that which renders the school sectarian.

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It may be assumed that this view is not in accord with that of the Board of Education, or else the regulation would never have been made or allowed to exist for so many years. I confess that I am wholly unable to concur in the plaintiffs' view on this question. The garb is the ordinary dress of a sister, the same as the uniform of a soldier is his, or the dress of a bishop is his. It is not worn in school for the purpose of teaching anything; it had its origin in a desire for neatness, simplicity and economy. I know of no law in force in this country imposing any limitation whatever upon a man as to the style of male attire he shall adopt, or upon a woman as to the style of female attire she shall adopt, provided always it be modest. To hold that the ordinary garb worn by a Sister of Charity, while engaged in teaching a public school, converts that school into a sectarian school, is in effect either to exclude her from being a teacher altogether, or else to deprive her of the right while teaching of wearing her usual dress. In my opinion there is no warrant for either the one or the other. What particular dogma of the Roman Catholic Church is taught a child simply by the dress of a Sister of Charity. If the child eventually arrives at the conclusion that the teacher is a Sister of Charity and a member of the Roman Catholic Church, that is a mere fact which might have been made known to her at the outset, one would think, without jeopardising the child's own views. I concede great possibilities to the system of teaching by object lessons, but to ask me to hold that the sectarian doctrines and tenets of the Roman Catholic Church are being inculcated in the minds of Protestant school children simply by their looking upon the garb of the sister who is teaching them, is asking much more than my belief in the system will warrant. In speaking of denominational schools and the exclusion from school libraries provided under the Parish Schools Act, of all books upon controversial theology, Mr. Justice *Fisher*, in *Ex parte Renaud* (11), says: "What sort of denominational school would that be, where the

(11) 1 Pug. at p. 276.

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master would not be aided in his dogmatic teaching by the writings of men of his own faith?"

One can with more point ask, what sort of a sectarian school would that be where the teacher's dress is the only text book? In my opinion, however, the validity of this regulation is practically settled by authority. The original regulation dealing with this subject differed materially from the present. Originally the regulation provided "that symbols or emblems distinctive of any national or other society, political party, or religious organization, shall not be exhibited or employed in the school-room, either in its general arrangements or exercises, or *on the person of any teacher or pupil*." The present regulation is as follows: "Symbols or emblems distinctive of any national or other society, political party or religious organization, shall not be exhibited or employed in the school-room in its general arrangements or exercises; but nothing herein shall be taken to refer to any peculiarity of the teacher's garb or to the wearing of the cross or other emblem worn by the members of any denomination of Christians or temperance organizations." The original regulation was in force in 1873, when *Ex parte Renaud* was decided. In that case the constitutionality of the Common Schools Act was attacked; and one of the grounds was that this very regulation took from Roman Catholics a right or privilege which they enjoyed under the Parish Schools Act, thereby rendering it invalid at least to that extent, by force of the educational clauses in the British North America Act. Though the point for determination then was the validity of the Act, and not the validity of the regulation made under the Act, the discussion covered both. As to the regulation, the late Chief Justice *Ritchie*, in delivering the judgment of the Court, says (1 Pug. 290): "It may be that the Board of Education have disregarded the general policy of the Common Schools Act, and interfered with the rights of teachers, parents and children, in excluding from the schools alike teachers and pupils who may exhibit on their persons, in dress or ornaments, symbols or emblems distinctive

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of any national or other society, political party or religious organization; for however clear the right of the Board of Education may be to make regulations necessary for the good government and discipline of the schools; to make arbitrary, restrictive regulations, as to the dress or personal adornment of the teachers and pupils, or which are calculated unnecessarily to interfere with the feelings, national, social or religious, in matters not calculated to give any just cause of offence to others or to interfere with good order in the schools, is quite another question. And while it is by no means clear to us, that any power exists in the Board of Education under the Common Schools Act, by regulation, to deprive teachers, parents and children, of their right of access to the free schools of the country, to the support of which they and all others are forced to contribute, unless they submit to such regulation; and though the assumption of such a power of practical expulsion by the Board of Education raises a question involving important and delicate rights—rights which in this land of civil and religious freedom, few may be willing to see infringed—or at any rate, raising discussions which must be unpleasant to those engaged in them, and calculated to result in consequences which can scarcely fail to produce acrimonious feelings, and in the end be injurious to the cause of free education, which we must presume the regulation objected to was intended to further; all we can say is, as the case stands, the regulations are not before us in such a way that we can deal with them, and therefore we are not called upon to express any decided opinion as to their validity, because the constitutionality of the Act cannot, in our opinion, be affected by any regulations made under it, there being nothing unconstitutional in the Act itself that we can discover."

It is very clear from this language that the Court thought that regulation invalid, though the case as presented did not call for a decision of that particular point. Mr. Justice *Fisher* thought the regulation within the powers of the Board of Education. As to the unwisdom of the board in passing it, all the members of the Court

seem to have been of the same opinion, though, being a question of policy, it was not a matter for their determination. The present regulation, which was passed, I think, in 1877, removes exactly the clauses which a majority of the Court thought rendered the original one invalid, and which all the Judges thought rendered it unwise and impolitic. If a regulation be bad because it excludes from the schools as teachers those who wear religious emblems as part of their daily and ordinary dress, it surely cannot be a bad regulation which restores that privilege.

In the case from Pennsylvania already cited (*Hysong* v. *School District*), decided in 1894, the Court dispose of this question as follows:

"But it is further argued that, if the appointment of these Catholic teachers was lawful, they ought to be enjoined from appearing in the school-room in the habit of their order. It may be conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, sectarian teaching, which the law prohibits? The religious belief of many teachers, all over the commonwealth, is indicated by their apparel. Quakers or Friends, Ommish, Dunhards, and other sects, wear garments which at once disclose their membership in a religious sect. Ministers or preachers of many Protestant denominations wear a distinctively clerical garb. No one has yet thought of excluding them as teachers from the school-room on the ground that the peculiarity of their dress would teach to pupils the distinctive doctrines of the sect to which they belonged. The dress is but the announcement of a fact that the wearer holds a particular religious belief. The religious belief of teachers and all others is generally well known to the neighbourhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the Courts to decide that the cut of a man's coat or the colour of a woman's gown is sectarian teaching, because they indicate sectarian religious belief? If so, then they can be called upon to go further. The religion of

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the teacher being known, a pure, unselfish life, exhibiting itself in tenderness to the young and helpfulness for the suffering, necessarily tends to promote the religion of the man or woman who lives it. Insensibly in both young and old, there is a disposition to reverence such an one, and at least to some extent, consider the life as the fruit of the particular religion. Therefore, irreproachable conduct, to that degree, is sectarian teaching. But shall the education of the children be intrusted only to those men and women who are destitute of any religious belief? . . . In the sixty years of existence of our present school system, this is the first time this Court has been asked to decide, as matter of law, that it is sectarian teaching for a devout woman to appear in a school-room in a dress peculiar to a religious organization of a Christian church. It was not assumed that the fact of membership in a particular church, or consecration to a religious life, or the wearing of a clerical coat or necktie, would turn the schools into sectarian institutions."

These sentiments and opinions are entirely in accord with my own.

I have considered the different points made, and have shown that in my view at all events, the plaintiffs have failed in proving the schools in question to be sectarian schools; and that whatever objections the plaintiffs may have to the defendants' mode of administering the law, are not matters for the supervision of this Court. Mr. Skinner, however, endeavoured to impress upon my mind that while some of the individual facts relied on as showing the sectarian character of the schools might possibly fail in doing so, the whole of them together forced one to the conclusion that the effect was really what the plaintiffs allege. I do not agree with this. One certainly is impressed with the fact that concessions in the management of school affairs were made to meet the views of the Roman Catholics for the purpose of harmonizing the grave differences which had existed. If you concede that the defendants' action has resulted in an unnecessary expense to the ratepayers—that the grammar school building afforded

ample accommodation for all the school children of the district—that the employment of the sisters as teachers was not only unnecessary, but done solely to meet the preferences of Roman Catholic parents—that the closing of the school on Ascension Day was a mistake, none of these things are in themselves illegal so as to call for the intervention of this Court. The Board of Education has a controlling power over all of them, and its power to withhold its money grant gives it ample means of enforcing its orders. On the other hand, if it be altogether legal to employ Sisters of Charity as teachers—that while teaching they are entitled to wear the usual habit of their order—and that both before and after school hours they may impart Roman Catholic teaching in the manner described, there remains nothing upon which this Court can act.

There is an allegation in the bill to which some reference must be made. The 32nd section alleges that by reason of the schools in the district being conducted in the manner described, the Protestant ratepayers have been compelled to pay school taxes, *but have been deprived* of the right of sending their children to non-sectarian schools, and that they are now sustaining a private school which Protestant children attend. The private school referred to is one conducted in the Orange Hall building standing on the lot owned by the plaintiffs. Some twenty-five children were attending it when this cause was heard. As school accommodation is furnished now-a-days, I judge these premises to be poorly suited for the purpose—in fact the opening of the school seems to have been for a temporary purpose altogether, and in no way as the result of anything in controversy in this suit. The statement in the bill is quite misleading—it must be regarded simply as an allegation of the pleader. It must be obvious to anyone that want of accommodation was not the moving cause. The trustees are charged with extravagance in renting the class rooms from Father Barry, because the accommodation in the grammar school building was ample for all the school children in the district. *A fortiori* it was ample for that number, less all who were attending the

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convent building. The fact is that the schools in the grammar school building had got in bad repute for reasons into which it is unnecessary to inquire here. Charges had been made against Cowperthwaite, one of the teachers, by Gammon, one of the plaintiffs in this case, which eventually led to his dismissal; and complaints had been made in reference to other matters which had considerably impaired the character and efficiency of the schools. Mr. Gammon, one of the plaintiffs, and who is described as feeling especially aggrieved by all that has taken place, gave the following evidence in his cross-examination—at page 210:

"Q. Did your complaint go simply to the acts or conduct of Cowperthwaite, or was it generally to the conduct in the whole school?

"A. The whole school, I presume it was.

"Q. Do you not know?

"A. I am certain that it was to that extent.

"Q. Then it went to the whole school taught in that building?

"A. I referred to the schools taught in that building."

The witness, it must be remembered, is here speaking of the grammar school, or public school, as many of the witnesses call it—not the convent school building. At page 220, when under examination by his own counsel, he said as follows:

"Q. Mr. Lawlor asked you a great deal about the private school. Tell me the history of its formation—why it was opened or why it was started?

"A. The one reason I had personally myself was, that this public school was run so careless in several ways, it was hardly fit to send children to. I thought so and I intended to keep my children home.

"Q. Then you have stated, have you, any other reason in regard to the matter?

"A. I don't know I had any other reason at the time, only just the careless way the schools were conducted."

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It is clear from this evidence that the convent building schools had nothing whatever to do with the so-called private school.

If the allegation in the bill means, as perhaps it was intended to mean, that as the schools in the convent building were then conducted, the influences were so Roman Catholic in their character and tendency as to preclude any Protestant child from going there, that is a different question. If I am correct in my view that these schools are not sectarian, that the employment of sisters as teachers, their wearing their usual garb while teaching, having religious instruction of a sectarian character before and after school hours, and the occupation of rooms in a convent building under lease for school purposes to the defendants, are all lawful, or at all events do not render the schools sectarian, it follows as a legal proposition that Protestants have nothing to complain of, because they have everything the law guarantees to them—free education in non-sectarian schools. If their fears of Roman Catholic influences, or their prejudices against the Roman Catholic Church, or their conscientious religious scruples prevent them from accepting what the law offers to them, in common with everyone else, it is their misfortune and no fault of the law. It is simply a case of persons feeling unable, for reasons of whose sufficiency they alone must be the judges, to avail themselves of privileges afforded to them by an Act of Parliament. Many persons, from reasons of a social character, object to sending their children to a public school where they are obliged to mingle, as they say, with the masses and the classes there assembled, and therefore pay their taxes and private tuition fees as well. Such persons are deprived of no right, because a locality, a building, and a teacher sembled because the law was not intended to preserve such social distinctions. Others refuse to send their children on account of some real or fancied objection to a locality, a building, or a teacher. They are deprived of no right because a locality, a building, and a teacher to their exact liking was never guaranteed them. So others, as in this case, either from prejudice or in the

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conscientious belief that if their children attended schools conducted as are those in the convent building, would necessarily or probably from Roman Catholic teaching acquire Roman Catholic beliefs, or be injuriously influenced in their religious education and faith, refuse to place their children in such an environment or within the sphere of such influences. They are, however, deprived of no right, because the law never guaranteed more than free education in a non-sectarian school, and free education in a school so taught is free education in a non-sectarian school.

In *The City of Winnipeg* v. *Barrett* (12), Lord MacNaghten, in delivering the judgment of the Privy Council, and speaking of the Manitoba Schools Act of 1890, says as follows:

"No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case), to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike."

(12) [1892] App. Cas. 438.

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So here, it is owing to prejudices or religious convictions, which are of course entitled to every respect, that prevent those who entertain them from partaking of advantages which are open to all alike.

There is neither allegation in the bill nor express proof, that all or any of these matters were ever made specific grounds of complaint to the Board of Education. It is evident, however, that the board is fully aware of them, and has been always aware of them. If they remain unredressed I must assume they were not considered substantial grievances, or else there were good and sufficient reasons for the Board's inaction. If the defendants were about to use their trust funds for illegal purposes, this Court would find no difficulty in restraining them; but where the causes of complaint arise from unwise administration or breaches of regulations involving no such misappropriation the plaintiffs must look for redress to the Board of Educaton, under whose control and supervision the whole school system is worked.

ORDER.—That the plaintiffs be at liberty to amend the bill, by converting it into an information at the suit of the Attorney-General, with the plaintiffs as relators, provided a draft of such amendment signed by the Attorney-General as consenting thereto be filed with the clerk, at any time before the minutes are settled, which is not to be done before the 1st April next. The information will then stand dismissed, with costs to be paid by the relators. Otherwise the bill will stand dismissed with costs.

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Practice—Partition suit and Sale—Joinder of Married Woman.

The wife of a tenant in common in land sought to be sold in a partition suit should be a party to the suit.

This was a demurrer to the plaintiffs' bill for partition and sale of premises owned by tenants in common. The bill and grounds of demurrer are sufficiently stated in the judgment of the Court. Argument was heard March 17th, 1896.

W. B. Chandler, in support of demurrer:—

The female defendant is neither a proper nor a necessary party to the suit. During her husband's life she has no interest or estate in land owned by him in common with others of which any value can be predicated. In *Washburn* (1) it is laid down that the wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate that if the entire estate should be sold in order to effect a partition, she loses by such sale all claim to the land. It therefore cannot be said that she is affected by the suit. If she has any interest the Court is not competent to order a sale that will divest her of it. In *Jackson* v. *Edwards* (2) it was held that a married woman's inchoate right of dower would not be barred by a sale in partition, although she was made a party to the suit. See also *Matthews* v. *Matthews* (3); *Cameron* on Dower (4); *Freeman* on Cotenancy and Partition (5) and *Rody* v. *Rody* (6). The statute relating to partition proceedings (53 Vict. c. 4, s. 196 *et seq.*) does not empower the Court to deal with the female defendant's interest, as no provision is made to indemnify her by setting apart a portion of the proceeds of the sale. The Ontario Act re-

(1) P. 199.
(2) 7 Paige 410.
(3) 1 Edw. Ch. 567.
(4) P. 174.
(5) S. 474.
(6) 1 Can. L. T. 546.

specting partition (R. S. 1887, c. 104) provides for the joinder of a married woman and the sale of her interest upon proper compensation being secured to her. In the absence of statutory authority the Court is without power to protect her. If a sale is ordered the land can be sold subject to the female defendant's right of dower in the event of her surviving her husband.

W. Watson Allen and *R. A. Borden, contra*:—

A wife's inchoate right of dower is a real and present interest which must be safeguarded. See *Allen* v. *Edinburgh Life Assurance Co.* (7). The provisions of the Act relating to partition are sufficiently comprehensive to include the contingent interest of any party who may be affected by the suit. Apart from the statute, the power of the Court is amply adequate to secure a just compensatory adjustment of the interests of all parties, and no difficulty in making a partition will be allowed to prevail. *Story* Eq. Jur. (8). The decree of the Court can be framed so as to effectually protect the female defendant's interest. Great inconvenience would result if the wife could not be joined and her interest barred by the sale. The estate would be sold at a depreciated value and the purchaser would get a defective title. In *Wilkinson* v. *Parish* (9) Chancellor *Walworth* said: "As a *feme covert* cannot be bound by a decree against her husband in a partition suit to which she is not a party, it seems to be proper, in all cases where a sale of the premises will probably be necessary, that the wife should be joined with her husband as a party in the suit, so that the purchaser's interest in the premises may not be charged with the incumbrance of her contingent claim of dower." The case comes within the well-known rule in equity, that all persons having an interest in both the subject and the object of the suit, and all persons against whom relief must be obtained in order to accomplish the object of the suit, should be made parties. See *Mitford* on Pleading (10). The dower interest of a married woman in the estate of her husband

(7) 25 Gr. at p. 314.
(8) 12th Ed. s. 656
(9) 3 Paige 653.
(10) Am. Ed. p. 36.

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seized of land as a tenant in common is subject to the incidents of partition: *Washburn* (11). On a simple partition her right of dower attaches to the share allotted in severalty to her husband. If a sale is decreed her interest similarly attaches to her husband's share in the proceeds.

Chandler, in reply.

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The defendant, Margaret Hannaghan, wife of the defendant, Andrew Hannaghan, demurred to the bill on the ground that she should not have been made a party. The bill is filed for partition of premises held in common; and the sole question raised by the demurrer is, whether the wife of a tenant in common, by virtue of her inchoate right of dower, is a proper party to a bill filed for a partition. The bill alleged that the premises cannot be profitably divided, and a sale is asked for. If the practice in such cases had been settled by the considered judgment of any Judge of this Court, I should be disposed to follow it, whatever my own views might be; but so far as I can learn, no such decision has been given, and I am, therefore, to consider the question as now arising for the first time.

The simple case of a partition presents little difficulty, because the authorities seem to agree, that in such a case, the wife's right of dower is confined to that portion of the land to which, on the partition, her husband becomes seized in severalty. *Cameron* on Dower, 171-2, and cases cited.

The power of this Court to order a sale so as to take away or interfere with the wife's right, is denied. It is contended that if a sale is decreed, such sale must be made subject to the wife's right; and that there is no authority for selling such right either with or without compensation. The wife, it is argued, is therefore neither a proper nor necessary party, because her rights cannot be interfered with by any decree which the Court can properly make in a suit for partition.

(11) P. 158.

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The jurisdiction in cases of partition was transferred to the Court of Chancery by Act 2 Vict. c. 36, which enacts "that from and after the passing of this Act the partition of lands, tenements and hereditaments, held in coparcenary, joint tenancy, or tenancy in common, shall be effected by the Court of Chancery according to the practice and proceedings established or to be established in that Court." There was no procedure provided for the purpose of carrying the Act into effect, and no provision was made for a sale. Section 3 however, provides that the decree shall operate as a transfer by the several tenants would, so as to vest in each tenant the interest of all the others in the land decreed to him. The practice of the Court of Chancery, then in force in England, will be found in 2 *Daniell*, 1150 *et seq.*

The methods by which Courts of Equity acted in effecting a partition of lands held in common, were essentially different from those adopted by Common Law Courts. It was because of the greater power this Court had of dealing equitably between all parties interested, that its jurisdictioon was invoked in such cases. The decree of the Court of Chancery in partition suits did not originally operate upon the title to the property; but when it had been determined what portions of the land were to go to each tenant, the Court, in order to complete the title, ordered mutual conveyances to be executed by the parties, which order the Court enforced, as it did any other order it saw fit to make: *Whaley* v. *Dawson* (12); *Gay* v. *Parpart* (13).

This order for the parties to execute conveyances was not made in pursuance of any statutory or special power, but by the authority which is inherent in the Court to do all that is necessary for a complete and effectual exercise of its jurisdiction. It had jurisdiction to make partition; in order to complete the partition the Court adjudged conveyances necessary, and it therefore compelled conveyances to be made. If by reason of the infancy of any of the parties, or any other

(12) 2 Sch. & Lef. 367. (13) 106 U. S. 679

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circumstance, the conveyances could not be made, the decree only extended to make the partition, give possession and order enjoyment accordingly until such conveyances could be made: *Story* Eq. Juris. § 652.

So it is said: "If a contingent remainder, not barable or extinguishable, is limited to a person not in existence, the conveyance cannot be made until he comes into being and is capable, or until the contingency is determined. An executory devise may occasion a similar embarrassment. And, in either of these cases, a supplemental bill will be necessary to carry the original decree into execution": *Story* Eq. Juris. § 652; *Mitford* on Pleading, 120; *Attorney-General* v. *Hamilton* (14).

Story, § 656, thus sums up the advantages which Courts of Equity have over Courts of Law: "Indeed, in a great variety of cases, especially where the property is of a very complicated nature, as to rights, easements, modes of enjoyment, and interfering claims, the interposition of a Court seems indispensable for the purposes of justice. For, since partition is ordinarily a matter of right, no difficulty in making a partition is allowed to prevail in equity, whatever may be the case at law, as the powers of the Court are adequate to a full and just compensatory adjustment."

The same author, at section 656 (*b*), says: "For, in all cases of partition, a Court of Equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition; but it founds itself upon its general jurisdiction as a Court of Equity, and administers its relief *ex aequo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree, adjust all the equitable rights of the parties interested in the estate; and will, if necessary for this purpose, give special instructions to the commissioners, and nominate the commissioners instead of allowing them to be nominated by the parties."

(14) 1 Madd. 214.

I cite these passages to show that this Court has ample power—subject, of course, to statutory limitations—to make such orders and adopt such procedure as will enable it, on a bill for partition, to do complete justice between all the parties; and that it will not hesitate to exercise this power.

As Courts of Equity ordered mutual conveyances to be executed in order to perfect the titles on decreeing a partition, it necessarily followed that all persons, whose conveyances were required for the purpose, must be before the Court as parties. The rule is thus laid down in *Daniell* (15):—"And so, where a bill is brought for a partition, either by joint tenants or tenants in common, as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit," for which proposition an anonymous case, in 3 *Swan* (16), and other cases are cited.

It is very clear that if such conveyances were being made to strangers, the wife would be a necessary party so as to release her right of dower, for without such release the title would be defective. And if she is not a necessary party where the conveyances are to be made mutually among the tenants, in order to complete and perfect their titles in severalty, it is because, as a matter of law, the wife's right of dower, on the severance being made, attaches solely to that portion of the land decreed to her husband.

The delay and inconvenience in the way of procuring these conveyances from infants and others under disability, and the difficulties which in so many cases stood in the way of making a beneficial partition, led to the enactment in this and other places, of statutes, by which in case of a partition the decree operated itself so as to vest in each tenant the interest of all others in the land partitioned to him; and where a partition was not beneficial a sale of the land to be partitioned could be made and the proceeds divided among the parties in interest. This power of sale was first given by Act 17 Vict. c. 18. It was re-enacted

(15) 4th Am. Ed. 208. (16) P. 139.

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in c. 49 Con. Stat., section 120, and again in Act 53 Vict. c. 4, though in a somewhat modified form.

I cannot but think, in view of the object sought by a partition suit and the course of legislation on the subject, that in empowering the Court to order a sale instead of a partition the one remedy was intended to be in substitution of the other; and that it is the duty of this Court, so far as it can, to give the fullest effect to this intention and at the same time do complete justice between the parties. The right of partition is one which each tenant in common admittedly has against his co-tenants. And it will be seen, from the citations which I have made, that this Court, in order to administer that right and make it effectual, will find means to surmount every difficulty in the way. And, in my opinion, where the circumstances exist which warrant the sale, the right to the sale is as absolute as the right to the partition for which under those circumstances the statute has substituted the sale. Considering that the object to be accomplished is, in the one case, to vest in each tenant a title free from all dower right of the co-tenant, and in the other case to give to such tenant the value of that right in money as derived from a sale, it is the duty of this Court, I think, to carry out that object. It cannot be doubted that if the land be sold subject to a right of dower the marketable, salable value is materially lessened. And in such a case the unmarried tenant is placed at a great disadvantage. Take, for example, the case of a piece of land worth $8,000, incapable of a beneficial partition and owned in common by A. a married man, and B., a single one. If the property could be partitioned A. would have his half, in which his wife would have an inchoate right of dower, and B. would have his half free of all dower rights, and worth to him $4,000. He can sell and convey for $4,000, but A. cannot sell his share for $4,000 without his wife joins in the conveyance so as to bar her dower. If you suppose this dower right worth $1,000, a sale of the land subject to the dower will only realize $7,000, of which B., the unmarried tenant, would only get $3,500, while

A. and his wife would receive the equivalent of $4,500. B. would have become compelled to contribute $500 for the right of dower of his co-tenant, without any liability for it in any way whatever. The result, therefore, of holding that the wife's inchoate right of dower cannot be got rid of by a sale by making her a party to the suit for a partition, is either to compel an unmarried tenant to submit to a direct loss or else to prevent him from having a sale in a case where by the statute he is entitled to have it. If the statute will bear such a construction as to permit the wife's right to be got rid of by a sale without violating any recognized principle of equity or canon of construction, the rights of all parties will, in my opinion, be more equitably protected than in any other way. It does not, I think, violate any principle of equity. In the first place, we have the general rule of the Court, which requires all persons to be parties to a suit whose interests in the subject matter of the suit may be affected by the decree. It is said a wife has no interest until by her husband's death her right has become consummate and her dower has been assigned. She has no estate in the land, it is true, but she has an interest. Kent, in his Commentaries, at page 50, says:—"Dower is a title inchoate, and not consummate till the death of the husband; *but it is an interest which attaches on the land as soon as there is the concurrence of marriage and seisin.*" See *Allen* v. *Edinburgh Life Assurance Co.* (17), and *Miller* v. *Wiley* (18).

It may not be an interest capable of seizure under a *fi. fa.*, or capable of assignment to a third person to be enforced by him. It is, however, an interest attaching on the land, and as much an incumbrance upon it as a mortgage on the undivided share of her husband would be, and affecting the value of the land just as substantially. Now, bearing in mind that the original method of completing partition in this Court was by mutual conveyances—that this involved having all

(17) 25 Gr. 306.
(18) 16 U. C. C. P. 529.

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parties before the Court who were to make the conveyances, that the wife's joining in such conveyance was necessary in order to give a title to a stranger, and that a sale under the Act is a judicial sale to a stranger, there is every reason for requiring the wife to be a party so as to bind her and enable the Court to give a title to what it professes to sell. In the case of a mortgagee of a tenant in common, it has been held that he is a proper party to a bill for partition. 1 *Daniell*, 279. A *fortiori*, he would be, where the land was to be sold as an incident to the estate of which the person from whom he derived title was seised. Nor does such a course, in my opinion, bear inequitably upon the wife. Her right arises from the seisin of the husband, and it is subject to all the incidents which attach to the husband's seisin. The right of partition at the instance of a co-tenant and the right of a sale where a partition cannot be made beneficially are among these incidents. And by the latter course the husband's title is divested. She is prevented from the enjoyment of her dower consummate, but that is a right which depends upon her surviving her husband, and she is getting a compensation for her interest in the increased price of the land, and the Court has ample means of securing that compensation to her.

Such are the principles upon which the Court acted in *Weaver* v. *Gregg* (19), referred to in *Cameron* on Dower, 176, and also in *Jackson* v. *Edwards* (20), and on appeal (21). By the New York statute under review in the last case, the conveyance executed by the Master was declared to be a bar both at law and in equity against all persons interested in the premises in any way, who shall have been named as parties to the proceedings.

Chancellor *Walworth*, in that case, says :—"But, independent of any statutory provision, this Court was not wanting in power to make a decree which would protect the purchaser at the Master's sale, when all persons having a legal or equitable right to the land that

(19) 6 Ohio St. 547. (20) 7 Paige 410 (21) 22 Wend. 498.

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was capable of being released or transferred to the purchaser, were made parties, and where they were within the jurisdiction of the Court, so that its process could be made effectual against them, although the parties having the legal title or interest in the land were infants, or *femes covert*." At another part of the same judgment it is said: "If it were necessary, therefore, to resort to the common law process of the Court to make a sale under a decree in partition valid and effectual against the inchoate rights of dower of the wives of some of the tenants in common, it will be seen that the means are generally within the reach of the Court, if it thinks proper to employ them."

If one takes into consideration the difficulties which so often lie in the way of making a beneficial partition —the varied interests often involved, and what, in many cases, is the almost impossibility of protecting those interests by means of a partition, and that a sale was provided to meet these very difficulties—it seems a signal failure in the remedy if it is only applicable to cases where no rights of dower are in question, or, if such rights do intervene, the remedy can only be adopted by an unmarried tenant-in-common by his submitting to a substantial pecuniary loss. In my opinion, both reason and convenience favour the jurisdiction and practice as laid down in the cases I have just cited.

Bearing in mind the subject matter and the evils intended to be remedied by the sale, I cannot see anything in the Act which prevents its being construed in the way proposed—on the contrary, I think that is its plain meaning. Section 204 of 53 Vict. c. 4, provides that a decree in partition shall transfer to the tenant in common all the right, title and interest of the other parties interested therein, as well infants and married women as *others* being parties to such proceeding. And by section 203 it is provided that on a sale by a Referee his conveyance shall vest in the grantee all the right, title and interest *of all parties to the suit*, of, in, and to the lands mentioned. It is not all the right, title, and interest of the tenants-in-common, but of all

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the parties to the suit, evidently contemplating other persons as parties to the suit than the tenants-in-common. I am unable to see any principle which would prevent this Court compelling a married woman to become a party, so that, in common with her husband, her right derived through him and therefore subject to the incidents attaching to his estate, of which a sale is one, should be sold and divested so as to realize the full value of the property, and give to the purchaser the full title of the tenants-in-common and those claiming through or under them. It was said that this course took a right from the wife without compensation. This is not so. The compensation is included in the proceeds of the sale coming to her husband as representing his interest in the property. And it only becomes a question between her husband and herself what proportion she is entitled to receive. If they cannot agree this Court has ample means of settling the question, for I see no greater difficulty in ascertaining the value of a wife's inchoate right of dower than in determining the value of a widow's dower under sec. 250 sub-sec. 4. When that question arises it will be found that the powers of the Court are ample for the protection of the interests of both husband and wife.

Although in cases where a partition and not a sale is asked for, it is not necessary, for reasons which I have already stated, to make the wives having inchoate rights of dower parties to the suit, it would be an inconvenient practice to omit them in cases where a sale might be asked for; and in cases where a sale is asked for, as here, and where the circumstances are such as to render a partition incapable of being beneficially made, married women having such inchoate rights should, I think, be made parties to the bill.

This demurrer must be overruled. Reserve question of costs.

In re C. F., AN INFANT.

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Infant, adoption of—Illegitimate birth—Consent of parents. May 19.

Under the provisions of the Supreme Court in Equity Act, 1890 (53 Vict. c. 4), the Court cannot grant leave to adopt an illegitimate child without the consent of both its parents.

This was a petition for leave to adopt an illegitimate child. The facts are sufficiently stated in the judgment of the Court. The application was heard May 12th, 1896.

A. W. MacRae, for the petitioners.

1896. May 19. BARKER, J.:—

This is an application by C. W. and wife for leave to adopt an infant and for a change of his name. It appears that the child is the illegitimate son of one B. F., and that he was born on the 13th day of February, 1895. It does not appear who the father is or whether he is dead or living. The mother consents to the order, but there is no consent from the father. The petition states that the child has since its birth been residing with the petitioners and been an inmate of their household, though it is not stated by whose directions or under what circumstances this has been done.

The Act is, I think, explicit that such an order can only be made by consent of the parents, if they are living, except in case of a divorce or the insanity of one parent, in which case special provisions are made. The effect of such an order is to divest the natural parents of all legal rights in respect of the child and to free the child from all legal obligation of obedience and maintenance. Without stopping to inquire as to the right of custody or control of the child in such cases, as between the parents, I think it sufficient to say that the Act, subject to the exceptions I have mentioned, only authorizes the order to be made on the consent of the parents. The father not having consented, and the case not being within any of the exceptions mentioned in the Act, the order must be refused.

Order refused.

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June 16.

THOMAS v. GIRVAN.

(No. 2. Ante, p. 257.)

Mortgage—Redemption suit—Dispute as to amount due—Mortgagee's costs.

A mortgagee will not be deprived of his costs in a redemption suit made necessary by a dispute as to the rate of interest to which he was entitled.

A mortgagor was indebted to the mortgagee in a sum in addition to the mortgage debt. He made several payments in money and goods to the mortgagee. He applied by his solicitor to the mortgagee for a statement of the payments made on the mortgage and of the amount due, as he wished to pay the mortgage off. Before answering, the mortgagee gave notice of sale of the mortgaged property under a power of sale contained in the mortgage. In his answer he stated that the whole of the principal and interest at 12 per cent. or $311.53, was due, and that no payments had been made on account of the mortgage indebtedness. The mortgagor thereupon filed a bill to restrain the sale and for redemption. A reference having been had to take account, the Referee found that a small payment had been made on the mortgage, and allowed interest on the mortgage from its maturity at six per cent. upon a construction of a covenant in the mortgage to pay interest at twelve per cent., and his report was confirmed by the Court.

Held, that the mortgagee was entitled to his costs of suit.

This was a suit for the redemption of a mortgage made by the plaintiff to James D. Phinney, and by him assigned to the defendant. The material facts of the case are fully stated in the judgment of the Court. The argument was heard May 19th, 1896.

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

The mortgagee is not entitled to his costs in a redemption suit if he has claimed more than was due, coupled with misconduct. See *Coote* on Mortgages (1). In *Livingstone* v. *The Bank of New Brunswick* (2), *Wilmot*, J., in delivering the judgment of the Court, says (3): "Although it may be considered as a general rule, that the mortgagee, on having his security redeemed, is entitled to his costs, yet, as said by the Lord Chancellor in *Detillin* v. *Gale* (4), 'it was not of necessity that a mortgagee should not pay costs.' And in that case his Lordship said 'it was a very clear moral proposition, that the mortgagee ought to pay

(1) P. 800. (2) 6 All. 252. (3) At p. 262. (4) 7 Ves. 583.

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all costs his unnecessary and oppressive dealings had occasioned.'" The mortgagee here was guilty of oppressive misconduct. He refused to state the amount due on the mortgage when application was first made to him, and subsequently over stated the amount by claiming excessive interest. After informed of the mortgagor's desire to redeem, he commenced proceedings in exercise of the power of sale contained in the mortgage. The suit was therefore rendered necessary by the mortgagee's misconduct, in order to have an account taken and to restrain the proceedings for sale of the property. See *Smith* v. *Cormier* (5); *Thomas* v. *Cooper* (6); *Coles* v. *Forrest* (7).

C. A. Palmer, Q.C., for the defendant:—

The contract between mortgagor and mortgagee makes the mortgage a security not only for principal and interest, but also for the costs properly incident to a suit for foreclosure or redemption, unless the mortgagee has forfeited them by misconduct amounting to a violation or culpable neglect of his duty under the contract: *Cotterell* v. *Stratton* (8); *Fisher* on Mortgage (9); 2 *Dan.* Ch. Prac. (10). In *Detillin* v. *Gale* (11), Lord Eldon referred to a case in which the mortgagee was made to pay costs on the ground that he refused a tender of principal and interest. Here no tender was made. In claiming interest at 12 per cent., the mortgagee believed he was entitled to it under a construction of the mortgage instrument.

Stockton, Q.C., in reply.

1896. June 16. BARKER, J.:—

The only question involved in this application is as to the costs of this suit and the reference to take the account. The plaintiff filed his bill for the redemption of a mortgage given by him to one James D. Phinney to secure the sum of $150, with interest at the rate of 12 per cent. per annum, which mortgage is dated December 19, 1885. At the

(5) 25 N. B. 487.
(6) 18 Jur. 688.
(7) 10 Beav. 552.
(8) L. R. 8 Ch. 295.
(9) P. 1002.
(10) P. 1385.
(11) 7 Ves. 583.

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plaintiff's request the defendant Girvan took an assignment of this mortgage on the 3rd of October, 1887, paying Phinney the amount then due, about which there was no dispute. The plaintiff alleges in his bill that after the mortgage had been assigned to Girvan, he paid him in cash and farm produce several amounts, and that Lloyd Thomas and George Thomas, his sons, who were then minors, worked for Girvan for several months in different years between October, 1887, and May, 1895, when this suit was commenced, and that these payments were all made on account of this mortgage, and that the sons' wages also were by agreement with Girvan to go in payment of the mortgage. The bill also alleges that there was then not more than $125 due on the mortgage, though Girvan claimed that nothing had been paid on account, as the cash, produce and labour, all had been paid and given in payment of another indebtedness existing on a promissory note of the plaintiff's held by Girvan for $260.27, and made in October, 1887, at the time the mortgage was assigned, but which related altogether to other dealings between the parties. About the 4th day of March, 1895, the plaintiff, by his solicitor, applied by letter to Girvan for an account of the payments made on the mortgage and a statement of the amount due, stating at the time that the plaintiff wished to pay it off. To this letter Girvan made no reply. On the 19th of March the plaintiff's solicitor wrote Girvan another letter, asking for a detailed statement showing the amount due on the mortgage so that he might pay the mortgage off. To this letter Girvan replied on the 23rd March, acknowledging the receipt of both letters, and stating that the amount due on the mortgage was the principal and interest at 12 per cent. per year, in all amounting to $311.53, no payment having been made on account. In the meantime the defendant had caused a notice of sale to be given under the power contained in the mortgage. I referred the matter to take the account, and the substantial dispute between the parties was as to the appropriation of the payments, the plaintiff contending that they had been

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made on account of the mortgage, and the defendant contending that they had been made on account of the promissory note. The Referee adopted Girvan's view on this point, and he reported that after allowing interest on both promissory note and mortgage after maturity at the rate of 6 per cent. instead of at the rate claimed by Girvan, there remained a balance of $6.98 to go to the credit of the mortgage. It seems that this note for $260.27 was given in settlement of certain other notes upon which interest had been charged at the rate of 2 per cent. a month, and the Referee in stating the account deducted this extra interest, so that the actual amount due on the note as he found it was $196.50. The Referee found that the total payments by the plaintiff, including the sons' wages, amounted to $203.48, the sum which Girvan had actually credited, so that there remained an over-payment of $6.98 to go to the credit of the mortgage. The Referee then found that there was due on the mortgage on the 23rd December, 1895, for principal and interest, the sum of $237.42, after crediting the $6.98 with interest and allowing interest on the mortgage at 6 per cent. Exceptions were filed to this report, which I disposed of by reducing this sum to $230.48.

The principle by which this Court is governed in dealing with the question of costs in suits of this kind is fully stated by the Lord Chancellor in *Cotterell* v. *Stratton* (12). At page 302 he is thus reported: "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court, which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption.

(12) L. R. 8 Ch. 295.

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In like manner, the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract."

That special circumstances may exist which warrant the Court in depriving a mortgagee of his costs in whole or in part cannot be denied. It is contended that this is such a case. The plaintiff bases his contention upon the ground that the suit was rendered necessary by the defendant Girvan's refusal to give a statement of the amount due when applied to for it, and his proceeding to exercise his power of sale, which the plaintiff was compelled to have restrained by this suit, which involved the reference and all the costs incident to the litigation. I am unable to concur in this view, and I think all the facts are against it. In the first place, the plaintiff, possibly with the exception of the value of some hay, the precise quantity of which, he says, he did not know, was as well aware of the amount of his payments as Girvan was, for he had reliable information on the subject easily available as to payments of which he had no personal knowledge, and in his bill, which he swore to, he states the amount due as less than $125, and even that sum he does not appear to have tendered or offered to pay. The defendant's contention, however, was that nothing had ever been paid on account, and therefore, as he had never been in possession, the amount due was the principal and interest—an arithmetical calculation which the plaintiff could as well make as the defendant, but which the defendant did make, and the result of which he gave the plaintiff in his last letter. It is clear that the real question in dispute was, whether the payments were on account of the note or the mortgage, and on this point the defendant turns out to have been right. He also seems to have kept an accurate account of

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these credits, and, though he claimed interest at a higher rate than he succeeded in sustaining before the Referee, that point, so far as the mortgage is concerned, was one purely of law upon the construction of the instrument, and involved in no way that I can see any additional costs to any one. The defendant's counsel did not claim more than 6 per cent. when the matter was first referred; and though the defendant, in his account filed with the Referee, did charge the interest at the higher rate, it was disallowed simply because the Referee thought, and in my opinion rightly thought, that by the construction of the mortgage interest was only recoverable at the smaller rate. When the plaintiff received the defendant's letter of the 23rd March he did not offer to pay the principal and interest at 6 per cent.—he did not even deny his liability to pay interest at 12 per cent., but what he did say was that his payments had not been credited. In this, however, he seems to have been wrong. I do not see that the defendant Girvan was at fault in giving the notice of sale. He had a right to take foreclosure proceedings or exercise his power of sale in order to realize his money; and the plaintiff's notion that this litigation is to be put down as the result of the notice of sale being given, is, to my mind, without foundation. The defendant was wrong in one particular only, that is, in claiming the 12 per cent. interest; but that was a *bona fide* contention, and, as I have already stated, added nothing whatever to the cost of the litigation. In the case I have already cited the mortgagees claimed £736 as the balance due when the result showed only £517 were due; the difference being made up by certain occupation rents for unoccupied premises, by rents not received in consequence of their wilful default, and by some expenditure for repairs improperly charged. In that case a notice of sale was given in precisely the same way as here. The Lord Chancellor, however, says that the mortgagee had the right to that remedy for the realization of his security, and that the suit, in his opinion, was necessary under any circumstances by reason of the questions raised whether a

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notice of sale had been given or not. These remarks are, I think, entirely applicable to the present case.

The result is that the defendant is entitled to his costs of the suit and the reference, and the plaintiff will be entitled to redeem on paying the $230.48, together with interest on the principal sum of $150 from December 23rd, 1895, the date of the Referee's report, and the taxed costs of the defendant Girvan (except the costs of the exceptions to the Referee's report, which were disallowed,) on or before the 10th day of August next; otherwise a sale in the usual way.

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July 21.

SMITH v. SMITH, ET AL.

Partition suit—Standing grass—Sale by Court.

During the pendency of a partition suit the Court will not, in opposition to the tenant in possession, order the sale of standing grass and payment of the proceeds into Court, unless it is necessary in the interest of the co-tenants.

The facts in this application are stated in the judgment of the Court. The application was heard July 7th, 1896.

M. G. Teed, in support of the application.

W. B. Chandler, contra.

1896. July 21. BARKER, J.:—

This is a suit for partition of some lands in Albert county, of which it appears that the plaintiff is in possession. The bill has not been filed, but an appearance has been entered by one of the defendants, Edson E. Peck, who now applies for an order to have the grass on the land sold under the direction of the Court, and the proceeds of the sale paid into Court. It was said at the argument that there was a dispute as to the title to some of the property. Whether this is so, or what the nature of the dispute is, does not very clearly appear. The applicant contended that he was, at all events, entitled to

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the order for sale of the grass on the disputed land. There is no special ground assigned for asking for the order, and, unless it goes as a matter of course, the motion must fail. No doubt this Court would take such steps as it might deem necessary for the preservation of the property and the protection of all the interests involved. The usual course is, I think, in order to make an equitable partition, for each party to account for rents or profits and to claim for allowances for expenditures. It is not put forward here that the plaintiff is not a responsible person, or that there is any apprehension if she cuts or gets the benefit of all the grass, that its value will not be fully and truly accounted for. It may be more beneficial to all parties that the plaintiff cut the grass and make the hay herself than that it should be sold standing. I see no reason for depriving the parties of this benefit.

I see no greater reason for interfering as to the grass on the land said to be in dispute. If the plaintiff goes on and cuts grass on land to which she has no title, she is a mere trespasser, and liable to the owner in an action at law. It is not a case where the property is to be preserved in specie by the Court for the person ultimately entitled to it, for it has to be sold and converted into money; that is the object of this motion. Cases might occur, no doubt, where, under special circumstances, the Court might deem it in the interest of all parties to interfere, but no such special circumstances exist in this case. *Bailey* v. *Hobson* (1).

The application must, I think, be refused with costs.

(1) L. R. 5 Ch. 180.

1896.
July 21.

POIRIER v. BLANCHARD.

Injunction order—Dissolution—Suppression of material facts.

It is not a ground for the dissolution of an *ex parte* injunction that the plaintiff suppressed facts relating to the subject-matter of the suit, which, though material as between the plaintiff and a person not a party to the suit, are not material to the suit with the defendant.

This was a motion by the defendant to dissolve an *ex parte* injunction granted by Mr. Justice *Barker* in this suit. The grounds of the motion are fully stated in the judgment of the Court. The argument was heard July 7th, 1896.

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

G. G. Gilbert, Q.C., *contra*.

1896. July 21. BARKER, J.:—

This is an application to dissolve an injunction order made by me *ex parte* on the 27th of January last, by which the defendant, Pierre O. Blanchard, was restrained from removing a steam engine and boiler and other machinery and mill gearing from a certain lot of land in the County of Gloucester. The plaintiff claims this engine, boiler and machinery as having passed to him under and by virtue of a certain mortgage made to him by the defendant in August, 1891. The defendant seeks to have the injunction dissolved on three grounds: 1. That there was a suppression of material facts by the plaintiff in obtaining the injunction. 2. That there was also a misrepresentation of material facts; and 3. That under the facts, as now stated, the order should be dissolved on the merits. It seems that the engine and boiler and a shingle machine, part of the machinery in question, were purchased from the Waterous Engine Works Company, Limited, by the defendant Blanchard under agreement by which the title to the property was to remain in the vendors until full payment of the purchase money, and that this purchase money has not been paid in full. It was alleged that the plaintiff knew of these agreements, and his failure to make

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their terms known to the Court was a suppression of material facts, or a misrepresentation of facts, which, without regard to the actual facts of the case, would entitle the defendant to have the injunction order dissolved. No doubt, this Court requires the utmost good faith and the fullest disclosure of all material facts known to the plaintiff in order to sustain an *ex parte* injunction. The plaintiff has, I think, substantially brought himself within the rule. In the first place, he denies, or, I think, substantially denies, all knowledge of these agreements. I do not mean that he may not have known that there was some special agreement subject to which the purchases were made, though that is by no means clear from the affidavits; but I think a fair reading of the affidavits leads to the conclusion that the plaintiff had no such knowledge of the provisions of these agreements, which are somewhat lengthy and particular, as if communicated to the Court, would or could be in any way material. There is another answer to this objection. The plaintiff is only asking for an injunction against the mortgagor Blanchard. He is not, and cannot in this suit, without making the Waterous Co. a party, in any way interfere with their rights. Blanchard, the mortgagor, when he purchased this machinery, made a cash payment on account and gave promissory notes for the balance, all of which, I think, except one, had matured before this suit was commenced. Now, if the plaintiff was not justified in assuming, as against the defendant, that he had paid his notes at maturity to the Waterous Co., the defendant certainly had a right of possession and certain equitable rights in the property, which, as between the plaintiff and defendant, had passed to the plaintiff, and which the plaintiff was entitled to enforce against the defendant without in any way interfering with the company or its rights. The material question is, did this property, or rather the interest of the defendant in it, pass to the plaintiff under the mortgage. There is, perhaps, no question of fact much more difficult to determine than this, where the property consists of trade fixtures, and whether it is attached to the soil or not depends upon such

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a variety of facts and circumstances. I should, if possible, always avoid deciding any such question upon affidavits. One need only look at such cases as *Climie* v. *Wood* (1), *Hellawell* v. *Eastwood* (2), and similar cases, to see upon what nice distinctions they run. The affidavits on these important points are not satisfactory on either side. This case is, I understand, almost ready for hearing—at all events, the injunction has stood for six months without any application, and I think no great injury can result from allowing matters to remain as they are until the hearing, when the witnesses can be subject to examination and the precise facts ascertained.

It was put forward by the defendant that in attempting to remove the machinery he was acting by the authority of the Waterous Co., who, by virtue of their ownership of the property in consequence of the defendant's default, had a right of resuming possession, and therefore of removal. Admitting this to be the case, it does not clearly appear here that the intended removal was the act of the Waterous Co., taken in pursuance of their rights under the agreement, and that they were acting through Blanchard, their agent. The affidavits of the defendant on this point, upon which, one would think, there ought not to be any doubt, are by no means clear or positive. The injunction order, as I have pointed out, does not in any way touch the company, which is left free to enforce any right which it has in regard to the property—it only controls the defendant from himself, as his own act and in his own right as against this plaintiff, from removing the property. I do not think the defendant has made out a case upon which I ought, on the eve of a hearing and after an expiration of six months, to dissolve this injunction, even if he had made the evidence as to his alleged rights much more clear and satisfactory than it is.

The motion will be refused, and the question of costs reserved until the hearing.

(1) L. R. 3 Ex. 257. (2) 6 Ex. 295.

JACKSON v. RICHARDSON, ET AL.

1896.
August 18.

Mortgage—Agreement to pay compound interest—Charge upon land—Intention.

A. and his wife gave a mortgage, bearing date January 25th, 1867, on land belonging to the former to secure the payment of £332 16s., with lawful interest, on June 1st, 1867, accompanied with A.'s bond in the same terms. In 1875 the mortgage and bond became vested in the plaintiff. On June 12th, 1880, A. executed a bond to the plaintiff, reciting that there was due on the original bond on December 31st, 1879, for principal and interest, $1,971.90, and providing that, in consideration of time for its payment, annual interest thereon should be paid at seven per cent., and that the annual interest as it accrued due, if it were not paid, should become principal and bear interest as such. In 1867 and 1873 A. acknowledged, by memoranda indorsed on the mortgage, the amount due thereon, and in both instances the amount was computed by charging compound interest at six per cent., with yearly rests. On August 18th, 1887, the balance due December 31st, 1886, was struck by charging compound interest at seven per cent., with yearly rests, from December 31st, 1879, to the time when the balance stated in the second bond was struck, and an acknowledgment stating the amount due on the mortgage was signed by A. upon the mortgage. In a suit for foreclosure, after A.'s death in 1895, against his widow, to whom the equity of redemption had nominally been assigned by A.:—

Held, that there was evidence of an agreement by A., from the acknowledgments indorsed on the mortgage, to charge the land with the payment of compound interest at six per cent., with yearly rests, up to December 31st, 1886, and that the land was so charged; but that the agreement in the second bond only created a personal liability, and that the mortgage bore simple interest at six per cent. from December 31st, 1886.

The facts in this suit are fully stated in the judgment of the Court. Argument was heard July 14th, 1896.

Powell, Q.C., for the plaintiff.

M. G. Teed, for the defendant, Lucy Ann Richardson.

1896. August 18. BARKER, J.:—

This is a suit for the foreclosure of a mortgage bearing date January 25th, 1867, given by one John R. Richardson and his wife, the female defendant, to one Eliza Crane, administratrix of William Crane, of some

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Parker, J.

property in Sackville to secure the sum of £332 16s. with lawful interest upon the same, on the first day of June, 1867, the interest to be paid from June 1st, 1866. Accompanying this mortgage was John R. Richardson's bond. By a conveyance dated February 10th, 1879, John R. Richardson conveyed his equity of redemption in a portion of the mortgaged premises to the defendant Albert D. Richardson; and by another conveyance dated April 4th, 1887, John R. Richardson conveyed his equity of redemption in the remainder of the mortgaged premises to one Helen M. Bowser. The latter portion of the premises was conveyed by Helen M. Bowser and her husband to the defendant Lucy Ann Richardson by deed dated April 6th, 1887. John R. Richardson died in February, 1895. The bill alleges, and the defendant Lucy Ann Richardson by her answer admits, that the conveyance by her husband to Bowser, and the conveyance from Bowser to her, were made without any consideration other than love and affection, and with the intention and object of vesting the title in her for her own benefit. It is also admitted that John R. Richardson lived on the premises up to the time of his death, and that he cultivated the land and treated the premises in all respects after the conveyance to Bowser as he had before. The defendant Albert D. Richardson has not appeared, and as he was served with summons upon which was endorsed the plaintiff's claim, I presume he admits the amount claimed to be correct. At all events the present contest is one raised by the defendant Lucy Ann Richardson, who, by her answer, not only denies the execution of some of the documents set out in the bill, but also that the amount claimed by the plaintiff is due. The plaintiff became possessed of this bond and mortgage in the year 1875, as part of her distributive share as one of the heirs of the late William Crane, and the same was assigned to her before her marriage to the defendant Jackson. On the 12th June, 1880, John R. Richardson entered into and executed under his hand and seal a bond to the plaintiff, by the name of Marian Crane, in the penal sum of $3,950.00. This bond recites and provides as follows:

"Whereas the said John R. Richardson, by his bond dated the 25th day of January, A.D. 1867, became bound unto Eliza Crane (now Eliza Cotton), in the penal sum of £664, conditioned for the payment of £332 16s. on the first day of June then next ensuing, together with lawful interest thereon, payable annually from the first day of June, A.D. 1866, in each and every year until the principal sum is paid. And whereas there was due on the said bond for principal and interest on the 31st day of December, A.D. 1879, the sum of $1,971.90. And whereas the said bond has been assigned to the said Marian Crane, and the said Marian Crane requires payment of said bond, but is willing to allow the same to stand for a longer time upon being paid seven per cent. annual interest, to which the said John R. Richardson has agreed. Now the condition of the foregoing obligation is such, that if the said John R. Richardson, his heirs, executors and administrators, do and shall well and truly pay, or cause to be paid, unto the above named Marian Crane, her heirs, executors and administrators, or assigns, seven per cent. annual interest on the said sum of $1,971.90, due as aforesaid on said bond (the annual interest as it accrues due, if not paid, to become principal, and bear interest as such), then the foregoing obligation to be void, otherwise to remain in full force and effect."

I think the evidence fully proves the execution of all these conveyances and instruments as alleged in the bill, and there remains for determination the question, which was the only one argued at the hearing, as to the principle upon which the interest due on the mortgage is to be computed. Annexed to the plaintiff's answer to the interrogatories filed by the defendant there is a schedule A, which contains a statement of the payments made on account of this mortgage by John R. Richardson, the last one having been made December 11th, 1894. These in all amount to $1,328.80; and I understand there is no dispute as to the correctness of this account. The plaintiff claims as due on this mortgage up to December 31st, 1895, when the summons

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was issued, the principal sum of $1,331.33, and $3,061.49 as balance of interest, and this after giving credit for the payments mentioned in the schedule I have already spoken of. The method by which this sum is arrived at is this: The account is stated with annual rests; the interest computed at 6 per cent. up to June 12th, 1880, when the last bond was given, and after that date at 7 per cent., in accordance with the terms of that arrangement. By this computation the payments are deducted, and the balance of interest each year is added to the principal, and interest thereon charged. The right thus to compound the interest is disputed, and it was to this point alone that the argument on the hearing was directed.

Although the female defendant who now raises this question was not the original owner of the property, she is, I think, under the circumstances, in no better position than though the equity of redemption had remained in her husband. She was a party to the original mortgage, and it is clear, I think, that the transfer to her in 1887 was merely nominal, and that during her husband's life he dealt with this property and mortgage, and made payments thereon amounting to $427, either as the real owner, or else as his wife's agent, with ample authority.

I think it may be admitted as the general rule of this Court that, in the absence of any agreement to the contrary, interest on a mortgage will not be computed with rests as the plaintiff seeks to do in this case. In *Waring* v. *Cunliffe* (1), the Lord Chancellor says: "My opinion is in favour of interest upon interest, because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the Court in a constant habit of thinking the contrary; and I must overturn all the proceedings of the Court if I give it." It may be that, at all events, so long as the usury laws remained in force, an original agreement for the loan of money, that the interest should be compounded, would have been

(1) 1 Ves. Jr. 99.

held bad, either as against the policy of those laws or as tending to oppression, and the evils those laws were intended to prevent, though a different rule prevails since the usury laws were repealed. *Clarkson* v. *Henderson* (2).

In *Chambers* v. *Goldwin* (3) Lord Eldon says: "It is clear the mortgagee cannot originally covenant for a collateral advantage; also, if upon the effect of the instrument there is nothing more than that the mortgagee shall do what a mortgagee ought to do as a trustee, there is no pretence to say the trust is distinct from the mortgage. There is nothing unfair, or perhaps illegal, in taking a covenant originally that, if interest is not paid at the end of the year, it shall be converted into principal. But this Court will not permit that, as having a tendency to usury, though it is not usury." See *Ex parte Bevan* (4) and *Morgan* v. *Mather* (5).

No question can arise here as to the original transaction, because the mortgage provides for no collateral advantage in any way; it is a simple mortgage to secure a certain sum of money with lawful interest at a certain time. The agreement to pay the compound interest, if made at all, was made afterwards. Now, there is nothing either usurious or illegal in a mortgagor agreeing, after his interest is overdue, to convert it into principal, and pay interest on it. The forbearance which he obtains is an ample consideration, and there are numerous cases where such agreements have been sustained.

In *Brown* v. *Deacon* (6), it appeared that the mortgage in question carried interest at the rate of 6 per cent., and the Master only allowed that rate, although the mortgagor had, long after the money was due, signed a memorandum agreeing to pay interest at the rate of 10 per cent., the Master thinking that the memorandum, not being under seal, would not control the mortgage. Mowat, V.C., reversed this finding, and

(2) 14 Ch. D. 348.
(3) 9 Ves. 254, at p. 271.
(4) 9 Ves. 223.
(5) 2 Ves. 15.
(6) 12 Gr. 198.

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held that the 10 per cent. rate was chargeable, and that on the authority of *Alliance Bank* v. *Brown* (7) no consideration for the contract need appear on its face, the plaintiff having actually forborne after the agreement.

In *Totten* v. *Watson* (8) the principle was not disputed, but it was held not to apply to an agreement not in writing, and where there was no proof that it was part of the agreement to charge the extra interest upon the land.

In *Tompson* v. *Leith* (9), a suit for foreclosure, the sole question was whether the plaintiff was entitled to compound interest under an alleged agreement arising out of a correspondence between the parties. Lord Romilly, in giving judgment, after showing that this correspondence did not amount to any such agreement as the plaintiff alleged, says: "In order to entitle the plaintiff to this demand, there should have been an express assent by the defendant, which there is not."

In *Daniell* v. *Sinclair* (10), which was a redemption suit, the same principle is admitted. The Court of New Zealand found that there was no agreement to pay the compound interest. Speaking of this Sir Robert Collier, in delivering the judgment of the Judicial Committee of the Privy Council, says (at p. 189): "He (*i.e.*, the Judge of the Court below), therefore, gave effect to the rule of law, which was undisputed, that without such an agreement simple interest only can be charged on a mortgage account."

Now, what is the evidence of the mortgagor's assent or agreement in this case? The evidence shows that on three separate occasions, that is to say, November 8th, 1867, March 22nd, 1873, and August 18th, 1887, John R. Richardson acknowledged a balance due on the mortgage. The last one is as follows: "I acknowledge that on the thirty-first day of December last there was due on the foregoing mortgage the sum of six hundred

(7) 10 Jur. N. S. 1121.
(8) 17 Gr. 233.
(9) 4 Jur. N. S. 1091.
(10) 6 App. Cas. 181.

and seventy-two pounds eleven shillings, which I promise to pay with interest thereon from that date."

"Sackville, 18th August, 1887.

(Signed) John R. Richardson."

The two other acknowledgments are in precisely the same terms, the first stating £344 6s. as due June 1st, 1867, and the other stating £370 3s. as due December 31st, 1872. These two acknowledgments are also entered and signed on the original bond, except the word "bond" is substituted for "mortgage." Now, the evidence shows, and it is in fact not disputed, that the balances stated to be due in these three acknowledgments were arrived at by charging compound interest with annual rests in the manner contended for by the plaintiff. There is no pretence here that these acknowledgments were made under any mistake, either of law or fact, or under any misapprehension by Richardson of his rights, or that they were in any way obtained by fraud or unfair dealing of any kind. Cogswell, who was agent of the Crane estate at the time, is dead as well as Richardson, so we are without any evidence beyond the writings themselves. Under these circumstances I feel bound to assume that an agreement to substitute compound for simple interest had been made. In *Daniell* v. *Sinclair* (11), already cited, a similar state of facts existed, but it appeared that the account was settled by both parties under a misapprehension as to their respective rights and obligations, in which case they were not held bound. The Court say at page 191: "Undoubtedly the signature by the plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been come to, and it was for the purpose of proving the agreement which the defendant had pleaded that the account was relied upon." Now there is no explanation even suggested here. On the contrary, when the plaintiff in 1875 took this

(11) 6 App. Cas. 181.

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mortgage as a part of her share of her father's estate, it had the first two acknowledgments upon it. Nearly twenty-nine years have elapsed since the first one was made, twenty-three since the second, and nine years since the third; and during all this long period Richardson, up to the time of his death a year ago, and his wife, who now raises this question, up to the present time, have had the benefit of the forbearance to which, as Kindersley, V.C., in *Alliance Bank* v. *Brown* (12), says an agreement such as is contended for here is referable and upon which it is based. To allow the matter to be re-opened and dealt with on an entirely different footing would, in my opinion, be contrary to both authority and principle. See *McCarthy* v. *Llandaff* (13); *Clancarty* v. *Latouche* (14); *Blackburn* v. *Warwick* (15).

I, therefore, hold that these acknowledgments show an agreement by Richardson to pay the compound interest, as charged and claimed by the plaintiff, for the period covered by them, that is up to December 31st, 1886. And as Richardson by these several written memoranda stated the balances to be due *on the mortgage*, it is equivalent to a writing declaring them a charge on the land under the mortgage. In addition to these acknowledgments we have Richardson's bond, given to the plaintiff in June, 1880, by which, as will be seen by the recital, he admits, under his hand and seal, that there was due on his original bond up to December 31st, 1879, the sum of $1,971.90, which is the amount due at that time computed on the principle contended for. By this admission under his seal Richardson would be bound: *Blackburn* v. *Warwick* (15); *Mosse* v. *Salt* (17).

I am disposed to think that the agreement as to compound interest, shown by the acknowledgments endorsed on the mortgage, cannot, however, be held to extend beyond the period specifically mentioned in them or to relate to the computation of future interest. In order to impose the burden of the extra interest on

(12) 10 Jur. N. S. 1121
(13) 1 Ball & B. 375.
(14) 1 Ball & B. 420.
(15) 2 Y. & C. Ex. 99.
(17) 32 Beav. 269.

the land, as it is here sought to do, there must not only be clear evidence of the agreement to pay the increased rate, but also an agreement to charge it on the land under the mortgage. In *Daniell* v. *Sinclair* (18) the Court in New Zealand held that the settlement of the account in which the compound interest was charged was not evidence of a continuing arrangement to that effect, and *Fergusson* v. *Fyffe* (19) and *Blackburn* v. *Warwick* (20) were cited as authorities for that position. In *Re Houston* (21), where the question was as to charging an increased rate of interest, Proudfoot, J., says: "Here, as in *Totten* v. *Watson* (22), no agreement at all is proved; there is the mere fact of payment of the increased rate of interest, from which perhaps an agreement might be inferred as to these particular payments; but there is no evidence of an agreement applicable generally to arrears whenever they might occur, and certainly there was no agreement to charge the land with the additional rate." By the terms of the bond given to the plaintiff in June, 1880, Richardson expressly agreed that interest at the rate of 7 per cent. on the balance then stated to be due on his original bond should be paid in future, and that overdue interest should be treated as principal, and bear interest as such. There is no doubt that a personal liability was created by this bond to pay, not only the compound interest, but also the increased rate of interest; but there must be some agreement by which this extra burden is charged on the land before it can be so. This bond makes no reference whatever to the mortgage; and if it was intended to substitute this bond for the original one, and make the mortgage void only on payment of the debt and interest as computed and settled by the latter bond instead of the former, it was a simple matter to have said so. In *Totten* v. *Watson* (22), already referred to, the mortgagee alleged an agreement to add 2 per cent. to the rate of interest, and that it should be a charge upon the land. The latter part of

(18) 6 App. Cas. 181.
(19) 8 Cl. & F. 121.
(20) 2 Y. & C. Ex. 99.
(21) 2 Ont. Rep. 84.
(22) 17 Gr. 233.

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the agreement was not proved as Spragge, C., thought was necessary in order to charge the land. So that a mere agreement to pay an increased rate of interest on a debt secured by a mortgage, does not necessarily involve an agreement to charge the payment of it on the land under the mortgage. It is true that interest at the rate of 7 per cent. is included in the £672 11s. stated to be due December 31st, 1886, and which I have already held to be a charge on the land. That is, however, irrespective of the last bond, and is a charge on the land, because Richardson, under the circumstances I have mentioned, agreed upon that balance as then due *on the mortgage*. The time for which the plaintiff agreed to forbear, by the effect of the bond of 1880, is at most a year; and in 1887, long after that period had elapsed, the plaintiff's agent and Richardson had the settlement by which the agreed balance of £672 11s. was arrived at, and as a part of the arrangement of that date the plaintiff's agent took from Richardson an agreement to pay interest on that sum from December 31st, 1886. This is the last arrangement or agreement between these parties, and if their rights are determined under it they ought not to complain. An agreement to pay interest primarily means simple interest only, and at the rate of 6 per cent.; and when the parties settled upon an amount due up to December 31st, 1886, and the plaintiff took Richardson's agreement to pay interest on that sum as principal, I think the amount for which he is entitled to claim as a charge under this mortgage is the sum then due and interest.

There is nothing to show that the amounts claimed as due by the plaintiff, shown by these acknowledged balances, are incorrect, computed on the principle contended for, and I understand that no error in calculation is charged. The £672 11s. will, therefore, be taken as the amount due December 31st, 1886, as principal, upon which the plaintiff will be entitled to simple interest at the rate of 6 per cent.

No doubt the parties can agree upon the sum in order to avoid a reference.

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September

(No. 2. Ante, p. 249).

Practice—Suit by administratrix—Non-joinder of husband—Amendment—The Married Women's Property Act, 1895 (58 Vict. c. 24), s. 18—Suits commenced before Act in force—Will—Suit for recovery of legacy—Admission of assets—Pleading.

W. by his will appointed his wife sole executrix, and left her the residue of his estate after payment of four legacies. The executrix proved the will and paid two of the legacies. She died intestate, and the defendant took out letters of administration of her estate. The plaintiff, a married woman, who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate, and filed a bill against the defendant to have the estate administered in Equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff. There was *no* allegation in the bill that *any* of the legacies had been paid, and that this was an admission of assets for the payment of all of them. The plaintiff did not make her husband a party to the suit. The defendant in his answer claimed that there were no assets to pay the legacies, as W. at the time of his death was indebted to his wife for advances out of her own separate property, which, with some other debts, exceeded the value of his estate.

Held, (1) that the bill should be amended by making plaintiff's husband a co-plaintiff.

(2) That the plaintiff was not entitled to a decree against the defendant for payment of her legacy without a reference being had and an account taken, when the bill did not charge that the testator's executrix had admitted assets and become personally liable by paying two of the legacies, and the defendant had expressly denied there were any assets for the payment of the legacies.

Section 18 of the Act 58 Vict. c. 24, does not apply to suits commenced before the Act came into force.

The facts in this suit are sufficiently stated in the judgment of the Court. Argument was heard June 17th, 1896.

R. F. Quigley, Q.C., and *D. Mullin*, for the defendants:—

The suit is improperly framed. The plaintiff's husband should have been made a co-plaintiff. In *Williams* on Executors (1), the rule is said to be clearly established that a *feme covert* executrix or administratrix can-

(1) 6th Am. Ed. 1031.

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not sue alone, citing *Marshall* v. *Rutton* (2), and *Boggett* v. *Frier* (3). See also *Daniell* Ch. Prac. (4). The husband of an executrix is entitled to administer in his wife's right, and may dispose of the personal estate vested in her in that capacity. He, therefore, should be joined that the defendant may have a discharge against him for any money decreed to be paid to the plaintiff. See *Re Wood* (5). Section 18 of *The Married Women's Property Act*, 58 Vict. c. 24, allowing a married woman, who is an executrix or administratrix, to bring suits as if she were a *feme sole* was not in force when this suit was commenced, and does not apply.

C. A. Palmer, Q.C., and *R. W. Hanington*, for the plaintiff:—

The objection that husband should have been joined is a ground of demurrer, and in the absence of demurrer is waived: *Burdick* v. *Garrick* (6). *The Married Women's Property Act*, 1895, in so far as it relates to practice and procedure not affecting vested rights, applies to suits pending at the time it was passed or came in force. See *Hickmen* v. *Trites* (7). There are numerous authorities that an Act respecting practice and procedure will be construed to be retrospective. Section 18 of *The Married Women's Property Act*, 1895, deals entirely with a matter of practice.

1896. September 15. BARKER, J.:—

The facts of this case are very simple. One Maurice Walsh died at the city of St. John on the 16th of August, 1885, having made a will on the 22nd of July previous, by which he appointed his wife Margaret sole executrix, and gave to her the residue of his property, after payment of debts, funeral and testamentary expenses, and the following legacies: $100 to his son Edward, $50 to his daughter Catherine, and $150 to each of his daughters, Mary and Margaret. The estate

(2) 8 T. R. 554.
(3) 11 East 303.
(4) 4th Am. Ed. 89.
(5) 3 DeG. F. & J. 125.
(6) L. R. 5 Ch. 233.
(7) 26 N. B. 53.

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was small, consisting principally of a life insurance of $1,000. The executrix proved the will and received the life insurance and some other moneys, amounting to some $1,250 in all. She never filed any inventory in the Probate Court, or passed any account. She died in August, 1892, intestate, and the defendant Nugent took out letters of administration to her estate. The plaintiff, who is also Margaret Walsh, but a daughter of Maurice Walsh, then obtained letters of administration *de bonis non* of her father's estate, and as such administratrix has filed this bill against Nugent as administrator of Margaret Walsh's estate, for an account of her father's estate with a view of obtaining payment of her own legacy of $150, and that of her sister Mary, the other legacies having, as is alleged, been paid, and the estate otherwise fully administered. The defence set up by the answer is that Margaret Walsh when she married Maurice Walsh, who was then a widower with the children mentioned in his will, was possessed of a considerable amount of property in her own right, and that after her marriage she permitted her husband to use in carrying on his own business, or in payment of his liabilities, a considerable portion of her own money, and that at the time of his death her husband owed her for these advances an amount which, with the funeral and testamentary expenses, was in excess of the value of all the assets of the estate. And, therefore, there never was any money of the estate available for the payment of these legacies, the whole $1,250, or whatever the Walsh estate amounted to, being absorbed in payment of debts, funeral and testamentary expenses.

Though the plaintiff has filed this bill in her representative capacity, and not in her own right as claiming her legacy, it has been treated, and I think I may treat it, practically as though the claim were for the legacies merely, because it does not seem disputed that except for Mrs. Walsh's claim as a creditor of her husband, the assets were ample for the payment of these legacies, and the estate has been otherwise fully administered. As Mrs. Walsh is entitled to the residuary estate, and

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the other legatees have been paid, the only sums to be accounted for by Nugent, as administrator of Margaret Walsh, to the plaintiff would be the amount of the two legacies in question with interest, if interest were recoverable.

It appeared by the evidence that the plaintiff is a married woman whose husband is living, and it was objected on that ground that as he was not a party the suit could not be maintained in its present form. I think, under the authority of *Burdick* v. *Garrick* (8) and other cases this objection must prevail. I, however, see no good reason why the difficulty should not be got rid of by amendment. The whole case has been heard, and no one can suffer by that course. I shall, therefore, order that the bill and other proceedings be amended by making the plaintiff's husband a co-plaintiff, on his filing a written consent to that effect, and to submit to any form of procedure which the Court may think fit to adopt. I make this order the more readily because by 58 Vict. c. 24, s. 18, express power is given to a married woman suing as executrix or administratrix to do so without joining her husband. That section is, however, not applicable to this case, as it did not come into force until January 1st, 1896, some months after this suit was commenced. It shows, however, the trend of legislation on the subject, and that the objection is one more of form than substance, and one which may, therefore, be well met by amendment.

As to the substantial ground of complaint in this case, I should have felt glad, in view of the small amount in dispute, to have avoided the delay and expense of a reference, and, if the parties had so desired, to have made a decree determining the question involved, as I suppose all the evidence has been given which is available to either of the parties. As the pleadings and evidence stand at present I cannot see my way clear to do so without disregarding what seems a settled practice in such cases. The bill in this case does not allege any circumstances or facts which in law

(8) L. R. 5 Ch. 233.

would amount to an admission by Margaret Walsh, the executrix, of assets in her hands available for the payment of these legacies. In such a case the executrix would have rendered herself personally responsible, and, therefore, a reference to ascertain whether she in fact had assets or not would be altogether unnecessary. There is proof here that this executrix had paid some of these legacies, and if that fact had been put forward in the bill as an admission of assets to pay these legacies in question, it might without explanation be held in law to amount to such an admission, and thus create a personal liability on the part of the executrix and render any reference unnecessary: *Lazonby* v. *Rawson* (9), *Hutton* v. *Rossiter* (10), *Stephens* v. *Venables* (11), *Barnard* v. *Pumfrett* (12), *Cadbury* v. *Smith* (13), *Coleman* v. *Whitehead* (14).

There is, however, in this case an express denial by the defendant that there are any assets available for the payment of these legacies, and the plaintiff, so far from putting it forward in her bill that certain of these legacies had been paid, and, therefore, the executrix had admitted assets for the payment of all of them, makes no allegation of this payment; and by the prayer asks that the estate be administered in equity, that an account be taken of all the unadministered property, estate and effects of Maurice Walsh which have been received by the defendant Nugent as administrator of Margaret Walsh, and that the balance of such estate be ascertained and paid over to the plaintiff as administratrix, etc., of Maurice Walsh. In *Savage* v. *Lane* (15), where the plaintiff filed a bill for the payment of a bond, the Vice-Chancellor says: "The first question that has been raised is, whether I am to decree an account of the personal and real estate of the testator, which is the relief prayed by the bill, or whether I am at once to decree payment of the plaintiff's debt personally by the executor. The ground upon which I am

(9) 4 D. M. & G. 556.
(10) 7 D. M. & G. 9.
(11) 31 Beav. 124.
(12) 5 M. & C. 63.
(13) L. R. 9 Eq. 37.
(14) 3 Gr. 231.
(15) 6 Hare, 32.

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asked to make the latter decree is an implied admission of assets by the executor, by having paid some legacies of the testator whilst the plaintiff's debts remained unpaid. A passage from the answer of the executor, admitting that such payment of legacies had been made, was read by the plaintiff and relied upon as sufficient to entitle him at once to a decree for payment of his debt, although the answer suggests that the legacies were paid under a mistake by the executor as to the amount of the assets. Without relying upon this suggestion in the answer, I am of opinion that the plaintiff is entitled, in this stage of the cause, to an account and nothing more. The bill does not make the point that the defendant has made himself personally liable to pay the plaintiff's debt by admission of assets, or on any other ground, but, on the contrary, prays an account of the testator's assets, and payment of the plaintiff's debt in a due course of administration. Admitting for the purposes of the argument (but not further), that payment of a legacy of £5, whilst debts remained unpaid, may be an admission of assets to pay all the testator's debts, it is obvious that the circumstances under which such payment was made may be material. And unless the plaintiff makes the point by his bill instead of praying an account, the defendant has no opportunity of making a case in answer to the claim."

This case seems almost identical with the present one, and is, I think, an authority for making only an order for a reference at this stage of the case and for taking the account asked for by the plaintiff.

