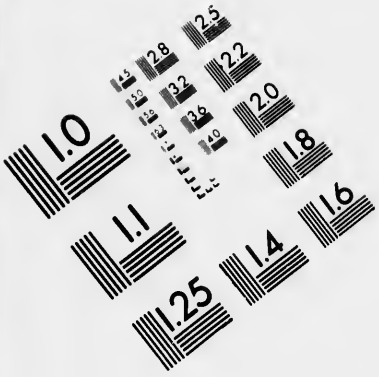


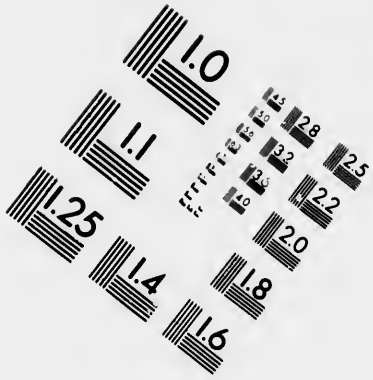
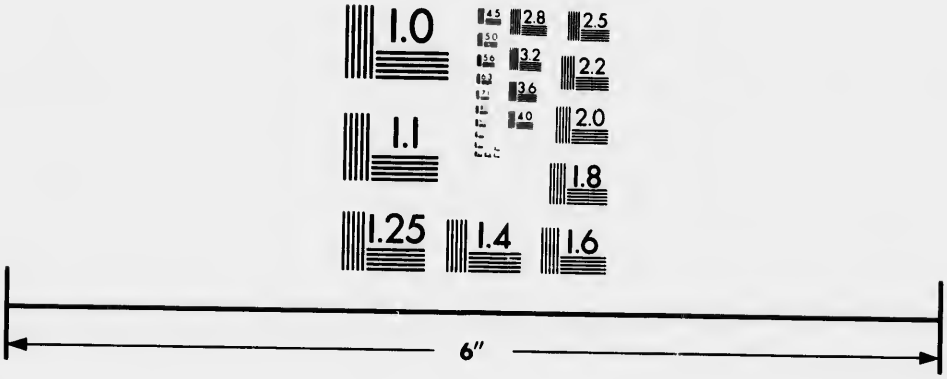
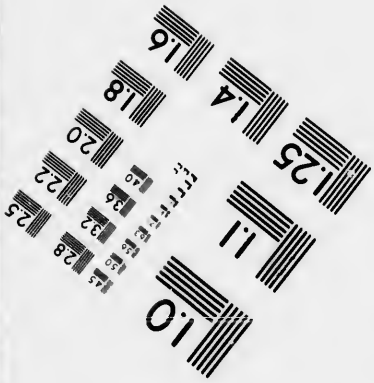
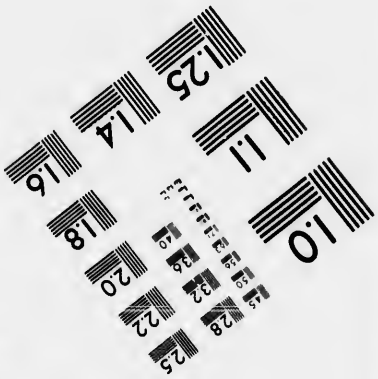


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [x] Includes index(es)/ Comprend un (des) index

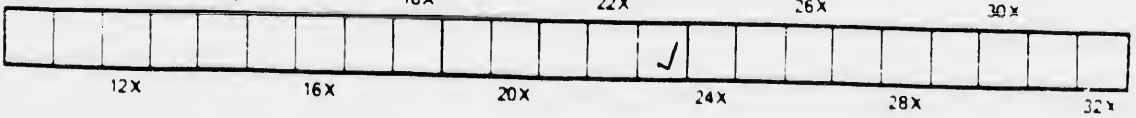
Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [x] Additional comments:/ Commentaires supplémentaires: Pages 324 & 435 are incorrectly numbered pages 342 & 343. Page 365 is repeated. Various pagings.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X 12X 14X 16X 18X 20X 22X 24X 26X 28X 30X 32X



The copy filmed here has been reproduced thanks to the generosity of:

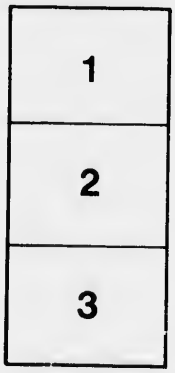
The Nova Scotia
Legislative Library

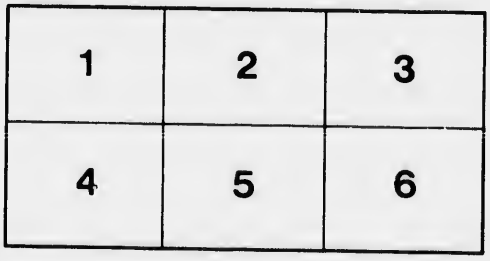
The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:





L'exemplaire filmé fut reproduit grâce à la générosité de:

The Nova Scotia
Legislative Library

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

SU

ONTAINI
(

C

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

AND IN THE

VICE ADMIRALTY COURT AT HALIFAX.

BY HENRY OLDRIGHT,
BARRISTER,
AND OFFICIAL REPORTER TO THE SUPREME COURT.

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

VOLUME I.

CONTAINING CASES DETERMINED FROM MICHÆLMAS TERM, 1860, TO MICHÆLMAS TERM, 1865,
(INCLUSIVE OF THE FORMER AND EXCLUSIVE OF THE LATTER TERM.)

HALIFAX, N. S.:
COMPTON & CO., 30 & 32 BEDFORD ROW,
1870.

TO

THE HONORABLE

SIR WILLIAM YOUNG, KNIGHT,

CHIEF JUSTICE OF THE SUPREME COURT OF NOVA SCOTIA, AND JUDGE OF THE VICE ADMIRALTY COURT AT HALIFAX

THIS WORK IS,

BY HIS LORDSHIP'S PERMISSION,

DEDICATED,

WITH FEELINGS OF REAL RESPECT AND REGARD,

BY HIS FORMER PUPIL,

AND MUCH OBLIGED FRIEND,

H. OLDRIGHT.

HALIFAX, N. S., APRIL, 1870.

JUDGES OF THE SUPREME COURT

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

CHIEF JUSTICE.

The Honorable WILLIAM YOUNG,
Appointed 3rd August, 1860.

JUDGE IN EQUITY AND SENIOR ASSISTANT JUSTICE.

The Honorable JAMES W. JOHNSTON,
Appointed 11th May, 1864.

OTHER ASSISTANT JUSTICES.

The Honorable WILLIAM BLOWERS BLISS,
Appointed 9th April, 1834.

The Honorable EDMUND MURRAY DODD,
Appointed 19th February, 1848.

The Honorable WILLIAM FREDERICK DESBARRES,
Appointed 11th November, 1848.

The Honorable LEWIS MORRIS WILKINS,
Appointed 11th August, 1856.

JUDGES OF THE VICE ADMIRALTY COURT.

The Honorable ALEXANDER STEWART, C. B.,
Appointed 29th April, 1846—Died 1st January, 1865.

The Honorable WILLIAM YOUNG,
Succeeded 1st January, 1865.

CROWN OFFICERS.

ATTORNEYS GENERAL.

The Honorable ADAMS G. ARCHIBALD,
Appointed 10th February, 1860—Resigned 11th June, 1863.

The Honorable JAMES W. JOHNSTON,
Appointed 11th June, 1863—Resigned 11th May, 1864.

The Honorable WILLIAM A. HENRY,
Appointed 11th May, 1864.

SOLICITORS GENERAL.

The Honorable JONATHAN MCCULLY,
Appointed 10th February, 1860—Resigned 11th June, 1863.

The Honorable WILLIAM A. HENRY,
Appointed 11th June, 1863—Resigned 11th May, 1864.

The Honorable JOHN W RITCHIE,
Appointed 11th May, 1864.

PREFACE.

Having had the honor to be appointed in June, 1865, Reporter of the Decisions of the Supreme Court of this Province, by the then Lieutenant Governor, Sir Richard Graves MacDonnell, C. B., my first efforts were directed to the publication of such of the decisions of the previous five years, (during which there had been no official Reporter), as were of permanent value, and as it was possible to obtain. I accordingly wrote to the Judges, desiring their Lordships to furnish me with such of their written judgments during the period named, as were of abiding importance. The result is seen in some six hundred pages of the present volume.

The preparation of these decisions for the press proved to be a much more formidable task than I had anticipated. In the first place the decisions were numerous, and most of them very lengthy. In addition to preparing a marginal note to every case,—a work of no small labor, difficulty, and delicacy, —superintending the publication of the judgments and verifying all the references to authorities, I was obliged in many cases to prepare an abstract of the pleadings and evidence, in order to make the report of the judgments more intelligible. The preparation of these abstracts involved often a long and tedious search for the necessary material at the offices of the Counsel engaged in the various causes, at the Prothonotary's office, or among the papers in possession of some of their Lordships. How I have succeeded in the task will be best ascertained by an examination of the book itself.

As will appear from what has been already said, the back decisions which I have published are almost entirely such as have been considered by the Judges as of permanent importance. I have, however, published two or three others on my

own responsibility, because the principles which they contained, although treated by the Court as firmly settled, seemed to me to be imperfectly known or understood.

Beside the back decisions of the Supreme Court during nearly five years, this volume contains several important Admiralty decisions delivered during the same period, by the late Judge, the Hon. Alexander Stewart, C. B., now deceased, and the present Judge, the Hon. Sir William Young. The volume also contains a portion of my own proper work, being the reports of the arguments and decisions of the Supreme Court during the first six months subsequent to my appointment, which alone occupy upwards of two hundred pages.

As this book may fall into the hands of non-professional readers, and as the continuance of these Reports must depend on the wisdom and liberality of the Provincial Legislature, it may not be amiss to make a few remarks on the value and importance of Law Reports, not only to the Profession (by whom their worth is well understood), but also to the whole Public, whom they really concern much more than the Profession itself.

The value and absolute necessity of authentic reports of the decisions of the Superior Courts may be enforced by a variety of arguments, but the strongest argument in their favor has always seemed to me to be that these decisions form a part of the law itself, and, as *ignorantia legis neminem excusat* (ignorance of the law excuses no man), it is dangerous for any to be ignorant of them. When a principle is once clearly settled by judicial decisions, it is as binding as the Statute Law. The meaning of the Statute Law itself is often settled by such decisions. Several instances of this kind will be found reported in this volume. No one doubts the propriety and necessity of a legislative provision for the publication of the Statute Law. Why should there be any doubt as to the necessity of a similar provision for the publication of what constitutes a large and most important part of our Common Law, namely, the decisions of our own Superior Courts? Without the aid of a Reporter, of course these decisions cannot be generally known.

I may add on this point a few sentences from a work of one of my learned predecessors, the author of several volumes of House of Lords Reports. The importance and necessity of Law Reporting are so well stated in these sentences, that I think I may be excused for transcribing them.

The learned author says:—"If law, having attained its perfection as a science, is stationary; if being exempt from the condition of all human things, it is unaffected by the impression of external circumstances, and yields nothing to the change of manners and opinions, or to the more pressing exigency of the necessities of human intercourse, Reports are now and have been for ages useless. But if new rules of law arise out of new combinations of fact; if old rules are modified or changed for the purpose of being adapted to the corresponding changes of society; if there is, among the doctrines of law, sufficient uncertainty to admit of a latitude and diversity of opinion among those who preside in the Courts of Judicature, and administer the law; these are matters fit to be known, and of too much practical importance in the administration of human affairs to be overlooked or neglected; for they may concern the *life*, the *fame*, and the *fortune* of every individual in society." (1 *Bligh's Reports*, *Preface*, *p.* 4).

The pecuniary value of Law Reports to the public at large was strikingly illustrated shortly after my appointment. An action was brought by a man in the country to recover possession of lands. His claim was keenly contested, a large number of witnesses examined, and the trial occupied several days. The jury found a verdict against him, and the case was subsequently brought before the Court *in banco* on a rule to set aside the verdict. His Counsel (who is a prominent member of the Bar) on opening the rule, was informed by the Court of a decision delivered some years previously, in which the point for which he was contending was settled against him; and he felt himself compelled to abandon his rule. Had this decision been generally known, at or shortly after its delivery, this man would have been saved an utterly useless expense of several hundreds of dollars, beside the loss of his own time, the ill feeling, and all the other evil consequences of long and harassing litigation.

Some persons may object to the length of some of the decisions in this volume. I can only say that the written judgments (which are the most lengthy) are reported exactly as delivered, and that, whatever may be done in the future, I have not hitherto felt myself at liberty to curtail such judgments. I think, however, that it will be absolutely necessary hereafter, where the decisions are very lengthy, to publish only the substance of them.

I have endeavoured to discharge to the utmost of my ability the important duty entrusted to me by the Government and the Legislature. The duty of a Law Reporter is, under any circumstances, and, even with the highest encouragement and patronage, an anxious, laborious, and, with regard to his professional reputation, a momentous one. The taking of the short-hand notes, the digesting, compressing, selecting, and revising the matter, the care and study required not to omit any material statement or fact which forms an ingredient of the judgment, and is part of the land-mark to future decision, constitute an amount of severe labor, which none but those who have condemned themselves to it can easily conceive.

I think it is not the slightest exaggeration to say, as has been publicly stated by His Lordship the Chief Justice, that the work of our Supreme Court has increased nearly four fold within the last fifteen or twenty years. As a matter of course there has been a corresponding increase in the work of the Reporter of the Court. Even since my appointment my work as Reporter of the Supreme Court has nearly doubled. I have not confined myself to that Court alone, but have also reported for the Vice Admiralty Court and Divorce Court.

I could not afford to abandon all other engagements, but I have conscientiously given to this work a very large proportion of my time,—all the time that I could possibly spare from other absolutely necessary duties. Some idea of the magnitude of a portion of my labors may be formed from the statement of the fact that I have not unfrequently spent an entire day in the Law Library, verifying the references to authorities in one single judgment; and that I have always

carefully read three, and generally four proofs of every page of the matter.

I may here remark that in the various references to authorities throughout the work where no particular edition is mentioned, the Law Library edition is that indicated.

I may also state that all the Rules of Court now in force will be found at the end of the volume.

No one regrets more than myself the delay in the publication of this volume, which has arisen mainly from circumstances beyond my control. If sufficient encouragement is afforded, I intend to commence immediately the publication of a second volume, which will bring up the reports of the decisions, etc., to about the present time, and which will be completed at the earliest possible period,—certainly, I trust, before the close of the present year.

In conclusion, I have to express my warmest thanks to the Judges, and to every member of the Profession with whom I have had occasion to confer in the progress of my labors, for their kind sympathy, constant encouragement, friendly countenance and coöperation. I have especially to acknowledge my indebtedness to His Lordship the Chief Justice, to whose manuscript note book of the arguments and decisions I have had free and ready access, and from whom I have, especially in the preparation for the press of the back decisions, derived invaluable aid.

With these remarks I submit this work to the kind consideration of the Legislature, the Profession, and the Public on whose liberal support the continuance of the undertaking must depend.

Halifax, N. S., April, 1870.

TABLE OF CASES.

ERRATA.

Page 96, line 11, for "*Sadlier* v." read "*Sadler* and."
" 101, line 27, for "L. & E." read "Law & Eq. Rep."
" 109, last line but one, after "*J. W. Ritchie*" add "Q. C."
" 153, line 6, for "L. & E. 9. R." read "Law & Eq. Rep."
" 227, line 29, for "wil" read "will."
" 235, line 3, for "23rd and 25th" read "26th and 28th."
" 287, lines 14 and 15, for "*Phalen* v. *Phalen*" read "*Phelan* v. *Phelan*."
" 317, in the marginal note, for "Act" read "Act."
" 322, line 30, for "*nulla*" read "*nulla*."
" 356, line 9, after the word "maintainable" insert "unless."
" 406, line 14, for "*McCay*" read "*N. W. White*."
line 15, for "*N. W. White*" read "*McCay*."
" 418, last line, insert "as" at the beginning of the line.
" 421, line 19, for "defendents" read "defendants."
" 423, line 16, for "*Barraclough*" read "*Barraclough*."
" 426, last line but one, for "*J. R. Ritchie*" read "*J. W. Ritchie*, Q. C."
" 433, last line but four, for "*Megers*" read "*Meger*."
" 473, line 12, for "*Carnegle*" read "*Carnegie*."
line 21, for "*Ferner*" read "*Fenner*."
" 556, line 4, for "1 Ves. Len." read "1 Vesey Senior."
" 667, marginal note, for "services" read "service."
" 668, marginal note, first line, after "is" insert "not."
line 11, after "affidavits" insert "accounting for the delay."
" 710, marginal note, last line but eight, for "oloths" read "frivolous."
" 789, marginal note, line 20, between "to" and "locality" insert "a."
" 837, line 20, for "1863" read "1869."

INDEX.

Page iii, line 20, omit "1."
" viii, last line but four, omit "he."
last line but two, for "proceedinge" read "proceedings."
" ix, last line but two, for "counts" read "count."
" xi, line 28, for "mortgager" read "mortgagor."
" xvii, line 2, for "*Estate*" read "*Estate*."
" xix, line 15, between "to" and "locality" insert "a."
" xxiii, line 23, for "civie" read "civil."
last line but three, for "sum" read "sum."
" xxv, line 19, for "*the*" read "*re*."

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHÆLMAS TERM,

XXIV. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J.
BLISS J.
DODD J.
DESBARRES J.
WILKINS J.

DODGE *versus* TURNER.

December 29.

THIS case was argued early in the term by *J. W. Ritchie*, Q. C., for plaintiff, and *S. L. Morse* for defendant. The facts appear sufficiently in the judgments of *Young*, C. J., and of *Bliss* and *Wilkins*, J. J.

T., by written contract, agreed to sell to *D.* a farm for £200, but subsequently refused to execute the deed. *D.* brought a suit for specific performance, to which *T.* pleaded several pleas, attacking the agreement on various grounds, but raising no distinct issue of circumvention or fraud, though by way of recital to his fifth plea he stated that he had been overreached, and that *D.* had by undue advantage endeavored to obtain his property for an inadequate consideration. The jury found that *T.* was not incapable of making a provident bargain—that the agreement was duly explained to him at or before its execution—that *D.* did not depreciate the value of the farm to him, knowing it to be of greater value than the amount of the purchase money; but they also found the value of the farm to be £250, and that *D.* had enjoined on *T.* secrecy as to the bargain.

Held by *Young, C. J., Dodd, DesBarres*, and *Wilkins, J. J.*, (*Bliss J.* dissenting,) that *D.* was entitled to a decree for specific performance.

By *Bliss J.*, That he should rather be left to his remedy by action for damages for breach of the contract.

YOUNG C. J.—In this case the plaintiff, *S. H. Dodge*, claims from the defendant, *Wm. Turner*, the specific performance of a written agreement, made on the 27th Jan'y. 1859, for the purchase of the defendant's farm at the sum of £200. Under this agreement the plain-

1860. DODGE v. TURNER. tiff entered into possession of the farm, but in a short time was obliged to leave it, as the defendant became dissatisfied with the bargain, and refused to execute a conveyance. This suit was therefore brought for specific performance, and the defendant put in five several pleas attacking the agreement on various grounds, but raising no distinct issue of circumvention or fraud. Mr. Justice *Wilkins*, before whom the cause was tried in the last June term at Annapolis, extracted the issues from the pleadings in the course of the trial, and submitted seven distinct questions to the jury, and the findings of the jury thereon, and the general effect and scope of the testimony, with the principles which apply to this branch of equity jurisdiction, have been argued before the whole Court in the present term.

It was not denied by the defendant's counsel that the Court had power under section 13 of chap. 127 of the Revised Statutes, (second series), to decree a specific performance of this contract, and a conveyance of the farm. This, indeed, could not be disputed, as the powers of a Court of Equity have been transferred to this Court, and among these powers, that of decreeing the specific performance of agreements has existed in the mother country from an early period in the history of the law, and in many cases is essential for the protection of the rights of parties, and the fulfilling of obligations according to their true intent and meaning. There are many instances where the awarding of damages would be no adequate compensation to the injured party; and this principle applies more especially to contracts touching the titles of real estate, and has always been maintained to a larger extent than in the cases of personal property or personal acts. The books go the full length of declaring, that where a contract has been entered into by competent parties, and is in the nature and circumstances of it unobjectionable, it is as much of course in a Court of Equity

to decree a specific performance as it is to give damages at law. *Hall* v. *Warren*, 9 Vesey, 608.

At the same time there is a wide distinction between the right to recover damages for breach of contract, and the right to have a contract specifically performed. In the former case, a Court of Law has no discretion whatever, and the only question to be determined by the jury is the extent of the damages; but in the latter, a Court of Equity has a large discretion, to be exercised, of course, upon sound principles, but giving them power to survey all the circumstances of each particular case, and to award or refuse a specific performance according to their conception of what is substantially just and right.

It may be laid down, therefore, as a universal rule, that the party applying for this remedy must come into Court with clean hands. The agreement must have been fairly entered into and fully understood. No undue influence must have been used and no undue advantage taken. The slightest admixture of fraud or imposition — of the *suppressio veri* or *allegatio falsi* — even a pressure too importunate, that sort of surprise that amounts to circumvention, in short any unconscionable advantage will be fatal to the plaintiff's claim.

But it is not enough that the defendant has done a weak or an indiscreet thing, that he has not advised with judicious friends whom it might have been prudent to consult, or, as in this instance, that he has entered into a contract for the sale of his property without the consent of his wife, though in many cases she of all others is the party with whom he ought to advise. In *Willis* v. *Jernegan*, 2 Atkins, 251, Lord *Hardwicke* laid down the rule "that it is not sufficient "to set aside an agreement in equity to suggest "weakness and indiscretion in one of the parties "engaged in it, for supposing it to be in fact a very "hard and unconscionable bargain, if a person will "enter into it with his eyes open, equity will not re-

1860.

DODGE v. TURNER.

"lieve him upon this footing only, unless he can show "fraud in the party contracting with him, or some "undue means made use of to draw him into such an "agreement." Neither is it enough that the defendant has sold his land at too low a price, unless the inadequacy is so glaring as, in the language of Lord *Eldon*, to shock the conscience, and of itself to afford conclusive and decisive evidence of fraud. *Coles* vs. *Trecothick*, 9 Ves. 234.

In *Gartside* v. *Isherwood*, 1. Bro. C. C., 558. Lord *Thurlow* declared "that in setting aside contracts on "account of inadequate consideration, the Court pro- "ceeds on the ground of fraud. In all such cases "the basis must be gross inequality in the contract, "otherwise the party selling cannot be said to be in the "power of the party buying; unless actual imposition "is proved by gross inequality, other circumstances "of fraud will pass for nothing—the basis must be "gross inequality." *Fry on Specific Performance*, 110.

The same doctrine is enounced in an American case, *Osgood* vs. *Franklyn*, 2 Johns. Ch'y. Rep. 23, and a recent illustration of it may be found in the case of *Abbott* vs. *Sworder*, where an estate was bought for £5000, the value of which was considered by the *Vice Chancellor* to be £3500, and the performance of the contract resisted by the vendee on the ground that the purchase money was too high; but this inadequacy of consideration was held both by the *Vice Chancellor* and by Lord *St. Leonards*, to be no bar to specific performance, which was accordingly decreed at the suit of the vendor. 4 *DeG. & Smale*, 468.

Such being the general principles applicable to the case before us, let us now inquire into the circumstances that are in proof. There was a mass of conflicting testimony as to the value of the farm, some witnesses estimating it as high as £450, others at £400, at £350, and £300, and the plaintiff and his friends as low as £200. It was bought by the defendant five years ago at £130, but the impression

derivable from the whole evidence is that he bought it at a low figure. Had he been more vigilant and active, he would probably have obtained £50 or £100 more. The jury, in answer to one of the questions, fixes the value at £250, and assuming this to be a just medium, there is no such inequality in my opinion as would justify the Court in refusing relief upon this ground. Besides the defendant has contracted to give a good and sufficient title, which would include a release of dower, but as the wife is obviously disinclined and cannot be compelled to join in the deed, the plaintiff is in this condition, that he must accept a title in so far imperfect, or forego his bargain.

I have already stated that the defendant omitted to raise a specific issue of fraud or circumvention, which of all others would have been the most effective, and was the most necessary for his purpose. He states, indeed, by way of recital or introduction to his fifth plea, that he had been overreached, and that the plaintiff had by undue advantage endeavored to obtain his property for an inadequate consideration; but he has not ventured to put the decisive issue, fraud or no fraud; and, if he had, there is nothing in the evidence that in my judgment would have sustained it. The material allegations in the pleas the jury have negatived. They have found that the defendant was not incapable of making a provident bargain; and upon this point it is worthy of remark that though the plaintiff was examined, the defendant was not. This circumstance alone would naturally have a strong influence with the jury. They have found also that the agreement was duly explained to the defendant, at or before the execution of it, which does away with any suspicion growing out of the fact so largely insisted on at the argument, that the agreement was drawn by the plaintiff's father, and remained in his hands. The jury have also found that the plaintiff did not depreciate the value of the farm, knowing it to be of greater value than the amount of the purchase money.

1860.

DODGE v. TURNER.

These findings substantially declare that in the opinion of the jury the transaction on the part of the plaintiff was open and fair, and upon a view of the whole evidence I concur in this conclusion. It is true that no counterpart of the agreement was left with the defendant, but then it was left by the parties with the person whom they accounted their mutual agent, and no counterpart was asked. This is perpetually done in the cases where solicitors are employed, and it would never do to hold it evidence of fraud. The only suspicious circumstance is the request of the plaintiff that the bargain should be kept secret; but as this may not have proceeded from any fraudulent motive, and as the secret in point of fact was not kept, I have not been able to persuade myself that it is enough to deprive the plaintiff of the relief he has sought.

I think, therefore, that it would be inequitable to remit the plaintiff to the trial of a second issue where the defence might assume a new shape, and that a decree for specific performance should pass in the usual form.

I am the more induced to this conclusion, because it is clear that we must either pass the decree as prayed for, or award an issue of *quantum damnificatus*, as was done in *City of London* v. *Nash*, 3 Atkins, 512, 517, and the other cases cited in the note to 2 *Story's Equity Jurisprudence*, 108. But such an issue would be a positive injury to the defendant, as it would largely increase the costs, which in the end must fall upon him, and would swallow up nearly the whole of the purchase money in the expenses of litigation.

BLISS J.—I have not been able to free my mind from some considerable doubts in this case. The right which belongs to a Court of Equity, and which this Court as such now possesses to enforce the specific performance of a contract is too clear to be questioned. But if, as it is said, it is a matter of right to have such

a specific performance in every case where the contract is unobjectionable, we are bound to look at each case to see that it falls within this rule: and that there are no circumstances attending the transaction which unfit it for this remedy. Equity can only reject the application or grant it. There is no middle course by which while it gives relief to a party in case of a breach of contract, it can modify the remedy to suit the particular circumstances of the case. It gives the whole which is asked, or nothing. The remedy on the other hand, which a Court of Law offers him in such a case, by giving damages commensurate with the injury which he has sustained by the breach of the contract, meets all the justice and equities of the case, and ought to be sufficient, except in those cases where the plaintiff seeks on some good and solid ground the possession of that which is the subject matter of the contract; and where mere damages will not give him that full relief which he desires, and to which he may be entitled. In this instance, then, the Common Law reverses the general rule, tempering rather, if I may so say, the severity of a Court of Equity. It does not decree the whole or nothing, but gives a remedy far more equitable in general, and quite as just, because in measuring the *quantum* of damages to which the party is entitled for the infraction of the contract, it can accommodate itself to the peculiar circumstances of the whole case, and by them regulate the recompense which it awards, through the verdict of a jury.