There is another defence put forward in the defendant's answer. The defendant alleges that after Maurice Walsh's death his wife Margaret Walsh, while she did not pay either of these legacies now claimed, did expend in the support and maintenance of this plaintiff and her sister Mary, out of her own private moneys, a sum in excess of these legacies; and the defendant claims that these sums so expended should be set off against the legacies. I cannot concur in this view, for if it appeared, which it does not very satisfactorily by

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the evidence, that any such moneys were expended, there is nothing to show that any liability was intended to be created. No claim was made for the money for the six or seven years which Margaret Walsh lived afterwards, and she had the benefit of the plaintiff's services during the fourteen months she continued to live with her. In addition to this, as it is distinctly alleged that these advances were not made in payment of these legacies, they must have been made as a personal matter between the two, creating simply a liability or debt from the plaintiff to the executrix. This suit is brought by the plaintiff in her representative capacity to recover such moneys as are unadministered in the defendant's hands as Margaret Walsh's administrator, and under these circumstances there cannot be any set-off. The reference will, therefore, not include these claims, but be confined to the ordinary inquiry.

Reserve all other questions until the Referee has reported.

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August 18.

Practice—Foreclosure suit—Affidavit of service of summons—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4), s. 185.

It is not sufficient in an affidavit of service of summons in a foreclosure suit to state that the defendant was served with a true copy without stating that it was indorsed with a true copy of the indorsement on the summons.

This was a motion in a foreclosure suit to take the bill *pro confesso* for want of an appearance. Section 185 of the Supreme Court in Equity Act, 1890 (1), provides that in all suits commenced for the foreclosure of any mortgage, or for the foreclosure and sale of mortgaged premises, the date of such mortgage, and the names of the parties thereto, shall be stated in the summons and in the copies served, and the amount which the plaintiff claims shall in all cases be indorsed on the

(1) 53 Vic. Ch. 4.

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summons and copies served; and a form of the indorsement is given. The summons in this suit was properly indorsed. The affidavit of service attached to the summons stated the defendant had been served with a true copy of it, but did not state that the copy contained the indorsement on the summons.

1896. August 18. *C. A. Stockton*, for the plaintiff.

BARKER, J.:—The affidavit of service is insufficient, and cannot be read.

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October 23.

LAUGHLAN, ET AL. v. PRESCOTT, ET AL.

Practice—Interrogatories—Insufficiency of answer.

It is not sufficient for the defendant, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.

This was a suit to restrain the defendants, Crandall S. Prescott, Isaac C. Prescott and George D. Prescott, from felling trees and lumbering on certain Crown lands in Restigouche county, for an assessment of damages, and a declaration of the rights of the parties. The plaintiffs, Charles McD. Laughlan and Samuel Laughlan, jr., by their bill, as amended, alleged that license to cut lumber on the lands in question was granted to one George K. McLeod; that on the 31st of August, 1893, McLeod assigned the license to one Samuel Laughlan by a memorandum of agreement of that date, and that a further memorandum of the agreement was filed on or about that date in the Crown Land Office at Fredericton. Both these memoranda were recited in the bill. The bill then alleged that Samuel Laughlan had transferred his interest in the license to the plaintiffs. Interrogatories were delivered for the examination of the defendants, which contained, *inter alia*, the following, viz.:

2. "Is it not true that on the thirty-first day of August, A.D. 1893, Samuel Laughlan purchased from

the said George K. McLeod certain rights on the said Crown lands? Is it not true that a memorandum containing the conditions of the said purchase, and setting out the assignment and transfer of the said rights, and signed by the said George K. McLeod, was delivered on or about the said thirty-first day of August, A.D. 1893, by the said George K. McLeod to the said Samuel Laughlan? Was not said memorandum in the words and figures firstly set out in the second paragraph of the plaintiffs' bill of complaint in this suit, or in what other words and figures was it? Is it not true that on the thirty-first day of August, A.D. 1893, another memorandum containing the conditions of the said purchase, and setting out the assignment and transfer of the said rights, was signed by the said George K. McLeod and the said Samuel Laughlan, and filed in the Crown Land Office at the city of Fredericton on or about the thirty-first day of August, A.D. 1893? Was not said memorandum in the words and figures secondly set out in the second paragraph of the plaintiffs' bill of complaint in this suit, or in what other words and figures was it? Declare the truth of the matters enquired after by this interrogatory to the best of your knowledge, remembrance, information and belief, with your reasons, fully and at large."

To this interrogatory the defendants answered as follows:

2. "Of our own knowledge, we do not know whether on the thirty-first day of August, A.D. 1893, or at any other time, Samuel Laughlan did, or did not, purchase from George K. McLeod certain rights on the Crown lands. We were never informed by the said George K. McLeod that he had sold said rights to said Samuel Laughlan; and we never saw the original or any copy of the alleged agreement, firstly set out in said amended second paragraph of plaintiffs' bill (if any such agreement exists) until we saw in the copy of plaintiffs' bill served on our solicitor a statement that such an agreement had been made, and what purported to be a copy of said agreement, set out in said bill; and we have no means of knowledge, as to whether such agreement was,

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or was not made; and we do not know whether or not such an agreement (if any such exists) is, or is not, in the words and figures firstly set out in the second paragraph of the plaintiffs' bill of complaint, or in any other words and figures. And we further say, that we do not know whether on the thirty-first day of August, A.D. 1893, or at any other time, another memorandum containing the conditions of the said purchase (if any purchase was made), and setting out the assignment and transfer of the said rights, was or was not signed by the said George K. McLeod, as is stated in said second paragraph of plaintiffs' bill as amended; and we never saw said supposed memorandum; and the first we heard of there being any such memorandum (if there is any) was in or about the month of November, A.D. 1895, when a copy of what purported to be such a memorandum was sent to us from the Crown Land Office at Fredericton; and we do not know whether said memorandum (if any exists) was or was not filed in the Crown Land Office at the city of Fredericton, on or about the thirty-first day of August, A.D. 1893, or at any other time; and we do not know whether such memorandum (if there is any) is, or is not, in the words and figures secondly set out in the second paragraph of the plaintiffs' bill of complaint, or in any other words and figures; and we never heard from George K. McLeod, or any other person, that the plaintiffs, or any other person or persons, had or claimed any rights in said lumber lands and licenses, except the rights we had purchased from George K. McLeod, until some time in the month of August, A.D. 1895, and long after we had purchased from the said George K. McLeod all the rights he had in the Crown lands mentioned in the plaintiffs' bill of complaint. We met the said Samuel Laughlan at New Mills in the county of Restigouche, who then and there stated to us, that he, the said Samuel Laughlan, claimed certain rights in the said Crown lands, and the timber and trees growing thereon. But we thought he was claiming for himself and not for the plaintiffs."

To this answer the plaintiffs filed exceptions, alleging that the defendants had not answered to the

best of their knowledge, remembrance, information, and belief, whether on the thirty-first of August, 1893, a memorandum of assignment of McLeod's rights to Samuel Laughlan was signed by McLeod, and filed on or about that date in the Crown Land Office at Fredericton, and whether the memorandum was not in the words and figures set out in the bill of complaint. Argument was heard October 20th, 1896.

C. A. Palmer, Q.C., and *John Montgomery*, for the plaintiffs:—

The defendants' answer is insufficient. It is not sufficient for a defendant to answer that he cannot give the information asked for, unless he goes on to say that he has made inquiry and cannot get the information. He cannot set up ignorance of matters as to which he has the means of information. *Attorney-General* v. *Rees* (1). The answer is also insufficient in its failure to state the defendants' belief. See *Daniell* Chan. Prac. (2), and *Story* Eq. Plead. (3).

G. G. Gilbert, Q.C., for defendants:—

If a party denies having any knowledge or information concerning the subject matter of the interrogatory, it is meaningless for him to disclaim any belief. The Court does not require minute and vexatious discovery, if substantial information is given: *Wiley* v. *Waite* (4). It is no objection to an answer that it is not so particular as to meet all the terms of the interrogatory, provided it is with reference to the object of the bill a fair and substantial answer: *Bally* v. *Kenrick* (5), and *Reade* v. *Woodrooffe* (6).

Palmer, Q.C., in reply.

1896. October 23. BARKER, J.:—

The rule as to answers is thus laid down in *Daniell* Chan. Prac. (7): "As to facts which have not happened

(1) 12 Beav. 50.
(2) 4th Ed. p. 723.
(3) 9th Ed. p. 679.
(4) Ante p. 150.
(5) 13 Price 291.
(6) 24 Beav. 421.
(7) 4th Ed. p. 723.

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within his own knowledge, the defendant must answer as to his information and belief, and not as to his information merely, without stating any belief either the one way or the other." The same rule is laid down in *Hendricks* v. *Hallett* (8). In this case the defendants deny personal knowledge as to the matters interrogated, but they admit having some information, and I think plaintiff is entitled to their belief, if they have any, or a statement that they have none.

The exceptions must, I think, be allowed with costs; the defendants to have twenty days to put in amended answer.

(8) 1 Han. 185, at p. 200.

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BRADSHAW v. THE FOREIGN MISSION BOARD OF THE BAPTIST CONVENTION OF THE MARITIME PROVINCES.

Practice—New Trial—Issues tried by jury—Improper admission and rejection of evidence—Misdirection—Voluntary gift inter vivos—Undue influence—Burthen of proof.

The granting of a new trial by the Court of Equity of issues tried before a jury is largely in the discretion of the Court, and where evidence has been improperly admitted or rejected, if the findings are satisfactory to the Court, and are the same that ought to have been made had there been no improper admission or rejection of evidence, and the Court is satisfied that justice has been done, a new trial will not be granted.

The Court of Equity, in the exercise of its discretion, will not grant a new trial on the ground of misdirection, if it is of such a nature, in view of all the circumstances and the charge as a whole, that it ought not properly to have influenced the jury, and their finding is the same that ought to have been made had there been no misdirection, and the Court is satisfied that justice has been done.

The doctrine of undue influence and the burthen of proof in cases of voluntary gifts *inter vivos* considered.

This was an application for a new trial in this suit, which was brought by Elizabeth Ann Bradshaw, as administratrix of Jacob Bradshaw, to set aside certain voluntary transfers of property made by the deceased to the defendants. The facts are fully stated in the judgment of the Court. Argument was heard August 17th and 19th, 1896.

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Gilbert, Q.C., *Pugsley*, Q.C., and *C. A. Stockton*, for plaintiff.

C. A. Palmer, Q.C., and *M. McDonald*, for defendants.

1896. October 23. BARKER, J.:—

At the hearing of this case, which came on originally before Mr. Justice *Palmer*, when a member of this Court, that learned Judge, in pursuance of section 83 of the Supreme Court in Equity Act, 1890 (1), directed certain questions of fact to be tried before a jury.

These issues were subsequently tried before Mr. Justice *Palmer* and a jury, and the case now comes before me for the first time on this application for a new trial, Judge *Palmer*, in the meantime, having resigned his seat on the bench. The case made by the bill is this: Jacob Bradshaw died April 25th, 1889, at the advanced age of 95 years. He left him surviving a widow, who is the present plaintiff, to whom he was married on the 20th of December, 1877. There was no issue of this marriage, but he left him surviving a son by a former marriage and some grandchildren. The bill alleges that within a short time after his marriage with this plaintiff Bradshaw's health began to decline, and he became enfeebled in his intellectual powers to such an extent as to render him liable to be easily influenced, "particularly if such influences were presented to him as being his religious duty." On the 16th of December, 1882, Bradshaw under his hand and seal executed an assignment to the defendants of certain mortgages, and of a sum in cash, amounting in all to $20,000, as a trust fund, to be called "The Jacob Bradshaw Memorial Fund," which the defendants were to keep invested at interest, which interest they were to pay to Bradshaw during his life, and after his death appropriate it for the support of certain specified missionary work in connection with the Baptist Church. The bill further alleges that by a certain other deed of gift, dated May

(1) 53 Vict c 4.

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4th, 1887, Bradshaw assigned and conveyed to the defendants certain other bonds and securities of the value of some $40,000, which were then in the possession of one John March and his son Ernest March, subject to Bradshaw's order, by which last assignment the defendants became possessed of these bonds and securities upon certain specified trusts, among others, upon trust, to pay the annual interest arising from these investments to Bradshaw during his life, and after his death to pay the unpaid interest already accrued, as well as the subsequently accruing interest, in certain specified proportions, that is to say: One-third to the Baptist Home Missionary Board, and two-thirds to be expended by the defendants in and about their work and objects. The bill further states that at the time of Bradshaw's marriage to this plaintiff he was worth from $80,000 to $100,000, invested principally in mortgages, bonds and bank deposits; "and as an inducement, he, prior to the marriage, told the plaintiff if she would marry him he would give her his house situate at Hampton, with the furniture therein, and the lot of land on which it was situated, and also the sum of $4,000 for her in her own right, and also that if she survived him she would receive her share of the balance." The plaintiff also alleges that Bradshaw died intestate, and that letters of administration were granted to her on the 11th day of November, 1889. It is also alleged that during the period that elapsed between the date of the first assignment and Bradshaw's death, he transferred to religious bodies almost the whole of his remaining personal property, and also the house and lot of land at Hampton which he had previous to the marriage promised to give to the plaintiff. The bill then charges that when these two assignments or deeds of gift were made Bradshaw was "from old age feeble in bodily health, and that his intellectual powers had become so enfeebled and impaired that he was not able to transact business understandingly with due knowledge; and that being so enfeebled the defendants fraudulently caused to be exercised undue and improper influence upon the said Jacob Bradshaw to induce him to transfer to them the pro-

perty mentioned in the eighth and ninth paragraphs of the bill (*i.e.* the two assignments I have mentioned), and by such undue influence did induce him to make the transfer of such property." The bill then prayed for a decree declaring these transfers void, and ordering a conveyance of the property to the plaintiff as administratrix, and for an account. In addition to the two assignments mentioned in the bill, the evidence shows that in August, 1886, Bradshaw placed in the hands of Ernest March, who was then assistant secretary of the Foreign Mission Board, securities of various kinds, with instructions to convert the same into money; and that on or about the 30th September, 1886, shortly after these securities had been realized, Bradshaw handed over these moneys, which amounted to upwards of $40,000, to John March, who was then secretary and treasurer of defendants the Foreign Mission Board, and his son Ernest March, with instructions, after making some special payments amounting to about $1,000, to hold the balance in trust to pay the interest to Bradshaw during life, and at his death to assign the fund to the defendants for foreign and home mission uses. Under this trust certain investments were made, and these investments were the securities which, by the deed of May, 1887, referred to in the bill, were at Bradshaw's request transferred by the Marchs to the defendants. Their trust then ended; the defendants were substituted as trustees in their place, and a written release was executed by Bradshaw to the Marchs.

It will be seen, therefore, that the assignment to the Marchs in September, 1886, of this $40,000 fund, by which it went to these defendants on Bradshaw's death, is not attacked in this suit at all. It will be seen also that the two assignments which are sought to be set aside are attacked on two gounds: (1) that Bradshaw, when he made them, by reason of his mental faculties having become so enfeebled by old age, was unable to understand the nature and effect of his acts; and (2) that being in this enfeebled state the defendants subjected him to undue influences, as a result of which these gifts were made. The findings of the jury are not really

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attacked as being contrary to the weight of the evidence, though that point was mentioned. I must take it, therefore, that if the other objections are not fatal, that the verdict of the jury is in accordance with the evidence, or at all events that it is entirely warranted by it.

Applications for new trials of issues directed by this Court have not been very frequent, and the official reports of them are so meagre that some reference to the practice and authorities on the subject is not out of place. I do not understand that the principles by which motions for new trials in this Court are governed differ in any respect where issues are settled under section 83 of 53 Vict. c. 4, as in this case, and where under a practice, which may now almost be considered obsolete, the questions were sent to a Court of law to be tried. In both cases the conscience of the Court had to be satisfied, and in neither case is the verdict or finding of the jury necessarily binding. The granting or refusal of a new trial has been largely a matter of discretion; and as a result of that rule this Court has not felt itself bound down by those hard and fast rules by which Courts of law are governed in disposing of motions of this kind. If evidence has been improperly admitted or rejected, and it was of such a nature that, if it had been admitted or rejected as the case may be, the finding ought to have been the same, and the finding was satisfactory to the Judge, then a new trial is refused. And though there may have been what technically amounts to misdirection, but of such a nature that it ought not properly to have influenced the jury in its finding, then a new trial is not given as a matter of right. On the other hand, if the circumstances of the case are of such a nature that in the interests of all concerned, and in the equitable disposal of the parties' rights the Court considers it prudent to take the opinion of another jury, it orders accordingly.

In *The Warden of St. Paul's* v. *Morris* (2), where a new trial was moved for on the ground of the rejection

(2) 9 Ves. 155.

of evidence, the Lord Chancellor says, at page 165: "There is no doubt upon the right of this Court to grant a new trial after a trial at Bar. Courts of Common Law had great difficulty in doing that. But in those very cases it is admitted to be the practice of this Court, where the issue is directed to inform the conscience of the Chancellor, upon this principle, that it was the habit of this Court to try upon the report of the circumstances, viz., the trial and all the objections, whether due attention had been given to all the considerations stated; whether according to the common expression the conscience of the Court was satisfied or not." Again at page 169 of the same case the Lord Chancellor says: "Is the Court necessarily to grant a new trial if material evidence was rejected? Or, is it not at liberty, supposing it to be material, to consider in what degree it is so; and whether the materiality is such that, because it was rejected, a new trial must be granted; even if the conscience of the Court is satisfied that the conclusion is right? I do not state what are the principles of the Courts of Common Law in granting new trials. They must be supposed to act upon wise principles. But in all times this Court, in such a case as this, has exercised its discretion upon the whole case." See also at page 168.

In *Pemberton* v. *Pemberton* (3), the Lord Chancellor says: "The principle is, that upon the motion for a new trial the Judge in Equity may look, not only at the report, but at the record in the suit in equity; and may collect from the whole what may satisfy his conscience; and if upon the whole he is satisfied that justice has been done, though he may think some evidence was improperly rejected at law, he is at liberty to refuse a new trial."

In *Bootle* v. *Blundell* (4), the Lord Chancellor says (p. 503): "In the ordinary case of miscarriage upon the trial of an issue by improperly rejecting evidence this Court, if satisfied that, had that evidence been received the verdict ought to have been the same, would

(3) 11 Ves. 50.

(4) 19 Ves. 494.

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not grant a new trial; being to form its judgment both upon that evidence and what appears upon the record."

In *Hampson* v. *Hampson* (5), the Lord Chancellor, in referring to the case I have just cited, *The Warden, etc.*, v. *Morris* (6), says: "The only considerations were, 1st, whether the evidence was improperly rejected; 2nd, what it was right to do. I thought the rejected evidence ought to have been admitted; but the course I took was to examine the whole case; and I refused the application; my opinion being that, if that evidence being received the verdict had been contrary to that which was found, I *should not have held myself bound by that verdict*." In the same case the doctrine is fully affirmed that if by giving the fullest effect to the evidence improperly rejected the verdict ought to be the same, this Court will not send the case to another trial to see whether a jury will do what in that view the Court thinks ought not to be done.

At page 42 the Lord Chancellor is thus reported: "Courts of Equity have an original jurisdiction, which, I agree, must be exercised according to a sound discretion, to try questions of fact without the intervention of a jury, and which aid is sought, according to the common expression, for the purpose of informing the conscience of the Court. I agree that a mistake in refusing to send the cause to a jury is a just ground of appeal, if the Court of Appeal should think that the contrary decision would have been a sounder exercise of discretion; but it is a competent exercise of the authority and duty of the Court in every case, and throughout every case, and in every stage, to determine according to its discretion whether it does or does not want that assistance."

In *Lorton* v. *Kingston* (7), the Lord Chancellor is thus reported (at p. 340): "It cannot be necessary to call to your Lordships' recollection that a Court of Equity is not bound to send an issue to a new trial because evidence has been received which was not legally receivable,

(5) 3 V. & B. 41. (6) 9 Ves. 155. (7) 5 Cl. & F. 269.

or because admissible evidence was rejected, or because the Judge in some respects inaccurately stated the law to the jury. The true consideration always is, whether upon the whole, there appears to be such a case as enables the Judge in Equity satisfactorily to administer the equities between the parties without the assistance of another trial."

In *Browne* v. *McClintock* (8), at page 467, Lord Chelmsford in discussing a question of a new trial on the ground that the finding was contrary to evidence, and after alluding to the rule at law in such cases, says: "To this it was said (and perhaps justly) that the Judge in Equity directing issues possesses a larger discretion in determining whether the finding of the jury is satisfactory to his mind or not. And in an appeal against the exercise of this discretion a Court of Appeal would be slow to interfere, unless it felt satisfied that there was nothing in the evidence upon which the opinion of the Judge could properly have been founded."

In *Swinfen* v. *Swinfen* (9), a case involving questions similar in their character to those involved in this case, the Master of the Rolls says (at p. 152): "The rules respecting new trials are less stringent in equity than they are at law, and the practice here has always been, not to consider merely whether there was evidence which would support the finding of the jury, and in that case to refuse a new trial, but the course in Courts of Equity has been, to consider whether, having regard to the entire subject matter, and to the whole of the evidence given at and before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary for the purpose of attaining that end; and unless it is so satisfied the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modification as it may consider desirable for the fair, thorough and impartial sifting of the whole

(8) 6 E. & I. App. 456.

(9) 27 Beav. 148.

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matter." These authorities will suffice to show the general principles by which this Court is governed in disposing of motions of this nature.

The questions which were left to the jury are as follows: 1. Was Jacob Bradshaw at the time of the execution of the deed to the defendants, dated 16th December, 1882, of so impaired and unsound mind as that he did not comprehend the extent and nature of the property he was thereby giving away and understand the effect of such deed?

2. Was the said Jacob Bradshaw induced to execute the said deed by undue influence?

3. If so, who exercised such influence over him?

4. Was Jacob Bradshaw at the time he gave the directions to John March and Ernest C. March to transfer the property to the defendants, and execute the deed dated the 4th day of May, A.D. 1887, of so impaired and unsound mind as that he did not comprehend the extent and nature of the property that was to be so transferred, and understand the effect of what was then done?

5. Was the said Jacob Bradshaw induced to give such direction by undue influence?

6. If so, who exercised this influence over him?

The first two questions were answered unanimously by the jury in the negative. The fourth and fifth were also answered in the negative, but by five jurors. The fifth and sixth questions of course became immaterial.

I have perused the evidence in this case most carefully on two occasions—once before the argument, and once since—and have given it every possible consideration, realizing fully the large amount involved and the importance of the interests at stake. Having arrived at the conclusion that, upon the authorities I have cited and upon the application of the principles which they lay down this motion ought to be refused, I shall endeavour, with as much brevity as possible, to give my reasons for coming to this conclusion. In the first place I may state that the findings are entirely in accord with what I think they should have been on the evidence,

Had the verdict been the other way I should have thought it altogether unwarranted by the evidence, and one upon which this Court ought not to act. The grounds upon which this application is made are three: (1) Improper rejection of evidence; (2) improper reception of evidence, and (3) misdirection. I will take up these objections as I find them in the notice of motion.

1. Refusal of the Judge to allow evidence to be given of statements by Bradshaw on his deathbed (page 43 of evidence). I think the Judge was quite right. This declaration was made seven years after the first deed, and two years after the last, and could have no bearing on his state of mind at dates so long prior. What the declaration was I do not know, as it was rejected; but if it related, as from the context of the question it seems to have done, to the handing of the securities to March in 1886, and the declaration was intelligent, it would indicate, even at that advanced stage of his life, a retentive memory and a good understanding, and in that view would not have helped the plaintiff's case. If the declaration under such circumstances was not intelligent, and in that way indicated a loss of mental power, it seems to me too long a time had elapsed since the execution of the deeds for it to have any material bearing on the question of Bradshaw's condition at the time the deeds were executed.

2. Refusal of the learned Judge to allow Dr. Smith to give evidence as to Bradshaw's capacity to do business understandingly (page 99).

3. Refusal of Judge this question to Dr. Smith: "Did you observe a gradual failing of the mind?" (page 101).

4. Rejection of this question to Dr. Smith: "From what you saw of him (Bradshaw) at that time, would you conceive him to be able to concentrate his mind so continuously as would enable him to see into business that required continuity of thought?" (pp. 101 and 102).

As to the first and third of these questions, I should be inclined to think them inadmissible on the authority of *Doe dem. Simonds* v. *Gilbert* (10), and that the other

(10) 22 N. B. 576.

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question was too leading. Dr. Smith's knowledge of Bradshaw was very slight. He only attended him once professionally, and he never had any business transaction with him at all. In addition to this the doctor stated all the facts which he knew and had any bearing on the case, and the jury had these with the other facts in the case upon which to form an opinion as to Bradshaw's condition, and it was their opinion on proved facts the Court wanted.

5. Improper course of the Judge in arguing with the witness.

6. Improper course of the learned Judge in putting leading questions to and cross-examining the witness.

I do not think there is anything in either of these objections. The witness under examination was Dr. Smith, and I think it is quite within the legitimate province of a Judge to interrogate a witness under examination in order to elicit full and accurate information. Especially is this the case where the trial is itself primarily for the purpose of obtaining the jury's opinion for the satisfaction of the Judge himself, and in order to aid him in determining the case in hand. Of course this right must be exercised within certain limits and subject to well-known rules. Looking at all that was said in this connection, as appears in the notes of evidence, and all that took place, no material injury to the parties can have arisen, however keenly Dr. Smith himself may have felt that his professional opinion received so little consideration from the presiding Judge.

7. Refusal of the Judge to allow the witness to answer the following question: "Was your answer to the learned Judge intended to qualify that statement which you made, that prior to 1887 you had noticed those changes in Mr. Bradshaw?" The witness (Dr. Smith) was a professional man, and presumably capable of using apt language to convey his meaning. Unless, therefore, he misunderstood the Judge's question, of which there is no suggestion by any one, and the answer did, in fact, qualify a previous statement, and of this the jury were quite competent to judge—it is perhaps immaterial whether the witness intended to do it or not.

I cannot myself see any objection to the question, as it prevents all possibility of doubt as to the exact testimony of the witness on that particular point; but where there is nothing to lead one to suppose that the witness was in any way misled, but deliberately made one statement in qualification of another, it cannot be very material that he was not permitted to be asked whether he intended to do so or not.

8. Rejection of the question: "And as a result of what took place between your father and Mr. Bradshaw this document was drawn up, was it?" (p. 119). This question was rejected as being too leading. I do not myself attach any importance to it in any view.

9. In rejecting the answer of Mr. Frost to the question: "Just describe a little more particularly how he would act in the conversation that impresses itself upon you; do not state your conclusions, but simply any fact that impressed itself on you," and the striking out of the answer given by the witness. The answer seems to me to show a power of memory and continuity of thought somewhat remarkable for a man over 90 years of age, and in that view its rejection cannot have injured the plaintiff's case very much. The reason, however, for striking it out was that it related to a period so long after May, 1887, as to make it irrelevant. On referring to page 151 of the evidence, I find that Mr. Pugsley only claimed the right to give evidence of declarations of Bradshaw, made anterior to May, 1887, and during the two or three immediately succeeding months. On further examination of the witness it came out (p. 152) that the conversation in question took place about October, 1888, and though the Judge expressed doubts as to the admissibility of the evidence, he offered to admit it if Mr. Pugsley wished, and the offer was not accepted. The plaintiff cannot, therefore, complain now.

10. Refusal to allow Mr. Pugsley to interpose to ask the witness a question (p. 155). There is, I think, nothing in this. This is a matter largely in the discretion of the Judge. Besides this, Mr. Pugsley went into the whole matter on re-examination, as reported at pages 162 and 163.

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11. Improper admission of the evidence of Mrs. Frost as to what money of her father's estate came into her mother's hands, and in this connection the improper allowance of the questions on page 156.

I think there is nothing in this ground. The witness, Mrs. Frost, is a granddaughter of Bradshaw, and in her direct examination she had proved that neither she nor her brothers and sister had received anything from him, though shortly before his marriage in 1877 he had shown her a will in which he had given $10,000 to her, and a like sum to her sister and brothers, amounting to $40,000 in all. This evidence was given, and it was used as an argument to show that Bradshaw's disregard of those who by nature had a claim upon his bounty, and his diversion of his entire fortune for charitable and religious objects, were evidence of an impaired or diseased mental state. It was sought to show that shortly before his death Bradshaw gave Mrs. Frost's husband $800, and that she and her family had in other ways received moneys from her grandfather. This evidence, I think, was quite admissible to meet the plaintiff's case.

12. Improper rejection of the following question to George Robertson: "Do you remember any other time when he wished you to take care of his property—first, do you remember?" (page 196). I confess that I see no objection to this question, but inasmuch as it was substantially repeated in the next question, at page 197 of the evidence, and fully answered, the matter becomes wholly immaterial.

13. Improper rejection of the following questions put to Dr. Steeves: "What would you say as to persons meeting him (that is a person subject to delusions) in ordinary intercourse? Might he or not appear to persons meeting him in the ordinary course, without the subject of the delusion coming in question, to be rational?" (p. 250). It is, I think, unnecessary to stop and inquire whether in strictness these questions were admissible or not in their present form, for they were put in another way and answered. Dr. Steeves was first asked whether a person entertaining a delusion, such as was described to him, might appear to be rational upon

all other subjects. His answer was: "He might have these delusions and still be capable of doing correct business." The two rejected questions were then asked, and then follows this question: "How might such a person appear to other persons on occasions when the subject of the delusion did not come in question?" To which the witness answered: "He might seem free from faultiness." I do not say the questions were improperly rejected, but if they were, the last question which was answered covered the whole ground, and the plaintiff has no cause of complaint.

14. Improper questions put to Dr. Steeves by the Judge, as shown on pages 251 and 252. So far from thinking these questions improper, I think they were quite proper. Some of Dr. Steeves' answers were liable to be understood as tending to prove mental unsoundness, so as to invalidate a contract, merely by the existence of what he called a delusion, by which he meant what we ordinarily might call an error or mistake. Of course Dr. Steeves never intended to convey any such idea; but it was to make that point clear that the Judge's questions were asked. The learned Judge seems to have thought it necessary—and in this I fully agree with him —that no misapprehension on the juror's part should exist from the evidence as to the important distinction between delusions in the popular meaning of that word, and those insane delusions which form one of the tests of mental unsoundness. In *Smith* v. *Tebbitt* (11), a case which, though overruled in its principle by *Banks* v. *Goodfellow* (12), may be well cited for my present purpose, Sir J. P. Wilde points out very clearly the distinction to which I have referred.

15. Improper direction given to the witness by the Court that he must answer yes or no (page 252). The evidence shows that, notwithstanding the Judge's direction, the witness did not answer either "yes" or "no," but answered it in his own way. I do not, however, wish to be considered as concurring in the correctness or prudence of any such direction, except to a witness who

(11) L. R. 1 P. & D. 398.

(12) L. R. 5 Q. B. 549.

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is clearly evading a question, or dishonestly giving his evidence. But to a professional man giving his evidence as a mere expert, with no interest in the suit whatever, and nothing to suggest any impropriety in his manner of giving his testimony, it is, in my opinion, out of place for any Judge peremptorily to require him to confine his answers to monysyllables.

I think there is nothing in the 16th objection to the question at page 269, and objected to as too leading.

18. Improper admission of evidence as to composition of Mission Board (vol. II. p. 59). The mode of proof is not objected to. I think the evidence quite admissible. These defendants are directly charged with undue influence, and one of the issues to be settled by the jury was by whom such influence was exerted. As such influence could only be exerted by the defendants, through and by its officers and agents, or some one acting for them and in their interest, it was, I think, a most proper course to show who composed the board, and then, by each, disprove the existence of any such influence as far as his knowledge would permit him.

19. Improper admission of evidence of Thomas A. Peters to show Bradshaw's mental condition, as shown on pages 91, 92 and 93. On referring to these pages I do not find any objection made to the evidence, except as to one question, in reply to which witness said he discussed matters very intelligently. If this was objectionable, it was merely a repetition of what the witness had before that said without objection.

20. This question, at pages 122 and 123, was, I think, properly rejected.

21. The questions at page 124 do not seem to have been objected to.

22. I see no objection whatever to Mr. Gates' answer at page 138.

This disposes of all the objections as to the rejection and admission of evidence to which it seems necessary to make particular reference, as the others, except those to which I shall presently refer, appear to me to be entirely unimportant. There are several which relate to

the evidence of an alleged settlement of the matters in dispute in this case in common with other matters about which there seems to have been some litigation. The evidence shows that Mr. McDonald, by the special authority of the defendants, Mr. Alward, acting as solicitor for the plaintiff, and Mr. Pugsley, acting for Mrs. Frost, I believe, met together with a view of settling all these matters, and an agreement was arrived at by which the defendants were to pay certain costs, amounting to some $580, and the plaintiff $1,000, in consideration of which the plaintiff was to execute a release to the defendants of all claims, both in her individual and representative capacity, the $1,000 going to her for her own use, and not as administratrix. The costs were paid, but acting on further advice the plaintiff refused, on the $1,000 being offered to her, to execute the release, and so the matter stands. I am unable to see upon what principle this evidence was admitted. There was no question of settlement raised by the pleadings. No mention of it is made in the answer in any way. If it had been, I cannot see how it had any relevancy to the issues which the jury were sworn to try. What possible light is shed upon the question as to Bradshaw's competency to make these two deeds in 1882 and 1887, or as to the undue influences under which they are said to have been made, by the fact that his administratrix in 1890 settled the whole matter, or agreed to do so? Ought I, however, to send this case to another jury, entertaining the opinion already expressed as to the whole case, and the correctness of the jury's conclusion on the questions submitted to them, on a mere conjecture that their conclusions may have been in some respect influenced by this evidence, though, in my own opinion, it ought not to have influenced them, and though, in addition to that, Judge *Palmer* in his charge practically told them the evidence was immaterial, and not for their consideration. Before recent legislation relaxed the rule as to new trials at law, it had been settled in many cases that the admission of improper evidence was no ground for a new trial if it was apparent that it could not have influenced the verdict, or if it was withdrawn from the

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jury's consideration: *Carter* v. *Saunders* (13), *Wilmot* v. *Van Wart* (14), *Stewart* v. *Snowball* (15). The principle was affirmed by the Supreme Court of Canada in the latter case on appeal (16).

Judge *Palmer* is reported as having told the jury that if this question of settlement had been raised by the answer in any way, it would have been an answer to the case. He then says: "It is not a question I can leave to you. I say that, and I say it advisedly, and I will tell you why." It is true he then goes on at considerable length and gives an explanation of the nature and effect of this settlement. He did, however, I think, practically tell the jury that it was a question with which they had nothing to do, and I think they must have so understood him. In the case of *Carter* v. *Saunders*, just cited, where the evidence improperly admitted was a grant, and where the evidence was *not* withdrawn, the Court say: "It (the grant) could have no bearing on any part of the case, except the question, what is the true rear line of the Bonnell grant. That was not a question left to the jury at all, and in none of the questions left to the jury could the Whelpley grant have any influence or bearing." So in this case it may fairly be said that this so-called settlement had no bearing on the case or any question which was left to the jury.

I come now to the Judge's charge. The notice of motion contains 46 objections to the charge. It would be a useless expenditure of time, and would serve no useful purpose to take these up and dispose of them separately. Each is but an isolated passage from the charge, and ought not to be considered separate from its context. The charge must be dealt with as a whole. The important point, I think, is whether the jury were properly instructed as to what degree of mental soundness is necessary to enable a party to make a valid disposition of his property, such as that in question here;

(13) 6 All. 147.
(14) 1 P. & B. 456.
(15) 3 P. & B. 597.
(16) Cassel's Dig. 571.

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and, second, what in law amounts to that undue influence which renders void a gift or transfer of property, such as was made by Bradshaw, when made as a result of such influence. Now I see the Judge as a part of his charge read to the jury quite lengthy passages from cases and text books, where the law is laid down on these points, and the accuracy of these authorities has not been questioned. The learned Judge also—and I think quite properly—called the jurors' attention to the facts and circumstances in proof as indicating mental capacity in Bradshaw, or the reverse. There are one or two passages in the charge which, if taken by themselves, would seem not altogether accurate. The one to which especial objection is made is a somewhat involved sentence, reported at page 26 of the charge, in which the learned Judge seems to lay down the doctrine that if an intention formed at one period of a man's life for a particular disposal of his property is carried out at a much later period, the transaction is valid, though at the time of the transfer the party may be altogether incompetent. It is obvious that no intelligent jury could well be misled by this statement, taken in connection with all the circumstances. Their attention during the trial must have been repeatedly directed to the fact that Bradshaw's competency to contract at the time the conveyances were made, and not at some time long anterior, was the important point for their determination. It was so stated in the issues themselves—the principal objections to the evidence were based on the same theory, and in other parts of the charge the minds of the jury were directed especially to this point. It is true that in his charge the learned Judge referred at some length to collateral matters, such as the scant provision made for this plaintiff, the ante-nuptial arrangement, the alleged settlement; his advice to these defendants to make some compensation to the plaintiff, coupled with an assurance that the authority of this Court would be exercised in order to compel them to do so. These matters, in my opinion, had little or nothing to do with the questions upon which this jury was asked for an opinion. It may have been that in addressing the jury

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counsel directed their attention to these matters with a view of creating a sympathy one way or the other, and that the Judge's remarks were intended simply to prevent any improper influences from operating. I do not myself quite see how evidence of this ante-nuptial agreement was relevant to any question submitted to the jury, for I agree with Judge *Palmer* in thinking that matter not involved in this suit. The plaintiff herself introduced the evidence; and one may fairly conclude from the recommendation with which the jury accompanied their verdict, that the effort to create a sympathy in her favour was not altogether in vain. Had the finding of the jury been in the plaintiff's favour it might have been fairly urged that the jurors' minds had really been led far away from the real questions submitted to them. In fact it was stated that such would have been the result had it not been for the, what is called, *promise* of the Judge to compel the defendants in some way to make this plaintiff reparation. To give any weight to such a suggestion is to assume that these jurors, in entire disregard of their oaths, would deliberately find in opposition to their own view of the evidence, and upon grounds which their own intelligence must have told them were altogether untenable. While there are passages in this charge the precise meaning of which is not altogether clear, and others which, unexplained by the context, or uncontrolled by other more minute and exact instructions on the same point, might mislead, the charge, taken as a whole, did not, in my opinion, convey to the jury any inaccurate idea of the law bearing on the questions which the jury were to answer, or any incorrect notion as to the facts which the jurors' own intelligence would not readily set right. If all these passages in the charge had been omitted, I think the result would have been the same. At all events, I think it should have been the same. To order a new trial under these circumstances would not, in my opinion, be a sound exercise of the discretion with which this Court is vested.

My observations would be incomplete without some reference to the reasons which have led me to concur in

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the opinion expressed by the jury on the questions submitted to them. The case seems to me involved in much less doubt and difficulty than are most of the cases of a similar character. The two grounds upon which the plaintiff rests her case—mental incapacity and undue influence—though distinct in their character, are nevertheless somewhat closely connected, especially in a case like this, where the act in question is that of a man enfeebled by old age, and for that reason more easily subject to undue influence. The case is not one where expert testimony is of much assistance. It is common knowledge that as men advance in years the human machinery gives indication of wearing out. There may be no specific or organic disease, but the hair becomes grey, the brow shows its wrinkles, the eyes become dim, the hearing becomes dull, the step loses its elasticity, and the voice loses its power; memory becomes faulty, producing a want of continuity in thought and expression; the mind works sluggishly and becomes dull and slow of comprehension, and scenes and events of years long since passed are dwelt upon to the exclusion of those of more recent date. Added to these indications of physical and mental debility are oftentimes unfounded suspicions and delusions of a more or less marked character—delusions existing entirely in the imagination, and incapable of being removed by any of those proofs which the ordinary normal mind accepts as conclusive, and which, therefore, are called insane delusions. Whether a person, at any particular stage of this gradually developing process of decay, is or is not capable of performing an act valid in point of law is a practical question to be determined by the tribunal before which it comes. In *Jenkins* v. *Morris* (17), where a lease was sought to be set aside, and the lessor was under insane delusions of a very extravagant character, the Judge directed the jury as follows: "It is a practical question whether he was so insane as to be incompetent to manage his own affairs in the sense of disposing of his property, and even of property believed by

(17) 14 Ch. D. 674.

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him to be full of sulphur"—which was one of his delusions. See also *Boughton* v. *Knight* (18). All the witnesses agree in describing Mr. Bradshaw as a man of strong and vigorous constitution, of determined will and energy; a man, so to speak, who had a mind of his own, and was not disposed to permit much interference in his affairs. He seems to have claimed the right to dispose of as his own inclinations prompted him, wealth which he had accumulated by his own thrift and industry. At the time of his marriage to the plaintiff in 1877, he appears to have been worth from $80,000 to $100,000. He was then over 80 years of age, and she, though in her second widowhood, was several years younger. It is scarcely in controversy that Mr. Bradshaw, many years before his death and at a time when neither his mental capacity nor his entire freedom of action can be at all questioned, formed the intention of devoting a large portion of his wealth to aiding the Baptist Church of this province, either in the support of its ministers or in the advancement of its missionary work. His marriage to the plaintiff took place on the 20th of December, 1877, and she tells us that a week after he went to Mr. Alward, who had always done his business, and made a will by which he gave $30,000, as she says, "for the Gospel"; $4,000 and the house and land at Hampton to herself, and $10,000 to his granddaughter, Mrs. Frost. Mr. Alward says that he was Mr. Bradshaw's legal adviser from 1868 until 1884—some 16 years—and that shortly after the marriage to the plaintiff in 1877 he drew a will for him which was executed, and of which he (Alward) and Mr. George Robertson were the executors. Mr. Alward corroborates the plaintiff's statement of the contents of this will, except that he says the sum for missionary purposes was $20,000 instead of $30,000, and that the sum was to be divided equally between the Home and Foreign Mission funds. Mr. Alward also tells us that between that time and November 1884, Bradshaw executed several—he thinks as many as a dozen—wills drawn by him, and

(18) L. R. 3 P. & D. 65.

in all of which he and Robertson were executors, though in the later ones March and McLachlan, of Hampton, were added. Mr. Alward also tells us that in these wills the sum given to the missionary funds of the Baptist Church gradually increased, and the legacies to the plaintiff and others decreased, until at last the only provision for the plaintiff was a life interest in the house and lot at Hampton, and the remainder of his property, except a small legacy to Mrs. Keith of about $100, went to the Baptist Church for missionary purposes. This was in 1884, and, as I judge from the evidence, in November of that year, at which time Mr. Alward's professional connection with Mr. Bradshaw ceased, though I think in 1887 or 1888 he accepted a retainer from him in some suit with which he was threatened. During the seven years which elapsed from December, 1877, until 1884, Mr. Alward must have seen much of Mr. Bradshaw. He drew many wills for him, to the execution of which he was a party, and in all of which he was named as an executor. He acted as his solicitor and professional adviser during the entire period, and yet we find that there was no fact, or event, or circumstance known to Mr. Alward in all that time which led him to suspect anything like a want of testamentary capacity. It is clear, therefore, that Mr. Bradshaw's intention to aid the charities and missions of the denomination to which he belonged, formed at least as early as 1877, not only had not been abandoned up to November, 1884, but during the intervening period had, if possible, become more firmly fixed, and been more emphatically asserted.

The first of the two deeds in question was made on the 16th December, 1882. It was prepared by Mr. Alward, Mr. Bradshaw's own solicitor, from instructions given by Bradshaw himself, and, so far as either appears by the evidence, or is suggested by it, without intervention or suggestion from anyone. Mr. Alward, as a notary public, took his acknowledgment, and the conveyance went on the public records of St. John on the day of its date, and on the public records of Kings on the 15th of the following January. And during the six years and upwards which elapsed before Mr. Bradshaw's

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death, he neither repudiated it, nor in any way that I can discover, either by his acts or declarations, suggested that he was incapable of dealing with the property as he did or that he did not in fact fully comprehend the nature and effect of the act. In this conveyance he recites that he had decided to set apart and appropriate a portion of his property to the maintenance and promotion of the missions under the management and control of the "board" (that is, these defendants), to wit, the sum of $20,000 in perpetuity upon the trusts, and to the uses and purposes thereinafter limited, described and declared. Here is a formal record of Mr. Bradshaw's intention to substantially assist the Baptist missionary organization of the province. It shows also that so early as 1882 he entertained the idea of completing these gifts to the defendants during his lifetime, rather than postpone the transfer until after his death. The assignment conveys $3,500 in cash and five mortgages, to secure in all $16,500—investments made by Bradshaw, all subsequent to his marriage, except one, and one as late as 1882. I am unable to find any evidence whatever to sustain the view that when Bradshaw made this assignment he was not in every way fully competent to understand the nature and effect of the business in hand, or that he did not in fact fully comprehend it. We next find Mr. Bradshaw giving $10,000 to a fund for the support of Baptist ministers in New Brunswick. This took place subsequent to 1882, but at what precise time does not appear. No one can read John March's account of his discussion over the rules made by Mr. Bill for the management of this fund without being impressed with the idea that Mr. Bradshaw was in every way intelligent. In 1883 and 1884 he built the church at Hampton Station. In 1887 he made the second gift to the defendants, and in 1888, some six months before his death, he assigned all his income to trustees for the benefit of the church which he had himself built at Hampton Station. All this expenditure was in harmony with the general intention I have mentioned, of aiding the Baptist Church and the advancement of its interests. It must be remembered that in all

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these transfers Mr. Bradshaw reserved to himself the entire income during his life; the donees derived no benefit until after his death. The idea of transferring his property upon trust for his own benefit during life and for specified purposes afterwards seems to have been entertained by Mr. Bradshaw long prior to 1886. Mr. George Robertson says that in 1880 or 1881 he made a proposal to him to take the property upon these conditions, giving as a reason that he was getting to be an old man, and his property was beginning to worry him, and he feared the day would come when he would be unable to take care of his property himself, and he was afraid he would fall into the hands of designing men. This proposal Robertson, after some consideration, declined to entertain, not in any way because he doubted Mr. Bradshaw's entire competency to make and complete such an arrangement, but because he himself did not wish to assume the sole responsibility of managing so large an estate. For four or five years after that Robertson saw him constantly, had business transactions with him and did business for him in the same way as he had been doing for a dozen years before. In 1886 he made a similar proposal to John March, which he also declined, but which eventually led up to the transfers made to the Marchs in 1886, and in 1887 to the defendants. It is clear, therefore, to my mind, that during all these years Mr. Bradshaw had a fixed intention of aiding the Baptist Church in a very generous way, and of completing the necessary arrangements for that purpose during his lifetime. The extent to which the church should benefit, the precise branch of its work to be benefited, and the precise means by which the benefit should be secured, may have varied, but the general intention remained unaltered.

I pass on to a consideration of the evidence as it bears upon the question of Bradshaw's memory. It seems to me indisputable, that in all these transactions to which this evidence in any way relates, his memory showed few signs of failure. He gave the instructions for these wills, and the transfers and other papers connected with them; he had an accurate knowledge and

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an accurate recollection, of his property and its nature and extent. He dictated the conditions upon which these gifts should be made, and was careful in seeing that the conditions were secured. He was prompt in the collection of his interest, and does not seem to have ever forgotten when it was due, or by whom it was payable. On questions of this kind we naturally look for the most reliable evidence from those who were most constantly with him, for they had the best means of observation. The plaintiff and Mrs. Frost are the only witnesses of this class produced; and, strange to say, Mrs. Frost is the only relative of this old gentleman produced on the trial of these issues, though his mental unsoundness was sought to be proved by his having disposed of his property to purposes altogether unnatural in view of those claims upon his bounty, which by a law of nature these grandchildren all had, and which was entirely disregarded. Are we to conclude that the others were so unmindful of their filial obligations to their grandfather that the last twelve years of his life was a blank to them; and of his health and vigour and memory during that period they from personal observation knew nothing? If so, he may well have thought all claims upon his bounty had been more than satisfied. Or are we to conclude that with such opportunities of observation as they had, the facts of which they could testify, would in no way support the plaintiff's case? The plaintiff was herself closely questioned as to her husband's memory, not only by counsel but also by the Judge; and when pointedly asked by the latter to state any one fact or incident which indicated a loss of memory, or failure to understand what he was doing, she was only able to recall one occasion, and that was when he commenced hoeing some potatoes on a Sunday morning, having mistaken the day of the week. On inquiry this proved to have taken place in 1888, a year and more after the last of these transfers was made. Mrs. Frost, when asked a similar question, is only able to recall the fact that he forgot to give her a watch he had promised her some ten years before, and gave it to some other grandchild. And the only evidence of mental weakness

she is able to remember is that in conversation he would pass suddenly from one subject to another, though she is unable to fix the date earlier than October, 1888, only a few months before his death. Now the plaintiff was, of course, constantly with her husband; and Mrs. Frost says she was in the habit of seeing her grandfather once a week, either at his home or her own. It seems incredible to me, if Mr. Bradshaw's memory had failed to any such a degree as to suggest a doubt as to his capacity to do this business, that both the plaintiff and Mrs. Frost, with their opportunities of observation, should not be able to give many instances. The only other evidence on this point is that of Robertson, who says that on one occasion Mr. Bradshaw left his bank box containing his bonds, etc., in his office, instead of taking it back to the bank; and Sproule, who says that on his return to Hampton after a considerable absence, Mr. Bradshaw mistook him for some one from St. Martin's. Such evidence is, in my opinion, altogether too frivolous to form an important factor in determining the questions at issue.

It is also put forward as an evidence of Mr. Bradshaw's weakness and incapacity, that in giving all his property away to these defendants and others, he entirely disregarded the natural claims upon his bounty of his wife, his son and grandchildren. There are, no doubt, cases where such considerations are entitled to great weight, but I think this is not one of them. The plaintiff's claims for consideration rest upon two grounds, (1) because of her natural claims as his wife; and (2) because of her claims arising out of an antenuptial contract, which she says was entered into immediately prior to the marriage and as an inducement to it. I have no doubt that this marriage of the plaintiff and Bradshaw accomplished all that it was expected to do. It secured her a comfortable home and him a kind companion and a prudent housekeeper. But a less sentimental wooing than that described by the plaintiff in her evidence it is difficult to imagine. It is as devoid of romance and as business-like as the sale of a house or the chartering of a vessel. To expect that under such

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circumstances the same considerations would influence a man in making provision for his wife as would if they had been married when young, had accumulated property as a result of their joint effort, and had gone through life sharing its fortunes, good and bad, together, would be to ignore the common experience of mankind. If the contract was made, as the plaintiff says, it, of course, ought to be carried out. That question is not, in my opinion, involved in this case; neither do I think it ought to have any weight in determining these issues. Evidence of this contract was admitted on the ground that a sane man is more likely to perform his contract than an insane one, and, therefore, where a contract is made and not performed it is some evidence of insanity. I do not at all wish to be considered as concurring in this view, but whatever advantage was to be derived from the evidence the plaintiff has had it. It is evident from various declarations of Mr. Bradshaw to Alward, John March and others that he thought ample provision had been made for his wife, as well as his surviving son and grandchildren. In addition to this, the evidence shows that by the lease of the house and lot at Hampton from the trustees of that church, dated July 23rd, 1886, she has a life interest in it for a nominal rent; that she received, by her own admission, from him in cash $2,400, and that she had $2,700 of her own at the time of her marriage; in all $5,100. More than this, the evidence of the plaintiff, at page 67 and following pages, taken with the assignment of mortgages made by Mr. and Mrs. Bradshaw on the 18th January, 1889, shows that five mortgages, which the instrument declares to be the plaintiff's own property, and acquired by her in her own right, were then assigned to Fownes & Keith in trust for her three children. These mortgages are all instruments made after the plaintiff's marriage, and in all they are given to secure $3,275—that is to say, Daniel B. Brown, $225; Melick, $1,000; Carson, $350; Crawford, $500, and Hicks, $1,200. In addition to this is the Keith mortgage, assigned to Mrs. Keith about 1884, for $1,200; $2,900 in the savings bank, and $200 in the building society. These sums altogether amount to

$7,575, an amount in excess of the $5,100 which the plaintiff started out with by $2,475. There may be explanations of this of which I am not aware, but I allude to it to show that Mr. Bradshaw's declaration that the plaintiff had been amply provided for has some grounds for it, though we may differ from him as to the sufficiency of the provision. As to Bradshaw's relations, the evidence shows very large expenditures for their benefit, amounting at least to $35,000. This branch of the plaintiff's argument, in my opinion, entirely fails.

Mr. Bradshaw is said to have been subject to insane delusions. One was that he imagined that the plaintiff, to use her own words, stole his money, and that "she husband any money except the two sums of $1,000 and had feathered her nest pretty well," to use the language $1,400, and more than that, that out of these she was of another witness. The plaintiff says these statements are wholly untrue, and that she never received from her compelled to defray the household expenses, the cost of her own clothing and her travelling expenses, except once when she went to New York he gave her $20. To argue that Bradshaw was under an insane delusion because he accused the plaintiff of appropriating his moneys to her own use, and she denied it, is, to my mind, a manifest absurdity. We do not know the grounds of his suspicion, or the reasons for making the accusation. If we did it is possible we might entirely agree with him. I do not desire to suggest that she did do this, or that she did not do it, for such an inquiry is not involved in this application. I only wish to say that this evidence entirely fails in establishing any such delusion. The other delusion suggested is that Mr. Bradshaw fancied J. L. Dunn tried to poison him. It seems that on one occasion he was at Dunn's house, and not being well Dunn gave him something to drink which was distasteful to him, and in alluding to this to Mr. Alward he said Dunn was trying to poison him, or something of that kind. He and Dunn seemed to have remained on friendly terms afterwards, a thing quite improbable if Bradshaw really believed in the attempt to poison him, or was under any delusion in reference to it. It would,

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in my opinion, be most dangerous for any Court to accept such loose evidence and act upon it.

Perhaps the oddest and least business-like part of this whole transaction was the placing in Ernest March's hands for sale the bonds and securities in 1886. It is evident, however, that Mr. Bradshaw had made up his mind to be, as he said, "his own executor"; and in order to carry out that idea it was necessary that he should, while alive, dispose of his property. It did not seem unnatural that he should go to John March. He was secretary for the defendants, in whose work he was so much interested. He was an old acquaintance, and he had, since the gift of 1882, been brought more closely in contact with him in receiving his interest on that fund. However unbusiness-like it may seem, the evidence clearly shows that bonds worth in the vicinity of $50,000 were put into Ernest March's hands for sale; that he sold them at auction, and that the proceeds, less some $9,000 which Bradshaw took to Prince Edward Island with him, were placed in the hands of John and Ernest March, subject to Bradshaw's instructions during his life, and at his death to be handed to the defendants for the benefit of home and foreign missions. The securities forming the $5,000 fund for the benefit of Dr. Bradshaw and his children were delivered on the 20th September, 1886, and on the 30th of that same month, and about a fortnight after the sale of the bonds, Bradshaw executed an instrument to the Marchs of a somewhat unusual character. It was, however, prepared by Mr. McDonald, as Bradshaw's solicitor, who prepared all the papers executed in 1886 and 1887. It was the result of objections raised by March to holding these moneys only on verbal instructions, and to avoid trouble in the future, and it professes to release the Marchs and the secretary of the defendants for the time being from all liability to account for these moneys, except to him during his lifetime. It recites that he (Bradshaw) had given to the Marchs certain moneys to be used and disposed of by them, or the survivors of them, or in case of their death, by the secretary of the defendants, according to instructions already given, or which might

thereafter be given during his lifetime. It also recites that it is his wish that his business affairs should be fully and finally settled during his life, so that he should leave no estate or rights of action to survive him, or to be administered upon, or to be transmitted or distributed among any of his heirs or next of kin, as he had already made what he considers just and ample provision for them. During the period between this and the following May the Marchs, by Mr. Bradshaw's orders, made some payments, among others the small legacies for the benefit of the Sunday schools of the Baptist churches in St. John, which were given by the will of 1877, and which Mr. Bradshaw does not seem to have forgotten. They also invested a large portion of the money in mortgages, consulting with Bradshaw as to the investments and security; and finally in May, 1887, by his directions they assigned to these defendants these mortgages, amounting to $26,930.25, and money on deposit in the Maritime Bank amounting to $13,521.53, to hold in trust to pay him (Bradshaw) the interest during his life, and afterwards to appropriate the interest for the benefit of the home and foreign missions. There was a formal assignment of these mortgages executed by the Marchs to the defendants; a release by Bradshaw to Marchs and a declaration of trust by the defendants to Bradshaw. The securities and papers were delivered at a special meeting of the board, at which about half-a-dozen members were present, together with Mr. Bradshaw, his solicitor, Mr. McDonald, and Mr. March. An address of thanks was made to Mr. Bradshaw for his generous donation, to which he replied. About two years passed before Bradshaw's death in April, 1889. On the 15th October, 1888, Bradshaw, by an assignment under his hand and seal, assigned all his income derivable from all these other transfers to Frost and Morrell to hold the same subject to his order during life, and after his death to go with any undrawn balance to the assignees in trust for the Hampton Church. On the 18th day of January, 1889, he joined the plaintiff in the assignment of the mortgages to Fownes & Keith, to which I have already referred. It seems impossible

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with this evidence to come to any different conclusion on the question of capacity from what the jury did. Mr. Bradshaw's own solicitor, charged with the duty of seeing that his client fully understood the business in which he was engaged, and fully comprehended the nature and effect of the act he was doing (a duty which I am sure no one would more conscientiously discharge than Mr. McDonald), saw nothing throughout to suggest any want of capacity or intelligence. The same remark applies to all those who accepted these trusts. They had no personal interest in the transactions, and were reaping no advantage from them beyond what was common to all. In addition to all the other evidence we find that the plaintiff herself made no protest or complaint as to any of these transactions during her husband's lifetime. She knew of the transfer by him to the trustees of the Baptist Church at Hampton Station in July, 1886, of the very house and land which she says she was to have by the terms of the ante-nuptial contract, but it does not seem to have occurred to her to raise any question as to his capacity. On the contrary, she is occupying these premises under a lease from these same trustees. She knew of the transfer of the moneys to the Marchs shortly after it took place, and yet there was no complaint on this ground; and then we find her joining with her husband on the 18th day of January, 1889, about two months before his death, in assigning her own property to her own children, following her husband's example in denuding herself of all her property, but reserving the income, and procuring the execution of the instrument by her husband. It must be remembered that this is not a case of insanity, where one may look for lucid intervals. It is merely a case of old age and a gradual weakening of the mental and physical powers. If this plaintiff but a few weeks before her husband's death recognized his capacity by procuring an assignment jointly with herself of these mortgages, how can she ask a jury to say that two similar acts done—one seven years before and the other two years before—were the acts of one too enfeebled by age to understand them? And when we find that Mrs.

Frost's own husband was a party to this assignment in January, 1889, and accepted the trust created by it without suggesting, either then or since, that Mr. Bradshaw was in any way incapable of understanding what he was doing, it weakens, if it does not destroy, any inference in the plaintiff's favour which we might draw from Mrs. Frost's evidence. Again, this plaintiff alleges in her bill that Bradshaw died intestate, and she files her bill as his administratrix. She must have made a similar allegation, and in some form or another have sworn to it, before getting the letters of administration in the Probate Court. Now, if she knew nothing of the other wills, she knew of the one made in 1877, and which she apparently considered operative until the fall of 1888, when it was burnt with the books and papers destroyed at that time. She could only make out the intestacy on the theory that her husband cancelled the will by its destruction. But that could only be on the theory that he had the *animus revocandi*, which he could not have without testamentary capacity: *Brunt* v. *Brunt* (19). And if testamentary capacity in October, 1888, is admitted it is strong evidence of capacity in 1882 and 1887. It does not seem to have occurred to the plaintiff, or anyone else, to have raised any question or suggested any doubt as to Mr. Bradshaw's mental condition when any of these transactions took place, and why should this Court or this jury be asked to do so?

In *Jenkins* v. *Morris* (20), already referred to, Price, who made the lease which was sought to be set aside, was under the insane delusion that he and others and things around him were impregnated with sulphur, and that the very farm in question was no longer habitable by him on account of the sulphur. He was also under the insane delusion that devils were always tormenting him, and his life sought. Notwithstanding this his capacity to understand, and his actual comprehension of the lease and the transaction, were so clearly shown by letters written about it at the time, that the jury readily found in favour of the validity of the lease. Baggally, L.J.,

(19) L. R. 3 P. & D. 37. (20) 14 Ch. D. 674.

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said: "Assuming that Price was subject to certain insane delusions, as to which there can be no doubt, having regard to the admitted evidence in this case, that is not a sufficient reason, in my opinion, why he should be held to have been incompetent to execute the lease in question, if the jury were satisfied that the delusions to which he was subject had not so far affected the general faculties of his mind as to render him incompetent to deal with the property which was the subject of the lease. I think that the opinion which I have expressed is in accordance with the general principles enunciated by the President of the Probate Division in the case referred to of *Smee* v. *Smee* (21), to which I entirely assent."

I come now to the second branch of this case—the question of undue influence. That species of coercion which we call "undue influence," and which comes under review where the validity of wills is in question, is described and explained in *Hall* v. *Hall* (22), *Wingrove* v. *Wingrove* (23), and many other cases. In the case of wills, there is, as a general rule, no presumption of undue influence arising from circumstances. He who asserts that as a defence assumes the onus of proving it. In the case of gifts *inter vivos*, though there may be no question as to the mental capacity of the donor, or as to his actual understanding and full comprehension of the act in question, Courts of Equity have, upon grounds of public policy and utility, always insisted as a condition of sustaining the gift that the person taking the benefit of it, should give satisfactory proof that it was in no way due to undue influence, where the party receiving the benefit stood to the person conferring it in a fiduciary or confidential relation, or where the relation between them was such that dominion might be exercised by the one over the other. This distinction between the case of wills and voluntary gifts *inter vivos* is pointed out in *Parfitt* v. *Lawless* (24), and recognized in other cases.

(21) 45 L. J. (P. & M.) 8.
(22) L. R. 1 P. & D. 481.
(23) 11 P. D. 81.
(24) L. R. 2 P. & D. 462.

In *Cooke* v. *Lamotte* (25), Sir John Romilly lays down the rule somewhat more broadly. He says: "The fact of such a relation existing between the parties is only a circumstance in the case, which may, according to its bearing on the other facts, be favourable or unfavourable to the person seeking to sustain the gift; but the existence of such a relation is not necessary to enable this Court to apply the rule above referred to, and that rule may, I believe, be thus expressed: that in every transaction in which a person obtains by voluntary donation a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done the transaction cannot stand." At another part of his judgment he says: "It is not necessary for the plaintiff to establish a direct case of fraud, but it is obligatory on the defendants, who claim benefits under the instrument, to prove that the transaction is one which this Court will allow to stand." The words of Lord Eldon in *Gibson* v. *Jeyes* (26) are: "It is necessary to say broadly that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous." *Hoghton* v. *Hoghton* (27); *Toker* v. *Toker* (28), and on appeal (29); *Hunter* v. *Atkins* (30); *Dent* v. *Bennett* (31); *Tate* v. *Williamson* (32); *McCaffrey* v. *McCaffrey* (33), may be cited in addition to the leading case of *Huguenin* v. *Baseley* (34), to which full reference was made by Judge *Palmer* in his charge to the jury.

In *Coutts* v. *Acworth* (35), Malins, V.C., held that in the absence of a power of revocation in a voluntary deed of gift the onus was on the party benefited to show that the donor expressly intended to make the gift irrevocable; though this is perhaps going further than Lord

(25) 15 Beav. 234.
(26) 6 Ves. 278.
(27) 15 Beav. 278.
(28) 31 Beav. 629.
(29) 3 DeG. J. & S. 487.
(30) 3 M. & K. 113.
(31) 4 M. & C. 269.
(32) Law Rep. 2 Ch. 55.
(33) 18 A. R. (Ont.) 599.
(34) 2 L. C. (6th Ed.) 597.
(35) L. R. 8 Eq. 558.

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Justice Turner goes in *Toker* v. *Toker*, already cited. In addition to this, where any such relation exists as that I have mentioned, it is necessary, in order to uphold the gift, that the donor must have had competent and independent advice: *Rhodes* v. *Bate* (36); *Mitchell* v. *Homfray* (37).

In *Allcard* v. *Skinner* (38) it appeared that the donor had joined a religious sisterhood, which exacted a vow from its members that they should dispose of all their property, not necessarily to the sisterhood, though that evidently was the expectation. In speaking of undue influence, which is never more subtle than when of a religious character, Kekewich, J., says (p. 157): "The law allows absolute freedom of disposition, and only insists that when challenged under such circumstances as exist here, the disposition shall be proved to have been absolutely free. What is required by law for the fulfilment of this condition? The law does not exclude influence. Nay, it recognizes influence as natural and right. Few, if any, men are gifted with characters enabling them to act, or even think, with complete independence of others, which could not largely exist without destroying the foundations of society. But the law requires that influence, however natural and however right, shall not be unduly exercised, that is, shall be exercised only in due proportion to the surrounding circumstances and the strength of the person submitted to it. The more powerful influence or the weaker patient alike evokes a stronger application of the safeguard." In the same case, at page 171, Cotton, L.J., says: "These decisions may be divided into two classes: First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact

(36) Law Rep. 1 Ch. 252. (37) 8 Q. B. D. 587.
(38) 36 Ch. D. 145.

the gift was the spontaneous act of the donor, acting under circumstances which enabled him to exercise an independent will, and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused." In the same case Lindley, L.J., at page 182, says: "The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence or want of foresight on the part of the donors. The Courts have always repudiated any such jurisdiction. . . . It would obviously be to encourage folly, recklessness, extravagance and vice, if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property, is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny, and with the infinite varieties of fraud. . . . . The Courts have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence, and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influ-

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ence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and failing that proof have set aside gifts otherwise unimpeachable."

Such are the principles by which this Court is governed in cases of this kind; and it only remains to apply them to the facts in evidence. In doing so I shall assume that all the considerations I have mentioned are included in the question of undue influence which was submitted to this jury. In his charge Judge *Palmer* used the following language. After having instructed the jury on the question of capacity, he said: "Then the next thing I want to draw your attention to is the question of undue influence. What I have said to you is entirely on the subject of the capacity of the man to make these gifts; and if this is a transaction of a mere gift I think the onus lies upon the person who claims the benefit of that gift to prove with reasonable certainty that the man did it voluntarily, and understood what he was doing—in other words, the first inquiry is, if he did it; then, whether he had the capacity to do it; and the third, how the intention to make the gift was created; and if it is found that the man has been imposed upon, that he has been cheated, or that somebody who got into fiduciary relations with him, as his attorney or his housekeeper, or anybody else in a fiduciary capacity with reference to it, and who saw his will was gone, and whose right it was to advise him—for the moment it is the will of the person who suggests rather than the man who gives—then it makes it undue influence." The Judge then cited a passage from *Pomeroy's* Equity, the accuracy of which is not questioned, or its applicability to this case. I cite this passage to show that the attention of the jury was directed to the onus of proof assumed by the defendants, and that their minds were turned to the true considerations upon which this question of undue influence depends.

Before discussing the main question two other points may be disposed of. In the first place the evidence very clearly shows that in all these transactions Bradshaw had competent and independent advice. Mr.

Alward, who acted for him in the case of the first gift, and Mr. McDonald, who acted for him in 1887, are both professional gentlemen of good standing and repute—they were both selected by Bradshaw himself—employed by him and paid by him, and they were altogether independent of the defendants, and in no way connected with them. In the second place, while neither of the two deeds in question contains a power of revocation, it is abundantly clear that they were never intended to be revocable. When you can conclude that Bradshaw had formed the intention of disposing of all his property during his life, so as to leave nothing at his death; when you find that he reserves to himself the income during life, and when you find that he was creating a trust fund, the management of which imposed immediate and continuous responsibility and labour upon the defendants, from which he alone derived any benefit during his life, and the defendants none until after his death, the inference is inevitable, that no power of revocation was ever intended, but quite the reverse. In *Toker* v. *Toker* (39), a case similar in many respects to this, Turner, L.J., in speaking of the absence of advice to insert a power of revocation, says: "Upon the evidence in this case, even assuming that such advice was not given (as to which I am not satisfied), I think it immaterial, as this lady knew that the purpose of the settlement was to make the disposition of the property contained in it irrevocable." So I think it is in this case. And in corroboration of that view I find in the deed of 1882 a power of attorney to the defendants to collect the mortgages thereby assigned, which power is by its terms irrevocable.

As to the gift of 1882, I can find no trace of any influence of any kind. Mr. Bradshaw seems to have conceived the idea and carried it out without suggestion from anyone, and altogether as his own voluntary act. It is, perhaps, not too much to say that the plaintiff's counsel found no great fault with the verdict, so

(39) 3 DeG. J. & S. 487.

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far as this first gift is concerned. At that time there were certainly no relations existing between Bradshaw and the defendants, or anyone connected with them, which could be considered of a character—confidential, fiduciary or otherwise—from which undue influence could be presumed, or from which it might be anticipated. The evidence of Mr. Alward and of John March, in reference to that transaction, fully and satisfactorily explains it, and entirely discharges any onus of proof under which the defendants are in reference to it.

The circumstances surrounding the gift of 1887 require closer inspection. It was not suggested on the argument, nor is it put forward in the bill, that any relation—confidential or otherwise—existed between the parties from which the law raises any presumption of undue influence. The bill, as I have already pointed out, alleges in the 6th section that Mr. Bradshaw, during the latter part of his life, was a person subject to strong religious influences (the precise meaning of which is not very clear), and liable to be swayed thereby. And in the 12th section the plaintiff charges that the defendants fraudulently caused to be exercised undue and improper influences upon Bradshaw to induce him to transfer to them the properties mentioned in these assignments, and by such influence induced him to make these transfers. There is no allegation in what way or by whom this fraud was committed, or the undue influences exercised. The plaintiff's counsel, in a somewhat elaborate opening, in which, I presume, he outlined with accuracy the case which he expected to prove, and upon which he relied, so far as this part of the case is concerned, pledged himself to show that after the plaintiff's marriage, and down to the date of the transfers of this property, Bradshaw was *literally* (I quote the exact words) *besieged* by Baptist ministers and Baptist deacons, who were soliciting from time to time donations and gifts, and urging him to make these transfers of his property, and "that after these transfers were made, and after he had divested himself of all his property, that the visits of these Baptist ministers and deacons, and their representatives, ceased." Except so

far as this passage affords a clue to the particular kind of undue influence upon which the plaintiff relies, I can discover no other. Neither Baptist clergyman nor Baptist deacon was produced as a witness by the plaintiff; and I think I shall be able to demonstrate from the evidence that not only is the statement without foundation in fact, but the inference sought to be drawn, that any influence was either exerted or attempted to be, to induce Mr. Bradshaw to make these gifts, is wholly unwarranted. It is true that the plaintiff states that most of the Baptist ministers travelling by Hampton called and remained the night, and sometimes to dinner, and she mentions the names of several of them. It is also true that she says that she had not so many of this description of visitors after 1887 as before. Among others she mentions Mr. Blackadar, the Messrs. Hopper and Mr. Gordon. These gentlemen were all on the stand. Mr. Blackadar swears that he never saw Bradshaw in his life, and was only at his house on one occasion, and that was after his death, when he called to see the plaintiff. The Rev. J. E. Hopper says he was only twice at Bradshaw's house—once in 1883, when Bradshaw sent for him to preach the dedication sermon at the opening of the Hampton Church, and again in 1886 with Mr. Bill, when they went in order to solicit a subscription in aid of the Baptist seminary at St. Martin's, which Bradshaw refused to give. The Rev. E. Hopper says he was stationed at Hampton from 1st May, 1888, until after Bradshaw's death, and during that time he paid pastoral visits, but that he first saw him about 1st April, 1888. The Rev. J. A. Gordon says that he never was at Bradshaw's house but once, about the 1st of August, 1886, when he happened to go to Hampton on a Sunday during his vacation to hold service. Of all those whose names are mentioned as visitors at the house, these four are the only ones who gave evidence, and the only ones, I believe, who had any connection, official or otherwise, with the defendants, and who are alive. If we compare the plaintiff's statement—general in its character as it is—with the specific and positive evidence of these four witnesses, we see how entirely

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unsafe it would be to accept it as a basis for any such inference as that for which it was offered. No one pretends to deny, as a general rule at all events, the legality of soliciting subscriptions or donations for the support of church or missionary work. To do so would paralyze the efforts of all such organizations. Neither does any one pretend to deny to clergymen the right to point out to those who have accumulated wealth the nature and extent of the obligation they are under to aid these church and missionary societies with their means. To do so would be to debar clergymen from disseminating teachings which we all recognize as founded in the highest morality. And if you admit that, even in such cases, circumstances might exist where the solicitation, or the importunity, or the influence might be so great as to deprive the donor of that freedom of action and will essential to the validity of the gift, there is nothing in this case to bring it within any such exception. Take all these gentlemen named by the plaintiff (except Dr. Hopper, Dr. Bill and Mr. Gordon), who, she says, came to her house, or, as her counsel says, besieged it previous to 1887, not one seems to have been much more than a stranger, and there is not a tittle of evidence that any one of them ever mentioned the subject of property to Bradshaw in his life. To argue that a gift to assist these defendants in carrying on their missionary work from a wealthy member of their own church, is to be defeated on the mere conjecture that he may have been influenced to make it by some Baptist minister who happened to accept his hospitality to the extent of a dinner in the daytime or a bed at night—when there is no evidence of it actual or presumptive—is to argue what, in my opinion, is founded neither on reason nor authority.

So far as I have been able to ascertain from the evidence, only two occasions are spoken of when a direct appeal was made to Mr. Bradshaw for a donation; once by Mr. Bill in 1882 or 1883, and apparently after the gift of $20,000 had been made; and again on the occasion to which I have already referred, when Mr. Bill and Mr. Hopper asked him for aid for the Baptist semi-

nary at St. Martin's, which he refused. Coming down to the circumstances more immediately connected with the gift of 1887, I find that the Mission Board—that is the defendants—in 1886 and 1887—from August 1st, 1886, to August 1st, 1887—as I understand the evidence, though only a portion went out each year, and these were eligible for re-election—consisted of the following ministers: Messrs. Day, Stewart, Bill, Gates, Cahill, Gordon, Cross and Dr. Hopper; and the following laymen: Harding, John March, Masters, Clinch, Simms, Baker and J. A. Estey. Of these there were present at the board meeting when the securities were handed over in 1887, Gates, Cahill, Stewart, Clinch, Baker, Masters, Simms, Harding and March. At the trial Messrs. Gates, Simms, Gordon, Baker, Harding and Dr. Hopper were examined. Messrs. Bill and Masters had died, and the others seem to have been away from the province, at all events they were not witnesses. Mr. Gates, in his evidence, says that he had been a member of the board since 1880; that he never on any occasion asked or applied to Mr. Bradshaw for money for any object, and that he never met him but once, when he was simply introduced to him, until he saw him at the board meeting in 1887, when the securities were handed over. Simms says that he had been a member of the board since 1882; that he had a speaking acquaintance with Bradshaw for a number of years; that he never spoke to him on the subject of a donation to the defendants, or his property, or of his disposition of it, and that he knew nothing about the gift, or that Bradshaw had any idea of making it, until the meeting in May, 1887, when the matter was completed. Mr. Gordon says that he was at Bradshaw's house but once—about April 1st, 1886—that it was merely a pastoral visit, and that Bradshaw did say something about his moneys being appropriated, but probably he might save interest, so that in the future he might make a donation to the seminary. Mr. Gordon says that neither at that nor any other time did he ask for a donation of any kind. When asked on cross-examination to explain how Mr. Bradshaw came to allude to the seminary, he said as follows: "I suppose it has arisen from

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this: Mr. Bradshaw, as well as all other members of the Baptist denomination, knew I was intimately interested in our educational movements in this province, and that the different boards, the Free Baptist and regular Baptist boards, had been pressing me very closely to accept the general superintendency of the work, and Mr. Bradshaw naturally brought this subject up, and the prospects of the seminary, and I gave him to understand I had not accepted, and then had no idea of accepting, the superintendency of that educational institution. He talked about its financial prospects, and the fact of my own name being before the two denominations, and my being pressed to accept that work—that brought out the subject." Dr. Hopper says that he never, on any occasion, asked Bradshaw for money or a donation, except when he solicited aid for the St. Martin's seminary, and was refused; and that both of these gifts were made without his knowledge in any way. Mr. C. P. Baker says that he was a member of the board for seven years —from 1882 until 1889—and that he was present at the board when Bradshaw attended, with Alward his solicitor, and completed the gift of 1882, and again in 1887, when the last gift was completed; but that, with the exception of these two occasions, he had never even seen Bradshaw to know him. Before referring to the evidence of Harding and John March, the other two members of the board who were examined, and whose evidence has a more direct bearing on the case than that of the others, I shall refer to the evidence of Rev. Mr. Todd. Though not a member of the Board of Missions, this gentleman was pastor of the Baptist Church at Hampton and Norton from the autumn of 1886 until January 1st, 1888, and as such necessarily came into constant intercourse with Mr. Bradshaw. He says that during this period he was in the habit of seeing Bradshaw once a week, or sometimes once in two weeks; and among other occasions on which he met him was the celebration of his 93rd birthday, when he interested them all with a narrative of his early life and his business experiences later on; and that even then he (Todd) did not detect any want of continuity of thought or expression in his conversation

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Mr. Todd speaks of his physical strength at this time, and tells how that on several occasions Bradshaw alluded to the gift of 1882 for mission purposes, his gift of $10,000 to the ministers' fund, and his placing a further sum of $40,000 in March's hands also for the benefit of home and foreign missions. He also spoke of the $5,000 in trust for his son, and the large sums he had from time to time given him and his grandsons. Mr. Todd denies having in any way exercised any influence, and says that he never on any occasion asked him for a dollar. It is difficult not to feel impressed by this evidence as to Mr. Bradshaw's mental and bodily strength at that time. His recollection of the gift of 1882 to the defendants, and of what he had done for his son and grandchildren seemed clear and accurate; and his intention to benefit the cause of home and foreign missions by a further donation seemed clearly defined. If Mr. Todd's account conveys an accurate idea of the facts, and there is nothing whatever to convey the contrary, one cannot but think it in the highest degree improbable that the transfer of the funds to March in September, 1886, for the ultimate benefit of these defendants, was in any way procured by undue influence; much less that such influences should have remained operative for the eight months which followed, and while the fund remained entirely subject to Bradshaw's disposal, so as to keep his will in submission and prevent his resuming possession of the property. Tested by those rules by which Courts judge of the accuracy of human testimony, I should say it was in the highest degree probable that in doing what he did Bradshaw was acting as an entirely free agent, without fetter of any kind, and carrying out in his own way an intelligently formed design of devoting a large portion of his fortune to objects and purposes represented by these defendants. In such a case we need not stop to speculate whether the act was the result of a vow exacted by the terrors of a storm on the Atlantic many years ago, or of an intention formed in more recent times, and when the surroundings were more favourable for calm and deliberate action.

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John H. Harding was a member of the board in 1887, and for many years before that. He says that he in no way influenced, or attempted to influence, Mr. Bradshaw to make any donations to the defendants or otherwise, and that he knew nothing of the gift of 1882 until after it had been made, and nothing of that of 1887 until after the money had been placed in March's hands. He says that soon after he learned that these funds were in March's hands he went to Hampton to see Bradshaw on the subject, and on that occasion Bradshaw told him about the $5,000 he had secured to his son, and also that he had handed over to March $35,000 or $40,000 for the Foreign and Home Mission Board. He says that Bradshaw told him the circumstances, and he asked him whether it would not have been as well for him to have made the transfer at once to the board, and why he did not do that, to which Bradshaw replied that "March was the board," or some remark like that. This seems to have been the only occasion upon which the subject was mentioned between Harding and Bradshaw, and the only time, so far as Harding seemed able to recall, when he saw Bradshaw after September, 1886, unless it may have been at church. Considering Harding's position, it does not seem an unnatural thing that when he ascertained that the funds were actually in March's hands, appropriated for mission purposes after Bradshaw's death, that he should have interested himself in ascertaining how the gift was to be carried out. Though the fund still remained subject to Bradshaw's control it had, subject to this power of revocation, been appropriated, and the gift made. Mr. Harding's recollection of what took place is not quite so definite as one might expect, considering the transaction, and that the interview was expressly in regard to it. I see nothing in the suggestion that the defendants, instead of March, should be the trustees, for that in no way altered the nature of the transaction. At all events the suggestion was not acted upon, as the fund was not handed over until the following May, and there is nothing to lead one to suppose that Harding's suggestion had anything to do with it one way or another.

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John March explains fully how in 1882 Bradshaw came to him and announced his intention of giving $20,000 for mission purposes, and $10,000 for the ministers' fund; and how from 1882 down to 1886 he saw Bradshaw frequently in consequence of his coming for the interest that was collected by March, as treasurer of the Mission Board. The conversion of the bonds into cash took place while John March was in England, and when he returned he found the money in the possession of his son Ernest. Mr. March explains fully how Bradshaw told him as to what he had done for his sons and grandchildren; as to the final gift of $5,000 for the benefit of the doctor, and urged upon him the acceptance of this fund for the benefit of the home and foreign missions fund. It would be wearisome, and is, I think, unnecessary to go minutely into his evidence. It is sufficient to point out that it is undisputed that Bradshaw did have this large sum in bonds; that by his directions they were converted into cash at a public sale; that the proceeds did go into March's hands on a verbally declared trust for the benefit of Bradshaw, and entirely subject to his control during his life, and after his death for these defendants; that substantially all of it except what remained in the Maritime Bank was invested with Bradshaw's concurrence in mortgages, and that all these securities, and the cash in the Maritime Bank, were, in fact, handed over to the defendants in May, 1887, by Bradshaw's directions upon trusts then reduced to writing, and March was released from liability. No doubt Bradshaw placed great confidence in March, and if the gift had eventually been made to him personally perhaps the transaction would require close scrutiny. But in this case March derived no profit or advantage from the transaction in any way, and he had no interests in the objects which it was given to promote that were not common to Bradshaw himself and every member of the Baptist denomination. I have read March's evidence through most carefully. There is nothing to throw discredit upon it; it is entirely corroborated by the evidence of McDonald on matters of which they had a common knowledge, and I find it corroborated by surround-

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ing circumstances in other particulars. If his relation to Bradshaw were such as to raise any presumption of undue influence as to either of these gifts, I think his evidence and the facts entirely rebut it, and that, so far as his connection with the transaction is concerned, his explanations are satisfactory, as showing that Bradshaw in what he did acted voluntarily as a free agent in every respect, and under no influences which, in the strictest sense of the term, can be called undue.

I have reviewed the evidence at no greater length than I felt warranted in doing, considering the importance of the principles involved and the large amount at stake. The best consideration which I have been able to give it leads me to the conclusion that the jury were quite right in their findings. While evidence may have been improperly admitted, and while there may have been observations in the Judge's charge which I may think might with propriety have been omitted, in my opinion the verdict should have been the same had this evidence been rejected and the observations omitted. To grant a new trial under such circumstances would, I think, serve no useful purpose, add unnecessary expense, and be an unsound exercise of the discretion which the Court has in applications of this kind.

I only desire to add that nothing which I have said is to be construed into any expression of opinion as to the plaintiff's rights arising out of the ante-nuptial contract which she says was made, or as to the small provision which her husband made for her. The first question does not arise here, and the second has only an indirect bearing on the question of Bradshaw's capacity. If the plaintiff has rights arising out of contract capable of enforcement, the law affords an adequate remedy; and if Bradshaw, in the intelligent exercise of a free will, chose to divest himself of his property in his lifetime by gifts or by his will after death to the exclusion of his wife, we cannot question the legality of the act, however much it may disagree with our own notions of what is right.

The new trial will be refused.

MOREHOUSE v. BAILEY.

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December 19.

Practice—Injunction—Undertaking as to damages—Dismissal of bill.

Where plaintiff on giving the usual undertaking as to damages obtained an *ex parte* injunction, which was subsequently dissolved, he was allowed to have his bill dismissed without payment of damages recoverable under the undertaking.

This was an application by the plaintiff to dismiss his bill. The facts are sufficiently stated in the judgment of the Court. Argument was heard December 1st, 1896.

William Wilson, for the plaintiff.

F. St. John Bliss, for the defendant.

1896. December 19. BARKER, J.:—

This is an application by the plaintiff to dismiss his bill, and the only question is as to the terms upon which he shall be allowed to do so. It seems that at the beginning of the proceedings the plaintiff obtained an *ex parte* injunction, upon giving the usual undertaking as to damages. An application was made to dissolve this injunction, and Mr. Justice *Van Wart*, to whom the application was made, on hearing the parties, made an order dissolving the injunction with costs. These costs were taxed at $84.04. They have been demanded, but have not been paid. The injunction was obtained to restrain the defendant from selling some mortgaged premises under a power of sale, and it is alleged that certain expenses have been incurred and damages sustained by reason of the injunction order, which are recoverable from the plaintiff under his undertaking given when the order was granted. No steps have ever been taken to have these damages assessed, though the affidavit discloses the cost of giving the notice of sale, and some other expenses incurred, which the defendant claims as part of these damages. The plaintiff admits that this order to dismiss can only be made on payment

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of costs. The defendant contends that the motion to dismiss can only be allowed on the terms of plaintiff, not only paying the costs of this suit, but also the $84.04, and the damages recoverable under his undertaking. It occurred to me that there might be a difficulty in the way of enforcing the undertaking as to damages after the suit had been dismissed, and in that event, the defendant should, if possible, be protected. On looking at the authorities, I find that Vice-Chancellor Woods so held in *Newby* v. *Harrison* (1), but that his judgment was overruled in the same case on appeal (2), where it is decided that the undertaking is distinct from the suit, and may be enforced at any time, even though the bill may have been dismissed in the meantime. I see no reason therefore for making this motion dependent upon payment of these damages. The defendant can have them assessed, and then have an order of the Court for their payment, as he has now for the taxed costs of the motion to dissolve the injunction.

I think the motion must be granted, and leave given to plaintiff to dismiss his bill upon payment of costs.

(1) 1 J. & H. 678. (2) 7 Jur. N. S. 981.

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1896.
December 19.

(No. 2, ante p. 302.)

Practice—Interrogatories—Insufficiency of answer.

It is not sufficient for the plaintiff, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.

Exceptions by the defendant Andrew Hannaghan to plaintiffs' answers. The facts are fully stated in the judgment of the Court. Argument was heard November 17th, 1896.

W. B. Chandler, in support of the exceptions.

W. Watson Allen and *R. A. Borden, contra.*

1896. December 19. BARKER, J.:—

The bill in this case was filed by John Hannaghan and others, against Andrew Hannaghan and others, for a partition of certain lands, of which one James Hannaghan, a brother of the plaintiffs, died seised. The lands in question are situate part in Westmoreland and part in Kent. It is in reference to the latter, or Ructouche property, that the dispute arises. The defendant Andrew Hannaghan alleges that although the title to this land was in his brother James, he (Andrew) was the real and beneficial owner, that he negotiated the purchase, bought the property, and paid for it with his own money. That James knew nothing about it until about a fortnight after the conveyance had been made out to him, and that after the purchase he (Andrew) expended money in the erection of a house and other improvements on the property. He therefore claimed that he was the real beneficial owner of the property at the time of James' death, and therefore that the plaintiffs are trustees of the same for him. In order to prove this part of his case the defendant Andrew Hannaghan filed interrogatories for the examination of the plaintiffs, and it is on exceptions to their answer to these interrogatories that this matter comes up.

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The object of administering these interrogatories is to obtain admissions of material facts, and thus avoid the necessity for their proof. See *Attorney-General* v. *Gaskill* (1); *Lyell* v. *Kennedy* (2). The party answering having submitted to answer must answer fully, and where he does answer substantially, the answer will be held sufficient, though it may not strictly and technically be so: *Reade* v. *Woodroffe* (3). The material fact sought to be established by the defendant is that this Buctouche property is his, and by way of proving that to be so, he alleges that he negotiated the purchase with Le Blanc and wife, the previous owners. That he paid for it, and also paid for the improvements subsequently put upon it. Seeking to establish these facts by the plaintiffs' admissions he interrogated them as follows:—

"Is it not true that all the negotiations and arrangements for the purchase of the said lands and premises were made by the defendant Andrew Hannaghan with the said Oliver J. Le Blanc and wife, or with one of them, and that the said James Hannaghan had no communication whatever with either the said Oliver J. Le Blanc or his said wife, with regard to the purchase and conveyance of the said last mentioned lands and premises, and did not know that the said lands had been purchased by the said defendant Andrew Hannaghan, and conveyed to him, the said James Hannaghan, by the vendors, until he was informed of the fact by the said defendant Andrew Hannaghan, or how in any manner otherwise? Is it not true that the said James Hannaghan did not know that the said last mentioned lands and premises had been conveyed to him until about two weeks after the purchase of the said lands and premises by the said Andrew Hannaghan, or how in any manner otherwise?" To this interrogatory the plaintiffs, William Hannaghan and those who joined him in answering, said as follows:—

"We do not know, nor does either of us know, whether all the negotiations and arrangements for the purchase of the said lands and premises were made by

(1) 20 Ch. D. 519. (2) 8 App. Cas. 217. (3) 24 Beav. 421.

the defendant Andrew Hannaghan with the said Oliver J. Le Blanc and wife, or with one of them or not, but we are informed and believe, and claim and allege, that if the said Andrew Hannaghan did make such negotiations and arrangements, he did so as agent for the said James Hannaghan, and not otherwise. We are not aware whether the said James Hannaghan had any communication with either the said Oliver J. Le Blanc or his said wife, with regard to the purchase and conveyance of the said last mentioned lands and premises, or whether he knew or not that the said lands had been purchased by the said defendant Andrew Hannaghan and conveyed to him, the said James Hannaghan, by the vendors, until he was informed of the fact by the said defendant Andrew Hannaghan or otherwise, or whether or not the said James Hannaghan did not know that the said last mentioned lands and premises had been conveyed to him until about two weeks after the purchase of the said lands and premises, but we are, and each of us is informed and believe, and claim and allege, that whatever connection the said Andrew Hannaghan may have had with the purchase of the said lands, and whatever action he may have taken in connection therewith, was as agent for and under the direction of the said James Hannaghan, and for and on account of the said James Hannaghan, and not otherwise."

This answer is excepted to as being evasive, imperfect and insufficient. I think this exception must be sustained. The plaintiffs' answer is sufficient so far as their personal knowledge goes, for they distinctly deny having any, but as to the specific facts inquired about they do not answer at all as to their information and belief. For instance, after denying all knowledge as to whether Andrew Hannaghan negotiated and arranged for the purchase from Le Blanc, they do not either deny or admit the allegation that he did so, neither do they say what their information or belief is as to this fact, but they go on and say that *if he did do as alleged*, he did it as James Hannaghan's agent. This is altogether insufficient. The defendant is entitled to an express admission or denial of the allegation that he

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negotiated the purchase with Le Blanc, and the defendant is entitled to the plaintiffs' knowledge on the subject, or if they have none, then to their information and belief if they have any, and if not, then to their statement that they have none. They can of course add, if they wish, that in negotiating this purchase Andrew Hannaghan was not acting for himself but for his brother. The same observations apply to the remainder of the interrogatory. The plaintiffs do not deny or admit, as to their information and belief, what the defendant alleges as to James Hannaghan's entire ignorance of the transaction until about two weeks after the purchase. It is of course possible that the defendant may have negotiated the purchase, paid the money, and taken a conveyance to James Hannaghan, of which he knew nothing until weeks afterwards, and yet the beneficial ownership be in James; but these facts are important as showing an entirely different result, and being material to the defendant's case, he is entitled to have from the plaintiffs an express admission or denial of their truth: on their personal knowledge, if they have any, and if not, on their information and belief.

The other interrogatory, the answer to which is excepted to, is as follows: "If it is claimed by the plaintiffs, or any of them, that the said James Hannaghan paid or contributed in any way towards the cost of the said buildings, or towards the cost of the purchase of the said Buctouche lands, you are required to set forth a true, full, and particular statement of all such sum or sums of money that were at any time paid by the said James Hannaghan towards the cost and expenses of putting up the buildings on the said lands, or any of them, with the dates of all such payments, and the names of the person or persons to whom the said payments and each of them were made by the said James Hannaghan, or by any person on his behalf. State your utmost knowledge, information and belief herein."

In the answer of William Hannaghan this interrogatory is answered as follows: "We do not, nor does either of us, know of our personal knowledge what

amount the said James Hannaghan paid or contributed towards the cost of the said building, or towards the cost of the purchase of the said Buctouche lands, and are unable to set forth a full, true and particular statement of all such sum or sums of money that were at any time paid by the said James Hannaghan towards the cost of the purchase of the said lands, or towards the cost or expenses of putting up the buildings on the said lands, or any of them, or the date of such payments, or the names of the person or persons to whom the said payments, and each of them, were made by the said James Hannaghan, or by any person in his behalf, but we are informed and believe, and claim and allege, that the said James Hannaghan did pay and contribute all the cost of the said buildings, and the cost of the purchase of the said Buctouche lands."

I do not think this interrogatory has been substantially answered. The plaintiffs allege that James Hannaghan himself paid not only the purchase money of the land, but also the cost of the improvements. They, however, admit that they have no personal knowledge of this, and at the same time do not give their information and belief. The defendant, for the reasons I have already mentioned, is, I think, entitled to this. The transaction only took place in 1888, and one of the plaintiffs, John Hannaghan, is administrator of the estate of his brother James, and as such might very well have come into possession by books or papers, or otherwise, of information in the very matters inquired about. Apart from this, I think, the information which the plaintiffs have, and the belief which they have, is important; and it may be equally important to know, if the fact be so, that they have neither information nor belief on the subject. The plaintiffs undertook to answer the interrogatory, and, in my opinion, they do not substantially or sufficiently do so simply by alleging on their information and belief that James Hannaghan paid *all* these sums himself, and at the same time admitting that so far as their personal knowledge goes they have none, either as to the amount he paid, when it was paid, or to whom, and withholding all information or belief, if they

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have any, as to the persons to whom these moneys were paid, what amounts were paid, and the times when they were paid.

The rule as to answers is a very simple one; and while the Court will protect suitors from vexatious interrogatories, and discourage exceptions based on technical grounds, where the requisite information has been substantially given, it will require from them positive answers to the extent which their personal knowledge, or their information and belief, will enable them to give.

The plaintiffs severed in their answers. There are some verbal differences in the three answers put in so far as they are covered by these exceptions, but nothing to make any difference in the result.

The exceptions will be allowed with costs.

The plaintiffs will have leave, on payment of the taxed costs of the exceptions, to file an amended answer within thirty days from the date of settling this order.

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February 16.

Life insurance policy—Assignment—Consent of beneficiary.

The plaintiff was named as the beneficiary in a policy of insurance on the life of her husband. The policy was taken out by the husband, and the premiums were paid by him. By an assignment, to which the plaintiff was a party, the loss was made payable to the defendants, for valuable consideration moving to the husband. Upon the death of the husband, the plaintiff claimed the benefit of the policy, setting up that her consent to the assignment was procured by her husband's fraud.

Held, that the assignment was valid without the consent of the plaintiff.

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

Argument was heard January 6, 1897.

W. Pugsley, Q.C., for the plaintiff.

D. Jordan, Q.C., and *J. W. McCready*, for the defendants Williams and Tenant.

W. Van Wart, Q.C., for The New York Life Insurance Company.

1897. February 16. BARKER, J.:—

In November, 1887, one George J. Gunter effected an insurance on his life for $1,500 with the defendants, The New York Life Insurance Co., which sum the company agreed to pay on receiving proofs of the assured's death, to the present plaintiff, Margaret A. Gunter, wife of the assured; or, in the event of her prior death, to the assured's executors, administrators or assigns. In August, 1892, Gunter was largely indebted to the defendants, Williams and Tenant, for money lent and liabilities assumed by them for his accommodation. They had entered into a bond for $2,000 to one Murray in August, 1892, for Gunter's accommodation, and in October of that same year Gunter applied to them for further assistance, offering as a security an assignment of the above policy, and a chattel mortgage to secure not only the loan then asked for but the $2,000 bond. Tenant and Williams, on the faith of

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this offer, then indorsed Gunter's note for $879. Both these amounts the defendants were compelled to pay. In addition to this there was an indebtedness to Tenant and Williams on Gunter's account of some $5,000, making the total amount in the vicinity of $8,000, the only security for which was this life insurance and some livery stable stock worth from $1,500 to $2,000. The policy in question was assigned by an instrument under the hands and seals of Gunter and his wife—this present plaintiff—to the defendants Tenant and Williams, dated December 31, 1892. It was executed in duplicate in presence of Mr. Slipp, a notary and a solicitor of this Court. One copy was forwarded to the head office of the company at New York, and the other with the policy was given to the defendant Tenant, who retained the papers until Gunter's death, which took place in January, 1896. The three premiums which fell due after the assignment—that is in November, 1893, 1894 and 1895, and which amounted in all to $151.74, were paid by Tenant and Williams. Gunter left no estate, so that these defendants must, in any event, make a loss of some thousands of dollars. It appears that in the spring of 1893 Gunter and his wife left the Province for St. Paul, where they remained for some time, returning to Fredericton, where they had before resided, some time in July, 1895. The defendant company has, by consent of the parties, paid the money into Court, so the dispute is one solely between this plaintiff, who claims in her own right as the beneficiary under the policy, and the defendants Tenant and Williams, who claim as assignees for value under the assignment of December 31, 1892.

The plaintiff bases her right to recover on two grounds: First, that she was induced to sign this assignment under a fraudulent representation of her husband that she was not parting with her beneficial interest in the policy, but merely signing the policy to enable him to obtain more insurance; and, second, that these defendants, Tenant and Williams were in some way in collusion with her husband in perpetrating this fraud. As to the latter charge there is not a particle of evidence to support it. These defendants seem to have incurred their liability purely to assist Gunter. The transaction, so far as they were concerned, was perfectly honest in

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every way, and the charge to the contrary in the bill is entirely disproved, and ought never to have been made. I also think the evidence fails in establishing any fraud in Gunter. This plaintiff, having admittedly signed this transfer—and as the evidence clearly shows, in duplicate, although she denied it—the onus is upon her to show such facts as will relieve her from the effect of it. It is not very clear from the evidence what the precise fraud is of which she complains, or who the person whom she charges as having perpetrated it. She says her husband wished her to sign the policy so that he could get more insurance. Probably he asked her to assign the policy that he might get more money. She says that afterwards he told her that she had been deceived, not that he had deceived her, though he was the only person who had any conversation with her in reference to the matter. The policy which she had up to that time had in her possession was then given up. She gave herself no further concern as to the premiums, and it seems a most improbable thing for her to mistake the policy for the assignment, for the two papers are not in any way similar. More than this, the plaintiff admits that sometime in 1893 her husband told her that her interest was gone, and that she then knew precisely the nature of the paper she had signed, and its effect. Quite apart from any question of waiver, of which I will speak later on, it is altogether inconsistent with the fact that a fraud had been practised upon this plaintiff, that she should, after having full knowledge of it in 1893, never say a word about it to these defendants until after the security had become valuable by her husband's death in 1896, which the evidence shows to have been the case. The plaintiff's case of fraud, I think, entirely fails.

The plaintiff's action must, I think, fail on another ground. There is no dispute as to the signature of Gunter to this assignment, or that it was made for valuable consideration, and no charge of fraud is made as to the assignment by him. In my opinion, as this assignment was made prior to the Act of 1895 (58 Vict. c. 25) relating to life insurance for the benefit of wives and children, and is, therefore, not affected by it, Gunter had a right to make it without his wife's consent at all, and that it is immaterial whether

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her signature was obtained to the assignment or not. In *Cleaver* v. *Mutual Reserve Fund Life Association* (1), Lord Esher, in speaking of a similar policy, says: "Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants, it would have no effect. She is no party to the contract; and I do not think that the defendants could have any right to follow the money they were bound to pay, and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy would create any trust in favour of the wife. James Maybrick (the insured) might have altered the destination of the money at any time, and might have dealt with it by will or settlement. I think that, apart from the statute, no interest would have passed to the wife by reason merely of her being named in the policy; and if the husband wished any such interest to pass to her, he must have left the money to her by will, or settled it upon her during his life, otherwise it would have passed to his executors or administrators." The bill in this case alleges that Gunter out of his own moneys paid the premiums up to 1892, and that the defendants paid them afterwards. This plaintiff never paid any. The benefit of the contract was never assigned to her, and her husband remained free to cancel it altogether; to settle it on his wife, or to assign the benefit of it to any one else for value, as he has done here. Apart from this, I should be disposed to hold that under the circumstances of this case the plaintiff, as to these defendants, cannot now dispute the validity of this transfer. Her assignment was only voidable, and she must be prompt to assert her rights after she is aware of the facts and repudiate her contract; otherwise she must be held as waiving her rights. What delay in asserting one's rights will preclude the party from doing so must, of course, depend upon the nature and circumstances of each case. A life policy of insurance such as this is an onerous security until it becomes payable by the death of the assured. Unless the premiums are paid, the insurance lapses, and all benefit of the contract is gone. This plaintiff admits that

(1) [1892] 1 Q. B. 147.

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in 1893 she knew she had executed an assignment of her interest in this policy to these defendants. She knew she was not paying any premium, and she must have known her husband did not intend to do so. She permitted, with a full knowledge of the facts, these defendants to pay the premiums, and thus keep their security alive, with full knowledge that they were doing so for their own protection, and as claiming the policy under an assignment which she said was obtained from her by fraud, to which they were in no wise a party. It would be inequitable to permit her thus to remain quiet and not even notify the defendants of her contention; and now when the money has become payable to claim the fund which is available solely by reason of their payments. It is no answer to say that the defendants are entitled to get back their premiums with interest. In my opinion, a person situate as this plaintiff is cannot, under the circumstances of this case, force these defendants to lend their money to pay premiums for her benefit.

The plaintiff's bill must be dismissed with costs. As the evidence shows an undisputed indebtedness by Gunter far beyond the value of the securities, there is no necessity for a reference, because there can be no surplus of this money for the plaintiff or any one else. The order will be as follows:—

The costs of the defendant company to be taxed and paid out of the fund in Court; the balance will be paid to the defendants Tenant and Williams. The costs of the defendant company as taxed will be added to the costs and taxed as part of the costs of Tenant and Williams; and these the plaintiff is ordered to pay.

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March 5.

LAUGHLAN v. PRESCOTT.

Timber license—Crown land regulations—Agreement to assign license—Assignment to innocent purchaser—Priority—Interest in land—Agreement not to bid at public sale—Legality.

In 1893 one M. purchased at a public Crown land sale a license to cut lumber on a block of land, and a license was issued to him dated September 1st, 1893, to remain in force until August 1st, 1894. By the Crown land regulations incorporated in the license, the license might be assigned by writing, the assignor to give notice thereof to the Surveyor-General, and the assignment to take effect from the date at which such notice should be received at the Crown land office. Licensees who paid their stumpage dues by August 1st in each year were entitled to annual renewals for such parts of the ground held by them as might at the first day of July in each year be vacant and unapplied for, on payment of the mileage thereon on or before the first day of August; and such renewals could be for 24 years from August 1st, 1894. Previous to the above sale, one L., being desirous of securing certain lumber privileges in a part of the area included in the license to M., entered into an agreement with him that he (M.) should buy in the block, and afterwards secure these privileges to L. Accordingly, after the sale, they entered into a written agreement, dated August 31st, 1893, prepared by the Surveyor-General, reciting that M. had agreed to sell to L. for the term for which a license should issue, and renewals, the right to cut, carry away, and appropriate to his own use cedar lumber in a certain area, and lumber of all kinds in another area, in consideration of $40; and witnessing that L. agreed to pay M. the renewal mileage each year on a certain number of miles during the continuance of the privilege at the rate fixed from year to year by the government; and M. agreed to renew the license. The agreement immediately after its execution was filed in the Crown land office. Subsequently L. assigned his rights under the agreement to the plaintiffs. This assignment was never filed in the Crown land office. On November 16th, 1894, M. assigned the same license, among others, to the defendants, who were purchasers for value, and without notice of M's agreement with L., and on the assignment being produced to the Crown land office a renewal for the year beginning August 1st, 1894, was issued to them. In August, 1895, a tender to M. and the defendants of L.'s share of the renewal mileage was refused. In a suit for a declaration of the rights of the parties:

Held, (1) that the agreement between M. and L. entered into before the sale was not illegal as being an agreement to stifle competition at a public sale.

(2) that the license purchased by M. did not convey an interest in land, and therefore that it could be assigned without an instrument under seal registered in the county where the land was situate.

(3) that the defendants were under no duty to search at the Crown land office as to the title of M. to assign the license.

(4) that the agreement of M. and L. was not an assignment of the license, but at most a mere sub-license, conferring no right of renewal against the Crown, and amounting only to a sale of, or an agreement to sell, rights under the license, enforceable by specific performance against M. upon the license being renewed to him, or, if not renewed, giving rise to an action at law for breach of agreement, and giving to L. or his assigns no rights against the defendants.

The facts fully appear in the judgment of the Court.

Argument was heard March 5, 1897.

C. A. Palmer, Q.C., and *John Montgomery*, for the plaintiffs:—

By the agreement of McLeod with plaintiffs' assignor McLeod was denuded of all his interest in the license, and any subsequent purchaser from him could obtain no better title than he possessed. It would, therefore, be immaterial that the defendants had acted in ignorance of McLeod's previous agreement. If it were necessary that they should have been affected with notice of McLeod's previous agreement, the filing of the agreement in the Crown land office in accordance with the eleventh Crown land regulation contained in the license would be constructive notice or notice in law, even though the defendants abstained in good faith from searching McLeod's title at the Crown land office, and were in fact ignorant of his previous dealings with the license. The policy of the regulation is for the protection of purchasers, and fixes a subsequent purchaser with notice similarly to the Registry Act. See *McArthur* v. *The Queen* (1). The evidence, however, is ample that the defendants had actual notice of McLeod's previous agreement. If they had any suspicion of his title to assign the license, they were put upon a full inquiry concerning it. If they abstained from the inquiry after notice or suspicion that the license was in some way affected, they are bound with constructive notice of facts they would have discovered had an inquiry been made. See *Jones* v. *Smith* (2). If the eleventh Crown land regulation is immaterial as between competing purchasers, then their rights must be determined by the priorities of their agreement in point of time.

(1) 10 O. R. 191.

(2) 1 Hare, 55.

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G. G. Gilbert, Q.C., and *W. A. Trueman*, for the defendants:—

McLeod's agreement with plaintiffs' assignor is not an assignment of the license. It is merely a personal agreement between them, passing no title as against third persons purchasing the license in good faith, and only giving rise in event of its breach after the intervention of the rights of third persons to an action for damages against McLeod. As an agreement for the cutting of standing timber, it relates to an interest in land and should be under seal. See *Duke of Somerset* v. *Fogwell* (3). The license itself being under seal could only be assigned by deed. An assignment of it should also be recorded in the registry office of the county where the land is situated in order to affect subsequent purchasers. The defendants were purchasers of the license for value and without notice of any infirmity in McLeod's title. At the time of its assignment to us the license was in the possession and disposition of McLeod, which was altogether inconsistent with any interest in any other person. See *Dearle* v. *Hall* (4). Constructive notice of McLeod's previous agreement cannot be imputed to us within the meaning of *Jones* v. *Smith* (5), for so far from evading investigation of his title, we inquired at the Crown land office of the state of his title, and were informed that we could accept the assignment. But we deny, unless we had some information or suspicion impeaching his title, that we were under a duty to investigate McLeod's title. Our legal title should not be defeated by a prior equitable one unless we have been guilty of fraud or gross and wilful negligence: *Hewitt* v. *Loosemore* (6); *Ratcliffe* v. *Barnard* (7); *Redgrave* v. *Hurd* (8). The agreement of McLeod with plaintiffs' assignor would only be valid during the continuation of McLeod's interest in the license, and would be determined on its assignment to the defendants: *Wallis* v. *Harrison* (9); and *Russell* v. *Harford* (10). The agreement of McLeod with plaintiffs' assignor being to stifle competition at a public sale is illegal and void: *Battersby* v. *Smyth* (11).

(3) 5 B. & C. 875.
(4) 3 Russ. 1.
(5) 1 Hare, 55.
(6) 9 Hare, 449.
(7) L. R. 6 Ch. 652.
(8) 20 Ch. D. 1.
(9) 4 M. & W. 539.
(10) L. R. 2 Eq. 507.
(11) 3 Madd. 110.

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Palmer, Q.C., in reply:—

A license to cut growing timber is not an interest in land. See *Marshall* v. *Green* (12). In *Irving* v. *McWilliams* (13), a similar agreement to that made between McLeod and plaintiffs' assignor was held not to be contrary to public policy.

1897. March 16. BARKER, J.:—

In the year 1893 one George K. McLeod purchased at a Crown land sale, the right to cut all classes of lumber on a block of Crown lands containing an area of nine square miles, and described in the license thereof as Block 3, Range 5, and the northern half of Block 3, Range 6, on the north-west of main northern branch of the Benjamin River (by mistake called Jacquet River in the license). A license dated September 1st, 1893, under the hand and seal of the Lieutenant-Governor, issued to McLeod in the usual way, subject to the Crown land regulations then in force, and which are incorporated in the license. By this license McLeod, his heirs, executors, administrators and assigns were granted the right "to cut all classes of timber in and within the bounds of the piece of ungranted Crown land herein mentioned and described, and the said logs, timber and other lumber as aforesaid so cut by him in and within the said bounds of the said piece of ungranted Crown lands, under this license and during its continuance, to remove, take and carry away and dispose of the same to his own use, subject however to the payment of stumpage, regulations and restrictions above mentioned." The license continued and remained in force only from the date up to 1st August thereafter and no longer—that is, August 1st, 1894—"after which time no logs, timber or other lumber to be cut or hauled from the said tract of Crown land hereinbefore described, under pretence thereof." Regulation 11 incorporated in the license is as follows: "Licenses may be assigned by writing, signed by the licensee, his executors or administrators, and the assignor shall, within reasonable time, give notice of such assignment and its date to the Surveyor-General. The assignment shall

(12) 1 C. P. D. 35. (13) Ante, p. 217.

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take effect from the date upon which notice thereof shall be received at the Crown land office unless the Surveyor-General, within ten days thereafter, refuse his assent thereto." Regulation 22 is as follows: "Licensees who have paid their stumpage dues in full and have otherwise fully complied with all the conditions of their licenses, on or before the first day of August in each year, shall be entitled to annual renewals of licenses for such parts of the ground held by them as may at the first day of July in each year be vacant and unapplied for, on payment of the mileage thereon, at the rate of $4 per square mile,payable on or before the first day of August in each year. These renewals of licenses may be received for a term of twenty-four years from the 1st day of August, A.D. 1894; provided, nevertheless, that no renewal mileage on licenses shall be received unless all stumpage dues shall have been fully paid as before provided; also provided, that no license shall be reckoned at less than two square miles, and that each license must be renewed for its full extent or entirely dropped."

Regulation 23 provides as follows: "Should any licensee fail to renew any timber license held by him on or before the first day of August in each year, the berth or limits covered by any such unrenewed license, shall be vacant and open for application by any other person, on the conditions mentioned in section 8 of these regulations." Section 8 provides for application for licenses, the deposit of $8 per square mile applied for and the sale at auction. In addition to the land included in this license, McLeod bought at the same time other licenses, covering in all some fifty-three square miles of Crown land, situate principally, if not altogether in the county of Restigouche, for the purpose of supplying a mill which he owned in that vicinity. One Samuel Laughlan, the plaintiffs' father, being desirous of securing certain lumber privileges in the six mile area included in the license in question, entered into an arrangement with McLeod before the sale that he (McLeod) should buy in the block and afterwards secure to him (McLaughlan) the privileges which he wished. Accordingly he and McLeod immediately after the sale took place entered into the following agreement:

"Memorandum of agreement made the 31st day of August, A.D. 1893, between George K. McLeod of Saint John,

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N.B., merchant, and Samuel Laughlan of Black Point, Restigouche county, N. B., mill owner. Whereas the said George K. McLeod has purchased the right to cut lumber on the Crown lands of New Brunswick; and whereas George K. McLeod has agreed to sell to Samuel Laughlan for the term for which licenses issue now and renewals to cut, carry away and appropriate to his own use the cedar lumber on the south-west quarter of Block 4, Range 4, on the Benjamin River, and the lumber of all kinds on the eastern half of Block three, Range five (5) on the Benjamin River; Samuel Laughlan paying to George K. McLeod the sum of fifty dollars for above privilege; and Samuel Laughlan agrees to pay to George K. McLeod the renewal mileage each year on five (5) miles of ground during the continuance of the privilege, at the rate fixed from year to year by the Government. It is understood that the right to cut and carry away applies only to cedar on Block 4 (S.W. ¼), but to all kinds of lumber on the eastern half of Block 3, Range 5.

Signed at Fredericton, N.B., this 31st day of August, 1893.

(Signed) George K. McLeod.
" Samuel Laughlan.

Witness: J. F. Atkinson.

G. K. McL. agrees to renew all the licenses which include the above ground."

Block 4, Range 4, mentioned in this agreement is included, with other lands, in all amounting to nine square miles, in another license issued to McLeod at the same time. The agreement between Laughlan and McLeod appears to have been written at the dictation of Mr. Tweedie, who was then Surveyor-General, and it was then and there filed in the Crown Land office. So far, therefore, as the assent of the Surveyor-General to the agreement is necessary to its validity, it may be said that he gave it. Laughlan paid McLeod the $40 mentioned in the agreement, and in August, 1894, paid him $20 as his share of the annual mileage.

It appears that no copy of this agreement was kept by the parties, and accordingly soon after their return from Fredericton McLeod and Laughlan interchanged agreements drawn by McLeod, which were supposed to be identical, or substantially so, with the one in the Crown Land office, but

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which differ in some respects. The one in evidence produced by the plaintiffs, is signed by McLeod, and is as follows:—

"Memorandum of agreement made this 31st day of August, A.D. 1893, between George K. McLeod of Saint John, N.B., merchant, and Samuel Laughlan of Black Point, Restigouche county, N.B., mill owner. Whereas George K. McLeod has purchased the right to cut lumber of all kinds on certain Government lands at the recent sale of licenses to cut lumber on Crown lands of the Province of New Brunswick; and whereas George K. McLeod, in consideration of the sum of forty dollars, has agreed to sell to Samuel Laughlan, who agrees to buy, the right to cut, carry away and appropriate to his own use the cedar lumber on the south-west quarter of Block 4, Range 4, Benjamin River; and the right to cut, carry away and appropriate to his own use the lumber of all kinds in the eastern half of Block 3, Range 5, Benjamin River. This privilege to cut lumber as above is to exist for the term for which licenses are issued by the Government, and for all renewals of such licenses. Samuel Laughlan agrees to pay to George K. McLeod the renewal mileage on five square miles every year at the rate fixed by the Government from time to time; the failure to pay such renewal mileage by Samuel Laughlan, George K. McLeod to have the right to cancel this privilege. The stumpage on all lumber cut by Samuel Laughlan, or by parties for him, is to be paid by Samuel Laughlan.

Signed at Fredericton, N.B., August 31st, 1893.

(Signed) George K. McLeod."

Samuel Laughlan afterwards transferred his right to these plaintiffs, who are his sons. This transfer is endorsed on the agreement I have just set out and is as follows:—

"This will certify that for and in consideration of the sum of one dollar of lawful money of Canada paid to me by Charles McD. Laughlan and Samuel Laughlan, junior, (receipt whereof is hereby acknowledged) I do hereby assign and transfer all my right, title and interest of, in and to the timber license to the south-west quarter of Block 4, Range 4, Benjamin River, and the right to cut, carry away and appropriate to their own use the lumber of all kinds on the eastern half of Block 3, Range 5, Benjamin River, and all

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privileges and all advantages therewith connected, to the said Charles McD. Laughlan and Samuel Laughlan, Jr., their heirs, executors, administrators and assigns. In witness whereof I have hereunto set my hand and seal this tenth day of February, in the year of our Lord one thousand eight hundred and ninety-four.

(Signed) Samuel Laughlan.

(Signed) Ebenezer McMillan."

There does not appear to be any seal to this instrument, though it professes on its face to be under seal. This assignment to the plaintiffs was never filed in the Crown Land office, and there is no evidence to show that any notice of it was ever given to the Surveyor-General, or the Crown Land Department in any way.

On the 16th day of November, 1894, McLeod entered into a written agreement with the defendants to sell, and they agreed to buy of him, his mill property already mentioned for the sum of $3,000, and all his Restigouche county lumber licenses (including the two in question), for the sum of $2,000; the title to both to be unencumbered. And on the 29th of November, a fortnight later, this sale was completed by the delivery of a deed of the mill property, and a transfer of the licenses under McLeod's seal to the defendants, who paid the purchase money. The renewal licenses for 1894 had not then actually issued to McLeod, and on the assignment being produced to the Crown Land Department the renewals issued to the defendants. They are dated August 1st, 1894, and expire on August 1st, 1895, and are subject to the same regulations and conditions as the originals I have mentioned. They were renewed again to the defendants in August, 1895, for the year expiring on 1st August, 1896.

In August, 1895, Samuel Laughlan forwarded to McLeod a cheque for his share of the renewal mileage, and he was then informed by McLeod that he had sold to the defendants, and he must apply to them. He accordingly went to them, having the money to pay the stipulated share of the renewal mileage, but the defendants entirely repudiated his having any claim whatever, and they say that was the first intimation they had in any way that Samuel Laughlan ever had or professed to have any claim whatever. Upon

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these facts, about which there is no dispute, the plaintiffs about a year ago filed their bill, in which they allege that when the defendants purchased from McLeod they knew or had notice of the agreement between him and Laughlan, and they pray for an injunction restraining the defendants from continuing their lumbering operations on the eastern half of block 3, range 5, which were then going on, an assessment of the damages already caused, and a declaration of the rights of the parties. An application was made to me on the 27th February, 1896, for an injunction, but as the defendants had their lumbering operations then in progress, and they were fully able to pay any damage to which the plaintiffs might be entitled, on my suggestion the injunction order was refused, on the defendants undertaking to account to the plaintiffs for any amount which this Court might assess as damages.

The only fact really in dispute is whether McLeod, at the time he sold to the defendants, told them of his agreement with Laughlan. On the one hand we have McLeod's evidence to the effect that he did tell them, or some of them, or Moses Prescott, who carried on the negotiations for them, but he does not speak very positively. On the other hand we have the positive testimony of Moses Prescott and all the defendants to the contrary, and Mr. Gilbert's evidence is also to a certain extent corroborative of Prescott's. I must hold that the plaintiffs have not made out this part of their case, and I find, as a fact, that neither Moses Prescott nor these defendants had any knowledge or notice of the agreement with Laughlan until after the defendants had purchased and acquired the property.

Before proceeding to a discussion of the main question, I may as well dispose of a point made by the defendants at the argument, and that is, that the agreement made between McLeod and Laughlan is void as being against public policy, inasmuch as it stifled or prevented competition at a public sale of Crown land licenses. I had occasion to consider this same point in *Irving* v. *McWilliams* (14), and I adhere to what I there said. If a block of Crown land is put up for license, as here, and A. wants a part of it, and B. wants the

(14) Ante, 217.

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remainder, neither wanting the whole—or A. wants the cedar on it and B. wants the other lumber, it is not, in my opinion, against public policy for them to arrange for one to bid in the whole and then divide as they wish. They are in no sense competitors, as neither wants the whole, and for one to bid it in is the only method by which each can get a part. I see nothing in this point. Much of the argument addressed to me on the part of the defendants was based on the assumption that these licenses conveyed an interest in lands, and any assignment of them must be under seal, and be registered as any other conveyance of land. If these licenses were in fact what Mr. Palmer contends they are in substance —licenses for 24 years from August 1, 1894, by virtue of regulation 22—*Marshall* v. *Green* (15) might be cited as an authority for the defendants' contention. The licenses are, I think, separate and distinct contracts for a year and no more, and as such must be regarded. The option which the licensee has for a renewal each year, subject to certain conditions, does not, in my opinion, alter their character as licenses. The rights of licensees under licenses like these have been settled by this Court, and by those decisions I am bound. The right given to the licensee by all these Crown land licenses is a right to cut, remove and appropriate to the use of the licensee. The licenses of themselves convey no right to trees not cut. In *Kerr* v. *Connell* (16) the plaintiff, as licensee, brought trover for the value of lumber cut on the land included in his license, but he failed because he had no title to the lumber. It will be seen by this case that such licenses are merely licenses coupled with an interest in the lumber when cut. In *Sharp* v. *McKeen* (17) it was held that such licenses were not assignable, at all events without the consent of the Crown. In *N. B. & N. S. Land Co.* v. *Kirk* (18) the license was for five years, yet the Court held that it conveyed no interest in the land, and though assignable, the assignee was not bound by the licensee's covenants.

In *Breckenridge* v. *Woolner* (19) it was held that the license gave no possessory estate in the land, though it was

(15) 1 C. P. D. 35.
(16) Ber. 133.
(17) 2 Kerr, 525.
(18) 1 All. 443.
(19) 3 All. 303.

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a grant of the trees when cut and a license to enter, cut and carry away, which would protect such person from being dealt with as a trespasser. The Court so held, notwithstanding the provisions of Rev. Stat. c. 133, s. 6, which they said only had reference to leases or licenses of land, which these licenses were not, and therefore the licensee could not maintain an action of trespass. These decisions led to the passing of the Act 22 Vict. c. 23 (Con. Stat. 1059), which is still in force, and which provides that during the continuance of the license the licensee shall be deemed in possession of the land described in his license, and can maintain an action of trespass, trover, or replevin against any person cutting or carrying away any trees, timber or lumber from such land. The effect of the statute certainly is to give the licensee a possession sufficient to maintain trespass against anyone cutting the lumber on the land mentioned in his license, and a sufficient property in any trees cut by others to enable him to maintain trover or replevin for them. While the effect of this statute is to secure to a licensee more than a mere permission to cut, and a grant of the lumber cut under the license, it was intended, I think, simply to furnish to the licensee a complete remedy for the protection of his right to cut all the lumber on the land included in his license, and which by the terms of his license he had the right to do during the continuance of his license, and which when so cut became his property. The Act was never intended to give to the licensee any greater or other interest in the land than he ever had, but simply to furnish a complete remedy against trespassers upon his rights.

The grounds upon which the plaintiffs rest their case are these: 1. That McLeod could not give the defendants any better title than he himself had. 2. If notice to the Surveyor-General of the transfer by McLeod to Laughlan was necessary to complete it he had notice, and the defendants, therefore, took subject to that transfer. 3. That if the assignment to Laughlan, and from him to the plaintiffs, was complete without notice to the Surveyor-General, then the defendants, having had notice either actual or constructive, they took subject to plaintiffs' rights.

While these licenses are assignable, not only by the terms of the regulations, but more especially by section 2 of 22

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Vict. c. 23 (Con. Stat. 1060), and the assignee succeeds to the rights and remedies of the licensee, I do not think the agreement with Laughlan or his transfer to the plaintiffs can be called an assignment of a license. They are at most mere sub-licenses, which conferred no rights of renewal against the Crown. And as far as these plaintiffs are concerned they never gave notice of their assignment to the Surveyor-General, as required by the section I have just cited, or as required by the regulations. I have already said that the evidence failed in showing any actual notice of the agreement under which the plaintiffs claim. Neither do I think they had any constructive notice. In *Jones* v. *Smith* (20), the Vice-Chancellor says that the cases in which constructive notice has been established resolve themselves into two classes: "First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice." This case cannot come under the first of these classes, because the defendants had no actual notice of any charge or incumbrance. Neither am I able to see how it can be within the second class. The defendants were under no obligation or duty to search at the Crown Land office—there was nothing which I can discover from the evidence to lead them to enquire or to excite any suspicion. McLeod had the original licenses intact, and these were the sole evidences of title from the Crown. The defendants certainly did not abstain from inquiring. On the contrary they did enquire at the Crown Land Office from the lumber agent, and he informed them that the licenses were all right, and renewals would issue to them, as they actually did shortly

(20) 1 Hare, 43.

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afterwards. The doctrine of constructive notice is one which Courts are not disposed to extend. In my opinion it has no application to this case.

The agreement between McLeod and Samuel Laughlan, under which these plaintiffs claim, regarded most favourably for the plaintiffs, amounts to nothing more than a sale of or an agreement by McLeod to sell, certain rights which he then had under the licenses, and the same rights under the renewals of these licenses. See *Collyer* v. *Isaacs* (21). The one right was existent and he then had it; the other he expected to get, and in fact agreed to get, but it was non-existent. The case seems to me to be altogether within the principle of *Holroyd* v. *Marshall* (22). Assuming that this agreement is one of which this Court would decree a specific performance, it would only create a right in Laughlan as against McLeod, so soon as he (McLeod) got the licenses renewed to have the privilege extended to him for another year. But until McLeod got the renewal no such right existed. Laughlan might have, and probably would have a right of action at law against McLeod for a breach of his agreement to obtain a renewal of the licenses, but that would be his only remedy —at all events he could have none against other persons who had acquired the renewals from the Crown as McLeod's assignees, and who had no notice of the agreement: *Joseph* v. *Lyons* (23). It is immaterial why McLeod did not obtain the renewals. He, in fact, did not; and therefore the property out of which the plaintiffs' rights were to be carved never came into existence.

I do not assent to Mr. Palmer's contention that these licenses are to be considered as one continuing license. By Regulation 16 the Government distinctly retains the right to increase both the mileage in licenses and the stumpage on any class of lumber, which increase is to take effect at and after the date of the next following annual renewal; new regulations may be made for enforcing the payment of stumpage, and the right of renewal given by Regulation 22 only applies to such parts of the ground as may at the first day of July in each year be vacant and unapplied for. More than

(21) 19 Ch. D. 342. (22) 10 H. L. C. 191.
(23) 15 Q. B. D. 280.

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that, the licenses by their terms are expressly made to expire on the 1st of August succeeding the date, after which time no lumber is to be cut or hauled from the land under pretence of that particular license. These regulations seem in substance much the same as those in force in Ontario, and this particular feature of them has come up for discussion in the Courts of that Province, and they have held these licenses to be simply annual licenses and nothing more: *McArthur* v. *Northern and Pacific Junction Railway Co.* (24); *Shairp* v. *Lakefield Lumber Co.* (25).

In my opinion the right to the renewals in no way improves the plaintiffs' position, so far as these defendants are concerned. What the plaintiffs' rights might have been if the defendants had purchased during the currency of the 1893 licenses and after the plaintiffs had acquired their right in February, 1894, and the question was as to the defendants' operations between February and August, 1894, it is unnecessary to determine, because no such question arises.

Mr. Gilbert contended that this sub-license to Laughlan was revocable, and that the transfer to the defendants was a revocation of it, for which he cited *Wallis* v. *Harrison* (26), and other cases. It is unnecessary for the determination of this case to decide this point, though I should incline to think this license was coupled with an interest, and therefore not revocable: *Wood* v. *Leadbitter* (27). Neither do I think it necessary to decide as to the sufficiency of Laughlan's tender of the renewal stumpage to these defendants when he saw them in August, 1895. It is certain he was prepared to pay, and when they repudiated his right altogether, I should think they waived the necessity for any formal tender.

The copy of the agreement from McLeod to Laughlan, certified by the Deputy Surveyor-General as a document on file in the office, was received in evidence subject to objection. It is unnecessary, in my view of this case, to consider this point either. There was the original agreement by McLeod in evidence, upon which was endorsed the assign-

(24) 17 A. R. 86.
(25) 17 A. R. 322; 19 Can. S. C. R. 658.
(26) 4 M. & W. 539.
(27) 13 M. & W. 837

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ment to the plaintiffs, under which they claim. So far as the questions involved in this case are concerned the two are identical in substance, and as the one on file is only of importance as bearing on the question of constructive notice it is for the reason here mentioned immaterial.

I think the plaintiffs' bill must be dismissed with costs.

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JEFFRIES v. BLAIR ET AL.

Practice—Foreclosure suit—Offer to suffer judgment by default—Offer made by one of several defendants—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4) s. 130—C. 37, C. S. N. B., ss. 127, 128.

An offer to suffer judgment by default, under Act 53 Vict. c. 4, s. 130, is not applicable to a suit for the foreclosure of a mortgage and sale of the mortgaged premises.

One of several defendants cannot offer to suffer judgment by default.

The facts sufficiently appear in the judgment of the Court.

Argument was heard April 2, 1897.

White, S.-G., for the plaintiff:—

A mortgagee in a suit for the foreclosure of the mortgage and sale of the mortgaged premises, occupies a position dissimilar in many respects from that of an ordinary suitor. He not merely seeks a declaration of the amount due him, but he also seeks to have the debt satisfied by the sale of the mortgaged premises. An offer to suffer judgment by default does not secure the foreclosure of the mortgage and enable the property to be sold as under the decree of the Court. Consequently the suit would have to be continued subsequently to the offer in order to perfect the remainder of the plaintiff's rights. If the defendant wished to throw the risk of further proceedings upon the plaintiff, he should have offered to redeem and tendered the full amount he admitted to be due, together with costs up to that time. Section 130 of The Supreme Court in Equity Act (53 Vict. c. 4) says that section 127 *et seq.* of chapter 37 Con. Stat. shall only

apply as far as the same can be made appliable. Section 127 refers to an action wherein debt or damages only are sought to be recovered. In *Barclay* v. *McArity* (1) it was held that the Act only applied to such cases as by a fair construction of its provisions were clearly within them.

S. Alward, Q.C., for the defendants :—

The question is one of first impression, but though no authority is to be found for the course taken by the defendants' solicitor, it may be that effect can be given to it. Upon the plaintiff filing his consent to the offer, the Court could have made a decree of sale. If defendants appeared at the hearing and confessed to a certain amount being due, could not the plaintiff thereupon ask for a decree? The fact that the offer of the defendants does not go on to consent to a foreclosure decree is immaterial, since they must be taken to have included in it whatever remedies the plaintiff is entitled to under a decree. The only matter in dispute was the amount due. If a defendant in a foreclosure suit is unable to redeem, this is his only way of avoiding costs against the property.

White, S.-G., in reply.

1897. April 20. BARKER, J.:—

This bill was filed for the foreclosure of a mortgage, and for the usual order for a sale of the mortgaged premises. The only point in dispute was as to the amount due. Instead of sending the matter to a reference I heard it myself, and I found the sum of $407.97 as the balance due. It seems that in June, 1896, Sterling C. Blair and Rachael Blair, two of the defendants, filed an offer to suffer judgment by default for the sum of $430 in pursuance of chapter 37, section 127, Consolidated Statutes, which offer was not accepted. These defendants now claim their costs incurred subsequent to the notice of this offer, as the amount found due is less than the sum for which they consented to suffer a judgment by default. The sole question therefore is as to the effect of this offer. Instead of raising the question before the Clerk on the taxa-

(1) Ante, 59.

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tion of the costs, and taking his opinion, and then bringing up the matter by way of review, the parties have come before me in an informal manner so as to get the Court's directions to the Clerk as to the taxation. I mention this, because under these circumstances, and as I was settling a matter of practice for the Clerk's guidance in the future, I feel at liberty to discuss a point not argued by the counsel, but which the Clerk might have himself raised, and which is, I think, fatal to the defendants' contention in this case. The Solicitor-General's argument before me was directed solely to the position that offers of this kind were altogether inapplicable to foreclosure suits; that in such suits neither debt nor damages were sought to be recovered, but the sole object of the bill was a sale of the property to satisfy the mortgage claim, or to foreclose the equity of redemption. I have come to the conclusion that this position is well founded.

Section 127 of chapter 37, Consolidated Statutes, provides that whenever any defendant in any action wherein *debt or damages only* are sought to be *recovered*, shall file in the office of the Clerk of the Pleas an offer and consent in writing to suffer judgment by default for a specific sum, the plaintiff may in accepting such offer sign judgment for the amount and costs. By Act 53 Vict. c. 4, section 127 of chapter 37 is made to apply to all causes and proceedings under that Act *so far as the same can be made applicable.* The position of mortgagees and trustees as to costs incident to legal proceedings is not quite the same as that of other litigants. It is a part of the contract between mortgagor and mortgagee, as it is understood in this Court, that the mortgage is a security not only for the principal and interest, and such ordinary charges and expenses as are usually provided for in the mortgage, but also for the costs properly incident to a suit for foreclosure or redemption. So the contract between the author of a trust and his trustees entitles the trustees to have out of the trust estate all their costs properly incurred in executing the trust: *Cotterell* v. *Stratton* (2); *Thomas* v. *Girvan* (3).

Moreover, this right to costs, resting as it does upon contract, is only lost by some violation or culpable neglect

(2) L. R. 8 Ch. 295. (3) Ante, 314.

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of duty under the contract, and is not subject to the exercise of that discretion of the Court which, in litigious cases, is, as a rule, not subject to review. The mortgagor may redeem on payment of the amount due and costs, or he may on foreclosure proceedings being taken terminate them by paying the amount due and costs: section 190, 53 Vict. c. 4; but in both cases the costs to which the mortgagee is entitled, must be determined upon the principle I have mentioned. I should not myself, therefore, feel disposed to hold that section 127 is applicable to a case like the present, unless I felt sure it was the intention of the Legislature that it should be. The section only affects the question of costs; and whatever may be its utility in actions at law, where the rule that costs follow the event is of such general application, it has no special advantage in suits in this Court, where the Court itself has entire control over the question of costs. See section 122 of 53 Vict. c. 4. The section in question by its terms refers *solely* to suits where debt or damages *only* are sought to be recovered, and the offer therefore is in form only an offer to suffer a judgment for a specific sum as debt or damages. That is to say, in cases where the judgment to be recovered and which the defendant consents may be entered up against him for a specific sum is a judgment for a debt or damages, then the Act applies if the suit is solely for the recovery of the debt or damages. Is this applicable to a foreclosure suit? I think not. A foreclosure suit is not for the recovery of a debt or damages in the sense in which those words are used in that section. There is no judgment secured for the amount due on the mortgage—there is no decree against any person for the payment of the money. In fact the defendants, as in this present case, may in no way be liable for the mortgage debt at all. The suit is one either to foreclose the defendants' right to redeem, and thus convert the mortgagee's title from a conditional into an absolute one, or, by a sale of the premises, to convey to the purchaser the title and interest of all the parties to the suit. A foreclosure suit is therefore not one for the recovery of a debt or damages, but if it could be so considered, it is not a suit for that alone. In *Gagnon* v. *Chapman* (4), the late Chief Justice in deliver-

(4) 21 N. B. 252.

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ing the judgment of the Court says: "The offer must be such as will entitle the plaintiff to sign judgment and issue execution, and thus terminate the suit." In foreclosure suits there are other questions to be determined by the Court than merely the amount due on the mortgage. It is always a question whether the decree will be one for foreclosure only or for a sale of the mortgaged premises; and if for a sale, then whether the premises are to be sold in one lot or in separate lots, and if in separate lots, then in what order. All these are questions to which the offer to suffer judgment has no reference whatever, and which are in no way settled by it. Very many cases arise where in foreclosure suits there is really no question as to the amount due on the plaintiff's mortgage, but the litigation is over other matters altogether. Take, for instance, a case where the question is between the parties, or some of them, as to the realizing collateral securities held by the plaintiff so as to relieve a second mortgagee, or questions of a similar character. An offer to suffer judgment in such a case would not touch the matter in litigation; neither could it in any way warrant any judgment upon it or any termination of the suit.

I come now to a second point which, though not argued before me, I feel at liberty to mention for the reasons I have already given. There are six defendants in this case interested in the equity of redemption. Blair and his wife, who filed this offer, are interested as purchasers of a portion of the mortgaged premises. Reddy and his wife, two other defendants, are interested as purchasers of another portion of the premises, and the defendants, White and wife, are interested as second mortgagees of a portion of the premises. In *Gagnon* v. *Chapman* (5) it was held that an offer to suffer a judgment under chapter 37, section 127, to be of any avail, must be made by all the defendants. That was an action of trespass, but I think the reasons given are equally applicable to this case. Suppose the plaintiff had filed an acceptance of this offer, what would have been his proceeding? There is no practice in this Court which permits a party of his own motion to sign a judgment by default. He must obtain an order of the Court to take the bill *pro confesso*; and in the

(5) 21 N. B. 252.

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case of a foreclosure, have the amount of the mortgage debt assessed by the Court directly or by means of a reference. Now while the admission of these defendants of the amount due might be evidence against them, it would not bind the others; and, therefore, as against those who did not join in the offer, the Court must find on evidence what the amount due actually is. You would, therefore, have one amount found due as against one set of defendants, and a different amount as against another set. In this case, if the plaintiff had accepted the offer, we should have $430 assessed due as against two defendants, and $407.97 as against the others on the same mortgage. To which of these amounts would the plaintiff be entitled in case the defendants wished to end the suit by payment of the amount due and costs, or in case the premises went to a sale, which of these two sums would the Court decree to be paid from the proceeds as the amount due him under his mortgage?

I think the minutes of the decree are correct, and that the costs of the parties must be taxed without regard to the offer to suffer judgment.

There will be no costs of this application.*

* See *Maritime Warehousing and Dock Co.* v. *Nicholson*, 24 N. B. 470—REP.

In re CHARLES MERRITT'S TRUSTS.

1897.

May 18.

Practice—Trustees—Petition for removal—Costs.

Trustees applying to be removed on a ground satisfactory to the Court, and not from mere desire or caprice, will be allowed the costs of their application out of the trust estate.

This was a petition by Nehemiah Merritt, William Ingersoll Merritt, John Holden, and Charles Holden, executors and trustees of and under the last will and testament of Charles Merritt, deceased, praying to be removed from being such trustees, and that new trustees might be appointed in their stead. The petitioners had acted as such trustees since probate of the will was granted to them in 1877. All the trusts of the will were in process of being wound up with the

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exception of a trust of $10,000 in bonds in favour of Charles H. Wright during his life, and then in favour of his children. This trust was subject to certain contingencies, the nature of which it is unnecessary to state. The petitioner, John Holden, had always been the acting trustee, and had had the entire management of the estate. He was now 77 years of age, and was about leaving the Province. The petition was heard May 18, 1897.

J. Roy Campbell, for the petitioners:—

I am not clear as to whether the costs of the application should be paid by the estate, or whether they should be borne by the petitioners. I would submit, however, that under the circumstances they should be made a charge against the estate.

BARKER, J.:—The application is granted, but the question of costs I will consider.

1897. May 18. BARKER, J.:—

I find on looking at the practice it is substantially as I stated it, with this exception, that in the case of a party showing some ground satisfactory to the Court for giving up a trust, more than his own mere desire or caprice, then the Court may grant costs out of the estate. In this case, so far as the trustees are concerned, except John Holden, it is mere caprice, but as he has been the managing trustee all throughout, and is an old gentleman over 70 years of age, and is leaving the country, I think that is a sufficient ground to remove this out of the general rule. The costs, therefore, will be paid out of this particular fund.

MITCHELL ET AL. v. KINNEAR ET AL.

1897.

July 9.

Mortgagor and mortgagee—Power of sale—Sale by mortgagee to himself—Subsequent valid sale producing surplus over mortgage debt—Mortgagee in receipt of rents—Interest—Costs of special case.

A mortgagee, his power of sale on default having arisen, sold the mortgaged premises ostensibly to a third person, in reality to himself. Subsequently he sold a portion of the premises to a third person for an amount in excess of the mortgage debt. He continued in possession of the remaining part, and received rent:

Held, that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus from the second sale, together with the rent, and interest on both sums and costs.

The Court has the same power to deal with the costs of a special case as in the case of a suit instituted by bill, and in awarding them will be governed by the same rules.

Special Case.

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

Argument was heard June 15, 1897.

H. A. Powell, Q.C., for the plaintiffs.

M. G. Teed, for the defendants.

1897. July 9. BARKER, J.:—

This is a special case, and the facts stated are as follows: Mitchell, on August 13th, 1883, conveyed by way of mortgage to Wood, a certain piece of property to secure the payment of $500 and interest, which mortgage contained a power of sale. On the 22nd December, 1883, the Halifax Banking Company obtained a judgment against Mitchell for $124.96. On the 3rd December, 1887, Wood assigned his mortgage to Kinnear, and on the 25th February, 1888, the bank assigned their judgment also to him. On the 22nd December, 1887, Kinnear gave Mitchell notice of sale under the power in the mortgage for January 25th, 1888, on which day the premises were sold and purchased by one Ford as Kinnear's agent, and for him, for the sum of $825. A conveyance was executed by Kinnear to Ford on 4th February, 1888, and Kinnear

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went into possession. On the 8th February, 1888, Kinnear sold a portion of the premises to Chapple for $1,200, who gave Kinnear a mortgage for the purchase money, payable with interest at the rate of 7 per cent., which was afterwards paid. On the 24th March, 1888, Ford conveyed the remainder of the premises back to Kinnear.

Mitchell left the Province about three months before the sale, and remained away until his death, which took place July 31st, 1893, at New York. Kinnear died November 10th, 1895, leaving a will, but Mitchell died intestate. On the 21st October, 1895, Kinnear and one Dixon entered into an agreement for the sale and purchase of the remainder of the premises for $500, for which Dixon gave Kinnear his five promissory notes for $100 each. Dixon went into possession, but received no conveyance. The parties, plaintiffs and defendants, are the personal representatives, heirs and devisees respectively of Mitchell and Kinnear, and Dixon is also a party defendant. The case also states that Ruth Mitchell, the widow, had assigned to her children, George, William and Jennie, all her arrearages of dower up to February 15th, 1897. The account stands thus:

The sale by Kinnear to Chapple realized $333.73 in excess of the amount then due on the Wood mortgage, the bank judgment and some $59.50 expended by Kinnear in the costs of the sale and insurance premiums. For the rent of the remainder of the premises Kinnear received $200 for rent accrued due before Mitchell's death; $100 for rent accrued due after Mitchell's death and before Dixon went into possession, and Dixon has received $60 since.

The questions are stated as follows:

1. Was not Kinnear at the time of his death trustee for the plaintiffs George Mitchell, William Mitchell, Harry Mitchell and Jennie Mitchell, heirs and next of kin of the said Henry L. Mitchell (the mortgagor) of the lands and premises mentioned and described in the eighth section of the case, subject to the widow's right of dower (that is the remainder of the mortgaged premises conveyed by Ford to Kinnear).

2. Are Mitchell's children or his wife, who administered upon his estate, and which of them, entitled to rank as credi-

tors against Kinnear's estate for the $333.73 in Kinnear's hands at the time of his death above stated.

3. If so, are they entitled to interest on that sum.

4. Is Ruth E. Mitchell, as administratrix of Mitchell, the mortgagor, entitled to rank as a creditor of Kinnear for the $200 received by Kinnear previous to Mitchell's death, and if so, is she entitled to interest thereon from the time Kinnear received it?

5. Are the plaintiffs (Mitchell's children) entitled to rank as creditors against the estate of Kinnear for the $100 received by him after Mitchell's death.

6. Are the plaintiffs (Mitchell's children) owners in equity of the lands mentioned in section 8 (that is, the remainder of the premises conveyed by Ford to Kinnear), and are they entitled to a conveyance of the same, subject to the widow's dower.

7. Are not the plaintiffs (Mitchell's children) entitled to receive from the said Dixon the $60 received by him as rents.

8. Is Dixon under any liability to pay the said five promissory notes for $100 each, and is he entitled to have the same delivered up to him by the said Mary A. Kinnear, executrix of Kinnear.

The only questions about which there seemed to be much contest on the argument were the interest and the costs of the special case. It was conceded that under the authority of *Henderson* v. *Astwood* (1), that the sale to Ford was altogether abortive, and that Kinnear when he went into possession of the premises immediately after that sale became mortgagee in possession. The effect of the sale of the portion of the premises to Chapple shortly after the pretended sale to Ford, left Kinnear in possession of a portion of the mortgaged premises with the mortgage, judgment and other charges all paid and a balance of $333.73 in his hands, which by right and in equity belonged to Mitchell, and should have been then and there accounted for to him.

In the case just referred to, Davies, the mortgagee, was held chargeable with a fair occupation rent for the time he was in possession, though his pretended sale was a mere

(1) [1894] A. C. 150.

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blunder and made in ignorance of his rights (2). In addition to this, the Court say that it was his duty immediately on his ascertaining his true position of mortgagee in possession to have offered to furnish the mortgagors with accounts, and because he did not do so, though there was nothing due, the Court compelled his estate to bear the costs of the action up to the time his representatives filed their defence. It is clear, therefore, that neither the ignorance of the mortgagee of his liability, nor an absence of fraud, relieves him in any way of his right to account as an ordinary mortgagee in possession. Now what is that liability as to interest? In *Wilson* v. *Metcalfe* (3), the Master of the Rolls says: "If a mortgagee receiving the rents of a mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money and ought to be charged with interest."

See to the same effect: *Quarrell* v. *Beckford* (4); *Lloyd* v. *Jones* (5).

This seems to decide the point as to the rents, and I see no reason why the same rule should not prevail as to the $333.53, for it is immaterial in principle whether the mortgagee has been paid by a sale of part of the mortgaged premises or from the rents and profits. The surplus in case of a sale is not only the mortgagor's money, but the mortgagee by the terms of the mortgage holds it in trust to pay it to the mortgagor. Mr. Teed contended that Kinnear's estate should escape payment of interest on the $100 for rent accrued due after Mitchell's death, because no administration of his estate was taken until February, 1897, and there was therefore no one to pay. This cannot prevail. The 19th section of the case expressly admits that Kinnear claimed these moneys as his own, and now when there is an administratrix to pay his executrix still contests his liability and refuses to pay. I think therefore the Kinnear estate must pay interest on the balance of $333.53 and the $300 rent received from the date of receipt.

(2) P. 163.
(3) 1 Russ. 530.
(4) 1 Madd. 269.
(5) 12 Sim. 491.

The first seven questions will therefore be answered in the affirmative, the plaintiff, Ruth E. Mitchell, as administratrix, claiming for the $333.53 and $200 and interest, and the children for the $100 and the $60 collected by Dixon.

As to the 8th question, I am unable to answer it in its present form, as the facts are not stated with sufficient fulness for the purpose. It does not follow that because Kinnear had not the title, and Dixon knew that he either had no title or that it was in dispute, that he had not by his agreement bound himself to give one, so that he would be liable for not doing so. I understand the case however as not intending to raise any such point, and in that view I think and so declare that on Dixon consenting to the contract of sale being cancelled, and cancelling the same, his notes be given up to him or accounted for.

There only remains the question of costs. By section 122 of 53 Vict. c. 4, the Court has the same power to deal with the costs of a special case as in other cases. In Morgan's Ch. Orders (6), it is said that the Court deals with the costs in the same manner as if it were a suit in the ordinary way by bill. In *Sabin* v. *Heape* (7), a special case stated as here, the Master of the Rolls says (8): "If this were a bill for specific performance I should make a decree for the plaintiff, and I must act similarly in a case for my opinion. The defendant must pay the costs, for if this were a bill for specific performance I should make the costs follow the event and I must do so here."

In *Usticke* v. *Peters* (9), the Vice-Chancellor says (10): "The circumstance of the question being raised upon a special case does not alter the principle that the successful party should get his costs. It is not a question of conduct; each party fairly claims what he thinks he is entitled to. Nor is it like an administration suit. The costs must follow the result."

This is a convenient and inexpensive way to settle all the questions in dispute, because it is likely more than one

(6) 3rd ed. 126.
(7) 27 Beav. 553.
(8) At p. 561.
(9) 4 K. & J. 437.
(10) p. 457.

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bill would have had to be filed in the ordinary course of procedure on account of the diverse interests. The whole difficulty has arisen from Kinnear claiming property to which he was not entitled, and claiming money as his own which belonged to other people. He did it no doubt honestly, and he was claiming only what I will assume he thought he was entitled to. It was in just such a case that the Vice-Chancellor in the last case said the costs must follow the result. I think that must be the case here.

The plaintiffs must have their costs.

1897.

August 17.

In re GILBERT AND SAINT JOHN HORTICULTURAL ASSOCIATION.

Arbitration—Appeal—Duty of Judge on appeal—Prospective capabilities of land—Evidence of arbitrator.

By Act 57 Vict. c. 74, providing for the expropriation of lands by the Saint John Horticultural Association by arbitration, it is enacted that "any party to the arbitration may within one month after receiving a written notice from one of the arbitrators of the making of the award, appeal therefrom upon any question of law or fact to a Judge of the Supreme Court, and upon the hearing of the Appeal, the Judge shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction. The Judge, upon such appeal, shall have the right to hear additional evidence and decide the question upon the original as well as the new evidence." On an appeal from an award made under the Act:

Held, that the Judge appealed to was not to disregard the award and the reasoning in support of it, and deal with the evidence *de novo*, but that he was to examine into the justice of the award on its merits, both upon the facts and the law, and whether a reasonable estimate of the evidence had been made in accordance with the principles of compensation.

In assessing damages upon the expropriation of land regard should be had to its prospective capabilities.

Rule considered as to when evidence of an arbitrator will be admitted in explanation of the award.

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

Argument was heard May 1, 3, 11, 12, 13, 1897.

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In re GILBERT AND ST. JOHN HORTICULTURAL ASSOCIATION.

G. G. Gilbert, Q.C., and *C. A. Palmer*, Q.C., for the appellants :—

The award has been made up on an erroneous principle; inasmuch as it has totally disregarded the prospective capabilities of the land. This position is unsupported by the authorities. As pointed out by Sir Henry Keating in *Mayor, etc., of Montreal* v. *Brown* (1), the prospective capabilities of land are an important element in the calculation of its value. In Cripps on Compensation (2), it is laid down that "the present value of lands is enhanced by the probability of their more profitable use, and the assessment of compensation should be made on the potential, as well as on the actual value of lands to the owner. When lands used for agriculture are suitable for building purposes, this is necessarily an important element in their value, and a matter for which the owner should be compensated," citing *Ripley* v. *Great Northern Railway Co.* (3). See also *Morrison* v. *Mayor, etc., of Montreal* (4); *Penny* v. *Penny* (5); *Paint* v. *The Queen* (6). Under any other principle grave injustice would be committed. The appellants have held these lands for generations waiting the growth of the city, and the appreciation of the value of real estate. Circumstances are now pointing to the maturing of their expectations. To deprive them of their property at this juncture without allowing for its prospective value would be nothing short of confiscation. It is also contended that where lands possess capabilities rendering them available for more than one purpose, compensation should be assessed in respect to that purpose which gives them their highest value: *Burton* v. *The Queen* (7). The property at the top of the hill has a prospective value for building purposes, but it has a greater prospective value as a park. The situation of this land, with a lake at its base, and an unrivalled view of the sea and country made it inevitable that some day it would be devoted to the purposes of a park. The respondents cannot forestall that demand or deny its

(1) 2 App. Cas. 168, 185.
(2) P. 153.
(3) L. R. 10 Ch. 435.
(4) 3 App. Cas. 148.
(5) 37 L. J. Ch. 340.
(6) 2 Ex. C. R. 149; 18 Can. S. C. R. 718.
(7) 1 Ex. C. R. 87.