Now having premised thus much with respect to the several remedies afforded by the two Courts of Equity and Common Law, let us look at some of the facts in this case.

It is one in which there can be no doubt that the plaintiff has made a good bargain in making this purchase for £200, and that he bought the property at much less than its real value. This very suit, and his desire to secure the property, is some proof of this, though certainly the verdict of the jury has reduced

1860.
DODGE v. TURNER.

the profits of the bargain to a less sum, perhaps, than I might have made them. The defendant, too, has not only made a bad bargain, but a very foolish one; for it appears from the evidence of *Lindsay Dodge* that the latter had offered the defendant £300 for the same property for which he asked £400, and when the defendant asked if the witness would not give another £50, he answered that he would, if he could sell his own place. This, it is true, was three years before, but there is nothing to show that the property had since fallen in value; on the contrary, it would appear to have risen, and to be still rising by reason of its orchard, which is growing every year more productive and valuable.

Now I am quite aware that a good bargain on the one side, and a bad or foolish one on the other, is not of itself a sufficient ground for refusing the specific relief which is asked; that mere inadequacy of price, unless it be very gross, will not of itself be sufficient. But starting from this point, how do we find that this bargain, such as it is, has been effected? A negotiation between the parties takes place; the defendant asked £300; the plaintiff offered £200. A pause or delay then ensues, during which the plaintiff enjoins secrecy on the defendant, or otherwise he would have nothing to do with it; and we have it in evidence from the statement of plaintiff to *Bowlsby*, that "he had to work headwork," as he significantly expresses it, "to keep the defendant's mouth shut, for "he knew if the neighbours heard of it, he should "not be able to get the land." And though we find that the defendant did mention the proposed bargain to one person, yet so effectually had the plaintiff succeeded in keeping his mouth shut, that the affair had not been even whispered to his wife, who seems to have been the best man of the two, and who would, it is perfectly clear, if she had known it, have prevented the defendant from entering into so silly a bargain. Nor do I much like the way in which this

bargain was, at last, consummated. This took place at eleven or twelve o'clock at night in the house of the plaintiff in the presence of his father, by whom the contract was drawn up.

I cannot say that these circumstances by any means amount to fraud, and if fraud had been pleaded, the verdict would no doubt have been found for the plaintiff. But Equity refuses this kind of relief on less grounds than that of fraud, and if all these facts had been submitted to a jury on the question of damages, they ought to have had, and, I think, would have had much weight with them. I cannot think that a person, who has obtained so good a bargain in this way, and by such means, would be entitled, on a breach of the contract, by the other party, to the same amount of damages as if the case had stood free from these circumstances.

Ought then a Court of Equity in such a case to decree a specific performance, which would, in effect, be equivalent to giving the highest amount of recompense, without regard to those facts, which, if taken into account, would probably diminish it? Is not this just one of those cases which is better suited to that tribunal, by which other cases of breach of contract are settled, by the award of such a measure of damages to the party complaining as he is fairly entitled to, taking into consideration not merely the infraction of the contract; but the manner and circumstances under which it was obtained, and the plaintiff's own conduct in the matter.

I must say, then, that I am not prepared to interpose the extraordinary powers of a Court of Equity in favor of the plaintiff in such a case as this; and that instead of decreeing a specific performance of the contract in question, I should prefer sending him to a jury to obtain such damages as they might give him for the breach of it.

DODD J. and DESBARRES J., concurred in the opinion of His Lordship the Chief Justice.

1860.

DODGE v. TURNER.

WILKINS J.—This is an appeal to the equitable authority of this court whereby the plaintiff seeks to obtain a decree for specific performance of an agreement for the sale of land. The agreement is dated the 27th January, 1859. The plaintiff, after its execution, entered into possession of the premises, and continued in possession for about six weeks, at the end of which he was forcibly ejected by the defendant. The pleadings raised several issues, all of which were found for the plaintiff with one exception. The excepted finding was to the effect "that plaintiff had "enjoined on the defendant *secrecy*." The nature of that injunction and the motive to it appear from the report of the judge before whom the trial was conducted. According to the plaintiff's statement secrecy would appear to have been enjoined on the same evening when the agreement was executed, but according to one of the defendant's witnesses, it was pending the negotiations therefor. The alleged reason was, (to use the words attributed to the plaintiff by the witness) "that he had to work headwork to keep defend- "ant's mouth shut, for he knew if the neighbourhood "heard of it, he should not be enabled to get the land: "that, after defendant's proposal to sell at £200, he "(plaintiff) told him to say nothing about it, otherwise "he would have nothing to do with it, and that he "wished to have the writings done before words got "out." Plaintiff is represented to have added "he ex- "pected to have some trouble to get defendant off the "place." The purchase money stipulated to be paid was £200, and the jury found the value of the property to be £250. They found, also, that plaintiff had not depreciated to defendant the value of the land. The defendant resists the application, first, on the ground of undue advantage taken by the plaintiff, (as inferrible solely, however, from the injunction to secrecy referred to), and secondly on the ground of inadequacy of consideration. The latter having been expressly decided not to be, *of itself*, a sufficient ground to induce

the Court to withhold its decree, the question for us is reduced to a very narrow point of enquiry. That is, "whether the injunction to secrecy, considered in "relation to the assigned motive for it, invests the "transaction with a suspicious character, and con- "stitutes a reasonable ground for concluding that "circumvention was practised, or that the contract "was not fair, and above suspicion." The defendant is found by the jury to have been capable when he contracted of making a provident bargain, and we are therefore bound to view his acts in that light. We are not at liberty to infer, for there is neither an express finding to that effect, nor facts to warrant such, that when the contract was entered into, plaintiff knew any fact relative to the land of which defendant was ignorant, but which in good conscience the former was bound to disclose to the latter. There appears neither an allegation of what was false, nor a suppression of what was true. All that we perceive, and all that we can infer amounts to no more than this, that the parties were, without fraud on either side, endeavouring, the one to buy as cheaply, and the other to sell as dearly as possible. It would seem, indeed, from the general scope of the evidence, as well as from the conclusion drawn by the jury, that the bargain is an advantageous one for the plaintiff, and although we may conclude that had the neighbourhood, during the negotiation for the contract, been made aware that this property was in the market, a larger price might have been obtained by the defendant for it than he actually contracted to sell it for, yet we cannot therefore refuse the decree asked for, without violating a settled rule of equity law, "that inadequacy of con- "sideration alone is not a sufficient ground for refus- "ing it."

We may not unsettle by our decisions established principles of equity law in relation to the doctrine of specific performance. Great judges have indeed intimated doubts as to the expediency of the unlimited

1860.

DODGE v. TURNER.

extent to which Courts of Equity have introduced this mode of relief into *Westminster Hall*; but they, whilst expressing that sentiment, recognize the doctrine as thus adopted, and carry it into effect by their judicial decrees. *Jeremy*, in his excellent treatise, says:—"Where the contract is such as a Court of "Equity approves, and there are no peculiar circum- "stances attending the same, it is as much *of course* to "decree a specific performance, as it is to give damages "at law, for, although it is truly said to be a matter of "discretion whether this Court will decree a specific "performance or not, yet such discretion is not arbi- "trary, but is exercised in a judicial manner accord- "ing to established rules." Other celebrated text writers entirely concur in this.

In relation to this case I have, of course, felt it my duty to subject it to the test of these rules as eliminated from the different treatises, and judicial decisions, to which a learned argument has referred us, and I have done so with an anxious desire to effect substantial equity between these parties. This I cannot do, however, according to my own capricious ideas of what equity is, but according to the rules of an established system of jurisprudence which I am bound to respect. It has been strongly pressed upon us that we ought to withhold the particular relief asked, because it will injuriously affect the interests of the defendant's wife. The writ does not, however, claim any relief against *her*, nor are we called on to require any act to be done by her to perfect the plaintiff's title. Had such been the case we should have felt it our duty to protect her rights, and, in accordance with equitable decisions, we should have refused to compel the execution of such act by her, in a case of personal hardship to herself; but it must suffice to say on this head, that she is not before us, and that, whilst we feel ourselves compelled to decree specific performance of this contract by her husband, we can only hope that that which we are bound to order, will not operate to her prejudice.

On the whole, though my own individual sense of equity might be better satisfied by remitting this plaintiff to common law to seek compensation *in damages*, I feel that this appeal to that judicial discretion which is vested in me as an Equity Judge, leaves me no alternative under the weight of authority and precedent which must govern my decision, but to decree specific performance of this contract in accordance with the plaintiff's prayer.

Decree for specific performance.

Attorney for plaintiff, *Thorne*.

Attorney for defendant, *S. L. Morse*.

FAIRBANKS *versus* ROLES.

December 29.

Where a defendant in ejectment first pleaded denying the plaintiff's right to the possession of the *whole* of the land claimed, but afterwards obtained leave to amend his plea, so as to limit his defence to a *part* of the land only, and that the amended plea should be treated as if pleaded in the first instance, and the plaintiff then signed judgment for the residue, and discontinued as to that part covered by the plea.

Held, that the plaintiff was entitled to costs on his judgment for that portion of the land disclaimed by the amended plea, and the defendant to judgment with costs for that portion for which he defended.

EJECTMENT. Question of costs argued before all the Judges this term by *J. W. Ritchie*, Q. C., for plaintiff, and by *J. McCully*, Sol. Gen., for defendant.

BLISS J. now delivered the judgment of the Court. This was an action of ejectment, in which the defendant originally defended for the whole land claimed in the writ, but afterwards obtained leave to amend his plea, limiting his defence to a small portion of the land only. The plaintiff thereupon took judgment for the residue of the land as to which the defendant now disclaimed, and prosecuted his claim no further as to that part covered by the plea.

The question between the parties is as to the costs of each under these circumstances. By the amended plea the parties now stand in the same situation as if it had been so pleaded in the first instance, the Court having sanctioned the substitution of the one plea for the other. Upon that the plaintiff is entitled to his judgment for that part of the land to which the defence does not apply, by virtue of section 144 of the Practice Act, (Revised Statutes, second series, chap.

1860.

FAIRBANKS v. ROLES.

134), and as I think with costs; for though that clause of the Act is in itself silent with respect to the costs, the form of judgment in the Appendix, No. 15, is given with costs, both where no appearance has been entered, and where there is a defence as to part of the lands only. Nor does there seem any thing unreasonable in this. The plaintiff by his writ alleges that the defendant withholds the possession of the land claimed. The plea disclaims all right to the part undefended and to the possession thereof, and by saying nothing more as to it, admits the withholding of the possession of the whole land of which the plaintiff complained. If the defendant had wished to avoid this, and so to relieve himself from a liability to costs in respect to this portion of the land, he should have pleaded differently and denied his having withheld the possession, if the facts would have warranted it. I confess that the statute does present some difficulty in the way of such a plea as this, for by section 142 "the plea in eject-"ment shall be confined to a denial in whole or in "part of the plaintiff's right to the possession claimed; "or to a right of possession in the defendant with the "plaintiff as tenant in common"; but I think this must be taken to mean that the defendant's plea, so far as it refers to a denial of the plaintiff's right of possession, shall be confined to these matters. It could not have been intended to prevent the defendant from pleading any plea, which would shelter him from liability to costs where the plaintiff had included in his claim land, to which the defendant not only made no claim, but of which he never had any possession.

The plaintiff then being entitled to judgment with costs for the land disclaimed by the plea, how does the case stand with respect to the portion of the land for which the defendant does defend? Upon that plea under section 145 of the Practice Act, the case is to be considered at issue, and the parties may proceed to trial thereon; but the plaintiff, instead of doing so, virtually abandons the action as to this part of his

claim by not further prosecuting his action, and so admits the defendant's plea.

Now the defendant is, I take it, upon this entitled to his judgment. If the parties had gone on to trial, and the defendant had obtained a verdict, it would be clear enough and beyond dispute. What difference can it make that the plaintiff has conceded the point to the defendant without a trial? There stands the plea on the record. How is it to be got rid of? The plaintiff cannot enter up his judgment for the part of the land to which defendant has disclaimed all right, and stop there; for the record which has already set out the plea to the other part would then remain incomplete. The plaintiff then, if he does not go down to trial upon the issue which it raises, must dispose of it by a *nolle prosequi* or discontinuance, or some other such mode which will make the record perfect and complete; and, in all these cases, he will be subject to a judgment against him for his false claim for the part of the land which he now abandons, and which the defendant has been compelled to resist: for if he had not resisted it, the plaintiff would have recovered judgment against him for this part also, and he would have lost the land.

It appears to me, then, to make no difference how this plea is disposed of for the defendant, whether by trial of the issue thereon, or by discontinuance or otherwise, and being entitled to his judgment on the plea, he will be entitled to it with costs, if he would have been entitled to costs in case the issue had been found for him on the trial. The costs will equally follow in the one case as in the other.

Let us see then how the matter would stand, if there had been a verdict for the defendant in such a case. Under the general rule of 2 *Will. IV.*, No. 74, which directs that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, the defendant would clearly have had costs, for it seems to be immaterial whether the issues arise upon

1860.

FAIRBANKS v. ROLES.

different counts, or upon one and the same count. In *Doe on the demises of Smith and Paine* v. *Webber*, 2 Ad. & Ellis, 448, there were two demises, one in the name of *Smith*, and the other of *Paine*. The plaintiff offered no evidence as to the title of *Paine*, and the defendant had a verdict on that demise, and the plaintiff on the other. It was held that the defendant was entitled to costs on the issue found for him. In *Doe c. d., Errington* v. *Errington*, 4 Dowl. P. C., 602, there was but one count, the lessor of the plaintiff recovered judgment for a part of the land claimed, the defendant succeeding as to the chief portion of the land in dispute, and he was held entitled to costs as to the portion for which he succeeded. This general rule of 2 *Will. IV.*, No. 74, has not, however, been included in our Practice Act, which adopts only those Rules of Court in England which were in force prior to 1 *Will. IV.* We are thus thrown back upon the English practice before that period, and on our own rules of practice. In *Day* v. *Hanks* 3, T. R. 654, where there were two distinct causes of action in two counts, and the defendant suffered judgment by default as to one, and took issue on the other, and had a verdict, it was held that he was entitled to his costs incurred by the trial of that issue. In *Griffiths* v. *Davies*, 8 T. R. 466, the same rule was held, where there were different issues on the same count. There *LeBlanc* J. cited a case from the Common Pleas. It was an action of covenant; as to part, defendant admitted that he had broken the covenant, and pleaded as to the residue, and on the trial obtained a verdict,—he was held entitled to the costs of the issue.

Our Practice Act, section 169, says that, upon finding for defendants or any of them, judgment may be signed and execution issue for costs against the claimants named in the writ. This, it is true, like the cases which I have cited, refers to a finding; but there can be no sound distinction, as I have already pointed out, between such a case and that where the

defendant succeeds on his plea, by the plaintiff relinquishing his claim to the land covered by it. The right to the costs must be the same, though the *quantum* of costs be very inconsiderable; but that will not affect the question. But on this point, section 195 of the Practice Act appears to conclude the matter:—"The party in whose favor a judgment shall be given "shall be entitled to recover from the opposite party "his taxable costs." This rule is without any restriction or exception, and must equally apply to a case where each party, whether by a verdict or discontinuance or any other way, has a judgment in his favor.

Rule accordingly.

Attorney for plaintiff, *J. W. Johnston, Jr.*
Attorney for defendant, *J. McCully.*

LEARY *versus* SAUNDERS ET. AL.

December 29.

TRESPASS. Plea, public highway. At the trial before *Wilkins J.* at Digby, in July last, although the evidence was somewhat contradictory, it appeared generally that the *locus* formed part of a *road* or *way*, which, from about the year 1792 until 1809, or thereabouts, had been used as such by the inhabitants of the neighbourhood. The way appeared to have been little more than a *track* or *path* through the forest, and as the country was then mostly in a wilderness state, and the inhabitants poor, few and scattered, it was only infrequently, (though occasionally) travelled with carts, or vehicles of any kind. One of defendants' witnesses swore that road-work had been done on some part of it: but could not remember on what part.

Where land was used as a way in the early settlement of the country, but a regular public highway was afterwards substituted for it, and from that time, being 50 years before action brought, the old way was disused. Held, An abandonment of the ancient right of way, if any, and that the owner of the soil over which the way passed held it exempt from the public right, (whatever the extent of it may have been,) that had previously burthened it.

The plea of a highway is not divisible, and must be made out as pleaded.
Semble, To constitute a public highway by user, there must be an intention, express or implied, of dedication to the public, on the part of the owner who permits such user.

1860.

LEARY v. SAUNDERS et. al.

A new road was substituted in 1809 for the old one, and the use of the old road ever since discontinued. The learned Judge instructed the jury that the old way had not acquired by user the character of a highway during the period in which it was used, and that he considered that the plea of justification had not been made out, and that therefore their verdict should be for plaintiff. The jury found for the plaintiff with £15 damages.

A *Rule Nisi* to set aside the verdict as contrary to evidence and for misdirection, was granted, which was argued early in the term by *J. W. Ritchie*, Q. C., and *C. W. H. Harris*, Q. C., for plaintiff, and by *James* and *S. L. Morse* for defendants.

WILKINS J. now delivered the judgment of the Court.

The defendants justify the trespasses committed by them on the soil of the plaintiff, under the plea of a public highway.

The plaintiff's land was then enclosed. The travelling public had for fifty years disused the way over it; vestiges of its former existence were but dimly discernible; and by the testimony of even defendants' witnesses, none had an interest in it except the members of a particular religious denomination. They were interested, solely, in respect of an ancient burial place, and a recently erected meeting house, situate in the vicinity of the enclosure, prostrated by defendants as encumbering the road. Even to them and their co-religionists the way was not essential. To their place of worship, and to that of interment, they enjoyed a convenient communication from an existing portion of highway, substituted in 1809 for a part of the ancient way that led over the locality of the trespass, and was connected with the modern road at either of its extremities.

The legal sufficiency of the justification depends, of course, upon the question whether there was, at

the time to which it refers, a highway over the close traversed by the plaintiff's fence.

A highway there, *in fact*, at that time, there was not, and it becomes necessary therefore to enquire whether there did then exist in that place, a right of way to the public, which they might at pleasure resume.

In prosecuting this enquiry four questions present themselves:—

First.—Is there evidence, by record or grant, of the alleged way, impressing on it, in its original, a character that endured up to the time of the trespass?

Secondly.—Does it appear that the owners of the soil dedicated the way to the public accepting it?

Thirdly.—Was there ever, in fact, in the place to which the justification refers, such a highway as is pleaded?

And Fourthly.—(Assuming these questions, or either of them, to be answered affirmatively,) Was the soil over which the way passed, at the time of the justification, held by its owner, exempt from the public right, (whatever the extent of it may have been,) that had previously burthened it?

The first question may be shortly disposed of, for whilst no direct evidence of any record was produced, no facts appear sufficient to warrant an inference that the alleged right rests on authority derived from grant or statute.

The second and third questions would demand an enquiry of importance and of interest, if doubts were entertained by us as to the solution of the fourth, respecting which, however, our opinions concur in an affirmative view of it.

If we were called on to decide whether in the early history of a nascent colony, the progressive exercise by the first settlers of a path through the forest, from settlement to settlement, furnished a state of facts from which dedication of a highway by the owner of the adjacent wilderness might be inferred; such an

1860.

LEARY v. SAUNDERS et al.

enquiry might present a question of some difficulty. That such an inference would not be warranted would appear to be the doctrine held in the United States; and Mr. J. *Patteson* says in *Barraclough* v. *Johnson*, 8 Ad. & Ellis 105, "There cannot be such a thing as "turning land into a road *without intention on the* "*owner's part.*" In the same case *Coleridge* J. observed, "A party is presumed cognisant of the consequences following his own *acts*: and if he permits "user of a way over his land, a jury may presume "that he *intended* to dedicate such way to the public. "But you cannot exclude evidence of the circumstances under which the user commenced."

These are significant and pertinent words. In view of them it might be reasonably urged that, referring to the time when, and the circumstances under which the user of this way commenced, there exists nothing to warrant, but on the contrary, much to exclude an inference of an *act* of absolute dedication to the public by the owner of the soil in question. He had, then, (in 1791) no interest in debarring the public from using a way across his land, and he (whoever he was) is not shewn to have been aware of the fact of the user when it commenced.

We are, of course, not now speaking of the exercise of the way over the precise locality of the trespass alone, but over the whole extent of the ancient path, for which the present highway has been substituted. At the same time we are not unmindful that some general and vague evidence exists of the ownership of the elder *Peters*, and of his having lived somewhere in the neighbourhood. He gave the burial place indeed, but before he did so, the way had been long travelled; and, therefore, he is not connected with the origin of the latter, which may have originated without his knowledge, and when he had no connection with the land. Keeping our view still confined to the origin of the user in point of time and circumstances, we might reasonably ask: "Where is the evidence in

"this case of the intention of the then owners of this "soil to turn their land into a road?" But this point, as has been already remarked, it is unnecessary to decide.

Neither are we called on to consider whether any, and if any, what course of proceeding would be effectual to discharge from the burthen of a highway, the soil of a subject, once charged with it by matter of record, by grant, or by the observed provisions of a statute; but we do not perceive that either reason or law demands that, in the case before us, the soil of this plaintiff should be held subject to the alleged public easement, at the time of the trespasses committed.

During a period, when the extent of the way on either side was lined by the forest, and when it was, to use the expressive language of a witness, such a road "as nature and a hoe could make it," the few inhabitants of the opening settlement in the neighbourhood passed over it in the exercise of an assumed right of way, as their limited occasions required, up to the year 1809: but that exercise, if it ever was made by the public in a proper sense, has been ever since abandoned by them. They have had a substituted way, which they have continuously and contentedly used, subsequently, and for upwards of half a century.

If we consider the legal effect of the defendants' plea, in connection with the facts of user adduced to support it, the justification must be held to have entirely failed. The plea of a highway is not divisible, and must be made out as pleaded. Such a way, if established, is a burthen on the soil over which it passes, and to that extent to which it is alleged to be an easement *in alieno solo*, it must be proved. Highways, of a much less comprehensive character than that which forms the subject of this plea, may undoubtedly have a legal existence. The right, however, set up by these defendants is alleged to be a right for them in common with all subjects of the Crown, to pass over the plaintiff's soil as a public highway at

1860. LEARY v. SAUNDERS et. al.

all times and in all seasons, on foot and on horseback, with every description of vehicle, and with all kinds of cattle.

Now, to take the strongest view of the proved exercise of the alleged right, at any time during the long period to which the testimony refers, it comes very far short of that kind of user which would support this plea.

The highway which it sets out, is as comprehensive as could be alleged, or as could exist, but the actual user proved amounts to no more than an occasional and unfrequent exercise of a way by the early settlers in a remote wilderness, successively by the foot of the wayfaring man, by the pack-horse carrying his burthen through branches and bushes that almost intercept his progress, by the ox-drawn sledge in winter, and by cart wheels in one or two solitary instances, at other seasons lumbering over the rude irregularities of the natural surface of the soil.

It is uncertain, as has been observed, whether the owners of the land in question were aware of the origin of the user, and even if they were so, it would be reasonable to infer that they intended nothing more than a permission to use an easement (under circumstances that occasioned to them no prejudice) until a regular highway should be established, in substitution for a temporary accommodation of a passage over their land through the wilderness.

We think, therefore, that the rule should be discharged.

Rule discharged.

Attorney for plaintiff, *Troop.*
Attorney for defendant, *J. A. Dennison.*

END OF MICHÆLMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

TRINITY TERM,

XXV. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J.
BLISS J.
DODD J.
DESBARRES J.
WILKINS J.

RIPLEY *versus* BAKER.

July 30.

Plaintiff derived title to a mill through his father, who forty-five years ago, cut a canal through the land, now belonging to the defendant, and through which canal the water flowed to the mill until nineteen years ago, when *B.*, the then owner of the land, gave verbal permission to the plaintiff to cut a new canal in substitution of the old one, and though he gave no express leave to the plaintiff, shortly after the permission thus given, cut the new canal, which was 200 yards North of the old one, and erected the dam. Defendant derived title under B., and there were no reservations in any of the deeds. Ten years after this, and after he had been privy to the plaintiff's repairing the dam, defendant abated it, without tendering to plaintiff the expense of its erection.

Held, That the permission thus given for the cutting of the new canal, and the erection of the dam, not being under seal, was to be accounted only a parol license, revocable at any time, and that the defendant might lawfully abate the dam, and (per *Dodd J.*) that the conveyance to defendant was a revocation.

TRESPASS, tried before His Lordship the Chief Justice at Amherst in October last, when a verdict was found for plaintiff by consent, with leave to defendant to move to set the verdict aside, and to have a non-suit entered. Defendant obtained a *Rule Nisi* accordingly, which was argued in Michaelmas Term last before all the Judges, by *J. W. Johnston, Senr.*, Q. C., and *W. A. Johnston* for defendant, and *J. R. Smith* for plaintiff. The Court now gave judgment.

YOUNG, C. J.—In this case the plaintiff complained that being possessed of a mill, and by reason thereof entitled to the flow of a stream for working the

1861.

RIPLEY v. BAKER.

same, the defendant had cut the bank and diverted the waters of the stream away from said mill. Five pleas were put in by the defendant, in which he alleged that the plaintiff had erected the bank under leave and license from a previous occupant of defendant's land, and as it injured the defendant he had abated it: that the flow of the stream was an easement enjoyed by the plaintiff as a favor, and not as a right, and that the bank was an artificial mound or dam erected on the defendant's land within twenty years, and which the defendant cut, as he lawfully might. To these pleas the plaintiff replied that the license had not been countermanded; that before abating the bank the defendant had not tendered the expenses of erecting it, and that the waters of the stream had been diverted from the original channel forty years before the acts complained of, and had continuously during that period flowed to the mill in a channel different from their said original channel. The action was tried before me at Amherst in October last, and a verdict found for the plaintiff by consent, subject to the legal questions which were argued at large in December.

It appeared at the trial that the plaintiff derived title to the mill from his father, who had been dead about twenty-four years: that the father forty-five years ago cut a channel through the land now owned by the defendant, which could still be traced nearly all over the lot, and was used without interruption for conveying the waters of the original brook to the plaintiff's mill until about nineteen years ago, when the plaintiff made a new cut from two to three hundred yards North of the old cut: that at the time the old cut was made, the land was in a wilderness state and unoccupied; that when the new cut was made, it was through wood and swamp, but the land at the old cut had been cultivated and improved; that the old and the new cuts were of nearly the same width and depth: that the old cut was doing mischief to the

land by heaving in the spring, and *Bulmer* who owned and occupied the land under mortgage, from whom the defendant derived title, gave the plaintiff verbal permission to substitute the new cut for the old, considering it a benefit: that the bank or dam which the defendant afterwards abated was necessary to prevent the water in the new cut from flowing out of the channel into low land, and though *Bulmer* gave no express leave to make the dam, he did not object to it when made: that the effect of the dam was to overflow at certain seasons about half an acre of defendant's land. and in 1856. ten years after he had bought. and after he had been privy to the plaintiff's repairing the dam, he abated it in the exercise of what he conceived to be a right; that he afterwards offered to allow the plaintiff to put the dam up again as a matter of privilege, but not as a matter of right, and with a sluice in it, the sluice not to be raised in the grinding season so as to injure the mill, and the object of it being to drain the half acre known as the frog pond.

It is unfortunate, perhaps, that this offer of the defendant was not accepted; but both parties stand upon their legal rights, involving, as we shall presently see, principles of very extensive operation.