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In re GILBERT AND ST. JOHN HORTICULTURAL ASSOCIATION.

existence to our prejudice. If they wish the land for a park they must pay for it at its value for that purpose. The land in lot No. 2 should clearly be assessed upon its prospective value for sites for manufactories and operatives' homes. Its location on the line of a railroad and its proximity to the city give it an exceptional position for such purposes, and demonstrate that in the near future a demand for it would have set in. If the arbitrators have proceeded upon an erroneous principle the Judge of course will correct it, but it is submitted that by the Act 57 Vict. c. 74, under which this appeal is taken, the Judge so far from being bound to regard the award of the arbitrators, is expressly required to deal with the evidence as though it were taken before him upon the original as well as the new evidence, and to exercise his own judgment upon it. By s. 4 (14), the appeal is upon any question of law or fact, and the question of fact is to be decided upon the evidence taken before the arbitrators as in a case of original jurisdiction. The Judge also has the right to hear additional evidence, and he is to decide the question.

J. D. Hazen, Q.C., *contra*:—

The basis on which compensation should be assessed is the actual market value of the land to the owners at the time of the commencement of these proceedings, independent entirely of its value to us. The test is not the benefit which we receive, but the loss which they sustain. The authorities are practically unanimous in their acceptance of this principle as the true criterion of compensation. In *Stebbing* v. *Metropolitan Board of Works* (8), Cockburn, C.J., said: "When Parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the person acquiring it. The plaintiff, as rector, could never have parted with those churchyards, and therefore to him they were perfectly valueless. The Metropolitan Board, it is true, will be able to apply the land to purposes which will give it an increased

(8) L. R. 6 Q. B. 37.

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In re GILBERT AND ST. JOHN HORTICULTURAL ASSOCIATION.

value, but that is no loss to the rector." In *Re Harvey and Town of Parkdale* (9), this was said to be the only intelligible rule upon which valuation of property to be expropriated could be put: per Hagarty, C.J. Proudfoot, J., in the same case said: "The principle of compensation is to ascertain what the market value of the property was to the owner; if the owner could make no use of it, though the corporation might, he would only be entitled to nominal damages." Osler, J.A., also there said: "The use for which the expropriator requires it is not an element of value taken by itself, and in the absence of a similar use attaching to it as an element of value to other possible purchasers; for, if it were, the owner would be measuring his demand not by his own loss but by the taker's gains." Where farm land was taken by a railway company for the purpose of using the gravel thereon as ballast, the owner was held only entitled to compensation for the land as farm land, the gravel having no market value to the owner: *Vezina* v. *The Queen* (10). In considering the fair market value of land, it is conceded that regard must be had to its prospective capabilities, provided that they are of a real and appreciable character. They must not exist in the imagination of the owner, but must demonstratably influence and determine the present saleable value of the land. In *Paint* v. *The Queen* (11), Burbidge, J., while observing that the prospective capabilities of land are to be considered, says that the value is that which the land has at the time of expropriation. In *The Queen* v. *Brown* (12), Cockburn, C.J., in referring to the future purpose to which land may be applied and that its value in this respect is to be taken into account, means that this value must be such as would be considered at the time in the market by a purchaser. It is in this sense that the cases laying down that the potential value of land is to be considered are to be read. It is no part of the prospective value of the lands here that they are suitable for a park. One can only speculate with indifferent success as to the property being available in a remote period of time for such a purpose, and under such circumstances that its value would be in excess of that put upon it by the pre-

(9) 16 A. R. 468.
(10) 17 Can. S. C. R. 1.
(11) 2 Ex. C. R. 149.
(12) L. R. 2 Q. B. 630.

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sent arbitrators. The fact that the lands will be utilized by us as a park cannot be taken advantage of to enhance their value to the owners. Their value to them must be ascertained exclusive of their suitability to our purposes, and their market value cannot be increased by our needs. The highland part of the property has no value for agricultural purposes. Its availability for building purposes is too speculative to be seriously thought of. It would certainly not be an element in the market value of the land to-day. The land is mostly a rocky and irregular hill. It is considerably removed from any settled part of the city, and could not be connected with the water, sewerage and lighting systems of the city except at an enormous expense. Difficult feats of engineering would have to be performed in laying out streets. The initial cost therefore of opening up the property for building purposes would be so great that the work could not be undertaken by private enterprise, but by capitalists willing to venture a vast outlay of money under most hazardous circumstances. The most cheerful optimist cannot foresee this being done. Certainly the market value of the land to-day will not be influenced by so remote a contingency. Coming to lot No. 2, we are again invited to indulge in an alluring speculation as to the growth of the city spreading in that direction. This cannot be done. It must be dealt with in its present state as agricultural land. The arbitrators in making their award have acted in accordance with the principles here laid down. They have measured the value of the land by its present merchantable condition, and their finding therefore should not be disturbed. The contention that the Judge is to deal with the evidence as though it had been heard before him, and that he should disregard the decision upon it of the arbitrators was advanced in *Atlantic and North-West Railway Co.* v. *Wood* (13), under the provisions of an Act identical with that here, and the Judicial Committee of the Privy Council declined to accede to it. See also *Re Canada Southern Railway and Norvall* (14); *Corporation of Levis* v. *The Queen* (15); *Benning* v. *Atlantic and North-West*

(13) [1895] A. C. 257. (14) 41 U. C. Q. B. 195.
(15) 21 Can. S. C. R. 31.

Railway Co. (16); *Paradis* v. *The Queen* (17); *Charland* v. *The Queen* (18).

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Messrs. Henry, Thomas, and James Gilbert and their sister, Mrs. Wilson, are owners in fee as tenants in common of a tract of land consisting of some 105 acres in the immediate vicinity of a populous part of the city of St. John. It is bounded on the north by the southern border of Lily Lake, and runs south down to the Marsh Creek, and comprises some 75 acres of marsh land. The Saint John Horticultural Association has for some time past been endeavouring to secure Lily Lake and the adjoining properties for the purposes of a public park. Many of these—including all of the lake—have already been secured, some by purchase and a few by means of arbitration under the expropriation powers given the association by 57 Vict. c. 74. Being desirous of securing as a part of the park ground some fifty two acres of Messrs. Gilbert's property, and having failed in agreeing upon a price, the association took proceedings to expropriate. They divided the tract which they desired to secure into two lots. Lot No. 1 comprises about 33 acres—it borders on the lake and consists chiefly of rocky ground affording some variety in scenery and a fine prospect of the adjoining country. Lot No. 2 comprises nineteen acres and consists of marsh land under cultivation, which yields about one and a half tons of hay to the acre. Mr. Geo. A. Schofield, manager of the Bank of New Brunswick, was chosen as arbitrator by the association. Mr. William Murdock, C.E., was selected by Messrs. Gilbert, and Mr. C. P. Baker was agreed upon as the third arbitrator. More than a year elapsed from the date of the first meeting of the arbitrators until they made their award. They examined in all 37 witnesses; they inspected the lands in question; they were attended by counsel for both parties, who in a somewhat elaborate argument pointed out to them the principles upon which the compensation should be awarded, and the considerations by which they should be governed in determining the amount of it. I mention this

(16) 20 Can. S. C. R. 177. (17) 1 Ex. C. R. 199, 229.
(18) 1 Ex. C. R. 291, 298.

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simply to show that the inquiry was in no sense a slipshod one, but one conducted with a due regard to the large and important interests involved. Messrs. Baker and Schofield—two of the arbitrators—made an award on the 8th day of March last, by which they assessed as compensation for lot No. 1 the sum of $3,582, and for lot No. 2 the sum of $2,500, in addition to certain rights and privileges reserved to Messrs. Gilbert in pursuance of the power given them by 59 Vict. c. 84, s. 3.

By sub-section 14 of section 4 of 57 Vict. c. 74, it is enacted as follows: "Any party to the arbitration may within one month after receiving a written notice from one of the arbitrators of the making of the award appeal therefrom upon any question of law or fact to a Judge of the Supreme Court, and upon the hearing of the appeal the Judge shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators as in a case of original jurisdiction. The Judge, upon such appeal, shall have the right to hear additional evidence and decide the question upon the original as well as the new evidence."

Acting under this section the Messrs. Gilbert, three of the owners of this property, appealed to me on the ground that the amount awarded was altogether too small and should be materially increased. Mrs. Wilson, the remaining owner, does not join in this appeal, but has applied to the Court with a view of setting the award aside on grounds which do not arise here and to which it is therefore unnecessary to make further reference.

At the hearing before me, Mr. Murdock, the dissenting arbitrator, was produced as a witness by the Messrs. Gilbert, and after some preliminary questions of no importance he was asked this one:

"Did you call their (the other arbitrators') attention to the price paid by the association to Margaret A. Hansard for a piece of land west of Lily Lake and between it and property of Judge Barker?" An objection was made to this evidence on the ground that an arbitrator could not be interrogated as to the manner in which his award has been made up. I then ruled that I would allow evidence of the arbitrator either to show that the award was the result of a con-

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sideration of matters not included in the reference and therefore an excess of jurisdiction, or that it was made up and based upon a principle altogether erroneous in point of law. I rejected the evidence as not being admissible on either ground. In thus ruling I think I went to the extreme of the rule laid down by Giffard, V.-C., in *In re Dare Valley Railway Co.* (19), or that stated by the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of Works* (20). The price paid by the association to Mrs. Hansard for her lot was merely a fact to show the value put by the association upon land near that sought to be acquired, and as such, entitled to such weight as the arbitrators might choose to give it. I mention this so that if in any ulterior proceeding the correctness of my ruling may be called in question it will be known precisely what it was. Besides proving on cross-examination of Murdock that the Gilberts and Mrs. Wilson were owners of this property as tenants in common, each with a one-fourth interest, he was not further questioned.

This appeal therefore comes before me upon the same evidence as was before the arbitrators, and on that evidence I am asked to review their decision and increase the amount of compensation by many thousands of dollars. It was rather pressed upon me that as the section which I have just quoted, empowered me to decide the appeal "as in a case of original jurisdiction," I had rather a free hand and could act without being in any way fettered by the decision of the arbitrators. If additional evidence of value had been given and I had felt at liberty on that evidence or on the case as it stands to increase the amount of the compensation, I might have felt free to remodel the award by directing to whom and in what proportions the sum should be paid, and whether the added compensation should be in whole or in part in the nature of easements reserved for the benefit of the remainder of Messrs. Gilbert's property. As the matter stands, I am confined to the evidence before the arbitrators, and I do not think I am at liberty, whatever my own ideas of the value of the property may be, altogether to disregard their decision. Except as to the provision for taking additional evidence, the section under which this appeal lies, is practically the same as that

(19) L. R. 6 Eq. 429.

(20) L. R. 5 H. L. 419.

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under consideration in *Atlantic and North-West Railway Co.* v. *Wood* (21). That was an appeal in the case of an award for $16,308 made under the Canadian Railway Act. The Superior Court of Quebec very considerably reduced this sum. It was however restored by the Court of Queen's Bench, and on an appeal from that judgment to the Judicial Committee of the Privy Council it was further sustained. In delivering judgment Lord Shand says:

"The Court dealt with the award as one which it was their province to review on the facts as appearing in the evidence adduced before the arbitrators, and in so doing in the opinion of their Lordships they acted rightly and in accordance with the statute. It would be a strained and unreasonable reading of the words of the statute 'as in a case of original jurisdiction' to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the statute would really make the Court the arbitrators, and the sole arbitrators, in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the Legislature, and that what was intended by the statute was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law. Previously to this enactment the Court had power only to approve of or set aside the award of arbitrators. This might often cause much expense and inconvenience in renewed proceedings before the arbitrators, and the purpose of the Legislature seems to have been to enable the Court to avoid this, by giving power to make, or rather to reform the award by correcting any erroneous view which the arbitrators might have taken of the evidence; that, in short, they should review the judgment of the arbitrators as they would that of a subordinate Court in a case of original jurisdiction, where

(21) [1895] A. C. 257.

review is provided for. And it is in this view worthy of notice that the enacting words of s.-s. 2 of s. 161 are followed by this provision of s.-s. 3. 'Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from a decision of an inferior Court to the said Court.'"

We have in s.-s. 15 of s. 4 of 57 Vict. c. 74, a provision similar to the one mentioned at the end of the passage I have just quoted; so that the case I have just mentioned lays down the rule by which I must be governed in determining this appeal. I am not entirely to disregard the judgment of the arbitrators and the reasoning in support of it, but I am to examine into the justice of the award on its merits, on the facts as well as the law. I am to review the judgment of the arbitrators as a superior Court would that of a subordinate Court in a case of original jurisdiction; or, applying the analogy suggested by our own statute, as the decision of a Supreme Court Judge would be on appeal. In the same case Mr. Justice Hall, of the Court of Queen's Bench of Quebec, in a passage from his judgment, quoted with approval by Lord Shand, says (p. 261): "Is that estimate which the present arbitrators have made judicious and suitable? In the face of the evidence adduced, it cannot be said to be unreasonable nor manifestly incorrect, and we do not feel warranted, therefore, by substituting our discretion for theirs, to adopt an estimate of damage which might be open to equal criticism, and even less defensible according to the evidence by which both they and we are bound."

In *In re Canada Southern Railway Co. and Norvall* (22), where a precisely similar statute was under discussion, Harrison, C.J., held that the Judge was not made a substitute for the arbitrators, nor was he permitted to reverse their finding as to damages on a mere question of the weight of evidence; but where it appeared from the amount of damages, as compared with the evidence adduced before the arbitrators, that they must have acted under the influence of undue motives or some gross error or misconception, the award would be corrected. The following cases may also be

(22) 41 U. C. Q. B. 195.

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referred to as applying the same principle to statutes of the same description: *Paradis* v. *The Queen* (23); *Charland* v. *The Queen* (24); *Benning* v. *Atlantic and North-West Railway Co.* (25); *Corporation of Levis* v. *The Queen* (26); *Reg.* v. *Murphy* (27).

There is no point of law arising out of this evidence, neither is there anything to show that in assessing the compensation the arbitrators acted on any erroneous principle, unless that is a necessary inference from the small amount awarded. The appeal is one solely of fact, and it was so argued. Messrs. Gilbert complain that the compensation is altogether unwarranted by the evidence—so small, in fact, that it is only to be accounted for on the theory that the arbitrators entirely misconceived the principle upon which they should have acted. In assessing damages in cases like this the owner of the land is, I think, entitled to full compensation for the loss he is sustaining in being compelled to part with his land; and in determining the amount the capabilities of the land—present and prospective—for all useful or valuable purposes to the owner must be considered. It is obvious that in fixing a value, which rests so much upon mere conjecture and so little upon fixed data as a basis of calculation, there will be great diversity of opinion. And it is for this reason that Courts have always hesitated in interfering with the decision of the tribunal created for the express purpose of determining the question in dispute, where that tribunal has acted honestly and with a correct appreciation of the business in hand and its duty in regard to it.

Mr. James Gilbert and Mr. Thomas Gilbert both gave evidence before the arbitrators. Mr. James Gilbert values lot No. 1 at $42,484, and lot No. 2 at $67,127, or $109,611 for the two. Mr. Thomas Gilbert values lot No. 1 at $68,400, and lot No. 2 at $39,500, or $107,900 for the two. These valuations are therefore in round numbers eighteen times larger than those fixed by the arbitrators. Stating the values on an average basis, James Gilbert's value of No. 1 would be say (33 acres at $42,484), $1,287 an acre, while that of the arbitrators is only about $108; and No. 2, comprising 19

(23) 1 Ex. C. R. 229.
(24) *Ib.* 238.
(25) Can. 20 S. C. R. 179.
(26) Can. 21 S. C. R. 31.
(27) Cassels Dig. 314.

acres, would, at Mr. Gilbert's valuation of $67,127, be at the rate of say $3,533 to the acre, while that of the arbitrators would only be about $131. Unless, therefore, Mr. Gilbert's figures are altogether wrong, so great a disparity between them and those of the arbitrators forces me to conclude that the arbitrators must have either altogether failed in appreciating the evidence, or that their award is the result of the application of some very erroneous principle, or else a very erroneous application of some right one. Mr. Gilbert has given us his basis of computation, and I shall have occasion later on to discuss his figures, with a view of ascertaining whether the other evidence in the case, aided by the arbitrators' own knowledge of the land, warranted them in rejecting Mr. Gilbert's figures.

So far as I have been able to analyze the evidence—and I have gone through it all with some care—there is no witness who speaks of value whose estimate at all approaches that of Mr. Gilbert. The two witnesses who put the highest value on the marsh land are Donovan and McIntosh. They both own land of a similar character in the vicinity, and should have a fairly good idea of its value. Donovan puts it at $400 an acre, and McIntosh at $500. So far as the remaining witnesses are concerned, I think their valuation is less than that of the arbitrators. Charles A. Everitt, a man with an intimate knowledge of this whole property for very many years, and with some experience in valuing property in the immediate vicinity, from having been one of the commissioners in the partition proceedings of the Hazen estate, puts $100 an acre as a fair average value for both lots. Patrick Byrne thinks that $100 an acre for the marsh rather low. He has been cutting the hay off it for some years past, and says that the whole 75 acres of marsh cut only about 135 tons of hay. George Knox, who is the only man who has ever lived on No. 1, and has lived there for the past 19 years, does not speak of the marsh land, but as to the other he says that if he had to pay the taxes on it he would not take it as a gift. W. F. Bunting, who has been connected with the city assessors for many years, says that the marsh land is always assessed at $100 an acre; that the assessed value of lot No. 1 is $2,200, and that the total assessed value of the

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whole Gilbert property—the whole 105 acres—including the Davenport house at $4,000, is either $13,000 or $17,000, I cannot tell precisely which from the evidence; but the larger sum is less than one-sixth of the value put by Mr. Gilbert on these 52 acres without any houses at all. Joseph Allison speaks of the prices paid by the association for other properties in the vicinity, and gives $75 an acre for both lots as a fair value. William Rafferty, a farmer, who has lived on the marsh for 30 years, and apparently is as well able to judge of the value as Donovan or McIntosh, puts the marsh land at $100 an acre. David Connell, who was once a lessee of all this land from Gilbert, and cut hay off it, gives $100 an acre as his opinion of the value. David Peacock, a farmer on the Sandy Point road, who has been selling milk in the city for a great many years back, and knows all about this marsh land, also puts it down at $100 an acre, while he values No. 1 lot at only $15 an acre. These, I think, are all the witnesses who expressed opinions as to the values. Two of them estimated in excess of the arbitrators, one of them (Byrne) about the same, and six of them under their estimate. Besides this the assessed value is less. So far as the judgment of these witnesses is any guide, the arbitrators' action is fully sustained. If the valuation be fixed on a basis of income the award is about right. With the exception of the Knox house there are no buildings of any kind on these lands sought to be expropriated. Knox, who according to his own evidence leased the lot he occupies under what proved to be an entire misapprehension of the right to use the lake for boating and other purposes, has been paying $100 a year for the last 19 years, and his lease expires a year or two hence. In addition to this Mrs. Whetsel has for some years past been paying $100 a year for a right of way in order to haul her ice to a storehouse. This agreement terminates two years hence. Then the whole property—I mean the whole 105 acres—less the Knox lot and some other lots on the lane, are under lease to Father Davenport for a yearly rental of $600. He sells the right to cut the hay to Byrne for $300 a year, leaving the rent of the house at $300. The total income of these two lots Nos. 1 and 2, the Davenport house and some 50 or 60 acres of marsh in addition, is only $800 a year. If you deduct the rent of the Davenport house, $300, and ap-

portion the remaining $500 equally between the 53 acres taken and the 50 or 60 not taken, you have $250 as the annual rental to be credited these 52 acres, which represents at 4 per cent. a capital of $6,250, or about the amount of the award. It must be remembered that this rental has not increased in many years, and that there seems every probability that Knox will not renew his lease.

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Now let us test the value by comparison with prices paid for similar properties in the vicinity. The only evidence on this point which seems to me to be of very much value is that which relates to the Hazen and Fitzgerald land purchased by the association, and perhaps the lots formerly owned by the Baptist Mission Board and Jack, where the association's garden now is. These last two lots lie side by side, and happen to contain a soil especially well adapted for gardening purposes. The Baptist Board lot, containing about two acres, was purchased for $450, and the other, containing about one and a quarter acres, was expropriated for $600. This is at the rate of $480 an acre for one lot and $225 for the other—a difference of over one hundred per cent.—showing the uncertainty of this test, even in lots apparently alike in value. These lots have a special value, as I have mentioned, and are in no respect similar in character to the largest part of lot No. 1 under expropriation. The Hazen and Fitzgerald properties purchased by the association comprise an area of some 84 acres, including in that the whole of Lily Lake, which is about 27 acres in extent, and which, from its natural beauty, is the chief attraction of the property and gives to it by far the most of its value. The total amount paid for these lots is $6,200, or in round numbers, $74 an acre. The total revenue derivable from them arises from the sale of ice and a right of way to haul it. This amounted at the time of sale to $260 a year, which, if capitalized at four per cent., would amount to $6,500, or $300 more than the price paid. These lots were not bought from the same person, neither do they seem to have been held at the same value per acre. The Fitzgerald lot, with 54.75 acres, including 18.25 acres of water, was purchased for $1,600, or about $29 per acre. The Sarah E. Hazen lots, one of which comprises 10.25 acres, including 5¼ acres of

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water, and the other comprises 3.75 acres, and is situate on the south side of Mount Pleasant avenue, were purchased for $1,700, or at the rate of, say, $121 per acre. The R. M. Hazen lot has 7.8 acres, of which four are water. It was purchased for $1,200, or at the rate of about $171 an acre. The Hansard lot contains 4.08 acres, and is put down on the plan at $1,200, or at the rate of about $300 an acre; while the Prissick lot, with its 4.05 acres, is only valued at $500, or about $125 to the acre. While I have taken the separate prices paid for the Hazen lots as entered on the plan, it is only right to say that the counsel stated on the argument—and Mr. Allison, who made the purchase, corroborates the statement in his evidence—that these lots were all purchased at a lump sum of $4,600, and that the values on the plans are those arranged among the heirs for the purpose of division. Taking the total acreage of these lots at 29, the price per acre would be about $158. Putting the value per acre of lot No. 1, as assessed by the arbitrators, at $108, that is in excess of the price of the Fitzgerald lot, and in excess of the average price of the whole. It is, however, slightly under the price of the Sarah Hazen lots, and considerably under the price of the others as well as the average price paid for the Hazen lots. The prices paid for these lots differ materially for no very apparent reason. It will be seen that the arbitrators assess a value higher than the lowest of these lots, and higher than the average of the whole, but not so high as the highest, but nevertheless at a figure sustained by the opinions of other witnesses. I might possibly have come to a different conclusion and fixed a somewhat higher valuation, but how can I say that the arbitrators were wrong? It would be as difficult to demonstrate that my valuation was right as it is to prove that of the arbitrators to be wrong.

If Mr. Gilbert's valuations are at all accurate or based upon anything like a correct principle, they are so far in excess of those I have been considering that it is a mere waste of time to say more as to the tests usually resorted to for the determination of questions of this kind. I shall therefore return to Mr. Gilbert's figures, and endeavour to see what justification the arbitrators can have had for disregarding them so entirely. Before doing so, I may say by way of explanation that Mr. Gilbert says this whole property has at

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present no marketable value; that for some 70 years it has been held for purposes of speculation; that its natural beauties give it a special value for building purposes; that even the marsh land, however useful it may be for mere agricultural purposes, has its chief value in the means it affords for that generous expansion of the city of St. John, which in Mr. Gilbert's view is sure to come to pass in the next decade or two. To prove that this view was no mere piece of optimism, with no substantial foundation for its support, Counsel, on the argument of this appeal, pointed out to me that St. John had outlived and overcome all the disastrous effects of the fire of 1877—that the lavish expenditures being made by the civic authorities for harbour improvements must result in a largely increased trade and business in the city, with a corresponding increase in its population—and that these influences, added to the fiscal policy of the general government and the steadily growing trade—home as well as foreign—of the country, all combined to create conditions so manifestly favourable for the rapid growth of this city in wealth, area and population, that Mr. Gilbert's expectation of seeing within the next few years the hills about Lily Lake dotted with villas and suburban residences, and the marsh land covered with factories and operatives' cottages, is no mere fancy. To test the capacity of these lands for these purposes and furnish reliable data for an exact calculation of their value, Mr. Gilbert, after these proceedings had been commenced, had all that part of lot No. 1, at all suitable for building purposes, laid off in a plan into 56 city lots 50 x 100, with suitable streets. He then makes up the value of lot No. 1 as follows:—

56 building lots @ 25 cents a foot, or $12.50 per year—in all $700 rent—capitalized.....	$17,500
Remaining 20 acres @ $600 each	12,000
Knox lease, $100 a year; Mrs. Whetsel, for right of way, $100 a year, and the right to have a sluice, which Mrs. Whetsel is willing to pay for at the rate of $200 a year—$400 in all.....	10,000
In all	$39,500

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Lot No. 2, Mr. Gilbert values as follows:—

For farming purposes, it is worth per acre.....	$ 600
" athletic grounds, it is worth per acre	2,500
" building lots, it is worth per acre	7,500
	$10,600

This divided by 3 gives $3,533.33 as the average value per acre, and makes the lot of 19 acres worth $67,127.

That the prospective capabilities of land should be taken into account as an element in determining its value in cases like the present is a principle recognized by authority: *Mayor of Montreal* v. *Brown* (28); *Paint* v. *The Queen* (29); *Kearney* v. *The Queen* (30). It is, however, obvious that in reference to any such question there can be no rule for its determination, and that a wide difference of opinion is inevitable. Perhaps no case can be put where that difference of opinion is likely to be greater than in a case like this, where the prospective value depends upon the extension of a city in a given direction, where the reasons for expecting it are founded on a basis so uncertain as that suggested by Mr. Gilbert. It cannot be expected that some official arbitrators discharging judicial functions, could ignore the other side of the question, and if their forecast of St. John's immediate future is not so cheerful a one as Mr. Gilbert's they are not without good grounds for their opinion. A similar question arose in the case of *Kearney* v. *The Queen*, in reference to the prospective value of some lots fronting on Halifax harbour in the vicinity of Dartmouth, and which the owner, like Mr. Gilbert, had laid off in a plan into building lots while the proceedings for expropriation were pending. There was evidence to show there was a remote probability that the land would become available for building purposes upon the extension of Dartmouth. It was, however, held that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation. I have already spoken of the other values placed upon the property by Mr. Gilbert.

(28) 2 App. Cas. 168. (29) 2 Ex. C. R. 149. (30) 2 Ex. C. R. 21.

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I have gone through the great mass of evidence given in this case, and viewing my duty as a Judge sitting on appeal from the award, as that duty is laid down by the Privy Council in the case already cited, I am unable to say the arbitrators have taken an erroneous view of the evidence, or come to a conclusion either unreasonable or incorrect. It is not my duty to demonstrate that the arbitrators are right and failing that, to correct their award, but it is my duty to ascertain if there is evidence reasonably capable of supporting their conclusion. In view of the evidence taken as a whole, and the reasons which may be given in support of the arbitrators' judgment, I think it is justified by the evidence and therefore the only ground for thinking it to be the result of applying some erroneous principle fails. If this were an appeal from the decision of a Judge vested with the power of determining the facts, I think upon principle and authority and where the point for decision is one almost exclusively of opinion and judgment, I should be bound not to interfere. To do so would simply be substituting my judgment for that of the arbitrators on a question which they were to determine, and upon which their opinion is quite as likely to be right as mine.

I was asked to amend the award by altering the wording so as to remove an alleged ambiguity in the language in reference to certain privileges secured or reserved to Messrs. Gilbert. I have concluded not to interfere with the award at all. If the language as to these privileges is considered doubtful, and does not clearly convey what all parties agree was the arbitrators' intention, the parties can by mutual agreement remove all doubts. I was also asked by the counsel for the association to amend the award by directing the amount awarded to be distributed among the owners, that is one-quarter to each. If the association had any objection to the award which could be corrected on appeal, they should have appealed themselves. As against them I must take it that they are satisfied with the award. If I had increased the award, and felt that the amount should be distributed among the owners according to their interests, possibly the whole question might have been open; but, as it is, the appeal must be dismissed. Appeal dismissed.

1897.

August 17.

WORDEN ET AL. v. RAWLINS ET. AL.

Practice—Costs—Set-off—Solicitor's lien.

Plaintiffs recovered a judgment in debt in the Supreme Court against R. Two days previously R. executed a bill of sale of all his property to B., and the plaintiffs brought suit to have the bill of sale set aside as a fraudulent preference. A settlement was made by B. R. being in insolvent circumstances, and leaving the Province after the commencement of the suit, no further step after the filing of the bill was taken by the plaintiffs against him. An application by R.'s solicitor to dismiss the suit for want of prosecution was granted with costs. The plaintiffs now applied to set off their judgment against such costs.

Held, that the lien of R.'s solicitor for his costs was paramount to the equities between the parties, but under the circumstances the application should be refused without costs.

The plaintiffs recovered a judgment for $69.20 in the Supreme Court in an action of debt against the defendant Adolphus L. Rawlins, on September 7th, 1895. Two days previously the defendant Daniel E. Berryman filed a bill of sale to himself from Rawlins of all Rawlins' property and effects, bearing date August 29th, 1895. The plaintiffs thereupon brought a suit in equity against Rawlins and Berryman to have the bill of sale set aside as fraudulent and void, and as an unjust preference within the meaning of the Act 58 Vict. c. 6, intituled "An Act respecting Assignments and Preferences by Insolvent Persons." The suit was settled by the defendant Berryman. Some time after the commencement of the suit Rawlins departed from the Province, being at the time in insolvent circumstances, and having no property in the Province. No further proceedings after the filing of the bill were taken in the suit against him. His solicitor applied to have the suit dismissed with costs, which was granted. The plaintiffs now applied to set off their judgment against such costs.

Argument was heard July 9, 1897.

W. H. Trueman, for the application:—

The rule under the old decisions is that one judgment will be set off against another without regard to the lien of the solicitor if both judgments arose in respect of the same matter:

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Morgan and Davey on Costs (1); *Taylor* v. *Popham* (2); *Bawtree* v. *Watson* (3); *Harmer* v. *Harris* (4); *Shine* v. *Gough* (5); *Gwynn* v. *Krous* (6); Waterman on Set-off (7). Here the judgment at law was defeated by the bill of sale, and the suit in equity became necessary that the plaintiffs might recover the fruits of their judgment. The two proceedings may therefore be accurately described as having a direct connection and as growing out of the same matter. If the application is not within the old rule, it is supported by the tendency and effect of later decisions and modern legislation, and with which the Court should bring itself into agreement. The strictness of the old rule that the lien of the solicitor is paramount to a right of set-off between the parties is now relaxed in favour of the equities between the parties, and the matter is vested in the discretion of the Court, having regard to equitable considerations. Jessel, M.R., protested against the old rule in *Pringle* v. *Gloag* (8). By order lxv. r. 14 of the English Supreme Court Rules, 1883, a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. See Wilson's Judicature Acts (9). In a note to the rule, the learned author observes that the rule applies to a set-off in distinct actions, and that the effect of the rule is to leave the matter in the discretion of the Court. In the case of *Flegg* v. *Prentis* (10), similar proceedings occurred to those here, and the set-off was allowed. Previous to the Judicature Act it was held that the judgment of one Court could not be set off against the judgment of another, though there were decisions the other way. See *Gurish* v. *Donovan* (11); *Vaughan* v. *Davies* (12); *Hall* v. *Ody* (13); *Haynes* v. *Gillen* (14). The objection is not tenable here as the proceedings are in the one Court. In *Flegg* v. *Prentis*, *supra*, a judgment in the Queen's Bench Division of the Supreme

(1) P. 397.
(2) 15 Ves. 72.
(3) 2 Keen, 713.
(4) 1 Russ. 155.
(5) 2 Ball & B. 33.
(6) L. R. 7 Ir. Eq. 274.
(7) S. 391.
(8) 10 Ch. D. 676.
(9) Ed. [1888] 484.
(10) [1892] 2 Ch. 428.
(11) 2 Atk. 166.
(12) 2 H. Bl. 440.
(13) 2 B. & P. 28.
(14) 21 Gr. 15.

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Court was ordered to be set off against a judgment on the Chancery side of the Court.

J. R. Armstrong, Q.C., *contra*:—

Any equities between the parties cannot be allowed to prevail against the solicitor's lien: *Bell* v. *Wright* (15); *In re Bank of Hindustan* (16). A judgment in one Court cannot be set off against a judgment in another: *Wenham* v. *Fowle* (17).

1897. August 17. BARKER, J.:—

On the 7th September, 1895, the plaintiffs recovered a judgment at law against the defendant Rawlins for $69.20. This present suit was brought to set aside as fraudulent a certain bill of sale made by the defendant Rawlins to the defendant Berryman. It seems that the plaintiffs settled the suit with Berryman so far as he was interested, but as the defendant Rawlins was not a party to this settlement he insisted upon the suit being prosecuted and eventually obtained an order dismissing the bill against him for want of prosecution with costs against the plaintiffs on the 11th of June last. Rawlins appears to have left the country and to be insolvent. This application was accordingly made for an order that the amount of the judgment should be set off against the costs. Two objections are made to this: (1) that it is contrary to practice to set off a judgment in one Court against a judgment obtained in another Court; and (2) that Rawlins' solicitor has a lien for his costs which would be destroyed in case the set-off is allowed. As to the first point, I see no difficulty in a case where there are no other objections. I have looked at the cases cited at the argument, and many others, and it seems difficult to ascertain precisely the principle upon which some of them have been decided. On a review of these cases I feel compelled to refuse this application, though I should very willingly come to a different conclusion.

In *Flegg* v. *Prentis* (18), a case very much like this, Stirling, J., allowed the set-off. This seems the strongest case in the plaintiffs' favour. It is, however, to be observed

(15) 24 Can. S. C. R. 656.
(16) L. R. 3 Ch. 125.
(17) 2 Dowl. 444.
(18) [1894] 2 Ch. 428.

that the real question in that case had nothing to do with the right of set-off. That point was not even mentioned, much less argued. The case can therefore scarcely be considered as much of an authority on the point. *Cattell* v. *Simons* (19) was a case of setting off mutual claims for costs. So far as it determines that the lien of the solicitor for costs is not to interfere with the rights of the parties, it is, I think, at variance with *Ex parte Cleland* (20) and other cases to which I shall hereafter refer. *Harmer* v. *Harris* (21) was an administration suit, and is I think clearly distinguishable from this. *Haynes* v. *Gillen* (22) was decided on the authority of *Watson* v. *Allcock* (23). They were decided upon a different principle from any involved in this case.

It must be remembered that this is an application to the favour of the Court. The plaintiffs have no legal right to this set-off. Neither do the parties stand in the same position as they would if pleading a set-off under the statute. In *Ex parte Cleland* (24), already referred to and which was followed by the Supreme Court of Canada in *Bell* v. *Wright* (25), the attorney's lien is fully recognized. The principle upon which Lord Cairns there seems to rest such applications, is that the costs which in this case are payable to Rawlins and recoverable in his name, in reality belong to his solicitor, for whom he is only a trustee. There is therefore in the view of a Court of Equity not only an absence of that mutuality which is the basis of all set-off, but there is at all events a general rule that this Court will not deprive the solicitor of his lien by paying the costs by means of a set-off. This case came under review in *Mercer* v. *Graves* (26), where the distinction between an application like this and pleading a set-off is pointed out. Though the Court of Queen's Bench has an explanation of Lord Cairns' language as to the party being a trustee for his solicitor as to costs payable to him by the opposite party, it adheres in all other respects to *Ex parte Cleland* (27). Lord Blackburn says: "When execution is about

(19) 6 Beav. 304.
(20) L. R. 2 Ch. 808.
(21) 1 Russ. 155.
(22) 21 Gr. 20.
(23) 4 De G. M. & G. 242.
(24) L. R. 2 Ch. 808.
(25) 24 Can. S. C. R. 656.
(26) L. R. 7 Q. B. 499.
(27) L. R. 2 Ch. 808.

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to be executed and the interference of the Courts is asked to allow the defendant to set-off a cross judgment, the Courts say: 'We will not interfere to prevent execution so as to take the judgment out of the hands of the attorney, simply because there are cross debts, unless the attorney's costs be first satisfied.' But when the defendant has a right to plead a set-off by statute, I am aware of nothing which can enable the attorney to say this shall not be done." At another part of his judgment Lord Blackburn says: "All that the expression of Cairns, L.J., amounts to is, that the Court of Chancery would not, any more than a Court of law, interfere to allow a debt to be set-off against an execution, except on the terms of the attorney's lien being discharged." Lush, J., in the same case, speaking of the judgment of Cairns, L.J., says: "That is essentially the same thing as if a litigant had applied to this Court to allow him, in the exercise of an equitable jurisdiction, to set-off one judgment against the other, and before granting the rule, we should say, 'You, who ask for equity, must first do equity by paying the attorney.'" Quain, J., says *Ex parte Cleland* really decides nothing more than this, that a Court of Equity will do the same as a Court of Law, that is, "refuse to allow a set-off of one judgment against another, unless the attorney's lien is satisfied." Though the Court of Queen's Bench in *Mercer* v. *Graves* did not adopt Lord Cairns' opinion that as to costs such as these the client and solicitor stand in the relation of trustee and *cestui que trust*, the Judges who took part in that case do distinctly affirm the principle that as a general rule at all events, neither Courts of Law nor Courts of Equity will order one judgment to be set off against another, or a debt to be set off against a judgment, without the attorney's lien being first satisfied. In *Harris* v. *Greene* (28), the attorney's lien was recognized as a prior right (see page 467). In *Pringle* v. *Gloag* (29), decided in 1879 and subsequent to *Mercer* v. *Graves*, Jessel, M.R., allowed a set-off, but in a case altogether different from this, for reasons which he gives at length. He says: "I see that even at common law the Judges have allowed a debt or damages in one action to be set off

(28) 25 N. B. 451. (29) 10 Ch. D. 676.

against costs in another action. In such a case there might possibly be some difficulty in allowing a set-off, but here it is merely a question of items of one account." See also *Simpson* v. *Lamb* (30). On the authority of these cases I think I must refuse this order; but, under the circumstances, without costs.

KENNEDY v. NEALIS ET AL.

1897.
August 17.

Mortgage of vessel—Sale by mortgagee—Invalid exercise of power of sale—Mortgagee in possession—Redemption suit—Valuation of vessel—Balance due mortgagor—Costs.

The mortgagee of a vessel took possession of her and transferred her to a clerk in his employ, who immediately re-transferred her to the mortgagee. The consideration expressed in both instances was $2,000. The mortgagee retained the management and possession of the vessel until her loss, without making an effort to sell her, though she was not paying expenses, and was depreciating in value from age, and the market demand for vessels of her class was declining. In a suit to redeem a mortgage on land given as collateral security with the mortgage on the vessel:

Held, that there had not been a valid exercise of the power of sale vested in the mortgagee, and that he was chargeable with the value of the vessel at the time he took possession.

In the above suit a balance was found due the mortgagor by the mortgagee.

Held, that the mortgagee should pay the costs of the suit.

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

Argument was heard May 7, 1897.

R. Le B. Tweedie, for the plaintiff:—

The vessel ought to have been sold by Nealis at the time he took possession, and the plaintiff ought to be credited with the sum it can be shown she then would have brought; that is, Nealis will be treated as a purchaser at a fair market value: *Marriott* v. *Anchor Reversionary Co.* (1). The duty of a mortgagee in possession of a ship to sell is imperative, except where it would be improvident to do so; and consequently if he retains the vessel in a declining market he will

(30) 3 Jur. N. S. 412. (1) 7 Jur. N. S. 155; 713.

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be charged with the price she would have realized under more favourable circumstances: *Wolff* v. *Vanderzee* (2); *National Bank of Australia* v. *United Hand-in-Hand Co.* (3). The sale by Nealis to his clerk was illegal, and cannot be supported: *Brouard* v. *Dumaresque* (4); *National Bank of Australia* v. *United Hand-in-Hand Co., supra.* The plaintiff cannot be charged with interest except at 6 per cent. after the time the vessel ought to have been sold. To do so would be to allow Nealis to repudiate the sale he made to himself, and this he cannot do.

W. B. Wallace, for the defendant George Smith:—

While Nealis will not be allowed to set up that the colourable sale by himself was void, he will be charged with the price which by care and diligence could have been obtained for the vessel at the time he took possession, and all right to interest after that time at a higher rate than 6 per cent. ceases: *Marriott* v. *Anchor Reversionary Co.* (5).

C. A. Palmer, Q.C., for the defendant Hugh Nealis:—

The bill treats Nealis as a mortgagee in possession, and prays for an account against him as such. The sale by Nealis to himself was abortive: *Henderson* v. *Astwood* (6). Being a mortgagee in possession, but without any profit or income, he is entitled to interest according to the mortgage.

1897. August 17. BARKER, J.:—

In the year 1884 the plaintiff, the defendant Smith and one James Brown built a schooner of some 97 tons called the "Grey Parrot," at a cost of between $5,000 and $6,000. On the 18th November, 1884, they mortgaged the vessel to the defendant Nealis to secure the sum of $1,500 with interest at the rate of 12 per cent. per annum, payable on the 18th November, 1886. This mortgage contained a covenant on the part of the mortgagors that if the principal was not paid at maturity, they would during such time as the same or any part thereof remained unpaid, pay to the mortgagee interest on the whole or such part thereof as might for the time remain unpaid at the rate of 12 per cent. per annum, by equal

(2) W. N. (1869) 66.
(3) 4 App. Cas. 391.
(4) 3 Moo. P. C. 457.
(5) 30 L. J. Ch. 571.
(6) [1894] A. C. 150.

half-yearly payments, on the 18th of May and November in each year. The schooner, while on a voyage from New York to Halifax, got into trouble somewhere near Yarmouth, and in order to make the necessary repairs the owners borrowed another $1,000 from Nealis. To secure these two amounts and $50 interest then overdue, the plaintiff and Smith each gave a mortgage on some property owned by them in St. Martins for $2,550, payable November 7th, 1886, with interest at the rate of 12 per cent. These mortgages were dated in February, 1885. Later on Nealis sold, or professed to sell, the schooner under his mortgage, but this seems to have been rather to get Brown's name off the register, as he had not paid his share and had left the country. The vessel was transferred to the plaintiff and Smith, who became the registered owners—the plaintiff of three-quarters and Smith of one-quarter. On the 1st February, 1887, the plaintiff and Smith executed a mortgage on the vessel for $2,000 to Nealis, payable with interest at the rate of 12 per cent. a year and containing a covenant similar to that in the first mortgage for the payment of the 12 per cent. interest, both before and after maturity. On the 21st May, 1888, Nealis took possession of the vessel under his mortgage, and on that day executed a transfer of her to one William Magee, clerk in his employ, who, on the same day, re-transferred her to Nealis, the express consideration in both cases, I believe, being $2,000. In November, 1888, Nealis sold sixteen shares to Hugh O'Connor for $600, of which $300 was paid in cash. The schooner was lost in June, 1889, and Nealis from the time he took possession in May, 1888, up to the date of her loss, thirteen months later, sailed the vessel and had the exclusive management, use and control of her. It seems that the mortgage given by Smith has been cancelled, and the plaintiff has filed this bill to redeem his mortgage, which has been assigned by Nealis to the defendant Parker. It seems that payments were made from time to time on account of the mortgage, and that Smith on the 17th May, 1890, paid Nealis on account $1,000. When the pleadings were read it occurred to me that the matter in dispute was merely one of account, and I said that I would send it to a referee in the usual way. The parties, however, wished to avoid that expense, and said the principal question on which

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there would be much evidence was the value of the vessel with which Nealis was to be charged. I then stated that if all other matters were agreed upon I would take evidence on that point and decide it myself. Accordingly, the counsel for the parties signed and filed in Court the following agreement:—

"Agreement entered into this 7th day of May A.D. 1897, between the counsel for all parties in the suit of Patrick Kennedy and Hugh Nealis *et al.* It is admitted that there was due and owing to Hugh Nealis on the 7th day of August A.D. 1886, the sum of $2,550. That the only amount he has received from the defendants, or either of them, since that date is the payment by George Smith of $1,000. That there is to be no other item or items in the account, except either the value of the vessel at the time His Honour may determine, or the amount of insurance collected and any moneys received from O'Connor on account of purchase, or from insurance on O'Connor's interest. The question of interest to be left to the Court to be settled on the contracts of the parties and the law."

When the vessel was lost Nealis had an insurance of his own interest, from which he realized $885.06, and on one O'Connor's interest covering the $300 unpaid of the purchase money of his shares, from which he realized $263.

I think the circumstances of this case warrant me in holding the defendant Nealis chargeable with the value of the vessel at the time he took possession of her in May, 1888. It is not pretended that the transfer to Magee was a valid exercise of the power of sale. From that time until the vessel was lost in June, 1890, Nealis assumed the entire use and control of the vessel. He was running her, as he says at a loss; he made but little effort to sell her; did not advertise her for sale, and kept her for that long time subject to deterioration from age, and when the market for that kind of vessel seemed on the decline. In view of the principles laid down in *Marriott* v. *Anchor Reversionary Co.* (7), I think Nealis has rendered himself chargeable with the fair value of the vessel at the time he took possession in May, 1888. In so holding I am not differing from Nealis' own

(7) 3 De G. F. & J. 177.

idea of his liability, for in the two statements of his claim which he rendered he charged himself with a sum as the value of the schooner, and which he placed to the credit of this mortgage transaction. I think $2,400 is a fair value of the vessel at that time. This is at the rate paid by O'Connor for his 16 shares, and is within the figures given by Elkin and others who knew all about this vessel, and whose competency to judge of her value all parties admitted. On this basis the account would stand thus:

Aug. 7, 1886.	To amount due as per agreement.	$2,550 00	
	" interest thereon to 7th Nov., 1886, when the $2,550 became due, at 12 per cent.	76 50	
	" interest on $1,500 from 7th Nov., 1886, to 1st Feb., 1887, at 12 per cent.	42 00	
	" interest on $1,050 from 7th Nov., 1886, to 1st Feb., 1887, at 6 per cent.	14 70	
	" interest on $2,000 from 1st Feb., 1887 to May 21st, 1888, when Nealis took possession, at 12 per cent.	312 32	
	" interest on $550 for same period, at 6 per cent.	42 94	
		$3,038 46	
May 21, 1888.	By vessel	2,400 00	
		$638 46	
	To interest on $638.46 from May 21st, 1888, to May 17th, 1890, at 6 per cent.	76 60	
		$715 06	
May 17, 1890.	By cash from Smith	$1,000 00	
		284 94	
	Interest on $284.94 from May 17, 1890, to July 17, 1897, at 6 per cent.	122 47	
	Due mortgagors, July 17, 1897	407 41	

This balance I find due from Nealis, including interest to the 17th of July last.

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I was asked by the counsel for the plaintiff and the defendant Smith also to state the account between them; and the defendant Smith claimed the benefit of this security for any balance due him. I thought I might do so without complicating the matters in dispute, but even if I could, in a suit like this, determine questions between the plaintiff and Smith, the pleadings raise no such questions. In Smith's answer he does not claim any account between him and the plaintiff, or that there is a balance due him by the plaintiff for which he would be entitled to have the plaintiff's mortgage as a security. It is by no means clear that he would be entitled to it under any circumstances, but the pleadings make no such claim. There seems no trouble in making up the account between Smith and the plaintiff as to this $1,000 paid by Smith after it is once determined what the amount due Nealis was at the time the $1,000 was paid, for Smith seems only to have been responsible for one-quarter of that sum. There is evidently enough due Smith by the plaintiff on this transaction to more than absorb this balance of $407.41, which I shall, therefore, order to be paid to him on account.

The defendant Nealis must, I think, pay the plaintiff's costs: *Barlow* v. *Gains* (8).

There will, therefore, be a decree declaring the mortgage from the plaintiff to Nealis to be fully paid, and that it be given up and the defendant be ordered to cancel the same. Declare that there was on the 17th July, 1897, due the plaintiff and defendant Smith by Nealis the sum of $407.41 for amount overpaid on the mortgage by them on the "Grey Parrot," and order that he pay that sum with further interest to defendant Smith.

Plaintiff's costs to be paid by defendant Nealis.*

(8) 23 Beav. 244.

* See *Rennie* v. *Block*, 26 Can. S. C. R. 356—Rep.

In re TAYLOR, *an Infant.*

1897.

October 26.

Infant—Testamentary guardian—Trustees—Construction of will—Education of infant.

A testator bequeathed his estate to trustees, and directed them out of their investments of the same to set apart £1,000 "to be used by them for the purpose of educating and giving a profession to my son, providing he has not already been educated and received a profession." He then directed the trustees to use and apply one-half of the income of the residue of the estate, as far as deemed necessary, for the maintenance and support of the said son, and that upon his arriving at the age of 25 years one-half of the estate with all accumulations thereon should be given to him absolutely. The testator left him surviving his wife, the mother of the son mentioned in the will, and the said son, an infant of about nine years of age. On an application by the mother of the infant to be appointed guardian of his person:—

Held, that the trustees were not appointed by the will guardians of the person of the infant; that the application should be granted, and that the mother as such guardian had the power, subject to the order of the Court, of selecting the school at which the infant should be educated.

The facts fully appear in the judgment of the Court.

Argument was heard October 19, 1897.

W. Pugsley, Q.C., and *G. G. Ruel*, for the petitioner:—

The mother is the natural guardian of the infant, and has a paramount right to be appointed guardian unless the father has indicated a clearly expressed intention to the contrary in his will. This intention cannot be found here, and it will not be allowed to rest on mere inference. The clauses in the will relied on to support the contention that the trustees are created guardians, merely indicate the use to which the infant's share of the estate is to be put, and are not words of appointment. See *Bedell* v. *Constable* (1); *Re Norbury* (2).

A. O. Earle, Q.C., and *C. J. Coster*, for the trustees:—

It is submitted that the father has constituted the trustees guardians of the infant. The money for the infant's maintenance and education is to be spent by them, and, con-

(1) Vaugh. 184. (2) I. R. 9 Eq. 134.

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sequently, his education must have been confided to them. If such is not the case their duties as trustees are reduced to meeting the expenses incurred by the guardian in the exercise of a discretion which they cannot superintend, or control. This was not the testator's intention. The sum set apart for the infant's education is to be "used" by the trustees, a power only intelligible upon the supposition that they were the infant's guardians.

1897. October 26. BARKER, J.:—

Two applications were made to me in this matter, which for convenience sake were argued together, and which I shall now dispose of. The first one is an application to have Margaret G. Taylor, the infant's mother, appointed guardian of his person and estate during his minority. It appears by the petition on which that application is based that Byron Gordon Taylor, the infant's father, died on the 1st of October, 1895, leaving him surviving this infant child, who is now nine years of age, and the widow, who now asks to be appointed guardian. Mr. Taylor left an estate consisting of personal property amounting to some $60,000, which at present is yielding an annual income of about $1,800. He left a will which is dated June 3, 1895, and was executed in London, England, where he then resided, and where he continued to reside up to the time of his death. By this will the testator appointed as his executors and the trustees of his estate his father, Charles S. Taylor, of St. John; George K. McLeod, of the same place, but who now resides in New York, and his brother-in-law, George Otty Dickson Otty, of Hampton, in this Province. On the testator's death these three gentlemen proved the will, and undertook the execution of the trusts of the will. The two sections in the will which give rise to the difference between the trustees and Mrs. Taylor are the second and third, which read as follows:—

"2. And I hereby will and bequeath all my estate, real and personal (of which I may die possessed), to my said executors and trustees for the following purposes:—That they shall, in the first place, convert all property into cash within one year from the date of my death, and, after the payment of my just debts, shall invest the remainder in safe interest-paying investments, and out of such investments I

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direct that the sum of one thousand pounds (£1,000), or the equivalent thereof, be set apart and used by my said executors and trustees for the purpose of educating and giving a profession to my son, Gordon Winslow Taylor, providing he has not already been educated and received a profession."

"3. And I further direct my said executors and trustees to use and apply the residue of my estate as follows:—One-half (½) of all income, revenues and interest thereof to be paid to my wife, Margaret Georgina Taylor, annually for her maintenance and support, while she remains my widow, and the balance or remaining one-half (½) of all such income, revenues and interest to be used (as far as deemed necessary) for the maintenance and support of my said son, Gordon Winslow Taylor, and upon his arriving at the age of twenty-five (25) years one-half (½) of all my estate, with all accumulations on said one-half (½) to be given to him absolutely."

The will contains various provisions as to the disposal of the income and corpus of the estate in various contingencies which might arise, such as the death or re-marriage of the widow, and the death of the infant, but in no case is the infant's share of the corpus of the property to be paid to him until he arrives at the age of 25 years.

I directed notice of this application to be given to the trustees, and on the day appointed for the hearing a petition was presented to me by Taylor and McLeod, two of the trustees, intituled in a suit wherein the infant, by Hugh H. Hansard, his next friend, is plaintiff, and the three trustees are defendants. In this petition it is stated that differences have arisen between these two trustees and the infant's mother in reference to the education of the infant—the mother claiming that she has the entire control and management of the education of the infant, including the right to select the schools at which he shall be educated, and that the trustees' duties are simply to pay the bills out of the moneys in their hands for that purpose. This application comes before me in a somewhat informal manner, as the trustees by their application not only ask that the infant be declared a ward of Court, but ask for the opinion, advice and direction of this Court, and for a declaration of their rights, duties and liabilities. I do not feel called upon to give my

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opinion on an application so general in its nature as this, as to the duties or powers of the trustees, except so far as that question is involved in the motion for the appointment of the guardian.

It is admitted that Mrs. Taylor, as the infant's mother, is his natural guardian, and as to her fitness for the position of guardian no question is raised. In fact, that is vouched for by several prominent persons, who have made affidavits in support of the motion. The argument, as I understand it, is that the clauses which I have quoted from the will create the executors and trustees testamentary guardians of the infant, thus giving them the entire control as to his education, to the exclusion of his mother, except so far as they may choose to yield to her wishes. Counsel did not claim for the trustees a right to the infant's custody, but did go so far as to claim for them the right to dictate to the infant what profession he should eventually choose, and what school he should attend in the meantime. Testamentary guardians, however, stand in the place of the father, and have an absolute right to the custody of the infant: *In re Andrews* (3); *Talbot* v. *Shrewsbury* (4); *Arnott* v. *Bleasdale* (5).

While, therefore, as in other matters involved in the construction of wills, it is a question of intention whether by the words used testamentary guardians are appointed, I can find no case, and certainly none was cited, where the mere conveyance of property in trust for the benefit of infants, as here, was ever held to constitute the trustees testamentary guardians. On the contrary, the books are full of cases where the words used in the instrument creating the trust are substantially the same as those used by the testator, where no such construction seems ever to have been suggested. Testamentary guardianship ceases when the infant attains his majority, while the trusts in this will for the benefit of this infant continue until he reaches twenty-five years of age, a circumstance altogether opposed to the idea contended for by these trustees. I had not a doubt on the argument after reading this will, and after considering what

(3) L. R. 8 Q. B. 153.

(4) 4 M. & C. 673.

(5) 4 Sim. 387.

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was advanced on the argument, I have not a doubt now, as to the true construction of this will, and that is, that beyond executing their trust in applying the moneys in their hands in the ordinary way for the benefit of the infant, these trustees have no control over him at all. More than this, though it is unnecessary to decide this point, I should have thought it quite right without any order for these trustees to have paid to Mrs. Taylor, as the mother and natural guardian of this infant, a reasonable sum for his maintenance and education out of funds in their hands held in trust for that purpose. It is simply a question as to whether such a charge should be allowed as proper when the trustees came to pass their accounts. Of course it is a prudent course in such cases to have the allowance fixed by the Court, and when fixed the trustees discharge their duties and apply the amount to the maintenance and education of the infant by paying it to the guardian, who is always under the control of the Court, and has ample power to remove her in case she should fail in properly discharging her duty to the infant. Subject also to this controlling power of this Court over its appointed guardian, and, therefore, in a sense one of its officers: *Wellesley* v. *Wellesley* (6) the guardian has the power of selecting the school at which the infant is to be educated: *Hall* v. *Hall* (7). And though it may be wise and prudent in such a case for the mother, though appointed sole guardian, to consult with the trustees and get the benefit of their judgment in such matters, she is, in my view, under no legal obligation whatever to do so. This Court recognizes extensive powers and a wide discretion in guardians as to the education and maintenance of infants under their charge, always remembering that the Court is all-powerful to correct abuses, and see that the ward's interests are fully protected. In *Re Lofthouse* (8), where there was a maintenance clause in a will for the benefit of infants there was no question as to the sum being paid to the father as the natural guardian. And in *Re Wells* (9), where the language creating the trust was in substance the same as in this case, the infant's aunt was

(6) 2 R. & M. 639.
(7) 3 Atk. 721.
(8) 29 Ch. D. 921.
(9) 43 Ch. D. 281.

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appointed guardian of the person and the money for his maintenance ordered to be paid by the trustees to her.

I shall follow these cases, and appoint Mrs. Taylor guardian of the person only. I do this because the infant has no estate except that held by the trustees, and any amount paid to the guardian for his support or education will be dispensed by her for that purpose: *Jodrell* v. *Jodrell* (10); *Browne* v. *Paull* (11).

Order, that Margeret G. Taylor be appointed guardian of the person of the infant during his minority, or until further order. Costs of petition to come out of income of infant, to be paid by trustees.

Reserve trustees' costs until action is disposed of.

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August 17.

THE MUTUAL LIFE ASSURANCE COMPANY OF NEW YORK v. ANDERSON ET AL.

Life insurance—Assignment—Wager Policy—Fraud—Pleading—Failure to prove fraud—Dismissal of bill—Costs—Suit made necessary by defendant's conduct—Terms of relief with respect to assignee of life insurance policy on the same being set aside.

A policy of life insurance in the plaintiffs' company was taken out by the assured after it had been represented to him by the plaintiffs' agent that he could raise money upon it from the defendant by selling the policy to him, and the policy was taken out by the assured for that purpose. At the time the assured was too poor to pay the premium and was unable to carry the policy. Immediately upon the policy being issued it was assigned to the defendant for a small sum, and the defendant paid the original and subsequent premiums. In a suit to set aside the policy as a wager policy, and void as against the plaintiffs, the assured in his evidence stated that when he assigned the policy he expected to redeem it, and carry it for his own benefit:

Held, that the policy was not a wagering policy.

A policy of life insurance in the plaintiffs' company, obtained by the fraudulent misrepresentation of the assured, was assigned by him to the defendant. Learning of the fraud the plaintiffs' agent charged the defendant with being a party to it, but, upon the defendant denying it, withdrew the charge, and asked that the policy be surrendered, offering to pay the defendant whatever money he had laid out in connection with it. This offer the defendant refused, as also a similar offer subsequently made in a more formal manner. In a suit to set the policy aside, the

(10) 14 Beav. 397. (11) 1 Sim. N. S. 92.

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assured and the defendant were charged with having procured it by fraud, but the evidence at the hearing failed to establish the charge with respect to the defendant:

Held, that the bill should be dismissed as against the defendant with respect to the charge of fraud, but without costs, as the suit had been made necessary by his refusal of the plaintiffs' offer.

If a charge of fraud as a ground of relief is made by a bill, and is not established by the evidence, and another case for relief is also made by the bill which is established, so much only of the bill as relates to the charge of fraud is to be dismissed, and relief may be given upon the other part of the case.

While a general allegation of fraud, without stating the acts which constitute it, is bad pleading, it was held that fraud was sufficiently pleaded in a bill to set aside a policy of life insurance which set forth representations made by the assured as to his health, and alleged that they were false and fraudulent to the knowledge of the assignee of the policy.

Terms of relief considered with respect to an assignee of a policy of life insurance, in a successful suit by the insurers to set the same aside on the ground of fraud by the assured in procuring the policy.

The plaintiffs issued to the defendant William L. Anderson three several policies of insurance on his life, dated March 27th, 1893, for $1,000 each, and which he immediately assigned to the defendant L. Wesley McCann. The suit was brought to have the policies delivered up to be cancelled on the ground of fraudulent misrepresentation by Anderson as to his health, and fraud and conspiracy by both defendants in procuring the policies, and also on the ground that the policies were wager policies. The facts are so fully stated in the judgment of the Court that it is unnecessary to refer to them here beyond referring to certain of the allegations in the bill of complaint. By the eighth paragraph of the bill the plaintiffs complained that after the issue and delivery of the policies they learned that the defendants and the soliciting agent of the plaintiffs had conspired together to deceive and defraud the plaintiffs, and by falsehood, concealment, misrepresentation and fraud had fraudulently induced the plaintiffs to enter into the contracts of insurance, and to issue the said policies. By the ninth paragraph the plaintiffs complained that in making application for the said insurance the defendant Anderson was acting at the instance and request of the defendant McCann, and for the sole benefit of the latter and with the fraudulent understanding and agreement that the premiums of insurance would be paid by him, and that the policies when effected would be

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assigned to him, and that he would thereafter continue to pay the annual premiums, and the plaintiffs alleged and charged that the defendant McCann had no legal insurable interest in the life of the defendant Anderson, and that the policies were wagering policies and void in law. By the tenth paragraph the plaintiffs complained that the statements and representations made by the defendant Anderson in his application for the said insurance as to the state of his health were false and fraudulent to the knowledge of both of the defendants, and were made falsely and fraudulently to induce the plaintiffs to issue the policies. By the eleventh paragraph the plaintiffs complained that the assignments of the policies by Anderson to McCann were made in furtherance of the said fraudulent and illegal designs of the defendants. By the twelfth paragraph the plaintiffs complained that the certificate of the health of the defendant Anderson was obtained for the said fraudulent purpose, and was false to the knowledge of both the defendants. In conclusion the bill charged that the policies were wagering policies, and had been procured by the falsehood, fraud, concealment, and misrepresentation of the defendants.

Argument was heard July 9, 10, 1897.

W. B. Chandler, for the defendant McCann:—

The bill charges the defendants with fraud, but the circumstances constituting the fraud are not stated. Fraud is a conclusion of law, and it is not sufficient to allege it unless the facts upon which the charge is based are specifically pointed out. See *Gilbert* v. *Lewis* (1). In *Wallingford* v. *Mutual Society* (2), Earl Selborne expressed the rule to be that general allegations, however strong might be the words in which they were stated, were insufficient to amount to an averment of fraud of which any Court ought to take notice. The bill is bad for multifariousness. It charges conspiracy, concealment and misrepresentation, and that the policies are wagering policies. These are all distinct and independent grounds of relief, and any one of them would be sufficient for the plaintiffs to rest their case upon. The effect of including several grounds of relief is to make it impossible to assign the relief granted to any one of them. See *Hill* v.

(1) 1 De G. J. & S. 37. (2) 5 App. Cas. 697.

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Great Northern Railway Co. (3). Plaintiffs' case is founded upon fraud, but the evidence has failed to sustain the allegation as against the defendant McCann. Consequently, no relief can be granted, so far as he is concerned, and he is entitled to have the bill dismissed as against himself with costs. See *Wilde* v. *Gibson* (4); *Marshall* v. *Sladden* (5); *Luff* v. *Lord* (6); *London Chartered Bank of Australia* v. *Lempriere* (7); *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (8). If it is contended that relief is sought on grounds other than fraud, it is submitted that fraud is indissolubly connected with every part of the case, and that, therefore, no relief can be given. See per Lord Cottenham in *Archbold* v. *Commissioners of Bequests* (9); *Price* v. *Berrington* (10); *Hickson* v. *Lombard* (11); Story Eq. Pl. (12). In any event so much of the bill as contains the unfounded charges of fraud should be dismissed with costs: *Archbold* v. *Commissioners of Bequests* (13); *Hilliard* v. *Eiffe* (14); *Thomson* v. *Eastwood* (15).

W. Pugsley, Q.C., and *A. G. Blair, jr.*, for the plaintiffs :—

We are not bound to establish the existence of fraud beyond a reasonable doubt: *Ætna Insurance Co.* v. *Johnson* (16); *Kane* v. *Hibernia Insurance Co.* (17). But even in the absence of fraud on the part of McCann, the policies must be set aside as against him. The innocent assignee of a policy of insurance procured by fraud takes no better title than his assignor had, and may be met by all the defences the insurers would be entitled to raise against the assignor: *Dormay* v. *Borrodaile* (18); *British Equitable Insurance Co.* v. *Great Western Railway Co.* (19); *Lefevre* v. *Boyle* (20); Porter on Insurance, 304. The policies are void as wagering

(3) 18 Jur. 685.
(4) 1 H. L. Cas. 605.
(5) 14 Jur. 106.
(6) 11 Jur. N. S. 50.
(7) L. R. 4 P. C. 572.
(8) 9 H. L. Cas. 711.
(9) 2 H. L. Cas. 440.
(10) 3 MacN. & G. 486.
(11) L. R. 1 H. L. 324.
(12) S. 252 (*a*).
(13) 2 H. L. Cas. 440.
(14) L. R. 7 H. L. 39.
(15) 2 App. Cas. 215.
(16) 21 Am. Rep. 223.
(17) 23 Am. Rep. 239.
(18) 10 Beav. 335.
(19) 38 L. J. Ch. (N. S.) 314.
(20) 3 B. & Ad. 877.

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policies. See the Gambling Act, 14 Geo. III. c. 48; Porter on Insurance, 36; *Vezina* v. *New York Life Insurance Co.* (21). At the time of Anderson's application for the policies it was agreed between him and McCann that the policies should be assigned absolutely to the latter in consideration of his paying the premiums and a sum of money to Anderson. Anderson never had any legal interest in the policies. His application was not a *bona fide* one. It was not intended that the insurance should be for his benefit. Nor had McCann any interest in the life insured. It was purely a wagering transaction. Conceding that the charges of fraud are not proven against McCann the suit itself does not fail. It is merely a question of costs: *Reynell* v. *Sprye* (22); *Blest* v. *Brown* (23). The plaintiffs do not ground their whole case upon fraud. Other grounds of relief are stated upon which the plaintiffs are entitled to succeed, though so much of the bill as relates to the case of fraud may be dismissed: *Parr* v. *Jewell* (24); *Espey* v. *Lake* (25).

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This suit was brought to compel the surrender and cancellation of three policies of insurance numbered 546995, 546997, and 546999, for $1,000 each, issued by the plaintiffs on the life of the defendant Anderson and assigned by him to McCann, the other defendant. It is alleged that these policies were obtained by fraudulent misrepresentations on the part of Anderson, and that McCann was either a party to this fraud or else that the policies themselves, though nominally for the benefit of Anderson, were, in fact, wager policies, and really for the benefit of McCann. The application for the insurance is dated March 18, 1893, at Moncton, where Anderson resided. He was then in the 27th year of his age, having been born August 27, 1866. He was examined by Dr. Ross, the plaintiffs' medical officer at Moncton, and on his certificate the risk was accepted and the policies issued on the 27th March, 1893, the annual premiums on which were $24.30 each, or $72.90 in all. The policies contain a stipulation that after two years from their date they become ab-

(21) 6 Can. S. C. R. 30.
(22) 1 De G. M. & G. 111, 660.
(23) 8 Jur. N. S. 602.
(24) 1 K. & J. 671.
(25) 10 Hare, 252.

solutely incontestable, provided the premiums have been paid and the requirements as to age and military or naval service have been observed. This suit was commenced shortly before the expiration of the two years. The policies were forwarded to McAlpine, the plaintiffs' soliciting agent, who had procured this insurance, for delivery to Anderson on receipt of the premiums. By a regulation of the company, where the original premium is not paid within a specified time from the date of the medical examination, a further certificate of health is required before the insurance will be completed by delivery of the policy and acceptance of the premium.

Anderson was a printer; a man of practically no means whatever, altogether unable to carry these policies; in fact unable to pay the original premiums. Before the insurance had been completed, the defendant McCann had either agreed to buy the policies from Anderson for $25, or advance that sum, but also to pay the original premiums; and he did, in pursuance of this arrangement, procure from Anderson assignments of these policies on the 11th day of April, 1893, though the premiums were not actually paid to McAlpine until some time after that—the precise time is not very clear. In consequence of the delay in payment of the premiums, a further certificate of health became necessary under the rule I have mentioned. This was given on the 12th July, 1893, though the evidence shows that McAlpine gave the policies to McCann some time before that.

The defendant Anderson put in an answer, but did not appear at the hearing. He was examined as a witness, and from his own admission it is abundantly clear that in order to procure the insurance he purposely deceived the plaintiffs by his answers to questions in his application in reference to his health and other material matters. That the policy must, therefore, be cancelled, I have no doubt; in fact, this much was conceded on all hands; for McCann, as assignee, could have no better right in reference to a policy procured by the fraud of the assured than the assured himself could: *British Equitable Insurance Co.* v. *Great Western Railway Co.* (26).

(26) 38 L. J. Ch. (N. S.) 314.

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The main question for decision, and in fact the only one upon which there was any argument, is as to the terms of the decree so far as it relates to the defendant McCann. The bill not only charges Anderson with fraud in procuring the insurance, but also charges McCann with being a party to the fraud. It also alleges that the policy was a wager policy, and made really for the benefit of McCann. Though these last two questions are distinct in character, the evidence which bears upon them is of such a nature as to render it necessary to discuss them together. In the case of *Vezina* v. *New York Life Insurance Co.* (27), a case similar in many of its facts to this, the Court held that when a party *bona fide* applies for and obtains a policy of insurance on his own life, and for his own benefit, the insurance is good, though he may do it with the intention of assigning it to a third person who is to pay the premium. In *North American Life Assurance Co* v. *Craigen* (28), a case where a bill had been filed to set aside a policy solely on the ground that it was a wager policy, it was held in accordance with many cases there cited, that in the absence of any collusion between the assured and his assignee the policy was good if *bona fide* made for the benefit of the assured. Strong, J., says: "Of course, if it is made to appear by evidence that the undertaking of the person whose life is assured to pay the premiums is colourable, and that the premiums are in reality to be paid by a third person who has no insurable interest in the life and who is to have the benefit of the insurance, the policy will be a wager policy, and so within the statute and void." Substantially the same direction was given to the jury by Lord Abinger in 1835 in the case of *Wainewright* v. *Bland* (29), and although that case eventually went off on another point (30) the accuracy of the direction was not seriously questioned.

Anderson's account of this transaction is that he and one McDougall were about starting a newspaper or some printing business for which they needed money; that in March, 1893, McAlpine came to them and proposed insurance to them, saying that it was a good scheme to raise money,

(27) 6 Can. S. C. R. 30.
(28) 13 Can. S. C. R. 278.
(29) 1 M. & R. 481.
(30) 1 M. & W. 32.

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and if they needed money in starting, it would be a good scheme to take out $1,000 each on their lives and sell the policies. Anderson said that he had been sick, and he did not think he would pass the medical examination, to which McAlpine replied, "that was for the doctor to decide, and that it would not cost him anything to be examined, as the company paid the examiner's fee." McDougall and Anderson then talked the matter over, and in a day or two they both went to Dr. Ross for examination as applicants for insurance. Before going, however, McDougall informed Anderson that McCann would buy the policies for $25 each; that is, his and McDougall's, as Anderson did not know until long afterwards that his application was for more than one policy of $1,000. He also told Anderson that McCann was to take the policy when it arrived and pay the premium; and Anderson says that the insurance was effected with that object in view and for that purpose. McCann paid Anderson the $25 in two payments of $10 and $15, the last of which was made May 29, 1893. Anderson never saw the policies or had them in his possession. Previous to this transaction Anderson and McCann were strangers to one another, and it does not appear that, except what took place when McCann got the assignment of the policies, and which is not of much importance, Anderson and McCann had any direct communication in reference to this transaction at all—what was said was to others and chiefly to McDougall. His account of what took place is this: In March, 1893, McCann with whom he was on friendly terms at the time, came to his office, and the first talk about this insurance was with him, and that it was this: "I had a conversation one day with him about some financial matters, and he told me a good way would be to insure my life, and I could use it. I could raise money on it, and he said he knew people who had often done that, and he told me if I would get my life insured he would take it; he would raise me some money on it, and that passsed on, and I think probably I might have spoken to him afterwards about it. And in a few days afterwards McAlpine called at my office. He asked me if McCann had been speaking to me about making an application for insurance. I said he was." At another part of his evidence McDougall says that he did not recollect the conversation

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between him and Anderson, but he thinks he told him $55 and not $25 as the sum McCann would give, and he also says that McCann was the first person who spoke to him about the insurance, and he added: "You might ask Anderson, too; you might both get insured, it would be a good speculation; and I spoke to Anderson about it." On his re-examination McDougall said: "He (i.e., McCann) spoke to me about Anderson; he asked me how Anderson's health was, and I told him that he was not very well, and he said it would be a good thing for him to insure, and he asked me who was the physician for his family, and I told him Dr. E. B. Chandler. And he said it was the best thing, that Anderson ought to insure, and he said it would be a good thing for him to have if he was sick or got sick; and he said life insurance was negotiable any time, and that he would take Anderson's policy, and do the right thing." This conversation McDougall says took place before they made their application, and that it was in consequence of what McCann said that he spoke to Anderson. McCann's account of the matter differs widely from that of McDougall. He says that McDougall was constantly borrowing or trying to borrow money from him—small amounts from 25 cents up—or to use his own expression, was constantly "bumming at him for money"; that the first conversation they had as to insurance took place in the street, when McDougall asked for a loan of $50 with which to make a payment for some type, and he asked him what security he had to give, and he then replied that he and Anderson were going to take out some insurance, and he wanted to know if he would buy their policies, to which he says he probably replied that he would assist him. He says that was all the conversation on the subject at that time, but that they had several conversations on the subject; sometimes on the street, sometimes in a barber's shop, and at other times in other places, though he does not state what these conversations were. On one occasion about a month after the first conversation, McCann says that McDougall came to his office and said that Anderson's policy had come, and he then wanted $25, one-half of what he first asked for. He says that there was no understanding as to the amount of insurance to be effected, and that he did not know the

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amount of Anderson's insurance until his policies arrived, and were in McAlpine's possession. He then says that it was agreed that he was to pay $25 to McDougall for his policy for $1,000, and a like sum to Anderson for his policies for $3,000. McCann had the policies assigned to him; he paid Anderson his $25, took the policies and paid the premiums. He altogether denies the truth of the other statements of McDougall. This part of the case, therefore, rests upon the evidence of McDougall, contradicted as it is by McCann, for admittedly Anderson had no direct communication with McCann until the time when the policies were assigned. As to the charges of fraud against McCann, I think the evidence fails in sustaining them, however suspicious some of the circumstances may be. He does not seem to have known anything about Anderson before this, either as to his health or his circumstances; they were practically strangers to each other; and I cannot see anything in what took place, or in the surrounding circumstances which could fairly bring home to McCann a knowledge that Anderson's life was not a good risk, or anything—except the mere fact that he was in want of money—which would be likely to lead one to suspect fraudulent practices in procuring the insurance. It is true that there are some expressions of McDougall—rather inferences than anything more—which, if true, might lead one to think McCann knew all that was going on. But mere inferences ought not to have much weight as proof of a charge of fraud, especially where they come from a witness discredited by his admittedly untruthful statements made to the plaintiffs for the purpose of securing an insurance from them on his life.