It was first objected by the Counsel for the defendant, that *Bulmer*, having executed a mortgage of the land, had parted with the fee, and therefore could not give a valid license to the plaintiff; but this question, which is new in our Courts, and is obviously of great importance, could not be raised, because the mortgage was not in proof, and it did not necessarily follow, though it was likely, in the usual course, that it was a mortgage in fee. [See 10 *Law Times Rep.* 240.]

The second material question turned on the effect and legal incidents of the license given by *Bulmer*, on the execution thereof by the plaintiff cutting the new channel and raising the dam at his own expense, on the abatement of the dam by the defendant, without

1861.

RIPLEY v. BAKER.

a tender of that expense, and on the distinction between a license and the grant of an easement.

A large number of cases were cited at the argument, all of which I have looked into, besides many others to be found both in the English and American reports, and I consider the principles of this branch of the law to have been clearly settled by the more recent decisions, controlling, or at least modifying and explaining the earlier cases. These principles come so frequently into play in our own Province, and have been so often argued, though we have no reported case recognizing them in this Court, that it seems advisable succinctly to review them.

The case of *Thomas* v. *Sorrell*, Vaughan's Reports 330, contains an elaborate judgment pronounced in the year 1685, and which is cited and approved of in the modern and equally elaborate judgment in the case of *Wood* v. *Leadbitter*, 13 Meeson and Welsby 838. In the course of his judgment, *Vaughan*, Chief Justice says:—"A dispensation or license properly passeth no interest, nor alters or transfers property in "any thing, but only makes an action lawful, which, "without it, had been unlawful, as a license to go "beyond the seas, to hunt in a man's park, to come "into his house, are only actions which, without "license (that is, I would add, a license express or "implied), had been unlawful. But a license to hunt "in a man's park, and carry away the deer killed to "his own use; to cut down a tree in a man's ground, "and to carry it away the next day after to his own "use, are licenses as to the acts of hunting and cutting "down the tree; but as to the carrying away of the "deer killed and tree cut down, they are grants. So "a license to a man to eat my meat, or to fire the "wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, "they are licenses; but it is consequent necessarily "to those actions that my property may be destroyed "in the meat eaten and the wood burned. So as in

"some cases, by consequent and not directly, and as "its effect, a dispensation or license may destroy or "alter property."

Several qualities of a license flow out of this definition which distinguish it from a grant. Though it do not amount to a grant under seal, it is an excuse for an act which would otherwise be a trespass, for a plaintiff cannot complain of a thing done by his own permission. Had *Balmer* sued the plaintiff as a trespasser in this case for cutting the new ditch, and his license been pleaded, he could not have recovered: yet it by no means follows that his license had the same legal effect and operation as a grant. Hence a license is revocable in many cases, where a grant would not be so. And upon this head a distinction is to be taken which neutralizes several of the cases relied on by the plaintiff's counsel. He insisted on the case of *Liggins* v. *Inge*, 7 Bing 682; but that only established that a license executed *by the licensee on his own land*, is not countermandable. This is one of the decisions of Chief Justice *Tindal*, which are of such high authority that Judge *Talfourd*, who was a good lawyer, although better known as a rhetorician and a poet, conceived a careful study of them his best preparation for the bench. Now in this case, the *Chief Justice* says; — "Suppose A authorizes B, by express "license, to build a house on B's own land, close ad- "joining to some of the windows of A's house, so "as to intercept some of the light, could he after- "wards compel B to pull the house down again, "simply by giving notice that he countermanded the "license?" The same principle applies to a party who erects a mill upon his own soil, with the assent of the owner of the stream, and extends "to every "license to construct a work, which is attended with "expense to the party using the license: so that, after "the same is countermanded, the party to whom it "was granted may sustain a heavy loss."

1861.

RIPLEY v. BAKER.

So in the earlier case of *Hewlins* v. *Shippam*, 5 Barn & Cres. 221, Judge *Bailey* remarking on that of *Winter* v. *Brockwell*, 8 East. 309, said that "all the defendant "did in that case he did upon his own land. He "claimed no right or easement upon the plaintiff's. "The plaintiff claimed a right or easement against "him.—viz., the privilege of light and air through a "parlour window, and a free passage for the smells "of an adjoining house through defendant's area; and "the only point there decided was, that as the plaintiff "had consented to the obstruction of such his ease-"ment, and had allowed the defendant to incur "expense in making such obstruction, he could not "retract that consent, without reimbursing the de-"fendant that expense. But that was not the case of "the grant of an easement to be exercised *upon the* "*grantor's land*, but on permission to the grantee *to use* "*his own land*, in a way, in which, but for an easement "of the plaintiff's, such grantee would have a clear "right to use it."

So much for the law, where the license is to be executed on the land of the party to whom the license is given. But a license from A to B to enjoy an easement over the land of A, by whom the license is given,—as for example, to enjoy the use of a drain, or a pew, or to come upon his land for any other purpose, is countermandable at any time, although it has been acted on, and although a valuable consideration has been paid for it, and the consideration has not been returned. I will glance at two or three of the leading cases establishing these positions.

The principal one is that of *Wood* v. *Leadbitter*, already cited, which the Court ingeniously, though not very successfully, laboured to reconcile with some of the prior decisions. There the evidence was that Lord *Eglintoun* was steward of the Doncaster races; that tickets of admission were issued with his sanction to the Grand Stand, and sold for a guinea each, entitling

the holder to come into the stand and the inclosure round it during the races, the stand being treated in the pleadings as the close of Lord *Eglintoun*: that the plaintiff bought one of the tickets, and was in the inclosure during the races: that the defendant by order of Lord *Eglintoun* desired him to leave it, and on his refusal to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea. It was assumed in the decision that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. Yet, it was held that the plaintiff, founding his claim on a parol license, and not on a grant, could not recover, and that it made no difference that he had paid a money consideration for the privilege of going on the stand. "Whether," said the Court, "it may give the plaintiff "a right of action against those from whom he pur- "chased the ticket, or those who authorized its being "issued and sold to him, is a point not necessary to "be discussed."

The same principles are upheld in *Cocker* v. *Cooper*, 1 Cr. Mees. & Roscoe, 418, and in the still later cases of *Adams* v. *Andrews*, 15 Q. B. 284, and *Roffey* v. *Henderson*, 17 Q. B. 574, in the former of which the Court said, that as there was no deed, and therefore no grant, the plaintiff might revoke the license he had given to the defendant to make partition of a pew, notwithstanding the expense the defendant had incurred.

All these cases recognize the common law principle, that an easement to be exercised upon a man's own land can only be created by grant. No incorporeal hereditament affecting land can be created or transferred, otherwise than by deed. This is a proposition so well established, said Baron *Alderson*, that it would be mere pedantry to cite authorities in its support.

1861.

RIPLEY v. BAKER.

All such inheritances are said emphatically to lie in grant and not in livery, and to pass by mere delivery of the deed. The very case is put of a parol license to come on a man's lands, and then to make a watercourse to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked.

As our attention was turned on the argument to the reasoning in *Cook* v. *Stearns*, 11 Mass. Rep. 533, which is in conformity with the English doctrine, it may not be amiss to notice that the Courts in some of the American States have adopted a different, and as some may think a more rational rule. In the case of *Cheaney* v. *Dargin*, 5 Maine Reps. 9, the broad ground was taken, that wherever the acts done, on the faith of a license, have resulted in the creation of an interest of whatever description, for the protection of which the continued existence of the license is necessary, the law will not permit it to be defeated by the party by whom the license was given. The same doctrine has been held to the fullest extent by the Supreme Court of New Hampshire, in which some very able men have presided. And in a recent case of *Wilson* v. *Chilcot*, 15 Ohio 247, it was decided that a license to build a dam on the land of the licensor, when once carried into execution, was irrevocable. So in Pennsylvania, a parol license to abut a dam upon the land of another has been held subject to be revoked at any time before the expenditure of money. *Beidelman* v. *Foulke*, 5 Watt's, (Penn.) Rep. 308.

However sound the morality, and however agreeable to natural justice the reasoning of these cases may be thought, they are clearly at variance with the technical rule, which in the absence of any legislation of our own must prevail in this Court. So far back as the days of Chief Baron *Gilbert*, in his Law of Evidence, page 96, the rule is laid down,—"that there

"can be no solemn agreement without a seal, so that "possession alone is not sufficient, since the thing "itself does not lie in possession, but by agreement; "therefore a man cannot claim a title to a watercourse, "but by deed and under seal." And in *Fentiman* vs. *Smith*, 4 East. 107, where the plaintiff claimed to have a passage for water by a tunnel over defendant's land, Lord *Ellenborough* lays it down distinctly:—"The title "to have the water flowing in the tunnel over defend- "ant's land could not pass by parol license without "deed."

As it is perfectly clear, therefore, that the plaintiff could not have availed himself of the parol license in this case, even as against *Bulmer*, who granted it, for any independent and new construction, and that it would still less avail him as against the defendant, it only remains to consider how far the new cut is to be taken as a substitution for the old, to which the plaintiff had acquired a prescriptive right. This is really the strong point of the plaintiff's case, and on the faith of which it is probable the action was brought. There are undoubtedly strong equities to recommend it. The new cut was considered by *Bulmer*, the then owner, as a drain: it was a benefit, not an injury, to the land; in his own words, he was proud when the plaintiff cut it. The plaintiff's counsel, therefore, had every motive diligently to hunt up decided cases or *dicta*, that would sustain his position, and I have no doubt he discharged that duty well. He has been able, however, to produce but one *Nisi Prius* case, that of *Payne* v. *Shedden*, 1 Moody & Rob. 382, tried at Winchester in 1834, which would favor his view. That was an action of trespass, and a justification was pleaded, under the English act 2 & 3 *Will. IV. ch.* 71, which has not been re-enacted here, of a right of way over the *locus in quo*,—that is to say, from A to B, which right the replication denied.

It appeared that, although the occupier of the messuage had enjoyed a way over the *locus in quo* during

1861.

RIPLEY v. BOWER.

the last twenty years, yet that the line and direction of the way had been a good deal varied, and at certain periods wholly suspended by agreement between the parties. In his charge, *Patteson* J. said: "If there "be ten years' enjoyment of a right of way, and then "a cessation, under a temporary agreement, for an- "other ten years, yet this may be a sufficient enjoy- "ment of the old right for twenty years, to make it "indefeasible under the statute (2 & 3 *William IV.*, "*ch.* 71), for the agreement to suspend the enjoyment "of the right does not extinguish, nor is it inconsist- "ent with the right. So if, instead of the direct path "from A to B, another track over the plaintiff's land "from A to C and thence to B, had been substituted "by a parol agreement of the parties for an indefinite "time, yet the user of this substituted line may be "considered as substantially an exercise of the old "right, and evidence of the continued enjoyment of "it. Defendant failed to establish any right at all, "and plaintiff had a verdict."

Now, it will be perceived, that not only did this *dictum* of *Judge Patteson* proceed upon an English act which our Legislature have not thought proper to adopt; but the defendant having failed in his proof, there was no opportunity of reviewing it at Bar, and I have not fallen in with any confirmatory decision either in the English or American courts. A man may raise and enlarge an ancient window without losing his prescriptive right; but that part of the new window which constitutes the enlargement may be lawfully obstructed. In *Thomas* v. *Thomas*, 2 Cr. Mees. & Ros. 34, where the plaintiff having an ease- ment for eaves-dropping thatched his wall, and the thatch projected some inches further than the pantiles before, and he also raised the wall three feet higher, Baron *Alderson* asked,—how does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? *Renshaw* v. *Bean*, 18 Q. B. 112. Here no question arises as to

the plaintiff's right to the old cut, and any slight deviations from its original course for straightening or improving it might, I think, have been justified; but an entirely new cut, two or three hundred yards distant, which could not have been done without the leave of the occupant, must fall within the general principle, and resting upon license and not upon grant, cannot be upheld in an English court. I am of opinion, therefore, that the defendant is entitled to our judgment.

BLISS J. concurred.

DODD J. This action was brought to recover damages against the defendant, for the destruction of a dam on his own land, which had been erected by the plaintiff fifteen years before such destruction with the implied consent of the then owner of the defendant's land. A verdict was entered for the plaintiff by consent, subject to the opinion of the Court, with power to direct a non-suit to be entered, should the Court be of opinion that the plaintiff had not made out such a case as entitled him to a verdict.

The facts of the case are shortly these. The father of the plaintiff was the owner of a mill, and for the purpose of diverting a stream of water, caused a canal to be cut across the lands, which afterwards became the property of the defendant, and in this manner drew the waters of the stream to his mill. At the time the canal was cut, the lands were in a wilderness state, and it does not appear by whom they were then owned. The father of the plaintiff used the canal until within two years of his death, when the mill passed into the hands of the plaintiff, who continued to use the canal until about fifteen years before the injury complained of, and for which this action is brought. At that time, with the consent of *Bulmer*, who was then in the occupation of the defendant's land, the plaintiff cut a new canal about

1861.

RIPLEY v. BAKER.

two hundred yards to the Northward of the old one. This new canal extended as the old one did across the whole width of the defendant's lot. A short distance after leaving the defendant's land, it united with the old cut. The united possession of the plaintiff and his father of the old cut extended over a period of twenty years. The new cut was made by the permission of *Bulmer*, but in consequence of there being a fall in the defendant's land about the centre of his lot, the plaintiff found it necessary to erect a dam from fifteen to twenty yards in length where the fall took place. *Bulmer*, in his evidence says, although he gave permission to cut the canal, he did not give permission to erect the dam, but he saw the plaintiff erecting it, and made no objection to his doing so, was pleased to see the new canal as he thought it was an advantage to his land, it passing through swamp and wilderness. The defendant became the owner of the land in *March*, 1846, by a deed from *Smith*, to whom *Bulmer* had sold. The deed contained no reservations whatever. The defendant had been in the occupation of the land some years before the date of his deed, had then seen the plaintiff use the new cut, and on one occasion pointed out a defect in the dam and advised him to repair it. He was also in the habit of having his grain ground at the plaintiff's mill. In *September* 1856, six months after the date of his deed, he destroyed the dam, and admitted to the plaintiff he had done so. The mill was repaired some years after the new cut was made, but in consequence of the destruction of the dam, it has become useless.

Under these facts the plaintiff claims a right to recover for the injury he has sustained, the counsel conducting the argument for him, contending that the parol license by *Bulmer* to cut the new canal, also amounted to a license to make the dam, without which the cut would have been valueless, and that the license is not revocable; that the new cut was an exchange or a substitution for the old one, and that

the agreement for this purpose did not require to be in writing. In support of this view of the case several authorities were cited, but when closely examined they will, in general, be found applicable to a class of cases distinct from that under consideration, and those that appear to be applicable have been much doubted, if not altogether overruled by subsequent authority. It will also be found in all the cases that a distinction is drawn between a beneficial privilege on land, which may be granted without writing, and an interest in land which requires by the Statute of Frauds to be in writing. *Kent*, in his Commentaries, 2 vol., page 452, says:—"The modern "cases distinguish between an easement and a license. "A claim for an easement must be founded upon "grant by deed or writing, or upon prescription which "supposes one, for it is a permanent interest in "another's land, with a right at all times to enjoy it. "But a license is an authority to do a particular act "upon another's land without possessing any estate "therein. It is founded in personal confidence, and "is not assignable, nor within the Statute of Frauds. "This distinction between a privilege or easement "carrying an interest in land, and requiring a writing "within the Statute of Frauds to support it, and a "license which may be by parol, is quite subtle, and "it becomes difficult in some cases to discern a substantial difference between them." He refers to several American cases where it was held that a parol license was valid, but a parol agreement to allow a party to enter and erect a dam for a permanent purpose was void by the Statute of Frauds, for it was the transfer of an interest in the land. The case of *Taylor* v. *Waters*, 7 Taunton, 374, cited by the counsel for the plaintiff, *Kent* says, is decidedly overruled by the cases of *Hewlins* v. *Shippam*, 5 Barn. & Cress., 221, and *Cocker* v. *Cowper*, 1 Cr. M. & Ros. 418.

There is another distinction in the cases worthy of observation, and which is referred to in several of the

1861.

RIPLEY v. BAKER.

late decisions, that is between a parol license to do an act upon the land of the party to whom the license is granted, and a license to do the act upon the land of the party granting it. The cases of *Winter* v. *Brockwell*, 8 East 308, and *Liggins* v. *Inge*, *et. al.* 7 Bing 682, cited in favor of the plaintiff, are cases of the first description; but in no case can I find where there has been an express interest in the land granted, has a parol license been held sufficient for that purpose. In the case under consideration the plaintiff claims a permanent interest in the land of the defendant. He does not claim the canal for a temporary or limited purpose, but as a right to use and occupy as long as he pleases. I think the reference in 2 *Saunders*, 113, *note a*, is against the plaintiff, instead of being in his favor. It is there stated that a license to be exercised on land may indeed be granted by parol, inasmuch as it conveys no interest in the land, as a license to stack hay, a license to occupy a box at the opera, or a license to put a sky light over the defendant's area, by which the plaintiff's window is darkened. In neither of these cases thus put, was any interest in the land transferred, therefore they are very different from the case under consideration.

I will now shortly refer to some of the cases cited in favor of a non-suit. To my mind they are unanswerable and conclusive. *Fentiman* v. *Smith*, 4 East, 107, is a case as much in point as it well can be. In that case the defendant allowed the plaintiff to lay a tunnel in his land for a guinea, for the purpose of conveying water to the plaintiff's mill, and assisted in making it under plaintiff's direction. He afterwards, when the guinea was tendered to him, refused to receive it, and refused to allow the plaintiff to continue the use of the tunnel, and diverted the water from running into it, by cutting a channel, and thereby prevented the plaintiff working his mill. In this case Lord *Ellenborough*, C. J., said that the title to have the water flowing in the tunnel over the defendant's

land, could not pass by parol license without deed, and as the plaintiff held by such license it was revocable at any time, in which the Court concurred, and a rule was made absolute for a non-suit.

In *Hewlins* v. *Shippam*, which was an action for stopping up a drain leading from the plaintiff's premises through the defendant's yard, the authority to make the drain was by parol, and the plaintiff in making it incurred an expense of £100. The defendant subsequently stopped up the drain without notice, or without offering compensation, or revoking the license. *Best* J. in delivering the opinion of the Court, refers to *Fentiman* v. *Smith*, as an authority for the judgment he was then pronouncing, and drew the distinction between that case and *Winter* v. *Brockwell*, and some other cases here cited for the plaintiff, and said that although a parol license might be an excuse for a trespass, till such license was countermanded, that a right and title to have passage for the water for a freehold interest, required a deed to create it, and as there had been no deed in that case, the action could not be supported.

Adams v. *Andrews*, 15 Queen's Bench Reports, 285, is among the latest cases to be found on the subject. It was an action for disturbances in the plaintiff's pew; with other pleas that of leave and license generally was pleaded. *Patteson* J. who delivered the judgment of the Court, after disposing of some other points, said a further question arose in the argument, as to the right of the plaintiff to revoke the license or agreement: that the law on that subject was elaborately and conclusively laid down in the judgment of the Court of Exchequer, in *Wood* v. *Leadbitter*, 13 M. & W. 838; and it was clear that as there was no deed in that case, and therefore no grant, the plaintiff might revoke the license, notwithstanding the expense the defendant had incurred; and therefore there was judgment accordingly.

In *Taplin* v. *Florence*, 10 Common Bench 744, it was

1861.

RIPLEY v. BAKER.

held that an auctioneer who is employed to sell goods by public auction, has not such an interest as will make the license to enter the premises for that purpose irrevocable. Nearly all the cases having reference to parol license, were referred to at the argument of this case. *Cresswell J.* said: "It is clear that an "auctioneer, who is employed to sell goods upon the "premises of a third party, has no such interest in "the goods as will make the license to enter the pre-"mises, for the purpose of selling the goods, irrevo-"cable. The fact of his having incurred expense, "certainly can have no such effect. According to "*Wood* v. *Leadbitter*, 13 M. & W. 838, and *Smart* v. "*Sanders*, 5 Common Bench 895, a mere parol "licence may be revoked at any time; such a license "to be operative at all, must be by deed." He refers for this last position to *Hewlins v. Shippam*, and some other cases.

Had this action been against *Bulmer*, from whom the license for cutting the canal was obtained, under the authorities I have referred to, it is clear that he could have revoked it, notwithstanding the expense the plaintiff had been at in cutting it, and making the dam; but, if possible, the defendant stands in a still better position, as he claims the land under a deed in fee simple from *Smith*, who purchased from *Bulmer*, without restriction or reservation.

In *Perry* v. *Fitzhowe*, 15 Law Journal, also reported in 8 Queen's Bench 757, the plaintiff declared in trespass for breaking and entering his dwelling-house, &c. There were several counts in the declaration, and extended pleadings, to which it is not necessary here to refer. To one of the counts, the defendant justified, &c., to which the plaintiff replied, that, before the land came to the defendant, one *Richard Howe* was seized in his demesne as of fee, and was the occupier of the same land, and, being so seized, did give and grant to the plaintiff leave and license, to shut in, fence off, and erect and build the said dwell-

ing-house, &c.; to which replication there was a demurrer, among other things alleging that the leave and license could be granted only by deed, &c. Lord *Denman*, Chief Justice, in delivering the judgment of the Court, said it was not necessary to consider what the effect of a parol license would be against the person granting it, for there it was pleaded against a subsequent owner in fee, as running with the land and binding the inheritance. In *Winter* v. *Brockwell*, 8 East. 308, and *Harrey* v. *Reynolds*, 12 Price 724, he said the license was set up against the party who gave it; but he was not aware of any case, in which it had been held that such parol license would bind the inheritance, and run with the land. On the contrary, he said, it was laid down in *Sheppard's Touchstone* 231, that a license or liberty could not be created and annexed to an estate of inheritance or freehold, without deed. He further observed that the right claimed by the plaintiff as against the defendant, was for freehold interest, if any, which could only pass by deed: that, upon this point, *Hewlins* v. *Shippam* was a leading authority, in which all the cases upon the subject were considered, and in which it was so decided.

In *Coleman* v. *Sir William Foster*, Baronet, it was decided that a license is determined by an assignment of the subject matter, in respect of which the privilege is to be enjoyed. The declaration there alleged a breaking and entering of the plaintiff's theatre. It appeared that *Rix* and *Cooper*, being trustees for themselves and other proprietors of a theatre, demised it for three years to *Sidney*, upon the terms, among others, that *Rix*, *Cooper*, and the other proprietors should have admission to the theatre; that *Sidney* entered upon those terms, when it was agreed between the plaintiff and *Sidney*, that the plaintiff should have the use of the theatre for two nights, and the plaintiff knew at the time of the agreement under which *Sidney* held. The defendant was one of the proprietors, and as such proprietor, entered. The

1861.

RIPLEY v. BAKER.

case came before the Court on demurrer, when there was judgment for the plaintiff. *Pollock* C. B. said, that, in order to be an excuse for the trespass, the alleged liberty of admission must be a license, or it is nothing: it conveys no interest whatever; that, if a man gives a license, and then parts with the property over which the privilege is to be exercised, the license is gone: that a license is a thing so evanescent, that it cannot be transferred.

In *Wallis* v. *Harrison*, 4 M. & W. 538, it was held that a mere parol license to enjoy an easement in the land of another, is not binding on the grantor, after he has transferred his interest and possession to a third party, nor is any notice of the transfer necessary to determine the license.

It was said at the argument that the new canal was substituted in exchange for the old one, and that no deed in writing was necessary for that purpose, even admitting a writing was necessary for the granting of such an easement in the first instance. But I am unable to see any sufficient reason for the distinction. Whether there was a money consideration for the new canal, or an exchange of the old one for it, cannot, in my opinion, make any difference. Upon a careful examination of all the cases cited at the argument or otherwise, I am clearly of opinion that this action cannot be maintained. The license in this case is for an easement or interest growing out of the land of the defendant, which could not be granted unless by deed in writing. But supposing the license to be good as against *Bulmer* so long as he was the owner of the land, which I am very far from admitting; still, whenever the land passed from him the license ceased, and the act committed by the defendant in the destruction of the dam could not be considered wrongful. For these reasons I think the defendant is entitled to a judgment of non-suit.

DESBARRES J. This was an action for cutting

1861.

RIPLEY v. BAKER.

down a dam and obstructing a watercourse made by the plaintiff on the defendant's land, by which the flow of water to the plaintiff's mill was diverted, and the mill itself rendered inoperative. The plaintiff claims a right to keep up and maintain this dam, and to have a free watercourse to his mill through the defendant's land, under a parol license given to him by one *Bulmer*, the former owner of it; and he contends that the license so given was not countermandable, because it was acted upon and expense was incurred. It appears that the plaintiff made the dam, and also the watercourse in connection with it, at his own expense, and that the defendant, without expressly renewing the license given by *Bulmer*, suffered the plaintiff to enjoy the easement for several years after he became the owner of the land; and the question now is whether the plaintiff, under these circumstances, is still entitled to enjoy it against the will and consent of the defendant, who, as owner of the land, has committed the act complained of. The right asserted by the plaintiff is of a permanent nature,—it is a right to enjoy for all time to come an easement over land under a parol license given by a person, whose title has long since ceased, and who, when he parted with his title to the land, made no reservation of the easement now claimed.

It is argued on the part of the plaintiff that a license to enjoy a beneficial privilege in land may be granted without deed, and various cases were cited at the argument in support of that position. The first is that of *Winter* v. *Brockwell*, 8 East. 308, in which the plaintiff complained that the defendant had wrongfully placed a skylight, over an open area above and between his window and the adjoining house, by means of which the light and air were prevented from entering into his house. At the trial before *Lord Ellenborough*, C. J., the defence set up was, that the area which belonged to the defendant's house had been enclosed and covered by the

1861.
RIPLEY v. BAKER.

skylight with the express consent and approbation of the plaintiff; and his Lordship held that the license given by the plaintiff to erect the skylight having been acted upon by the defendant, and the expense incurred, it could not be recalled and the defendant made a wrong-doer, at least not without putting him in the same situation as before, by offering to pay the expenses which had been incurred in consequence of it. That case appears to be clearly distinguishable from the present, for all that the defendant there did he did upon his own land, and claimed no right or easement on the plaintiff's. The plaintiff claimed a right and easement against him, viz., the privilege of light and air from the defendant's area through a window in his house, and as remarked by *Bayley* J., in the case of *Hewlins* v. *Shippam*, 5 B. and C. 233, the only point decided there was, that as the plaintiff had consented to the obstruction of his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way, in which but for the easement of the plaintiff such grantee would have had a clear right to use it.

The next is the case of *Taylor* v. *Waters*, 7 Taunt. 374, against the door keeper of the opera house for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him entrance. In that case *Gibbs*, C. J. laid down the doctrine for which the plaintiff here contends, "that a "beneficial license to be exercised upon land may be "granted without deed, and cannot be countermanded "after it has been acted upon;" and the grounds given for his judgment were that the silver ticket was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges

thereon, which was not required to be in writing by the Statute of Frauds, and consequently might be granted without deed. If the doctrine here laid down were uncontroverted and incontrovertible, it would be a strong case for the plaintiff, but its soundness has not only been doubted, but it has been pronounced by *Alderson* B., in *Wood* v. *Leadbitter*, 13 M. & W. 838, "to the last degree unsatisfactory," so that it cannot be taken as a reliable authority on the point raised here, and may now be considered as overruled.