I have also, after much consideration and with some considerable doubt, arrived at the conclusion that the evidence fails in supporting the plaintiffs' contention that these policies are wager policies. As the policies must be set aside for other reasons this point is, perhaps, only important as bearing upon the question of costs, which I shall dispose of on other grounds. Taking McDougall's statement and McCann's together, I think it may be fairly said that the insurance was not entered into at McCann's instance, even though he may have suggested to McDougall this as a de-

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sirable way of obtaining a security which could be made available for the purpose of raising the money which Anderson then wanted. And a careful consideration of Anderson's own statement leads me to think that in procuring this insurance he had a *bona fide* intention of benefiting himself beyond the $25, of which he was then in immediate want, because he seems to have thought that later on he might be able to return this $25 to McCann, get his policies back and carry them for his own benefit, though McCann swears positively that he bought these policies out and out, and that on their assignment to him, Anderson ceased to have any interest in them, legal or equitable. This, I think, brings the case within the reasoning of *Vezina* v. *New York Life Insurance Co.*, already cited. As to the costs, I have looked carefully through the plaintiffs' bill, and I do not think it open to the objections raised against it by Mr. Chandler on the hearing, and which he pointed out as bearing upon this question. The plaintiffs sought relief first in consequence of the fraud practised by Anderson in procuring the insurance. If that were proved, then admittedly a decree setting aside the contract must go against both Anderson and McCann. McCann's position as to costs, or as to a return of the premiums, might depend upon one of two other grounds: (1) Was he a party to this fraud, and (2) was the policy though free from any imputation of fraud in procuring it, void as a wager policy. All of these conditions are alleged in the bill to have existed, but I know of no rule by which the plaintiffs' bill is to be dismissed or they are deprived of their costs, because they only proved one out of two charges of fraud. As to the costs incurred by McCann in defending the charge of fraud against himself, and in which he has succeeded, under ordinary circumstances, I should give him these costs, but for reasons which I shall mention later on I do not think he is entitled to them.

It is true that a general allegation in a bill that a deed has been obtained by fraud, without stating the acts which constitute the fraud, is bad pleading: *Gilbert* v. *Lewis* (31); *Other* v. *Smurthwaite* (32); *Attwood* v. *Small* (33). I think

(31) 1 De G. J. & S. 50.
(32) L. R. 5 Eq. 437.
(33) 6 Cl. & F. 232.

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this bill is free from this objection, even on demurrer. In the 3rd section the plaintiffs set out the representations made by Anderson upon which the contract of insurance issued; and in section 10 they allege that these representations were false and fraudulent to defendant's knowledge. Now, the principal object of the rule is to prevent the defendant being surprised by charges of which he has had no notice, and against which he is therefore unprepared to defend himself. That is not the case here. More than this, one of the grounds upon which McCann seeks to escape paying the general costs of proving the fraud practised upon the plaintiffs by Anderson, under whom he claims, is that he has not taken the ground that the policies were not fraudulently obtained, but simply stood passive as to that point as a defendant without knowledge, information or belief on the subject. The only doubt I have had is whether I should not make the defendant McCann liable for these costs, or at all events some of them, because I think the allegations in sections 10 and 14 of his answer go further than mere discovery.

In *Parr* v. *Jewell* (34), Wood, V.-C., says: "With respect to the question of fraud, and as to the dicta of Lord Cottenham in *Wilde* v. *Gibson* (35), I may observe, first, that it is an error to suppose (and Lord Cottenham himself said that he never intended it to be supposed) that if a charge of fraud is introduced into a bill which fails, and another case is also made by the bill which is established, the bill is to be dismissed because the charge of fraud fails; but the true rule is, that so much of the bill is to be dismissed as relates to the charge of fraud, and relief may be given on the other part of the case which is established." See also *Glascott* v. *Lang* (36); *Espey* v. *Lake* (37); *Baker* v. *Bradley* (38). There is, however, another ground to which I desire especially to refer, upon which I think I ought to deprive the defendant McCann of his costs. It seems that the plaintiffs were led to make inquiries in reference to this insurance and the others mentioned in the evidence—that is the McDougall one and the Jonah one—by certain newspaper articles published in some of the leading newspapers. These articles were not

(34) 1 K. & J. 671.
(35) 1 H. L. Cas. 605.
(36) 2 Ph. 310.
(37) 10 Hare, 260, and note, p. 265.
(38) 7 DeG. M. & G. 597, at p. 627.

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in evidence, but from McCann's attitude in reference to them it is fair to assume that not only were these insurance transactions, which were spoken of as "graveyard insurances," denounced as frauds upon the company, but McCann was represented directly or indirectly as being a party to the fraud. Some of these articles at all events were written by McDougall. No one connected with the plaintiffs had anything to do with any of them. In consequence of the statements in these articles, Johnston, the plaintiffs' general agent at Halifax, through whom these policies came to McAlpine from the head office at New York, investigated the matter, and having satisfied himself that the company had been grossly deceived, went to Moncton in order to procure from McCann a cancellation of all these policies—the Anderson, McDougall and Jonah ones—amounting in all to $9,000, and for which, as Johnston learned, McCann had paid about $40. The first interview between Johnston and McCann was somewhat stormy—none the less so because Johnston there and then accused McCann of being a party to the fraud. However, a second meeting was arranged to take place in presence of Mr. Peters, manager of the Record Foundry Co., a gentleman selected by Mr. McCann himself. Mr. Peters was produced as a witness, and he tells us that Johnston complained of these insurances having been obtained by misrepresentation, but withdrew all charges of complicity against McCann, and offered to give him a letter to that effect for publication if he wished. He also says that Johnston told him that Anderson and the others were willing to execute a surrender of the policies and he wanted him (McCann) to do so, and he would pay him not only the premiums he had paid and interest, but also the amount he had paid to each one of them for the policies, so as to make him whole. There seems to have been some difference as to the amount which was then made up by Johnston. What it was does not appear, but Peters says it did not relate to either the premiums or the amount paid out for the policies. At page 246 of the evidence, Peters gives the reason assigned by McCann at that time for not giving up the policies. He says: "The reason he refused was because he thought he had explained to Johnston there—to use his own words as near as I can—he said, 'I would look nice to de-

liver up these things after what the newspapers have been saying—what a nice position I would be in'; and then Johnston asked, would a letter from the company about it to the press be sufficient to put you right, and McCann said it would be according to what kind of a letter it would be." At another part of his evidence Peters says: The objection to giving up the policies to McCann was not to the amount offered, but on account of his own position with the public. He said: "As I (Peters) understood and remember it, he would not deliver them (the policies) up, as I understood McCann at that time, even if the amount were right, on account of the position that he would place himself in—in fact I am quite positive and I will swear to it, that he said that he would rather be cleared or convicted by the Court than be cleared or convicted by public opinion." The interview ended without any settlement being arrived at, but McCann was to telegraph Johnston if he would accept the proposition, or do anything, but he did not do so. Now there can be no doubt that this offer was a perfectly *bona fide* one. Johnston says he had the money there to pay the amount which would be coming to McCann. McCann himself admits that Johnston's charge against him was entirely withdrawn, and that he (McCann) was an innocent holder of these policies, for he even went to the trouble of making a memo of this admission in his note book. McCann did not then pretend that the policies had not in fact been procured by misrepresentation. The sole reason which he gave for not doing as the plaintiffs wished was that it would prejudice him in the eyes of the public. Of course he knew perfectly well that the plaintiffs must take proceedings to set these three policies aside, and do so within the two-year limit fixed by the incontestability clause, which at this time had well nigh run off, for the meeting at Peters' office took place in January, 1895. And he may have thought that to one engaged as he was in speculating in life insurance policies, and who had for a trifle of $25 captured three $1,000 policies, where the premium was small and the life was uncertain, it might not be bad management to run the risk of an equity suit in which he might raise the question of the original fraud with such indefiniteness as to enable him to get the advantage of a finding one way, and escape the payment

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of costs on a finding the other way. At all events, the plaintiffs have been put to this litigation in consequence of the conduct of McCann, and, as he says himself, to vindicate his character in the eyes of the public. He cannot do this and make the plaintiffs pay his costs incurred in doing it. Besides all this, before these proceedings were instituted, the plaintiffs formally tendered the defendant McCann with the premium paid and interest and a deed of cancellation of the policies. No objection either to the amount or form of the tender has been raised or suggested. In *Millington* v. *Fox* (39), Lord Cottenham, after alluding to the general rule that costs should follow the result, says: "There is another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which were essential to enable parties to vindicate and establish their rights," and accordingly his Lordship, although he held that the plaintiffs were entitled to part at least of the relief they prayed, refused to give them the costs of the cause, because it appeared that the defendants had written the plaintiffs a letter offering terms which would have rendered the suit unnecessary; which letter his Lordship held, as to costs at least, rendered it incumbent on the plaintiffs to put to the test whether the defendants were sincere in their offer, and not to go on with the suit unless they found that they were insincere: *Salter* v. *Bradshaw* (40); *Bromley* v. *Smith* (41); *McAndrew* v. *Bassett* (42). It is said that all of this did not justify the plaintiffs filing a bill charging the defendants with fraud after their agent had withdrawn it, and admitted that any such charge was without foundation. In this I agree, and if they had filed a bill without such charges I should have given them their costs against McCann. As it is, I shall not give either party his costs.

I have not thought it necessary to say much in reference to the unimportant question as to the admissibility of the evidence as to the facts and circumstances connected with the McDougall and Jonah insurances. I shall deal with that point in the observations I shall make in disposing of the

(39) 3 M. & C. 338.
(40) 26 Beav. 161.
(41) 26 Beav. 644.
(42) 10 Jur. N. S. 492.

Jonah case. I have found the charge of fraud against McCann not sustained by the evidence. My conclusion on that point is the same whether I base it upon all the evidence or only upon that to which there was no objection, and which related solely to the policies involved in this suit. I confess that with the evidence before me of what actually took place at the time in connection with these Anderson policies the circumstances of the Jonah case however fraudulent they may have been, did not seem to furnish a very safe guide in arriving at McCann's intention in reference to a transaction, which, though similar in character, took place a long time before and was in no way connected with it.

There being therefore no doubt as to the plaintiffs' right to come into this Court to have these policies set aside upon grounds not apparent on the face of the instruments themselves, the only question is upon what terms should this be done. In Daniell's Ch. Practice (43) the rule is thus laid down: "The cases to which allusion is made are those in which the Court orders securities to be delivered up or sales of reversionary interests to be set aside, because the bargain has been unconscientious; in these cases, the Court generally decrees for the plaintiff upon terms that he shall repay the defendant the amount actually advanced or paid by him, with interest; and looking upon him as a mortgagee for that amount, it formerly treated him as such, by ordering the plaintiff to pay him his costs. The Court now, however, considers cases of this description to be analogous to redemption suits, where the mortgagee resists the right to redeem; and no costs are given on either side; but if the defendant has refused to accept terms which were better than those to which the Court considers him entitled, he will be ordered to pay the costs of the suit." I am not at present prepared to hold that in a case like this, the principle that as a matter of equity the defendant should be made whole, includes a repayment by the plaintiffs to McCann of the $25 paid to Anderson by McCann, though of course the premium and interest must be paid back. McCann does not, according to

(43) 4th Am. ed. 1386.

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his own account, even stand in the position of having advanced money on this security—he says he purchased it for his own benefit, and he knew when he did so that for any fraud practiced in obtaining it, it was liable to be set aside within two years from its date. The company, however, offered to McCann to pay him that amount as well as the premiums, and I have deprived him of his costs because he did not accept it. I think therefore complete justice will be done all parties by declaring these policies void, the plaintiffs undertaking to pay the defendant McCann the premiums, the $25 and interest thereon at the rate of 5 per cent.; plaintiffs to have their costs against Anderson only—and the bill, so far as it charges McCann with the fraud, to be dismissed as against him without costs; and there will be a decree accordingly.

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Evidence—Fraudulent intent—Proof of other fraudulent transactions.

In an action by an insurance company to set aside a policy of life insurance issued by it, on the ground that the policy was procured by fraud of the assured and the assignee of the policy, evidence is admissible as bearing upon the fraudulent intent of the assignee that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent.

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

Argument was heard July 16, 1897.

W. Pugsley, Q.C., and *A. G. Blair, jr.*, for the plaintiffs.

W. B. Chandler, for the defendant McCann.

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This case is similar in its object and character to the one against Anderson just disposed of. The facts are, however, different in many important particulars. On the 2nd of May, 1893, the defendant Jonah signed an application to the

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plaintiffs for an insurance on his life for $5,000. A policy issued, dated May 8, 1893, the annual premium on which was $132. The policy was assigned to the defendant McCann, May 30, 1893. He paid the first premium. He also paid Jonah $5 for the assignment. I am relieved in this case from all considerations of evidence as to the fraudulent misrepresentations made to this company by the defendant Jonah for the purpose of procuring this insurance, for at the hearing, Mr. Gregory, who appeared as counsel for both the defendants, frankly admitted that the policy could not possibly be upheld.

Before discussing the merits of the case involved in the other points, I shall refer to the question which arises as to the admissibility of evidence of the Anderson insurance and assignment to McCann for the purpose of proving a fraudulent intent in McCann as to this Jonah one. Taylor at page 351 lays down the rule that in cases where the intent of the party is a material fact, evidence of occurrences which took place both before and after the principal case, but which have a bearing on it is admissible, though apparently collateral and foreign to the main subject. In *Blake* v. *Albion Life Assurance Society* (1), Grove, J., in speaking of this rule says: "I think that when a person is alleged to be guilty of an offence which *per se* cannot be brought home to him by proving his mere act without explaining his animus, purpose, or object in doing it, the law permits evidence of other acts done by the same person to be given for the purpose of such explanation." Of course if the collateral cases of alleged fraud are not proved to have been actually fraudulent, the evidence, though admissible, becomes immaterial, as it fails in proving the fact for which it was offered. In my opinion where, as in this case, a defendant is charged with a fraudulent intent in procuring an insurance on the life of some one else for his own benefit, it is good evidence as bearing upon that intent, that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent. This present case is, I think, capable of being determined on its own facts without outside

(1) 4 C. P. D. 94.

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aid. The conclusion at which I have arrived has been reached without reference to the Anderson case, or the circumstances connected with it.

The evidence shows that the defendant Jonah was 21 years of age when he made his application in May, 1893; that at that time he weighed 105 lbs.; that he had never been able to do anything like hard work; that for nearly all his life he had been subject to frequent expectorations indicative of pulmonary or catarrhal affection of some kind, and that of late years these expectorations had become more frequent and more offensive. At the hearing Jonah said in his evidence that he then weighed 85 lbs. From his manner and appearance at that time I should think a less likely subject for life insurance could scarcely be found out of bed. The defendant McCann had known Jonah all his life; they had lived as near neighbours in Graves' Settlement, in Kings county, not far from Petitcodiac, and beyond all question McCann knew all about Jonah's condition, physical and otherwise. Although Jonah describes himself in his application as a carpenter, the evidence shows that he knew nothing more about that trade than any young man of his age would pick up in the ordinary mending and repairing going on about a farmhouse and premises. And as to his ability, present or future, for paying the $132 premium, much less keeping the policy alive afterwards, he seemingly had none. He was then in an uncertain employment in Moncton at a salary of $50 a year, trying to learn carriage building, an experiment which he abandoned in six weeks. I should say from the evidence that he never earned $132 in his lifetime. The carriage builder with whom Jonah engaged in 1893 occupied premises adjoining very near to McCann's office. Jonah had applied to McCann to procure him employment, and as a result he secured this position. Within forty-eight hours of his arrival the soliciting agent, McAlpine, was introduced by McCann to Jonah. He was taken out of the yard where he was at work into McCann's office, a small room about 12 x 14 feet in size, and there and then the subject of life insurance was spoken of. He was solicited to make an application. Jonah then said that he was not able to carry a policy, and for another thing he did not think the doctor would pass him.

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McAlpine then said, it would cost him nothing to be examined, and if the doctor passed him, all right, and that if he could not carry it he could get some one to carry it till he was able to carry it himself; and he then in reply to McAlpine's question if he would let him fill up an application, said that he did not think it would be of any use. McAlpine then said: "You can let the doctor decide that." Jonah then said: "If there is anyone who would help me carry it for a year or two, till I learn my trade, then I could carry it." McAlpine then said: "Perhaps McCann would," and McCann turned round and said he would. Then McAlpine sat down and filled up the application in presence of McCann. Though the application is for a $5,000 policy, Jonah thought he was applying only for $1,000; in fact, he never knew to the contrary until January, 1895, when Johnston went up to investigate the matter, and nearly two years after he had parted with all his interest to McCann. Jonah was examined by Dr. Ross, recommended by him as a good risk, the policy issued and was sent to McAlpine for delivery and collection of first premium. Now it must be recollected that all this conversation which led up to Jonah making this application, his own statement that the doctor would not pass him, and that he was unable to pay the premiums, which were only some $25 a year, as he thought; all that took place in McCann's office and in his presence, and except one or two minor matters, he does not venture to deny that he heard and knew all that was said and done there at that time. The next thing we find is that Jonah is brought to Moncton by McCann to sign the assignment on the 30th May, 1893, at which time he paid Jonah the $5. There does not seem to have been any negotiation as to this $5. No agreement about the amount, according to Jonah's account—it was paid him and he took it and signed the transfer, and so far as he was concerned, he says he did not bother further about it. The next thing which took place, occurred in January, 1894. During the intervening period of eight months nothing was done—the original premium was unpaid—the policy remained under the control of the plaintiffs' agent, McAlpine. As the sixty days had elapsed from the date of the policy, the plaintiffs required further evidence of health. Accordingly

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McCann again brings Jonah to Moncton, takes him to his home to dinner, and then to Dr. Ross, where he is again examined, or at least the doctor so certifies, and Jonah himself then, on the 22nd of January, 1894, in order to give this contract vitality and make it binding, gives an untrue certificate of his state of health, and did it knowingly for that purpose. At this time Jonah had no interest in this incomplete contract. He had assigned that to McCann months before. It was done as a necessary act in order to enable McCann by paying the premiums, as he had, according to Jonah's account, originally agreed to do, to render operative this insurance contract, and which enured entirely to his benefit without further act or consent of Jonah. I think there is no doubt that McCann did agree, or at least gave all parties to understand that he would pay the original premiums. He may not have expected to pay a premium for more than $1,000, but whatever it was he no doubt was to be the paymaster. Everybody knew that Jonah could not pay, in fact, he gave himself no concern about the matter. McAlpine, by his arrangement with the plaintiffs, got some 50 or 60 per cent. of their first premiums for obtaining the insurance. He is quite too sharp not to have known where the money was coming from, and McCann was the only one to supply it. More than this, McCann knew the amount of the policy to be $5,000 in May, 1893, when it came to him, and before the assignment was made, so he then knew what the premiums amounted to, and it seems incredible that he would pay the $5, small as it was, unless he had made up his mind to carry the policies along for his own benefit. When you take all these circumstances into account and remember that McCann was speculating in this kind of securities, and that within a short time afterwards he had secured and held for his own benefit $4,000 more insurance on this young man's life, it is difficult to acquit McCann of being a party substantially to this whole scheme. He may not have actually participated in it, but I should be doing injustice to his intelligence and shrewdness as a business man to come to the conclusion that he did not know practically all that was going on and that without gross deception somewhere this invalid could never get any company to take a risk on his life. More than this, it is idle to

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suppose that this insurance was for the benefit of any one but McCann. I can only regard this $5 paid to Jonah as a small gratuity for his part in the transaction. McCann had no insurable interest in Jonah's life of any kind. He was using him, I think, as a mere instrument for carrying out his own speculations. Jonah was not requiring money as Anderson was when he insured. He had no means of paying the premiums and can really have had no expectation of having any. His going to learn a trade of carriage building was a mere farce, or else his health was so bad that he could not endure the work. I think this case is entirely within the exceptions put by the Chief Justice in *Vezina* v. *The New York Life* (2), and by Strong, J., in *North American Life Assurance Co.* v. *Craigen* (3).

See also *Ætna Life Insurance Co.* v. *France* (4), and *Cammack* v. *Lewis* (5).

There will be a decree setting aside this policy, the plaintiffs accounting for the premiums and interest at 5 per cent. The plaintiffs must have their costs against both defendants, and the premiums and interest will go in payment of the costs.

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Agreement—Physician—Sale of practice—Covenant to discontinue practice—Legality—Restraint of trade—Condition precedent—Waiver—New Brunswick Medical Act, 44 Vict. c. 19—Vendor not registered—Terms of injunction.

The plaintiff was a physician practising at Sussex, and in receipt of a large income. Having occasion to remove from the Province, he entered into an agreement with the defendant, a physician, to lease to him a part of his (the plaintiff's) house, including offices, for two years from July 1, 1894. An annual rental was reserved. The defendant covenanted that at the end of the lease he would either purchase the house at a named sum, or would forthwith leave and depart from the parish of Sussex, and would not for a period of at least three years next thereafter reside in said parish, or practise thereat, either as physician or surgeon, or act directly

(2) 6 Can. S. C. R., at p. 44.
(3) 13 Can. S. C. R., at p. 291.
(4) 94 U. S. 561.
(5) 15 Wall. 643.

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or indirectly as partner or assistant to or with any other physician or surgeon practising in said parish, or elsewhere within ten miles thereof, and that he would, at least three months before the end of the said term, give the plaintiff notice in writing whether he would so purchase or would depart from Sussex. It was provided that if at the end of the term the plaintiff did not wish to sell he could return to Sussex and resume practising, in which case the defendant might remain and practise in Sussex. The plaintiff covenanted that he would on or before July 1, 1894, repair the roof of the house, and that from that date he would cease to practise in the parish of Sussex for two years, and that if the defendant purchased the house and lot as aforesaid he would not practise in Sussex for three years from said date. Repairs to the roof were not made until January, 1895, and were found to be insufficient, and it was not until the fall of 1895 that the matter was attended to, when a new roof was put on. At the time the defendant went into possession, July 1, 1894, he was aware that the repairs had not been made, and he raised no objection to the plaintiff's default. At the time of the agreement the plaintiff was not a registered physician, though he had been registered the year before, and was entitled to be registered on payment of the annual fee. At the end of the lease the defendant declined to purchase the property, or discontinue to practise at Sussex. In a suit for an injunction to restrain the defendant from practising and residing at Sussex, in the terms of his covenant:

Held, (1) that the agreement was not invalid as being in restraint of trade, and contrary to public policy.

(2) that there had been a waiver by the defendant with respect to the time of performance of plaintiff's covenant to make repairs; and that its performance was not a condition precedent to the performance by the defendant of his covenant.

(3) that it was immaterial that the plaintiff was not a registered physician at the time of the agreement.

(4) that defendant's covenant was supported by consideration.

(5) that the defendant should be enjoined from residing at Sussex as well as from practising there.

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

Argument was heard May 18, 20, 1897.

L. A. Currey, Q.C., and *J. M. McIntyre*, for the defendant:—

Where a contract is in restraint of trade, the Court will scrutinize its terms very narrowly, and will not enforce it if unreasonable and oppressive. The Court will not permit its extraordinary remedies to be invoked to enforce an unfair and improvident agreement. See *Buxton* v. *Lister* (1); *Ellard* v. *Lord Llandaff* (2); *Martin* v. *Mitchell* (3). The agree-

(1) 3 Atk. 383. (2) 1 Ball & B. 251.
(3) 2 J. & W. 413.

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ment here is one-sided and productive of hardship. The plaintiff did not bind himself to sell the property to the defendant, and did not penalize himself if he resumed his practice, while the defendant undertook to buy the property or abandon his practice. A contract in restraint of trade, though under seal, must be supported by consideration: *Mallan* v. *May* (4). There is no consideration here for the defendant's agreement to retire from practice. The consideration for the lease was the rent. The promise by the plaintiff not to practise for three years cannot be set up as a consideration, for at the time he was not a registered and, therefore, a qualified physician under The New Brunswick Medical Act, 1881 (44 Vict. c. 19). See *Provincial Medical Board* v. *Washington* (5). A promise by a party to abstain from doing something he is not legally competent to do is no consideration: *Wade* v. *Simeon* (6). It is submitted that the sale by the plaintiff of his practice at a time when he could not legally practise was a contravention of the Medical Act, and that the contract was therefore illegal. See *Williams* v. *Jones* (7). If there were several considerations for the defendant's promise, the illegality of any one of them vitiates the contract: *Anson* on Contracts (8). The plaintiff having broken his covenant to make repairs to the premises, has precluded himself from enforcing the performance of defendant's covenant by the remedy of injunction. See *Telegraph Despatch and Intelligence Co.* v. *McLean* (9). We also contend that the plaintiff put an end to the agreement by his failure to make the repairs: *Fetcher* v. *Montgomery* (10); *Waring* v. *Manchester, etc., Railway Co.* (11).

White, S.-G., and *Leonard Allison*, for the plaintiff:—

There is no evidence to show that the plaintiff was not registered under the Medical Act at the time of this agreement, and the burden of proof that he was not registered is upon the defendant. The mere production of the Gazette is not conclusive, for he may have been registered the day after

(4) 11 M. & W. 653.
(5) 19 N. S. Rep. 470.
(6) 2 C. B. 548.
(7) 5 B. & C. 108.
(8) 4th ed. 190.
(9) L. R. 8 Ch. 658.
(10) 33 Beav. 22.
(11) 7 Hare, 482.

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its publication. But it is difficult to conceive in what way the question is affected by the non-registration of the plaintiff. The Act does not require that before a physician can sell his house and office premises he shall be registered. The policy of the Act is the protection of the public against quack practitioners by barring them from recovering for their services. In *Williams* v. *Jones* (12), the agreement was to practise in violation of the law. The authorities are numerous that the agreement here will be upheld. In *Davis* v. *Mason* (13), a bond given by a surgeon's assistant, that he would not practise on his own account for ten years, within fourteen miles of where the surgeon lived, was held to be valid. See also *Sainter* v. *Ferguson* (14); *Benwell* v. *Inns* (15); *Dubowski* v. *Goldstein* (16); *Timmerman* v. *Dever* (17). There was sufficient consideration for the defendant's promise. He was to have the benefit of plaintiff's practice during his absence, and if plaintiff at the expiration of the term elected not to sell the property, defendant could continue to reside and practise at Sussex. Moreover, no consideration is required to support a covenant in restrain of trade when the agreement is under seal: *Matthews* on Restraint of Trade (18). There is no hardship in the agreement. But the question of hardship is to be judged of at the time an agreement is entered into: *Fry* on Specific Performance (19). The covenant by the plaintiff to repair is not a condition precedent to the performance by the defendant of his part of the agreement, but is an independent covenant. To be a condition precedent, it must have been intended that it should be a substantial part of the contract, going to its very root, so that in the event of its non-performance, the contract would be discharged. The failure of the plaintiff to make the repairs in time merely gave rise to an action for damages. See *Wilkes* v. *Steele* (20); *Bastin* v. *Bidwell* (21); *Bettini* v. *Gye* (22); *Directors, etc., of the London Guarantee Company* v. *Fearnley* (23); *Hunter* v. *Gifford* (24).

(12) 5 B. & C. 168.
(13) 5 T. R. 118.
(14) 7 C. B. 716.
(15) 24 Beav. 307.
(16) [1896] 1 Q. B. 478.
(17) 50 Am. Rep. 240.
(18) pp. 153, 164.
(19) 2nd ed. s. 398.
(20) 14 U. C. Q. B. 570.
(21) 18 Ch. D. 238.
(22) 1 Q. B. D. 183.
(23) 5 App. Cas. 911.
(24) 1 All. 701.

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The facts of this case are not very complicated, neither is there much difference between the parties as to what these facts are. It seems that the plaintiff, who is a regularly graduated physician and surgeon, had for some twenty years previous to May, 1894, been residing and practising at Sussex, in the county of Kings, where he had established a business worth at that time on an average about $2,400 a year. He was also owner of a lot of land in the town of Sussex on which was a two-storey flat-roofed house in which he lived. Attached to this house, and a part of it, was a building containing the plaintiff's offices, and over them two rooms used as sleeping apartments. There was also a barn on the lot as part of the premises. The plaintiff's wife, having developed some weakness which rendered her removal to a warmer climate necessary, was taken by her husband in January, 1894, to Los Angeles, in California, where he left her on his return home shortly after. Shortly before this, the defendant had graduated as a physician and surgeon, and was at this time looking about for some locality in which to commence practising. Hearing that the plaintiff was desirous of joining his wife in California, and was therefore willing to dispose of his property and practice, he procured an introduction to him, the result of which was that negotiations for this purchase were opened, which after some period ended in a written agreement being entered into by the parties, out of which has arisen this litigation. By this agreement (which is under the hands and seals of the parties, and also of the defendant's father, who became surety for the rent) the plaintiff *in consideration of the rents and covenants therein contained* to be paid and kept by the defendant and his father, leased to the defendant, "the physician's offices and the bedroom immediately over said offices, all contained in said lessor's dwelling house, and also the barn attached to said dwelling house," which house and barn were then in the plaintiff's occupation, as I have already mentioned. This agreement is dated May 3rd, 1894, and the demise extended for two years from July 1st, 1894, at which time the defendant was to have the exclusive possession, the agreement providing for a joint occupation of the offices during the intervening

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period from May until July. The annual rental reserved was $200, payable in two equal semi-annual payments. There was also a proviso that on giving a certain notice the defendant had the right for an additional rent of $50 a year of occupying the lower flat of the main building. This agreement contained covenants by the defendant as lessee, (1) for the payment of the rent, (2) not to commit waste, and to maintain the premises in tenantable repair, (3) not to make alterations or additions to the premises or to sublet, (4) not to interfere with the tenants of the other part of the premises. The fifth covenant is the one upon which this case turns, and it is as follows:—

"That said lessee (the defendant) will at the end or other sooner determination of said lease either (*a*) purchase all said 80 x 100 lot of land and said buildings thereon at the price or sum of $3,500, to be paid as hereinafter mentioned, or (*b*) will forthwith leave and depart from said parish of Sussex, and will not for a period of at least three years next thereafter reside in said parish of Sussex, or practise thereat either as physician or surgeon, or act directly or indirectly as partner or assistant to or with any other physician or surgeon practising in said parish of Sussex, or elsewhere within 10 miles thereof; and that said lessee will at least three months before the end of said term of two years give said lessor notice in writing whether said lessee will so purchase said house and lot, or will depart from Sussex as aforesaid."

Then follows a provision as to the payment of the purchase money, in case the defendant exercised his option to purchase, and then came the following proviso: "Provided that should said lessor not wish at the end of said two years to sell said house and lot, said lessor may on giving said lessee two months' previous notice of his intention not to sell, then return to Sussex and practise thereat as heretofore, in which case the said lessee shall be at liberty on quitting said premises at the end of said term to remain in Sussex and practise his profession thereat as he may choose." Then follows a re-entry clause for non-payment of the rent, and then this covenant by the plaintiff: "And said lessor covenants with said lessee that said lessor will on or before July 1st, 1894, put the roof of said house in tenantable repair, and that he

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will upon, from and after last mentioned day cease to practise as physician or surgeon in said parish of Sussex, for and during the said term of two years, or until breach by said lessee of some one or more of said covenants by and on the part of said lessee, and that from the execution hereof until July 1st, 1894, said lessee may free of charge occupy and use said offices and barn, and have in common with said lessor, but so as not to interfere with or hinder the reasonable use and enjoyment thereof by said lessor. And that if said lessee purchases said house and lot as aforesaid, and well and truly keeps and observes all said lessee's said covenants, said lessor will not practise as physician or surgeon in Sussex aforesaid for three years next succeeding said July 1st, 1894." Then followed another proviso, that if during the term the defendant should die, or from any cause not his own default or neglect, become permanently incapacitated for the ordinary practice of his profession, on notice of such death or incapacity being given, the term should end and all liability for subsequent rent cease.

The parties continued in the joint use of the offices until July 1st, 1894, when the defendant went into the exclusive occupation of the premises leased to him—that is the offices, bedroom and barn—some question is raised as to the occupation of the barn. The defendant says that for a considerable period after July 1st, 1894, the plaintiff kept a pony cart in the barn, and that for all or the greater part of the whole two years he had a stove stored in this barn. I attach no importance whatever to this. The defendant raised no objection to them, he never requested the removal of these articles, or removed them himself, as he might have done; nor is there any evidence to suggest the slightest inconvenience to the defendant, or that his possession of the premises was in the slightest way interfered with. The plaintiff discontinued practice at Sussex as he had agreed, joined his wife in California, where he remained until July, 1896, after the two years had expired, when he returned to Sussex. Except as to the repairs to the roof of the building, which the plaintiff undertook to have done prior to July 1st, 1894, and in reference to which I shall have occasion to speak later on, the evidence shows a strict compliance with his part of

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this agreement. The defendant continued in possession of the offices, bedroom and barn for the two years—paid the rent agreed on, but at the end of that term declined either to purchase the premises or discontinue practice at Sussex as he had agreed. Some time before the expiration of the two years, he notified the plaintiff of his intention not to purchase, and he now openly avows his intention of remaining in Sussex and practising there, notwithstanding his covenant to the contrary, and for this purpose he has rented offices in the immediate vicinity of the plaintiff's house. The plaintiff has therefore filed this bill, by which he seeks an injunction restraining the defendant from practising, in the terms of his covenant, and asking for an account of damages sustained and an order for their payment.

The defence set up may be thus stated: 1. That the agreement is void as being in restraint of trade, contrary to public policy, and made without consideration. 2. That a physician's practice is not capable of sale, but if it were, there was no agreement for its sale here, and therefore the covenant as to practice and residence are unreasonable, unnecessary and void. 3. That as the plaintiff was himself disqualified from practising by reason of his non-registration when he entered into the agreement, he had no practice to sell or transfer. 4. That the plaintiff having himself been guilty of a breach of his covenant to repair, is not entitled to a remedy by injunction, even though the covenant were good. 5. That this Court will not enforce performance so unfair and harsh in its terms.

The evidence shows that the agreement was arrived at after considerable negotiation, and the various interlineations in it are some evidence to show that its terms were scanned with both care and caution. The defendant does not complain that he has been imposed upon in any way, or that circumstances which he could not control let him into a bargain involving obligations which otherwise he would not have assumed. On the contrary, with a full knowledge of what he was doing he entered into this contract in order to secure an opportunity for establishing himself in practice, with the result so far that he has secured a business too valuable to be abandoned even temporarily, except under the pressure of

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legal proceedings. He has availed himself of every advantage which the agreement gave him, and now seeks to get rid of the effect of what seems like a deliberate violation of his own covenant, by an attempt to show that the whole contract is illegal by reason of its provisions being contrary to public policy. Under these circumstances, the defendant can have no ground for complaint if any discretion which in cases like the present this Court has to grant or withhold the remedy now asked for, shall be exercised against him rather than in his favour.

It will be convenient in the first place to enquire whether a physician's practice is capable of sale so as to form a consideration for a covenant such as that now sought to be enforced. While there may be a distinction between what is ordinarily known as the good-will of a mercantile business and which Lord Eldon in *Cruttwell* v. *Lye* (25), describes as that "probability that the old customers will resort to the old place," and a professional practice I can see no reason why the same principle is not applicable to both. It cannot be contended that the introduction and recommendation of one physician by another physician of standing and repute to his patients on his retiring from practice among them has no pecuniary value. It is common knowledge that such sales, if we can properly call them by that name, are continually made and sometimes handsomely paid for. Nor have Courts hesitated about enforcing such contracts. In *Whittaker* v. *Howe* (26), which was the case of a sale of a solicitor's practice, the Master of the Rolls says: "I confess there is something in all contracts of this nature of which I have entertained some doubt. Where clients rely on the professional skill and knowledge of the individual they have long employed, I have some doubt as to the policy of sanctioning the purchase of their recommendation of the clients to other persons. These doubts have not originated with myself, because I recollect very well their being long dwelt upon, and commented on by Lord Eldon, not only in the case of a solicitor and his clients, but *in the cases of medical men and their patients*. I perfectly recollect a case in which the

(25) 17 Ves. 335.

(26) 3 Beav. 383.

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professional practice of one physician had been sold to another, wherein the policy of permitting such arrangements was the subject of great discussion and consideration. It is not, however, for me to act upon any doubts I may entertain of that nature, because agreements of this description have been too often sanctioned to be now questioned." The same principle has been acted upon in numerous cases. See *Nicholls* v. *Stretton* (27); *Rawlinson* v. *Clarke* (28); *Sainter* v. *Ferguson* (29); *Bunn* v. *Guy* (30); *May* v. *Thomson* (31).

It is true that in this case there is nothing in the agreement by which the plaintiff bound himself to introduce or recommend the defendant to his patients. It is however beyond doubt both from the evidence and the general scope of the agreement that what was purchased was not only the right of occupation of the premises, but such advantage as might accrue to the defendant professionally by reason of such occupation, coupled with the retirement of the plaintiff as a competing practitioner. For any introduction or recommendation is of comparatively little value unless the field is free from competition. Hence it is that covenants of this kind are found essential to the complete enjoyment of the privilege or right contracted for. Though the agreement in this case is silent as to any recommendations of the defendant by the plaintiff, the evidence shows that the plaintiff in addition to personal introductions did have printed and circulated among his patients some hundreds of post cards, in which he informed them of his intended removal from the Province, and that his place had been rented to the defendant, whom he spoke of as "a skilful physician, who will take charge of my place and practice July 1st, next." These cards were dated May 28th, 1894, and the defendant knew of their being issued. The defendant, therefore, had the benefit of this recommendation, as well as the covenant by the plaintiff to abstain from practice during the two years. Another point was made that the plaintiff at the time this agreement was entered into was not a regularly qualified practitioner, and therefore he was disposing of a business

(27) 7 Beav. 42.

(28) 14 M. & W. 187.

(29) 7 C. B. 716.

(30) 4 East, 190.

(31) 20 Ch. D. 705.

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which it was unlawful for him to carry on. The question arises under The New Brunswick Medical Act, 1881. The plaintiff had been registered under this Act, and his name appears in the Gazette for the year 1893, though in the list published in May, 1894, showing the names in the register on the first day of January of that year, the plaintiff's name does not appear. A question arose as to the fact whether he was or was not registered at the time the agreement was made. If it were necessary to decide this point, I should think the onus was upon the plaintiff to show the fact, and that it has not been shown. If I were to assume anything, I should assume that the state of things as shown on January 1st, 1894, continued. The plaintiff was under no obligation to register any more than he was to practise. The point is, to my mind, altogether unimportant from any standpoint. If the defendant's position be correct, that he bought no practice, then it is of no moment that there was no legal practice to purchase. On the other hand, it is admitted that by payment of the annual registry fee the plaintiff could re-register, as I believe he actually did on his resumption of practice in 1896. Besides all this, as is pointed out by Jessel, M.R., in *May* v. *Thomson* (32), the thing sold is the recommendation or the covenant not to practise, or both. What has the registry to do with either? I think nothing whatever.

Neither do I think there is anything in the point that this agreement is without consideration. Having in mind the principle applied in *Hitchcock* v. *Coker* (33); *Gravely* v. *Barnard* (34); *Sainter* v. *Ferguson* (35), and various other cases of a similar character, it is abundantly clear to me that there is ample consideration for this agreement, and when that is once established the adequacy of the consideration is not a subject matter for inquiry. The expressed consideration in the agreement itself for the demise of the premises was not only the payment of the rent, but the performance by the defendant of his covenants of which that particular covenant now sought to be enforced is one. To the extent that the plaintiff now that he has resumed his practice is in-

(32) 20 Ch. D. 705.
(33) 6 A. & E. 438.
(34) L. R. 18 Eq. 518.
(35) 7 C. B. 716.

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jured by the competition of the defendant during the three years from 1st July, 1896, to that extent the plaintiff has sustained or will sustain a loss. He is therefore not getting what he bargained for as the value and consideration of the whole agreement. See also *Davis* v. *Mason* (36). We come now to the question in this agreement, is this particular covenant void as being in restraint of trade and contrary to public policy? In my opinion it is not. The scope of this agreement is simply this: The plaintiff leases to the defendant his offices for two years at a stipulated rent, coupled with the undertaking on the plaintiff's part that he will not during that period practise in Sussex. As I have already shown, that covenant or at all events a covenant of a similar nature, is necessary for the attainment of the object in view; otherwise the advantage in purchasing the practice and getting the recommendation would be practically neutralized. Then the agreement provides that if the defendant does not buy the premises and the plaintiff resumes his practice, the defendant will in his turn cease to be a competitor in the field for three years. There is the same reason for the defendant coming under the restraint in case of the plaintiff's return as there was for the plaintiff coming under the restraint for the defendant's benefit. I think these covenants perfectly reasonable. The restraint provided for is partial—it is restricted both as to time and area; and the only question in such a case is whether the restraint provided for is reasonably necessary to secure to the person for whose benefit the restraint accrues the full enjoyment of the thing contracted for.

In *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (37), Lord Watson, at page 552, is thus reported: "I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly, it has been determined judicially, that in cases where the purchaser

(36) 5 T. R. 118, 120.

(37) [1894] A. C. 535.

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for his own protection obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced." In applying the principle, however, we must not lose sight of the tendency which modern authority has shown towards upholding the individual right of contract, and holding those who voluntarily enter into agreements to a substantial observance of them. In the case just cited, Lord Watson says: "But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade." In *Printing and Numerical Registering Co.* v. *Sampson* (38), Jessel, M.R., says: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider —that you are not lightly to interfere with this freedom of contract."

See also *Badische Anilin und Soda Fabrik* v. *Schott* (39). In the case just cited, Chitty, J., says: "The reasonableness depends on all the circumstances, which must be duly weighed in each case. If the restraint is greater than can possibly be required for the protection of the business of the covenantee, the covenant is unreasonable and void. But if the restraint is not greater than can possibly be required for the protection of the business of the covenantee, it is not unreasonable." In this case as well as in *Rousillon* v. *Rousillon* (40), it is held that where the covenant is qualified as to time the onus is upon the covenantor of shewing that the

(38) L. R. 19 Eq. 462.

(39) [1892] 3 Ch. 447.

(40) 14 Ch. D. 363.

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restraint is unreasonable. I do not think the defendant has discharged this onus of proof. On the contrary, the terms of the covenant seem to me, except perhaps as to the defendant's residence, to be perfectly reasonable and practically the same as the defendant himself exacted from the plaintiff as reasonably necessary to him for the enjoyment of a similar right. This Court, in my opinion, ought not to hesitate to enforce this covenant, unless there are other considerations which would render it inequitable to do so. The only other consideration which seems of any weight arises from the fact that the plaintiff had not strictly complied with his covenant to put the premises in repair; and it was strongly urged upon me that in such a case this Court would not decree a specific performance by the defendant of his covenant at the instance of a plaintiff who is himself in default for a breach of his own covenant arising out of the same transaction and part and parcel of it. The facts which bear upon this part of the case are these: The roof of the building in question was what is known as a "gravel roof," and it seems that there were only two persons in Sussex skilled in repairing work of that kind, one of whom was indebted to the plaintiff. This person was employed to do the work, but for some reason he did not do it within the time expected. This roof as well as the one over the offices was leaking, and it seems from the evidence that although the plaintiff employed the workman to make these repairs he really did nothing until January, 1895, when as was thought at the time the roof was put in thorough order. When the next heavy rain came on it was discovered that the roof still leaked so as to cause considerable inconvenience in the office part, as well as in the main part of the building. Accordingly, in the fall of 1895 the whole roof was taken off, and a new one put on at an expense of some $200. In addition to this some $30 were spent by the plaintiff in 1894, after the agreement was made, in repairs to the verandah. The plaintiff admits that he did not strictly perform this part of his agreement, but alleges that the defendant waived performance of it so far as time is concerned. The evidence shows that the defendant went into possession July 1st, 1894, with full knowledge that nothing whatever had been done towards making these repairs, and therefore with

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full knowledge that the plaintiff was in default so far as the stipulated time for making the repairs was concerned, for it had then arrived, and in taking possession the defendant made no objection or protest on account of the repairs not having been made. Of course both parties expected the work to be done without further delay, but there was I think a waiver on the defendant's part of the time within which, according to the agreement, the repairs were to be made. I only allude to the plaintiff's contract in this matter to show that there never was on his part any intention of evading his contract in any way as to repairs, and that he not only expended the money on the verandah, which he was in no way bound to do, but that he put the new roof on instead of repairing the old one, two expenditures considerably in excess of anything in the contemplation of the parties when the contract was made, and both of which accrued to the defendant's benefit in case he purchased the premises. More than this, the defendant never, except on one occasion as the evidence shows, made any complaint about the repairs, and he paid his rent without objection and without claiming any abatement. In cases like this when specific performance of a contract is sought, the exercise of the equitable jurisdiction is not a matter of right in the plaintiff seeking the relief, but of a discretion in the Court to be exercised not arbitrarily or capriciously, but so far as is possible upon fixed rules and principles: *Lamare* v. *Dixon* (41).

In determining this discretion the conduct of the party seeking relief is always an important factor. The plaintiff's conduct here, as I have already pointed out, shows no intention to violate or disregard his agreement; in fact, there is no pretence that he has done so except in the time in which these repairs were to have been made. The plaintiff's covenant to repair is a separate and independent covenant; it is in no sense a condition precedent to the defendant's performance of his covenant. In addition to this, when the defendant gave the plaintiff notice that he did not intend to purchase the premises, and thus took upon himself the alternative of refraining from practice for the two years, all

(41) L. R. 6 H. L. 414.

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these repairs had actually been made, and the plaintiff was in no default. The idea suggested that the defendant was in any way influenced in his decision not to purchase by the fact that the repairs were not put on within the time agreed upon, is, I think, altogether unsustained by the evidence. There is nothing in the agreement by which it can be said that this covenant was not to be binding on the defendant, unless the plaintiff had literally performed all of his. See *Bastin* v. *Bidwell* (42).

As I have already pointed out, these covenants are independent; and where there is no condition precedent upon which the liability of the defendant on his covenant depends, the principal question is whether the plaintiff's covenant has substantially been performed, or, speaking more accurately, whether the breach of the covenant has been repaired. If so, and the conduct of the party seeking relief has been otherwise such as not to disentitle him to relief, there is neither authority nor principle for saying that the Court should refuse to enforce performance by the other party of his covenant: *Proctor* v. *Sargent* (43).

I have said that the plaintiff had fully repaired the building, not only before the expiration of the two years, but also before the defendant gave notice to the plaintiff of his intention not to purchase. It is but right to say that the defendant said he gave notice of his intention prior to his letter of December 17, 1895. The letter which is said to have contained such notice is not produced. The plaintiff denies the receipt of any such letter, and professes to have produced all the letters received from the defendant during the two years in question. I think the defendant is in error in thinking that he gave any previous notice or wrote any letter intended as any such notice other than that dated December 17, 1895. This conclusion is, I think, warranted by the letter itself, and the circumstances under which it was written, as detailed in the letter itself. The new roof was completed in October, 1895, and on the 17th of December following the defendant wrote the plaintiff a letter from Sussex, some passages in which have a direct bearing on this

(42) 18 Ch. D. 238. (43) 2 M. & G. 20.

case. After devoting several pages to the current news of the place he speaks of his own practice and the difficulties he has experienced in making collections, and then proceeds thus: "They (i.e., his patients) won't bring even hay and oats, and just a few days ago I had to order hay and pay cash for it. This is and has been my experience in this place, and I find it impossible to get along without daily going deeper into debt, which is very undesirable. My practice in the country is gradually extending, yet in the village it is very limited." He then goes on to give a detailed description of the illness of a female patient of his, and of her subsequent death, caused, as I judge from his own account, by a want of experience or skill on his part. He tells how two other physicians of Sussex had been called in consultation at a late moment, and how one of them by a post mortem examination had discovered what he had anticipated was the real trouble—one which ought never to have happened at all—a misfortune injurious to the reputation of an established practitioner, but doubly so to that of a beginner. After alluding to the way in which this occurrence had been noised about, and the injury it was likely to do him, he says: "My expenses are greater than my income, and that means I cannot and have no intention of living in Sussex with the prospects as they are at present, any way. This notice is longer than you were supposed to have, but I could have given it to you six months ago. There are now at least two too many of us in Sussex, and that means that some one or more must get out sooner or later." It is, I think, altogether improbable that the defendant could have at any time before this letter was written given any notice as he says. In this very letter the defendant mentions as a reason for not purchasing that his expenses were in excess of his income, and that he was daily going further into debt. There is not a word about the repairs one way or the other. The defendant says that he could have given this notice six months before; an expression which he could never have used if, in fact, he had already given a notice. I have, therefore, no hesitation in finding as facts in this case, that the only notice which the defendant gave the plaintiff of his intention not to purchase was contained in this letter of December 17th; that long be-

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fore that all the repairs stipulated for had been made, and that the defendant's determination not to purchase was in no way due to any delay in putting on these repairs.

I see no reason for not holding this defendant to a performance of his contract. As I have said before, there is no sum mentioned as liquidated damages in case of an action at law, and it is a difficult matter to prove the actual damage. Where the right is clear, as I think it is in this case, the Court has never hesitated in compelling the defendant to adhere to his contract: *Bastin* v. *Bidwell* (44); *Dubowski* v. *Goldstein* (45); *Raffety* v. *Schofield* (46).

The only doubt I have had is whether the covenant not to reside in Sussex is not to that extent unnecessary, and whether the injunction ought to go to that extent. In *Atkyns* v. *Kinnier* (47), and *Dendy* v. *Henderson* (48), such a covenant was held reasonable, and on the authority of these cases the injunction will be granted as to the residence also.

The bill prayed for an assessment of damages up to the time of making the decree. There is really very little evidence on this point, and what there is only covers a small part of this period. I suppose the plaintiff's principal object was the injunction. It is difficult, as I have already pointed out, in a case like this to give very exact proof of damage. In this case I could not well go beyond some nominal amount. I shall, therefore, assess none.

There will, therefore, be an injunction restraining the defendant in the words of his covenant, and he must pay the plaintiff his costs of this suit.

(44) 18 Ch. D. 238.
(45) [1896] 1 Q.B., 478.
(46) [1897] 1 Ch. 937.
(47) 4 Ex. 776.
(48) 11 Ex. 194.

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December 7.

Practice—Security for costs—Plaintiff resident out of the jurisdiction—Plaintiff a judgment creditor of the defendant.

Where a person resident out of the jurisdiction, having obtained a judgment in the Supreme Court for a large amount, which was defeated by a bill of sale given by the judgment debtor, brought a suit to have the bill of sale set aside as a fraudulent preference, he was required to give security for the costs of the judgment debtor made a party to the suit.

The plaintiffs carry on business in co-partnership, and reside in the city of Quebec. On July 16th, 1897, they obtained judgment in the Supreme Court of New Brunswick against the defendant James Scott in an action of debt for $952.65. A few days previously Scott executed a bill of sale of his property and effects to the defendants, A. Miller & Co. The plaintiffs' judgment being unsatisfied, they brought this suit to have the bill of sale set aside as a fraudulent preference contrary to the provisions of the Act respecting assignments and preferences by insolvent persons, 58 Vict. c. 6. The defendants, including Scott, appeared, and demanded security for costs. The plaintiffs having refused to extend the security in favour of Scott, the defendants applied for an order that security be given. Argument was heard December 3, 1897.

H. F. Puddington, for the plaintiffs:—

The defendant Scott already has security, since he is indebted to the plaintiffs under a judgment the validity of which cannot be questioned. Where a defendant admitted his liability the Court declined to order the plaintiff to give security: *De St. Martin* v. *Davis* (1). In *Re Contract and Agency Corp.* (2) a creditor having recovered judgment against a company, and issued execution, on which a return of *nulla bona* had been made, was not required to give security for costs of a petition to wind up the company.

(1) W. N. (1884) 86.

(2) 57 L. J. Ch. 5.

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A. H. Hanington, Q.C., for the defendants:—

The application on behalf of the defendant Scott cannot be taken out of the general rule that security will be ordered from a plaintiff residing abroad.

[BARKER, J.:—*Crozat* v. *Brogden* (3) appears to be a decision in your favour. There it was held that a person resident out of the jurisdiction bringing an action on a foreign judgment should, nevertheless, give security for costs.]

The security should be in a separate bond to each defendant: *Lowndes* v. *Robertson* (4).*

1897. December 6. BARKER, J.:—

On the authority of *Crozat* v. *Brogden* security must be put in for the costs of the defendant Scott.

(3) [1894] 2 Q. B. 30. (4) 4 Madd. 465.

* See *Stewart* v. *Harris*, 1 N. B. Eq. CAS. 143.—Rep.

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December 21.

RENEHAN v. MALONE.

Will—Construction—Words of request—Precatory trust.

A testator, by his will, gave and bequeathed all his property, both real and personal, to his wife for her use and benefit, and then added: "I request my wife to pay to P. R. (an adopted son), at her death, or should she sell the farm on which I now live before her death, $400. I also give P. R. the sorrel horse now in my possession."

Held, that the gift to the testator's wife was subject to a precatory trust in favor of P. R.

Demurrer to bill. The facts are fully stated in the judgment of the Court.

Argument was heard December 7, 1897.

J. H. Barry, in support of the demurrer:—

The words of this will do not create a precatory trust; they are merely an expression of the testator's wish, but are not to be held imperative. The gift is to the wife for "her use and benefit." It is therefore an absolute gift, which will not be altered into a conditional one. See *Eaton* v.

Watts (1); *Lambe* v. *Eames* (2); *Stead* v. *Mellor* (3); *In re Hutchinson and Tenant* (4); *Parnall* v. *Parnall* (5); *In re Adams and Kensington Vestry* (6); *Mussoorie Bank* v. *Raynor* (7). To create a trust the words must not admit of a discretion in the party who is to act, as to his acting according to them or not. See *Briggs* v. *Penny* (8), where this rule was laid down by Lord Truro; and see *Stead* v. *Mellor*, *supra*, per Jessel, M.R. The condition of a precatory trust that the subject-matter of it must be pointed out with certainty is not satisfied here. There is no specific property indicated to which the trust could apply. The farm is not charged with the payment to the plaintiff of the money. In the event of the wife selling it it is the testator's wish that the plaintiff be paid a sum of money. This does not mean out of the proceeds of the farm. If the farm is not sold in the wife's lifetime the payment to the plaintiff is not requested to be made out of the farm. The testator, therefore, having failed to define the subject-matter of the alleged trust the words cannot be put higher than a mere wish. To construe the testator's wish into an obligation would be at variance with the gift to the wife. The current of late authorities as to precatory trusts is against raising a trust from expressions of recommendation, request or entreaty: *Lambe* v. *Eames*, *supra*; *In re Hutchinson and Tenant*, *supra*; *In re Adams and Kensington Vestry*, *supra*; *In re Diggles* (9); *In re Hamilton* (10); and on appeal (11). In *Hill* v. *Hill* (12), Lord Esher, M.R., after laying down the rule of construction that words must have their ordinary signification unless there is something which obliges the Court to give them a meaning other than their ordinary meaning, says that words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind. A little later he adds: "I am unable to find any rule of law laid down which obliges a Judge in any particular case to give a meaning other than

(1) L. R. 4 Eq. 151.
(2) L. R. 6 Ch. 597.
(3) 5 Ch. D. 225.
(4) 8 Ch. D. 540.
(5) 9 Ch. D. 96.
(6) 24 Ch. D. 199; 27 Ch. D. 394.
(7) 7 App. Cas. 321.
(8) 3 MacN. & G. 546.
(9) 39 Ch. D. 253.
(10) [1895] 1 Ch. 373.
(11) [1895] 2 Ch. 370.
(12) [1897] 1 Q. B. 483.

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their ordinary meaning to words of request," and that "where there are words prior to the words of request, which, if they stood alone, would give well known legal or equitable rights, and afterwards there come words of request, it appears to me that the strongest possible circumstances would be required to enable the Court to say that those words of request are to cut down the prior words giving the legal or equitable rights, and impose an obligation." Lopes, L.J., in the same case says: "It is inconceivable to me that a testator, who really meant his hope, recommendation, confidence, or request to be imperative should not express his intention in a mandatory form."

F. St. John Bliss, contra :—

Though the recent cases are less favourable to precatory trusts than the older cases, they in no wise impair the integrity of the doctrine itself. The effect of the modern cases cited by my learned friend is to make the question purely one of construction as to what was the testator's intention, and whether the words used are to be construed as imposing an obligatory trust. Cotton, L.J., in *In re Adams and Kensington Vestry* (13), while insisting that the older authorities went too far in holding that some particular words appearing in a will were sufficient to create a trust, said: "Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust," and that what is to be looked at is the whole of the will. In *Williams* v. *Williams* (14), Lindley, L.J., said it would be an entire mistake to suppose that the old doctrine of precatory trusts is abolished, and that what must be regarded is the testator's intention to be gathered from the will as a whole. In the recent cases the Courts negatived the creation of a precatory trust on the ground that the donee in the first instance took an absolute gift which subsequent words were not intended to cut down, as shown by the gift being "absolute," "unfettered," "free from control," "for her own use absolutely." Here such expressions are wanting. A trust is fastened upon the gift. The conscience of the donee is affected, and, therefore, the Court will treat the

(13) 27 Ch. D. 394, 410. (14) [1897] 2 Ch. 12.

gift as subject to the trust: *Wood* v. *Cox* (15). Lindley, L.J., in *Williams* v. *Williams, supra,* at p. 18, says: "If property is left to a person in confidence that he will dispose of it in a particular way, as to which there is no ambiguity, such words are amply sufficient to impose an obligation." See *Wright* v. *Atkyns* (16); *Shovelton* v. *Shovelton* (17); *Curnick* v. *Tucker* (18); *Le Marchant* v. *Le Marchant* (19), in all of which cases, as pointed out by Lindley, L.J., the devise or bequest was to the devisee or legatee absolutely. If the widow takes the benefit given her by the will she cannot disregard the confidence placed in her by the testator: *Gully* v. *Cregoe* (20).

1897. December 21. BARKER, J.:—

The sole question raised by this demurrer is whether by the will of Daniel Sweeny a trust was created for the payment out of his estate of $400 to this plaintiff. Sweeny died in January, 1881, without children, but leaving a widow, to whom letters of administration *cum testamento annexo* were duly granted. She died intestate in January, 1897, leaving her sister, the above defendant, as her sole next of kin. The plaintiff lived with Sweeny and wife for several years, having been taken by them out of an orphan asylum at St.John about the year 1871, when he was ten years old. He continued to live with Sweeny and wife up to the time of Sweeny's death in January, 1881. At the date of the will the testator owned a farm on which he continued to live up to the time of his death, and which his widow continued to own and occupy up to the time of her death. This suit is brought to enforce as a charge against this farm, and which was substantially all the property Sweeny had at the time of his death, the payment of a legacy of $400, to which the plaintiff says he is entitled under Sweeny's will. This will is very short. Omitting the formal parts it reads as follows: "I give and bequeath to my beloved wife Ellen all my property both real and personal, for her own use and benefit. I request my wife Ellen to pay to Philip Randeland" (by whom

(15) 2 M. & C. 684, 692.
(16) T. & R. 157.
(17) 32 Beav. 143.
(18) L. R. 17 Eq. 320.
(19) L. R. 18 Eq. 414.
(20) 24 Beav. 185.

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it is admitted he intended this plaintiff), "at her death, or should she sell the farm on which I now live before her death, four hundred dollars. I also give Philip Randeland the sorrel horse now in my possession." It is claimed by this plaintiff that the words of the will amount to what is commonly spoken of as a precatory trust, enforceable by this Court, that the testator's widow took the real and personal property of her husband, not absolutely, but subject to the trust that out of it the plaintiff was to be paid $400 at her death, or in case she should sell the farm before that, then at the time of such sale.

The difficulty in cases of this kind lies not in the principle, but in its application. I have read all the cases cited at the hearing and many others in addition, not with the expectation of finding one where identical words were under consideration, but with a view of ascertaining whether by the more modern decisions commencing with *Lambe* v. *Eames* (21), decided originally in 1870, and on appeal in 1871 (22), any new principle had been put forward as applicable to trusts of this nature. I have, at all events, satisfied my own mind that the doctrine is in no way altered, but that it remains precisely as it has for many years. No doubt the tendency of modern decision has been to restrict rather than extend the doctrine and to limit its application to those cases where, not only from the words used by the testator in creating the so-called trust, but from the whole contents and scheme of the will, it is clearly deducible as the intention of the testator that a trust should be created. In determining this question undue weight is not to be given to the mere words of request or recommendation, for they always exist in such cases, but the question is whether from a consideration of the whole will an intention on the part of the testator can be discovered that these words of request or recommendation carry with them a legal obligation, and whether the language is sufficiently certain in other respects to enable a trust to be executed. A reference to two or three of the more recent authorities will show the tendency of modern judicial thought on this point.

(21) L. R. 10 Eq. 267. (22) L. R. 6 Ch. 597.

In *Re Diggles* (23), Cotton, L.J., says: "I adhere to what I said in *In re Adams and the Kensington Vestry* (24): 'Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will.'" Fry, L.J., in the same case (25) says: "The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention." In *In re Hamilton* (26), the above case is affirmed, and the expressions of the Judges are cited with approval. The latest case on the subject is *Williams* v. *Williams* (27), where the Judges did not differ as to the rule, though Lord Justice Rigby did dissent as to its application in that case. Lindley, L.J., says: "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way, as to which there is no ambiguity, such words are amply sufficient to impose an obligation. Nothing can be plainer than Lord Eldon's statement to this effect in *Wright* v. *Atkyns* (28). The books are full of cases decided in accordance with this doctrine: See *Shovelton* v. *Shovelton* (29); *Curnick* v. *Tucker* (30); *Le Marchant* v. *Le Marchant* (31), in all of which the devise or bequest was to the devisee or legatee absolutely. But still in each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases, obligations were inferred from language which in modern times would be thought in-

(23) 39 Ch. D. 253.
(24) 27 Ch. D. 394, 410.
(25) p. 258.
(26) [1895] 2 Ch. 370.
(27) [1897] 2 Ch. 12.
(28) T. & R. 157.
(29) 32 Beav. 143.
(30) L. R. 17 Eq. 320.
(31) L. R. 18 Eq. 414.

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sufficient to justify such an inference. It would, however, be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts, i.e., equitable obligations to deal with property in a particular way, can be imposed by any language which is clear enough to show an intention to impose them. The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its real meaning, although couched in language which is not imperative in form. A request is often a polite form of command. A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of Equity." In the same case (32), Rigby, L.J., is thus reported: "In theory, I do not think that there ever has been, at any rate for a century, any doubt as to the principles on which a trust or condition should be deduced, if at all. If in some cases those principles were departed from, such cases must be treated as inconsistent with and overruled by the general current of authority. No authoritative case ever laid it down that there could be any other ground for deducing a trust or condition than the intention of the testator as shown by the will taken as a whole, though no doubt in older cases that intention was sometimes inferred on insufficient grounds. The general intention was always treated as the matter to be ascertained; but it was from very early times pointed out that there could be no imperative obligation unless the subject-matter and the objects were both clearly ascertained. On these fundamental points there never has, in my opinion, been any real difference, though the application of them to particular instances has not always been satisfactory." This same learned Judge later on says that he has examined all the authorities cited to him, together with many others, and he cannot find one binding on that Court, or any other since the date of *Wright* v. *Atkyns*, in which the principles, as he stated them in the extract I have just given, had in any way been called in question. He adds (p. 29): "I find, indeed, repeated, and, having regard to older decisions, most salutary warnings, that the intention, having regard to the whole will, must always pre-

(32) p. 28.

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vail, and statements that the doctrine must not be extended; but nothing to impeach the principles themselves."

Now, what is the doctrine of precatory trusts? Lord Langdale in *Knight* v. *Knight* (33) says: "As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust; first, if the words are so used that, upon the whole, they might be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain." In this case there can arise no difficulty as to the last two conditions mentioned by Lord Langdale. The testator's widow, who took the property, is requested to pay—the sum is a fixed sum of $400, and it is to be paid to this plaintiff at a specified time. In these respects, therefore, there is no doubt or vagueness, nothing is left to the discretion of the widow, and there is no difficulty in the way of executing the trust. Then comes the question of intention as to whether the word request is to be construed as imposing an obligation upon the testator's wife as devisee of his property. In the case last cited Lord Langdale gives the following as a sample case to which there is no difficulty in applying the rule: "If a testator gives £1,000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given. or upon the person or object of the wish." In what material respect does this present case differ from that stated by Lord Langdale as a sample illustration of the rule and its application? This testator, in giving his property to his wife, does not use the words "absolutely" or "unfettered," or other similar words such as we find in some of the cases. He does, however, use

(33) 3 Beav. 148, 172.

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language amply sufficient in a will to carry an absolute interest unless controlled by other language, though it is in no way inconsistent with an inferior estate. The sentence giving her the property for her use and benefit is immediately followed by that in which she is requested to pay this $400—a form of expression short of a positive direction, as strong as one could well select. It is clear to my mind that while the testator was willing that his widow might enjoy the use of the farm if she chose during her life, and thus postpone the payment of the plaintiff's $400 until after all need of the farm for the widow's use had ceased, it was equally his intention that if she sold it her interest in his estate was then and there to be reduced to the extent of the $400 then payable out of the proceeds. I am unable to find anything in the will indicating any different intention. On the contrary, the only other sentence in the will sustains the view I have taken. He says, "I also give to Philip Randeland the sorrel horse now in my possession." This means, or at all events implies, that the horse was in addition to the other gift of $400, thereby indicating that the testator viewed and intended the $400 to be a gift from him, payable out of his property, and in no sense dependent upon the widow's option whether he should get it or not. I think this demurrer must be overruled with costs.

Demurrer overruled with costs.

FLEMING v. HARDING.

1897.

December 21

Practice—Bill—Leave to file—The Supreme Court in Equity Act, 1890 (53 Vict. c. 4) s. 22.

Where the bill was not filed within the time provided by Act 53 Vict. c. 4, s. 22, and defendants had not appeared, an order absolute was granted, giving leave to file bill, upon the terms of the order being served upon the defendants.

The summons in this suit was issued October 12th, 1896. The defendant, Horace Harding, was served November 7th following, and the defendant Sarah Harding was served November 12th. The defendants did not appear. The bill was filed January 12th, 1897. By The Supreme Court in Equity Act, 1890 (53 Vict. c. 4) s. 22, the plaintiff is required within three months from the commencement of the suit, or within such further time as a Judge may allow, to file the bill in the suit. The plaintiff now applied for leave to file the bill, considering that it had not been filed in time. Application was heard December 21, 1897.

A. P. Barnhill, for the application.

BARKER, J.:—I will grant you an order absolute, upon the terms of the order being served upon the defendants.*

* In *Brass* v. *Connor*, Nov. 16th, 1897, leave to file bill upon an *ex parte* application was refused, though the defendant had not appeared.

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January 18.

Partnership—Agreement—Construction—Whether persons partners inter se.

M. carried on business, and had in his employ his sons, J., R. and A. An agreement was entered into between them, by which the sons were to be associated with the father for a term of five years as co-partners in carrying on the business which was to be under the name and style of W. M. & Sons. The father was to furnish the capital and stock in trade, and the sons were to work in their several departments in carrying on the business. J. was to have charge of the books of the business, and power in the absence of the father to sign the firm's name, and also in the absence of the father was to have general

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charge of the business. R. and A. were to be under the direction of the father. The agreement witnessed that each of the sons should accept from the father "out of the proceeds of the business, as their and each of their several interests in the business, on account of the services to be performed by each of them," a specified sum of money each year, and which the father covenanted to pay them "on account of their several interests in the business." Provision was made for the withdrawal of the sons or either of them "from the said firm," on giving notice to the father, upon which the account with the firm of the party giving such notice should be made up, and the balance due him paid when all his interest in the business should cease. It was further agreed that at the end of the term of five years the several accounts of the sons should be balanced, and the money found to be due to each paid, whereupon the agreement should terminate. The sons were prohibited from entering into any contract on behalf of the firm involving more than $10, or engaging in any transaction out of the usual course of the retail business, and the wish of the father in all matters respecting the general management of the business, was to be binding on the sons. In the books of the business kept by J., and accessible to the sons, an account was opened against each of the sons, in which they were charged the cash paid to them, and were credited as salaries the amounts which by the agreement they were to be paid each year. Stock was never taken, and no steps were taken to ascertain the profits or losses of the business.

Held, that the father and sons were not partners *inter se*.

William Martin, John F. Martin, Richard P. Martin, and Alfred Martin entered into the following agreement under the circumstances therein recited: "Articles of agreement had, made, concluded and agreed upon this thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-eight, between William Martin, John F. Martin, Richard P. Martin, and Alfred Martin, all of the city of St. John, in the city and county of St. John, and Province of New Brunswick.

"Whereas the said William Martin and John F. Martin, two of the parties to this agreement, have for some time past been carrying on business as custom tailors and dealers in gents' furnishing goods at No. 13 Dock street, in the said city of St. John; and

"Whereas the said Richard P. Martin and Alfred Martin during the time the said business has been carried on at Dock street, as aforesaid, have been severally employed in working with the said William Martin and John F. Martin as cutter and clerk respectively; and

"Whereas the said William Martin and John F. Martin have mutually agreed to discontinue the business heretofore

carried on by them under the name and style of William Martin & Son on the thirtieth day of June instant, and

"Whereas the said William Martin has proposed and agreed to and with the said John F. Martin, Richard P. Martin and Alfred Martin, and they the said John F. Martin, Richard P. Martin and Alfred Martin, each for himself, has agreed to and with the said William Martin to associate with him from the second day of July now next ensuing for the full end and term of five years, as co-partners, in carrying on the business of custom tailors and dealers in gents' furnishing goods, under the provisions and agreements and subject to the covenants hereinafter contained.

"In accordance with the terms of the aforesaid proposal and agreement, the said William Martin by these presents doth agree to associate with himself John F. Martin, Richard P. Martin and Alfred Martin aforesaid, in carrying on the business of custom tailors and dealers in gents' furnishing goods, under the name and style of William Martin & Sons, for the term of five years as aforesaid, from the second day of July now next ensuing, in the shop and premises on Dock street, where the said William Martin and John F. Martin are now doing business, he the said William Martin furnishing the capital and stock in trade; and the said John F. Martin, Richard P. Martin and Alfred Martin engaging and undertaking to work in their several capacities in prosecuting and carrying on the said business of custom tailors and dealers in gents' furnishing goods, as follows: The said John F. Martin to have the charge and control of the books of accounts and all papers and correspondence incidental to or connected with the carrying on of the said business, with the power and authority in the absence of the said William Martin to sign all cheques, notes, bills and other accounts in the name of the said firm, to attend to the banking and other business connected therewith of the said firm, and in the absence of the said William Martin through sickness or otherwise from the store, to have the general charge and control of the said business during such absence of him the said William Martin; the said Richard P. Martin to employ himself at all reasonable times during the said term, or while he may continue to be attached to the said firm, under

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the direction of the said William Martin, in cutting and fitting garments, and the other usual and necessary work connected with the business or calling of tailor's cutter; and the said Alfred Martin to employ himself at all reasonable times during the said term, or while he may remain connected with the said firm, in assisting the said William Martin, John F. Martin and Richard P. Martin in their several departments, subject to the order and under the direction of the said William Martin. And it is hereby agreed by and between the said William Martin, John F. Martin, Richard P. Martin and Alfred Martin, and the said John F. Martin, Richard P. Martin and Alfred Martin hereby bind themselves and each of them to accept from the said William Martin out of the proceeds of the said business as their and each of their several interests in the said business, on account of the services to be performed by them and each of them; and the said William Martin hereby covenants and agrees to pay to the said John F. Martin, Richard P. Martin and Alfred Martin, on account of their several interests in the business to be carried on by them as aforesaid, the following sums of money, namely: to the said John F. Martin a sum not to exceed the sum of $500 in each and every year during the said term including board, to the said Richard P. Martin, a sum not to exceed in any one year during the said term the sum of $600, and to the said Alfred Martin a sum not to exceed the sum of $400 in any one year during the said term, including board. And it is hereby agreed by and between the parties hereto that in case the said John F. Martin, Richard P. Martin or Alfred Martin, or either of them, should desire at any time to withdraw from the said firm of William Martin & Sons, he or they may do so on giving three months' notice in writing to the said William Martin of such intention, upon which the account with the firm of the party giving such notice shall be made up and balanced, and he shall be paid at the completion of the time mentioned in any such notice, such sum or sums of money as may be found to be due and owing to him under the agreement above mentioned, upon which all his interest in the business aforesaid shall cease and determine. And it is hereby further agreed by and between the parties hereto, that at the end of the said term of five years the

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several accounts of the said John F. Martin, Richard P. Martin and Alfred Martin shall be duly balanced, and the money found to be due and owing to each of them respectively (if any) shall be fully paid, whereupon this agreement shall terminate and become void. And it is hereby further agreed by and between the parties hereto that any clothing which the said John F. Martin, Richard P. Martin or Alfred Martin may require during the said term or the continuance of this agreement shall be furnished to them, or either of them, out of the stock in hand at the first cost of production and not otherwise; and shall be a charge against the said several sums of money to be paid them and each of them during the said term. And it is hereby further agreed that no purchase or other contract involving a liability of more than ten dollars, or any importation from abroad shall be made, nor any transaction out of the usual course of the retail business shall be undertaken by the said John F. Martin, Richard P. Martin or Alfred Martin, or either of them, without the previous consent or approval of the said William Martin. That in all matters respecting the general transactions and management of the business, the wish of the said William Martin shall be binding on the other partners. That any advance of money which may be made at any time by the said William Martin to the said John F. Martin, Richard P. Martin, or Alfred Martin, or either of them, during the continuance hereof, shall form and be a separate charge against the allowance due them, or either of them, as above set out.

"In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written."

"(Sgd.) William Martin,
(Sgd.) John F. Martin,
(Sgd.) Richard P. Martin,
(Sgd.) Alfred Martin."

John F. Martin died September 17th, 1889; Richard P. Martin died in October, 1893, and William Martin died December 17th, 1894. The plaintiff, Elizabeth Martin, was appointed administratrix of the estate of Richard P. Martin; and Alfred Martin took out probate of the will of William Martin as the executor thereof. John F. Martin died intes-

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tate, and letters of administration of his estate were not taken out. After the death of William Martin, Alfred Martin continued to carry on the business. The plaintiff brought this suit for an account of the business carried on under the above agreement, and for the payment of the share therein to which she was entitled as the administratrix of Richard P. Martin. By the bill she alleged that under the agreement a partnership was constituted between the parties, and that they carried on business as co-partners under the firm name and style of William Martin & Sons. The defendant by his answer denied that a co-partnership was formed between the parties to the agreement, and in addition to relying upon the terms of the agreement, set up a number of facts as negativing the contention of the plaintiff, and which are fully stated and reviewed in the judgment of the Court.

Argument was heard December 3, 1897.

C. N. Skinner, Q.C., for the defendant:—

The agreement does not establish a partnership between the parties within the definition of that term as laid down by the authorities. Whether an agreement creates a partnership or not depends on the real intention of the parties ascertained upon a construction of the instrument, but there must be an agreement to share the profits of the business. Lindley, p. 7, says the basis of all partnerships is an agreement to share the profits arising from some business or undertaking, and Pollock, Art. I., is to the same effect. In *Mollwo, March & Co.* v. *Court of Wards* (1), it is laid down that "to constitute a partnership the parties must have agreed to carry on business and to share the profits in some way in common." Here the existence of a partnership is negatived by the absence of any community of interest in the profits, and that is accounted for by the fact that there was no joint contribution to the capital of the business. The sons were to be under salaries, payable regardless of whether the business showed a profit or a loss. Where clerks are paid salaries proportionate to the profits of the business in which they are employed, no partnership subsists between them and their employers: Lindley, 13, unless it appears from the whole agreement that a partnership was intended:

(1) L. R. 4 P. C. 436.

Ib. In *Shaw* v. *Galt* (2) it was held that a clerk entitled to a fixed salary and one-third of the net profits of the business was not a partner with his employers. The agreement is silent as to taking accounts, except with reference to the state of the salaries accounts. Under such circumstances it cannot be said that the sons had a direct and principal interest in the business, or, as expressed in *Cox* v. *Hickman* (3), that the business was carried on in their behalf. Expressions in the agreement that the parties were partners are not conclusive, particularly if it appears from the context that they were used erroneously: *Vice* v. *Anson* (4). The facts in *Radcliffe* v. *Rushworth* (5) bear a singularly close resemblance to those here, and there it was held that there was not a partnership as between the parties, though they were partners as regards the world.

A. I. Trueman, for the plaintiff:—

If a partnership was not intended to be formed what explanation can be given for the existence of the agreement? The provisions of the agreement as to the amounts to be drawn by each of the sons are quite usual, and are in nowise inconsistent with the effect to be imputed to the agreement that each took a fourth interest in the profits. The skill and labour contributed to the business by the sons were as distinctively a part of its capital as the property brought in by the father, and were recognized as such in the agreement. A contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter: Lindley, 63. As observed by Wigram, V.-C., in *Dale* v. *Hamilton* (6), "If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the Court to measure the quantum of the value. The parties must decide that for themselves."

(2) 16 Ir. Com. Law Rep. 357.
(3) 8 H. L. C. 268, 306.
(4) 7 B. & C. 409.
(5) 33 Beav. 485.
(6) 5 Hare, 393.

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The sums payable to the sons were contingent upon the profits of the business. The sons were to be paid "out of the proceeds of the business," and the sums were not to be in full satisfaction for their services, but merely on account. They were therefore to participate in the profits. An analysis of the agreement as a whole rebuts the notion that it was merely a hiring agreement. As a partnership must have been in the contemplation of the parties, the Court will strive to give effect to their intention, and will not allow it to be defeated by the unskilfulness of the draftsman.

1898. January 18. BARKER, J.:—

This case was heard on bill and answer, the plaintiff having adopted the sworn statement of the defendant in the answer as correct. There is no dispute about the following facts: The stock originally put in the business belonged exclusively to Wm. Martin, the father, whose business it was when the arrangement was made—the sons contributed nothing whatever to the capital. In the firm's books (I call it a firm for the sake of convenience) kept by John up to the time of his death and always accessible to all, an account was opened against each of the sons, in which they were charged the cash paid to them, and credited *as salaries* the amounts which by the terms of the written contract Wm. Martin agreed to pay them each year. These payments seem to have been made in small sums as required—sometimes weekly and sometimes at shorter periods. In the account of Richard (I refer to his account particularly as his representative brings this suit) it appears that between July 9th, 1888, and the end of that year, he is charged with some 32 payments, amounting in all to $386.73. He was then credited with "six months' salary, $300," which left him in debt $86.73. This sum is carried down to his debit January, 1889. The account is continued the same way all through 1889, and at the end of that year he was credited with $600 *as salary*, and a balance of $38.57 carried to his debit. At the end of 1890, after crediting his salary, he was in debt $78.20. At the end of 1891 he was in debt $192.66. At the end of 1892, he was in debt $221.30, and on the 30th June, 1893, when the five years mentioned in the agreement

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expired, there was a balance against him of $201.37. It seems that after this date the business went on as before, Richard continuing to do such work as his health permitted up to October, when he died. The account shows some $300 paid to him subsequent to June 30th, 1893. His salary is credited up to October 14th, which I believe is the date of his death, and there remained a balance to his debit of $351.92. By directions of Wm. Martin this account was on the 16th October, 1893, balanced on the books by a credit entry as follows: "*Oct. 16. Forgiven. $351.92.*" The accounts of John and Alfred were kept in the same way. They were charged with the cash and goods paid them and credited with their salaries. At the expiration of the five years, Alfred's account showed a balance of $212.08 to his credit. Stock was never taken during the five years—the books were never made up, or any other steps taken to ascertain whether the business was being carried on at a profit; or, if so, what the amount of that profit was. And the defendant, who is now in possession of the books, says that it is impossible to make up any account from them on the basis of the business being a partnership business. The defendant claims that by a correct construction of the agreement no partnership was created which would entitle anyone to an account of profits, for the profits belonged exclusively to his father, and that this construction is in accordance with the well understood intention of all parties, and so acted upon by all of them. The plaintiff admits that Richard received in excess of his salary the sum which at the time of his death stood against him, but she claims that she is entitled in addition to be paid the share of the profits to which Richard was entitled, that is, I presume, one-fourth up to the time of John's death and one-third afterwards, though that was not exactly so stated. I have come to the conclusion that the plaintiff's contention cannot be sustained.

This is, of course, not a question between these parties and the outside world. If it were, entirely different considerations would prevail. It is solely a question as to these parties' rights *inter se* under their intention, as evidenced by the agreement which they executed, the circumstances under which it was entered into, and the acts of the parties themselves in carrying that agreement into effect. It is

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clear, I think, that persons may execute an agreement by which they call themselves partners and hold themselves out to the world as such, and yet by no means as among themselves incur the liabilities or have the usual rights of partners. In the absence of special provisions in the agreement defining those rights and liabilities the law would fix them as an incident to the partnership, but when those rights and liabilities are fixed by the parties themselves the agreement must prevail, even though its effect may be to reduce the so-called partnership to a mere name. In this case it is of no practical utility to discuss whether there was a partnership created or not, because it is admitted that Richard Martin received more from his father than the stipulated sums which the father agreed to pay him, and it can make no difference whether you call these sums profits, salaries or allowances, so long as they are all that he was entitled to under the agreement. It is true that these four persons called themselves partners, and they provided for the business being carried on under a firm name for a specified term and on specified premises. Stopping there, I should think there would be a community of profit and loss—each sharing equally—not because the parties had specially so provided, but as a result which the law would fix as an incident of the partnership which by the agreement would be created. The agreement, however, does not stop there; but there are other provisions in it, and other facts and circumstances which show that no such rights existed. In the first place we have the fact that Wm. Martin furnished the entire capital. He had supreme control over the business. It was only in his absence that John could sign a cheque or note. Richard was to do his part of the work under his father's direction, and Alfred was to assist the other three in their several departments, but under his father's directions. The father's wish in reference to the business transactions and management was binding on the others. It was to him a notice of intention by any of the three sons to retire was to be given. He was the person who covenanted to pay the salaries to the other three, and they were under contract not to incur a greater liability than $10 without his consent, or make any importation or undertake any transaction out of the usual course of the retail business without first

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obtaining their father's consent. It seems to me a most unlikely thing that where the business was the father's originally—where the capital was altogether his—where he was the only one who had anything at risk, where he retained entire control and assigned to each of the others his special work, and agreed to pay their salaries, and where no provision was made for the father withdrawing anything from the business yearly, these three sons should, as is now contended, be entitled to share in the profits equally with the father. He could not claim a salary, because in the absence of some special arrangement for the purpose each partner is bound to give his time and services to the partnership, and look to the profits for his remuneration. It may be doubtful whether in stating profits he could be allowed interest on his capital, and yet, if the sons participated in the profits, they would get out of the business their salaries and an equal share of the profits, while the father would only receive his share of profits. In other words, if the total profits amounted to no more than the salaries, the father would get nothing. I should require a much more explicit agreement than this to lead me to think these parties for a moment contemplated any such result. I have called these sums which the father agreed to pay the sons "salaries," thus adopting the language used in the accounts, but in doing so I am perhaps not quite accurate. The agreement in one place calls them "allowances," but the clause which provides for their payment calls them "the sons' interest in the business." They agree to bind themselves "to accept from the said William Martin out of the proceeds of the said business as their and each of their several interests in the said business on account of the services to be performed by them and each of them," a sum of money not exceeding $500 a year and board to John, $600 to Richard, and $400 and board to Alfred. There is a manifest inconsistency in binding the father to pay the sons out of the proceeds of the business—whether that means out of profits or not—and then saying that the proceeds of the business are not his to pay with. In addition to this, however, the sons distinctly agree to take these sums as their interest in the business on account of their services, which, as I read the clause, means simply that by reason of their services to a partner-

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ship in which they put no capital, they are to receive out of the proceeds of the business yearly as their share or interest sums not exceeding those mentioned. This clause is not very neatly worded, but I think its true construction is what I have mentioned. It is one at all events in accord with what the only evidence in the case shows was in fact the understanding of all parties. It is the construction upon which all the parties acted, and it is the construction which, in my opinion, carries out the intention of the parties as gathered from the terms of the agreement itself.

The agreement further provides that if either of the boys should wish to retire from the firm he could do so by giving three months' notice to the father, though there is no provision made as to the father retiring. At the expiration of this three months the retiring member is to be paid the balance due him under the "above agreement," which has reference solely to these salaries, and then all his interest in the business ceases; showing, I think, almost conclusively, that his interest in the business was simply the yearly allowance or salary he was to get out of it for his work. There is nothing said about continuing the firm upon a new basis, and there is not a word said about profits or anything of the kind, two facts which of themselves, in my opinion, are entirely opposed to the view put forward by this plaintiff. Now, let us see what was to take place at the end of the five years. The agreement provides that at that time the accounts of the three sons shall be balanced and the amount due them paid, and an end put to the agreement. This, surely, is not the language one would use if the profits of the business were to be ascertained and divided. There is not a word about profits in this agreement at all, and it seems to me incredible that if there had been any idea on the part of any one to it, or the person who drafted it, that there should be any community in the profits of this business we should not have found something said about it. There is but one other consideration to which I shall refer. Ordinarily a partnership is dissolved by the death of a partner, and the business necessarily is wound up, the interest of the deceased partner ascertained and accounted for in some way. When John Martin died in 1889 no one seems ever to have suggested any such thing as taking an account.

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Everything went on the same as before, except that Alfred's salary was increased to $500 a year, and it does not seem to have occurred to anyone that the rights of the parties had been in any other way altered. I myself entertain no doubt that while William Martin, the father, may have desired to give his sons a status in the community by holding them out and publishing them as his partners, and was willing to run the risk which that course might involve as to himself, the intention of all parties was that the sons should give their work and services to the business for this stipulated sum which the father agreed to pay, and which should represent their interest in the business. This amount having been paid the plaintiff's bill cannot be sustained, because there is nothing for which the defendant is entitled to account to her.

Authority in a case of this kind is scarcely to be expected, but the circumstances are so similar to those in *Radcliffe* v. *Rushworth* (7), where the Master of the Rolls arrived at the same conclusion which I have reached, that I refer to it.

The bill must be dismissed, and, I think, with costs.

In re AARON EATON'S ESTATE.

Trustees—Remuneration—Income—Investments.

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Trustees under a will will be allowed 5 per cent. commission on income, and 1 per cent. commission on their investments. No commission will be allowed on investments made by the testator.

Aaron Eaton died in September, 1866. By his will duly admitted to probate September 25th, 1866, he appointed James D. Lewin, Samantha Eaton and Thomas C. Humbert executors and trustees of his estate. At the time of his death the testator was the owner of three lots of land in the city of St. John of the value of $4,000, a mortgage for $1,700 on the Exmouth Street Methodist church; St. John water bonds of the value of $2,000; 36 shares in a Massachusetts bank, worth $3,600, and 144 shares in the

(7) 33 Beav. 484.

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Bank of New Brunswick of the par value of $14,400, now selling at a premium of $170, or $24,480 above par value. The accounts of the executors were passed from time to time in the Probate Court upon which a commission was allowed by that Court. Thomas C. Humbert now petitioned that he should be allowed a commission in respect of the above property and the income therefrom, as well as upon re-investments to the amount of $40,000 made by the trustees. The petition came on for hearing February 8, 1898.

A. O. Earle, Q.C., for the *cestuis que trustent*:—

The only commission to which the trustees are entitled has been allowed to them by the Probate Court on the passing of the accounts.

[BARKER, J.:—The application is for commission on amounts not passed in the Probate Court.]

The property consists of investments made by the testator upon which no commission should be allowed. A commission on the income has already been paid.

A. A. Stockton, Q.C., for the petitioner:—

The application is made for the purpose of obtaining the ruling of the Court as to the commission allowable upon the different classes of property belonging to the estate, as well as upon the income. If the rules of the Court are defined there will be no disagreement among us as to their application.

E. T. C. Knowles, for the co-trustees, was not heard.

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I will lay down these rules for your guidance, and they will be embodied in my order. I will allow no commission on the real estate, as that is an investment made by the testator, and I make the same rule as to the personal estate of the testator at the time of his death, consisting of bank stock, bonds and mortgages. A commission of five per cent. will be allowed on income, and a commission of one per cent. on investments made by the trustees. Of the commission I allow one-third to the petitioner. The costs of all parties to be paid out of the estate.

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August 28.

Specific Performance—Jurisdiction—Parol Agreement—Conflict of Evidence —Dismissal of Bill—Costs.

In a suit for specific performance the evidence must satisfactorily shew that the agreement is substantially what it is alleged to be by the plaintiff. If the agreement is denied on oath by the defendant the Court will not decree specific performance of it unless the plaintiff's evidence is so corroborated by witnesses or by the surrounding circumstances as to leave no substantial doubt that the defendant is in error.

The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements is not a matter of right in the party seeking relief, but of discretion in the Court to be exercised in accordance with fixed rules and principles.

In a suit for specific performance of an alleged parol agreement for the sale to the plaintiff by the defendant of a piece of land, the bill alleged the agreement to be that the plaintiff should take the land subject to a mortgage on payment to the defendant of $100. The plaintiff's evidence proved the agreement to be that the amount payable to the defendant was to be secured to him by a second mortgage on the land. The defendant's evidence proved that the plaintiff was to pay off the mortgage then on the land, and give the defendant a mortgage for amount payable to him.

Held, that there was no concluded agreement between the parties, and that the bill should be dismissed, but, under the circumstances, without costs.

The facts fully appear in the judgment of the Court.

Argument was heard June 21, 1898.

W. B. Chandler, and *M. G. Teed*, for the plaintiff:—

The possession of the premises by the plaintiff after the dissolution of the partnership was solely referable to the agreement sought to be specifically enforced, and takes the case out of the Statute of Frauds. The possession cannot be said to have been under the lease, for it came to an end by act of law when the partnership terminated, and also by virtue of the agreement. In *Hodson* v. *Heuland* (1), it was held that possession taken before, but continued after, a parol contract for a lease, may, if unequivocally referable to the contract, constitute part performance, taking the case out of the Statute of Frauds. It is sufficient if the substantial

(1) [1896] 2 Ch. 428.

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terms of the agreement were concluded upon between the parties, though some of the details were not arranged. Isaac Brewster is not a *bona fide* purchaser for value without notice. He is affected with constructive knowledge of the agreement of the vendor with the plaintiff under the rule that the knowledge of the agent is the knowledge of the principal: *Dryden* v. *Frost* (2); *Gosling's Case* (3); *Spencer* v. *Topham* (4); *Sheldon* v. *Cox* (5); *Eyre* v. *Burmester* (6); *Brown* v. *Sweet* (7); *Kettlewell* v. *Watson* (8). A person purchasing merely the interest of another takes it subject to all equities existing against it: *Miller* v. *Duggan* (9).

H. A. Powell, Q.C., for the defendants:—

The sale by Frederick Brewster to Isaac Brewster was the ordinary transaction between vendor and vendee, and did not involve any element of agency between them so as to affect Isaac with Frederick's knowledge. See *Espin* v. *Pemberton* (10). The evidence establishes that there was no concluded agreement between the plaintiff and Frederick Brewster. The acts of part performance, in this view, are therefore immaterial: *Lady Thynne* v. *Earl of Glengall* (11). The bill sets out a different agreement from that proved at the hearing. An amendment will not be allowed: *Lord Ormond* v. *Anderson* (12). Where parties contradict each other and the plaintiff's version is not corroborated, specific performance will not be decreed: *Hawkins* v. *Malthy* (13); *Lindsay* v. *Lynch* (14); *Toole* v. *Medlicott* (15); *Cooper* v. *Hood* (16); *Stuart* v. *London and North-Western Railway Co.* (17); *Reynolds* v. *Waring* (18).

Teed, in reply.

1898. August 28. BARKER, J.:—

The plaintiff filed his bill in this suit for the specific performance by the defendant Frederick Brewster of a verbal

(2) 3 M. & C. 670.
(3) 3 Sim. 301.
(4) 2 Jur. N. S. 865.
(5) 2 Eden, 224.
(6) 10 H. L. C. 114.
(7) 7 A. R. 740.
(8) 21 Ch. D. 685.
(9) 21 Can. S. C. R. 33, 47.
(10) 4 Drew. 333; 3 DeG. & J. 547.
(11) 2 H. L. C. 131.
(12) 2 B. & B. 363.
(13) L. R. 3 Ch. 195.
(14) 2 Sch. & Lef. 1.
(15) 1 B. & B. 402.
(16) 26 Beav. 293.
(17) 1 DeG. M. & G. 721.
(18) 1 Young Ex. 346.

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contract alleged to have been made between him and the plaintiff for the sale of a piece of land at Albert in the county of Albert, of which contract the plaintiff alleged there had been a part performance by him sufficient to obviate the effect of the Statute of Frauds. It appears that the plaintiff and Frederick Brewster in the month of August, 1896, entered into a partnership under the name of P. W. F. Brewster & Co. for the purpose of manufacturing carriages. They carried on the business at Hilsboro, and also in the premises in question, which were owned by Brewster and in which he had prior to the partnership carried on the same business on his own account. The partnership continued only until the 26th of December following, on which day, as the result of negotiations which had apparently been going on for some time, a dissolution was agreed upon, the terms of which were reduced to writing, and which are substantially these: The plaintiff purchased Brewster's interest in the whole partnership assets for the sum of $600, and assumed the liabilities of the firm. This sum was to be paid by Brewster taking the Hilsboro stock as a part payment at $150, and the balance of $450 was to be secured, and was in fact secured by plaintiff's promissory notes to Brewster. The partnership transaction has no bearing on the case except so far as it relates to the retention of possession by the plaintiff of the premises in question after the sale or alleged agreement for sale which was also made on the 26th of December—the plaintiff alleging that he was in possession under the purchase, and the defendant contending that he was there as tenant to Brewster, under the lease of the premises to Brewster & Co., from Brewster the owner, and which lease went, as defendant contends, to the plaintiff as part of the partnership assets under the terms of dissolution. It is this possession upon which the plaintiff relies as a part performance of the contract.

On the 26th day of December, the day on which the dissolution took place, and after that had been concluded, it seems that the plaintiff and Brewster did verbally agree upon a sale and purchase of the Hilsboro premises at a price of $400. These premises were at that time owned by Brewster, subject to a mortgage to Hon. A. R. McLellan, upon which there

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was then due about $300. The dispute arises as to the terms of payment. The plaintiff alleges in his bill that the agreement was that he was to pay Brewster the difference between the amount due McLellan and $400, and get from Brewster a conveyance of the property and assume the McLellan mortgage. Brewster's version of the arrangement is that the plaintiff was to pay the McLellan mortgage off and give him a mortgage for the $100 coming to him. This would give him a first lien for his $100 and relieve him of his personal obligation to McLellan for his claim. At the hearing the plaintiff failed in sustaining the contract of purchase as it was alleged in his bill, but proved distinctly that he was not to pay the difference coming to Brewster in cash at the time, but give him a mortgage for it second to McLellan's; and that although he was to pay the McLellan mortgage eventually, he was under no obligation to do so immediately. In consequence of this evidence, the plaintiff moved to amend his bill by adding to section two, which sets out the contract of sale, these words: "such amount" (that is the difference between the $400 and the amount due McLellan) "so to be paid to be secured by a mortgage from the plaintiff to the defendant Frederick Brewster on the said shop, land and premises." The bill therefore as amended alleges a contract on the part of the defendant Frederick Brewster to sell these premises to the plaintiff for the sum of $400, and to secure the portion of it coming to Brewster by a second mortgage. Brewster's account of it is that McLellan was to be paid off and he was to get a first mortgage, and this is the dispute between the parties as to the terms of the contract so far as these terms were concluded upon. It appears from the evidence that the plaintiff continued in possession of the premises in question and carried on the business until the first of February, 1897, when it was taken over by certain persons of whom the plaintiff was one, who had arranged to apply for incorporation under the Joint Stock Companies' Act, and who did afterwards become incorporated, and are defendants in this suit. To this company the plaintiff leased the premises for a year, and they took possession and carried on the business. On the 3rd day of March, 1897, a conveyance of the land and premises in dispute from Frederick

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Brewster to the defendant Isaac Brewster, who is his brother and lives in Rossland, B.C., was registered. This conveyance is dated February 20th, 1897, and purports to have been made for the consideration of $100. The bill contains an offer to pay the defendant Frederick Brewster the difference between the $400 and the amount due McLellan, and prayed that Brewster be decreed specifically to perform the said agreement, and to make a good title subject to the said mortgage—that is the McLellan mortgage—and that the Brewsters' be restrained from interfering with the possession of the plaintiff and his lessees and from bringing ejectment to recover possession.

On this bill as originally framed and on some affidavits used in support of it, an injunction was granted—I believe upon notice—by Mr. Justice *Hanington* on the 18th day of March, 1897; and for the purposes of that motion the plaintiff made an affidavit verifying the bill, and among other material portions of the bill swore to the truth of the second section, which sets out the alleged contract, thus proving the contract of which he seeks specific performance to have been materially different from that proved by him at the hearing—so materially different that his counsel felt compelled to ask for an amendment. At the hearing three principal objections were taken to the plaintiff's right to a decree: 1. That there was no concluded contract between the parties, or at all events the evidence on that point was so uncertain that the Court would not act upon it. 2. That the possession of the plaintiff relied on as part performance is not referable to any purchase and sale, but to the lease taken over by the plaintiff on the dissolution of partnership, and 3. That the defendant, Isaac Brewster, was a *bona fide* purchaser for value without notice. I shall only deal with the first ground, as I think that fatal to the plaintiff's right to a decree.

It is no doubt the recognized rule of this Court that in order to sustain a bill of this nature, the evidence must satisfactorily show that there was a concluded contract between the parties—the matter must have progressed beyond the stage of mere treaty or negotiation, during which either

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party could withdraw, and reached the stage of definite concluded contract, certain in all its essential details. More than this, the evidence must satisfactorily shew that the contract is substantially what the plaintiff alleges it to be. In this case, the parties do not differ as to the fact that there was an agreement to sell at a fixed price, but they disagree as to the terms of payment or security for the payment of the purchase money. In *Rossiter* v. *Miller* (19), Lord Blackburn says: "I quite agree with the Lord Justices that (wholly independent of the Statute of Frauds) it is a necessary part of the plaintiff's case to shew that the two parties had come to a final and complete arrangement; for, if not, there was no contract. So long as they are only in negotiation, either party may retract; and although the parties may have agreed on all the cardinal points of the intended contract, yet if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties in such a case are still only in negotiation." The terms of the contract as stated in the original bill upon which the injunction order was granted by Mr. Justice *Hanington*, are essentially different from those stated in the bill as amended, upon which I am asked to decree a perpetual injunction—so different in fact that I should think by the practice which prevails in this Court, the amendment would have the effect of dissolving the injunction unless it were specially reserved. The exercise of the jurisdiction of equity as to enforcing specific performance of agreements is not a matter of right in the party seeking relief but of discretion in the Court, not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration: *Lamare* v. *Dixon* (20); *Haywood* v. *Cope* (21). It is not sufficient even to entitle a party seeking this peculiar relief to show what would be sufficient to entitle him to recover in a Court of Law, namely, that a contract existed: Per Strong, J., in *Harris* v. *Robinson* (22). More than this, it is the rule of

(19) 3 App. Cas. 1151.
(20) L. R. 6 H. L. 423.
(21) 25 Beav. 140.
(22) 21 Can. S. C. R. 397.

this Court not to make a decree in such cases in the plaintiff's favor when the alleged contract is denied on the defendant's oath, unless the plaintiff's own evidence is so corroborated either by the testimony of other witnesses or the surrounding circumstances as to leave no substantial doubt that the defendant is in error. In determining whether the parties ever made a concluded agreement with its essential details, or in determining if they did, whether the plaintiff's or defendant's version of it is to be accepted, it is, I think, by no means unimportant to recollect so far as this plaintiff is concerned that he has in fact sworn to two different versions of this contract. In saying this, I must not be regarded as attributing to him any improper motive. The character of all the parties to this litigation is, I understand, such as to preclude any such notion. Human memory is however not always reliable; and perhaps there is no class of cases where the testimony of two equally reputable persons will differ more widely than in one like the present. They perhaps draw inferences which are not warranted by the language used, or they misunderstood one another. Having confidence in each other, they agree upon the all-important point of price, and probably leave the details of payment in a general sort of a way to be settled later on. Something intervenes in the meantime to prevent the final arrangement and the parties drift apart. Speaking of a somewhat similar case, the Master of the Rolls in *Price* v. *Salusbury* (23), says: "This is more worthy of observation, because it must be admitted to be a circumstance extremely unusual, that a plaintiff, who comes to enforce the specific performance of an agreement, should not be able accurately to state, in his instructions for the original bill first filed, exactly what that agreement is in all its details, the specific performance of which he seeks to enforce." The plaintiff, in his direct examination did not seem very clear or very positive as to the terms of the contract. At first he said the arrangement was that he was to give $400 for the land subject to McLellan's mortgage. He however corrected or explained this as meaning inclusive of the mortgage. Later on he said that Brewster was to deed him the shop for $400—that is, $100 to him, and he was to

(23) 32 Beav. 454.

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satisfy the Governor (Lieutenant-Governor McLellan). In all his direct examination he made no mention of any mortgage to be given to Brewster. It was on his cross-examination, as detailed at pages 54 and 55 of the evidence that he swore positively that the arrangement was that he was to give Brewster a mortgage for his $100. And in reference to the McLellan mortgage he says, "I want to make myself plain in that—that it was not necessary that I should pay the Governor right at once for that." Under these circumstances, if the case rested upon the plaintiff's own evidence, I should scarcely feel justified in concluding that it at all satisfied the requirements of the Court in such a case. It was however argued that the plaintiff's evidence was corroborated by that of other witnesses. I do not think it is corroborated as to the facts in dispute. Mr. Peck and Mr. Trueman and the other witnesses only speak of Brewster's declarations to the effect that he had sold or agreed to sell the shop. About that fact however there is really not much dispute—the dispute is as to the manner of paying or securing the purchase money, and in reference to that none of these witnesses speaks at all. Mr. Peck swears distinctly that there was no mention to him or in his presence of any mortgage to Brewster, yet both defendant and plaintiff say that was the arrangement. The fact that there was no mention of this mortgage to Mr. Peck when the parties were at his office on the 26th December, apparently for the purpose of completing the negotiations which had been going on during the day, rather leads me to think that there was nothing definitely settled about it at that time. Brewster's version of what took place is that after some talk on the matter the plaintiff finally asked him if he would take $400 for the shop, and he agreed to this. He then says (p. 134), "He asked me if I would take security, he to pay Hon. A. R. McLellan the mortgage and to pay me the difference between that amount and the amount I had agreed to accept." To this Brewster at first said he would not exact the security, but afterwards said he would take the security, and that the matter was left in that way. Later on in his evidence he said that it was said on the 26th December that his mortgage was to be a first mortgage. Brewster also states in his

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evidence that soon after the agreement was made and when the question of renewing the insurance came up, he asked the plaintiff if he were making arrangements to pay the McLellan mortgage, and he said he did not know, he had not decided, or words to that effect. He then said, "In that case what do you propose to do with me. He answered (p. 141), It was understood that you were to take a second mortgage, and I said nothing of the kind was understood by me. He said, it certainly was, and I said it certainly was not, and that it would not be a business transaction at all. And he said, you would be as well off as you are now, and I said that I would not have anything negotiable for it." Now the plaintiff does not state that it was ever agreed or said that the defendant was to take a second mortgage; though he says that he so understood the arrangement. It is clear from Brewster's evidence that *he* did not so understand it. It may be that as to this essential and important part of the arrangement the parties' minds never were *ad idem* —it may be that the matter was left in a loose, unsettled way and never finally agreed upon; or it may be that if there was in fact a concluded contract between the parties, that the evidence of what it was is so vague and uncertain that the Court would not act upon it; the result in either case is the same, for in none could the plaintiff have a decree. See *Williston* v. *Lawson* (24). There remains only the question of costs. The defendant Isaac Brewster must have his costs. The general rule in such cases is not to give costs. In *Stratford* v. *Bosworth* (25), the Vice-Chancellor says: "The result is that the correspondence, taken altogether, has not reached beyond treaty and these papers cannot be blended into one concluded agreement. The consequence is that the bill must be dismissed. With regard to costs, this is a case of misunderstanding, arising from the want of clear, unequivocal conduct and language. The defendant also insisted upon the Statute of Frauds, for which there is no pretence, but on the former ground it is not a case for costs." See also *Needler* v. *Campbell* (26).

Bill dismissed with costs as to Isaac Brewster, and without costs as to the other defendants.

24) 19 Can. S. C. R. 573. (25) 2 V. & B. 341. (26) 17 Gr. 592.

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September 20.

Deed — Mistake — Rectification — Costs — Bill for rectification and foreclosure of mortgage—Competing purchasers—Priorities—Quit claim Deed—Purchaser for value—Covenant for interest—Rate—Construction.

Rectification decreed of misdescription in conveyance of land arising from mutual mistake of grantor and grantee, as against a subsequent purchaser with notice of mistake, but without costs.

Bill sustained for the rectification of a mortgage, and for the foreclosure and sale of the mortgaged premises.

A purchaser of a lot of land taking under a conveyance describing by mistake of grantor and grantee a different lot, has merely an equitable right to have the conveyance rectified as distinguished from an equitable estate, and the maxim "*qui prior est tempore potior est jure*" has no application as against a subsequent purchaser for value without notice.

Where the owner of the fee simple grants, bargains, sells, assigns, and conveys, all his interest in land, to have and to hold the same unto the purchaser, his heirs and assigns, the conveyance is not a deed of quit claim, but transfers to the purchaser all the interest of the grantor sufficient to sustain a claim of purchase for value.

A mortgage provided for payment of the principal on a certain date, with interest thereon at the rate of 9 per cent., payable annually, and that the same rate of interest should be paid from and after the expiration of the date fixed for payment of the principal until the whole sum was paid, and that overdue interest should bear interest at 9 per cent. per annum.

Held, that the principal bore interest at 9 per cent. both before and after maturity, and that overdue interest bore interest at 9 per cent, whether it accrued due before or after the maturity of the principal.

The facts fully appear in the judgment of the Court.

M. G. Teed, for the plaintiff.

W. B. Chandler, for the defendant, M. S. Keith.

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This bill was filed by the plaintiff as assignee of a mortgage of two lots of land in Salisbury—first, for the rectification of the instrument in reference to certain alleged errors in the description of the lots in question; and, second, for a foreclosure, and sale of the premises. The facts as they have been established by the admissions of the defendant Keith in his answer and by the evidence given at the hearing are substantially these: There were three lots of land in

Salisbury containing about 48½ acres each—part of a block of glebe land lying to the south of Steeves Road and to the west of the road to Victoria Mills. The most southerly of these three lots was known as the Green lot—the one lying immediately to the north of it is the Durant lot, and the third, lying immediately to the north of the Durant lot and between it and the Steeves Road is the Berry lot. On the 30th July, 1872, Joseph Green, as owner in fee of the Green lot, conveyed it by way of mortgage to Flewelling and Moreton, church wardens of the parish, to secure the sum of $150 and interest. On the same day Alexander Durant, as the owner in fee of the Durant lot, conveyed it by way of mortgage also to Flewelling and Moreton to secure the sum of $145.50 and interest, and on the 28th May, 1872, Alida Berry, as the owner in fee of the Berry lot, conveyed it by way of mortgage also to Flewelling and Moreton to secure the sum of $125 and interest. On the 27th January, 1873, Flewelling and Moreton assigned these three mortgages to E. B. Chandler, Jr.; Green remained in possession of his lot until September 25th, 1873, when he sold to one Henry B. Killam. The proper description of this lot commences at a stake on the south-east corner of Glebe Lot C, and then runs along the southern side of the lot south 74° west 41 chains and 25 links to a stake; thence *north* 16° W. to a marked maple tree, etc. In the conveyance from Green to Killam of September 25, 1873, the second course of this description instead of running *north* 16° W., is made to read *south* 16° W to a marked maple tree, the effect of which was that the lot described in this deed was a lot south of the Green lot, and one in which Green had no interest whatever. This is alleged to have been a mutual mistake of the parties. The erroneous description has been continued in the several conveyances of the lot down to and including the plaintiff's mortgage; and this is one of the errors which it is sought to have rectified in this suit. Killam, the purchaser, went into possession of the Green lot under his deed from Green, and remained in possession until September 9, 1876, when he sold to Charles N. Killam, who then went into possession of the Green lot under his deed. It is alleged in the bill, and I think established by the evidence, that Henry B. Killam

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paid the mortgage on the Green lot to Chandler. It however remains uncancelled on the records. In May, 1878, Chandler, under the power of sale in the Berry mortgage, sold the Berry lot to one William Good, who afterwards sold to Mary Killam, and in July, 1896, she sold it to the defendant Keith and conveyed it to him on the 16th of July in that year. He also procured from Alida Berry, the original owner, a release of her interest in August, 1896. In 1880 Chandler, as the plaintiff contends, sold the Durant lot under the Durant mortgage to one John E. Russell for $164, and intended to convey it to him, but in the conveyance, which is dated March 16, 1880, the lot described is the Berry lot. This is alleged also to have been a mutual mistake of the parties, though the defendant denies that there was any mistake about it. And it is this error, which with the other one I have mentioned, it is sought by this suit to have rectified. In 1885 Russell agreed to sell the Durant lot to Charles N. Killam for $400, and in performance of that agreement, conveyed the lot to Killam by deed dated June 1, 1885, describing in reality the Berry lot by the same metes and bounds as those contained in the Chandler deed. In order to raise a portion of the purchase money for this Durant lot, Charles N. Killam who then owned as he supposed, both the Green and Durant lots, borrowed the sum of $225 from one John A. Wheaton on the agreement, that as security for the repayment of the money he was to give Wheaton a mortgage on these two lots; and in pursuance of that agreement he did execute a mortgage to Wheaton as was intended on the two lots in question, dated June 10, 1885—the two lots however being both described with the erroneous boundaries already pointed out—the lots really described being some lot to the south of the Green lot instead of the Green lot itself, and the Berry lot instead of the Durant lot. Wheaton assigned the mortgage to Pitfield on January 20, 1888, and Pitfield assigned it to the plaintiff March 2, 1896. The plaintiff endeavoured to sell under the power of sale, but failing in getting a purchaser, the property was at the plaintiff's request bought in for him by his brother, to whom he conveyed, and who reconveyed the property to him. It also appears that on the 8th July, 1891, Charles N. Killam

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executed an assignment for the benefit of his creditors to the defendant McCann in terms sufficiently comprehensive to include whatever interest he had in these lots; and the evidence shows that at the time of the assignment he told McCann that these lots were subject to the Wheaton mortgage, which was then held by Pitfield. Chandler died intestate in January, 1890, leaving two children surviving—William B. Chandler and Mrs. Blackwell, from whom the defendant Keith procured a conveyance dated April 12, 1893, of their interest in the Durant lot. The defendant Keith claims the Green lot under a verbal agreement to purchase, which, he says, he made with McCann as Killam's assignee, under which he took possession; and he claims the Durant lot under the conveyance from Chandler's heirs, and a similar conveyance from Durant and wife dated April 30th, 1897, though Keith in his answer says that the conveyance he intended to get, and which until recently he thought he had got, from the Chandler heirs was one of their interest in the Green lot and not the Durant lot. The bill has been taken *pro confesso* against the defendant McCann for want of an appearance.

I shall first dispose of an objection made by the defendant's counsel based on the attempted sale by the plaintiff, when, at his request, his brother bid the lots in for him. It was contended that this put the title in the plaintiff, as absolute owner on the records, and that while the mortgagor might redeem, the plaintiff could not file a bill to foreclose. In my opinion such a sale is altogether abortive: *Henderson* v. *Astwood* (1). There can be no doubt of the mortgagor's right of redemption, and I think it necessarily follows that the corresponding right of foreclosure must also exist. There is nothing in this objection.

The first question to be determined is whether there was in fact a mutual mistake between the original parties to these contracts of sale and purchase in the conveyances executed for the purpose of completing the contracts. As to the Green lot, there does not seem much difficulty so far as these defendants are concerned, for the bill has been taken

(1) [1894] A. C. 150.

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pro confesso against one, and the defendant Keith by his answer admits that there was a mutual mistake in the original conveyance from Green to Killam in September, 1873, and that the error has been continued in the subsequent conveyances. It is true that neither of the original parties to the contract was examined, but a consideration of all the circumstances leads almost irresistibly to the inference that the mistake was made as the plaintiff alleges. So far as the records show, the equity of redemption in that lot is still in Green, if alive, or whoever represents him, if dead. This interest may have long since been lost by adverse possession or by some other equally effectual method, but any finding in this case would not affect that interest or conclude those in whom it is vested as to the question of mistake. So far as the defendant Keith is concerned, his only claim to the Green lot is under his verbal agreement with McCann as assignee of Charles N. Killam. But Charles N. Killam never had any interest in this Green lot, unless the original error existed as the plaintiff contended. I have therefore no difficulty in finding that so far as the Green lot is concerned the plaintiff has made out this part of his case as against these defendants. As to the Durant lot, though the facts are somewhat complicated, I think the plaintiff has also established his case. It is of course necessary in the absence of admission that the evidence of the mutual mistake should be clear so as to leave no reasonable doubt—more especially perhaps when so long a time has elapsed, and when one of the parties to the mistake is dead and his evidence therefore not available. There are no admissions as to this part of the case except as to the possession of the lot from time to time. On the contrary, the defendant alleges that when Chandler made the conveyance to Russell in November, 1880, describing the Berry lot and professing to sell under the power of sale in the Berry mortgage, he was doing precisely what he intended to do, and, as proof of that, stress is laid upon the concluding words in the description in that deed: "Being the lands and premises which one Alidah Berry by way of mortgage conveyed to O. E. Flewelling and James H. Morton, and which they afterwards assigned to said Edward B. Chandler." I dare say this may be quite

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true, but the mistake was in dealing with the Berry lot at all when the Durant lot was the subject-matter of the purchase. If the contract of sale made between the parties three years before had reference to the Durant lot, as I shall endeavour to show by the evidence was the fact, then that contract is not completed by conveying some other lot. If there was a *bona fide* intention of completing the contract by conveying the lot agreed to be sold, a conveyance of some other lot must be attributable to a mistake. The alternative argument is that a fraud was attempted, but no one suggests that here. I have no doubt at all that though Mr. Chandler when he made this conveyance to Russell, knew he was conveying the Berry lot, he was under the mistake of thinking it was the Berry lot Russell had bought and paid for, and in reference to which they had contracted three years before. The important question is what did Russell agree to buy and what did Chandler agree to sell. The conveyance is merely made in execution and performance of that contract. It would appear from the evidence that although these three mortgages were assigned to E. B. Chandler, Jr., his father, the late Governor Chandler, was in reality the beneficial owner. The accounts of the transactions were kept in the Governor's books, and among his papers produced at the hearing by Mr. Hewson, who had charge of his papers, were the mortgages in question, and certain accounts and memoranda which have a material bearing upon this Durant transaction. More than this, the evidence shows that when Russell first went to E. B. Chandler to negotiate as to the purchase of this property, he was referred to the Governor. George Russell, the father of John E. Russell, to whom the conveyance was made, was examined at the hearing. He had formerly lived at Salisbury, and knew all about these three lots. After having been referred to the Governor by E. B. Chandler, as I have already stated, he went to see the Governor and the following is his account of the interview:

"Q.—What took place between you and the Governor? A.—I asked him if he held the Durant mortgage in Steeves' settlement, and he said he thought he did, and looked it over. And I said my son was with me, and I said we wanted to buy the piece of land. I says, what do you want for that? Well,

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he says, I think it ought to be worth two hundred dollars. I said I cannot give that; so we talked then about a horse, if he would take a horse in the payment of it, that maybe we would trade, and we traded.

Q.—What was your bargain? A.—I was to give him $160 for the land.

Court—State what took place.

A.—I traded with him—me and my son traded for the Durant lot.

Court—Tell as nearly as you can what took place between you and the Governor.

A.—Yes. He said, I'll take that horse at $120.

Q.—Was this on account of the purchase? A.—Yes. And you can go home and go to work on this land, and when you have money to pay why we will take some writings. And I was on that land some five years before there was any writing done.

Q.—He agreed to take the horse at $120 on account of the purchase money? A.—Yes. He agreed to sell the lot to me for $160.

Q.—What lot was this? A.—The Durant lot. It was not the Berry lot. I never occupied the Berry lot.

Q.—You made that bargain? A.—Yes.

Q.—Did he tell you anything about what you could do in respect of the lot? A.—He told me to go and work on it.

Q.—You came up to Salisbury? A.—Yes.

Q.—Did you see young Edward, Jr.? A.—Yes.

Q.—Did you tell him what took place? A.—Yes. I said your father is going to take that horse. And he said, where is the horse? I said I will fetch him out to Petitcodiac to-morrow, and he sent Parson Willis to look at the horse, and if he was all right to send him to Edward B. Chandler's place. I took him out, and they passed the horse all right and they sent him in, and I went home and went to work on the land. I cannot tell the year exactly. It was sometime before the deed was given.

Q.—Did you say anything to the Governor about in whose behalf you were buying it? A.—I said my son will pay for this land. He says, when you have money to pay, or pay all up, we will give you a deed.

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Q.—Give who a deed? A.—He would give John Russell, my son, a deed."

The witness then states that he and his family, including his son John, who was then about 19 years of age and living with him, moved on this Durant lot and continued there eight years, during which time they cleared several acres, built a house and made substantial improvements, costing some $250 or $300. The witness also states that while he cannot give the exact year in which this bargain was made, it was about 19 or 20 years ago—that they were on the lot about five years before the deed was given, and on it eight years altogether. He also says that his son John paid the balance of the purchase money. There can be no doubt from that evidence which is altogether uncontradicted, that Russell was negotiating solely as to the Durant lot—that his contract had reference entirely to that lot—that he went into possession of that lot under his agreement of purchase and made substantial improvements upon it. This evidence is strongly corroborated by papers of Governor Chandler found after his decease, which took place some years before anything seems to have been known about these mistakes. Among the papers was this Durant mortgage, and folded upon it several memoranda and accounts. On the back of the mortgage in the Governor's writing is this memo: "*John Russell wants to purchase, Oct. 77.*" There is also a letter in E. B. Chandler's writing addressed to his father, and dated 30th October, 1877, which corresponds with the date of the Governor's memo. This letter, so far as it relates to this transaction, is as follows: "My dear Father—Yesterday I bargained with Russell, taking a valuable horse he or his son owns and $50. His son will complete the purchase about the 1st of next month" (I think it is) "when he will pay $20 in cash and the remainder in a year. Mr. Willis, a good judge, says the horse is well worth $120."

There is no evidence to show that Russell ever had any other transaction with Chandler than this one. The memo. on the mortgage shows conclusively the land to which the bargain had reference, and the reference to Willis and the

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price of the horse entirely corroborates Russell's evidence. There was also another paper among those of the Governor to which I have referred. It is a memo. of account in E. B. Chandler's writing, and it is as follows:—

"JOHN RUSSELL.

1880

Feb. 6th,	Balance due.....	$56	75
	Interest to 16th Nov., 1880..	2	70
	Writing mortgage	2	00
	Registering deed and mortgage.....	4	00
		65	45
	By cash.....	20	00
		$45	45

Payable half in 1 year and remainder in 2 years."

This is in E. B. Chandler's writing.

The first item of $56.75 clearly represents the balance of the purchase money, $50 and the interest from October, 1877 to February 6th, 1880, $6.75. The next item of $2.70 is the interest to 16th March, 1880, the date of the conveyance to Russell—the $2 is a charge for writing the mortgage, which Chandler took back for the small balance; and the $4 is the registry fee on the deed and mortgage. The credit of $20 corresponds with what Chandler in his letter of 30th October, 1877, said John Russell was to pay. These memoranda produced from the Governor's own papers and corroborated by entries in his books, coupled with Russell's evidence, leave no doubt in my mind that both parties were contracting in reference to the Durant lot, and that both the Governor, E. B. Chandler, Jr., and the Russells, understood that the one had agreed to buy and the other to sell the Durant lot; and that their negotiations had no reference whatever to the Berry lot. There are other circumstances tending to the same conclusion, but I shall only refer to two of them. The evidence shews that for the unpaid balance due by Russell, he gave the Governor a mortgage on the Berry lot on getting his own deed of that lot. It is most unreasonable to suppose that the Governor would have taken

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a mortgage on a piece of land of which he had given the mortgagor his title unless he supposed the title was good. And, in addition to this, the Berry lot had been sold by Chandler and conveyed to Good in May, 1878, two and a half years before this deed was made to Russell. It is impossible to attribute to the Governor or to his son E. B. Chandler, Jr., the deliberate intention of conveying to Russell property which they had sold and conveyed away long before. It must have been a pure mistake, as the plaintiff alleges it to have been.

It is, I think, equally clear that when Russell sold to Chas. N. Killam the same mistake took place. They were both contracting as to the Durant lot but, as was natural to do, using the Chandler deed for a description of the lot, neither party being aware of the error. Killam goes into possession of the Durant lot under his purchase, and Russell gives up the possession to him in performance of the bargain. The conveyance to Charles N. Killam of this lot is dated June 1st, 1885. Killam therefore at that time, according to the evidence, really had purchased and owned both of these lots, though his paper title to both was defective in the way I have mentioned. It appears from the evidence of Charles N. Killam, and his evidence is in no way contradicted—that the money he was borrowing from Wheaton was for the purpose of assisting in paying Russell for this Durant lot, and that Wheaton knew this, and that the mortgage to Wheaton, of which the plaintiff is now the assignee, was to be given by Russell on these two lots in question; and the three conveyances, that is, the deed to Killam of the Green lot; the deed to him of the Durant lot, and the mortgage to Wheaton, were all registered the same day. Killam's evidence on this point is positive and clear. When asked what took place between him and Wheaton about this lot, he says: "I told him the lot I was going to buy. I told him it was the Durant lot, that I was buying the Durant lot, and that I had a lot lying off it, and I wanted the two together. He said he would let me have the money provided I would give him a mortgage of the two lots— the Green lot and the Durant lot. I told him I wanted $225. He said he would let me have it on a mortgage on the Green

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and Durant lots." He then says that Mr. Emmerson, the solicitor employed to draw the conveyances, got Russell's deed and Killam's deed of the Green lot and drew the mortgage from them—thereby continuing the errors which had originated some years before. Now, it is quite true, as the defendant's counsel pointed out at the hearing, that Wheaton was not examined, and there was no evidence from him that he had made any mistake; and for that reason the defendant claimed that the evidence as to a mutual mistake fails as to the very instrument under which the plaintiff in this suit claims. It cannot of course be said that a suit of this kind must always fail unless you can prove by all the parties to the error that the error existed. In *In re Boulter* (2), the Vice-Chancellor exercising a bankruptcy and therefore an equity jurisdiction found no difficulty in enforcing an agreement for a mortgage made under circumstances very similar to those which exist here as proved by Killam in the extract from his evidence which I have just quoted. So, in this case, while we have not Wheaton's evidence, we have the uncontradicted evidence of Killam as to what took place between them, which Wheaton, if produced, could only repeat. That evidence points to but one conclusion—that the parties were contracting solely as to these two lots—the Durant lot and the Green lot. And the only sensible conclusion to arrive at, I think, is that if the conveyance does not in fact carry out the intention of the parties, it is due entirely to a mistake in which both parties participated—there being no suggestion of fraud on either side.

It is contended in the next place that even if the evidence shewed a mutual mistake between the original parties to these conveyances, the plaintiff cannot succeed as against Keith, who is a *bona fide* purchaser for value without notice. I am disposed to think that as the right claimed by the plaintiff is merely an equitable right, as distinguished from an equitable estate, it is liable to be defeated by a *bona fide* purchase for value without notice, and that the maxim, "*qui prior est tempore potior est jure*," does not apply: *Phillips* v.

(2) 4 Ch. D. 241.

Phillips (3); *Utterson Lumber Co.* v. *Rennie* (4). It is however denied that Keith is a *bona fide* purchaser for value without notice, and several grounds are put forward in support of this position. It is said in the first place that the conveyances from Durant to Keith, and from the heirs of Chandler to Keith are mere deeds of quit claim or release, and therefore insufficient to sustain a claim of purchase for value: *Goff* v. *Lister* (5). Whatever these conveyances may in point of fact have been intended to be, I cannot agree that in point of form they are what the plaintiff contends—mere releases or deeds of quit claim. The granting words (grant, bargain, sell, assign and convey) and the *habendum* clause (To have and to hold the same unto the said Mordecai S. Keith and his heirs, to the use of him the said Mordecai S. Keith, his heirs and assigns for ever) are I think amply sufficient to convey a fee simple where the grantor only professes to convey all his interest in the premises and that interest is a fee simple: *Doe d. Wilt* v. *Jardine* (6); c. 74, s. 20, C. S. N. B.; 57 Vict. c. 20, s. 58. These conveyances are I think ample to transfer to Keith all the interest in the described premises which the grantor had, and which by a true construction of the instruments it was the intention of the grantors to convey. And they would be operative, though Keith at the time had neither title nor possession, which would not be the case with mere releases or quit claims. Let us see however what the real facts are as to these conveyances. It is not difficult to see. I do not know that the defendant Keith was at much trouble to try to disguise the fact—that he was endeavouring by securing these conveyances to obtain a title to these two lots, for which he had practically paid nothing, and to which, so far as I can see, he had no equitable claim, and that his object in doing so was to defeat the title of the rightful owner, whoever he might be. The only claim he sets up to the Green lot is derived through the arrangement which he says he made with McCann, and which, according to his account, was that he was to pay him $25 for his interest in these two lots,

(3) 4 DeG. F. & J. 208.
(4) 21 Can. S. C. R. 218.
(5) 14 Gr. 452.
(6) Bert. 142.

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which he understood at that time were still subject to the mortgages to Flewelling and Moreton, and upon which, so far as he knew, nothing had been paid. As to the Durant lot, the defendant Keith relies not only on this arrangement with McCann, which seems to have been made soon after the assignment to him by Killam in July, 1891, and during the haying season of that year, but also upon the Durant deed of April, 1897. For the present, I shall leave out of consideration the deed from the heirs of Chandler. I shall refer to that later on. The alleged purchase from McCann in no way assists the defendant. Though he has paid $10 on account of the purchase he has no conveyance, and he has full notice of the defective title. More than this, as I have already pointed out, McCann's interest is precisely that of Charles N. Killam, who assigned to him: *In re Mapleback* (7), and Killam's interest is nothing at all except on the theory that these were precisely the errors which the plaintiff alleges to exist; and even in that case, the interest is only an equity of redemption which the assignee would take subject to all equities against the assignor, who, in this case, would in effect be McCann: *Harter* v. *Colman* (8); *Beevor* v. *Luck* (9); *Cummins* v. *Fletcher* (10); *Jennings* v. *Jordan* (11). It is true that the defendant Keith sets up some claim to the Green lot by virtue of the deed from the Chandler heirs, but that conveyance does not profess to convey the Green lot at all—whatever may be the effect of it, it has reference solely to the Durant lot. I am unable to see what equity this defendant Keith has shown as regards this Green lot in any way to compete with that of the plaintiff. As I have already pointed out, the Durant lot stands in a somewhat different position, but as regards it I think the defence which the defendant sets up as being a *bona fide* purchaser for value without notice is not sustained by the evidence. The price paid in purchases of this kind is always an element in determining their *bona fides*. A rule prevailed at one time in reference to conveyances under the Statute of Elizabeth (12), that where the consideration was altogether

(7) 4 Ch. D. 156.
(8) 19 Ch. D. 630.
(9) L. R. 4 Eq. 537.
(10) 14 Ch. D. 712.
(11) 6 App. Cas. 701.
(12) 27 Eliz. c. 4.

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out of proportion to the real value, such transactions were considered in reality gifts, and only purchases in name and form. And one- third in some cases and one-tenth in others has been fixed as the proportion which would lead to this result. See *Metcalfe* v. *Pulvertoft* (13); *Doe d. Parry* v. *James* (14). It is worthy of note here that so soon as Keith learned of this Wheaton mortgage in the fall of 1891, only a very short time after he had made this alleged purchase from McCann for $25, he was willing to pay Pitfield $250 for his mortgage interest. This fact is of special importance when you are dealing with the effect of the conveyances from Durant and the Chandler heirs. For as to them the question is whether Keith can in any sense be said to have been a *bona fide* purchaser for value: *McLennan* v. *McDonald* (15). The evidence shows that Keith neither paid nor agreed to pay the Chandler heirs anything as a consideration for their conveyance ; and that although he paid Durant $20, Durant insisted upon having a bond of indemnity from him. I should think it quite impossible in the circumstances of this case to hold that these were *bona fide* purchases for value. The only interest which the Chandler heirs could possibly have in the lot was that of mortgagee; and if you assume that by their conveyance they intended to convey this interest, what was it? So far as this mortgage constituted a charge on the land, it had been equitably discharged by the sale from Chandler to Russell years before. It is unreasonable to suppose, and there is nothing to suggest, that the Chandler heirs were making Keith a present of anything which either party deemed of value. So also in reference to Durant. His interest was simply an equity of redemption at most, and although he seems to have received $20 he also insisted upon having a bond of indemnity against damage or claims by reason of his making the transfer. I am however clearly of opinion, and so find, that Keith had actual notice of the defects in the title before he obtained either of these conveyances, or contracted for them. As to the Durant deed, he was served with Mr. Teed's notice on the 22nd of April, and he says that it was in consequence of that he went

(13) 1 V. & B. 184. (14) 16 East, 212. (15) 18 Gr. 502.

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to Durant. This notice gave Keith distinct information of the plaintiff's claim, and that there was a mistake in the conveyances under which he claimed. In addition to this, the evidence shows that in 1891 when Keith had agreed to pay Pitfield $250 for the mortgage which was then held by him, he caused the title to be searched, and then found the deed from Chandler to Russell. Keith admits that he knew of the purchase of this Durant lot by Russell from Chandler in 1877 when it took place, and that Russell went and lived on the lot for years afterwards. He also says that he understood at the time that Chandler sold to Russell under the Durant mortgage. He also knew of the subsequent possession of the same lot by Killam when he purchased, and a continuance of that possession up to the time he assigned to McCann. Taking all these facts into consideration, I have no doubt that, while it may be strictly true that Keith did not know until later on precisely the way in which the mistakes took place, he knew perfectly well of the defect in the conveyances now sought to be rectified, for with the knowledge he acquired from his search in 1891, and his other knowledge of the facts and circumstances, it seems impossible to suppose he had not full notice of the defect in the title. In *Wigle* v. *Setterington* (17), the present Chief Justice of Canada, then Vice-Chancellor of Ontario, in speaking of purchases for value and in enumerating the reasons why in that case the claim failed, says (18): "Thirdly, for the reason that the plaintiff had notice sufficient to disentitle him to set up such a defence inasmuch as he admitted in his evidence that he knew the defendant claimed the land in dispute and had been exercising acts of ownership upon it by cutting timber . . . and lastly, on the ground that such a defence cannot be permitted to be used as a shield by a purchaser such as the plaintiff shews himself to have been; a mere speculator buying a lawsuit rather than a parcel of land, and doing so with the avowed object of cutting out the real equitable owner." The reasons applied to the plaintiff in that case are applicable to the defendant in this. See

(17) 19 Gr. 512. (18) At p. 519.

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Rice v. *O'Connor* (19). As to the deed from the Chandler heirs, it is to be remembered among other things that the defendant Keith swears that he contracted with them not as to the Durant lot, but as to the Green lot, and that he does not claim to be a purchaser of the Durant lot from the Chandler heirs or under their deed. If the defendant Keith attaches no importance to the deed from the Chandler heirs in reference to the Durant lot, I see no reason why this Court should do so.

Another objection raised by the defendant is that this bill is multifarious; and that, framed as it is, the plaintiff is not entitled to the relief he seeks. The plaintiff, however, seeks no relief against the heirs of Chandler, he does not seek to have the Wheaton mortgage declared prior to the Green mortgage, or to interfere with it in any way. It is true that he alleges in his bill that the Green mortgage has long since been paid, and I think the evidence shows this to be the fact, but the plaintiff's case as to these errors would have been quite as complete without any such averment. It is also true that the plaintiff's counsel contended that the Green mortgage if not paid, was barred by the Statute of Limitations. Whether this is so or not does not I think arise, as the representatives of Green are not parties to this suit, and therefore no declaration on that point could bind them. In fact no such relief is asked for by the plaintiff. See *Rowsell* v. *Hayden* (20). All the plaintiff asks, and all that he says he requires, is a declaration against the defendant Keith. The defendant's counsel also contended that the plaintiff could not go back and correct any error made by Chandler and Russell, or an error made by Wheaton and Killam; and that if Wheaton were himself the plaintiff seeking to correct the conveyance by describing the Durant lot instead of the Berry lot, he would be no better off, as Killam had no title to that lot. If such a bill only went that far perhaps this result might follow. It is however because that would simply be perpetuating the original mistake into which their predecessors in title had mutually fallen, that with the necessary parties before the Court you can deal with their rights

(19) 12 Ir. Ch. R. 424. (20) 2 Gr. 557.

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and adjust them as their equities may require. The right to reform a deed passes to the purchaser: *Story* Eq. Jur. (21); *Kerr* on Fraud and Mistake (22). It is true that this plaintiff purchased this mortgage with full notice of the defective legal title, and I presume when he did so he realised the probability of being compelled to come to this Court for assistance in establishing his lien on the property. This however does not preclude the plaintiff from obtaining the relief he asks. The evidence shews that he is a *bona fide* purchaser from Pitfield, who, as the evidence establishes, was a purchaser without notice. There is no positive evidence, but there is an almost irresistible inference to be drawn from the facts and circumstances, that Wheaton never knew of the errors. Pitfield and Killam swore they never knew of them until recently, and long since they ceased to have any interest in the property. This plaintiff, therefore, stands in the position of a *bona fide* purchaser for value with notice, from a *bona fide* purchaser for value without notice and is therefore protected: *Story* Eq. Jur. (23); *Watson's* Compendium (24); *Lowther* v. *Carlton* (25). It was also objected that there could not be in this case both a decree rectifying the mortgage and an order of foreclosure and sale. The objection cannot prevail I think in a case like this. In *Hodgkinson* v. *Wyatt* (26), a case very similar to this, the full relief was granted, and the same course was adopted in *Russel* v. *Davey* (27). As to the form of the decree it will only be necessary as the titles stand to declare that the contract between Chas. N. Killam and John Wheaton was for a mortgage on the Green and Durant lots, and that it was by a mutual mistake that these lots were not conveyed instead of those described in the plaintiff's mortgage. There will be a declaration that such mortgage is a charge upon the Green and Durant lots, and that any interest in these two lots which the defendants or either of them has is subject to the plaintiff's mortgage.

There will be a reference in order to ascertain what is due on the mortgage and the question of costs, and further directions will be reserved until after the report.

(21) § 165. (23) § § 409. 410. (25) 2 Atk. 242. (27) 6 Gr. 165.
(22) P. 419 n. (24) P. 1056. (26) 9 Beav. 566.

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On motion made October 18th, 1898, by the plaintiff to confirm the Referee's report on the reference, the plaintiff asked that defendant M. S. Keith be decreed to pay costs of suit, and that interest on mortgage due after maturity and interest on overdue interest be allowed at the rate of nine per centum per annum.

M. G. Teed, for the plaintiff.

W. B. Chandler, for the defendant, M. S. Keith.

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The only two points reserved for consideration are the costs and the rate of interest to be allowed on the mortgage. The condition of the mortgage is as follows: "The full sum of $225 in four years from the day of the date hereof with lawful interest on the same at the rate of nine per centum per annum, payable annually, on the 18th day of June in each year, the first payment of interest to be made on the 18th day of June, A.D. 1886. The same rate of interest to be paid and chargeable from and after the expiration of the said four years and until the whole sum is well and truly paid. Overdue interest to bear interest at the said rate of nine per centum per annum." I think the true construction of this proviso is that the principal bears nine per cent. interest both before and after maturity, and that all overdue interest bears a like rate of interest whether it accrues due before or after the maturity of the principal.

As to the costs, I have felt somewhat in doubt. In *Harris* v. *Pepperell* (28), Lord Romilly, after saying that in cases like this the costs must depend upon the conduct of the parties, goes on thus—"When the mistake is entirely owing to the conduct of the plaintiff, then he must pay all the costs of the suit. When the defendant has been aware of the mistake from the beginning and refused to rectify it, then the costs must be given against him." This, of course, refers to proceedings by the parties between whom the mistake occurred, and who are therefore personally cognizant of the facts. In this case, neither plaintiff nor defendant was a party to the original error; and while it is true that

(28) L. R. 5 Eq. 1.

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as to the Green lot the defendant, though admitting the plaintiff's contention, refused to set the matter right, it may be that he was entitled to proof of facts of which he had no personal knowledge, though he no doubt had learned sufficient to convince him of their truth. The plaintiff bought this mortgage at a very low valuation—$100—with full knowledge of what was before him. He sought to perfect his title by means of a pretended sale and in other ways; and the defendant, after he had knowledge and full notice of the plaintiff's claim, sought to strengthen his position by procuring a conveyance from Durant. Neither party therefore seems entitled to much consideration. I shall make no order as to costs against the defendant personally, but the plaintiff's costs will be taxed and with the interest due on the mortgage be taken from the proceeds of a sale of the property. The amount due on the mortgage, made up upon the principle I have just mentioned, can, I understand, be ascertained without a reference. Counsel can file with the Clerk a memorandum of the agreed amount and the order will be for a sale, the plaintiff retaining from the proceeds his costs and the amount due on the mortgage, and any balance to go to the defendant Keith.

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October 4.

CITY OF FREDERICTON v. MUNICIPALITY OF YORK.

Public Market—Erections in connection therewith—Weigh-scales—Nuisance—Construction of grant—Grant affected by Act of Parliament.

In 1813, pursuant to Crown license, T erected on public land in the City of Fredericton a public market house and public weigh-scales in connection therewith. The scales were kept in use until 1874, when they were voluntarily removed by their then owner. In 1816 the market building was sold by T. to the defendants, and in 1817 the land on which it and the scales stood was granted by the Crown to the defendants in trust to use the lower floor of the building, and the land, for a public market place, and the upper floor for a County Court house. By Act 20 Vict. c. 17, s. 3, it was enacted that the land should be used as a public landing, street and square for the court and market house, and for no other purpose whatever. By s. 4 of the Act it was provided that nothing therein should in anyway affect public rights. In 1898 the defendants sought to erect on the

land public weigh-scales to be used in connection with the market. A suit for an injunction having been instituted by the plaintiffs to restrain the defendants from proceeding with the erection of the scales:

Held, that the Crown grant to the defendants contained an implied authority to the defendants to erect upon the land structures necessary or reasonably convenient or useful for the purposes of the market, including weigh-scales, and that this authority was not taken away by Act 20 Vict. c. 17.

SPECIAL CASE.

In 1813 license was granted by the Crown to James Taylor to occupy a piece of land in Fredericton for twenty-one years, and to erect thereon a public market house. In accordance with the license, Taylor erected a public market building on the site of the present County Court House and erected public weigh-scales contiguous to the market, and placed partly on Queen street and partly on Court House and market square. The scales were kept in use in connection with the market for weighing hay, straw, etc., for customers at the market, until 1874, when they were voluntarily removed by Taylor's successor in interest, Joseph Myshrall. The part of the land on Queen street on which the scales stood was then filled in and thereafter managed by the Mayor and Council of Fredericton as a part of Queen street, and the part of the land within the limits of the Court House and market square on which the scales stood was thereafter used as a part of the square. In 1815 on the petition of a number of the inhabitants of Fredericton, the Governor-in-Council by grant dated November 27th, 1815, granted, appointed and declared that for the term of twenty-one years thereafter a market should be erected and established for buying and selling victuals and provisions of all kinds in the town of Fredericton in front of block No. 1 of the town, between the street and the St. John river, so as to include the market house there erected, and a space of sixty feet in breadth on each side thereof, extending from the street to the river. In November, 1816, the sessions of the County of York agreed with Taylor for the sale to the county of the market building for the purpose of using the upper story as a County Court House.

By grant dated February 21st, 1817, the Crown granted and confirmed unto the justices of the county the piece or

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parcel of land "on which the market house now stands, lying in front of block No. 1 in the town plot of Fredericton, and bounded as follows, viz: South-westerly by the north-easterly line of the front street of the said town plot (which street measures four rods in breadth), north-easterly by the waters of the river Saint John, and north-westerly and south-easterly by lines parallel to the sides of the said market house and sixty feet distant therefrom; the said piece of land measuring in width, in the whole, one hundred and fifty-two feet, and containing two roods and thirty-four perches, saving and reserving that part of the said land between the north-east end of the said market house and the margin of the bank of the said river, the whole width of the land hereby granted, which we do hereby declare is to be left open and unincumbered and used as a public highway forever. To have and to hold the said piece or parcel of land, with the appurtenances thereunto belonging, saving and reserving, as aforesaid, unto the said Justices of the Peace for the County of York, for the time being, forever. In trust, nevertheless, for the public uses following, to wit, the lower floor of the said building, or of any other building which may at any time hereafter be erected on the same site, and all other the land and premises hereby granted, for a public market place; and the upper floor of the same, or any other buildings as aforesaid, for the purpose of a County Court House forever; and to and for no other use, intent or purpose whatsoever; this grant being nevertheless on the express condition, that if the said Justices of the Peace for the said county, for the time being, shall at any time hereafter permit or allow any tavern, inn, or ale-house to be kept on any part of the present, or any other building or buildings erected or to be erected on the land hereby granted, or any wine, rum, brandy, gin, or any other strong liquors, to be sold in any part of the same, or any other building or buildings aforesaid, then these presents shall thenceforth be null and void, and the land hereby granted shall revert to and be vested in us, our heirs and successors, as if these presents had not been made, anything herein contained to the contrary in anyway notwithstanding." On the incorporation of York County the powers of the Justices of the Peace were transferred to the

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County Council of York, and the title to the market house, and the land and premises described in the said grant became vested in the municipality of York. By Act 11 Vict. c. 61, incorporating Fredericton, the administration of the fiscal, prudential and municipal affairs, and the government of the city were vested in the Mayor and Council, and they were given power (s. 37) to "regulate and manage the markets, to establish and regulate market days and fairs, to regulate the place and manner of selling butcher's meat, hay, straw, etc., to restrain and regulate the purchase and manner of selling of all vegetables, fruit, country produce, poultry and all other articles, or things, or animals, exposed for sale, or marketed in the open air." By s. 40 all power and authority granted to the Justices of the Peace for the County of York to make by-laws, rules or regulations upon any subject or for any purpose whatever within the City of Fredericton were declared to be vested exclusively in the City Council. The above Act was repealed by Act 14 Vict. c. 15, and the latter Act was repealed by Act 22 Vict. c. 8. By s. 54 of the last named Act, it was enacted that the City Council of the City of, Fredericton should have the sole power and authority to make bye-laws to establish and regulate markets and fairs, and to grant licenses to butchers; to regulate the manner of selling, weighing and measuring meat, fish, poultry, vegetables, fruit, grain, hay, straw and fodder, and to grant licenses for the due weighing and measurement thereof. By Act 20 Vict. c. 17, it was enacted (s. 1) that the lower flat of the building erected for a County Court House and market, or such part thereof as should be used for a market, should thereafter be and be deemed a free market, and no toll, rate or impost for any meat, fowls, fish, vegetables, fruit, hay, straw, grain or other country produce of any kind therein, sold or exhibited or left for sale, should be at any time thereafter charged or levied. By section 2 of the Act, the County Council of the County of York, and the City Council of Fredericton, were empowered to make such rules and regulations for the government of the market as they might deem advisable. By section 3, it was enacted that "the piece or parcel of land bounded south-westerly by Queen street, north-westerly by Market street, and land granted to Hon.

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John S. Saunders, south-easterly by land granted to Hon. John S. Saunders, and north-easterly by low-water mark on the river Saint John, shall forever hereafter be under the sole control of the County Council of the County of York, and their successors, and shall be used as a public landing, street and square for the said court and market house, and for no other purpose whatever." (This description covers the lands and premises conveyed by the Crown to the Justices of the County of York by grant dated February 17th, 1817). Section 4 of the Act provided that nothing therein contained should affect public rights. By Act 23 Vict. c. 55, ss. 1 and 2 of Act 20 Vict. c. 17, were repealed. Between the years 1855 and 1869 the City Council of the City of Fredericton appointed a market clerk and disposed of fees and tolls collected in connection with the market. By Act 30 Vict. c. 37, it was provided (s. 3) that the City Council of the City of Fredericton should have power as before to impose tolls and rates, and might if they saw fit sell and dispose or otherwise farm the tolls and rates arising from wharves, markets or weigh-scales, or any of them at public auction. It was admitted that in the case of *Edwards* v. *Burgoyne* (1), the Court held that the municipality of York has no right to make any market regulations to be enforced in the City of Fredericton, though they have the title to and control of the land described in the grant hereinbefore mentioned, and the building thereon, for the purposes named in the grant; and that the City Council of the City of Fredericton has no power to close the market on the said land or to impose tolls on the sale of articles sold in the said market. By Act 45 Vict. c. 65, the County Council of the Municipality of York were authorized and empowered after reserving a space of thirty-one feet in depth by the width of the building from the front entrance of the lower flat of the County Court House for the purpose of a free market as then existing, to convert the remaining portion of the lower flat into a Record office and such other public offices and rooms as the County Council

(1) 21 N. B. 228.

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might deem necessary and advisable. In the month of August, 1886, the City Council of the City of Fredericton enacted a bye-law declaring such part of the lower flat of the County Court House as is appropriated for the purpose of a market to be a public market, and to be called Queen's Ward Market. At a session of the County Council of the Municipality of York, held in the month of January, 1898, leave was granted by the Council to James S. Neill and others to erect weigh-scales in front of the said County Court House to replace the scales hereinbefore mentioned, and between the Court House and the line of Queen street. The licensees proceeding to make the necessary excavations for the weigh-scales on the land, but not on that portion reserved as a public highway, described in the hereinbefore mentioned grant to the Justices of the County of York, an injunction was granted by Mr. Justice *Van Wart* restraining them from erecting the scales. It was thereupon agreed to submit the following question for the opinion of the Court: Has the Municipality of York the right to erect, or to authorize the erection of weigh-scales on the lands and premises described in the said grant (not reserved by the terms of said grant as a public highway), for use in connection with the said public market on the said lands and premises?

Argument was heard September 22, 1898.

W. Van Wart, Q.C., for the plaintiffs.

John Black, and *F. St. John Bliss*, for the defendants.

1898. October 4. BARKER, J.:—

If the question in this case depends simply upon the construction to be placed upon the grant from the Crown to the Justices of York, dated February 21st, 1817, I should have no doubt that the defendants' contention should prevail, and that the question submitted for determination should be answered in the affirmative. By that grant the block of land in question (excepting that portion between the north-east side of the market house and the river which was reserved as a public highway) was granted upon trust for the following public uses—that is to say—the upper floor of the then existing or any future market building standing on the lot of land,

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was to be used for a County Court house, and the lower flat of the house and the remainder of the land and premises *for a public market place*. Such a grant in my opinion carries with it an implied authority to the grantees to erect upon the land such structures as may be either necessary or reasonably convenient or useful for the full enjoyment by the public of the privilege granted for their use. It perhaps might be said that structures of an entirely different character could lawfully be put on the land so long as ample space was reserved for the use of the public for market purposes. See *Prince* v. *Lewis* (2). We all know that structures erected for market purposes vary very widely. In some cases a market building is erected, divided into stalls; in others open stalls are in use; sometimes market waggons are used and in others various other means are employed, of which one gets some information in the case of *Mayor of Yarmouth* v. *Groom* (3). *Dillon* on Municipal Corporations (4), quotes the opinion of a State Court as follows: "A municipal market consists (1) In a place for the sale of provisions and articles of daily consumption; (2) convenient fixtures; (3) a system of police regulations for various specified purposes, and (4) officers to preserve order." It is obvious that the convenient fixtures here spoken of must necessarily vary according to the kind of market and the description of the commodities sold there. While it is quite true that when this grant issued there was on the land in question a building used in connection with the market, which probably at that time afforded ample and convenient accommodation for the sale at all events of certain classes of produce, it by no means follows that no other erection could have been placed on the premises for the use or convenience of the public in the exercise of their privilege. That such a condition of things was in contemplation is evident from the words of the grant itself, because the forfeiture clause at the last of the grant was to become operative not merely from the sale of liquor in the building then existing, but in any other building or buildings erected or to be erected on the land. It is also to be remembered that so far as the weigh scales are concerned, that prior to 1817, and while Taylor was licensee

(2) 5 B. & C. 363. (3) 1 H. & C. 102. (4) § 381 n.

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of the same land with authority to occupy it and erect thereon a public market house, he did erect weigh-scales for use in connection with the market for weighing hay, straw, etc., for customers at said market. These scales seem to have stood partly on Queen street and partly on the land in question; and it is admitted by the case, that they were used and conducted as aforesaid—that is, "for weighing hay, straw, etc., for customers at said market"—down to 1874, a period of over 57 years, when Myshrall, the then owner of them, voluntarily removed them. During all this long period neither the city authorities, the county authorities, nor anyone else, seem to have raised any question either that these scales were not an appropriate, useful or convenient fixture for the uses to which they had been appropriated, or that they were in any way an illegal structure, although they stood in part on one of the principal streets of Fredericton, which are by law under the sole control of the civic authorities. It is to replace these scales which were removed in 1874 that the present scales are being erected; the new ones, however, will be situated entirely on the land granted for market purposes —not on any street of the city, and not on that portion of the granted land reserved for a highway. I should have no hesitation in holding that, in the absence of statutory prohibition, the municipality as grantees under the grant of 1817 have a right to erect on the premises weigh-scales such as those in question for the use of those frequenting the market, as being a useful and appropriate, I might almost say a necessary, part of the equipment of a market place such as this, where commodities of large bulk, such as hay and straw, are brought for sale. The plaintiffs' counsel did not very strenuously dispute the correctness of this view; but he urged that the Act of 1857, 20 Vict. c. 17, in effect prohibited the erection of any such structure, and that such structure was therefore *per se* a public nuisance. The argument, as I understood it, went to the length of denying the municipality's right to place any encumbrance on the premises in question except the present building. I do not understand, as at first sight might seem to be the case, that it is by this case admitted that the Court in *Edwards* v. *Burgoyne* (5), decided "that the municipality has the title to and

(5) 21 N. B. 228.