Next is the case of *Liggins* v. *Inge*, 7 Bing. 682. That was decided upon a principle not applicable to this case, the ground of that decision being that the parol license given by the plaintiff's father to the defendant to cut down his own bank, and erect the weir or fletcher, had not and was not intended to have the effect of transferring to the defendant any right or interest whatever in the water, which was accustomed to flow to the plaintiff's mill, but simply to be an acknowledgement on the part of the plaintiff's father that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir which he consented should be erected by the defendant, again to become *publici juris* by the act of relinquishment, and therefore it was that the license there given was held not to be countermandable. But, if it had been considered necessary in that case to decide, whether a permanent interest in part of the water which flowed to the plaintiff's mill passed under the parol license, we must presume the decision would have been the reverse of what it was; for *Tindal* C. J. there says:—"If it were "necessary to hold that a right or interest in any part "of the water which before flowed to the plaintiff's "mill, must be shewn to have passed from the plain- "tiff's father to the defendants under the license, in "order to justify the continuance of the weir in its "original state; the difficulty (by which he meant the

1861.

RIPLEY v. BAKER.

"objection raised on the part of the plaintiff, that it "could only pass by grant,) would undoubtedly follow, "for it cannot be denied that the right to the flow "of water to the plaintiff's mill could only pass by "grant as an incorporeal hereditament, and not by "parol license."

The last case relied upon by the plaintiff, to which I think it necessary to refer, is that of *Wood* v. *Manley*, 11 A. & E. 34. That was an action of trespass *quare clausum fregit*. The defendant pleaded that he was possessed of a large quantity of hay on the plaintiff's close, and that he entered on the close by the leave and license of the plaintiff. It appeared that the hay in question was sold by the plaintiff's landlord, who had seized it as a distress for rent, and that the conditions of the sale were, that the purchaser of the hay might leave it on the close until a day named, and might in the meantime come on the close as often as he pleased to remove it. These conditions were assented to by the plaintiff, and the defendant became the purchaser of the hay; but before the time allowed for the removal of the hay, the plaintiff locked up the close. The defendant broke open the gate, entered the close, and carried away the hay, and the jury, being instructed by the learned Judge who tried the case, that the license to come from time to time to remove the hay was irrevocable, found a verdict for the defendant. A motion was made to set it aside, but the Court of Queen's Bench refused to grant the rule, upon the ground, as it would appear, that the license was part of the very contract assented to by the plaintiff, and that the hay, having by the sale become the property of the defendant, the license to remove it became irrevocable. This was not the case of a mere license, but a license coupled with an interest, which is looked upon in a very different light from a license without any interest in that which is claimed, as in the present case. I pass over the case of *Webb* v. *Paternoster*, Popham 151, as I find that the

objection here raised on the part of the plaintiff was not taken in that case, and therefore it can have no immediate bearing on this.

Having now run over all the more important cases relied upon on the part of the plaintiff, I will now proceed to consider the main objection raised on the part of the defendant to the verdict found for the plaintiff in this case, namely, that the license given by *Bulmer* to the plaintiff, to erect a dam and water-course over the land then belonging to him, and now the defendant's, being by parol, was revocable at the will and pleasure of the owner. As that objection involves the principle upon which alone the present case must rest; but little may be said touching the other objection taken on the part of the defendant, that the sale of the land to the defendant operated as a revocation of the license. I will advert to one case only—comparatively a late one—in support of the opinion I have formed,—that of *Wood* v. *Leadbitter*, 13 M. & W. 838, in which the whole doctrine of license is elaborately and ably reviewed by *Alderson* B., by whom the judgment of the Court was delivered. That learned Judge there says:—"That no incorporeal "inheritance affecting land can either be created or "transferred otherwise than by deed, is a proposition "so well established that it would be mere pedantry "to cite authorities in its support. All such inherit-"ances are said emphatically to lie in grant, and not in "livery, and to pass by mere delivering of the deed. "In all the authorities and text books on the subject, "a deed is always stated or assumed to be indispen-"sably requisite, and although the older authorities "speak of incorporeal inheritances, yet, there is no "doubt but that the principle does not depend on the "quality of interest granted or transferred, but on the "nature of the subject matter; a right of common "for instance which is a *profit a prendre*, or a right of "way which is an easement, can no more be granted "or conveyed for life or for years, without deed than

1861.

RIPLEY v. BAKER.

"in fee simple"; and in considering the nature of a license, and what are its legal incidents, he proceeds to say:—"A mere license is revocable, but what is "called a license is often something more than a "license; it often comprises or is connected with a "grant, and then the party who has given it cannot in "general revoke it, so as to defeat his grant to which "it was incident. It may further be observed," he says, that a license under seal, provided it be a mere "license, is as revocable as a license by parol; and "on the other hand, a license by parol, coupled with "a grant, is as irrevocable as a license by deed, pro-"vided only that the grant is of a nature capable of "being made by parol. But where there is a license "by parol, coupled with a parol grant, or pretended "grant of something which is incapable of being "granted otherwise than by deed, there the license is "a mere license; it is not an incident to a valid grant, "and it is therefore revocable. Thus a license by A. "to hunt in his park, whether it be given by deed or "by parol, is revocable; it merely renders the act of "hunting lawful, which, without the license, would "have been unlawful. If the license be as put by "Chief Justice *Vaughan*, (referring to the case of "*Thomas* v. *Sorrell*, Vaughan 351,) a license not only "to hunt, but also to take away the deer when killed "to his own use, this is in truth a grant of the deer "with a license annexed to come on the land, and, sup-"posing the grant of the deer to be good, then the "license would be irrevocable by the party who had "given it; he would be estopped from defeating his own "grant, or act in the nature of a grant. *But suppose "the case of a parol license to come on my lands, and there "make a watercourse to flow on the land of the licensee* "(*which is the case here.*) In such case there is no valid "grant of the watercourse, and the license remains a "mere license, and therefore capable of being revoked. "On the other hand, if such license were granted by "deed, then the question would be on the construc-

"tion of the deed, whether it amounted to a grant of "the watercourse, and if it did then the license would "be irrevocable."

It appears from the report, that the license which *Bulmer* gave to the defendant was to cut a ditch through his land for a watercourse to his mill. He gave the defendant no license to make a dam; but as he did not object to it after it was made, I have assumed that both were made with his consent, and considered the case on that assumption. Now, it cannot be pretended that the license gave the plaintiff any interest in the land, as it was a naked license unaccompanied and unconnected with any grant, and being of that description, it was revocable at any moment, according to the principle laid down in *Wood* v. *Leadbitter*, which shews that the incurring of expense could not give to it the efficacy of a deed and pass a permanent interest, any more than the payment of a guinea by *Wood* for a ticket of admission, could give him a right to remain on the grand stand, the property of Lord *Eglintoun*, during the *Doncaster* races.

That case appears to me conclusive on the first and main point taken in this, and although it may not be necessary to express any opinion as to the other, I may say that I am strongly inclined to concur in the view expressed by the learned counsel for the defendant, that the sale of the land by *Bulmer* operated as a revocation of the license, which could not from its nature continue to be of any effect after the title of the licensor had ceased; and to support that position, the opinion of Lord *Abinger*, C. B., in *Wallis* v. *Harrison*, 4 M. & W. 543, may be cited, who says, "that a "mere parol license to enjoy an easement on the land "of another does not bind the grantor, after he has "transferred his interest and possession in the land to "another. I never (he says) heard it supposed that if "a man, out of kindness to a neighbor, allows him to "pass over his land, the transferee of that land is "bound to do so likewise." The plaintiff has, there-

1861.

RIPLEY v. BAKER.

fore, no right to deprive the defendant of the use of a portion of his land under such a license as this, much less to maintain an action against him for cutting a dam, for the erection of which no express license or authority was ever given, and, if given, may, under the authority of the case last cited, not improperly be said to have been long since revoked. To hold otherwise would be not only to allow a parol license the effect of passing to the plaintiff a permanent interest or easement over the land of the defendant, which it is clear could only pass at common law by grant under seal; but it would confer a right, which I cannot presume was ever contemplated by the grantor, and such as cannot, in my opinion, be maintained on any recognized principle or authority. Such being my view of this case, I think the *Rule Nisi* granted therein must be made absolute.

WILKINS J. I was strongly impressed, at the argument of this cause, with an opinion that established principles were decisive of the real question at issue, without reference to authorities; and the result of a research into the cases cited, which I have felt it my duty to make, has but confirmed my first impressions. Whether the plaintiff can or can not sustain this action, depends entirely on the legal effect of the license which is pleaded, and by the authority of which alone the ditch was cut by plaintiff in the land of the defendant. If, in point of law, that license were irrevocable, and in effect the same with a grant of an easement, the action lies; if, on the contrary, it conveyed a mere personal privilege, and was revocable under the circumstances, it has been revoked in fact by the very act of the defendant which is complained of, and the action fails.

In order to ascertain the nature and effect of this license, we must consider its original. Knowledge of this we derive from the witness *Bulmer*, who says that what is called the new cut, was made 19 years

previous to the trial, and that it was made by the plaintiff under permission asked by him of the witness, who was then the occupant of the land, and who granted that permission accordingly. It is certain, then, that *that* which plaintiff calls an easement, and in respect of which he claims an absolute right, which (as he alleges) defendant violated by cutting the bank in question, (on which the exercise of that right depended), had its origin in permission, or a mere personal license, of the then occupier of the soil. Such having been its origin, such must now be its legal character. (See *Beasley* v. *Clark*, 2 Bing. N. C. 705.)

It cannot be regarded as an easement *in alieno solo*, which can be founded on grant alone. It was, when the act done by defendant was committed, a mere privilege, enjoyed at the pleasure of the owner of the soil, who could determine it when he pleased, and determine it without any legal obligation entailed upon him to compensate any expense that the plaintiff may have incurred, in respect of acts done by him under the license in question. Modern authorities, which have carefully reviewed the older cases, establish this to be the legal character and effect of a license to do acts in relation to the land of another, such as that act to which the particular license in question refers. (*Wood* v. *Leadbitter*, 13 M. & W. 838.)

With reference to the plaintiff's replication to the defendant's fifth plea, it is only necessary to remark, that, whilst that replication imports an allegation by the plaintiff of an uninterrupted, continuous, and identical user of the stream over the defendant's land, for the period of forty years, in a channel (which might be understood to mean one and the same channel) different from the original channel. The evidence not only fails to sustain, but directly contradicts that allegation. It does so most clearly, by shewing that the new ditch cut was entirely distinct from the old one

1861.

RIPLEY v. BAKER

through which the stream had been previously conducted.

I am, therefore, of opinion that a non-suit must be entered.

Rule absolute.

Attorney for plaintiff, *Dickey*.
Attorney for defendant, *R. McCully*.

July 30.

SOMMERVILLE *versus* MORTON ET AL.

M., by Will made in 1819, devised certain lands in trust "*for the benefit of a Protestant Orthodox Minister, duly authorized*, as also for the building thereon a house for the public worship of Almighty God, a parsonage house, a school house, and burying ground for the use of the inhabitants of the Western part of the township of *Cornwallis*, whenever there may be a sufficient number united in the promotion of the public worship of God in that quarter."

There was not in 1819, nor up to the time of *M.*'s death, any Presbyterian Church, or Protestant Church of any kind in *West Cornwallis*, but the members of the Presbyterian Church residing there communed with the Presbyterian Church in *East Cornwallis*, and *F.*, the Minister of the latter church, occasionally officiated in *West Cornwallis*.

M. died in 1821, and from the year 1800 to the time of his death, was an Elder of the church of *F.*, who was a minister of the Church of *Scotland*.

The plaintiff, who was a Minister of the Reformed Presbyterian Church, and the first Presbyterian Minister that was settled and had a congregation in *West Cornwallis*, claimed the benefit of the devise.

The trustees of *M.* had declared the land to be held for the use of the Free Church of *Scotland*, now having a resident minister in *West Cornwallis*, and claiming the land as rightfully belonging to them.

It appeared that according to the principles of the Reformed Presbyterian Church, a member of that church could not consistently hold a civil office under government, or be a magistrate.

No such principles were held either by the Established Church of *Scotland* or the Free Church of *Scotland*, and *M.* had been for many years previous to, and at the time of his decease, a magistrate and a major in the militia.

It further appeared that the plaintiff would not commune with members of the Church of *Scotland*.

Held, That in order to ascertain the intentions of *M.*, the Court was bound to consider all the circumstances surrounding him at the time the will was made, and that in view of these circumstances, and of other clauses in the will, the plaintiff was not entitled to the benefit of the devise.

THIS was a case on the construction of a Will, argued before all the Judges in Michaelmas Term last, by *J. W. Ritchie*, Q. C. and *C. W. H. Harris*, Q. C., for plaintiff, and *J. W. Johnston, senior*, Q. C. and *Webster*, for defendants. All the material facts are fully set out in the judgment.

YOUNG C. J.—This case has arisen out of a bequest in the will of the late *Elkanah Morton*, dated the 16th *October*, 1819, which bequest is contained in the eleventh clause of the will, and runs as follows:—

"And further, I do hereby give and bequeath to my "trusty and well-beloved grand-sons, *John M. Terry*,

"*Holmes Morton*, and *Samuel Beckwith*, one hundred "acres of land, situate, lying and being in Cornwallis "aforesaid, on the east side of the road, near the "bridge, which is near the south-east corner of the "said *Holmes Morton's* farm; bounded on the west "side of the said road, and extending northward until "it makes the said one hundred acres at right "angles, to be held of the said *John Morton Terry*, "*Holmes Morton*, and *Samuel Beckwith*, in trust as a "parsonage or glebe, for the benefit of a Protestant "Orthodox Minister, duly authorized, as also for the "building thereon a house for the public worship of "Almighty God, a parsonage house, a school house, "and burying ground for the use of the inhabitants "of the western part of the said township of *Corn-* "*wallis*, whenever there may be a sufficient number "united in the promotion of the public worship of "God in that quarter, to be held and enjoyed by them "for the above uses and trusts, and no other, for- "ever; and in the event of the death of either of the "above named trustees, the surviving two are hereby "authorized and directed to agree on and appoint, in "the room of such deceased, a religiously disposed "successor to the said trust, and by that means to "keep up the number of the said trustees forever."

The testator died in 1824, and Mr. *E. Morton*, one of the defendants, was duly appointed by the other two a co-trustee, in room of Mr. *John M. Terry*, deceased. In 1825 or 1827, a meeting of the Religious Society in *West Cornwallis* was held, at which the trustees were requested to improve the land, and to make it more useful for the purposes for which it was devised. Some clearings and improvements were accordingly made, but none of a permanent kind, and no building has hitherto been erected on the lot by the trustees.

The plaintiff was the first Presbyterian Minister (that is, the first minister holding the doctrines of the *Westminster* Confession of Faith,) that was settled, and

1861. SOMMERVILLE v. MORTON et. al.

had a congregation in *West Cornwallis*, and has resided there about ten years. Mr. *Chipman*, a Baptist Minister, had long preceded him, having been settled in charge of a congregation in *West Cornwallis* upwards of thirty years. No claim, however, is made on behalf of that body, and the land has been declared by the trustees to be held for the use and benefit of the Free Church, who have now a resident Minister in *West Cornwallis*, and claim the land as rightfully belonging to them. The plaintiff, on the other hand, insists that he was first settled; that he comes within the definition of "a Protestant Orthodox Minister duly authorized"; and, if it be confined to Presbyterians, that he is as much a Presbyterian as a Minister of the Free Church; that, in point of fact, he was the first Minister who ever enjoyed the benefit of the trust; and that the recent declaration of the trustees in favor of the Free Church, was an injury to himself and his congregation, which this Court is called upon to redress.

With these contending claims, it is obvious that the first inquiry is as to the meaning of the words, "Pro-"testant Orthodox Minister," and the words in connection therewith used by the testator. The plaintiff, in his evidence, says: "I am not aware that the word "Orthodox applies to any particular Christian body "in opposition to any other: it applies to all Chris-"tians who hold the doctrine of the Trinity, the Divi-"nity of Christ, the agency of the Spirit in regenera-"tion, and kindred doctrines; so that it applies to "Presbyterians, Congregationalists, Methodists, and "Baptists, who hold those doctrines professed at the "time of the Reformation." To the bodies which the plaintiff has thus specified, Episcopalians, and other Christians must certainly be added, and even the Unitarians, by the liberality of modern times, would probably be included. The word Protestant has a meaning certain and clearly defined; but nothing can be more vague and shadowy than the meaning

which different men attach to the word "Orthodox." "If two men," says the learned and judicious *Hooker*, "take Scripture for their guide, and professing to "have no other guide, come to opposite conclusions, it "is quite clear that neither has a right to decide that "the other is not orthodox." Upon this principle, Dr. *Williams* and the other authors of the *Essays and Reviews* that are now so famous, (and which have a tendency, as I cannot but think, to shake and unsettle the very foundations of the Christian faith), as they profess to take Scripture for their guide, may account themselves equally orthodox as the Archbishops and Bishops who denounce them. I observe, indeed, that Dr. *Williams* employs this very term in the essay for which he has been prosecuted in the Ecclesiastical Courts, and speaks of "the more than orthodox "warmth with which Baron *Bunsen* embraces New "Testament terms." Orthodoxy is said by one of these very Archbishops, Dr. *Whately*—almost as great a name as *Hooker* himself—to mean "right opinion, "in popular language, a conformity to what is gene- "rally received as the right faith." Even *Shaftesbury*, ingenious, eloquent, and infidel as he was, is not ashamed in his *Characteristics* to assert "his steady "orthodoxy and entire submission to the Christian "doctrine." Did we confine ourselves to the will, then, all the Protestant denominations, each equally orthodox in its own eyes, and each, as we may charitably and fairly assume, equally aiming at the truth, as it is revealed in Scripture, would be equally entitled to the benefit of this devise.

The will being thus, of itself, insufficient to guide us to a just conclusion, it seems to follow that we should look beyond it, and resort to extraneous evidence to get at its real meaning. Now, the extent to which such evidence should be received, has been discussed in several of the cases, and led to a great variety of opinion. The most celebrated of these is that which arose out of Lady *Hewley's* deed of foun-

1861.

SOMMERVILLE v. MORTON et. al.

dation for "poor and godly preachers of Christ's "Holy Gospel." reported under different titles in 7 *Jurist* 781, in the note to 7 *Simon* 290, in 11 *Simon* 605, and in 16 *Simon* 220. The foundation having passed into the hands of the Unitarians, when as it was contended it ought to be confined to Presbyterians, depositions were received of Dr. *John Pye Smith* and others as to the religious opinions of Lady *Hewley* and her trustees, derived from tradition and authentic publications, and Dr. *Bennett* also deposed that the word or term Presbyterian in 1704, the date of the first deed, was commonly used as the name of a class of English Protestant Dissenters, so large and influential as to give a name to all the Dissenters of that period. The reception of this testimony was disapproved of at the time by Chief Justice *Tindal*, and has been since condemned by Lord *Campbell:* and much of it, and especially the declarations of Lady *Hewley*, was clearly inadmissible. It probably led to the singular diversity of opinion which marked this celebrated case, and illustrated, not the uncertainty of the law which is often blamed where there is no blame; but the difficulty of expounding and ascertaining the meaning of an instrument obscurely expressed. Seven of the Judges gave their opinions to the House of Lords; and as they are reported in 11 *Simon*, some of them are models of judicial reasoning. They all agreed that the words comprehended Orthodox Dissenters of every sect. One of them thought that Unitarians, and another that members of the Church of England were included. Six of them thought, as it was ultimately decided, that Unitarians were excluded. The *Vice Chancellor* finally held in 16 *Simon*, that the deeds of 1704 and 1707, and the words already cited, "Godly preachers of Christ's Holy "Gospel," under the evidence in the case, extended to Orthodox English Dissenting Ministers of Baptist Churches, of Congregational or Independent Churches, and of Presbyterian Churches in *England*,

not in connection with, or under the jurisdiction of the Kirk of *Scotland*, or the Secession Church. An appeal was lodged against this decision, and a decree passed by way of compromise which allowed all Presbyterian Ministers to participate in the fund, and settled the case. It settled also the principle, that where the terms used are obscure, doubtful, or equivocal, it becomes the duty of the Court to ascertain by evidence, as well as it is able, what was the intent of the founder, and to give effect to that intent where it can be done without infringing any known rule of law. The intent of the founder at the time of the making of the will, or the execution of the deed was the object of inquiry. "Evidence of the circumstances "by which the author of the instrument was surrounded "at the time," was said by the *Chancellor*, "to be "clearly admissible." The same principle runs through the other cases cited at the argument.

In the *Attorney General* v. *Pearson*, 3 Mer. 353 and 7 Simons 290, the intent of the founders of the charity is perpetually brought up. The meeting-house was founded by Protestant Dissenters "for the worship "and service of God;" and the *Vice Chancellor* used this strong illustration—"Supposing the state of the law "had permitted it, if the persons who founded this "chapel had been *Mahometans*, I should have thought "it a matter of course, that they must have meant the "service of God by means of disseminating *Mahometan* "principles." In the case of the *Presbyterian Congregations in Dublin*, 2 Law & Equity Reports 15, the whole question was said by Lord *Cottenham*, to be the sense in which the words "Protestant Dissenters" were used by the founders of the trust. Evidence of the meaning of these words as used by them was admitted, and Unitarians, though, as Lord *Campbell* observed, it would be very unchristian to say that they were not Christians, still as they were not considered Christian brethren at the time of the foundation, were excluded.

Taking these principles as our guide, we have to

1861.

SOMMERVILLE v. MORTON et. al.

inquire in this case what was the position, and what the opinions of the testator, and in what sense he must be understood to have employed the words "Protestant Orthodox Minister."

The testator died at the great age of 94, and appears to have been all his life a Presbyterian. This generic term embraces members of the Church of Scotland and of the Free Church, members of the Secession, Congregationalists, Covenanters, and Cameronians—the last of these equally with the others acknowledging the *Westminster* Confession of Faith and the Catechisms, larger and shorter, to be founded upon and agreeable to the Word of God.

During the present century, the Presbyterian body in *Cornwallis* has undergone several changes, as is usually the case in a new country. Mr. *Phelps*, the first Minister of whom we have any account, was a Congregationalist. Mr. *Graham*, who succeeded him, belonged to the Secession. Then came, about the year 1800, the Rev. Mr. *Forsyth*, a licentiate of the Church of Scotland, who survived the testator. He was succeeded by the Rev. Mr. *Struthers*, who separated from the Church of Scotland after the great disruption of 1843, and now there are three settled Ministers of the Free Church, besides the plaintiff, all four having congregations in *East* or *West Cornwallis*.

At a very early period, the testator is said to have been an office bearer in Mr. *Phelps'* church, and he was an elder in Mr. *Graham's* and Mr. *Forsyth's*. *Holmes Morton*, his grandson, says that he was called, and it would seem that at the time of his death, he was, in fact, a Presbyterian of the Church of *Scotland*, he was never known as a Covenanter or Cameronian. It must be remembered that he died 19 years before the Free Church had being,—that there was then but one Presbyterian Church in the township,—and however slight the connection may have been, that Church professed to be a branch of the Established Church of

Scotland. Several of its adherents and one or two of its elders reside in *West Cornwallis*, and as early as 1830, about £200 was subscribed for the erection of a Church there. Mr. *Forsyth* occasionally preached in *West Cornwallis*, and administered the sacrament in Mr. *Chipman's* church. Now, the testator devises to Mr. *Forsyth*, the use and profit of the westwardly dyke lot, which he owned in the *Grand Dyke*, to hold to him so long as he continued the pastor of the people of whom he then had charge. He then gives it to his wife (the testator's grand daughter), should she survive him, during her widowhood,—and finally bequeaths it in trust for the use and benefit of any such regularly ordained Protestant Minister as might be legally constituted to the pastoral care of said church,—and so on in succession, so long as the inhabitants of *Cornwallis* unite and agree in the maintenance and support of a legal and orthodox succession, and continuance of a pastor over the said church, and in case of the final failure of such succession, he gives the lot to his son *Roland* in fee.

The legal and orthodox succession in this clause clearly meant a succession according to the principles of the Church of *Scotland*, and throws a strong light on the words, "a Protestant Orthodox Minister," in the clause we are now considering.

It was admitted on all hands at the argument that only Presbyterians could claim; but it was contended by the plaintiff's counsel that all Presbyterians stood upon the same footing, that the fundamental principles of their belief being the same, the minor differences of Church government, and of speculative and political, rather than of religious sentiment, ought not to be taken into account. And this of necessity led to an examination of the opinions held by Mr. *Sommerville* and his congregation.

These opinions abundantly appear in the evidence, and affected me, I must confess, with no little surprise. I was not aware that they were entertained by any

1861. SOMMERVILLE v. MORTON et. al.

body of Christians in this Province; and although they separate this body from every other, and may appear, at first sight, to place them, as subjects of the Queen, in a singular and rather equivocal position, I am persnaded that if it came to the point, they would be found as eager to defend the Crown, and to resist an invading force, as the staunchest Episcopalian or Kirkman in the land. It must be confessed, however, that their principles, as avowed by Mr. *Sommerville* himself and other witnesses, and as they are stated in the *Testimony* of the Reformed Presbyterian Church published at *Glasgow*, and adopted by their Synod *May* 15, 1837,—and in *Martin's* Catechism, printed in the year 1855, and given in evidence in this cause, wear a peculiar aspect. "I believe," says Mr. *Sommerville*, "that our principles are precisely the same as "those of the Free Church, who hold to the permanent "obligation of the Solemn League and Covenant"; and so far I believe he is right. The Free Church equally with the Covenanters adhere to the National Covenant and *Westminster* Confession of Faith, ratified by various acts of the *Scottish Parliament* in 1640, 1644, and 1649. Having, in view, the uniformity contemplated in the Solemn League and Covenant of 1643, the Church of *Scotland* consented to adopt the Confession of Faith, (which substantially agrees with the articles of the Church of *England*), and the Catechisms, directory for public worship and form of church government, agreed upon by the Assembly of Divines at *Westminster* in 1647.

Now, the Free Church, while asserting the right and duty of the civil magistrate to maintain and support an establishment of religion, and deeply sensible of the advantages resulting to the community at large, and especially to its more destitute po'ions, from the public endowment of pastoral charges among them, have renounced the benefits of the National Establishment, not that they disapproved of such an establishment, but because they would not submit to the

conditions which the State imposed. They still concur in the great principle of an Ecclesiastical Establishment, and would at once connect themselves with the State, could they preserve, in so doing, their spiritual independence.

But in these fundamental principles, they differ widely, and the Church of *Scotland*, of course, still more widely, from the Covenanters. It is admitted by Mr. *Sommerville*, that a member of his church, and he thinks also a member of the Free Church, can not consistently hold a civil office under government, nor be a magistrate or member of parliament, or vote at elections. Mr. *Isaac Morton* says: "Our principles "do not allow us to vote at elections, nor to accept "the office of a magistrate, nor to be a member of "parliament; I expect they do not allow us to take "the oath of allegiance." "The reason," he adds, "that we think it improper to take the oath of allegiance is, that we believe the Lord Jesus Christ to "be the Head of the Church on earth, and we think "that taking the oath of allegiance would be recognizing the Queen as Head of the Church. We "abstain from voting and holding office on the same "principle; but we think the *British* Government to "be the best in the world. Our principles lead us to "uphold the laws of the country; we are loyal subjects of the Government; our objection to taking the "oath of allegiance is a matter of conscience; we "would readily take up arms in defence of our "country." For the same reason, the oath of allegiance as involving an acknowledgment of the King's supremacy, is classed in the *Testimony*, fol. 137, with "other detestable contrivances." So also the Reformed Presbyterians, in their Catechism, frankly acknowledge that the rights of men are as well secured, and as faithfully guarded in *Britain*, as perhaps in any other nation on the earth, but regard the *British* nation and its rulers as having renounced and proscribed the attainment of the Second Reformation.