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control of the land described in the said grant and the county building thereon *for the purposes mentioned in the said grant.*" That the municipality has the title to the land and its control under the grant is admitted, but that it holds the land for the purposes mentioned in the grant is disputed, as I understand the contention, on the ground that the Act of 1857 has in some way altered these purposes—a question which was not involved in the decision of *Edwards* v. *Burgoyne* at all, though the Chief Justice does in his judgment in that case (p. 234) use substantially the words quoted in this case. *Edwards* v. *Burgoyne* was decided in 1881, and the points involved in it and which were decided are these: (1) that the title to this land was in the municipality of York; (2) that the control of the market so far as to regulate it was in the City Council; (3) that the market was a free market by the grant and that the City Council had no power either to close it or impose tolls, and (4) that the repeal of sections 1 and 2 of 20 Vict. c. 17 did not amount to a legislative declaration that the market should not be free. This case I think leaves untouched the point now set up, whether section 3 of 20 Vict. c. 17, has in any way altered the rights or powers of the municipality expressly or impliedly given them by the grant—or, if so, whether it has so altered them as to render the erection of these scales illegal. It might be contended—though I do not think such a contention would prevail—that the effect of section 1 of that Act was to limit the market place to the lower flat of the Court House. This section was however repealed in 1860, 23 Vict. c. 55, so that the terms of the grant are not altered by it. The plaintiffs' contention rests solely upon section 3 of 20 Vict. c. 17. I should scarcely expect to find in an Act the title to which is, "An Act relating to the lower flat of the County Court House in the County of York," a provision in any material way altering or abridging market privileges secured to the public by this grant and enjoyed by them without interruption for over forty years; and I think there is no rule for the construction of statutes which requires me to place such a meaning upon the section, unless it clearly appears that such was the intention of the Legislature. This section provides that this block of land

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described in this grant "shall forever hereafter be under the sole control of the County Council of the said County of York and their successors, and shall be used as a public landing, street and square for the said Court and Market House and for no other purpose whatever." And section four provides that "nothing in this Act *shall in any way affect public rights.*" Looking at this Act as it was originally passed, it seems as though its primary object was to remove doubts as to control between the city authorities and those of the municipality, and that any declaration in section 3 as to the uses for which the land should be held was not intended to alter existing rights; and that to avoid any possibility of the rights of the public being interfered with they were specially reserved. What were the public rights which were reserved? In the first place, the land between the house and the river was reserved as a public highway, to remain unencumbered, and which we know extended to the river, and formed a ferry landing. In the next place, the public had an express right by the grant of buying and selling upon the remainder of the land as a public market place, and I should say an implied right of passage to the Court House, or that part of the building used as such. This right had been exercised for nearly half a century. If you admit that this section declares that the land shall be used in part as a public landing, and in part as a street and square for the house used as a market house and a court house, it does not alter the fact that the land is also to be used as a square for the market house—it may be used for other purposes, but it certainly can be for that. I do not see that such use is necessarily inconsistent with its original use as a market place. Loads of hay and straw could not be driven into the market house for sale. Can you gather any indication on the part of the Legislature that this public privilege so long enjoyed was to be abolished and abridged in any way, especially in view of section 4? I think not. The argument most strongly urged by the plaintiffs' counsel was that the effect of this section 3 was to make the land a public street, and therefore this proposed erection would be a nuisance in the same way as though it were situated on Queen street. A passage from

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Dillon (6) was cited as an authority for this proposition; and it was said that if this encumbrance could be permitted others might be added until the whole ground had been appropriated to the exclusion of the public who desired to use it for purposes of passage. This could as well be said to the original grant; but I do not agree with the argument either as to the grant or the Act. It cannot be denied I think that to whatever extent the land may be used as a street for the court and market house, it is also to be used as a market square. There is nothing in the Act which states where the street or the landing or the square, is to be. And if you look at the grant, the only part reserved as a street is that part of the land between the house and the river. Admitting, however, for the sake of the argument, that the public right of passage to and from the court house, and the public right of use for market purposes of the so-called square, are preserved, it by no means follows that these weigh-scales are a nuisance. There is no analogy I think between the case of an ordinary street and this public right of passage for a specific purpose, which is to be enjoyed in conjunction with the other public right over the same land. What would be a nuisance if erected on an ordinary public street, would not, in my opinion, necessarily be one here. What would be an illegal obstruction on a street might not be one on a square or a public landing. A fountain on a public square used by the public as a place of recreation might be quite legal, when it would be a nuisance on a public street, and a ferry-house on a public ferry landing for the protection and convenience of passengers might be a legitimate use of the land, whereas it would not be permissible on a public street. If, therefore, you hold that all this land is a street in the ordinary meaning of the word—in the same sense and to the same extent as Queen street for instance—you prevent any erection on the whole land which would not be permissible on a public street; and it makes this public right to use the land for market purposes entirely subordinate to the public right of passage—a condition of things which had no pre-existence and which I am satisfied the Legislature never intended to create. As to other obstructions which it may

(6) § 383.

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be attempted to erect on this land, they can be dealt with when the question arises. The municipality is a public body holding this property for public uses, and it is not to be presumed they will allow the public interests to be prejudiced. As to this present case, I think the proposed scales are not illegal or a nuisance *per se*. I also think that they are a useful and appropriate erection for the use of customers resorting to the market in the exercise of their rights secured by the grant; and that they are so, is not only not denied by the case, but is proved by the long use of similar appliances on practically the same site for the same purposes, and which were so in use when this original grant was made. It is not asserted that the erection or use of these scales interferes in any practical way with the legitimate use of this land as a street for purposes of passage; or that it is, in any sense, an annoyance to any one. I therefore am of opinion that the municipality were within their rights in giving the permission they did. The question submitted to me is as follows: "Has the Municipality of York the right to erect or to authorize the erection of weigh-scales on the land and premises described in the said grant (not reserved by the terms of said grant as a public highway) for use in connection with the said public market on the land and premises described in said grant?" and I answer it in the affirmative.

I have not thought it necessary to refer to the Acts passed since *Edwards* v. *Burgoyne* was decided, and which were cited before me. They do not I think bear upon the point in dispute, neither do I think it necessary to refer to the by-laws made by the City Council from time to time. It was held in *Edwards* v. *Burgoyne* that the city authorities had the control over the market and could make the necessary regulations for its use. The by-law passed in August, 1886, merely conferred a name on this market. I confine my opinion to the case stated—as to the control of these scales or the power to license them, regulate them, or impose tolls or to collect them and when imposed, I offer no opinion as no such question is involved in this case.

There will be a decree declaring that the Municipality of York has the right as claimed, and the injunction order will be dissolved and the plaintiffs' bill be dismissed with costs.

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November 15.

GODEFROI v. PAULIN.

Practice—Motion to take Bill pro confesso—Clerk's Certificate—Service.

A motion to take a bill *pro confesso* for want of a plea, answer or demurrer, will be allowed, though a copy of the Clerk's certificate of the state of the cause has not been served upon the defendant.

MacRae v. *MacDonald*, N. B. Eq. Cas. 498, not followed.

Motion to take bill *pro confesso* for want of a plea, answer or demurrer.

A. I. Trueman, for the defendant, objected to the motion being heard on the ground that a copy of the Clerk's certificate of the filing of the bill, and that no plea, answer or demurrer had been filed, had not been served upon the defendant, citing *MacRae* v. *MacDonald* (1).

G. G. Gilbert, Q.C., in support of the motion.

BARKER, J.:—*MacRae* v. *MacDonald* is not followed in the practice of the Court. At the Fredericton sittings the state of the cause is frequently shown from the Clerk's record book brought into Court.

Motion allowed.

(1) N. B. Eq. Cas. 498.

1898.

December 12.

In re SUTTON AND JEWETT ARBITRATION.

Arbitrators' Fees—Basis of Value—Reduction by Review Judge.

An arbitrator will not be allowed to fix his fees upon the basis of the value of his services in his own business or profession. What fees he should receive depends upon the particular circumstances of the case. The expert or professional man, who has been selected as arbitrator, because the matters in controversy are such as his special training and education enable him the more intelligently to determine, is not to be rated the same as one who has no exceptional qualification. In determining as to the reasonableness of his fees, regard must also be had to the nature and importance of the question in dispute, the amount of money involved, and the time necessarily occupied.

Where arbitrators charged for each of their services $25 a day, for 21 days of 4½ hours each, a review Judge reduced the charge to $20 per day of 6 hours each.

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Review before Mr. Justice Barker, as a Judge of the Supreme Court, of arbitrators' expenses, under Act 61 Vict. c. 52. The facts are fully stated in the judgment of the learned Judge.

Argument was heard December 2, 1898.

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

A. I. Trueman, and *C. J. Coster*, for the respondents.

1898. December 12. BARKER, J.:—

The claimants made separate claims for damages sustained by reason of the city of St. John exercising its right of expropriation under Act 61 Vict. c. 52, in reference to certain rights to the water of Spruce Lake. The total claim as filed amounted to $34,000. The claimants, it was admitted, were interested in their rights as tenants in common in the proportion of one-eighth to Mrs. Sutton and seven-eights to Jewett. Though their claims were separate and separate awards were made, the evidence taken applied to both. The claimants selected Mr. Pugsley, Q.C., as their arbitrator, the city selected Mr. Chesley as theirs, and these two appointed Mr. Vroom as the third arbitrator. They delivered their awards by which Messrs. Pugsley and Vroom (Mr. Chesley not concurring in the awards) assessed to Jewett the sum of $875 as compensation for a certain piece of land taken and certain privileges connected therewith, and the sum of $27,125 for damages past and prospective, sustained by reason of the city appropriating and taking the water of the lake. The same arbitrators made a similar award in favour of Mrs. Sutton, assessing to her $125 under the first head of damages and $3,875 under the other—the total amount awarded being $32,000. With these awards the arbitrators sent to the city a memorandum of their charges amounting to $1,575, or $525 each, in addition to a small sum for disbursements, about which there is no question. The city deeming the charge excessive, refused to pay it and accordingly the Recorder made an application to me to review the amount under a power for that purpose given by section 8 of the Act. This section says, "The arbitrator's expenses connected with the arbitration shall be paid by the city, subject to review as to reasonableness by a Judge of the Supreme Court." Thinking that the substantial questions in dispute

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might perhaps be more readily ascertained and more easily settled if an itemized account of the charges were submitted, I suggested that this be done, and the arbitrators in accordance with my suggestion furnished a detailed statement of their services and charges, amounting in all to the sum of $2,335.50 (exclusive of the disbursements), or $760.50 in excess of the amount originally claimed.

In *Webb* v. *Wyatt* (1), Pollock, C.B., speaking of a similar case says: "We shall give no opinion as to the *details* of the charges in the present case; it would be beneath the dignity of the Court to inquire into the various items of time, attendance, etc." I hope I have not exposed the dignity of the Court to any unnecessary peril, but at the risk of doing so, I have examined with some particularity the details of this account; for only in that way could I ascertain with any degree of accuracy the nature and extent of the services rendered for which the arbitrators are claiming compensation. Under ordinary circumstances, all useful purposes of this application would likely be served by my merely announcing my decision, but as I have the misfortune to differ from the arbitrators as to the amount to which they are entitled, I think it is due to them to state in a general way my reasons for doing so. I desire at the outset to disclaim all intention of laying down any general rule as to the compensation of arbitrators. If that is thought advisable, the Legislature can be asked to do so in this Province as the legislatures of other places have done. I shall deal with this case upon its own merits, and when other cases arise they must be dealt with upon theirs.

Arbitrators have never been allowed conclusively to settle the amount of their own fees. In *In re Coombs* (2), Parke, B., says: "The amount of his own fee is to be excluded by natural justice, for it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause." In *Roberts* v. *Eberhardt* (3), Watson, B., says: "It is true that an arbitrator cannot conclusively determine the amount of his own fee. But the invariable rule or practice of the profession—and I believe of lay

(1) 3 Jur. N. S. 496. (2) 4 Ex. 839. (3) 3 C. B. N. S. 482.

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arbitrators also—is that the arbitrator fixes in the first instance the amount of his own fee and retains the award until such fee is paid. . . . It is clear that any excess over a reasonable fee received by an arbitrator may be recovered back by action." Erle, J., in the same case says: "The arbitrator cannot judicially decide the amount of his own fee, whether he specifies it in his award or demands it orally from the parties. . . . Whether the amount is stated in the award or demanded orally when the award is delivered out, the decision of the arbitrator on his own costs is always subject to some review, because he may not decide finally in his own favour." While, therefore, the provision in the statute making a Judge of the Supreme Court the person to review the arbitrators' fees in this case is an innovation in point of practice, it is no innovation in point of principle. The question to be determined is this—what is a reasonable sum to be paid the arbitrators for their services as arbitrators in this particular case. I say, *as arbitrators*, because I dissent from the proposition put forward that a man who chooses to act as an arbitrator can fix his fees upon the basis of value of his services in his own special business for the time given to the arbitration. He need not act as an arbitrator unless he chooses, or he may stipulate as a condition of his consenting to act that his remuneration shall be at a fixed rate, but in the absence of that, if he chooses to act as an arbitrator he must be contented with arbitrator's pay. What that pay is must obviously depend upon the particular circumstances of each case. The expert, the professional man, the lawyer, surgeon or engineer, as the case may be, who has been selected an arbitrator because the matters in controversy were such as his special training and education enabled him the more intelligently to determine, can scarcely expect to be rated the same as one who has no such exceptional qualification for the work in hand. It is obvious also that in determining as to the reasonableness of the compensation regard must be had to the nature and importance of the right in dispute, the amount of money involved and the time necessarily occupied in the work. There is no scale of fees to guide one in such cases, there is no established usage, there is no uniform practice. In England and in Ontario the matter has been the subject of special legislation.

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By c. 53, R. S. O., a scale of fees is established for arbitrators. A non-professional arbitrator for every day's sitting of not less than 6 hours is taxed not less than $5 nor more than $10. And for every sitting of less than 6 hours when the arbitration is actually proceeded with, for each hour is taxed not less than $1 nor more than $1.50. Professional arbitrators get double these fees. Thus the maximum allowance per day of 6 hours is $20 to a professional man and the minimum $10, or a *per horam* allowance of from $2 to $3. By this Act the taxing officer is to exercise his discretion, having regard to the length of the arbitration, the value of the matter in dispute, and the difficulty of the questions to be decided; and he is also authorised to allow a reasonable sum for preparing and drawing up the award. A reference to the following cases under this statute will show how it is viewed in Ontario: In *Re Hilyard and Royal Insurance Co.* (4) the question was as to the value of a stock of dry goods destroyed by fire. It was voluntarily submitted to arbitration, and of the three men selected one was a barrister, one a banker and the third a merchant. The award was for $2,780, and the arbitrators sat in all 41 hours. The taxing officer allowed the barrister $100 and the other two $50 each, and his decision was sustained on appeal. This statute as originally passed was expressly "for restraint of unreasonable charges attending arbitrations," and while it contains a provision by which an agreement may be made for fees different from those mentioned in the table, it imposes heavy penalties upon those who, in the absence of any such agreement, exact fees beyond those allowed by the Act. See *In re Town of Thornbury* (5); *Jones* v. *Godson* (6). By our own Equity Court table of fees c. 119, C. S., only $4 a day is allowed accountants and specialists employed by the Court. An examiner could not very well make up his fees beyond $10 or $12 a day of six hours. A commissioner in lunacy (who is a barrister) is allowed a maximum fee per day of $15, while a commissioner in partition of dower only receives $5 per day. In England, I find a referee's fee is £5, and for every hour over two full days 10s. an hour, with some

(4) 12 P. R. 285. (5) 15 P. R. 192. (6) 23 A. R. 34.

extra charge when the referee is sitting out of London: *Morgan's* Ch. Orders, 683. This is substantially the same as the Ontario scale, though in England in the taxation of arbitrators' fees some considerable latitude is given the taxing master.

In *Brazier* v. *Bryant* (7), the arbitrators' fee was reduced from £87 to £35. In a case reported in 2 Times Law Rep. 667, it appears that by a special provision in a contract with the Government of the Cape of Good Hope, any matter of difference was to be referred to the President of the Institute of Civil Engineers. A dispute having arisen, Sir James Brunlees acted as sole arbitrator and made an award for a large sum of money. He charged for 65 days £1,499, but the taxing master reduced it by about sixty per cent. In *Webb* v. *Wyatt*, already cited, the arbitrator was a barrister, and the question involved was a right of way. The arbitrator's fee was £43. The taxing officer reduced this to £33, and the Court held this sum excessive and directed a review of the master's taxation, adding, "and let it be generally understood, that unless arbitrators are reasonable in their charges, the evils of arbitration will be greater than those of litigation." In *Barnes* v. *Hayward* (8), two civil engineers acted as arbitrators and claimed £436 as fees. The master reduced this to £304 10s., which it was said was more than two barristers would have been allowed, and the Court held the sum excessive and ordered the taxation reviewed. In *Sinclair* v. *Great Eastern Railway Co.* (9), the arbitrator was a Q.C.; he held 24 meetings, made an award for £28,850, and his fees were reduced from £553 17s. 9d. down to £340. I mention these English cases to show how constant is the practice for arbitrators' fees to come under review, and also to show how wide is the difference in many cases between the opinions of the arbitrators themselves and those of the taxing master as to the reasonableness of the amount. While the amount involved in this present case is large, and it therefore was of sufficient importance to require the care and attention which the arbitrators seem to have given it, I have not been able either from a perusal of the

(7) 2 Dowl. 600. (8) 1 H. & N. 742. (9) L. R. 5 C. P. 135.

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evidence or from anything given before me or said by counsel on the argument, to gather that the case involved any point of very great difficulty. In fact, while the Act under which these proceedings are taken calls the persons appointed arbitrators, their functions are rather those of appraisers. They are called upon simply to determine what the city shall pay to the owners of land or water as the case may be, for their interest in the land or water, which, on such payment, vests in the city. They settle no disputed rights and determine no differences. They merely assess the value of the land or rights which are being expropriated. It was said that in this case there were certain disputed questions as to the ownership of some of this land; but whatever that amounted to at one stage of the proceedings, and however much the proceedings may have been lengthened out in consequence, the determination of the question by the arbitrators never became necessary. I do not mean to say that the case was free from difficulties, but I can see no more serious difficulties in it than arise in many of the numerous cases of expropriation to which one's attention is turned, and which come up for consideration. A stenographer was furnished the arbitrators at the city's expense, and he furnished them with transcripts of the evidence for their use as the matter proceeded. The cost of drawing the award was also borne by the city. It appeared in the evidence that the way by which the amount of the original claim was arrived at was this: There were it was said 28 meetings of the arbitrators, some of them full meetings and some not. These the arbitrators estimated as equivalent to 21 full days, for which they charged $25 each per day, or in all $525 for each arbitrator. I have no very reliable means of verifying the accuracy of this time estimate, and shall therefore take it as a basis of calculation. The idea of $25 a day seems to have been derived from some supposed analogy to counsel fees paid on the trial of cases. I can only say that in my opinion there is not the slightest analogy between the two positions of arbitrator and counsel. Their duties, their responsibilities, and their special qualifications are as dissimilar as well can be. But if we take the method of calculation adopted and

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apply it in its entirety, what is the result? I find by the evidence before me as well as by the notes of evidence before the arbitrators, that the arbitrators at the beginning of their work agreed that their day should run from 10.30 until 1 o'clock in the morning, and from 2.30 until 4.30 in the afternoon, making in all 4½ hours to the day. In Ontario and England a day, when spoken of in reference to arbitrator's or counsel's fees, means 6 hours. See *Brown* v. *Sewell* (10). In this Province the Legislature has recognized what we all know is the usual practice on trials, a day as meaning seven hours. Twenty-one days of 4½ hours are equal in round numbers to 13½ days of 7 hours; and 13½ days at $25 amounts to $337.50, as against the $525 charged. If you allow 6 hours to the day, the amount is in round numbers $400, as against the $525 charged.

Applying the English scale for referees, the result would be as follows: 21 days of 4½ hours is equal to 95 hours, avoiding fractions. Deduct 2 days, or 12 hours, and computing the remaining 83 hours at 10s. or $2.50 per hour, you have $207.50, which, with the £5 for the first two days, amounts in all to $232.50. If you tax the bill under the Ontario scale it would stand thus: The 21 days are equal to 16 of 6 hours each. Allowing all the arbitrators the highest professional fees, or $20 a day each, and the amount is $320, as against the $525. To this however should be added an amount to cover some special charges, such as perusing papers, attendances to be sworn in, and other charges. Taking these into consideration, and having in mind the evidence as to what in some similar cases the city has paid, I think $400 to each arbitrator, or $1,200 in all, in addition to $31.10, the cash disbursed, is reasonable under the circumstances, and I fix the amount at that sum. I have not overlooked the evidence given before me on this application. Mr. Gilbert, who was counsel for the claimants before the arbitrators, and who therefore had the advantage of a personal knowledge of the case in forming an opinion, stated that he thought from $500 to $700 for each arbitrator not unreasonable. At the same time he said he thought if the case had been tried in the ordinary way before a Court it

(10) 16 Ch. D. 517.

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would have been disposed of in a week or ten days, an opinion in which from the amount of evidence taken and my own experience in such matters I entirely concur. In fixing the fee at $400 I have been influenced somewhat by the fact that the amounts which the city has paid for somewhat similar services in previous arbitrations may fairly have led these arbitrators, when they consented to act, to suppose that their services would be paid for on a somewhat liberal scale—more liberal in fact than seems to me reasonable, and more liberal I think than that which prevails in other places where the conditions are not dissimilar.

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December 20.

LEONARD v. LEONARD.

Will—Construction—Absolute Gift—Condition for Divesting—Repugnancy—Precatory Trust—Motive for Gift—Life Insurance Policy—Policy Payable to Wife of Assured—Will Disposing of Policy—Act 58 Vict. c. 25, s. 7—Resulting Trust—Advancement—Purchase by Husband in Name of Wife—Rebuttal of Presumption.

A testator by his will gave a lot of land with house thereon and personal property to his wife absolutely, to enable her to maintain a home for herself and the testator's sons until they should attain the age of 21 years. The residue of his estate he gave to trustees in trust for his sons. The will then provided that the devise and bequest to the wife should be in lieu of dower, and that if she married again the property devised to her should vest in the testator's trustees for the benefit of his sons.

Held, that the wife took an absolute interest free from any trust in favor of the sons, but subject to the gift being divested in the event of her marriage, and that such condition was not void as being repugnant to the gift.

Section 7 of Act 58 Vict. c. 25, does not apply to a will made before the passing of the Act, varying a policy of life insurance.

A purchase by a husband in the name of his wife is presumed to be an advancement to the wife, and the presumption will not be rebutted by the fact of the husband devising the property by will.

SPECIAL CASE.

Charles H. Leonard by his will dated the thirty-first of October, 1894, gave, devised and bequeathed a lot of land on the north-east corner of Carmarthen and Orange streets in the city of St. John, with the brick building thereon, and the furniture therein; a lot of land in the Parish of Westfield, Kings County, with the buildings thereon and

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the furniture therein; and certain mortgages and life insurance policies, to his wife absolutely, to enable her to maintain a home for herself and the testator's two sons until they should respectively attain the age of twenty-one years. All the rest, residue and remainder of his estate he gave, devised and bequeathed to his executors and trustees in trust for his two sons, George Percy and Charles Franklin, to be invested, used or expended by his executors and trustees as they should consider for the best interests of the said sons until they should respectively attain the age of twenty-one years, when each should be entitled to one half, share and share alike. In the event of the death of one son before attaining the age of twenty-one years, the survivor should have and take the whole on his attaining the age of twenty-one years. The will then proceeded as follows: "The devise and bequest to my said wife shall be in full satisfaction and in lieu of all dower and dower rights, and should she marry again the property in such event so devised to her, as herein stated, shall vest in my said executors and trustees for the benefit of my said sons as hereinbefore expressed." The lot of land and premises situate at Westfield referred to in the will were purchased by the testator but conveyed by his direction by the vendor to the testator's wife, in whose name the title has ever since remained. At the time of his death the testator had a number of policies of insurance upon his life. One policy was made payable to his wife, and another was expressed to be payable to the assured, July 5, 1907, if then living; or in the event of his death to his wife. It was submitted on the part of the plaintiff, the testator's widow, that the land and premises at Westfield, and the policies expressed to be payable to her, were her own property and were unaffected by the will; that the real estate on the corner of Carmarthen and Orange streets, and the personal estate mentioned in the will, vested in her absolutely, free from any trust or condition or gift over. For the defendants, the testator's sons, it was submitted that the plaintiff did not take under the will absolutely, but subject to the property divesting in case of her marriage; or that she held the same in trust for herself and the defendants, subject to being divested as to herself in case of her marriage.

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Argument was heard October 18, 1898.

W. W. Allen, for the plaintiff:—

The general intent of a testator governs the construction of his will, and a particular secondary intent will not be allowed to prevail against the general intent: *Doe d. Bean* v. *Halley* (1); *Doe d. Gallini* v. *Gallini* (2). The gift to the plaintiff as respects both realty and personalty is an absolute one and cannot be controlled by the condition for divesting in event of her marriage. Such a condition is inconsistent with and repugnant to the words of gift. As to personalty, the rule of law is that where the absolute interest is given in personal estate there can be no further gift of it: *In re Lowman* (3); *In re Jones* (4); *Watkins* v. *Williams* (5). Words that would create an estate tail with reference to real estate are held to convey an absolute interest with reference to chattels: *Crooke* v. *De Vandes* (6). Household effects are things *quae ipso usu consumuntur*, and are incapable of gift over: *Randall* v. *Russell* (7). In *Jarman* on Wills (8), it is laid down that the gift of consumable articles to a woman so long as she shall be living unmarried is the gift of an absolute interest. As to real estate, if a devise is made absolutely it cannot be cut down except by clear and conclusive language. Here that is not done. See *Hoare* v. *Byng* (9); S. C. sub. nom. *Byng* v. *Lord Strafford* (10); *In re Percy* (11); *Randfield* v. *Randfield* (12). The words in the will annexed to the gift to the wife, "to enable her to maintain a home for herself and my two sons until they shall respectively attain the age of twenty-one years," do not qualify the gift or create a trust for the sons, but merely denote the motive of the gift. In *Benson* v. *Whittam* (13), the Vice-Chancellor says: "I am not aware that there is any case where there is a gift to a party apparently in terms which would make him the taker so as to have a benefit, and words have been connected with it which express the reason for which it was given in which the Court has held that a trust was created

(1) 8 T. R. 9.
(2) 5 B. & A. 621.
(3) [1895] 2 Ch. 354.
(4) [1898] 1 Ch. 438.
(5) 3 MacN. & G. 622.
(6) 9 Ves. 206n.
(7) 3 Mer. 194.
(8) 5th Ed. 857.
(9) 10 Cl. & F. 521.
(10) 5 Beav. 558.
(11) 24 Ch. D. 616.
(12) 2 DeG. & J. 57; 8 H. L. C. 225.
(13) 5 Sim. 22.

for those persons." See also *Hammond* v. *Neame* (14); *Thorp* v. *Owen* (15); *In re Jones* (16). The property at Westfield belonged to the plaintiff and could not be affected by the testator's will. Where property is bought by a husband and conveyed to his wife a presumption is raised in equity that the purchase was intended as an advancement: *Drew* v. *Martin* (17). The policies of life insurance on the testator's life payable to the plaintiff are her separate property, and do not form part of the testator's estate: Act 58 Vict. c. 25.

A. I. Trueman, for the testator's children:—

The question is strictly one of construction as to what was the testator's intention, and for the purpose of the inquiry the will must be read as a whole, and if there is a contradiction in its different parts the Court will seek to give to them a meaning consistent with each other. If in one clause of a will the testator gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly. *Hoare* v. *Byng* (18), and *In re Percy* (19) are not authorities for any other rule than that a clear gift in a will cannot afterwards be cut down except by words indicating such intention on the part of the testator with reasonable certainty. Here that intention is unequivocally expressed. The proposition that an absolute gift, whether of real estate or personalty, cannot be limited to a life estate or lesser interest on a certain contingency happening cannot be supported. See *Jarman* on Wills (20). An executory devise or gift may be and often is limited upon an estate in fee simple or an absolute gift. See *Jarman* on Wills (21). It is therefore submitted that the gift to the plaintiff must be read subject to the condition for divesting on her marriage. The opinion of the Court is also sought as to whether a precatory trust in favor of the testator's children, is not limited upon the gift to the plaintiff. That the gift is made in words conveying an absolute interest in her

(14) 1 Swan. 35.
(15) 2 Hare, 608.
(16) 67 L. J. Ch. 511.
(17) 2 H. & M. 130.
(18) 10 Cl. & F. 508.
(19) 24 Ch. D. 616.
(20) 5th Ed. 436.
(21) 5th Ed. 822, *et seq.*

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is not conclusive of the question, for in the nature of the thing a precatory trust must be limited upon an absolute gift. See *Scott* v. *Key* (22); *Gully* v. *Cregoe* (23); *Shovelton* v. *Shovelton* (24); *Curnick* v. *Tucker* (25); *Irvine* v. *Sullivan* (26); *Hart* v. *Tribe* (27); *Horwood* v. *West* (28); *Raikes* v. *Ward* (29); *Crockett* v. *Crockett* (30). Section 7 (1) of Act 58 Vict. c. 25, permits an assured person to vary, restrict or extend, transfer or limit the benefits of policy to the wife alone or the children, or to one or more of them, although the policy is expressed to be for the benefit of the wife.

A. H. Hanington, Q.C., for the executors and trustees.

1898. December 20. BARKER, J.:—

It is a well-settled rule of construction as to wills that they are to be read in the ordinary and grammatical sense of the words unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument should follow from so reading it: *Abbott* v. *Middleton* (31). Lord Cranworth, in the same case, says: "It is not the duty of a Court of Justice to search for a testator's meaning otherwise than by fairly interpreting the words he has used." See also *Grey* v. *Pearson* (32); *Roddy* v. *Fitzgerald* (33). The difficulty of the rule lies mainly in its application; and, in this, one derives no very material assistance from cases decided upon other instruments drawn in different though perhaps similar language. Reading this will in the ordinary sense of the words and giving to those words what seems to me a fair interpretation, I should say the testator's intention was that his widow should have an absolute interest in the property given to her so that she might have a home for herself and children, but that if she chose by marrying again to make other arrangements for herself, the property he had given her should then go to trustees for the benefit of the children.

(22) 35 Beav. 291.
(23) 24 Beav. 185.
(24) 32 Beav. 143.
(25) L. R. 17 Eq. 320.
(26) L. R. 8 Eq. 673.
(27) 18 Beav. 215.
(28) 1 S. & S. 387.
(29) 1 Hare, 445.
(30) 1 Hare, 451.
(31) 7 H. L. C. 68.
(32) 6 H. L. C. 61.
(33) 6 H. L. C. 877.

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I have myself no doubt whatever that this was what the testator desired and intended to accomplish; and the only question is whether there is any such inconsistency or repugnance between different parts of the will as, under recognized canons of construction, will defeat that intention. I do not think the words "to enable her to maintain a home for herself and my two sons until they shall respectively attain the age of twenty-one years," create any trust in favour of the children. The cases on points of this kind run on very fine lines and the distinctions between them are not always easily discovered. The language of the devise to the wife is sufficient to pass the fee in the real estate and an absolute interest in the personal property included in the gift. It is given to her absolutely, and the remainder of his property the testator speaks of as residue, which he also disposes of absolutely in another channel. It would be difficult for this Court to measure in any way the value of the sons' interest in this property so as to enforce any trust in reference to it; and that is one consideration which influences Courts in construing words like these as not creating any trust: *Morice* v. *Bishop of Durham* (34). When this testator wished to create a trust he seems to have known apt words for the purpose, for in the very next sentence of the will he devises the residue of his property specifically in trust for these same children. I think the testator recognizing the moral obligation of the mother to provide for the children intended to give her the means necessary for that purpose, and to provide a home for herself and them. In *Thorp* v. *Owen* (35), the will under discussion contained these words: "I give the above devise to my wife that she may support herself and her children according to her discretion and for that purpose." The Vice-Chancellor held that there was no trust created. He says: "A legacy to A. the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A. could enforce in this Court; and again, a legacy to A. the better to enable him to maintain or educate and provide for his family must, in the abstract, be subject to a like construction; it is a legacy to the individual with the motive

(34) 10 Ves. 534. (35) 2 Hare, 607.

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only pointed out." See also *Benson* v. *Whittam* (36); *Brown* v. *Casamajor* (37); *Hammond* v. *Neame* (38). I think the words this testator has used merely indicate the motive for making the gift and were never intended to create any trust in favour of the children.

It was contended on the part of the widow that the Westfield lot stood in a different position from the other real estate given to the wife. It seems that this lot though bought and paid for by the testator was by his directions conveyed to his wife. A purchase in the name of the wife, unlike a purchase in the name of a stranger, creates no resulting trust in favour of the husband, but is presumed to be a gift or advancement for the wife's benefit: *Kingdon* v. *Bridges* (39); *Rider* v. *Kidder* (40). Of course this presumption may be rebutted, but there is nothing in this case which would rebut it. The mere fact that he devised it by his will would not do so: *Crabb* v. *Crabb* (41); *Dummer* v. *Pitcher* (42); *Jeans* v. *Cooke* (43). The next question is what is the effect of the clause, "and should she (i.e., the wife) marry again the property in such event so devised to her as herein stated shall vest in my said executors and trustees for the benefit of my said sons as hereinbefore expressed." It was contended on the part of the widow that this clause of the will was wholly inoperative, as it was altogether repugnant to the previous clause of the will by which the testator gave this property to the wife absolutely. It was said that this was at all events the result as to the personal property, and that the furniture consisted of consumable articles, and was on that account free from any such limitation. It would I think be contrary to authority and principle to reject words as plain and positive. In *Crawford* v. *Broddy* (44), the Chief Justice of Canada says: "That there is either inconsistency or repugnance in a testator first giving an estate in fee in absolute terms, and then cutting down that gift and making the absolute estate defeasible by an executory devise over or

(36) 5 Sim. 22.
(37) 4 Ves. 498.
(38) 1 Swan. 35.
(39) 2 Vern. 67.
(40) 10 Ves. 360.
(41) 1 M. & K. 511.
(42) 2 M. & K. 262.
(43) 24 Beav. 513.
(44) 26 Can. S. C. R. 345.

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by the addition of words altering the estate to an estate tail, is a proposition which would be at variance with numberless authorities." The words in the will under consideration in that case were these: "At the death of any one of my sons and daughters having no issue their property to be divided equally among the survivors." The Chief Justice says of this clause, "no clearer and more decisive terms could be used than the language of the testator in the clause by which he limits the subsequent estate over. In *O'Mahoney* v. *Burdett* (45), the will contained this clause: "If my said niece should die unmarried or without children the £1.000 I here will to revert to my nephew Colonel Henry L'Estrange." In that case Lord Cairns says: "A bequest to *A.* and if she die unmarried or without children to B. is, according to the ordinary and literal meaning of the words, an absolute gift to A. defeasible by an executory gift over in the event of A. dying at any time unmarried or without children. And, in like manner, a bequest to X. for life with remainder to *A.*, and if *A.* die unmarried or without children, to B., is, according to the ordinary and literal meaning of the words, an executory gift over defeating the absolute interest of A. in the event of A. dying, at any time, unmarried or without children. . . . The direction that if the niece should die unmarried or without children the £1,000 is 'to revert to my nephew Colonel Henry L'Estrange,' appears to indicate that the legacy was to come back or come away from the niece after she had had the enjoyment of it. . . In other words, the benefit intended for the nephew appears to me to be introduced through the medium of an executory limitation over after enjoyment by a previous taker." The clause in the will now before me giving the property over in the case of the wife's marriage is, in my opinion, much stronger and clearer than that in the case last cited and quite as plain as that in the first cited one. The testator says that on the happening of a certain event—which if it happen at all must happen in the widow's lifetime—the property, which by a previous clause in the will he had given her absolutely, shall then *vest* in his executors in trust for the children; and as a necessary result it would cease to be vested in the wife,

(45) L. R. 7 H. L. 388.

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although her title up to that time was absolute and would have continued so had she remained a widow. See *Armstrong* v. *Wright* (46); *Lloyd* v. *Lloyd* (47); *Grace* v. *Webb* (48). It was, however, urged that a different rule prevailed where the subject matter of the gift was personalty as is in part the case here. *Watkins* v. *Williams* (49), and several other similar cases were cited and relied on as sustaining this position. It was argued that while a devise of property to the widow for life or *durante viduitate* would be good as being an interest limited to a special period, a devise of an absolute interest or for life followed by a provision that on the marriage of the widow her interest was to cease, would not be effected by the proviso, but that it must be held void for repugnancy. I do not think the authorities sustain this proposition. It is true that the class of cases referred to does lay down the doctrine that where an absolute interest is given to a legatee any subsequent clause which would alter the channel fixed by law for the devolution of the estate at the legatee's death, or which would abridge the legatee's rights in reference to the property which the law gives him as an incident to the absolute ownership is void. In other words, in order to be absolute owner, as the testator intends, he must have the rights of an absolute owner; and any clause in derogation of those rights is void as being inconsistent with the general intention. In two cases, *Shaw* v. *Ford* (50), and *In re Wilcock's Settlement* (51), the rule as I have outlined it is fully explained. It in my opinion has no application to a case of this kind. If it were so, there could be no such a thing as a gift by way of executory devise, because that title is based on the idea of an absolute interest being given to the party first taking. Here the testator has chosen from motives and for purposes which he has expressed in his will to give to his wife certain property of which except in the happening of one event, she is to have the absolute use and ownership, but of which she is to cease to be the owner on the happening of that event. I see nothing unusual in

(46) 25 Can. S. C. R. 263.
(47) 2 Sim. N. S. 255.
(48) 15 Sim. 384.
(49) 3 MacN. & G. 622.
(50) 7 Ch. D 669.
(51) 1 Ch. D. 229.

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such a provision, nor anything in it inconsistent or repugnant. In *Watkins* v. *Williams* the Lord Chancellor distinguished the case of *Doe d. Stevenson* v. *Glover* (52) on the ground that it related to a devise of real estate, whereas he was dealing with a gift of personalty. This distinction no longer exists, as *Doe d. Stevenson* v. *Glover* has been overruled: *Holmes* v. *Godson* (53); *Shaw* v. *Ford* (54). In the latter case Fry, J., says the distinction between realty and personalty in such cases "never had anything in the nature of principle or reason to support it." In *Watkins* v. *Williams* the Lord Chancellor in discussing the rule as applied to a gift of a money fund by which a condition annexed to the gift that so much of it as the legatee should not dispose of should go over to another person is held void, gives as one reason for the expediency of the rule, that in many cases it might be very difficult and even impossible to ascertain whether any part of the funds remained undisposed of or not. *Jarman* (55) says that the cases show that repugnancy is the true ground of those decisions and not the difficulty of ascertaining the fund as suggested by Lord Truro in *Watkins* v. *Williams*. In my opinion, the clause vesting the property in the trustees on the marriage of the widow applies equally to the personal as to the real estate, and on the happening of that event such of it as vested in the widow under the will will then be divested: *Doe d. Blomfield* v. *Eyre* (56); *Jarman* (57). The household furniture is I think governed by the same rule. Consumable articles are those *quae ipso usu consumuntur*. Articles such as hay, corn, wine, or flour, when not given as part of a stock in trade, are consumable articles, because their use involves their consumption. In such cases the use of the article and the property in it can have no separate existence and therefore there can be no gift over: *Randall* v. *Russell* (58); *Breton* v. *Mockett* (59); *Cockayne* v. *Harrison* (60); *Phillips* v. *Beal* (61). I come now to the question of the life insurances. Though the two policies were effected before the Act 58 Vict. c. 25 was enacted,

(52) 1 C. B. 448.
(53) 2 Jur. N. S. 383.
(54) 7 Ch. D. 669.
(55) Vol. 2 (4th ed.) 22.
(56) 5 C. B. 713.
(57) Vol. 1 (4th ed.) 869.
(58) 3 Mer. 190.
(59) 9 Ch. D. 95.
(60) L. R. 13 Eq. 432.
(61) 32 Beav. 25.

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they are nevertheless governed by the provisions of that Act. Section 3 makes the Act applicable to all contracts of insurance, including endowment insurances, whether entered into before or after the passing of the Act. And section 6 provides that every policy effected by a man on his life and expressed on its face to be for the benefit of his wife, shall enure and be deemed a trust for the benefit of his wife for her separate use, and shall not be subject to the husband's control during the life of the wife, nor shall the moneys when collected form part of his estate. One of these policies was by its terms payable to the wife, on the death of the husband, and the endowment policy was payable to the husband July 5, 1907, or in the event of his death before that the amount was payable by the terms of the policy at that time to the wife. This Act has for its object the securing to wives and children of the benefit of life insurance, and I think the effect of section 6 upon these two policies was to secure them as the wife's separate estate. Previous to that there was no trust in favour of the wife and the policies remained under the husband's control and subject to his disposal: *Cleaver* v. *Mutual Reserve Fund Association* (62). When therefore this testator died his wife held these policies as her own property, and the moneys which then became payable belonged to her not as devisee under the will, but in her own right by virtue of the Act. The Act accomplished what the will would have accomplished, though perhaps in not quite the same way or with the same result. I do not think the devise in the will of these policies to the widow can be considered as an apportionment under section 7 of the Act, for the will was made before the Act was passed; and it would not I think so operate in a case like this even if made afterwards. In my opinion therefore these two insurances the wife holds the same as the Westfield lot; not under the will, but as owner under titles acquired prior to the testator's death. Neither do I think this is any case where the widow would be called upon to elect. It is true that the testator has devised both the Westfield property and these insurances when, if I am correct in my view, he did not own either of them, but he devised them

(62) [1892] 1 Q. B. 147.

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to the owner, thereby showing his intention that she should have these properties as well as the others he gave her. See *Cull* v. *Showell* (63). The clause vesting the property in the trustees in the event of the widow's marriage would only refer to the property which vested in her under the will over which the testator had control at the time of his death, and would not in my opinion have any reference to the Westfield lot or the two insurance moneys. She would, if she married again, be holding nothing under the will and claiming nothing under it, and would therefore have nothing either to abandon or make compensation for. The widow must elect and I presume has already elected as to her dower. The benefits given to her by the will are given in lieu of dower, and if taken they must be accepted in lieu of dower. It operates as a purchase of the interest and operates so as to extinguish it. The divesting of the property has no effect upon the dower. It is the interest under the will given to the widow which is in lieu of dower, whatever that interest may be.

There will therefore be a declaration as follows:—

1. That in all the property, real and personal, the plaintiff takes an absolute interest subject to be defeated and determined by her marriage except as to the Westfield property and the two $1,000 insurances which are not subject to the clauses of the will.

2. No trust is created under the devise in the will to the widow, in favour of the children—the words "to enable her to maintain a home for herself, etc.," being simply an expression of the testator's motive in making the gift.

3. The divesting of the property from the widow on her marriage has no effect on her dower, which has been extinguished by her election to take the benefits of the will which were given in lieu of dower.

(63) Amb. 727.

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December 20.

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Priorities—Ante-nuptial contract charging husband's land—Mortgage—Copy of instrument—Proof of execution—Defective registration—Constructive notice—Registry Act, 57 Vict. c. 20, s. 69—Interest under mortgage—Parol agreement for increased rate.

By an ante-nuptial contract entered into in Quebec, the intending husband endowed his future wife in a sum of money as a dower prefixed chargeable at once upon his property in New Brunswick. The contract was executed in Quebec before a notary. A copy of the contract certified to by the notary was registered in Madawaska County. Subsequently to its registration a mortgage by the husband of his real estate in Madawaska County to the plaintiff was registered in that county. The plaintiff was a purchaser for value, and had no notice of the ante-nuptial contract.

Held, that as the Registry Act, c. 74, C. S., provides only for the registration of an original instrument, except in certain cases, the copy of the marriage contract was improperly on the records, and the marriage contract was not entitled to priority over the plaintiff's mortgage.

Section 69 of the Registry Act, 57 Vict. c. 20, providing that the registration of any instrument under the 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 does not apply where the registration is a nullity, as where the proof of the execution required by the Act is wanting.

A parol agreement to increase the rate of interest reserved by a mortgage upon land will not be enforced as against the land.

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

Argument was heard October 19, 1898.

W. Pugsley, Q.C., and *J. G. Stevens, Jr.*, for the plaintiff.

The instrument relied upon by the defendant Theriault as creating a lien in her favor in priority to the mortgages sought to be foreclosed is not the original instrument, and the Registry Act, c. 74, C. S. does not permit of the registration of a copy of an instrument. It is also improperly on the registry, for the reason that its execution has not been acknowledged before an official as required by section 6 of the Act. It is also in the French language, and it is submitted that the registry laws of this Province do not permit of the registration of a document not in the English language. The requirements of the Registry Act must be

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strictly followed: *Doe d. Catherine* v. *Turnbull* (1); *Inch* v. *Flewelling* (2). In *Doe d. Lyon* v. *Slavin* (3), it was held that a deed containing no acknowledgment of its execution as required by the Act 26 Geo. 3, c. 3, s. 6, was not properly on the registry. A deed not duly acknowledged, though recorded, does not affect innocent purchasers with constructive notice: *Devlin* on Deeds (4). The statute 4 Geo. II., c. 26, requiring that all pleadings and proceedings shall be in English is, perhaps, broad enough to prohibit the use of any other language than the English language in the registration of documents.

[Barker, J.:—A certified copy of a French will would necessarily be recorded in the original language.]

A. A. Stockton, Q.C., and *Fred. La Forest*, for the defendant Theriault:—

The policy of the Registry Act is that a person dealing with land may have notice of the state of the title, and it is immaterial how that notice is conveyed. If it is shown that he had notice of an instrument, he cannot free himself from the consequences of such knowledge by setting up that the instrument is improperly on the registry owing to failure to observe formalities of the Registry Act. Section 69 of the Registry Act, 57 Vict. c. 20, constitutes the registration of an instrument notice to subsequent purchasers notwithstanding any defect in the proof for registration. The statute 4 Geo. II., c. 26, is limited in its application to the matters it specifically deals with. The marriage contract is binding upon all property movable and immovable of the intending husband situate in New Brunswick: *Taillifer* v. *Taillifer* (5).

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The plaintiff filed his bill for the foreclosure of four mortgages, and sale of the mortgaged premises; he also asks for a declaration, as against the defendant Leveque, that he is mortgagee in possession of a certain lot described in the mortgage from Levite Theriault to him dated 21st

(1) 3 Pugs. 74.
(2) 30 N. B. 19.
(3) 3 Kerr, 258
(4) Sec. 478.
(5) 21 O. R. 337.

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September, 1882, for the usual account and offers to redeem him. The plaintiff also seeks a declaration as against the defendant Marie Luce Eugenie Theriault, who is the widow of Levite Theriault, the mortgagor, that a certain ante-nuptial contract entered into between her and her husband in the Province of Quebec immediately prior to their marriage there, is not, as the widow claims it to be, a lien on these lands prior to that of the mortgagee; and he asks that the copy of this contract registered in the registry of deeds for the County of Madawaska be removed from the registry. The only other question raised in the case is as to the rate of interest to be allowed on these mortgages, which, at the request of the parties, I consented to determine at this stage of the proceedings in order to facilitate a settlement of the matters in controversy.

The first question arises on the following facts: On the 21st September, 1882, Levite Theriault executed a mortgage to the defendant Leveque upon a certain property in Madawaska. Subsequently Theriault gave a second mortgage on the property to one Berubè, which was assigned to the plaintiff, and in 1889 a third mortgage to the plaintiff's wife, which was also afterwards assigned to the plaintiff. On or about the 5th of March, 1895, and after the two other mortgages had been given, Leveque proceeded to sell under the power in his mortgage at public auction, when one Pelletier, as agent for Theriault, the mortgagor, bid for the property $650, at which sum it was knocked down to him. Nothing was ever paid, and Theriault being unable to raise the money or complete the purchase, it was abandoned by all parties. Leveque made a conveyance on the 2nd of April—nearly a month after the sale—to Pelletier; it being understood at the time that Pelletier was immediately to reconvey the property back to Leveque, which he did on the same day. I have no doubt that this conveyance to Pelletier was in no way either a completion of the sale or an execution of the power. Pelletier never was the purchaser of the property, and when the conveyance was made to him, the sale to Theriault had been abandoned by both parties. When Pelletier took the conveyance he took it as trustee for Leveque, the vendor, to whom he was bound to reconvey precisely as

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he did do. The transaction is rather a fraud on the power of sale than an execution of it: *National Bank of Australasia* v. *United Hand-in-Hand Co.* (6); *Henderson* v. *Astwood* (7). I think therefore the plaintiff has a right to redeem as against Leveque, and there must be a decree against him for the usual account as mortgagee in possession since April, 1895.

The facts upon which Madame Theriault bases her claim to priority over the mortgagee's are as follows: The contract in question, which is written in French, appears to have been entered into by the parties on the 14th day of January, 1878, in the Province of Quebec, in presence of one J. B. Chamberland, a Public Notary. The introductory part is translated as follows: "No. 3688. Before me Jean Baptiste Chamberland, Notary Public for the Province of Quebec, residing in the City of Fraserville in the District of Kamouraska, undersigned, appeared Lévite Theriault, Esquire, member of the Provincial Parliament of the Province of New Brunswick, widower by his first marriage of the late Mrs. Eugenie Lebel, residing in the Parish of St. Basile, in the County of Madawaska, in the said Province of New Brunswick, stipulating for himself and in his name of the one part, and Mrs. Marie Luce Eugenie Patry, domiciled in the City of Fraserville in the County of Temiscouata, in the Province of Quebec, widow by her second marriage of the late Octave Marchand, stipulating also for herself and in her name of the other part—which parties have said and declared to the said undersigned Notary to have made and stipulated between them the agreements and conventions of marriage following, to wit." Then follows several articles or clauses embodying the terms of the contract. The third and fourth are the only ones bearing upon this case. They are translated as follows: "Article 3. The future husband has endowed and endows his said future wife in the sum of five thousand dollars currency of Canada as a dower prefixed, once paid, and without return to have and take by the future wife on the property the most clear of the said future husband, which is by these presents specially mortgaged to begin on this day. Article 4. And it is understood that the said future husband will live and

(6) 4 App. Cas. 391. (7) [1894] A. C. 150.

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continue to live in the said Province of New Brunswick where his property is situated. And it is expressly agreed and understood between the said parties to these presents that the said future wife has from this day and always, the right to the part and portion of the property of the said future husband that the laws and customs of the said Province of New Brunswick assign to the wife contracting marriage and residing in the said Province of New Brunswick, as and in the same manner as if the said parties had contracted marriage in the said Province of New Brunswick, and that the prefixed dower herein constituted in favour of the said future wife cannot in any manner whatever affect, prejudice or bear injury to the said right on the part of the said properties of the said future husband." The concluding part of the instrument is translated as follows: "Made and received under the number three thousand six hundred and eighty-eight in the said City of Fraserville, the residence of the future wife, on the morning of the fourth day of the month of January, one thousand eight hundred and seventy-eight. And after reading, the parties have signed with us the said notary and Miss Adee Patry, sister of the said future wife, who has also signed." Then follows the signatures of the contracting parties and Miss Adee Patry and Chamberland, the notary, and underneath them the following: "For a true copy of the original remaining of record in my office." Signed, "J. Bte. Chamberland." This instrument, according to the law of Quebec as proved by a lawyer of that Province, remains as an original record in the notary's office, and an authenticated copy is furnished by the notary to any one entitled to it. An authenticated copy, that is a copy certified by the notary with a certificate of the notary's official position by the Lieutenant-Governor of the Province of Quebec, was registered in the Registry office of Madawaska on the 12th day of June, 1878, prior to any of the mortgages in question. Theriault, the mortgagor died in December, 1896, leaving a will by which he devised all his property to his two sons, Joseph and Regis, who are made defendants, and entitled to the equity of redemption in all these mortgaged premises. Madame Theriault claims that by virtue of the marriage contract and the registry of this certified copy, she

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acquired a lien on all the real estate which at the time of the marriage Theriault owned, and which I believe includes all the mortgaged premises in question, except the lots conveyed in the mortgage from Theriault to the plaintiff dated July 14th, 1891, and known as the Edmonton lots. The question therefore arises between the widow on the one side and purchasers for value claiming under registered conveyances on the other. I have no doubt whatever that the registry of this copy of the contract was altogether unauthorized and invalid. The registry laws of this Province—with a few exceptions which do not include this case—require the production of the original instrument duly acknowledged or proved to the Registrar; and it is that instrument and that alone which the Registrar is to mark with the date of its receipt and the proper register number. Provision is made for registering a certified copy of a will proved in this Province and authenticated copies of wills made and proved abroad, but there is no provision whereby a copy of an instrument such as this one in question is entitled to registry. It is not only a mere copy, but neither the original nor copy seems to have been either acknowledged or proved as our Registry Act requires in order to authorize its registration. The instrument is precisely what it was intended to be—a civil contract of marriage entered into before a notary, deposited of record in his office, from which it cannot be removed until the notary's death, when it is deposited or filed in the office of the Superior Court of Quebec, where in fact this contract now is, Chamberland having died. While I have no doubt it is quite true that such an instrument is entitled to registry in the Province of Quebec, and a lien is thereby created upon the real estate to which it relates, no advantage can in my opinion be derived from the registry in this Province unless the formalities required by our law as a condition of the registration have been duly observed. In *Este* v. *Smyth* (8) Lord Romilly in dealing with a will made in France said: "A will executed by an English person will not, since the late statute, pass any property in this country (England) unless executed according to the forms

(8) 18 Beav. 112.

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required of English subjects. The contrary may be the law in France; but where, as in this case, the right of disposing of her property generally, is given to the wife by any instrument, I infer that it follows, that she must dispose of her property, which is settled by that instrument, in the various countries where it is placed according to the laws of those countries and following the forms which are there imposed." So far, therefore, as Madame Theriault's claim to priority rests upon this instrument as a registered instrument it cannot I think be supported. It is said however that the plaintiff had notice of this contract and Madame Theriault's rights thereunder, and this Court would on that account postpone his claim to hers. There are I think sufficient reasons for refusing to give effect to this contention. It has been settled by a number of authorities that in order to postpone a subsequent purchaser for value who has acquired priority over an earlier grantee by first registering his conveyance, there must be actual notice—such notice in fact as would make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent. The cases on this point are all collected and cited in *New Brunswick Railway Co.* v. *Kelly* (9). The evidence shows beyond any doubt that this plaintiff had no knowledge whatever of this contract before March, 1895, about the time when Leveque offered his lot for sale. It is true that at that time, he heard something about some paper being on record, which, as he understood it, related solely to the Leveque lot. From whom he heard this rumour does not appear; and I should be disposed to think the evidence fails in showing even a constructive notice to the plaintiff, much less an actual one. It is desirable in order to give due weight to the contention of Madame Theriault in this branch of the case to note the particulars of the mortgages in question. The first one is from Theriault to one Magloire Hèbert, dated Nov. 23rd, 1885, and registered on the 28th of that month. This was assigned to Cora H. Murchie, the plaintiff's wife, on the 23rd Nov., 1889. The next mortgage is from Theriault to Cora H. Murchie, dated Dec. 13th, 1889, and registered January 6th, 1890.

(9) 26 Can. S. C. R. 341.

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These two mortgages were on August 28th, 1897, for convenience in taking these proceedings, it was said, assigned to one Thomson, and at the same time assigned by him to the plaintiff. The third mortgage is from Theriault to the plaintiff, dated July 14th, 1891, and registered 28th September, 1891. This is the one in reference to which I understand Madame Theriault makes no claim, as I have already mentioned. The fourth mortgage is from Theriault to Berubè, dated January 27th, 1886, and registered the same day. This mortgage was assigned by Berubè to the plaintiff on the 2nd of September, 1897, after Theriault's death. There is no suggestion that any one of these original mortgagees knew anything about this contract, or ever heard of it, except the plaintiff himself, who states, as I have already pointed out, that the first he ever heard of any such contract was in March, 1895, and nearly four years after the mortgage from Theriault to him had been given. The plaintiff's wife was examined, and she stated that she never heard anything about it until the hearing of this case. There is not a particle of evidence to show that any other person connected with these mortgages, except Theriault himself, had any knowledge or notice as to this contract in any way. It is true that when the first two mortgages were assigned to the plaintiff in August, 1897, and the Berubè mortgage in September of that year, the plaintiff had heard of this contract, knew that it was recorded and also knew the claim made under it, though he was unable to read it himself as it is registered in French, a language with which the plaintiff tells us he is altogether unfamiliar. But in what way does the fact support the defendant's contention? If the mortgages were then good and valid charges on the lands, as having been created without notice of this contract, how is the position of Madame Theriault altered to her advantage by that lien being assigned to the plaintiff, even though he had notice. She has the same defence she always had, that her equitable right is superior to the mortgagee's legal right. It is in my opinion immaterial whether the plaintiff had actual notice or not, provided he had no such notice when he took the mortgage himself and the mortgagees from whom he derived his title had no such notice. The evidence on this point is all on the side of the plaintiff,

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and opposed to the defendant's contention. *Story*, Equity Jurisprudence, § 409, says: "The doctrine which has been already stated in regard to the effect of notice, is strictly applicable to every purchaser, whose title comes into his hands affected with such notice. But it in no manner affects any such title derived from another person in whose hands it stood free from any such taint. Thus a purchaser with notice may protect himself by purchasing the title of another *bona fide* purchaser for a valuable consideration without notice; for, otherwise, such *bona fide* purchaser would not enjoy the full benefit of his own unexceptionable title." Before leaving this branch of the case, some reference may be made to *Rooker* v. *Hoofstetter* (10), an authority not cited at the argument, but which has some bearing on the point under discussion. From the report of this case in 22 A. R. 175, it appears that by virtue of the Registry Act in force in Ontario, priority was given to an instrument creating an equitable charge on land, though there were irregularities in the proof upon which the instrument has been registered. The ground upon which the decision went, is that by the Act the registry, though defective to the extent alleged, operated as actual notice to the subsequent purchaser. The section of the Ontario Act is similar if not identical in its terms to section 69 of the Registry Act now in force in this Province, 57 Vict. c. 20. This provision making registry equivalent to notice to subsequent purchasers even though there may be a defect in the proof for registration was first introduced into this Province on the passing of that Act on April 21st, 1894, and consequently can have no bearing on this case as the mortgages were all given prior to that. In the case just cited. Mr. Justice Gwynne says: "If such purchaser fails to search the registry he must accept the fact of registration as equivalent to actual notice unless at least the objection taken constitutes an absolute defect in the proceeding, as, for example, the absence of any affidavit of execution would perhaps have to be held to be a defect constituting nullity in the registration." This present case comes within this rule because the proof or acknowledgment required by our Registry Act is entirely wanting.

(10) 26 Can. S. C. R. 41.

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Giving therefore full effect to this contract as sufficient to create an equitable charge on the land of the husband in favour of the wife—a question upon which I express no opinion—she is not, for the reason I have given, entitled to priority over the plaintiff, but her lien is subject to that of the plaintiff under these mortgages.

The remaining question is as to the rate at which the interest is to be charged. In *Jackson* v. *Richardson* (11), I had occasion to consider a similar question, and the conclusion at which I then arrived was sustained on appeal. In this present case there is no written agreement whatever, and there is no agreement either verbal or written that the extra interest is to be a charge on the land. In order to create a charge on the land there must be some writing to satisfy the Statute of Frauds or some act in part performance which would enable the verbal promise to be proved and enforced: *Totten* v. *Watson* (12); *Ex parte Hooper* (13); *Shepherd* v. *Tilley* (14); *In re Houston* (15); *In re Beetham* (16); *Maddison* v. *Alderson* (17). It was not disputed that none of these mortgages bear a higher rate of interest than 6 per cent. after maturity, though a much greater rate is reserved on the principal up to that time. I have inspected all these mortgages and have no doubt that this is so under the authorities by which similar provisions for payment are construed: *St. John* v. *Rykert* (18); *Peoples Loan Co.* v. *Grant* (19). Bearing not only this in mind, but also the fact that Theriault, with whom these alleged agreements were made, is dead, and that the evidence which ought to be accepted as sufficient proof of them should therefore be very clear and positive, let us see what that evidence is. The first mortgage from Theriault to Hèbert bears interest at the rate of 10 per cent., and the plaintiff's evidence is, I think, very clear and positive that when he took the assignment for his wife in November, 1889, he did so at Theriault's request, and with a clear verbal agreement that the then overdue interest amounting to $120 was to be added to the original principal of $300, and that on the whole $420 Theriault was to pay interest at the rate of 10 per cent until the whole sum

(11) *Ante*, 325.
(12) 17 Gr. 233.
(13) 1 Mer. 7.
(14) 2 Atk. 348.
(15) 2 O. R. 84.
(16) 18 Q. B. D. 380, 766.
(17) 8 App. Cas. 467, 480.
(18) 10 Can. S. C. R. 278.
(19) 18 Can. S. C. R. 262.

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was paid off. The plaintiff's statement in this respect is corroborated by the fact that Theriault did make two payments —one of $42 and one of $84—for three years' interest up to November 5th, 1892, as appears not only by the plaintiff's evidence, but also by the receipts given by him at the time to Theriault and produced by the defendant on the hearing. Now the effect of this agreement was to convert the original mortgage for $300, and bearing at that time only 6 per cent. interest—for it was then long overdue—into one for $420 at 10 per cent. Though I think on a foreclosure bill such as this, the mortgagee is not entitled to enforce a mere verbal agreement for the reasons I have mentioned, I think he is entitled to have the benefit of the agreement so far as it has been performed and of the money paid under it. He is entitled to recover on this mortgage the principal sum of $300—the interest due when it was assigned to him $120—and interest on $300 from November 5th, 1892, at the rate of 6 per cent. per annum.

The mortgage from Theriault to Cora H. Murchie bears interest at the rate of 7½ per cent., and it became due in one year from its date. The evidence shows that three years' interest were paid in two sums—one of $142 on May 4th, 1891, and one of $285 on 23rd September, 1892. I think the evidence fails in making out any agreement to pay the high rate of interest after the loan matured. It is true that the two years' interest covered by the $285 payment is at that rate. But there was no legal obligation under the mortgage and there was no agreement of any kind to pay it: *Daniel* v. *Sinclair* (20). This mortgage will therefore only bear interest at the rate of 6 per cent. after maturity and the account will be stated accordingly.

The next mortgage is the one from Theriault to the plaintiff. It is dated July 14th, 1891, for $1,000, payable in a year with interest at 7 per cent. The evidence shows that the interest up to July 14th, 1892—that is the year for which the mortgage was to run—was paid, and that a further payment for $600 was made on November 23rd, 1894. There is evidence that when this last payment was made, and which was long prior to the mortgage made to Rice on the same

(20) 6 App. Cas. 181.

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property, it was agreed by Theriault that the 7 per cent. interest was to be charged. I think, therefore, there should in stating the account be charged interest at 7 per cent. up to November 23rd, 1894—the balance of the $600 then paid after deducting the interest to that date to be credited to principal and interest on that balance allowed at 6 per cent. The Berubè mortgage will be dealt with under the rule I have laid down as to the first one. It is for $500 with interest at the rate of 8 per cent. This was assigned to the plaintiff after Theriault's death, and there was no agreement about it of any kind. Interest at 8 per cent. will therefore be allowed until the principal became due, and after that only 6 per cent. will be allowed.

The Leveque mortgage stands in a somewhat different position. It is dated 21st September, 1882, for $400, and payable in one year with interest at the rate of 12 per cent. Payments seem to have been made on account at different times up to October 15th, 1892, amounting in all to $358.76.. The first payment was made November 25th, 1884, more than a year after the loan had matured. Leveque claims that by a verbal agreement with Theriault, made after the mortgage became due, Theriault was not only to continue paying the 12 per cent. interest, but also interest on overdue interest. His evidence on this point is as follows:

"Q.—Had you an agreement with Theriault as to the amount of interest he was to pay you after the mortgage became due? A.—Yes, he was to give me 12 per cent. with interest on the arrears of interest.

"Q.—When was this arrangement made between you and Theriault? A.—He neglected to pay the mortgage when due, and I went to see him and get my money, and he told me, 'Jule, you will lose nothing, I will pay you all your money and your interest, and interest on your interest.'"

On his cross-examination he said this conversation took place not more than three or four years after the mortgage was given, which would bring it down to say September, 1885 or 1886. Now Berubè's mortgage on this same lot, of which the plaintiff is the assignee, was given on the 27th January, 1886. Two questions therefore arise—first, does Leveque's evidence show any such agreement as he claims,

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because, if it does, is it of any avail against Berubé's assignee? Admitting for the sake of the argument that although in a foreclosure proceeding the mortgagee could not for the reasons I have mentioned enforce any such verbal agreement, a mortgagor seeking to redeem would only be allowed to do so on condition of carrying out his agreement, a question upon which I express no opinion, but upon which the following cases may throw some light: *Inglis* v. *Gilchrist* (21); *Daniel* v. *Sinclair* (22); *Ex parte Fewings* (23); *Mellersh* v. *Brown* (24); it is necessary that some agreement must be shown or such circumstances must exist from which it can clearly be implied. Were this a question between Theriault's representatives and Leveque, I should hesitate before holding that a loose conversation such as that detailed by Leveque, amounted to any such agreement. It is not an unreasonable supposition that Theriault considered himself bound by the terms of his mortgage to continue the high rate of interest as was the case in *Daniel* v. *Sinclair*. There seems to have been no agreement for forbearance or any other condition for the promise, even though actual forbearance was extended. Under any circumstances I should not hold a second mortgagee bound by it in any way unless it clearly appeared not only that the agreement had in fact been made, but that it had been made before the second mortgagee's rights had intervened. The onus of proving both these facts is upon the mortgagee Leveque, who sets it up, and I hold as a matter of fact that he has not discharged that onus. The interest on this mortgage will therefore only be allowed at 6 per cent. after its maturity.

There will be a declaration that the copy of the marriage contract was improperly registered, and an order that it be cancelled on the registry.

Unless the parties agree as to the amounts due, there will be a reference to take the account due on the Leveque mortgage as mortgagee in possession, and also to take the account and report what is due on the other mortgages.

All other questions will be reserved for further consideration.

(21) 10 Gr. 301.
(22) 6 App. Cas. 181.
(23) 25 Ch. D. 339.
(24) 45 Ch. D. 225.

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1898.

December 20.

Trustee—Insolvency— Removal — Appointment of receiver—Dismissal of bill—Costs.

An insolvent executor and trustee disputed a creditor's claim, and the creditor filed a bill for the appointment of a receiver, and the payment of his debt. The appointment of a receiver was opposed by all other parties interested in the estate. Pending the suit the creditor brought an action at law upon his debt and recovered much less than the amount originally demanded of the executor. The debt was then paid.

Held, that the bill should be dismissed with costs.

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

Argument was heard November 15th, 1898.

L. J. Tweedie, Q.C., for the plaintiff:—

The plaintiff is entitled to costs of suit. Where a sole trustee is bankrupt or insolvent, the Court has always taken the position that a receiver should be appointed: *Langley* v. *Hawk* (1); *Scott* v. *Becher* (2); *Jervis* v. *White* (3); *Middleton* v. *Dodswell* (4); *In re Johnson* (5); *In re Barker's Trusts* (6); *Bowen* v. *Phillips* (7).

Robert Murray, for the defendant Pallin.

R. A. Lawlor, for the defendant Snowball.

1898. December 20. BARKER, J.:—

On the 21st May, 1897, I granted an interim injunction order on an *ex parte* application of the plaintiff by which I restrained the defendant Herbert W. Pallin from receiving, and the defendant Snowball from paying to him, the sum of $2,700, the purchase money of certain property agreed to be sold by Pallin as trustee under his father's will to Snowball. By the order of injunction I appointed the 9th day of July, 1897, for hearing the parties as to a continuance of the injunction, and for the appointment of a receiver. On the

(1) 5 Madd. 46.
(2) 4 Price, 346.
(3) 6 Ves. 739, note 3.
(4) 13 Ves. 267.
(5) L. R. 1 Ch. 325.
(6) 1 Ch. D. 43.
(7) [1897] 1 Ch. 174.

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day appointed it was agreed on my suggestion that the purchase by Snowball be completed and the purchase money ($2,700), less $350, a legacy payable under the will of Dr. Pallin, the testator, to the plaintiff, and which was paid her before the injunction was granted but after the bill had been sworn to should be paid into the Bank of Nova Scotia at Chatham to the joint credit of the said Herbert W. Pallin and one Robert H. Anderson, agent of the Bank at that place, to be paid out by their joint cheque on the order of this Court. An order was accordingly made to that effect, and as there was no dispute about the debts of the estate except as to the plaintiff's claim, it was at the same time ordered that those debts be paid. Liberty was given to the plaintiff to apply for an order for the payment of her claim when the amount should be ascertained, and I reserved the question of costs for further consideration. The plaintiff now asks for an order for the payment of her claim and for the costs of the original application. Since the matter was first before me it appears that the plaintiff brought an action against the executor of the estate for the recovery of her claim, which amounted to $602. It was tried before Mr. Justice *Landry*, without a jury, and resulted in a judgment being entered for the plaintiff for $189,15. An offer to suffer a judgment by default for a greater sum had been filed, so after adding the plaintiff's costs up to the time of the offer—$37.65 –and deducting the sum of $82.60, at which the defendant's subsequent costs were taxed, a balance was left of $143.70 due the plaintiff. I have therefore made an order for the payment to the plaintiff of this sum out of the fund in the bank under my previous order. The plaintiff therefore has no further interest in the suit; and as the removal of the trustee or the appointment of a receiver is opposed by all others interested the suit begun by the plaintiff must fail, and it only remains to dispose of the costs. The only ground put forward as a justification for filing this bill and making the application for an injunction and the appointment of a receiver, was that Pallin, the existing trustee, was a bankrupt. The bill did not ask for his removal, or the appointment of a new trustee, or for the administration of the estate in this Court. I shall however only deal with the one question

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raised. The defendant's counsel no doubt felt—and I think properly so—that the few cases of misconduct of Pallin as executor, as alleged in the bill, had been entirely disposed of by the affidavits. It was said, however, that Pallin was bankrupt, and on that ground he must be removed from his trusteeship. A reference to the cases cited for this proposition shows that they were decided under a provision in the Bankruptcy Act for the removal of bankrupt trustees, but we have no Act of that kind here. The reason why this Court exercises its jurisdiction in such cases is because, as a result of the adjudication in bankruptcy, the bankrupt becomes denuded of all his property, and it is not desirable that in so impecunious and needy a state, he should be entrusted with the control and management of trust moneys and property. Even then the jurisdiction is not exercised if the application is not made promptly after the bankruptcy and the party has in the meantime acquired property, always assuming there is no sustained charge against him of personal dishonesty. *In re Adams' Trust* (8); *Steele* v. *Cobham* (9), and *In re Barker's Trusts* (10), were decided upon the same principle. In *Archbold* v. *Commissioners of Bequests* (11), Lord Brougham says: "But generally at common law, without regard to any particular provision in the trust, either in the foundation of the charity or in the particular deed describing the trust, bankruptcy of itself would be no ground for removing a trustee." And in *Re Bridgman* (12), the Vice-Chancellor says: "The question is whether it is the law that if a trustee has become bankrupt (no matter what the circumstances or the grounds on which he has been made a bankrupt) upon an application like the present, it is sufficient to show merely that the trustee has been a bankrupt. I am of opinion that is not the law, and that the section in question gives the Court a discretionary power and does not impose it as a duty on the Court to make the order upon the mere fact of bankruptcy being proved." Of course, as I have already pointed out, there is no bankruptcy here in the sense in which the term is used in the cases I have cited. It may, however, be well

(8) 12 Ch. D. 634.
(9) L. R. 1 Ch. 325.
(10) 1 Ch. D. 43.
(11) 2 H. L. C. 461.
(12) 1 Dr. & Sm. 164

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said that a trustee in needy or insolvent circumstances from whatever cause is as unsafe and undesirable a trustee as one who has been adjudicated a bankrupt, and in that way lost all his property; and that though the first case may not technically be within the authorities I have just mentioned, it is within their reason and principle. Admitting this, let us see what the facts are as they stood when the application was first made. It is true that the plaintiff alleged in her bill that the trustee was a man of little means—that recently several judgments had been recovered against him for small amounts for which execution had issued, and that he had discontinued doing business and compromised at 50 cents on the dollar—that he was in insolvent circumstances at the time the testator died, and that some time prior to that all his property had been sold by the sheriff under executions. It is somewhat difficult to see how the plaintiff was in a position to swear to some of these allegations, but, taking them as they are, I should scarcely feel justified in removing a trustee at the instance of a plaintiff whose sole claim was an account the validity of which was questioned, and as we now know, questioned on sufficient grounds, and where his removal is opposed by every one else interested. The trustee, however, swears that all these small debts were paid off before the 19th day of May, the day on which the bill was sworn to, and that he was then—that is in June, 1897—a householder, the owner of the furniture in his house, and had an interest in some real estate in Chatham, and this is not denied. It is true that Mr. Winslow speaks of a judgment signed against Pallin in July, 1898, but that was after the hearing of the application. The trustee seems to have been no more insolvent in 1897, when this application was made, than he was long before his father's death. There does not seem to have been any objection to his taking sole charge of the estate at the time of the testator's death in July, 1895, nor does any one seem to have thought any application necessary for the appointment of trustees in the place of the two who refused to act. The plaintiff, who must have had personal knowledge of this trustee's affairs in order to enable her to swear to the allegations in her bill to which I have just referred, must have known of his financial position. Yet she

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made no complaint for about two years. More than that, one of her grounds of complaint is that this very trustee had not before this converted the personal and other property into money and wound up the estate. This does not look like distrusting the trustee or considering him as a person not fit to be trusted on account of his financial condition. I think under the circumstances, after the lapse of time and the fact that no one of the parties interested in this estate supports the plaintiff in her application, and considering her own conduct in reference to the matter, that her application must be refused with costs, as was done in *Re Bridgman* (13), already cited. I have already ordered the legacy of Mrs. Morton to be paid, so that all the debts and legacies are paid. The defendant Snowball must have his costs. They will be paid out of the fund and added to the defendant's costs to be paid by the plaintiff. I will allow to Anderson, the interim trustee of the fund, the sum of $50, as compensation to him to be deducted from the fund, and the balance will be paid to Pallin to be paid out in the ordinary course of administering the estate.

(13) 1 Dr. & Sm. 164.

POIRIER v. BLANCHARD.

1898.

December 23.

(No. 2. Ante, 322.)

Contempt—Injunction—Breach—Form of motion.

In proceeding for contempt for breach of an injunction order restraining the doing of an act, the proper course is to move that the party in contempt stand committed, notice of the motion having been first personally served upon him, and not to move that he shall shew cause why he shall not stand committed, or why an attachment shall not issue against him.

Order *nisi* for the defendant to shew cause why an attachment should not issue against him for contempt for breach of an injunction order not to remove a steam engine, boiler and machinery from certain premises.

On the return of the order,

December 20, 1898, *J. Roy Campbell*, who appeared to shew cause, argued that the motion should have been that

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the defendant stand committed, notice of motion having been served upon the defendant, citing *Angerstein* v. *Hunt* (1).

G. G. Gilbert, Q.C., in support of order.

1898. December 23. BARKER, J.:—

On the 20th September last, on an application of the plaintiff, an order *nisi* was taken out returnable at the October sittings calling upon the defendant Blanchard to show cause why an attachment should not issue against him for contempt in disobeying an injunction order of this Court. At the return of the order the defendant appeared and asked for further time to answer the affidavits, which application was granted, and the matter stood over until the present December sittings. The defendant now takes the objection that the motion instead of being for an attachment should have been for a commitment. I was disposed to think the objection too technical to be listened to, especially after time to answer the affidavits had been granted without the objection being raised, but on further consideration I think I must give effect to this objection. In *Daniell's* Ch. Pr. (2) the rule is laid down thus: "The remedy, in the event of the breach of an injunction or restraining order is by committal and not by attachment," citing *Angerstein* v. *Hunt* (1), and *Gooch* v. *Marshall* (3). In the case from Vesey the Lord Chancellor says: "It is not the practice in this Court for a man to shew cause, why he should not stand committed. The motion ought to be, that he shall stand committed for breach of the injunction; and it ought to be made upon personal service upon him that the Court will be moved for that purpose. Where the injunction is to do a thing, the course is to move for an order that he shall do it by a particular day, or stand committed. But this is not to do a thing. The proper mode, therefore, will be to serve him with notice that the Court will be moved, that he shall stand committed." The practice is laid down in the same way by *Smith*, Ch. Pr. (4), and by *Grant* (5). I find that in *Sayre* v. *Harris* (6), that was the form of order taken out. It is safer I think to adhere to the practice as established by these cases. This motion

(1) 6 Ves. 488. (2) 4th Am. ed. 1683. (3) 8 W. R. 410.
(4) P. 623. (5) P. 402. (6) 2 P. & B. 678.

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will be refused, but without costs. If the plaintiff chooses to renew the application he is at liberty to use for the purpose any of the affidavits produced by him on this application.

Order refused without costs.

[On the matter coming again before the Court, January 17, 1899, the Court being of opinion upon consideration of the facts disclosed by affidavit, "that the said defendant has been guilty of a contempt of this Court by a breach of the said injunction, doth order that the said defendant do stand committed to the common gaol of the County of Gloucester for the said contempt, and that a warrant for such his contempt do issue accordingly, unless the said defendant having fourteen days' notice thereof, shall show unto this Court good cause to the contrary on the third Tuesday in March next."]

NICHOLSON v. REID.

1899.

January 17.

Foreclosure—Judgment creditor—Disclaimer—Dismissal of bill—Costs.

Where a judgment creditor having registered a memorial of his judgment is made a party to a suit for the foreclosure of a mortgage given previously by the judgment debtor, disclaims he is not entitled to costs on the dismissal of the bill as against him.

Bill for the foreclosure of a mortgage upon leasehold land and premises in Restigouche County, executed by Marshall Reid to the plaintiff as trustee of the estate of John W. Nicholson, deceased, and for the sale of the mortgaged premises. Subsequently to the making of the mortgage the Bank of Nova Scotia recorded in the registry office of Restigouche County a memorial of a judgment obtained by the Bank against the mortgagor. The Bank having been made a defendant in the suit disclaimed as follows: "The defendant Bank of Nova Scotia have not and do not claim and never had or claimed to have at the time of the commencement of this suit, or at any time since any right or interest in any of the matters in question in this suit, and they disclaim all right, title and interest, legal and equitable, in any of the said matters, and they say that if they had been applied to by the plaintiffs before the filing of their bill they, the said defendant Bank, would have disclaimed all such right, title and interest, and they the said Bank submit that the bill ought to be dismissed as against them with costs." The suit

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coming before the Court on motion to take the bill *pro confesso* as against the defendant Marshall Reid for want of an appearance the defendant Bank of Nova Scotia appeared by

L. A. Currey, Q.C., who asked that the bill be dismissed as against the Bank with costs.

J. D. Hazen, Q.C., for the plaintiff:—*Horn* v. *Kennedy* (1) is authority that costs will not be allowed.

1899. January 17. BARKER, J.:—The bill is dismissed as against the defendant Bank of Nova Scotia without costs.

(1) N. B. Eq. Cas. 311.

1899.

WINSLOW v. DALLING.

March 21.

Highway—Dedication—User—Extinction by owner of soil—Non-user by public—Alteration of highway by commissioners—Compliance with Act by commissioners—Sale of removal of obstruction—Owner known—Act 59 Vict. c. 21, s. 22.

The right of the public to the use of land dedicated by the owner as a public highway and used by the public as such for a number of years, cannot be extinguished by act of the owner; nor can such right be lost by the public by non-user of the highway.

Highway commissioners altering the course of a highway are held to an exact compliance with their statutory authority.

Authority under The Highway Act, 1896, 59 Vict. c. 21, s. 22, to sell the work of removing an obstruction upon a public road is not limited to a case where the owner of the obstruction is unknown.

The facts fully appear in the judgment of the Court.

Argument was heard January 18, 1899.

A. B. Connell, Q.C., for the plaintiff.

A. A. Stockton, Q.C., for the defendant.

1899. March 21. BARKER, J.:—

On the first day of November, 1897, the defendant, as Commissioner of Highways for District No. 2, in the Parish of Northampton, in the County of Carleton, gave public notice that on the 4th of that month at 10 a.m., he would sell at public auction the work of removing all obstructions from the public road and ditches of the road from the eastern end of the river bridge to the mouth of the south new bridge

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road. Within these limits the plaintiff has a steam saw-mill which was then and for some time before had been occupied and operated by one McElroy. It did not appear by the notice what the alleged obstructions were, but the evidence shews that they consisted of quantities of lumber from this mill and, as was alleged, a small building which had been used as an office, and which the defendant contends is also an obstruction on the public highway. On the 2nd of November, 1897, Mr. Justice *Van Wart* granted an *ex parte* injunction restraining this sale until after the hearing. The principal point in dispute is as to the situation of the public highway in question. There is no record of it produced, as none can be found—there is no evidence to shew that there ever was any. Those who took part in its original dedication or laying out in 1861, whichever it may have been, are, I believe, dead; at all events they were not produced as witnesses. And of the 28 witnesses who gave evidence at the hearing not one was able to give any satisfactory evidence as to the boundaries of this road at this point, except possibly as to the "Baird posts," so-called, and even that was by no means exact. It appears that in 1861 one Sperry Shea owned the tract of land through which this piece of road now passes. It is in what is known as the village of Grafton, on the eastern side of the river opposite Woodstock. At this point the road runs north and south. Shea's land was bounded on the north by Rankine's land and on the west by the river and extended eastwardly from the river for some distance. Before 1861, the main highway road for this part of the county ran at the foot of the hill some distance back from the river, but this having become inconvenient for the public accommodation the owners of the front lots, as is said, agreed to give 22 feet off the front of these lots for a road in lieu of the other, the new or substituted road to be 22 feet wide from the *top of the river bank*, which is somewhat high at this point, and much above the ordinary level of the river. The second section of the plaintiff's bill contains the following allegation as to this part of the case: "That when the Parish of Northampton was first settled the public highway through the said parish ran along the side of the hill back of the said village of Grafton, and that afterwards the

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said road being found inconvenient and too far from the River Saint John and the ferry landing opposite the said town of Woodstock in the said county of Carleton, the owners of the land along the front of the river lots, and what has since become the village of Grafton aforesaid, gave, as I am informed and believe, twenty-two feet off the front of their lots and along the bank of the said River Saint John for a public road, and that the said new road ran along near the edge of the bank and within a few feet thereof, the distance thereof varying according to the nature of the ground and the course of the river, but that there is no public record of said road." This allegation is substantially admitted by the defendant in his answer, and this admission the plaintiff read as a part of his case, except an additional statement made by the defendant to the effect that the old road was then closed up and that the new one was laid out by the Highway Commissioners and a record of it made and filed. The evidence shows that this was in 1861; that the old road was closed up and its use by the public discontinued, that though no record of the new road was ever filed, and there is nothing to show that any was ever made, and though it is not very clear as a matter of evidence how the new road was laid out or by whom, it nevertheless continued to be the only public highway in that locality, and was used as such without interruption for the following ten years down to 1871, and without objection by any one. In August, 1869, Shea leased a lot 60 x 118 feet off his land immediately to the south of the Rankine land to Lewis Coombs for 20 years, which he bounded by the *main highway* on which the lot fronted, in this way recognizing this highway as existing at that time. What took place in 1871 the plaintiff in the fourth section of his bill describes as follows: "That sometime during the fall of the year 1871 the said late Sperry Shea agreed to sell and convey to one Frederick H. Hale, a lumberman who now resides at Grafton aforesaid, sufficient ground for a steam saw-mill, and that as there was not room enough between the road as then used and the said river, the said Shea agreed to move the said road further east, which was done and laid out by him and the late George H. Hovey, the then Commissioner of Roads for the Parish of Northampton, and the said Frederick H. Hale in that fall put up the frame of his mill on the

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site of the present mill and finished it the following spring, and the said Sperry Shea gave him a deed of the land in the fall of the same year, which deed bears date the 6th day of November, A.D. 1872, and the lands thereby conveyed are therein bounded and described as follows, viz.: "A certain piece of land situate, lying and being in the Parish of Northampton in the County and Province aforesaid, commencing at the River St. John on the southerly line of a lot now occupied by one Jacob Bacon, and near the Northampton steam ferry boat landing, and running from the said river easterly along the said line until it strikes the main highway road; thence following along the main highway road southerly twenty-five rods, thence due west by the magnet of 1872 until it strikes the River St. John; thence along the River St. John to the place of beginning." It is somewhat remarkable that the plaintiff nowhere in his bill alleges the distance which this road was shifted, as he says it was, nor does he anywhere aver that that part of the road then taken as the plaintiff claims for Hale's use was closed up as a public highway or its public use as a highway extinguished, or that the right of passage which the public had undoubtedly enjoyed without hindrance for the previous ten years was then ended. Neither does the conveyance to Hale from Shea throw any light on the distance between the bank and the highway, which is made the eastern boundary of the Hale lot.

For the purposes of this case, I must take it as admitted if not proved that in 1861 the old road was abandoned and a new one opened along the bank of the river in its place, twenty-two feet in width from the top of the bank, and that for the following ten years it was used by the public as a public highway—in fact, it seems to have been the only public highway in that locality. It is unnecessary to inquire whether the new road was dedicated by Shea, the owner of the land, or whether it was laid out under the Highway Act by the proper authority, though this seems improbable, as the width was only 22 feet, whereas the minimum width allowed by the Act was 4 rods. The result in either case, so far as this suit is concerned, is the same. While the fee in the land thus dedicated would remain in Shea, he would hold it subject to the public right of passage for which it was dedicated, and which the public had by ten years' uninterrupted

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use explicitly accepted. Neither could this public right be extinguished without some formal proceeding for that purpose under the Highway Act, or perhaps a resort to the old writ of *ad quod damnum*. In *Dawes* v. *Hawkins* (1), Byles, J., says: "It is clear that there can be no dedication of a way to the public for a limited time certain or uncertain. If dedicated at all it must be dedicated in perpetuity. It is also an established maxim, 'once a highway always a highway.' For the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are either by the old writ of *ad quod damnum* or by proceedings before Magistrates under the Statute."

In *Malloch* v. *Anderson* (2), the owner after dedicating a strip of land for a public road, made a conveyance of a portion of it, but it was held that as the dedication had been made and the road been adopted by the public, the subsequent conveyance could not control the prior dedication. Robinson, C.J., said that the dedication having been expressly and deliberately made could not be revoked.

In *Reg.* v. *Hunt* (3), it was held among other things that after a road had once acquired the legal character of a highway it was not in the power of the Crown by grant of the soil and freehold thereof to a private person to deprive the public of their right to use the road.

In *Nash* v. *Glover* (4), it was held that though the plaintiff had taken possession of the original road allowance and held it for over forty years, the public right was not interfered with and the municipality could take possession and open up the road.

It would therefore seem that even if Shea in 1871 continued to be the owner of all this property, which the evidence shows was not the case, he could not by his own mere motion extinguish the public right which had been acquired by the previous dedication and ten years' subsequent user. It is necessary therefore to see what official action, if any, was taken by the Highway authorities towards making the alteration in the road upon which the plaintiff relies, and

(1) 7 Jur N. S. 262; 8 C. B. N. S. 848.
(2) 4 U. C. Q. B. 481.
(3) 16 U. C. C. P. 145.
(4) 24 Gr. 219.

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closing up the old road. Mr. Hale, in whose interest the change was made, is the only witness produced whose evidence is at all material in this part of the case. He says that Shea agreed to give him the necessary land if he would build a mill—that there was not sufficient land between the river and the highway (by which I understood him to mean the travelled part of the road) for a mill and the necessary yard room, and he says that Shea in consequence of this agreed to put the road back if he would agree to build the mill. He says that at that time the road as travelled was "snug out to the bank of the river," and west of the red lines which as delineated on the plan attached to the defendant's answer and used at the hearing, represent the present wheel tracks. Hale further says that Shea agreed to have the road changed and to get the Road Commissioner to have it changed, and give enough room for a mill, and that he did so. He further says that George Hovey was the Commissioner; that he (Hale) was not present when it was laid out; but that Shea showed him the bounds of the road as laid out by Hovey; that he occupied up to these bounds, though he could not or did not say where these bounds were, except the Baird posts on the eastern side of the road opposite the mill, and the posts M and N, which he says now stand a little to the west of the road as changed—the posts M and N having of course been put there recently. Hale further says that after the road had been shifted according to the arrangement with Shea, he conveyed to him the piece of land already described and mentioned in the deed dated November 6th, 1872, and which, excepting some small portions sold off by Hale, became vested in the plaintiff in August, 1893, and is now owned by him. This is really all the evidence of any change in the road made by a Commissioner, and it is I think altogether insufficient to prove that part of the bill which alleges that this change was made by Hovey as a Highway Commissioner. So far as Hale's personal knowledge is concerned it really amounts to nothing. He never saw Hovey there or on the land. Hovey never even pointed out to him any boundaries or ever placed any. Neither does it appear that Shea ever did anything. It is true he pointed out to Hale boundaries which he said Hovey had fixed, but that

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would not avail to prove an official act by Hovey, whatever its effect might be as between Hale and Shea. In addition to this, in September, 1870, over two years before the conveyance to Hale, Shea had conveyed to R. M. Phillips a lot 45 x 145, sixty feet to the south of the Coombs' lot, which fronted 15 feet east of the highway, that would be 37 feet from the bank, so a part of this Phillips' land must also have gone with the change. The plaintiff claims that the western side of the road, which is the eastern boundary of his lot, is where the posts M and N are, that is about 35 feet from the bank, and according to Hale's evidence the distance at the mill would be about the same. This would bring it within two feet of the Phillips' line and therefore some 20 feet must have been taken off his lot for the new road. The change which the plaintiff contends was made in 1871, involves the total extinguishment of the original road of 22 feet and a donation by the owners of 30 feet off their lots in addition to the original 22 feet. There is admittedly no record of this alleged alteration in the road—that any such record ever existed is a matter of the merest conjecture—there is no evidence that Hovey was even a commissioner—in fact Jeremiah Bragdon said he thought he was not. But if he was, as I have already pointed out, there is no evidence of one act or thing that he did in reference to this matter. The Highway Act of that day required an application to lay out, alter, widen or extend any public highway to be made to the Commissioners in writing by three or more freeholders—it required the location to be fixed by stakes and a written statement of the width, marks, bounds and lines of all roads laid out, altered, extended or shut up, to be returned to the Clerk of the Peace, whose duty it was to enter the same within three months in a book to be kept for that purpose. And when any alteration was made in a road, the Commissioners were authorized under certain circumstances to discontinue the old road and direct it to be stopped up and enclosed by the proprietor after which it ceased to be public. In *Reg.* v. *Jones* (5), Coleridge, J., says: "There is no part of the administration of the law by justices acting on

(5) 12 A. & E. 687.

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their own authority in which it is more necessary for the Court to look closely at their proceedings than the stopping of highways." And our Court has in many cases emphasised the necessity which exists for an exact compliance with the provisions of Highway Acts in order that the action of Commissioners thereunder may be valid. See *Rex* v. *Sterling* (6); *Perley* v. *Dibblee* (7); *Boyington* v. *Holmes* (8); *Basterach* v. *Atkinson* (9); *Oulton* v. *Carter* (10). In *Basterach* v. *Atkinson* the Court held that the laying out of a highway was altogether invalid where the return did not show the boundaries. And in *Oulton* v. *Carter*, a return of the Commissioners as to closing up a road was held not to deprive the public of the use of the road, because it did not recite in words that they had found that it was not required for the convenience of the inhabitants.

There are no doubt cases where in the absence of public records such as the one in question, Courts have felt at liberty to apply the maxim, "*Omnia presumuntur rite acta esse.*" *Dickson* v. *Kearney* (11), and *Palmatier* v. *McKibbon* (12), may be cited as instances. It is impossible to make any such presumption in this case. There is no evidence of any one thing having been done by the Commissioner. It seems almost certain that he fixed no boundaries as the Act requires, and I can scarcely presume that he did when there is an almost irresistible inference to the contrary raised by the evidence. It is agreed by all parties that wherever the road is it, as changed, was 22 feet wide. I can scarcely assume that the Commissioner laid it out when the statute under which he was acting expressly forbade public roads to be laid out under it of a less width than 4 rods. Neither can I assume that the Commissioner directed the old road to be stopped up, and its public character extinguished, when there is no allegation in the bill that such is the fact—when there is no evidence to sustain any such allegation—when the road was not in fact stopped up—and where all legitimate inferences from the facts in proof are entirely opposed to the idea that such a thing was considered by one Commissioner much less three.

(6) Bert. 22.
(7) 1 Kerr, 514.
(8) 3 Kerr, 74.
(9) 2 All. 439.
(10) 4 All. 169.
(11) 14 Can. S. C. R. 743.
(12) 21 A. R. 441.

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In *Rex* v. *Marquis of Downshire* (13), where the defendant was indicted for obstructing a public road which he alleged had been closed up, Lord Chief Justice Denman says: "As to the roads generally, they were found by the jury or admitted by the defendant's counsel to have been public; that is to say, the two first mentioned to have been public footways and the seven last mentioned to have been public highways. The burthen, therefore, of showing that they ceased to be such, or, in other words, had been legally stopped, clearly lay upon the defendant." So in this case, as the plaintiff claims the land which he admits for ten years was a public highway, the onus is upon him to show that the public right has been extinguished, or, in other words, that the road has been legally stopped. So far as the evidence before me goes, I have no hesitation in holding that the old road of 22 feet, which all parties allege and agree was opened along the bank of the river in 1861, has never been legally closed up—in fact there is no allegation in the bill that it ever had been. It is true that there is a great amount of testimony to the effect that the used part of the road is to-day and for some years past has been much further east than it was in 1871 and before that. This evidence, voluminous though it is, in reality I think has no direct bearing upon the questions raised by this bill. In the first place, it cannot be relied on as showing an abandonment of the old road by its non-user, for, in addition to the cases I have already cited, *Reg.* v. *McGowan* (14) is an express authority that the public cannot by non-user relinquish their right in a public highway. *Turner* v. *Ringwood Board* (15) is to the same effect. Even if such an abandonment could be proved by non-user, it would be a question by no means easy to determine upon the evidence in this case, whether the non-user even to the extent to which it exists is the result of any intention on the part of the public to abandon the old road and use as a matter of right a new one, said to have been in some way dedicated to their use, or whether it is simply a deviation by the public from time to time rendered necessary by the construction of the mill and other buildings along the bank of the

(13) 4 A. & E. 718. (14) 1 P. & B. 191. (15) L. R. 9 Eq. 418.

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river and encroachments of a less permanent character from time to time placed on the highway by those who have used and occupied the mill property. In *Dawes* v. *Hawkins* (16), already cited, Erle, C.J., says: "Then was there any evidence of user, from which the jury might reasonably infer a dedication? The parties who passed intended to use the original highway, and probably deviated without knowing it. If they knew the true line and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land by reason of a wilful obstruction, is no more the user of a highway as of right than the user of a deviation over the adjoining land by reason of the highway being foundrous. I know of no decision and no principle making a distinction between a road impassable by nonfeasance, that is neglect of repair, and a road impassable by misfeasance, that is by a ditch and a bank wilfully made. But even if the one deviation be a trespass and the other be a justifiable act, still in neither case is it the use of a highway as of right, and therefore in neither case would the user alone of a line of deviation be evidence against the owner of a deviation. If the user of a line of deviation is not the user of a highway, then the user of such deviation for twenty years would not alter the nature of the act; for if the first traveller who preferred turning aside to beating down the bank and passing through it, did not use a highway, neither did the second or those that followed, the number of passengers being for this purpose immaterial." For reasons which I shall presently state, I do not think that the relief asked for in this suit renders the decision of this question of fact at all necessary.

In addition to the sections in the plaintiff's bill to which I have called attention, there are two or three others to which I must refer. The defendant not only gave the public the notice of sale which I have mentioned, but he served the plaintiff on the 2nd November, 1897, with the following notice: "To Norman Winslow—You are hereby notified to remove the office belonging to the Grafton mill out of the public road within three days, otherwise the work of removing said office will be sold by public sale on Thursday, 4th inst.

(16) 7 Jur. N. S. 262; 8 C. B. N. S. 848.

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Dated November 1st, 1897. I. N. Dalling, Commissioner of Roads, Parish Northampton." In section 12 of the bill it is alleged, and I think it is also proved, that the office is situate 15 feet west of the posts M and N, and that it was built about the year 1883. It stands within the limits of the original road laid out along the bank, being about 21 feet from the edge of the bank. Section 13 of the bill alleged that it was the defendant's intention to remove this office building and to run the road over a part of the ground then occupied by it, and from there straight on southwards close to the south-east corner of the mill, the result of which would be to prevent the plaintiff, as he said, from using the mill for the purposes for which it was built. The evidence also shows that the Trustees of Schools, who own the lot lying south of the Phillips' lot, and between it and Broadway—a street running east from the main road—in 1897 with a view of fencing in the lot, ran the side lines out westwardly to within a few feet of the posts M and N, where they put down posts. The conveyance under which these trustees claim, though not in evidence, was said to be dated in May, 1884, and given by Smith and wife, heirs or devisees of Shea, who died in 1876. Rankine also speaks of 1884 being the year in which the trustees got possession. Claiming under this deed, the trustees in 1897 proceeded to inclose this lot as I have mentioned. The plaintiff, in the 17th section of his bill, alleges that as an owner of land fronting on this highway he has a right of free access to it, and that he is hindered and obstructed by these posts. The relief prayed for in the bill may for correct reference be divided up and numbered as follows:

1. That the defendant be restrained from obstructing the highway and committing any nuisance thereupon.

2. That the defendant be restrained from removing the office and lumber then upon the premises and from selling or attempting to sell the same.

3. That the defendant be restrained from interfering with the plaintiff and his tenants in the occupation and enjoyment of his premises.

4. That the defendant be directed to remove the posts and fences and incumbrances placed on the highway.

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5. That defendant be restrained from doing anything on such highway to lessen the enjoyment by the plaintiff and his tenants of the land in question.

I see nothing whatever in this case to warrant any such decree as the plaintiff asks for in the 1, 3, 4, and 5 grounds. When this bill was filed the defendant had done nothing beyond giving a notice that in the event of certain alleged obstructions to the highway not being removed within a specified period, he would as Commissioner of Highways sell the right to remove them at public auction. He had nothing to do with placing the posts down at the front of the School lot, and, if he had, such an incumbrance would if anything be a public nuisance. The plaintiff does not allege in his bill or show by proof that he is in any way impeded in the use of the highway more than any one else, and to sustain a bill in such a case he must suffer some injury or inconvenience over and above that suffered by the public generally. And to grant an injunction in the general terms of the 3rd and 5th grounds would be meaningless. Speaking of a similar motion, the Lord Chancellor in *Earl of Ripon* v. *Hobart* (17), says: "What purpose then could such an injunction serve, as the second alternative of the motion describes? It would give no information—it would prescribe no rule or limits to the defendants, it could not in any manner of way be a guide to them, if it did not operate as a snare. It would in reality amount to nothing more than a warning that if they did anything which they ought not to do, they would be punished by the Court; but it would leave to themselves to discover what was forbidden and what allowed." As to the second ground there is more difficulty. In the Highway Acts, prior to that passed in 1896, under which the defendant was proceeding, the authority to sell the right of removing an obstruction to a highway was limited to cases where the owner was unknown. Although that restriction seems to have been omitted from the Act of 1896, I can scarcely think so summary a proceeding to abate a nuisance a very appropriate remedy for a case like this where the defendant has himself no very settled idea of the limits of the

(17) 3 M. & K. 173.

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road in question, where the rights both public and private are honestly in dispute, and where the defendant's action involved an interference with the plaintiff's possession of buildings of a permanent character, which had been in the use and occupation of him and his predecessors in title for very many years without interference or objection from anyone until at a comparatively recent date. There are ample remedies open to the Attorney-General, as representing the public, for abating public nuisances of this character and settling the disputed rights by decision of a competent tribunal. While I think the defendant might perhaps have adopted a wiser and more prudent course and one more likely to have settled a long standing cause of trouble, I am not prepared to hold that in what he did he exceeded his authority. As to the office building, I have already stated that it is legally an obstruction to the original highway of 22 feet which all parties agree was laid out along the bank in 1861, and which in my opinion, so far as the evidence in this case shows, has never been legally closed up, and therefore remains open to the public. Under these circumstances I cannot prevent the defendant from adopting such means for its removal as the law may give him: *Bagshaw* v. *Buxton Local Board of Health* (18). At the same time, I have no doubt whatever that when Hale and Shea made this arrangement it was well understood that Shea was, so far as he could do so, giving to the public a road 22 feet wide to the east of the existing one, and in substitution for it. In no other way could the object of both of them be accomplished. On the same day that Shea made the conveyance of this mill site to Hale he conveyed to Baird his lot on the opposite side of the road. Baird's western boundary is the highway, and Hale's eastern boundary is also the highway—the road as Shea intended it to be therefore lay between those two points. Jeremiah Bragdon, one of the defendant's witnesses, said that he had lived in the vicinity some 39 years, during which period he had at times been roadmaster, commisioner, councillor, and occupied other public positions, the duties of which rendered him familiar with this road and its history. He helped build the mill for Hale, worked at the office for

(18) 1 Ch. D. 220.

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Black, and built the sidewalk. He says that this sidewalk was built in 1881, and continued in public use down to 1887, when it was carried away by the freshet. It extended from below the mill up to Rankine's, running in front of these lots, including the present school lot. He also says that before 1881, though the precise time does not appear, the owner of these three lots—that is the McElroy, Stewart and Phillips lots as marked on the plan—gave 15 feet off the front of their lots to widen the road, and the school trustees, who then owned a lot in the rear, gave them 15 feet off their lot, to be added to the rear. He also says that this sidewalk was put down on this 15 feet thus added to the road, and that the fences on the front of these lots as they are to-day are where they were placed when the 15 feet were taken off. That such an operation should widen the road it is of course necessary that the lot from which the 15 feet were taken should have abutted on the street. This seems to show that when Shea in 1872 conveyed the lot to Baird (the Stewart lot on the plan), making its front or western boundary the eastern line of the road, that eastern line was 15 feet west of the present fence. The present measured distance from that fence to the top or edge of the bank is 60 feet; and if you add 22 feet, the original width of the road, to the 15 feet, you reach a point at this particular part of the road 23 feet east of the top of the bank as the western limit of the road and the eastern line of the plaintiff's land as Shea understood it. From this, as well as other circumstances, it is clear that Shea intended to substitute this new road for the old one, and in such a way as to give Hale for his exclusive use a strip of land along the bank at least 23 feet wide, in which case the office building would not be an obstruction. There are circumstances which may well lead one to conclude that Shea's intention was concurred in by the other owners of land, and was acted upon by the highway officials and the public generally. Without relying too much upon the precise location of the travelled part of the road and which might, as I have already pointed out, be referable as well to deviations resulting from encroachments as the user as of right of a road dedicated to the public use, there are facts and circumstances from which a dedication by the owners of all these lots of a road in front of them as at present fenced

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may be inferred. The present front fences of these three lots (McElroy, Stewart and Phillips) were placed back in their present site prior to 1881; the present owners only claim to those fences and they gave away 15 feet to widen the road. And not only was this sidewalk built along this line of fence, but other public work was done on the road. The sidewalk is said by Young to have been 30 feet, by Ralston 26 feet, and by Bragdon 24 feet from the front of the eastern part of the office—in other words, 45, 47, and 51 feet from the edge of the bank—more than twice 22 feet, the alleged width of the road. Again, in 1884 or 1885, J. J. Hale says the road along these lots was turnpiked and gravelled close to the sidewalk, and there is evidence of the expenditure of public moneys at various times on this road. As to the present school lot, though it remained unfenced across the front, I am unable to discover from the evidence any indication on the part of the owners at variance with an intention to dedicate a road in like manner with the owners of the other lots. Mrs. Haley (Mr. Shea's widow), who knew the lot from 1874 down, and if not the owner certainly had the control of it down to 1884, when the trustees got it, says she never claimed further west than the Phillips lot, and from 1884 down to 1897—a period of 13 years—the only act relied on as indicating any claim west of that line is the planting of two or three trees on Arbor Day by the school children, who set them out where they pleased and in honor of one of their number crowned Queen of the May. Acts such as those I have mentioned deliberately done by owners of land having the authority to dedicate a public highway, and acts such as I have described permitted to be done on the land by public officials charged to some extent with the control of the public highways, followed by a public user, without objection and apparently as of right, must be attributed to an intention to dedicate. The whole of the user may well be referred "to a lawful origin rather than to a series of trespasses": *Turner* v. *Walsh* (19); *Reg.* v. *Inhabitants of East Mark* (20); *Reg.* v. *Petrie* (21). The lumber to which the defendant's notice of sale referred is I presume gone long ago.

(19) 6 App. Cas. 636. (20) 11 Q. B. 877. (21) 4 E. & B. 737.

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More than this, the plaintiff is not without remedy if his lumber is interfered with. It is not usual for this Court to interfere in cases of trespass where, as here, there is no suggestion or proof that the legal remedy is not entirely adequate, or that irreparable loss or mischief would result unless the threatened trespass were restrained. While this Court might interfere to prevent the removal of a building which, though not technically fixed to the soil, is nevertheless a structure of a permanent character, it would not do so in all cases where the act related merely to personal and movable property,—at all events not until the legal right had been determined.

Where this newly dedicated road is, or what are its precise limits, I do not feel called upon to determine. At the hearing on two or three occasions I endeavoured to find out from the plaintiff's counsel where they claimed them to be, but I did not receive a very satisfactory explanation. In his answer the defendant claims that the 15 feet given off the front of three lots are to be added to the original 22 feet, making a road of 37 feet wide from the top of the bank. The sidewalk and turnpiking and much of the other work done on the street were all east of this point and outside those limits, and the front fences of the properties on the east side of the road are now and for some 20 years have been from 20 to 25 feet to the east of it also.

I think the plaintiff's bill must be dismissed, but under the circumstances, without costs.

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March 28.

HUTCHINSON v. BAIRD.

Will—General power of appointment—Intention to exercise power—Direction to Pay Debts—C. 77, s. 22, C. S.

A testatrix, having a general power of appointment under the will of her father over real and personal estate, by her will directed that her debts and funeral expenses should be paid out of her estate. After making certain bequests the testatrix proceeded as follows: "The real estate of which I am possessed, and the personal estate to which I am entitled, came to me under the will of my late father, and it is my will that after the payments above provided for that the residue of my estate, such as came to me under my said father's will, and all other I may be entitled to, both real, personal and mixed, shall be divided between my three children." The testatrix had no estate of her own.

Held, that the will operated as an exercise of the power; the direction to pay the testatrix's debts out of her estate being but one circumstance to be considered in determining what her intention was.

SPECIAL CASE.

By his will dated the 30th June, 1847, Peter Reed devised to trustees real estate in trust to pay the net income thereof to his daughter Agnes W. Reed, during her life, and upon her decease leaving lawful issue he gave the real estate to such person or persons, and in such manner as she should by writing in the nature of her last will and testament appoint, and in default of such appoinment, then to her right heirs in fee simple. The residue of his estate he directed his trustees to convert and invest and to pay the interest upon £500 to his daughter Rebecca S. Disbrow during her life, and in case of her death without leaving lawful issue, then such interest to be thereafter paid to his daughter Agnes W. Reed during her life, and at her decease the principal to be paid to such person or persons as she might in manner aforesaid appoint, and in default of appointment, then to her executors and administrators; in case his daughter Rebecca S. Disbrow should die leaving lawful issue, then the said principal sum to be paid to such person as she might in manner aforesaid appoint, and in default of appointment, then to her executors and administrators; to pay the interest upon £750 to his daughter Agnes W. Reed during her life,

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and in case of her death without leaving lawful issue, such interest to be thereafter paid to his daughter Rebecca S. Disbrow during her life, and at her decease the principal to be paid to such person or persons as she should by writing in the nature of her last will and testament appoint, and in default of such appointment, to her executors and administrators; in case his daughter Agnes W. Reed should die leaving lawful issue, then the said principal sum to be paid to such person as she should by writing as aforesaid appoint, and in default of such appointment, then to her executors and administrators. The will was duly admitted to probate on the 16th day of August, 1849. Agnes W. Reed subsequently married Andrew Baird. By her will dated the 17th day of September, 1896, after stating that she intended to dispose thereby of all the estate, both real, personal and mixed, that she might be possessed of and entitled to both at law and in equity at the time of her decease, she ordered that her just debts and funeral expenses be first paid out of her estate. She then made certain bequests. The will then proceeded as follows: "The real estate of which I am possessed and the personal estate to which I am entitled came to me under and by the provisions of the will of my late father Peter Reed, and it is my will that after the payments above provided for, the residue of my estate such as came to me under my said father's will, and all other I may be entitled to both at law and in equity, both real, personal, and mixed, and wheresoever the same may be, shall be divided between my three children, Eliza Margaret Baird, Helen V. Baird, and James P. Baird, to have and to hold the same in equal parts, to them their heirs and assigns forever." These children survived the testator. The question was whether the will of Agnes W. Baird operated as an execution of the power of appointment given to her by the will of Peter Reed.

Argument was heard March 23, 1899.

C. N. Skinner, Q.C., for the trustees of Peter Reed's will:—

The question is one of intention to be gathered from the will. The testator states that her intention is to dispose of her own estate; she orders her debts and funeral expenses to

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be paid out of her own estate; she explains that the real and personal estate she is disposing of is that which she possesses and is entitled to. As she took no interest in the property of Peter Reed under his will except the income of a part of it during her life, a disposition of her own estate obviously would not include property still subject to the will of Peter Reed. See *In re Wait* (1), where cases are cited by counsel that the inference from the use of the word "my" is that the testator did not intend to use the power. The direction to pay the testator's debts and funeral expenses establishes an intention to deal only with her own property. The power of appointment was not for the purpose of paying the donee's debts. To hold, therefore, that the power has been validly exercised would be to defeat the limitations accompanying it. It is submitted that an intention appears by this will not to exercise the power of appointment within the meaning of s. 22, c. 77, C. S. In *In re Mills* (2), occurs the following apposite language by Kay, J.: "The intention of a testator can only be inferred from the words of his will, and from the circumstances which at the time of executing it were known to him, and which the Court, putting itself in his place, is bound to regard. Here, at the date of the will, the testator had no real estate. By his will he in general words gives 'all my real and personal estate' Power and property are completely distinct; and if he had at that time any real estate it is clear the power would not have been exercised. The other principal facts bearing upon the question of his intention are these. The will contains a gift out of the bulk of the proceeds of his real and personal estate to his wife, who was not an object of the power, and a direction out of the same fund to pay funeral and testamentary expenses and debts, which could not be done out of the property subject to the special power. . . . All these are indications which tend to prove that it was not his intention to exercise this special power."

A. I. Trueman, for the executor of Agnes W. Baird's will:—

Under the old law it was necessary to find an intention to exercise a power of appointment; there must have been

(1) 30 Ch. D. 620. (2) 34 Ch. D. 186, 191.

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some reference either to the power or to the property subject to the power. C. 77, C. S., s. 22, now imposes on those who deny the execution of a general power, the burden of proving that by the will it was not the testator's intention to exercise it. Before the statute a devise of all "my" real estate would not pass lands which the testator could only dispose of under a power of appointment. The party claiming under the will could show that there was no other property which could pass, or over which the testator had any disposing power, and the devise would operate as an appointment under the power: *Wallop* v. *Earl of Portsmouth* (3); *Standen* v. *Standen* (4); but the whole burden of proof was thrown on the person setting up that the power had been exercised. In the case of a general bequest of personalty before the statute, it was held that it would not operate as an execution of a power unless the Court was satisfied by the manner in which the particular property was referred to that the testator intended to deal with it. A will which would have been an execution under the old law can scarcely not be so now. It is submitted that not only is there not a contrary intention in the will, but that it bears affirmative evidence that the testatrix intended to exercise the power. *In re Mills* (5) had to deal with the exercise of a special power of appointment, while s. 22 relates only to a general power.

1899. March 28. BARKER, J.:—

The sole question involved in this special case is whether the will of Agnes W. Baird dated September 17th, 1896, is an execution of the power of appointment given her in and by the will of her father, the late Peter Reed. As this power of appointment is general, the execution by Mrs. Baird, the donee of the power, of her will disposing of all her property as she has done would operate as a complete execution of the power unless a contrary intention appears by the will: c. 77, C. S., s. 22. So far from a contrary intention appearing by this will, I think there is ample affirmative evidence on the face of the will that the testatrix intended thereby to dispose of what she acquired under

3) Sugden on Powers, 8th ed. p. 916. (4) 2 Ves. 589.
(5) 34 Ch. D. 186.

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her father's will. She had no other property except that, and she declares in her will that the real and personal property which she is disposing of by her will is that which she received and which came to her under and by the provisions of her father's will.

In *Airey* v. *Bower* (6), Lord Halsbury says in reference to the section in the Wills Act I have just quoted, that the legislature created this perhaps somewhat artificial system that a general power of appointment should be treated as the property of the testator. And in *Boyes* v. *Cook* (7), James, L.J., says: "In fact a general power of appointment really confers on the donee of the power the entire beneficial interest in the property subject to the power, and enables him to dispose of it as he pleases."

In *Workman* v. *Petgrave* (8), Pearson, J., says: "It is admitted that the testator had no property at Belluton other than that over which he had the power of appointment, and that therefore, unless he is to be taken to have exercised the power (although he has made no reference to it in any part of his will) the devise of his estate at Belluton must fail. It is plain, according to the settled rule of this Court, that under these circumstances the testator must be taken to have exercised the power of appointment as regards the Belluton estate. I must, therefore, read this gift as indicating, as plainly as anything can indicate, that, at the time when he made his will, he intended to exercise the power of appointment given to him by the settlement." So, in this case, as it appears that this property was the only property of which the testatrix had any power of disposal, and it was the property which she derived under her father's will, the rule of this Court requires that the testatrix must be taken to have exercised the power of appointment. I have no doubt on the authority of these cases—and those cited at the argument are to the same effect—that the will of Mrs. Baird is an execution of the power of appointment given to her by her father's will.

The only ground which Mr. Skinner was able to suggest for a different conclusion is that Mrs. Baird by her will

(6) 12 App. Cas. 263. (7) 14 Ch. D. 53. (8) 30 Ch. D. 617.

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directed her debts and personal expenses to be paid out of her estate, evincing thereby an intention to deal with property other than that in reference to which she had a power of appointment, and therefore an intention not to exercise the power. And he relied chiefly on the case of *In re Mills* (9). The power in that case was a special, not a general one, and therefore governed by different considerations. The donee of the power in that case had no authority to charge the property with the payment of debts. The point does not arise here, and it is unnecessary to decide it, but I do not wish to be considered as concurring in the view that Mrs. Baird could not under the power given to her by her father's will charge the property with her debts. But even admitting that part of the will to be inoperative, it does not, I think, affect the question submitted in this case. Where a testator charges his estate with the payment of debts, and a question arises whether by his will he has executed a power of appointment or not, that is only a circumstance to be regarded as evidencing an intention one way or the other, and has not prevailed in cases of a general power of appointment where the testator had no property to dispose of except that which he held as donee of the power, nor in cases where the power was special, but the evidence of an intention to execute it was ample notwithstanding the direction for the payment of debts and funeral expenses. See *Cowx* v. *Foster* (10); *Ferrier* v. *Jay* (11); *Bailey* v. *Lloyd* (12); *In re Teape's Trusts* (13).

The question stated in this case I answer in the affirmative, and there will be a declaration accordingly. Costs of all parties will be paid out of the fund by the trustees.

(9) 34 Ch. D. 186.
(10) 1 J. & H. 30.
(11) L. R. 10 Eq. 550.
(12) 5 Russ. 330.
(13) L. R. 16 Eq. 443.

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March 28.

JONES v. BREWER.

Specific performance—Agreement to give chattel mortgage.

Specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture sold and delivered upon credit in reliance upon such agreement.

Demurrer to bill by the defendant Brewer.

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

Argument was heard March 21, 1899.

W. B. Wallace, and *G. H. V. Belyea,* in support of demurrer:—

The plaintiff's case falls within the rule that a Court of Equity will not decree specific performance of an agreement relating to chattels where there is a remedy at law. It cannot be contended that there is not a remedy at law because of Brewer's insolvency. To hold that in such a case a ground for equitable relief exists would be practically destructive of the limits of the Court's jurisdiction. The remedy at law is an action for damages against Brewer for breach of contract. As by contract between the parties a price has been put upon the chattels that circumstance will be treated as a conclusive admission that relief can be had by money payment: *Dowling* v. *Beljemann* (1). The Court is unable to grant relief by specific performance as Brewer is out of the jurisdiction, and no other relief can be granted, as the bill does not ask the Court to vest the property in the chattels in plaintiff except by the execution by Brewer of the bill of sale. The plaintiff cannot put his rights higher than an ordinary creditor. On delivery of the chattels there was no agreement that the property should not pass until bill of sale was given. Brewer could therefore vest a good title in Dunlop. The bill is demurrable as it discloses that the suit is premature. The agreement is shown to be that the bill of sale was to secure the payment of a promissory note, and the note was not due at the commencement of the suit. Dunlop has a registered title to the chattels by bill of sale, and also

(1) 2 J. & H. 544.

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title by possession. Any title that the plaintiff has in the chattels is an equitable one, and therefore cannot prevail against Dunlop's legal title in the absence of an allegation of fraudulent possession. No relief consequently can be granted against Dunlop, and he should not have been made a party to the suit. See *Moffatt* v. *Coulson* (2); *Tidey* v. *Craib* (3). A further ground of multifariousness is that the bill does not pray for relief against Dunlop. It merely seeks specific performance of Brewer's agreement, and that bill of sale to Dunlop be set aside. See *Busby* v. *Bank of Montreal* (4).

G. G. Ruel, contra:—

The plaintiff is not seeking specific performance of an agreement for the sale or purchase of chattels, but the specific performance of an agreement to give a chattel mortgage. This distinction takes the case out of the rule that specific performance will not be decreed of an agreement relating to chattels. Cases are of common occurrence in which specific performance of an agreement to execute a mortgage has been declared: *Ashton* v. *Corrigan* (5); *Hermann* v. *Hodges* (6). In *Taylor* v. *Eckersley* (7), specific performance was decreed of an agreement to execute a bill of sale of personal chattels. The existence of a common law remedy is not accepted by the Court of Equity as a hard and fast rule to exclude its jurisdiction: *Ryan* v. *Lockhart* (8); *Beech* v. *Ford* (9); *Cogent* v. *Gibson* (10); *Attorney-General* v. *Mid-Kent Railway Co.* (11). Here the plaintiff's common law remedy would be a mockery. Brewer is insolvent and out of the jurisdiction. The cases decide that a plaintiff will not be left to his common law remedy of damages where its beneficial effect depends upon the personal responsibility of the defendant: *Doloret* v. *Rothschild* (12); *Clark* v. *Flint* (13). The objection that the bill is multifarious cannot stand. No relief can be given unless the rights of the plaintiff and Dunlop are pronounced upon. That Dunlop is interested in only a portion of the relief prayed for does not

(2) 19 U. C. Q. B. 341.
(3) 4 O. R. 696.
(4) N. B. Eq. Cas. 62.
(5) L. R. 13 Eq. 76.
(6) L. R. 16 Eq. 18.
(7) 2 Ch. D. 302.
(8) 1 Pug. 135.
(9) 7 Hare, 208.
(10) 33 Beav. 557.
(11) L. R. 3 Ch. 104.
(12) 1 S. & S. 599.
(13) 22 Pick. 238.

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render the bill multifarious: *Campbell* v. *Mackay* (14); *West Midland Railway Co.* v. *Nixon* (15). Nor is the bill objectionable for misjoinder. By the demurrer Dunlop is admitted to have taken a bill of sale of the chattels with notice of the agreement between the plaintiff and Brewer. The plaintiff is therefore entitled to make Dunlop a party to the suit for the purpose of setting aside his bill of sale and obtaining whatever other relief as against him may be necessary. See *Potter* v. *Sanders* (16); *Daniels* v. *Davison* (17); *Clark* v. *Flint* (18); *Holmes* v. *Powell* (19); *Denison* v. *Fuller* (20). The objection of misjoinder cannot be raised by a defendant on behalf of a co-defendant not a party to the demurrer: *Roberts* v. *Roberts* (21); *Daniell* Ch. Pr. (22).

Wallace, in reply.

1899. March 28. BARKER, J.:—

This is a demurrer to the bill by the defendant Brewer. The bill was filed for a specific performance by Brewer of a verbal agreement made by him and the plaintiff, to give the plaintiff a mortgage on certain furniture. I had no doubt on the hearing that the demurrer must be overruled, but I desired to look more closely at the bill in reference to one of the points raised. The grounds of demurrer are (1) want of equity, and (2) multifariousness.

The facts alleged in the bill and admitted by the demurrer are as follows: The defendant Brewer being desirous of opening a private boarding house applied to the plaintiff, who is a dealer in furniture, for the purchase of an amount of house furniture. After some negotiation it was agreed by them as follows, that the plaintiff would let the defendant Brewer have a certain amount of furniture; that he would buy for him a certain amount of crockeryware which he also required, and a certain amount of table linen and other articles of a similar kind, which he also required in fitting up his house. The value of the furniture supplied by the plaintiff was $827.36; the table linen account was $110.06, and the

(14) 1 M. & C. 603.
(15) 1 H. & M. 176.
(16) 6 Hare, 1.
(17) 17 Ves. 433.
(18) 22 Pick. 231.
(19) 8 DeG. M. & G. 572.
(20) 10 Gr. 498.
(21) 2 Phill. 534.
(22) 4th Am. ed. 337 n.

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crockeryware account was $104.59, the three sums amounting to $1,042.01. The defendant Brewer made no cash payment, but as a part of this arrangement agreed with the plaintiff that he would give his promissory note for the whole sum and a chattel mortgage upon the goods thus furnished him and his other household furniture then in the house occupied by him on King Square, to secure the payment of the note and renewals. The note was to be made payable in three months, but it was to be renewed from time to time on certain specified payments being made, so that the whole debt would be paid off in about two years. This agreement was made on or about the 28th of April, 1898. The goods were purchased and supplied by the plaintiff, as I have stated, during the month of May, 1898. A complete schedule of all the goods to be included in the mortgage was made with Brewer's assistance. He gave the promissory note for $1,042.01, dated May 15th, 1898, at three months. About that time, at Brewer's request, the plaintiff agreed to take the mortgage only on the chattels he himself supplied to him. Brewer employed his own solicitor to prepare the security, and he applied to the plaintiff and obtained from him the schedule of the chattels. The mortgage was prepared, approved of by the plaintiff, and the solicitor finally appointed July 25th, 1898, as the time when it would be ready for execution, and on that day at noon Brewer was to have attended at his solicitor's office to execute it. On that day, but earlier than the hour named, Brewer went to the office and told his solicitor that he had already given a mortgage on all this property to Dunlop (the other defendant), and that he would only give the plaintiff a mortgage subject to this one to Dunlop. The mortgage to Dunlop is dated July 21st, 1898, filed the same day, and professes to have been given to secure $480, payable with interest by instalments covering a period of 18 months. The bill also states that the defendant Dunlop had taken possession of all these chattels, that Brewer had no property, that he had since this suit was commenced absconded for the purpose of avoiding his creditors, and that he is wholly unable to pay the promissory note or any part of it. Take these facts, admitted as they are for the purpose of this demurrer, and a grosser fraud on this plaintiff can scarcely be imagined; and if this

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Court is as powerless to afford the plaintiff any useful remedy against Brewer himself as his counsel contends, I should think it had outlived much of its usefulness. He takes the position in the first place that this Court could never enforce an agreement of this kind relating to chattels, and that the plaintiff had an adequate remedy at law. A legal remedy against a debtor who has absconded in order to avoid payment of his creditors, who has no property, and wholly unable to pay the debt in whole or in part, can scarcely be regarded as a very adequate or useful remedy. *Holroyd* v. *Marshall* (23), is a direct authority against the defendant. Lord Westbury, in that case, says: "A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance." After saying that this principle applies as well to contracts in reference to chattels as to real estate, he gives the following illustration: "A contract for the sale of goods, as for example of five hundred chests of tea, is not a contract which would be specifically performed." Why? Not, as the defendant here contends, because it is a contract relating to chattels, but, as Lord Westbury says, "because it does not relate to any chests of tea in particular. He goes on, "but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract and for an injunction (if necessary) to restrain the seller from delivering it to any other person." In the same case, as every lawyer knows, the Lord Chancellor shows that when a vendor agrees for a valuable consideration to sell, or a mortgagor to mortgage property, either real or personal, of which he is not then possessed, this Court will compel him to perform his contract the instant property answering the description of that in the contract comes into his possession—that is of course always supposing that the contract is in other respects

(23) 10 H. L. C. 191.

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such an one as the Court will direct to be specifically performed—that is that it is a fair contract—completed between the parties for a good consideration and so on. At the hearing I cited the case of *Clark* v. *Scottish Imperial Insurance Co.* (24)as altogether opposed to the view which was being advocated on the defendant's behalf. I desire to quote a short passage from the judgment of the present Chief Justice of Canada in that case, reported at page 710: "It is sometimes said by text writers that specific performance of an agreement as to chattels will not be decreed, but that parties will be left to seek a remedy at law in respect of the breach of a contract relating to such property. This, however, is incorrect as regards specific and ascertained chattels, as is explained by Lord Westbury in *Holroyd* v. *Marshall*, and the rule as to such property as the schooner in question here is what I have already propounded"—that is that the agreement to mortgage created an equitable lien on the specific chattel to which the agreement referred.

In this case the chattels were ascertained. They were the goods sold to the defendant, scheduled under his direction, and in reference to which there could be no doubt.

Vice-Chancellor Wickens in *Ashton* v. *Corrigan* (25), decreed specific performance of an agreement to give a mortgage on leasehold premises though the mortgage contained an absolute power of sale. Lord Selborne in *Hermann* v. *Hodges* (26), did the same. In *Taylor* v. *Eckersley* (27), the agreement, which was a verbal one, related to furniture, and the Court found no difficulty in granting an injunction and placing the property in the hands of a receiver. I have no doubt whatever that as Brewer as part of his agreement with this plaintiff for the delivery of these goods agreed to secure the payment of the purchase money by a mortgage upon them, he will be compelled to carry out his contract. What may be the form of the decree which this Court will make—whether it will be to order the execution of the mortgage, or to sell the property and pay the plaintiff from the proceeds, is a matter of procedure. Another ground of demurrer was that the plaintiff's equitable title would not prevail

(24) 4 Can. S. C. R. 192.
(25) L. R. 13 Eq. 76.
(26) L. R. 16 Eq. 18.
(27) 2 Ch. D. 302.

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against Dunlop's legal title derived by his registered mortgage, although he may have had notice and knowledge of the agreement between the plaintiff and Brewer when he took his mortgage. On this point I express no opinion, for I think Brewer has no such interest as entitles him to raise any such point. His rights in the property are the same whether the plaintiff's lien has priority over that of Dunlop or not. When that matter comes up, as I suppose it will, on Dunlop's answer, it will require consideration.

The plaintiff's bill by the prayer asks that the mortgage to Dunlop "so far as the same interferes with and is inconsistent with the specific performance of the said agreement between the plaintiff and Brewer be set aside and ordered to stand null and void as against the plaintiff." This language is perhaps not very appropriate for the relief which the plaintiff wants and to which the facts of the case when proved entitle him; that is a declaration as against Dunlop, that the plaintiff's equitable lien is entitled to priority over the mortgage to Dunlop, with the necessary directions to render that declaration effective. I cannot hold the bill multifarious on this demurrer if the relief which the plaintiff no doubt intended to ask for, which practically he has asked for, and to which he is entitled, if he is entitled to any, is such as to render the bill free from all objection, because that relief is properly asked for by a bill against both these defendants.

I think this demurrer must be overruled with costs. The defendant Brewer will have leave to answer in 20 days from settling the minutes of this order on payment of the costs.

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April 18.

Will — Construction — Gift of income to trustees for maintenance and education of children—Income payable to father.

A testator by his will gave his estate to trustees in trust to pay over the net income to the support, maintenance and education of the children of his son until the youngest should attain the age of twenty-one years. Some of the children were of age, and the others were minors. The father was able to support, maintain and educate the children.

Held, that so much of the income as would be necessary should be paid to the father while he was under an obligation to support, maintain and educate the children, and did so, until the youngest child became of age.

Special case to determine whether William Vassie, executor and co-trustee with the plaintiff of the residuary estate of John Vassie, deceased, is entitled to be paid the income therefrom while he supports, maintains and educates his children, and until the youngest of his children comes of age.

By his will dated the 27th of March, 1896, John Vassie devised and bequeathed the residue of his estate and effects real and personal unto William Vassie his son and George A. Schofield upon trust for conversion and investment of the proceeds, and "to pay over the net income, interests, dividends and profits arising from the said residuary estate to the support, maintenance and education of the child or children of my said son William Vassie, and the issue of such of his child or children who may have predeceased me, so that such issue shall only have the share or shares their deceased parent or parents would if living have had, until the youngest of the surviving children of the said William Vassie shall attain the age of twenty-one years or, if a girl, shall attain that age or marry, and as soon as the youngest of the surviving children of the said William Vassie shall attain the age of twenty-one years, or being a girl shall attain that age or marry, then to convey, assign, transfer and set over to the said child or children of the said William Vassie then surviving, and the issue then living of his child or children then deceased, the whole of my said residuary estate absolutely in equal shares, but so that the issue of his deceased

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child or children shall only take the share or shares their deceased parent or parents if living would have taken." The testator died on the 8th of October, 1898, leaving him surviving his son, the said William Vassie, and four children of his son, viz., Johan Mary, of the age of twenty-one years and upwards, spinster; Jane Cockburn, of the age of twenty-one years and upwards, spinster; William, of the age of about fourteen years, and Charlotte, of the age of about twelve years. All of the said children live with their father, and are supported, maintained and educated by him. At the hearing it was admitted by counsel that the net annual income of the residuary estate, about $3,000, is not more than sufficient for the suitable support, maintenance and education of the children, having regard to their position in life.

Argument was heard April 4, 1899.

A. I. Trueman, for the plaintiff:—

It is submitted that the trust to pay over the income to the support, maintenance and education of the children is not operative while the father is able to support, maintain and educate them. Otherwise the gift is for the father's benefit. The income is to accumulate and follow the principal.

The following cases were cited: *Webb* v. *Kelly* (1); *Soames* v. *Martin* (2); *In re Parker*(3); *In re Bunn* (4); *Lucknow* v. *Brown* (5); *Carr* v. *Living* (6); *In re Booth* (7).

A. O. Earle, Q.C., and *H. H. Pickett*, for the father and children:—

The gift is to the father, and takes place regardless of his ability to support, maintain and educate his children.

1899. April 18. BARKER, J.:—

My decision upon this special case has reference solely to existing circumstances, which are these: Mr. Vassie and his four children, who benefit under the residuary clause of the testator's will, all live together at St. John as one family;

(1) 9 Sim. 469.
(2) 10 Sim. 287.
(3) 16 Ch. D. 44.
(4) 16 Ch. D. 47.
(5) 12 Jur. 1017.
(6) 28 Beav. 644.
(7) [1894] 2 Ch. 282.

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the father furnishing the children with their appropriate support, maintenance and education. Should the father by reason of the marriage of his daughters or in other way be relieved from the obligation of furnishing any child with maintenance, or should he for any reason cease to furnish it, a new set of circumstances would arise the effect of which it will be time enough to discuss when it actually arises. Whether it would alter the distribution of the fund or not is a question which does not arise here and upon which I express no opinion. It was conceded by counsel for all parties —and I quite concur in their view—that the whole net income derivable from the residuary estate is not more than sufficient for the suitable support, maintenance and education of these four children, and therefore no inquiry on that point is necessary.

It is clear that the testator by his will did give the net income of the residuary estate as a fund or sum of money to be paid for the support, maintenance and education of the child or children of his son the defendant William Vassie, until by the happening of the event mentioned in the will, the corpus of the fund should become divisible among the children. The trustees are to pay over the net income to the support, maintenance and education of the children, until the youngest child shall attain the age of 21 years, or, if a girl, shall attain that age or marry. I have no doubt that all the children whether minors or not, have a right to participate in this fund: *Booth* v. *Booth* (8). Then comes the question to whom is the fund to be paid, and if it is payable to William Vassie the father, is he entitled to it quite irrespective of his own ability to support and educate his children without having recourse to this fund. I have no doubt that the father as the natural guardian of his children and the person upon whom rests the obligation of providing them with suitable support and education, always has the right to apply for an allowance out of their property when he shows that he is himself unable to provide it: *Havelock* v. *Havelock* (9). The instrument creating the fund may have placed it in the discretion of the trustees to say what portion of it

(8) [1894] 2 Ch. 282. (9) 17 Ch. D. 807.

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should be used for the purpose, or whether any of it shall be used. In such cases it is the rule of this Court not to interfere with such discretion when it has been exercised *bona fide*: *Gisborne* v. *Gisborne* (10). But where there is not merely a power but an absolute trust created for the maintenance and education of the children, irrespective altogether of the father's ability, the father so long as he is under an obligation to furnish the maintenance and education and does furnish it, has a right to have so much of the trust fund as is necessary for the purpose paid over to him. In *Wilson* v. *Turner* (11), Jessel, M.R., says: "When you have a trust to apply the whole of the income whether it is 'for the maintenance' or 'towards the maintenance,' that is a compulsory trust, and you can take the whole income either for one purpose or the other." The trust here is that the net income be paid over for the purpose I have mentioned until the youngest child comes of age or, if a girl, comes of age or marries. As I read this will, the testator intended that the fund should all go to the father of these children for their maintenance and education to enable him to discharge the obligation under which he is in this respect, and that his own ability to maintain and educate them is not involved in the case at all. See *Leach* v. *Leach* (12); *Living* v. *Carr* (13).

There will be a declaration that the defendant William Vassie, so long as he shall remain liable to furnish and shall furnish the said children with support, maintenance and education suitable to their position and prospects, is entitled to be paid the net income, interests, dividends and profits arising from the residuary estate of the testator until the said Charlotte Vassie shall marry or attain the age of twenty-one years.

The costs of all parties to come out of the income.

(10) 2 App. Cas. 300.
(11) 22 Ch. D. 521.
(12) 13 Sim. 301.
(13) 28 Beav. 644; 33 Beav. 474.

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April 18.

Debtor and creditor—Preference—Fraudulent conveyance—Stat. 13 Eliz. c. 5.

An insolvent debtor being in expectation that his property would be seized under execution conveyed to his father, who had a knowledge of his son's insolvency, land previously conveyed by the father to the son in consideration of the son's bond to support and maintain him and his wife for their lives. After the conveyance to the father he conveyed the land to the son's wife in consideration of her paying off a mortgage upon the land and agreeing to support the father and his wife.

Held, that the conveyance from the son to the father, having been made *bonâ fide* and for valuable consideration, and not for the purpose of retaining a benefit to the son, was good within the statute 13 Eliz. c. 5, though made for the purpose of preferring the father as against other creditors.

The facts fully appear in the judgment of the Court.

Argument was heard March 28, 1899.

W. B. Chandler, for the plaintiff:—

The statute of 13 Eliz. c. 5, declares to be utterly void, all covinous conveyances, gifts or alienations of lands or goods whereby creditors are hindered, delayed or defrauded of their just rights unless made on good consideration, *bona fide* and without notice of such covin. A conveyance will not be upheld if defective in either of these particulars. It is not enough that the conveyance is for a valuable or even an adequate consideration. It must be *bona fide*. See *Twyne's Case* (1); *French* v. *French* (2); *Neale* v. *Day* (3); *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Khan* (4). In *Cadogan* v. *Kennett* (5), Lord Mansfield says: "The statute does not militate against any transaction *bona fide*, and where there is no imagination of fraud; and so is the common law. But if the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed;

(1) 3 Co. 81 b.
(2) 6 DeG. M. & G. 95.
(3) 28 L. J. Ch. 45.
(4) 8 Moo. P. C. 90.
(5) Cowp. 434.

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yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void." The conveyance here from the son to the father was made with the knowledge and connivance of the latter to defeat the former's creditors. The moving consideration in the minds of both parties was to place the property out of the reach of creditors. See *Bott* v. *Smith* (6). The fraudulent and collusive character of the transaction is disclosed by the immediate reconveyance of the property by the father to the son's wife. The two deeds are part of the same transaction, and their true nature is illustrated by each other. The conveyance to the father would be bad as having been made with a fraudulent intent. By the deed from the father to the son's wife the whole transaction is shown to be merely a cloak for retaining the property in the son. See *Harman* v. *Richards* (7); *Ex parte Games* (8); *Corlett* v. *Radcliffe* (9); *Holmes* v. *Penney* (10); *Slater* v. *Dudley* (11). There was no change of possession, and no alteration of the position of the parties. This has ever been regarded as evidence of fraud: *Edwards* v. *Harben* (12); *Bennett* v. *Musgrove* (13). The deed from the father to the son is not supported by valuable consideration. The only consideration set up is a liability of the defendant son on the bond. But the bond was satisfied by the other obligors, and no liability remained outstanding against the son to the father. The answer does not set up that the father was a purchaser without notice, as required by the statute, and the rule of pleading that the defence, want of notice, must be distinctly pleaded: *Phillips* v. *Phillips* (14). If the bill is dismissed it should be without costs as the circumstances justified an investigation: *Jack* v. *Greig* (15).

A. A. Stockton, Q.C., for the defendants:—

The original conveyance from the father to the son was made in consideration of the son's bond to maintain and support the father, and therefore while the property remained in the son's hands it was subject to a lien in the

(6) 21 Beav. 511, 516.
(7) 10 Hare, 81.
(8) 12 Ch. D. 314.
(9) 14 Moo. P. C. 121, 135.
(10) 3 K. & J. 90.
(11) 18 Pick. 373.
(12) 2 T. R. 587.
(13) 2 Ves. Sr. 51.
(14) 3 Giff. 200.
(15) 27 Gr. 6.

father's favor: *Cunningham* v. *Moore* (16); *Waters* v. *Waters* (17). By the conveyance back to the father the son was merely restoring to the father his own property. The father certainly cannot be regarded as a volunteer, but as a creditor of the son. Under the statute of Elizabeth a debtor may prefer one creditor as against another, though the debtor is insolvent to his own knowledge and the knowledge of the preferred creditor, provided it is done in good faith, and is not a contrivance for the benefit of the debtor. The intent of the statute is not to provide equal distribution of the estate of a debtor among his creditors. See *Middleton* v. *Pollock* (18); *Ex parte Games* (19); *In re Johnson* (20); *Mulcahy* v. *Archibald* (21). The conveyance will also be upheld though made for the express purpose of defeating the execution of another creditor: *Alton* v. *Harrison* (22); *Dalglish* v. *McCarthy* (23). While inadequacy of consideration does not *per se* prove fraud, the presence of valuable consideration in a conveyance renders the case of those who contest it one of great difficulty: *In re Johnson* (24). In *Harman* v. *Richards* (25), Turner, V.C., says: "It remains to be considered whether the settlement which was thus made for valuable consideration was also made *bona fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge." In order to create a fraudulent intent under the statute there must be such an intent in the mind of the grantee as well as in the mind of the grantor: *Hepburn* v. *Park* (26); *Brown* v. *Sweet* (27). The relationship of the parties is only of importance when suspicious circumstances are present: *Wait* on Fraudulent Conveyances (28). If the transaction here is considered to be an agreement between the parties that the son was to

(16) *Ante*, 116.
(17) *Ante*, 167.
(18) 2 Ch. D. 104.
(19) 12 Ch. D. 314.
(20) 20 Ch. D. 389.
(21) 28 Can. S. C. R. 523.
(22) L. R. 4 Ch. 622.
(23) 19 Gr. 578.
(24) 20 Ch. D. 389.
(25) 10 Hare, 81.
(26) 6 O. R. 472.
(27) 7 A. R. 725.
(28) S. 242.

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convey to his father, and the father to the son's wife in consideration of her undertaking to maintain and support the father it is good. See Vol. 12, Rul. Cas. 354, where it is said that a conveyance on condition that the grantee should support certain members of the grantor's family is not voluntary.

Chandler, in reply.

1899. April 18. BARKER, J.:—

The bill in this case was filed for the purpose of setting aside two conveyances—one from the defendants to one Placide F. Bourgeois, dated September 21st, 1892, the other from Placide F. Bourgeois to the female defendant Delphine Bourgeois, dated October 17th, 1893—on the ground that they are fraudulent under the statute of Elizabeth as having been made with intent to defeat, hinder, delay and defraud the plaintiff and other creditors of the defendant Maurice Bourgeois.

The bill alleges that the plaintiff on the 19th of January, 1897, purchased at sheriff's sale the interest of the defendant Maurice Bourgeois in the land in question, and that his conveyance from the sheriff was registered on the 28th of January, 1897. And the bill prays for a declaration that the two deeds first mentioned are a cloud upon his title, and that they be removed from the registry. The only question raised before me was whether these two deeds were fraudulent as claimed; and I shall therefore deal only with this one point.

The evidence shows that Placide F. Bourgeois had three sons and two daughters living in 1883, and finding himself and wife getting too old for work, concluded to do a very common but not a very wise thing—that is, to convey his property to his sons on an agreement by them to maintain him and his wife during their lives. Accordingly, he did convey a lot of land to each of his sons. The conveyance to the defendant Maurice, one of the sons, is dated April 25th, 1883; the conveyances to the other two sons, Tranquil and Francois, are not in evidence, but they were made shortly before or about that time. Admittedly the only consideration for those conveyances was a bond or agreement dated April 25th, 1883, given by the three sons to their father and mother, and which bond is as follows:

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"Know all men by these presents, that we Maurice P. Bourgeois, Tranquil P. Bourgeois, and Francois P. Bourgeois of the Parish of St. Mary's in the County of Kent and Province of New Brunswick (Farmer). We are held and firmly bound unto Placide F. Bourgeois and Ann (his wife) of the Parish of St. Mary's, in the County of Kent and Province aforesaid, in the penal sum of three hundred dollars lawful money of Canada, to be paid to the said Placide F. Bourgeois and Ann his wife or their certain attorney, executors, administrators or assigns as a yearly payment for their lifetime for such payment well and truly to be made, we bind ourselves, our heirs, executors, administrators firmly by these presents. Sealed with our seal and dated this twenty-fifth day of April in the year of our Lord one thousand eight hundred and eighty-three. The condition of this obligation is such that if the above bounden Maurice P. Bourgeois, Tranquil P. Bourgeois, and Francois P. Bourgeois do and shall for their parts keep the said Placide F. Bourgeois and Ann his wife for their life time, and them to be keep in clothing and boarded and with lodgment as they may require to have, and also to keep their two daughters Emile and Delphine Bourgeois as long as they may be willing to stay until they may be married, then this obligation to be void, otherwise to remain in full force, virtue and effect.

"Signed, sealed and delivered in the presence of Joseph Bernard, *Justice of the Peace.*" Maurice P. Bourgeois,[L.S.] Tranquil P. Bourgeois,[L.S.] Francois P. Bourgeois,[L.S.]"

This bond was duly acknowledged on the day of its date and recorded in the registry of Kent County on the 15th day of December, 1887. On the 19th of December, 1887, the defendants mortgaged the lot to James McLean for $100 and interest, and on the 6th of May, 1891, they made a second mortgage to Judge Landry to secure the sum of $600 and interest. On the 31st October, 1895, Judge Landry took an assignment of the McLean mortgage upon which there seem to have been due at that time $44.35. On the 21st of September, 1892, the defendants conveyed the lot back to Placide, the father, and on the 17th of October, 1893, he conveyed it to the defendant Delphine. The expressed consideration in

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the conveyance to Placide is $1,300, and in that to Delphine it is $500. Appended to the conveyance to Placide and registered with it is a memorandum in the following words: "I, Maurice P. Bourgeois do hereby certify that aforegoing deed is given to pay and satisfy the amount of a bond of maintenance given by me to Placide F. Bourgeois and wife on the 25th day of April, A.D. 1883, and duly registered in Libro G. No. 2, Folio 24, and numbered 18028 therein the 15th day of December, A.D. 1887.

Maurice P. Bourgeois."

This conveyance and memorandum were duly registered September 23rd, 1892, two days after they were executed, but the conveyance from Placide to Delphine, which is dated October 17th, 1893, was not registered until October 7th, 1895. The defendant Maurice Bourgeois was engaged in trading in a small way, and he became indebted to the plaintiff and others in a sum which he was altogether unable to pay. A fire took place on his premises in the summer of 1892, which destroyed his barn and some stock and farming utensils. Judgments for small amounts were obtained against him, and as a result of the fire and sales under these judgments all his property was swept away, except this lot of land in question. The insurance on the stock—some $425—went to Judge Landry, who held a mortgage on it for advances. There is no doubt therefore that when Maurice conveyed the land back to his father he was insolvent and had no other property left. I have no doubt that Placide, the father, was himself well aware of this when he asked for and received the conveyance back. The evidence also shows that during the nine years which elapsed from the giving of the bond up to the transfer of the property back to the father in 1892, the defendant Maurice contributed nothing whatever to the support or maintenance of his father, although he had been applied to for that purpose. It is useless to discuss the various cases cited as to the construction and application of the Statute of Elizabeth. The question becomes a question simply of fact. The conveyance may have defeated creditors, it generally does; it may have been made by a person altogether insolvent, it generally is; it may have transferred all or substantially all

the debtor's property, that is generally the case and the transferee may have known all this at the time, as in most cases he does; but notwithstanding all this, if the conveyance is *bona fide* and for a valuable consideration and there is no benefit directly or indirectly retained by the debtor for himself, the transfer is perfectly good. I need only cite *Mulcahy* v. *Archibald* (29), decided in 1898, as an authority for what I have stated. It is I think impossible to treat the conveyance from Maurice to his father as a voluntary deed. It is unnecessary for the purpose of this case to decide whether or not Placide had a lien on the land for the support and maintenance secured to him by the bond, a proposition for which the case of *Cunningham* v. *Moore* (30) was cited, and to which I may add a later case in Ontario—*Ward* v. *Wilbur* (31). For if no such lien existed, Maurice's bond was outstanding and his release from further liability on that bond was a valuable consideration I think for the conveyance. The property which was free when Maurice got it from his father was being returned heavily encumbered and after the lapse of nine years, during which these old people had received nothing from it, and in satisfaction of an outstanding legal obligation, the amount of which was uncertain at that time, because it was impossible to know how long these old people would live. We know now that they had lived over six years, and if Maurice's liability on the bond is placed at only $100 a year, he has already escaped the payment of a sum which with the amount due on the mortgages is probably as much as the premises are worth or would realise at a sale. See *Baker* v. *The Trusts, etc., Co.* (32). If the lien existed as Mr. Stockton contended, the plaintiff as a purchaser at a sheriff's sale would take subject to it and his title would in no way be clouded by the conveyances of which he complains. I do not, however, rest my judgment on that ground. The transfer from Maurice to Placide was made and completed by registry before the plaintiff had acquired any rights in the land by reason of his judgment. I have already pointed out that it was made for a valuable consideration, and I can see no reason for supposing that it was not made *bona fide*. So far from

(29) 28 Can. S. C. R. 523.
(30) *Ante*, 116.
(31) 25 A. R. 262.
(32) 29 O. R. 436.

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there being anything in this transaction for which Maurice ought to be condemned, it seems to me that for handing back the property to his father under the circumstances he is rather to be commended. I can find nothing in the evidence to support the notion that any benefit, direct or indirect, was intended to be secured to Maurice. The only circumstance suggested is the fact that Placide afterwards conveyed the property to Maurice's wife. When this conveyance was delivered the evidence does not show, but it is proved that Delphine, the wife, agreed to take care of these old people as part of the consideration for the conveyance, and also to pay off the balance due on the mortgages. It also appears that for a good portion of this time she has actually supported them, and that she has made a conditional payment of $60 to Judge Landry on account of this mortgage—that if her title to the property proved to be good the $60 was to be credited on the mortgage, otherwise it was to be returned. As to the defendant Maurice, he has been absent from the Province for the greater portion of the time since his stock was sold out, trying to earn a living elsewhere. In my view the evidence altogether fails in showing that this transaction was in any way tainted with bad faith, or intended in any way as a cloak to the defendant. The conveyance from Maurice to Placide is in my opinion perfectly good and valid, and in that case it is immaterial whether he gave the property to Delphine or what he did with it. I think the plaintiffs cannot succeed, and the bill will therefore be dismissed. Mr. Chandler contended that in no event should the defendants get their costs, and he cited some authorities to show that costs were not given when the circumstances were of so suspicious a character as to warrant investigation though the bill was eventually dismissed. I do not think any such principle applies to this case. It may be quite true that the plaintiff was misled by Maurice Bourgeois' statement to him in 1891 upon which he gave him credit, but that has nothing to do with this suit. Before commencing these proceedings the plaintiff knew all about this bond, and that the transfer of the property back to Placide was in discharge of this bond, for the record showed these facts, and the plaintiff sets them out in his bill. And

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when he saw by the records that this bond was dated at the same time as the original conveyance from Placide to Maurice he might fairly have assumed that the transaction was precisely what it is shown to have been. If the plaintiff under these circumstances chooses to try the experiment of a suit I do not see why he should escape paying the defendants' costs if the experiment fails.

The bill will be dismissed with costs.

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May 12.

Costs—Construction of statute—C. 119 C. S.—Act 60 Vict. c. 24.

The provision in the table of fees of the Supreme Court in Equity, C. 119, C. S., that for services not therein provided for, the fees are to be those allowed on the Common Law side of the Supreme Court, applies to the table of fees in the Supreme Court Act, 60 Vict. c. 24.

Application by the plaintiff to review the Clerk's taxation of costs. The facts sufficiently appear in the judgment of the Court.

Argument was heard May 2, 1899.

C. E. Duffy, for the plaintiff.

F. St. John Bliss, for the defendant.

1899. May 12. BARKER, J.:—

The Clerk in this case taxed a fee of $5 for instructing counsel as allowed at law by 60 Vict. c. 24, instead of the fee provided by c. 119 of Con. Stat. In the table of fees contained in the latter chapter it is provided thus: "For all other services, the like fees as are allowed to attorneys on the Common Law side of the Supreme Court." And in the scale of fees provided for the Common Law side of the Court and contained in c. 119, there is no fee of $5 as allowed by the Clerk. The plaintiff contends that the provision I have just quoted, "For all other services," etc., means that for those services the fees there allowed can only be taxed, and that when the scale of fees for the Common Law side of the Court was enacted in 1897 by 60 Vict. c. 24, it did not

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alter the fees taxable in Equity under the general provisions I have quoted. The Clerk allowed the fee of $5, being of opinion that he was bound by the scale of fees contained in the Act of 1897. I think he was right in doing so. I cannot agree in thinking that the words "For all other services," etc., are to be read as though the word "now" were introduced so as to make the sentence read "For all other services as are *now* allowed," etc. Neither do I think that the fees are to be taxed as though in the Equity table of fees had been incorporated instead of the general provision I have quoted, all the fees and services to which that provision relates. Neither course was adopted, and we have simply to apply the provision to the case in hand. A statute is supposed always to be speaking, and when the Clerk was called upon to tax these costs he was directed to allow such fees under this provision *as are allowed*, which means as were allowed at the time of taxation, and not as were allowed some years ago.

The application to review is refused.

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