1861.

SOMMERVILLE v. MORTON et. al.

and the National Vows, and falling, therefore, under condemnation, "as an immoral and anti-Christian "state." These distinctive principles are frankly avowed, and while they are not inconsistent with a due and ready appreciation of the Christian merits of other denominations, they have this important practical effect, that Mr. *Sommerville* and his congregation cannot commune with any other body. Mr. *Sommerville* himself declined communing with the members of Mr. *Forsyth's* congregation, though he preached to them after the Communion service. He was asked if he would preach to the congregation as a Presbyterian minister, and drop his Cameronian principles, and he replied to the effect that the Church of *Scotland* would not unite with him, nor he with them.

Here, then, is a conscientious and a substantial difference. The testator, if he had lived, could not have been a consistent member of the plaintiff's church, because he filled the offices both of a magistrate and a major of militia, and although he might have communicated with Mr. *Sommerville's* adherents, they could not have communicated with him. Whether the testator, had he survived, would have cast in his lot with the Free Church, or sympathized with the Establishment, can be only matter of conjecture. We are called upon not to determine the rights of the Free Church, but the right of the plaintiff to this land, and as that depends on the intent of the testator, to be gathered from all the circumstances in proof, it seems to me that it would be doing violence to his intent and meaning, to award the land to the plaintiff in this suit. I think, therefore, our decree should be for the defendants; but as this is avowedly a struggle between the two congregations, as a doubt was raised by the obscurity of the will, and as the expense will fall, not on the trustees, but on the congregation with whom they sympathize, I think the decree should be without costs on either side.

BLISS J. concurred.

1861.

SOMMERVILLE v. MORTON et. al.

DODD J. This is an application on the part of the plaintiff, who claims certain lands in *West Cornwallis*, devised by the late *Elkanah Morton*, by his last will and testament, dated 16th *October*, 1819, to certain trustees therein named, as a parsonage or glebe for the benefit of a Protestant Orthodox minister duly authorized, as also for the building thereon a house for the public worship of Almighty God, a parsonage house, a school house, and burying ground, for the use of the inhabitants of the western part of the township of *Cornwallis*, whenever there should be a sufficient number united in the promotion of the public worship of God in that quarter, to be held and enjoyed by them, for the above uses and trusts, and no other, for ever.

The plaintiff is a minister of the Reformed Presbyterian Church, is settled in *West Cornwallis*, having there a congregation of persons of the same religious belief and opinions that he professes to have, and he contends that he and they come within the meaning of the testator's devise, and requests this Court to make an order upon the trustees, the present defendants, to transfer to him the trust estate. In deciding this case the Court are not so much required to determine who are the objects of the testator's bounty, as to decide whether the plaintiff is entitled to the estate. A large amount of testimony has been taken in the cause, and if particularly examined I think it will be found that some portion of it was not receivable in evidence. Sufficient, however, of a different character was received, to show what the religious opinions of the testator were, when he made his will, as well as the religious opinions of the plaintiff who claims the trust estate.

The testator died in 1824, having made his will in 1819, his death having occurred seven years before the plaintiff was ordained a minister, and there is not any evidence showing that the testator was acquainted with the religious opinions of the plaintiff, or that there were any persons professing those opinions

1861. SOMMERVILLE v. MORTON et. al.

resident in *Cornwallis* previous to the death of the plaintiff. When he made his will he was a justice of the peace, and a major in the militia. He was also an elder of the church in *Cornwallis*, of which the Rev. *William Forsyth* was pastor, and of the Established Church of *Scotland*. He was an elder of Mr. *Forsyth's* church from the year 1800 until his death in 1824, and until within a few years of his death, was, as one of the witnesses states, an active member of the church; and when it is remembered that he died at the advanced age of 94, it is not much matter of surprise that his activity as a member declined as he advanced in years. The evidence, however, is conclusive that the testator was in principles of the Established Church of *Scotland*. How far those principles are in common with the principles and doctrines of faith held by the plaintiff, will presently be inquired into, being essential to the construction of the devise in question. The devise does not in clear and distinct language point to the object of the testator's bounty, beyond that it was intended for a Protestant Orthodox Minister. We must, therefore, call to our aid such circumstances as surrounded the testator when he made his will, as well as other parts of his will besides this devise, to enable us to see whom he intended by the words "Protestant Orthodox Minister."

To the Rev. *William Forsyth* he devised a lot of land, in the eastern part of the township of *Cornwallis*, to hold to him so long as he should continue the pastor of the people of whom he then had charge; and in the event of his leaving his wife, who was a granddaughter of the testator's, a widow, then she was to have the use and profits of the land during her widowhood. The people referred to in this devise over which Mr. *Forsyth* was pastor, formed the congregation in which the testator was an elder. It is important to follow out the further disposition of this devise which the testator does by a subsequent clause. He says,—"After the purposes of the before named

"*William Forsyth*, and those of my grand-daughter, "his wife, are fully answered, my will is that the said "lot should then and from thenceforth for ever, hold "to my son *Roland* and his heirs, in trust for the use "and benefit of any such regularly ordained Protes- "tant Minister as may be lawfully constituted and "appointed to the pastoral care of the said Church, "of which the said *William Forsyth* is now pastor: and "so on in succession so long as the inhabitants of "*Cornwallis* unite and agree in the maintenance and "support of a legal and orthodox succession, and "continuance of a pastor of the said Church." And in case of the final failure of such pastoral succession, he gives the lot to his son *Roland*, his heirs and assigns for ever.

I think it will be scarcely questioned, that the Orthodox succession there referred to, would only refer to a pastor holding the same principles of faith as those held by Mr. *Forsyth*, and that none other could claim any benefit under the trust thus created, unless a regularly ordained Protestant minister of the Church to which he belonged. The language the testator makes use of in devising the lands in *East* and *West Cornwallis* appears to me to be substantially the same. In the one he gives the land in trust for the benefit of a "Protestant Orthodox Minister," duly authorized; and in the other, he gives the land in the first instance to the Rev. *William Forsyth* (who is a Protestant Orthodox Minister), so long as he should continue pastor over those he then had in charge. His final disposition of the property, so far as the church is interested, is after the purposes of the said *William Forsyth* and his grand-daughter are fully answered. Then his will is, that the land should be held in trust, for the use and benefit of any such regularly ordained Protestant minister, as may be lawfully constituted and appointed, &c., and so in succession, so long as the inhabitants unite in the support of a legal and orthodox succession. I think it impossible to read the two devises,

1861. SOMMERVILLE v. MORTON et. al.

and not see that the testator intended the same thing in both: that is, that the lands should be held in trust for the benefit of a "Protestant Orthodox Minister," professing the same principles of faith as those held by Mr. *Forsyth*, and that the trust should not be extended for the benefit of any other class of Christians. In the lifetime of the testator, Mr. *Forsyth* was the pastor of *East* and *West Cornwallis*, then forming one parish. One-sixth of his time, Mr. *Forsyth* gave to *Western Cornwallis*, but his congregation resident there received the communion from him in *Eastern Cornwallis*. It was about this time that the testator made his will, and I cannot doubt that his mind was then intent upon providing a minister for *West Cornwallis*, when it was in a position to support one, of the same principles of faith as the congregation over which Mr. *Forsyth* was then the pastor, and he (the testator) an elder, and I think this intent is abundantly clear, from the language of his will.

At the argument it was admitted that no church or denomination of Christians could claim the benefit of the trust, unless Presbyterians, and yet there are not any words in the devise that expressly exclude other denominations. The words "Protestant Orthodox "Minister," would apply equally to a Baptist, or Methodist, as to a Presbyterian: and if to be confined to a Presbyterian, then there must be some distinct and clear reason for confining and limiting their application. If limited to Presbyterians, because the testator was a Presbyterian, then the reason is equally strong for limiting the devise to the Presbyterian body, of which the testator was a member.

Having satisfied my mind that the devise in question can only apply to a minister of the church of which the testator was a member, and the evidence clearly establishing that he was a member of the Established Church of *Scotland*, and not a Covenanter or a member of the Reformed Presbyterian Church, I will now turn to the evidence to ascertain if the

opinions and principles, professed and held to by the plaintiff, were in common with those held by the testator.

The plaintiff says that he holds by principles, the same as the Free Church of *Scotland*, that the vital principles of the Free Church are the same as those of the Established Church, that they differ only in church government. The Rev. *William Murray*, who was examined as a witness in the cause, and who is a Divine of the Presbyterian Church of the *Lower Provinces*, formerly of the Free Church, admits that the Reformed Presbyterian Church, or Covenanters, hold many principles in common with the Free Church, but that they differ in some points: that the Reformed Church have adopted a position of dissent from the civil government of *Great Britain*. "We," he says, "are part and parcel of the National Civil Society; "practically their members will not take the oath "of allegiance to the *British* Crown, will not hold a "public office, civil or military, and will not take the "oath now required of volunteers in *Great Britain* for "the national defence." He further says, that the members of all other Presbyterian bodies known to him, take their share in working out the *British* Constitution; and, as a matter of fact, he knows that the members of the Reformed Presbyterian Church will not hold communion with other Presbyterian bodies, and that the plaintiff would not take a seat as a corresponding member of the Synod of the Presbyterian Church of the *Lower Provinces*, when invited to do so. In addition to the evidence of Mr. *Murray*, we have the admissions of the plaintiff, that he declined communicating with Mr. *Forsyth's* congregation, and passed the Bread, when it was offered to him; and, in express terms, he says that he would not commune with the Established Church of *Scotland*.

These distinctive principles exhibit important differences between the testator and the plaintiff. The testator was a magistrate and a major in the militia.

1861.

SOMMERVILLE v. MORTON et. al.

The plaintiff says that a member of his church could not consistently hold any civil office under the Government. Neither could he, if the testator was alive, commune with him.

Under these circumstances, I am of opinion, that the devise of the land by the testator in *West Cornwallis*, cannot be claimed by the plaintiff, and I may say, I entirely agree with him in what he said in the presence of *John Kinsman*, viz., that "it was not in "the mind of the testator when he made his will, "that there ever should be a Covenanter's Church "formed in *West Cornwallis*."

DESBARRES J. The plaintiff by his writ claims the use and benefit of 100 acres of land devised by the late *Elkanah Morton* to *Holmes Morton* and *Samuel A. Beckwith*, two of the present defendants, and also to one *John M. Terry*, since deceased, in trust for certain purposes named in his will, viz.: "as a parsonage or "glebe land for the benefit of a Protestant Orthodox "Minitser, duly authorised, as also for the building "thereon a house for the public worship of Almighty "God, a parsonage house, a school house, and burying "ground for the use of the inhabitants in the western "part of the said township of *Cornwallis*, whenever "there might be a sufficient number united in the "promotion of the public worship of God in that "quarter." The surviving trustees having, in pursuance of the power and authority vested in them by the will, appointed *Elkanah Morton* in the room of *John M. Terry*, who died several years after the testator, the present action is now prosecuted against the three defendants, for the purpose of causing them to perform and execute the trusts in the will, and that the plaintiff may be declared to be entitled to the benefit of that trust.

The plaintiff avers that "he is a Minister of the "Reformed Presbyterian Church of *Cornwallis*, con-"nected with the Reformed Presbyterian Church of

"*Ireland*, adhering in communion with the Reformed "Presbyterian Churches of *Scotland* and *America* to "the doctrine, worship, discipline, and government "set forth in the *Westminster* Confession of Faith," and he claims the use and benefit of the land in question, upon the ground of his being a Protestant Orthodox Minister, ordained and settled in the Western part of *Cornwallis*, over a congregation duly incorporated, and the only congregation in the locality, to which he says the lands are appropriated in the will coming under the designation of Orthodox, according to the ideas of the testator, who was a Presbyterian adhering to the doctrines set forth in the *Westminster* Confession of Faith.

Such being the grounds on which the plaintiff rests his claim, we must endeavor to ascertain, what is all important in this case, what meaning the testator himself attached to the word "Orthodox," for it is obvious that no other than a Protestant Orthodox Minister, in the sense in which the testator used and understood the term, is or can be entitled to claim the use and benefit of the land devised for the purposes mentioned in his will. To discover what his views were upon that subject, we must look to the principles and doctrines which he professed, and to the Church to which he belonged when he made his will, as the best exponents of his ideas of Orthodoxy. From what we learn of his character, he appears to have been a pious and exemplary person, strongly attached to the doctrines of his Church, of which he was a leading and influential member; and it may, therefore, be inferred that his great object in making the devise was, to disseminate the doctrines of that Church among the inhabitants of the western part of the township of *Cornwallis*, in which there was then no resident minister.

We have it in evidence that the testator was a member of the Established Church of *Scotland*, and an elder in that Church during the ministry of Mr.

1861. SOMMERVILLE v. MORTON et. al.

Forsyth, and that certain members of that Church resided in Western *Cornwallis*, to whom Mr. *Forsyth* and his successor, Mr. *Struthers*, occasionally ministered.

It is said that the standards of that Church are the same as those of the Reformed Presbyterian Church, and hence it is contended that the plaintiff comes within the designation of a Protestant Orthodox Minister, according to the ideas entertained by the testator of Protestant Orthodoxy. We, however, find from the testimony of Mr. *Murray*, lately a Minister of the Free Church, now of the United Presbyterian Church, whose principles are identical with those of the Established Church of *Scotland*, that while the latter holds many principles in common with the Reformed Presbyterian Church or Covenanters, these bodies of Christians differ with each other on some points. This witness says:—"In point of worship, "the Reformed Church differ with us in that, in cele- "brating the praises of God, they use the Psalms of "David only; we, in addition to the Psalms of David, "use paraphrases and hymns. The Reformed Pres- "byterian Church make the acknowledgment of the "perpetual obligation of the covenants and solemn "league, a term of ministerial and Christian Com- "munion. We do not. They make the owning of "the judicial declaration and testimony emitted by "the Synod of the Reformed Presbyterian Church, a "term of Communion. We do not. The Reformed "Presbyterian Church have adopted a position of "dissent from the civil government of *Great Britain*. "We are part and parcel of the national civil society. "Practically their members will not take the oath of "allegiance to the British Crown, will not hold a "public office, civil or military. They will not now "take the oath required of Volunteers in *Great Bri-* "*tain* for the national defence. The members of all "the Presbyterian bodies known to me take their "share in working out the British Constitution. *I*

"*know as a matter of fact the Ministers of the Reformed* "*Presbyterian Church will not hold communion with other* "*Presbyterian bodies.*"

The plaintiff himself admits that on the occasion of the first communion held at the old church after his arrival in *Cornwallis*, he declined communicating, and still avows that he would not communicate with the Established Church of *Scotland*. It would appear, then, that these points of difference, at all events some of them, were not looked upon either by the members of the Established or the Reformed Presbyterian Church as unimportant matters of faith, for we find from the testimony of Doctor *Webster*, who was also a member of Mr. *Forsyth's* Church, that after the latter became incapable of preaching, there was a meeting of the congregation to know what they should do, and it was resolved to invite Mr. *Struthers*, a Minisier of the Established Church, then in *Demerara*, to come and preach to them. This gentleman accepted their call and became their pastor. The plaintiff, he says, was in *Cornwallis* when this meeting was held, but was not called, and Doctor *Webster* says the reason he was not called, was, that he was a Covenanter or Cameronian, and that they wanted a Minister who was a Presbyterian and not a Covenanter; and he further says, that he asked the plaintiff if he would preach to them, and drop his Cameronian principles, who replied to the effect that the Church of *Scotland* would not unite with him nor he with them.

This shews that the differences between the Reformed and Established Presbyterian Church in doctrinal points are of so grave a character, as to preclude the possibility of any union between them, or the recognition by either of the soundness or orthodoxy of the principles of the other. Is it to be supposed, then, that the testator, imbued with principles common to the members of his own Church, could have meant or ever intended that a Minister of the Reformed Presbyterian Church, between which and his own

1861.

SOMMERVILLE v. MORTON et. al.

there could be no union of sentiment, should become the recipient of his bounty, and reap the benefit of a trust created, as we may reasonably infer, for the dissemination of principles not at variance or inconsistent with his own? Above all can it be reasonably supposed, or believed, that he ever designed his property to be enjoyed by a person who would not, and could not commune with him, and that according to his ideas of orthodoxy he would have regarded such a person as a Protestant Orthodox Minister?

As respects myself, I can only say that I can neither suppose, nor believe anything so improbable, and the conclusion to which I have arrived, after a careful examination and consideration of all the evidence and papers in this case is, that the plaintiff as a Minister of the Reformed Presbyterian Church, which had no existence and was unknown in *Cornwallis* in the life time of the testator, is not entitled to the benefit of this trust, not being orthodox in his principles in the sense in which I think the testator used and intended that term to be understood, and as is to be collected from all the evidence adduced in this case.

The plaintiff's own definition of the word Orthodox is prejudicial to if not destructive of his claim. He says, "I am not aware that the word Orthodox applies to any particular Christian body in opposition to any other. I believe in the current acceptation of the term, it applies to all Christians who hold the doctrine of the Trinity, the divinity of Christ, the agency of the Spirit in regeneration, and kindred doctrines, so that it applies to Presbyterians, Methodists, Congregationalists and Baptists."

Now, if this definition be correct, the plaintiff's claim cannot be sustained, as we have it in evidence that the field of ministerial labors, to which the devise was intended to apply, was occupied by a Minister of the Baptist Church before the plaintiff came, at all events before his congregation was formed there. Let it not for a moment be understood that I am ex-

pressing any opinion as to the validity of that gentleman's claim, I only mention it to shew that, according to the plaintiff's own definition of the word Orthodox, assuming it to be right and such as the testator might have concurred in, he is not the person (whoever else may be) entitled to the benefit of this devise.

But it is not necessary to resort to the plaintiff's definition, however correct it may be, nor to rely alone on the facts to which the witnesses have testified, to determine in what sense the testator, in creating this trust, used the term Orthodox, as I think some light is thrown upon the subject by another clause in the will, in which the same word is again used.

The testator bequeathed to the Rev. Mr. *Forsyth* the use and profits of a dyke lot, to hold so long as he might continue the pastor of the people over whom he had the charge, and in the event of Mr. *Forsyth* leaving his wife a widow, he bequeathed the use of the same dyke lot to her during her widowhood, and after the purposes of Mr. *Forsyth* and his wife were fully answered, then to his son *Roland* and his heirs, in trust for the use and benefit of any such regularly ordained Protestant Minister, as might be legally constituted and appointed to the pastoral care of the church of which Mr. *Forsyth* was the pastor, "and so "on in succession so long as the inhabitants of *Corn-* "*wallis* unite and agree in the maintenance and "support of a legal and orthodox succession, and "continuance of a pastor over the said church."

I will not say, because I am not called upon to say, to what denomination of Protestant Ministers, after Mr. *Forsyth*, this clause was intended to apply; but I may say that it has to some extent assisted me in putting the construction I have upon this clause, on which the plaintiff's claim is based, and made it less difficult to comprehend its meaning, than it otherwise would have been.

The view which I have taken in this case is, I think, sustained by the case of the *Attorney General* v.

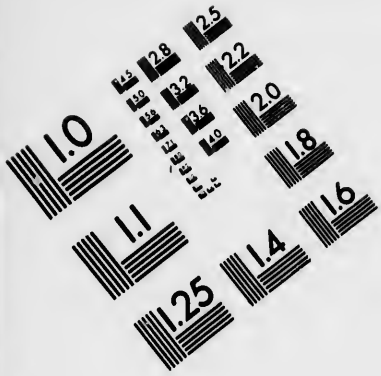
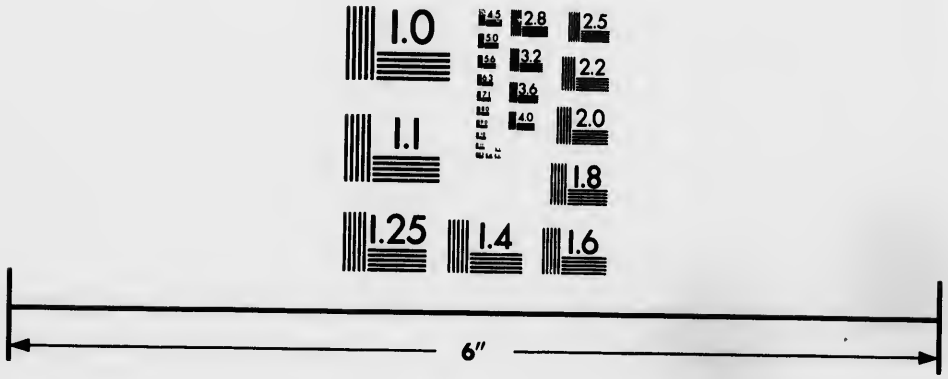
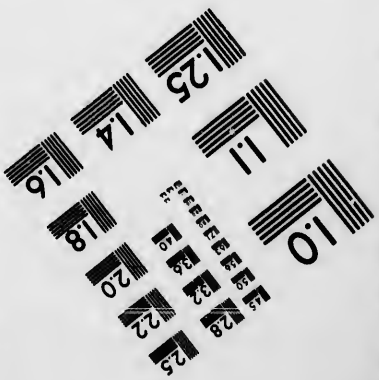


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1861. SOMMERVILLE v. MORTON et. al.

Pearson et al., 7 Simons 290. In that case it appears a meeting house was founded by certain Protestant dissenters *for the worship and service of God.* The founders of the meeting house and the original subscribers and contributors to it were dissenters of the Presbyterian denomination, who believed in the doctrine of the *Trinity.* A change of opinion gradually took place in the sect, and the majority of them at length removed the officiating Minister because he preached *Trinitarian* and *Calvinistic* doctrines, and elected as his successor another Minister, whose opinions were in unison with their own. It was held that no doctrines ought to be taught in that meeting house which were opposed to the opinions of the founders. The *Vice Chancellor* there said: "When, "as in the present case, a gift is made, or a trust is "created by certain persons of certain funds for the "service and worship of Almighty God, the thing to "be regarded is, what were the religious tenets in "general of those persons, because it would not be a "just application of those trust funds, if they were "allowed to be employed for the sustentation of reli "gious opinions, which the donors themselves would "have disavowed."

May we not reasonably infer in this case, that, if the plaintiff, agreeing with the testator on some essential points, and differing with him on others, had told the latter when he was about to make his will, that there could be no union between their respective churches, and what is more, that while those differences existed, he could not accept him as, or permit him to be, a communicant with him; that the testator would have immediately repudiated the plaintiff's religious principles as not in his view orthodox, and told him that he could not conscientiously devise his property, or create any trust to encourage and promote their dissemination? I have no doubt such would have been his answer, and, therefore, it is that I feel myself bound to repeat, that the plaintiff has

failed to satisfy my mind that the claim he has preferred is well founded.

The case of the *Attorney General* v. *Wilson*, 16 Simons 210 (Lady *Hewley's* Charity), and also the later case of *Drummond et al.*, appellants, and the *Attorney General et al.*, respondents, 2 Law and Eq. Rep. 15, might be referred to, as having some bearing, so far as to show the rule of construction acted upon in cases like the present; but it is unnecessary to do so, having, I trust, said enough to shew the grounds (which is all I desire to do) upon which I have formed my opinion in this important case, in which, I am glad to find, we all concur. I may add, that I entirely agree that this is a case in which both parties ought to pay their own costs, having been prosecuted and defended for no other purpose than to obtain a judicial decision on a disputed right, which it was hardly possible for the parties to have settled among themselves.

WILKINS J. Viewing this will as a whole, and having regard to the opinions, professions, and acts of the testato., in relation to his theological tenets, and ideas of church government, so far as we can collect these from the evidence, I think it abundantly clear, first, positively, what his model of "a Protestant Ortho-"dox Minister duly authorised" was, and secondly, negatively, that the reverend claimant, tried and proved by his own evidence, is not a minister of religion in accordance with that model, and not therefore the object of the trust in question.

The will shews, incontrovertibly, that the Reverend Mr. *Forsyth* was the testator's type of "a Protestant "Orthodox Minister, duly authorised." We may safely take *Seth Burgess* for an authority as to the opinions held by the deceased about the period when he made his will, and as to the circumstances in which he was then placed, and had been placed, during the latest years of his life. *Burgess* says, "in Mr. *Forsyth's* time "there was but one Presbyterian Church in *Cornwallis*."

1861. SOMMERVILLE v. MORTON et. al.

The Rev. Mr. *Struthers* succeeded him, and he was succeeded by the Rev. Mr. *Mackay*, who now has charge of the congregation in *West Cornwallis*, formerly of the Free Church, but now of the Presbyterian Church of the Lower Provinces. "Mr. *Mackay's* "people" he adds, "hold to the same principles that "Mr. *Forsyth* and Mr. *Struthers* held." "Mr. *Macka* ," he says, "is the first Presbyterian Minister who "preached all his time, in *West Cornwallis*." Mr. *Forsyth* preached one-sixth part of his time there, and the people there were to pay one-sixth of the stipends. Mr. *Forsyth* never had a Communion there, the members of the Church, living to the westward, attended the Communion held in the old church in *East Cornwallis*. "Mr. *Morton*" he further says, "was an active "man in the Church, till within three or four years of "his death, and, at that time, I think there were be- "tween twenty and thirty members of the church "residing to the westward of the town house."

It is surprising that so much discussion took place at the argument, as to what portion of the township of *Cornwallis* is comprehended within the limits, by some of the witnesses designated "*West Cornwallis.*" The will speaks not of "*West Cornwallis*," but of "*the western part of the township of Cornwallis.*"

Let us now examine the will, in the light of the testimony afforded by Mr. *Burgess* regarding the antecedents of the testator, at the time of making his will, and the circumstances in which he was then placed, in relation to the church in which he worshipped and officiated. I have selected *Burgess*, because he seems to have been intimate with the testator, and because his testimony is not materially modified by the evidence of any other witness. When the testator made his will, in 1819, he was about ninety years of age, and a member and elder of the Church of *Scotland*, or of that church of which his grandson, Mr. *Forsyth*, was the officiating clergyman, not settled, but occasionally ministering in the west-

ern part of *Cornwallis*, where about twenty Presbyterians were resident. His was, then, the only church in that settlement. There was then there no building for worship, no manse, no school-house, no burial place. The few who were members of that church partook of the Holy Communion in the old church at *East Cornwallis*.

Now, mark, the testator knew and deplored this state of things, and, by a testamentary disposition of a portion of his estate, desired to remedy it. This is the key to all that is doubtful in the true construction of the testamentary disposition in question.

At the time of the execution of his will, the Rev. Mr. *Forsyth* was, by the testator's bounty, enjoying the profits of his "*westwardly dyke lot*," and the use of *that* the testator gave him, *so long as he should continue to be the pastor of the people of whom he had then the charge.*

This reverend gentleman, the testator considered to be "*a Protestant Orthodox Minister.*" There can be no question about this, for he expressly says so. After the death of Mr. *Forsyth* and his wife, the testator gives the dyke lot to his son *Roland* and his heirs, "in trust for the use and benefit of *any such regularly* "*ordained Protestant Minister*, as might be legally con- "stituted and appointed to the pastoral care of the "said church, of which the said *William Forsyth* was "*then* pastor, and so on *in succession*, so long as the "inhabitants of *Cornwallis* unite and agree in the "maintenance and support of *a legal and orthodox* "*succession*, and maintenance of a pastor over *the said* "*church*, &c."

Now, observe, "such union and agreement" was an event not then realized, but anticipated by the testator, and obviously it was in anticipation of it, that he made that devise of the one hundred acres, which is now before us for our interpretation. The harmony between the different clauses of his will, in respect of this, is perfect. That tract the testator disposes of as

1861.

SOMMERVILLE v. MORTON et. al.

follows:—he gives it to trustees in trust for a parsonage or glebe, for the benefit of a Protestant Orthodox Minister, (*i. e.*, such a Protestant Orthodox Minister as, in the estimation of the testator, the Rev. Mr. *Forsyth* then was), in other words, to that Protestant Orthodox Minister, contemplated by the testator to succeed Mr. *Forsyth*, as pastor of the Church over which he then presided, and who should be in the pastoral charge of the inhabitants of the western part of *Cornwallis*. Adverting, accordingly, to the contingency of his becoming settled there, in pastoral charge of *a sufficient number of the inhabitants thereafter united in public worship of God, in that quarter*, he declares these further trusts, respecting those one hundred acres, viz., that they should be held in trust *for the erection thereon of a house for the public worship of Almighty God, of a parsonage house*, of a school house, and for a burying ground, for the use of the inhabitants of the western part of *Cornwallis*; the inhabitants, let it be borne in mind, of that part of the township in which Mr. *Forsyth*, when the testator executed his will, was officiating by his occasional ministrations.

If the present order of the three extracted clauses of the will be transposed, and that which is last be placed second, and read before the clause in question, the meaning of the testator becomes perfectly clear, especially if, for the words "*a* Protestant Orthodox "Minister," we read "*such* Protestant Orthodox "Minister." The three clauses all evidently refer to one and the same subject, though variously expressed therein: viz., the first clause to "the people of whom "Mr. *Forsyth* had the charge"; the second, as so transposed, to "the inhabitants of *Cornwallis*, then "constituting the Church, of which Mr. *Forsyth* had "pastoral care"; the third—*that* under consideration—to "the inhabitants of the western part of the said township of *Cornwallis*, for whom, in fact, Mr. *Forsyth* then ministered." The second clause points to "a legal Orthodox successor" to him, in continu-

ance of the pastoral charge which he then had over the Church; and the third contemplates "a sufficient "number of the inhabitants of the western part of the "township of *Cornwallis*, forming that same Church, "at some future time united in public worship in that "quarter, to an extent that would demand a resident "minister, and consequently a building for worship, "a manse, a school house, and a burial ground." For this desired and anticipated combination of circumstances, the testator devised the tract in question, to the trustees named in his will.

Thus, by permitting the testator to explain that which is obscure in one part of his will, by that which is clear in another, we are enabled to ascertain what idea was in his mind when he made a disposition for the benefit of "a Protestant Orthodox Minis- "ter, duly authorized."

It only remains to inquire whether this reverend claimant realizes that idea, and comes up to the testator's standard of orthodoxy.

Taking the character of his religious tenets and opinions from himself, and contrasting these with those proved to be held by this testator, I am of opinion that he is not the object of the trust in question.

Mr. *Sommerville* tells us that he understood Mr. *Forsyth* to have been a licentiate of the Church of *Scotland*. With that church the testator held, but with it Mr. *Sommerville* says he would not hold, communion. In that church, the testator held office as an elder. In it we must necessarily infer from his own declaration, that Mr. *Sommerville* (if not in orders) would not have held that office.

The testator was in the commission of the peace, and held a commission in the militia. Neither of these offices would Mr. *Sommerville*, if a layman, hold, from conscientious scruples. Mr. *Sommerville* declares the identity of his principles with those of the Free Church. The Free Church had not existence whilst

1861. SOMMERVILLE v. MORTON et. al.

the testator lived; neither does it appear that *that* form or mode of Presbyterianism, which the plaintiff professes, was even known to the testator.

It is unnecessary, in my judgment, to examine catechisms or formularies, in order to distinguish nice shades of opinion between Presbyterians, and to show in what they agree and in what they differ. There are marked differences enough between what the plaintiff holds and professes, and what testator recognized by his acts, conduct, connections, and experience, to constrain us to decide that *that* particular class of Presbyterians to which Mr. *Sommerville* belongs, was not in the contemplation of the testator when he made the will in question.

Decree for defendants, without costs.

Attorney for plaintiff, *Moore*.

Attorney for defendants, *Webster*.

LAWSON ET. AL. *versus* SALTER ET. AL.

July 30.

Defendants were the makers of two promissory notes to *A. & Co.*, which the latter endorsed to the *Halifax* Banking Co. Before the notes became due, both defendants and *A. & Co.* became insolvent. A composition deed was executed between defendants and their creditors, by which the latter agreed to receive eight shillings and nine-pence in the pound in full of their respective debts. This deed was not executed by the *H. B. Co.*, but they took new notes from the defendants, embracing at this ratio all their claims against the defendants on promissory notes, including the two notes in question, and gave the following receipt:—

ASSUMPSIT on promissory notes by assignees of indorsees against the makers, tried before *Bliss* J., in the *October* sittings, 1859, without a jury, who gave judgment for plaintiffs. A *Rule Nisi* had been granted to set aside the judgment, which was argued in *Michælmas* Term, 1859, and again in *Michælmas* Term, 1860, before all the Judges, by *J. W. Johnston*, *senior*, Q. C., for plaintiffs, and *J. W. Ritchie*, Q. C., for defendants. The Court now gave judgment.

YOUNG C. J. In this action, the plaintiffs, as the assignees of *Allison & Co.*, claimed the amount due on two promissory notes, made to them by the defendants, and which were at one time held by the *Halifax* Banking Company as indorsees. The makers and payees having both become insolvent, deeds of composition were prepared for both houses, and executed by most of their creditors. The defendants' deed was in evidence, giving them an absolute release on the payment of eight shillings and nine-pence in the

"*Halifax* Banking Company's Office, *Halifax*, *24th April*, 1858.

Received from Messrs. *Salter & Twining*, the sum of one hundred and twenty-two pounds ten shillings currency, being the composition of eight shillings and nine pence (8s. 9d.) in the pound, on their two notes of hand, in favor of Messrs. *Allison & Co.*, amounting to £280, and discounted by Messrs. *Allison & Co.*, at this bank, the notes being retained for the purpose of receiving a dividend from the estate of *Allison & Co.*

N. T. Hill, Cashier."

The cashier of the *H. B. Co.* stated "That the notes were left in the bank by defendants of their own accord; that had the notes been required by the defendants they would have been delivered to them, the bank considering the defendants wholly discharged of any further claim on them on account of these notes." He also stated that there was no reservation.

It appeared, however, that one of the defendants, at the time the notes were so left, said: "The bank are fully entitled to receive the whole amount of the notes, and with that consideration I leave them with you for the purpose of recovering from Messrs. *Allison*, (*A. & Co.*,) the difference from their assets."

The *H. B. Co.* subsequently obtained ten shillings in the pound on the face of the notes from the estate of *A. & Co.* (neither *A. & Co.* nor their assignees, it would appear, being aware at the time of the transaction between defendants and the bank), and the action was brought by the assignees of *A. & Co.*, to recover from defendants the balance due on the face of the notes after crediting the £122 10s.

Held, by *Young* C. J., *DesBarres* and *Wilkins* JJ., (*Bliss* and *Dodd* JJ. dissenting), that the *H. B. Co.* had absolutely discharged the defendants from all liability on account of the notes, and that the action could not be maintained.

By *Wilkins* J., that by the acceptance of the composition, the *H. B. Co.* became virtually parties to the composition deed, and bound by all its terms.

1861.

LAWSON et. al. v. SALTER et. al.

pound, by certain instalments therein specified. The Banking Company did not become parties to the deed of composition; but they took new notes from the defendants, embracing all the claims the bank had against them on promissory notes, including the two notes in question, and granted the following receipt:

"*Halifax* Banking Company's Office,
"*Halifax*, 24th *April*, 1858.

"Received from Messrs. *Salter & Twining*, the sum "of one hundred and twenty-two pounds ten shillings "currency, being the composition of eight shillings "and nine-pence (8s. 9d.) in the pound, on their two "notes of hand, in favor of Messrs. *Allison & Co.*, "amounting to £280, and discounted by Messrs. *Allison* "*& Co.*, at this bank, the notes being retained for the "purpose of receiving a dividend from the estate of "*Allison & Co.*

"*N. T. Hill*, Cashier."

Had the question turned on the language of this receipt, a doubt would have arisen as to the nature of the agreement between the bank and the defendants; but this is made clear by the deposition of Mr. *Hill*, which was taken by consent, to be used at the argument, and, in my view, puts an end to any objection founded on the receipt. Mr. *Hill*, in his examination, says that "the notes were left in the bank by the "defendants of their own accord. Had the notes "been required by the defendants, they would have "been delivered to them; the bank considering "defendants wholly discharged of any further claim "on them on account of these notes. Mr. *Twining* "said, the bank was fully entitled to receive the "whole amount of the notes, and with that consider- "tion, I leave them with you, for the purpose of "recovering from Messrs. *Allison* the difference from "their assets."

The bank afterwards obtained ten shillings in the pound upon the whole face of the notes from the

estate of *Allison & Co.*, and, as Mr. *Hill* thinks, executed their deed of composition. The notes were then handed over to Mr. *Allison*, who was not informed, at the time, of the payment having been made by the defendants, and there is no proof that he knew of it.

The plaintiffs, having thus obtained possession of the notes, brought this action against the defendants as the makers, and the question is whether they are liable therefor.

If liable, it is plain that they never contemplated or intended to be so. They paid the composition to the holders of these notes, as to their other creditors, who gave them a discharge in full; and Mr. *Hill*, in his examination, says: "On taking the eight shillings "and nine-pence from the defendants, it was clearly "understood, that they were wholly and completely "discharged from any further claim of the bank, on "account of these notes. There was no reservation."

It appears, by the minutes, that the new notes given by the defendants to the bank were in the exact terms of their composition, and that this suit is defended at the instance of the bank, which cannot, however, affect the legal rights of the parties on this record.

It was insisted by the defendants' counsel that the bank, having accepted the composition, must be considered in the same light, and be subject to the same obligations as if they had executed the defendants' deed, and many authorities, and among others *Burrill on Assignments*, p. 217, founded on a case in 7 *Howard* to that effect, were cited. But it is not necessary to inquire into these cases, because there is no question here that the bank being the holders of the notes accepted a composition in full satisfaction, and discharged the makers of all further liability. Independent of their admission, the acceptance of the composition, and the receipt under the case of *Lewis* v. *Jones* 4 Barn. & Cress. 506, would be enough, and the defendants, as respects the bank, must be held as absolutely and fully released.

1861.

LAWSON et. al. v. SALTER et. al.

Now, it is an established principle running through all the cases and illustrated by Mr. Chief Justice *Best* in *Philpot* v. *Briant* 4 Bing. 717, that the maker of a promissory note or the acceptor of a bill of exchange is to be considered as the principal debtor, and all the other parties, the payee of the note, the drawer of the bill, and the indorser, as sureties. And it is equally well established that if the original debt be satisfied and gone, no action will lie against the surety. In the language of Mr. Justice *Holroyd*, "the extinguish-"ment of the debt puts an end to the agreement of "the principal and surety." Judge *Story* in his Treatise on Promissory Notes, sec. 424, accordingly lays it down as a corollary from the foregoing doctrine, that the release of the maker of the note by the holder, will release all the other parties thereto from all liability thereon, and amounts to a satisfaction of the note; for the maker is the party personally liable to all the subsequent parties; and, if they were compelled to pay the note, they would have their remedy over against the maker for the amount, contrary to the true object and import of the release.

The argument of the plaintiffs in this case is, that the defendants were not released, or if they had a release it was only *sub modo*, and by leaving the notes in the hands of the bank that they might recover a dividend thereon from the estate of *Allison & Co.*, that the defendants lost the benefit of their release, and having made the indorsers liable are themselves liable over to the indorsers.

Now, admitting that the defendants could legally occupy this anomalous position, the question is, did they occupy it here. What was the real effect and meaning of the transaction between them and the bank? Is it to bind them to the same extent, as if they had entered into a covenant that the bank should retain the right of recovering from the indorsers, and that the bank accepted the composition upon condition that such right was reserved? Or is it not rather to

be taken as the true meaning, that the defendants being completely, and in all events absolved, were content that the bank should obtain a further dividend from *Allison & Co.*, if they could.

In the cases of *Boultbee* v. *Stubbs*, 18 Ves. 21, Lord *Eldon* said:—"There are many cases of a creditor "entering into a composition with the person liable in "the first instance; with a stipulation that it shall not "prejudice his remedies against others, who are liable "as sureties. The ordinary case is that of composi- "tion upon bills. The answer given is, that by the "agreement reserving the creditors' remedy against "sureties, the situation of the surety is not varied, "and this doctrine has been held at law as well as "here; but I agree that a stipulation of this kind is "in many cases so very absurd that it must be seen "plainly."

Applying these pungent remarks to the present case, as the defendants are to be charged upon an agreement operating against themselves, and involving an absurdity, it must be seen plainly; but in my view nothing of the kind is to be seen, and the Court would do a manifest injustice in imposing on the defendants by a circuity of action a liability, from which they were plainly intended to be, and were, in fact, released.

The makers of the notes having been so released by the holders without the assent or knowledge, as is alleged, of the indorsers, it is equally clear that the indorsers were released; and if *Allison & Co.*, or their assignees paid the dividend on the notes in ignorance of the fact that the makers had been discharged, they may possibly have their remedy still against the bank. If they paid the dividend with knowledge of the fact, they have no ground of complaint; but in neither view, as I think, can they recover from the defendants.

There is a wide distinction between the cases of the holder of a note releasing the maker as in this case,

1861.

LAWSON et. al, v. SALTER et. al.

and as in many of the cases cited at the argument, merely giving time to the maker, but the holder, in so doing, reserving his right to proceed in the intermediate time against the indorser. In the latter case the debt remains unliquidated, a delay is granted to the maker with a condition attached, and if the holder think proper to proceed against the indorser, that is within the condition, and the maker has no ground of complaint. Neither is any injury done to the indorser, because, if called on, he has the right of immediate recourse against the maker. If the holder give time to the maker, not reserving such right, the indorser on the equitable doctrine, which, as Baron *Parke* expressed it, has crept into the law, is clearly discharged.

Where it sufficiently appears that time has been given to a party on the bill prior to the defendant, this is a substantial defence. If you give time to a party you shall not, in fraud of that arrangement, sue another who will sue him. (Per Justices *Williams & Coleridge*, in *Hall* v. *Cole*, 4 Ad. & Ellis, 581.)

So also in the case of *Mayhew* v. *Crickett*, 2 Swanst. 189, it is laid down that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle, said Lord *Eldon*, which prevails both in Courts of Law and Courts of Equity.

It remains only to examine certain cases not yet referred to, which were urged upon our attention by the plaintiff's counsel at the argument, and all of which I have attentively considered.

In *Fentum* v. *Pocock*, 5 Taunt. 192, which was much insisted on, and is upheld by more modern decisions, the main question was, whether the acceptor of an accommodation bill was to be treated merely as a surety, and the drawer as the principal,—"a posi-"tion," said Chief Justice *Mansfield*, "which would "subvert and pervert the situation of the parties." "The case of *English* v. *Darley*, 2 Bos. & Pul. 61,

"therefore," said he, "is not applicable, where the "giving time to an acceptor was held to be a dis- "charge of an indorser, who stands only in the "situation of a surety for the first."

In *ex parte Gifford*, 6 Ves. 809, Mr. *Richard Burke's* case is cited, where Lord *Thurlow* admitted, that, if there is a reserve of the remedies against the others, there is a consent of the party with whom the composition is made; and if, out of that, a demand arises against him, it is a demand which began to exist with his consent expressed in the terms of the contract, and under some circumstances, wisely and prudently given; for the party would not have entered into the contract, unless he were allowed to contract for that remedy over against the co-surety. And in *ex parte Glendinning*, Buck 517, the *Lord Chancellor* is reported to have said, that a creditor entering into an agreement for a composition with a debtor, and wishing to retain his remedy against a surety, must cause the reservation to appear upon the face of the agreement, for that parol evidence can not be admitted to explain or vary the effect of the instrument.

Upon these cases I would observe, as I have already said, that there appears to me to have been neither consent, contract, nor agreement, by the defendants, importing a subsequent liability, and it is in proof that there was no reservation. In *Nichols* v. *Norris*, 3 Bar. & Ad. 41, there was such a stipulation on the face of the deed of composition, taking the case out of the common rule, as to the discharge of a surety.

The American cases of the *Gloucester Bank* v. *Worcester*, 10 Pick. 528, and *Bruen* v. *Marquand*, 17 Johnst. 58, do not apply, because the maker of the note in each was released with the assent of the indorser, who was accordingly held liable; but here the indorsers paid without contesting their liability, and seek to recover over from the makers as the principal debtors.

So also the two cases in 4 Mees. & Wels., (*Smith* v.

1861.
LAWSON et. al. v. SALTER et. al.

Winter, p. 454, and *Cowper* v. *Smith*, p. 579), and the case in 16 Meeson & Welsby, (*Kearsley* v. *Cole*, p. 127,) on which Mr. *Johnston* so much relied, are very distinguishable from the present. The two first turned upon the liability of the surety, arising in *Smith* v. *Winter*, out of her own consent, twice testified in writing, and to which the present case has no resemblance whatever; and in *Cowper* v. *Smith*, by the express terms of the guarantee, the defendant agreed to become bound, notwithstanding the discharge of the principal debtor. "As the surety has expressly "contracted," said Lord *Abinger*, "to remain liable, "notwithstanding the discharge of the principal, it "cannot now be contended that the discharge of the "principal is an implied discharge of the surety."

The case of *Kearsley* v. *Cole* deserves a more extended notice. There the plaintiff, a shareholder in a banking company, became a surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition deed, to which the plaintiff and the banking company were parties, whereby he assigned his property to trustees for the benefit of his creditors, and this deed contained a stipulation for a reserve of remedies against sureties for the defendant, the very stipulation that is wanting here, and on the want of which my opinion is principally founded. The plaintiff having been compelled to pay the debt to the banking company, brought his action and recovered, because there had been a reserve of remedies expressly made by the defendant. The question did not turn upon the consent of the surety, but upon the reservation or contract of the principal debtor. "A reserve of remedies," said Baron *Parke*, "prevents the discharge of a "surety, even without his consent, first, because it "rebuts the implication that he was meant to be dis"charged, which is one of the reasons why the surety "is ordinarily exonerated by such a transaction, (that "is by a deed of composition giving time, *et a fortiori*.

"I would add, by a release); and secondly, because it "prevents the rights of the surety against the debtor "being impaired, the injury to such rights being the "other reason, for the debtor cannot complain, if the "instant afterwards, the surety enforces those rights "against him, and his consent that his creditor shall "have recourse against the surety, is impliedly a con- "sent that the surety shall have recourse against "him." In this case it must be remembered there was an express provision in the deed; the consent of the defendant, to which the Court referred, was plainly and clearly given, and he must suffer the legal consequences of such consent. Here no such inference can be drawn, it is impossible to believe that the banking company ever required, or that the defendants ever agreed that they should be answerable over to the plaintiffs the instant after the bank, as the holders of their notes, released them. And, therefore, upon the authority of this case, as well as on a review of the others I have cited, I am of opinion that there should be judgment for the defendants.

BLISS J. and DODD J. dissented.*

DESBARRES J. This case was tried without a jury before my brother *Bliss*, who gave judgment in favor of the plaintiffs, with leave to move to set it aside. A *Rule Nisi* having been accordingly granted for that purpose, it was argued in *Michælmas* term, 1859, and re-argued at the last *Michælmas* term in consequence of my brethren *Dodd* and *Wilkins* having differed in opinion.

It was an action brought by the plaintiffs as assignees of the late firm of *Allison & Co.*, on two promissory notes made by the firm of *Salter & Twining* payable to the firm of *Allison & Co.*, one for two hundred and the other for eighty pounds. It appears

*DODD J. delivered a written judgment, stating the grounds of his dissent, which was lent to the plaintiff's counsel, and has not been returned, having been unfortunately mislaid.

1861.

LAWSON et. al. v. SALTER et. al.

from the report of the trial, that these notes were discounted by the *Halifax* Banking Company for the payees, who then endorsed them to that company. Before the notes became due, both firms stopped payment, and each made a composition with their creditors, *Allison & Co.* agreeing to pay ten shillings in the pound in two years, and the defendants eight shillings and nine pence in the pound in three, eight and twelve months. A deed of composition was entered into and executed by the defendants and their creditors, with the exception of the *Halifax* Banking Company, who were the holders of these notes. They, however, received one hundred and twenty-two pounds ten shillings from the defendants, being the composition of eight shillings and nine pence in the pound on the amount of the notes, for which they gave a receipt, retaining the notes, as the body of the receipt expresses it "for the purpose of receiving a dividend from the estate of *Allison & Co.*" There was no indorsement on the notes of the amount so paid, and *Allison & Co.* on being called upon subsequently paid the Banking Company ten shillings in the pound upon the whole face of the two notes, and the present action was then brought to recover the difference between the amount paid by defendants to the then holders of the notes, and the amount still due upon them.

The first question that seems to me to present itself on this statement of the facts is, whether the defendants having paid the holders of the notes at the time, the full composition which their other creditors agreed to accept, are now and can still be held liable to the indorsers. By the deed of composition all the defendants' creditors who were parties to it agreed and bound themselves to accept eight shillings and nine pence in the pound in full satifaction of all their respective claims against the defendants. It is clear, then, that those who signed that deed and accepted that composition can have no further claim against

the defendants, and we are now to consider whether the Banking Company who accepted the composition, but did not sign the deed, are to be put in a better position than those who did sign it. My impression is, that they cannot, and I will refer to the cases on which that impression is founded.

First of all is the case of *Butler* v. *Rhodes*, 1 Esp. 236. That was an action for goods sold and delivered, and the defence was, that the defendant having become embarrassed, had proposed to pay his creditors a composition, and to execute an assignment of all his effects to trustees for their benefit. The plaintiff, among others, on being applied to, consented to accept the composition, and, in consequence of this supposed acquiescence, the deed had been prepared and executed by the defendant, assigning to the trustees all his effects for the benefit of his creditors who had agreed to receive a composition; but the plaintiff, notwithstanding he had given his assent, refused to execute the deed, and brought the action to recover the whole amount of his demand. Lord *Kenyon* ruled that this was a complete defence, saying, "it "never should be allowed to the plaintiff to recede "from what he had undertaken, and to evade the "effect of the composition by a refusal to execute the "deed which had been prepared with his consent." There is no proof in this case that the Banking Company ever agreed to sign the deed of composition, but they accepted the composition money, and by that acceptance tacitly assented to the terms of, and became practically bound by, all the clauses in the deed.

The case of *Jolly* v. *Wallis*, 3 Esp. 228, is a stronger case than this. There the insolvent debtor entered into an agreement with his creditors to pay a composition, with a clause, that if all his creditors whose debts amounted to five pounds, did not sign the agreement before a certain day, the agreement was to be null and void. There were two creditors of that

1861.
LAWSON et. al. v. SALTER et. al.

description, who, though they did not sign the agreement, accepted the composition, and the plaintiffs contending that the agreement was void, because they had not signed it, brought that action to recover certain monies which the bankrupt, according to the terms of the agreement, had paid into the hands of a banker in the name of the defendant; and the same learned Judge (Lord *Kenyon*) in that case held that the agreement was not void, and the plaintiffs could not recover, saying,—"If the creditors have all come "in and taken the security proposed by the agreement "for the composition, though they have not actually "signed it, I shall hold that they have acquiesced in "the composition, and consented to come in under it. "It is proved that the only two creditors who have "not signed the deed, have, however, accepted of the "notes given by the composition, that in my opinion "binds them."

Now, if the principle laid down in that case is to prevail in this, the Banking Company, though they did not sign the deed of composition, were, nevertheless, in effect, bound by the terms of it, when they accepted the composition money, and if so, the defendants were absolutely discharged from the debt due on these notes, and being discharged, the indorsers were discharged also, and they could not, therefore, have been held responsible to the Banking Company for any further payment on these notes.

The same principle was recognised in *Harland* v. *Binks*, 15 Q. B. 713. In that case there was a feigned issue under the Interpleader Act, to try whether certain goods seized under an execution at the suit of the defendant against a debtor were, or were not, at the time of the seizure the goods of the plaintiff. It appeared that an assignment had been made by the debtor, of all his goods to a trustee, for the benefit of all his creditors who should come in and execute the deed, and that the trustee had taken possession before the seizure. The deed was not signed by any of the

creditors, but communications were made by the attorney of the trustee to several of the creditors stating what had been done. It was contended that the deed was voluntary and void as against creditors, unless there had been such an assent as to create the relation of trustee and *cestui que trust* between the plaintiff, and some one at least of the creditors, that it remained without consideration and voluntary, until some creditor had either actually executed the deed, and so released the debtor, or at least until he had bound himself in such a manner that he could be compelled to come in and execute the release. Lord *Campbell* C. J. held that the relation of trustee and *cestui que trust* was established between the plaintiff, and the creditors who had expressed themselves satisfied with the explanations made to them, and that they must have meant by saying "they were "satisfied" that the deed should be proceeded with, and that they intended to come in, and take the benefit of the assignment, saying in conclusion: "I "think the creditor must be considered as assenting "to the deed, so far as to create privity between him "and the trustee." *Wightman* J. in the same case, says: "The argument has been that to render the "deed valid, some creditor must have irrevocably "bound himself to come in under the deed. If it "were so, I should doubt whether enough had been "done in the present case to establish the deed, but "my judgment proceeds on the ground that it is not "necessary to have the creditor bound to such an "extent, but that it is sufficient if any creditors have "been put in such a position that their rights may "have been altered."

Now, it appears to me that if a mere verbal assent on the part of certain creditors was enough, in that case, to establish the validity of, and to make them parties to the deed, *a fortiori* must the acceptance by the Banking Company of the composition money, stipulated to be paid by the defendants, be sufficient

1861.
LAWSON et. al. v. SALTER et. al.

to bind that company to the terms and provisions of the deed entered into between the defendants and their creditors; and if the rights of the creditors who signed that deed were altered, I do not see any good reason why the rights of the creditors who accepted the composition, but did not sign the deed should remain unchanged, and that the latter are to be at liberty to recover the whole, or nearly the whole, while the former are to have but a small part of their respective demands. Upon every principle of justice all the creditors ought to be placed on a footing of equality, and no one of them ought to receive more than another, unless there is something to give that other a higher claim than the rest, a circumstance which I have failed to discover in this case.

I have so far viewed this case as resting alone on the effect of the composition, independent of any reservation of remedies against the sureties, that would give the Banking Company the right to look to the sureties, who, but for such act, would be discharged. It is contended, on the part of the plaintiffs, that such a reservation was made between the Banking Company and the principal debtors, at the time the composition money was paid; and that, having been called upon and obliged to pay the holders, the sureties are now entitled to recover from the principal debtors the amount still due on these notes.

The principle propounded, and very ably illustrated at the argument by the learned counsel for the plaintiffs, namely: that where a reservation is made, the surety remains liable, is well settled by numerous authorities; but the question here is, whether there is evidence to show that this case comes within that principle. Without stopping to enquire whether there is or ought to be any distinction between a reservation by parol and by deed, to the latter of which all the cases seem to point, and assuming that the former may be considered as equally binding with the latter, the next question is, whether any

reservation actually was made by the defendants, as principal debtors, to bind the sureties. There are facts which, standing alone, would lead to that conclusion, namely: that no demand was made to deliver up the notes, and no indorsement required to be made of the amount paid upon them, and also allowing them to remain after payment of the composition money in the hands of the creditors, for the purposes set forth in the receipt; but we have the evidence of Mr. *Hill*, the cashier of the bank, who states that *there was no reservation*, and further, that "*had the notes been "required by the defendants, they would have been delivered "up to them, the bank considering the defendants discharged "of any further claim on them on account of these notes.*" This evidence, it is true, is inconsistent with the language of the receipt, which states the purpose for which the notes were retained; but being given by the same person who wrote the receipt, and who must have known what effect it was intended to have, it appears to me that we are bound to take the statement of the witness, as the best evidence of what was understood and agreed upon between the parties at the time, however irreconcilable it may be with the words and purport of the receipt, and with the statement of the same witness, that "Mr. *Twining* said the bank were "fully entitled to receive the whole amount of the "notes, and, with that consideration, left the notes "with them, for the purpose of recovering from "Messrs. *Allison & Co.* the difference from their "assets."

Taking this last statement in connection with the receipt, and apart from the other, I must confess I should have had no difficulty at all in arriving at the conclusion, that a reservation was made between the Banking Company and the defendants; and then the principle laid down by *Parke* B., in *Kearsley* v. *Cole*, 16 M & W. 127, and the other cases to which he refers, would have been applicable to this, and there would have been no doubt whatever of the continuing

1861.

LAWSON et. al. v. SALTER et. al.

liability of the sureties to the creditors (the Banking Company), and, as a necessary consequence, of the liability of the principal debtors (the defendants) to the sureties. The learned judge, speaking of a reserve of remedies in *Kearsley* v. *Cole*, says: "First, it rebuts "the implication, that the surety was meant to be "discharged, which is one of the reasons why the "surety is ordinarily exonerated by such a transac- "tion; and, secondly, that it prevents the rights of the "surety being impaired, the injury to such rights "being the other reason; for the debtor cannot com- "plain, if, the instant afterwards, the surety enforces "those rights against him, and his consent, that the "creditor shall have recourse against the surety, is "impliedly a consent that the surety shall have "recourse against him." But if, in point of fact, there was no reserve of remedies against the sureties, and the defendants were, as it is testified by Mr. *Hill*, completely discharged by the Banking Company from any other claim on account of these notes, it follows that the Banking Company have received a sum of money from the sureties (the plaintiffs) in payment of a debt previously paid, and satisfied by the principal debtors themselves, for which the sureties have, therefore, no remedy as against them, whatever remedy they may have against the Banking Company (as to which, however, I express no opinion), for having paid to them a sum of money, which they had no right to demand, and could not legally have enforced. Such being my view, I think the *rule nisi* in this case must be made absolute.

WILKINS J. It is perfectly clear that receiving part of the amount due on a promissory note, even if in express satisfaction for the whole, is not a *discharge*, and cannot be pleaded as such. It is merely *nudum pactum*. In order to effect extinguishment of such a debt, there must be either a formal release under seal, or the collateral engagement of a third person to

respond the commuted sum, or there must be a composition deed binding the creditor who accepts a less sum in satisfaction for a greater. There are, then, obviously, only two questions raised in this case, first,—"Did the *Halifax* Banking Company, when "holding the notes in question, and receiving from "these defendants (the drawers) new notes, amounting "to eight shillings and nine pence in the pound on "the whole amount due, thereby act under, and so "make themselves in legal effect parties to the com- "position deed, proved to have been entered into "between defendants and their creditors?" And, second,—"Did such adoption of the deed operate, in "point of law, as an absolute discharge of the "drawers?"

I think it impossible to read the receipt given to defendants by the cashier of the bank, in connection with his testimony, and that of the defendant, *Twining*, without concluding that the company were aware, at the time of the receipt given, that the defendants had formally compounded with their creditors, and had stipulated to pay them eight shillings and nine pence in the pound, which they had agreed to receive.

It was in the ratio of that composition, that the arrangement between the bank and defendants was then made. The very language of the receipt shows this. It is not "received £120, being *a* composition," but "*the* composition of eight shillings and nine- "pence." Captain *Hill* says: "When I received eight "shillings and nine-pence in the pound, we took new "notes from defendants, embracing *all* the claims the "bank had against defendants on promissory notes, "including these notes. I took eight shillings and "nine-pence in the pound, in full of all our claims "on defendants, for *all* previous notes not paid at "maturity. On taking the eight shillings and nine- "pence from defendants, it was clearly understood, "that they were wholly and completely discharged

1861.

LAWSON et. al. v. SALTER et. al.

"from any further claims of the bank on account of "these notes." The defendant, *Twining*, says: "We "paid the eight shillings and nine-pence under our "assignment, in *April*, 1858, by notes in the precise "terms of our compromise,"—also, "that the notes "were held by the bank, when the composition deed "(which was in evidence) was executed."

From all this we cannot but infer, that the company were aware of the deed of compromise, and thus acted under it.

Now, *Sadlier* v. *Jackson*, *ex parte*, 15 Vesey 52, is an express authority, to the effect, that creditors are bound by acting under a composition deed, as if they had signed it. In that case, the *Lord Chancellor* said: "The point as to the execution of the deed, is not "*whether they actually signed.* In this jurisdiction, which "is both legal and equitable, a creditor who has not "signed may be bound, if by any act he has assented." *Jolly* v. *Wallis*, 3 Esp. 227, is a common law authority to the same effect. As the whole doctrine of the effect of deeds of composition *at law*, has been introduced therein from the Equity Courts, all the consequences of a creditor being so bound, must follow in the courts of Common Law. These consequences flow, indeed, entirely from equitable principles, governing all the decisions in either court.

Greenwood v. *Lidbetter*, 12 Price 433, is a very strong case to illustrate the principle on which the execution of a composition deed by a creditor operates, on his receiving a dividend, *as a release to his debtor*. The Lord Chief Baron *Richards*, in an elaborate judgment, thus shews that the doctrine originated in Equity, and was afterwards brought into the Law courts. "The "main ground, he says, "on which the *exception* to the "rule, that agreements which are *nuda pacta* are not "binding on the parties, is admitted in cases of "engagements by creditors to compound with debtors, "is the equitable principle now adopted by courts of "*law*, that where they do or *may* operate as the means

"of fraud on some of the creditors, if allowed to be "broken, they shall bind."

If the Banking Company, when holding these notes, had actually executed the composition deed, a release of this debt would have been the legal consequence, on the principle equally recognized in both courts, that for a creditor, after receiving the composition, to take *more* from the debtor, would be a fraud on the other creditors, the mutual understanding being *that all were to stand in pari passu.*

Such an act would not, in principle, be less a fraud, if the creditor, instead of having actually signed the deed, virtually became a party to it, by adopting it, and acting under it.

Feise v. *Randall*, 6 T. R. 146, announcing opposite views, has been directly overruled at law, by *Leicester* v. *Rose*, 4 East. 372, and, in equity, by *Sadlier* v. *Jackson ex parte*, above referred to. See also *Harland* v. *Binks*, 15 Ad. & Ellis 714.

In my view of this case, the question is to be regarded precisely as if the Banking Company had executed the composition deed entered into between defendants and their creditors. Now, that deed contains an absolute stipulation, on the part of all the creditors, "that they would receive eight shillings and "nine-pence in the pound, in *full of all subsisting* "*demands against these defendants.*" *It* contains no reservation of any rights on the part of the creditors, who held promissory notes of these defendants, *in regard to recourse on the indorsers thereof.*

If it had contained such a provision, the question would have been different from that which now presents itself to the Court. We are, in my opinion, called upon to decide the question whether there was an absolute release and extinguishment of the original notes, *in view of the conditions of the composition deed, and of those alone*—not at all in view of the receipt and the evidence of the cashier, *because the other creditors who executed the deed had no connection*

1861.

LAWSON et. al. v. SALTER et. al.

therewith. We look, indeed, to the receipt, and to that evidence, in order to ascertain whether the Banking Company acted under the composition deed or not, but, for no other purpose, does it appear to me to furnish evidence that bears on the question just adverted to. In no other respect can the receipt affect the legal consequences that necessarily result from the execution of the deed, and operate on these notes, and the parties thereto. Every individual creditor who executed the deed had, on the assumption that the Banking Company became a party to it, a direct interest in the transaction in question; and when that company accepted the eight shillings and ninepence, it was an absolute discharge of the defendants, and an extinguishment of the debt, *by virtue of the legal and equitable operation of the mutual arrangement of all the parties to the deed.* This is the principle recognized at law, and in equity. It may have been a fraud, (of course, I do not mean a moral fraud), in the company, after the transaction in question, to receive from *Allison & Co.* payment of the notes, and *they* may have so paid, in their own wrong, and in ignorance of a state of facts which constituted a complete discharge *to them*,—and *they* may now have a remedy against the company to recover back the money so paid. I have already said that I look upon the retention of the notes by the company with the approval of defendants, and their consent to the company's receiving the balance, if they could get it, from *Allison & Co.*, as not affecting the release, which, in my judgment, was a legal consequence of receiving the composition; but it was, unquestionably, a fraud in the company, thus to receive *more* than the composition, in any shape, and from any source, in respect of this particular debt.

The opinion expressed to the cashier by defendants, as to the right of the company to recover from *Allison & Co.*, on the original notes, was not a compact, but an *opinion*, and an opinion that could not confer, or

affect, rights; and, as for the notes not having been taken up, or the amounts paid indorsed thereon, although the omitting these acts may, under circumstances, as between the parties, lead to important inferences, I do not see how they are to affect the other parties to the composition deed, and *that*, as I apprehend, is really the question as to their operation.

The view that I have expressed does not, in the least, conflict with the now established principle, that a creditor may, in arranging with his debtor, reserve his rights, as against the surety, provided he leave the surety in that position that he may pay the debt for which he is responsible, and then have recourse to the principal debtor. *Boultbee* v. *Stubbs*, 18 Ves. 20; *Kearsley* v. *Cole*, 16 Mees. & Wels. 129. That principle is untouched here because the original composition deed contains no such reservation.

I think this case may be put, with logical precision thus: The Banking Company, whilst holders of these notes, executed the composition deed. They *then* stood in the relation of *creditors* to these defendants—the drawers—and were under an obligation to take from these, their debtors, eight shillings and nine pence in the pound, *but not one penny more.* The clearest authorities decide that the legal consequence of their receiving such composition was an absolute release of this debt, as absolute as would have been payment in full, or a release under seal. The very instrument was spent and exhausted. On what principle is this? On the principle that there existed a mutual understanding between all the creditors, *inter se*, so executing the deed, that they should *all* stand on the same footing, that the receipt of the composition by a creditor *must*, *per se*, operate as a discharge because it *might* otherwise operate as a fraud on the others. (See *Leicester* v. *Rose*, and *Sadlier* v. *Jackson ex parte*, above cited.)

The rule has no reference to any act done, or arrangement made (as here) between the principal

1861. LAWSON et. al. v. SALTER et. al.

debtor, under the composition deed (being then the drawer of a note) and the particular creditor holding the same, *in respect of the results of that act upon other parties to the note in question.* With these the other creditors under the deed have nothing to do. The compact between all the creditors is understood to be "*that the receiving by any one of them of the composition "shall, per se, extinguish the debt to him.* Here, the sole "question is, 'Were *these defendants* absolutely dis- "charged by payment of the composition'"? If they were not, the Banking Company might have sued them, the next day, for the balance, which would have been a clear fraud practised by them on the other creditors, inasmuch as the company would thus have received a larger dividend than these last.

It would follow, then, that one of many creditors, executing a composition deed, *can* practise such a fraud as this, on the other creditors, *without its operating as a release of the debt.* But, as has been shown, this is a position directly opposed to decisions at law, and in equity. It cannot, therefore, be supported.

In my opinion this rule should be made absolute.

Rule absolute.

Attorney of plaintiffs, *J. W. Johnston, Jr.*
Attorney of defendants, *W. Twining.*

In re ESTATE OF WOODWORTH.

July 30.

A testator bequeathed a certain sum of money to his wife, which he stated he supposed to be one third of the worth of his property, after the payment of his debts and necessary expenses. By subsequent clauses he devised a lot of land to one of his children, and bequeathed specific sums to others of his children, and to his brother, these sums amounting in the whole, together with the value of the lot of land, to the remaining two thirds of his estimated value of his property. In a further clause he said:—"If, after paying my debts and necessary expenses, there should be a greater sum than I have counted on or conveyed, my wife, with each and every of the heirs, shall participate in or receive of said sum in the same proportion as I have already allotted to them; and if there should not be a sufficient sum to pay the sums conveyed or allotted to each heir, each and every heir shall sustain a loss in proportion to the sum already allotted to them."

The estate yielded a much less sum than was estimated by testator.

Held, That the widow was not included in the word "heirs," and that, therefore, her legacy should not abate; that the testator's brother was so included; and, that after the payment in full of the specific legacy to the widow, all the other legacies should abate proportionally.

APPEAL from the decision of the Judge of Probate for *Hants* County, argued in *Michælmas* Term last before all the Judges, by *A. G. Archibald*, Attorney General, and *J. McCully*, Solicitor General, for the heirs, and *J. W. Johnston, senior*, Q. C., for the widow. All the material facts are fully stated in the judgment of His Lordship the Chief Justice. The Court now gave judgment.

Young C. J. The testator by his last will disposed of all his estate, real as well as personal, including the residue, which, after payment of debts and expenses, he seems to have computed at eight hundred and eleven pounds, and divided the same by the following clauses:—"First, I give and bequeath unto "my well-beloved wife *Sarah*, the use of the sum of "two hundred and seventy-one pounds, which sum I "suppose to be one-third of the worth of my property, "after paying my debts and necessary expenses."

The testator then gives various sums, from eight to one hundred pounds, to ten of his children, five of them having fifty-three pounds each; he allots a like sum of fifty-three pounds to a child, of which his wife was then *enceinte;* gives a lot of land to another son *George*, which he probably estimated at other fifty-three pounds, as it was appraised at fifty pounds; and gives his brother *Paul* twenty-five pounds,—these several amounts making the sum of eight hundred and eleven pounds.

The will then proceeds thus: "And further, if after "paying my debts and necessary expenses, there

1861.

In Re Estate of Woodworth.

"should be a greater sum than I have counted on, or "conveyed, my wife with each and every of the heirs "shall participate in or receive of said sum, in the "same proportion as I have already allotted to them; "and if there should not be a sufficient sum to pay "the sums conveyed or allotted to each heir, each and "every heir shall sustain the loss in proportion to the "sum already allotted to them."

It appears by the final account of the executors and by the decree, that the estate, after sale of the lands and paying the incumbrances thereon, and other debts, yielded a distributable balance of only three hundred and twelve pounds two shillings and three pence, and the decree awarded thereout the whole two hundred and seventy-one pounds to the widow, and decided that the legacy of twenty-five pounds to the brother should abate in proportion with those of the other heirs. It contained no direction as to an abatement of *George's* legacy, but that question was raised at the hearing before this Court.

One of the grounds of appeal was founded on a supposed intention of the testator to give the widow only the use of the two hundred and seventy-one pounds for life, not the absolute property; but that was abandoned at the hearing, and obviously could not have been sustained.

The next and the principal question is her right to that sum, being as it was justly put eight-ninths of the whole residue, in place of one-third of the estate. Now, this will turn on the intention of the testator, to be gathered from the whole will, and to be carried out where no rule of public policy or of positive law intervenes. Numerous cases have been decided on the meaning to be attached to the word "heir" in a will. Most of these have no application to the present case, as for example, when it is to be understood to mean the heir of a living person,—the heir presumptive or the heir apparent,—the heir at common law or the next of kin. These are reviewed in a very

elaborate note in the *Law Magazine* for *May*, 1854, on the leading case of *DeBeauvoir* v. *DeBeauvoir*, decided in the House of Lords, in which the writer vindicates the superior claims, even as respects personal estate of the heir at law. There are many decisions, however, which interpret the word "heirs" *quoad* personal property as the next of kin; among which are *Holloway* v. *Holloway*, 5 Ves. 399, *Vaux* v. *Henderson*, 1 Jac. & Walker 388, and *Gittings* v. *McDermot*, 2 Mylne & Keene 69, in which Lord *Brougham*, the then *Chancellor*, said: "The sense in which this word (heirs) "shall be taken, as applied to personalty, is fixed by "many decisions. It designates the heir of the per- "sonalty, that is, the next of kin."

In the case of *Gwynne* v. *Muddock*, again, 14 Ves. 488, where the testator s real and personal estate, as in this case, was blended together and given to his daughter-in-law for life, "his nighest heir-at-law to "enjoy the same after her death"; the *Master of the Rolls* said,—"there is no doubt the heir-at-law, pro- "perly and technically speaking, may take personal "property, bequeathed to him by that description. It "is always a question of intention what the testator "means by the use of such description." The keenly contested case of *Doe on the demise of Winter* v. *Perratt*, reported in 5 Barn. & Cres. 48, and 6 Man. & Granger 314, affords an abundance of curious learning upon this subject.

In other cases, the word "heirs" has been held equivalent to "children," as in *Beaulieu* v. *Cardigan*, Ambl. 533, where a bequest to the heirs of A was construed to be a gift to the children of A, living at his death; and in *Loveday* v. *Hopkins*, Ambl. 273, where the devise was in these words: "Item, I give "to my sister *Loveday's* heirs, six thousand pounds." "I give to my sister *Brady's* children equally one "thousand pounds"; and it was held that the testatrix intended to give the six thousand pounds to Mrs. *Loveday's* children, equally as she had given the one thousand pounds to Mrs. *Brady's*.

1861.

In Re Estate of Woodworth.

What meaning, then, are we to attach to the word "heirs," in this will? Does it or does it not exclude the widow; *George*, the son; and *Paul*, the brother, of the testator? Let us look, first of all, to two or three of the leading rules of construction, as developed in the modern cases. In *Sherratt* v. *Bentley*, 2 Myl. & Keene 149, the *Master of the Rolls* says: "If the general intention of the testator can be collected upon "the whole will, particular terms used, which are "inconsistent with that intention, may be rejected, as "introduced by mistake or ignorance, on the part of "the testator, as to the force of the words used." In *Buck* v. *Nurton*, 1 Bos. & Pul. 57, *Eyre* C. J., said: "Every testator ought to be supposed to take legal "words in a legal sense, unless, indeed, there be "demonstration plain of an intent to use them in a "different sense." And in the case of *East* v. *Twyford*, in the House of Lords, 31 L. & Eq. 81, the rule is laid down thus: "Now, the power, or rather the "duty, we have of looking to what the testator "explains, as to the meaning of his words, is not confined to that particular portion of his will, in which "the words in question occur. You may clearly "refer from one part of the will to another, from one "gift to one person to another gift to another person, "to gather his meaning." Lastly, in *Doe on the demise of Page* v. *Page*, 6 L. & E. 346, it was held, as to the word "business," that, having been used in a certain sense in the early part of the will, the same meaning must be given to it in other parts, no intention to the contrary appearing on the face of the will. Now, looking at this will, I can not bring myself to think that the wife comes within the definition and meaning of the word "heirs." No case to that effect was cited, nor have I been able to find one, after a pretty diligent search. It was decided by Lord *Eldon*, in *Garrick* v. *Camden*, 14 Ves. 382, that, in a bequest by a husband to his next of kin, *prima facie* his wife is not included. Our law, indeed, with a liberality peculiar

to itself, and which does it honour, where an intestate has no kindred, assigns the whole of the estate to the widow; but in common parlance, and according to the English cases, the widow is not an heir, and in this will she is plainly distinguished from the heirs. She was to participate with them in any surplus, but is not included in the paragraph which follows, and distributes any loss among the heirs. She is left not a third of the residue, not the sum of two hundred and seventy-one pounds, *as* or *being* one third, but two hundred and seventy-one pounds, which sum the testator says, "I suppose to be one-third of the worth "of my property." It is an absolute gift, with a reason assigned for the amount; and though it is possible, that the testator, if he had known the real amount of his property would not have assigned so large a share to the widow, and it may be a hardship on the children, especially such as are grown up, to cut down their legacies to a mere fraction, I do not see how we can arrive at any other conclusion, and, therefore, think that this portion of the decree should be confirmed.

I confess, I have more difficulty as to the abatement on the legacy to *Paul*. There is one case, to be sure, in 1 Ventr. 381, *Pibus* v. *Mitford;* but that does not quite satisfy me that the word "heirs" in a will, is to be construed as "legatees." I agree, therefore, to the decree being confirmed on this point, rather from what I believe to have been the intention of the testator, in the absence of any peculiar reason assigned for this legacy, than from the weight of legal decisions or rules of construction.

The last question respects the abatement of the legacy to *George*, being a lot of land. Now, on a deficiency of assets to pay debts, all legatees, both general and specific, must abate, preference being given to specific legatees in this respect, that the general fund, out of which general legatees are payable, may first bear the burthen. It is held, too, that every

1861.

In Re Estate of Woodworth.

devise of land is specific, *Forrester* v. *Lord Leigh*, Ambl. 171; and in *Clifton* v. *Burt*, 1 P. Wms. 679, Lord *Parker* observed that though equity will marshal assets in favor of a legatee, as well as of a simple contract creditor; yet every devisee of land is as a specific legatee, and shall not be broken in upon, or made to contribute towards a pecuniary legacy. But it has also been held that assets are marshalled between legatees under the same will, where part of the legacies are charged on the realty, together with the personalty, and some of the legacies are charged only on the personal estate. *Bligh* v. *Darnley*, 2 P. Wms. 621. And as the whole of the property, real as well as personal, passes under this will,—as *George* comes undoubtedly under the word "heirs"—and as it is unreasonable that he should enjoy his entire legacy and the others almost nothing, I think he must abate, giving him the option of accepting the lot at a valuation fixing its cash value, and paying in the difference, or rejecting it entirely, in which case it must be sold by the executors, and the proceeds form a part of the residue distributable among the heirs.

Bliss J. and Dodd J. concurred.

DesBarres J. When this case was argued, the impression on my mind was, that the testator intended to give his wife one-third of the value of his property, whatever that might be, after his debts were paid; but on a more careful reading and consideration of the first clause of the will, in connection with the two last clauses of it, I am of opinion that he meant to give, and that she is entitled to take the entire sum bequeathed to her for her absolute use and disposal, without any abatement for want of sufficient assets to satisfy all his other bequests.

Contemplating the possibility of a surplus, as well as a deficiency of assets, the testator directs that his wife, and each and every of his heirs shall participate

in the surplus, if any, "and that if there should not "be a sufficient sum to pay the sums allotted to each "heir, each and every heir shall sustain the loss in "proportion to the sum allotted," thereby making a clear distinction between his wife and the other legatees, and shewing that while he desired that his wife should participate in any surplus, he did not intend that she should suffer any loss by reason of any deficiency of assets. In giving his wife a preference over his children, the testator may have been and probably was influenced by the consideration that the surrender of her right of dower in his estate, resulting from the acceptance of the legacy bequeathed to her, entitled her to a provision equal to the value of the right to be surrendered, and it would appear from the final account of the executors that the value of that right was at least equal to, if not greater than the sum bequeathed. Whatever effect this consideration may have had on the mind of the testator, it appears to me obvious from the two last clauses of the will that he intended to give his wife priority over all others, and did not intend her legacy to be reduced in case there was not enough to satisfy all the rest.

As to the remaining question whether the devise of the lot of land is, or is not to be affected by the insufficiency of assets, I think it was clearly the intention of the testator that, in that event, the devisee of the land should suffer loss, as well as the rest of his heirs; and that he is bound to contribute towards the pecuniary legacies, the difference between the value of the land, and his ratable proportion of the assets. There is nothing in the will indicative of any intention on the part of the testator to give the devisee any preference over his other children, but, on the contrary, there is an express declaration, that in the event of a deficiency, each and every heir shall sustain a proportionate loss, and that applies as well to the devisee of the land as to the pecuniary legatees. This seems to me to be a construction consistent with the words of the

1861. In Re Estate of WOODWORTH.

will, and it is besides an equitable construction, placing the specific devisee, as of right he ought to be placed, on an equality with all the pecuniary legatees, with the exception of the testator's wife, who alone is to have a priority over all the rest.

WILKINS J. I regard the question of construction of this will, as altogether free from difficulty. The testator's meaning is, I think, transparent, and he has used language not unapt to designate the objects of his bounty. He has contradistinguished an individual of those objects from a class of them, in relation to the provisions which he has made for two contingencies contemplated by him.

Nothing can be more clear than that he used the term "wife" in opposition to the term "heirs." In fact, of the twelve persons to whom he has given legacies, including the devise to *George*, eleven answer the description of "heirs," for all these twelve, excepting testator's brother *Paul*, were, when his will took effect, in the strictest sense, "*heirs of the* "*testator.*"

His widow, on the other hand, was not an heir, and, on well known principles, could have no interest in his estate, recognized by the law, except as devisee under his will, or by dower actually assigned.

The testator, then, distinguished "the wife," on the one hand, as one object of his bounty, from the class of persons designated as "heirs," as objects of it, on the other. Now, nothing is more common amongst men than, when speaking of many persons, to describe them by a general collective term, though there may be an exceptional case, which is, in strictness, not comprehended in it.

There is such an exception here, but it is unimportant, because an individual, the wife, is mentioned in contrast with twelve other persons, as a class, and none others are referred to in the will.

Besides, it is now a canon of construction, in regard

to wills, that, where technical words are used, obviously in a *non-technical sense*, they are to be interpreted according to ordinary principles and rules. *Vaux* v. *Henderson*, 1 Jacob & Walker, 388. *Forster* v. *Sierra*, 4 Ves. 766.

Let us now consider the will, the effect of which we cannot but lament, in view of results disastrous to the children of the testator, which he, evidently, did not contemplate or foresee.

It may fairly be inferred from the language of the testator, taken in connection with his dispositions, that he had estimated the value of the net proceeds of his property, after payment of debts and expenses, at an amount, of which two hundred and seventy-one pounds would be the one-third.

Under that impression, he bequeaths the last mentioned sum to his wife; but he does not say "I give "her two hundred and seventy-one pounds, *or whatever* "*sum may be one-third of the worth of my property, &c.*" He gives that sum *absolutely*.

He then gives additional pecuniary legacies, amounting to four hundred and eighty-seven pounds, and he devises a lot of land to his son *George*. It is probable that the testator supposed *that* lot to be worth *fifty-three pounds*, because he has given *that* sum to six of his children, and because *it* superadded to the other legacies, (that to the wife included), makes up (less thirteen shillings and four pence) *that whole sum*, of which two hundred and seventy-one pounds is an exact third.

Testator next contemplates two contingencies, which must not be confounded, *in regard to those to whom they relate*, for they are distinct, in that respect, and the construction of the main question submitted to us turns on that distinction.

The first is, the event of there being a *greater* amount of net proceeds than he had "*counted on, or* "*conveyed*"—in other words, than he had, on com-

1861.

In Re Estate of Woodworth.

putation, previously disposed of, namely, to his wife and to the "heirs."

The second is, the event of there being a *less* amount than would be sufficient to pay (not the aggregate of legacies previously given to the wife, and to the other legatees, but) "*to pay the sums conveyed or allotted to* "*each* '*heir*,'" (that is, to each "legatee," as distinguished from *the wife*, who is mentioned, *with* "*the* "*heirs*" in the preceding clause, but is omitted in this.)

In the first event, the testator expressly declares that his wife shall participate with "the heirs" (other legatees) in the surplus.

In the second event, he does not say, nor intimate that *she* shall abate. The provision made for that event does not refer to her. She is, therefore, unaffected by it.

There is nothing in this will to warrant us in putting *two* interpretations on the word "heirs", namely, one that includes, and another that excludes, the wife.

In the latter sense the testator has used it, in the first contingent clause. In that sense, therefore, we must adopt it in the second, there being nothing in the instrument which necessitates a change of meaning.

The learned Judge has not adverted to the specific devise to *George*, and to the point of abatement in relation thereto.

The arithmetical calculation above adverted to makes it probable that the testator considered *that* devise as equivalent to a bequest of fifty-three pounds, whilst there is no reason to doubt that he designed to include the devisee amongst the legatees designated by the term "heirs".

I think, therefore, the devise must be viewed as a bequest of fifty-three pounds; and *George* must be decreed to pay into the Court of Probate, the surplus above his true proportion of the distributable assets, which surplus the Judge will apportion amongst the other legatees in rateable proportions.

But, inasmuch, as *George* may consider the land at testator's death to be of *less* value than fifty-three pounds, he must have the option (to be exercised within a reasonable time) of the devise being regarded as a bequest of fifty-three pounds, and subject in that respect to the consequences of this judgment, or of having the question of its value, at the death of the testator, ascertained under the directions of the Court.

The decree of the learned judge, subject to this modification is, in my opinion right, and must be confirmed accordingly.

Rule accordingly.

Attorney for appellants (executors), *G. Campbell.*

EVENS *versus* CITY OF HALIFAX.

July 19.

Plaintiff sustained an injury from earth left on the street by *V.* who had obtained permission from *P.*, a public officer, (Superintendent of Streets,) in the employ of defendants, to place the earth there, but not to leave it there after ten o'clock at night. The earth was left on the street all night, but the accident occurred before ten o'clock. It did not appear that the defendants were aware of the earth being so deposited or left.

Held, That, as the defendants were a public body, discharging a public duty gratuitously, and had no share or participation in the wrong complained of, it having been done without their consent or knowledge, that they were not liable, and that the action could not be maintained.

TRESPASS, tried before *Wilkins* J., at the *April* Sittings in 1860, and verdict for defendants under the direction of the Judge. A *Rule Nisi*, to set aside the verdict, and for a new trial, had been granted, which was argued in *Michælmas* Term last by *J. W. Ritchie*, Q. C., for plaintiff, and *Thomson* and *Richey* for defendants. The facts sufficiently appear in the judgment of his Lordship Mr. Justice *Dodd*. The Court now gave judgment.

DODD J.* This action is brought against the city by the plaintiff, for an injury sustained by him in

*YOUNG C.J. and BLISS J. gave no opinion, the former having been concerned in the cause, when at the Bar, and the latter being absent.

1861.

EVENS v. THE CITY OF HALIFAX.

accidentally driving his carriage, on the night of the 1st *June*, 1859, over a heap of earth, that had been deposited in Argyle Street by *Veith* during the day, by which accident the plaintiff was seriously injured in his person, and for some time afterwards prevented from attending to his ordinary business.

The facts are concise. *Veith* wishing to remove earth from his yard, requested permission from *Pollock*, the superintendent of streets to deposit it in the street. *Pollock* gave him the permission, but he was not to allow it to remain there for a longer period than the night ordinance permitted, which was ten o'clock. The accident occurred half an hour before that time. Under these circumstances, the plaintiff attempts to make the city liable in damages for the injury he thus sustained. The jury, under the direction of the learned Judge that tried the cause, found a verdict for defendants. A *Rule Nisi* was granted to set aside the verdict and grant a new trial, and the case was argued before this Court in the term of *Michælmas* last. The plaintiff contends that the superintendent of streets is the servant of the corporation, and that he performs his duties under their authority, and that in the performance of those duties, they are liable for his acts; and, secondly, that the streets being under the charge of the city, and the inhabitants paying for their repairs and keeping them in good order, the city are liable for the injury he complains of in consequence of the incumbrances being placed on the street by *Veith*, without the necessary guards about it to prevent accident.

The act of 1853, chap. 36, directs and authorizes the appointment of superintendents of streets for the city of Halifax, and the seventh section of the act transfers the powers and duties held and exercised by commissioners of streets to such superintendents, who, nevertheless, are to exercise the same, subject to any order of the City Council; and upon reference to the duties of commissioners of streets, as prescribed

1861.

EVENS v. CITY OF HALIFAX.

by law, we find their duty is to remove all incumbrances upon the streets, prevent encroachments thereon, make repairs, alterations, and improvements thereon as required, &c., &c., with power in certain cases to grant permission to persons to place in the streets materials for buildings, &c., subject, of course, to the order of the City Council. Here, then, we have the superintendent of streets not only authorized to remove all incumbrances therefrom, but his particular duty is to cause such incumbrances to be removed; and for any neglect or injury that may arise to a party from a failure on his part in the performance of his duties, redress may properly be had from him; but how the defendants can be made liable for a breach of duty on his part, I am at a loss to conceive. But, admitting that the city are liable for a breach of duty on the part of the superintendent, still, in the present case, no such breach can be attributed to him. His permission to *Veith* to remove the earth from the yard, was without any order or direction from the city, and had *Veith* not exceeded the permission given to him, and not allowed the earth to remain in the street during the night, the accident complained of could not have occurred.

The superintendent is not the servant of the defendants in the sense attributed to him by the counsel for the plaintiff. It is true he acts under their direction, when they think proper to give him instructions respecting the streets of the city, but if silent upon the subject, and no directions are given to him, he would still, under the law, be bound to remove all incumbrances, and failing to do so, might make himself liable for consequences.

If the city are liable in this form of action for the injury complained of, then it is difficult to say where their liability is to end. It would be open to any evil disposed person every night throughout the year to make them liable, by placing incumbrances of any kind in the streets, from which injury resulted. And

1861.

EVENS v. CITY OF HALIFAX.

if they are liable as a public body, performing public duties for the benefit of the whole inhabitants of the city, for acts which they cannot, however vigilant in the performance of those duties, entirely prevent; it will be difficult, I suspect, to obtain the services of gentlemen competent to fill the various offices of the city, necessary for performing its duties, and for which they derive no remuneration. It would have a startling effect upon the country generally, if it was announced by a decision of this Court, that the commissioners of streets, throughout the Province, were liable personally for all injuries sustained in consequence of incumbrances upon the streets within their several districts. Yet the principle contended for here, on the part of the plaintiff would equally apply to them, for, as I have already shown, their duty is to remove all incumbrances, &c., but I admit a case might arise which would make them liable, such for instance as where an incumbrance was on the street, and it was brought particularly to their notice, and no means within a reasonable time taken to remove it, and an injury resulted to an individual from its remaining after such notice, then, I think, they would be rightly liable. So the superintendent of the streets in the city, or the city itself under similar circumstances might be made liable, but the case under consideration is not that case, nor does it approach it in any manner whatever.

The case of *Hall* v. *Smith et al.* 2 Bing. 156, cited on the part of the defendants appears to me to govern this case. There it was held that clerks of commissioners, entrusted with the conduct of public works, were not liable in damages for the negligence of artificers employed under their authority. The commissioners were appointed under an act of parliament for paving, lighting, watching, cleaning and otherwise improving the city of *Birmingham*, and a section of the act directs that the commissioners may sue and be sued in the name or names of the treasurer or trea-

surers, clerk or clerks for the time being. Such then was the reason why the action was brought against the clerks, instead of the commissioners, and *Best* C. J., in delivering the judgment of the Court, observes that unless the commissioners were liable, the clerks could not be so. The action was for negligently leaving a ditch or tunnel open by reason of which the plaintiff fell in and was injured. It is not disputed that the commissioners were authorized by the act to order the tunnel to be made, and they had left the making of it to *Norton* and *Kimberly*, the former of whom was the surveyor, and the latter the undertaker of the work, and were defendants in the action joined with the clerks. The accident happened to the plaintiff from these persons, that is *Norton* and *Kimberly*, not putting up rails, and not leaving lights during the night to prevent persons passing along the road, in which the tunnel was made, from falling into it. The *Chief Justice* proceeds to say—"These commissioners, who are charged with the execution of a public duty, for the performance of which they receive no emolument or advantage, must employ such persons as *Norton* and *Kimberly* to do the works which the act of parliament orders to be done, and the commissioners cannot be expected continually to watch such persons whilst so employed." The Court, therefore, held that the commissioners were not responsible for the accident that had happened, and that the action could not be maintained against the clerks, but that the party injured must have his remedy against the agents of the commissioners, by whose negligence it was occasioned. His Lordship, in giving the judgment of the Court, made many valuable remarks upon the action, too voluminous for me to introduce here, although extremely applicable to the present case. I cannot avoid, however, selecting one or two passages. "If commissioners under an "act of parliament", he says, "order something to be "done, which is not within the scope of their authority,

1861.

EVENS v. CITY OF HALIFAX.

"or are themselves guilty of negligence in doing that "which they are empowered to do, they render them- "selves liable to an action; but they are not answerable "for the misconduct of such as they are obliged to em- "ploy." "If the doctrine of *Respondeat Superior*," he continues, "were applied to such commissioners, who "would be hardy enough to undertake any of those "various offices, by which much valuable yet unpaid "services are rendered to the country?" "The maxim "of *Respondeat Superior*," he continues, "is bottomed on "this principle, that he who expects to derive advan- "tage from an act which is done by another for him, "must answer for any injury which a third person "may sustain from it."

If we apply this principle of *Respondeat Superior* to the present action, it is very clear the city could not be made liable, for in no manner could they derive advantage from the act of the superintendent who gave *Veith* permission to put the earth in the street.

In the case I have been citing from, the commissioners appointed the persons that caused the injury, but here the superintendent of streets is a public officer, and who did no more than his duty in allowing the earth to be removed to the street, with the express understanding that it was not to remain there after ten o'clock at night, the time permitted by the city ordinance for such incumbrance to remain in the street. To make the city liable for the wrong committed by *Veith* would, in my opinion, be contrary to every principle of reason and justice; and as *Best* C.J. observes in the case cited, where it may be supposed the commissioners were aware of the tunnel having been open, they could not be expected to attend day by day, to see that proper precautions were taken against accidents, or get up in the night to see that lights were burning to warn passengers of the danger from the temporary obstructions in the roads.

It must be borne in mind that, in the present case, there is not any evidence to show that the corporation

was aware of the permission given to *Veith* by the inspector, nor aware of the earth being on the street until after the accident. Therefore, not called upon to move in the matter in any way whatever, no charge can be made against the corporation for acting outside of their authority, for here the act that produced the injury was done without their authority, and without their knowledge. Neither can they be charged with negligence for not doing that which they were empowered to do, for although the streets of the city are to be kept free from incumbrances by the superintendent acting under their authority, yet before they can be charged with negligence in this particular case, it must appear that they were aware of the incumbrance, and allowed it to remain without sufficient guards to protect the citizens from injury. Now, on the contrary, as I have already said, they were totally unacquainted with the earth having been placed in the street, until after the accident, when it was immediately removed.

It is difficult to find any case in the books precisely similar to the one under consideration. In all the cases I have seen, the parties attempted to be charged were in some manner the actors that produced the injury, either by themselves or by those that were supposed to be acting under their authority; but here the attempt is made to make the defendants liable for an act not done by their authority, or with their knowledge. But the general principle running through all the cases is very clear, that public bodies acting in good faith, in the performance of a public duty without remuneration, are not liable in an action like the present, unless the act causing the injury proceeds from negligence on their part. Here negligence cannot be charged, for the defendants were not privy in any way in producing the injury the plaintiff complains of.

In the case of *Sutton* v. *Clarke*, 6 Taunton 29, it was held that one in the execution of a public function without emolument, which he is compelled to execute,

1861.

EVENS v. CITY OF HALIFAX.

acting without malice and according to his best skill and diligence, and obtaining the best information he can, does an act which occasions consequential damages to a subject, is not liable to an action for such damages. The case was this. The trustees of a turnpike road, empowered to make water courses to prevent the road from being overflowed, directed their surveyor to present a plan for carrying off the water of an adjacent brook. He recommended, and on that recommendation they adopted, and caused him to make a wide channel from the road, gradually narrowing and conducting the water into the ordinary fence ditches of the plaintiff's land, which were insufficient to discharge it, and his land was consequently overflowed; it was held that no action lay against the chairman of the trustees who signed the order for cutting the trench. That, and the other cases decided upon the same principle, are distinguishable from that of persons acting for their own benefit, or employing others for their own benefit. When injury has accrued to third parties, in all such cases the principle of *respondeat superior* has been held to apply.

The cases were all reviewed by *Best* C. J. in *Hall* v. *Smith*, (the case already referred to), and his concluding remarks are, "that from these cases I collect that "the law recognises the principle, which I ventured "to state was founded in sound policy and justice, "and that no action can be maintained against a man "acting gratuitously for the public, for the conse- "quence of an act, which he was authorized to do, "and which, so far as he is concerned, is done with "due care and attention, and that such person is not "answerable for the negligent execution of an order "properly given."

These principles so enunciated by *Best* C. J., have been upheld in several subsequent cases, and very lately in the case of *Halliday* v. *The Vestry of Shoreditch*, which was an action against the vestry for damages done to the plaintiff, and which is reported in the *Law Times* of the 1st *June*, 1861. By that case it appears

1861.

EVENS v. CITY OF HALIFAX.

that a surveyor, appointed by the vestry to look after the highways in the parish, employed men to do some work in one of the streets, who left some stones in such a position as to cause the cart in which the plaintiff was driving to be upset, whereby he sustained serious damage, and it was held by the Court after argument in an action against the vestrymen, that as they were acting gratuitously as a public body, and not having participated in the wrong done, they were not liable.

Erle C. J. in giving his opinion, says: "It is agreed, "on both sides, that if a private individual had left "stones there, he would have been liable, and the "question is, whether persons who give their services "gratuitously are liable, they being ignorant of the "work which was going on, and not giving their "attention to it." "I am of opinion," he says, "that "they are not. The principle has been recognized, "and the law has for a very long time been estab-"lished, that persons discharging a public duty, and "acting gratuitously, and having no share or participa-"tion in the wrong done, are exempted from liability."

If we decide the case under consideration by these principles, as laid down by *Erle* C. J., then I think all must admit that the learned Judge who tried this cause was correct, when he told the jury that the action could not be sustained, and I do not see how it is to be decided upon any other principle. The defendants are a public body discharging a public duty gratuitously, and had no share or participation in the wrong complained of, but, on the contrary, were entirely free from the act, it having been done without their consent or knowledge. I, therefore, am of opinion, that the rule for a new trial should be discharged.

DESBARRES J. and WILKINS J. concurred.

Rule discharged.

Attorney for plaintiff, *J. W. Ritchie.*
Attorney for defendants, *Beamish Murdoch*, Q. C.

July 30.

ALLAN ET AL. *versus* McHEFFEY.

Where a party has been authorized to enter into a speculation on the joint account of himself and others, and the negociation has been broken off, he cannot afterwards renew it on his own account, and purchase for his own benefit, without first notifying the other parties, so as to give them an opportunity of uniting with him in the purchase, if so disposed.

The doctrines of maintenance and champerty are largely modified by the modern cases.

ASSUMPSIT, tried before *Bliss* J. at the *October* Sittings, in 1860, and verdict for plaintiffs. A *Rule Nisi* had been granted to set aside the verdict, which was argued before all the Judges, during the present term by *J. R. Smith*, and *J. W. Johnston, senior*, Q. C., for plaintiffs, and the *Solicitor General* for defendant.

YOUNG, C. J. now delivered the judgment of the Court. The plaintiffs and defendant in this case, being each of them entitled through their wives to a share in the estate of Mr. *Robert Hill*, and two of the other shares therein being held by an assignee, it was agreed between them that the defendant should enter into a negociation on their joint account, and in the expectation of realising a profit thereon for the purchase of said two shares, and the sum of three hundred pounds was to be offered therefor. Mr. *Primrose*, who acted for the assignee, at first agreed to accept this sum, and had that agreement been carried out the question in this case would not have arisen. But a difficulty occurred as to the extent of Mr. *Primrose's* authority, and the costs of an action that had been brought for the recovery of these two shares, amounting to about one hundred pounds; and the negociation between *Primrose* and the defendant was broken off, and so remained for a considerable time. It was then renewed by Mr. *Primrose*, and the defendant having agreed to pay him an additional sum, equivalent to the costs, the two shares were assigned to him, and on the settlement of the estate realised a profit of eight hundred and twenty-three pounds fifteen shillings and two pence, for two-thirds of which the action was brought. The material facts are not in

dispute—the three parties were examined at the trial, and the legal principles on which our judgment proceeds result from the evidence, which was very fairly and candidly given by the defendant himself. He conceived that the negotiation having been once broken off with the knowledge of the plaintiffs, and a larger sum having been paid for the assignment than was contemplated in the first instance; he had a right, without notice to the plaintiffs, to negotiate anew and purchase for his own benefit. But it appeared to the Judge upon the trial, and we all concur with him, that the defendant took a mistaken view of his rights in this transaction, and that before he could re-open the negotiation, or act upon its being re-opened by Mr. *Primrose*, and purchase for himself, he was bound to notify the plaintiffs, with whom he was originally associated, and give them the opportunity of negotiating for themselves and assenting to the increased price, if they thought it for their interest. The three parties having embarked in a common speculation, neither of them could withdraw without notice to the others, and the profits and advantages made by one enured for the benefit of all. It was plainly the interest of the plaintiffs, as much as of the defendant, to assent to the additional one hundred pounds; and on principles of equity well established in this Court, they ought to have had the opportunity.

The objection mainly insisted on at the argument, that the purchase came within the doctrines of maintenance or champerty, and was therefore illegal, would have applied to the first agreement which the defendant was prepared to carry out in good faith, as well as to the second, which he disputes on entirely different grounds.

We have looked into the cases cited on this point, and in that of *Findon* v. *Parker*, 11 Mees. & Wels. 675, I find it admitted that many of the older authorities cannot be upheld at the present day; that the old cases, in fact, are now exploded; and, while the principle

1861. ALLAN et al. v. McHEFFEY.

remains intact, its operation is very much restrained, and holds only where there is the danger of oppression or abuse. "The law of maintenance," says Lord *Abinger*, "as I understand it, upon the modern con-"structions, is confined to cases where a man impro-"perly, and for the purpose of stirring up litigation or "strife (or, I would add, for the purpose of profiting by "it), encourages others either to bring actions, or to "make defences which they have no right to make." Champerty is the purchasing of a suit or right of suing—a practice, as *Blackstone* expresses it, abhorred by our law, but which, obviously, can have no application to the *bona fide* purchase, by one of the heirs of an estate, of the share of another heir, which is a very different thing from the purchase of a suit with a view either to oppress or profit by another, through the means of litigation. We think, therefore, that there is nothing in this defence, however ingeniously urged, and being also of opinion that the other grounds taken at the argument,—want of consideration and want of mutuality in the agreement,—are untenable, the rule for a new trial must be discharged.

Rule discharged.

Attorney for plaintiffs, *W. A. Johnston.*

Attorney for defendants, *Solicitor General.*

COZENS *versus* WIER ET AL.

July 30.

A general plea of release of action is bad, if the release is not pleaded as being made under seal.

A plea, setting forth an agreement between plaintiff and defendants, that plaintiff should accept third parties as paymasters for the amount of his claim against defendants, that said third parties agreed to pay the same to plaintiff, and that plaintiff accepted the said third parties and released defendants, is good.

DEMURRER to two of defendants' pleas, argued before *Young* C. J., *DesBarres* J., and *Wilkins* J., during the present term, by *R. G. Haliburton*, for plaintiff, and the *Solicitor General* for defendants.

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

This is an action of Assumpsit, to which two of the defendants pleaded:

"3. That after the alleged claim and before this "suit, the plaintiff released them therefrom.

"4. That the plaintiff and they agreed that the "plaintiff should take and accept the firm of *Gibson* "*and Henderson* of *Newfoundland*, who at the time "were indebted to the defendants in a sum equal to "the plaintiff's demand, as paymasters for the amount "of their claim, and the said firm of *Gibson & Hender-* "*son* agreed to pay the same to plaintiff, and plaintiff "accepted the said last mentioned firm, and released "and discharged the said *Benjamin Wier* and *John T.* "*Wylde* from all liability therefor."

The plaintiff demurred to these pleas, and it was admitted, at the argument, that the principal objection to both pleas was, the want of an allegation that the release pleaded was a release under seal. As respects the fourth plea it is precisely analogous to the case put by Judge *Buller* in *Tatlock* v. *Harris*, 3 T. R. 180:— "Suppose A owes B one hundred pounds, and B owes "C one hundred pounds, and the three meet, and it is "agreed between them that A shall pay C the one "hundred pounds, B's debt is extinguished, and C "may recover that sum against A",—that is, under the agreement pleaded in this case, *Gibson & Henderson* are liable to *Cozens*, and the debt due to him by *Wier* and

1861.

COZENS v. WIER et al.

Wylde is extinguished, or in other words, is released and discharged without deed. It was said that the above was merely a *dictum* of Judge *Buller*, but it is repeated in most of the text books, and was cited by *Holroyd* J., and relied on in *Wharton* v. *Walker* 4 Barn. & Cres. 164. So also in the case of *Wilson* v. *Coupland*, 5 Barn. & Ald. 228, the defendants were originally indebted to *Taillasson & Co.* for money had and received, and *Taillasson & Co.* were indebted to the plaintiffs, and, with the consent of all parties, it was arranged that the plaintiffs should take the defendants as their debtors. By that arrangement the plaintiff's demand against *Taillasson & Co.*, as in this case the plaintiff's demand against *Wier & Wylde*, was extinguished, which is a release in law, being that, according to *Perkins*, which doth acquit by way of consequence or intendment of law. We think therefore that the fourth plea is substantially good, and that the cases cited as to accord and satisfaction do not apply. The case of *Case* v. *Barber*, in Sir *Thomas Raymond's* Reports, 450, on which the plaintiff's counsel so much relied, is distinguishable from the present, because it did not appear that there was any consideration for the promise, but only an agreement without any consideration, which cannot be alleged here.

As respects the third plea, it is not in the form given by the Practice Act, which requires a release to be pleaded by deed, and no consideration is set out. Now, it is clear that such a release given in evidence, would be of no avail, for though it is laid down in 1 *Sid.* 177 and *Cro. Car.* 383, that a promise by words may before breach be discharged or released by parol, and that *exoneravit* generally is a good plea, this principle does not apply after a right of action accrued, as appears also by the case of *King* v. *Gillet*, 7 Mees. & Wels. 55. Looking to the spirit of our Practice Act, we are not disposed to favor technicalities in pleading; but, still, every defence pleaded, in whatever form it may be, must be in substance a legal defence,

which this plea is not, while it is a departure from the established form. Our judgment, therefore, is in favour the plaintiff on the third, and of the two defendants on the fourth plea.

1861.

COZENS v. WIER et al.

Rule accordingly.

Attorney for plaintiff, *R. G. Haliburton.*
Attorney for defendants, *Solicitor General.*

[NOTE.—His Lordship Mr. Justice BLISS, who had been absent in *Europe* since *January* last, and did not return until the 24th *July*, instant, did not deliver any *written* judgments during the present term, although he concurred generally in most of those delivered by the other Judges.]

END OF TRINITY TERM.

1861.

CASES IN VACATION.

TRINITY VACATION

XXV. VICTORIA.

November 16.

THE QUEEN *versus* BURDELL AND LANE.

Alien defendants are not entitled, in this province, in any case, civil or criminal, to a jury *de medietate linguæ*.

An alien may be a juror.

THIS was an application on behalf of the defendants, American citizens, indicted for the murder of *Matthew Gardner*, a constable in the city of Halifax, for a jury *de medietate linguæ*, and was argued before *Young* C. J., *DesBarres* J., and *Wilkins* J., by *J. W. Johnston, senior*, Q. C., and *J. W. Ritchie*, Q. C., for defendants, and the *Attorney General* and *Solicitor General* for the Crown.

His Lordship the *Chief Justice* now delivered judgment.

YOUNG C. J. On the arraignment of the prisoners in this case, their counsel claimed for them a jury *de medietate linguæ;* and the present appearing to be the first instance in which such a claim has been advanced, though foreigners have been frequently indicted and tried in this Province, it has been fully argued before Mr. Justice *Bliss*, Mr. Justice *Wilkins*, and myself, and having carefully considered it, we are now to give judgment.

There is no doubt that the privilege thus indulged to aliens was known to the *English* law at an early period, and may be traced back to an ordinance of King *Etheired*, the immediate predecessor of *Alfred*, the greatest of the *Saxon* Kings. It was extended to all manner of inquests and proofs, to be taken and made amongst aliens and denizens, be they merchants or

other, and although the King be party, by the famous statute known as the Statute Staple, 28 *Edw.* 3 ch. 13, the object being as it was expressed in the 8 *Hen.* 6 ch. 29, "to give to merchants aliens the greater courage, "and desire to come with their wares and merchan- "dizes into this realm." That this was the policy of the law, appears also from 2 *Reeves' History of the English Law*, fol. 395, 461, and from 3 *Blackstone*, 361. In this last passage, the commentator seems to think that the privilege, in civil causes, had been abridged or superseded by the act 3 *Geo.* 2, ch. 25, and it appears by the books of practice, that it had not been resorted to for a long period in such causes, before it was virtually repealed therein by the 6 *Geo.* 4, chap. 50. The mode of granting it in civil suits is shewn in *Denbawd's case*, 10 Co. 104, where in an action of slander, but six *Englishmen* and five aliens appeared, and a question arose about the granting of a *tales de circumstantibus per medietatem linguæ*, and it was granted, so that there wanted only one alien. In criminal cases the privilege has always been preserved, though now-a-days it is difficult to discover any sufficient reason for it, and sec. 47 of the consolidated Jury Act, already cited, 6 *Geo.* 4, ch. 50, expressly reserves it to every alien indicted or impeached of any felony or misdemeanor; adding what must have been intended by the original statute, and is expressed in the 8 *Hen.* 6, that no such alien juror shall be liable to be challenged for want of freehold, or other qualification required by the Act. This mode of trial was also recognized by the 4 and 5 *Will. & Mary*, ch. 24, sec. 15.

It has been contended before us by the prisoners' counsel, that so ancient an usage in the mother country, though founded originally on an ordinance of the King, and on Acts of parliament, must be taken as part of the common law — part of the birth-right and inheritance which the inhabitants brought with them to this Province, and of which nothing can deprive them, but an Act of their own legislature. And,

1861.

THE QUEEN v. BURDELL et al.

although it might be questioned how far it was a privilege of the colonists, and in their actual condition, whether it would be a benefit or an injury, such an argument might have been plausibly maintained, if the exercise of the privilege had been found consistent with the forms of proceeding in this Court, or the acts of the Provincial legislature.

Now, it is to be noted, that in the numerous Jury Acts, extending from 1759, the earliest of which, 33 *Geo.* 2, ch. 4, I have now before me, in one of the old editions, down to the *Revised Statutes*, 2nd series, not the slightest allusion nor provision for this privilege of aliens in civil or in criminal suits,—and if good in one, it is good in both,—is to be found. This long course of legislation, coupled with the fact that it has never before been claimed in our Courts, though the idea and the usage in the mother country were familiar to every lawyer, is strong evidence of the opinion held by our judges and legislators. Of the course pursued in the *United States*, the books within our reach afford but a vague and imperfect notion. The two passages cited from *Dane's Abr.*, chap. 182, art. 5 & ch. 221, art. 6, and the note to *Waterman's Archbold* 159, convey no reliable information. We have no means of knowing whether the privilege ever existed in *Massachusetts:* we are only told that it does not exist now. We know that it was abolished by the *Revised Statutes* of *New York*, but have no access to the earlier Acts referred to in the case *People* v. *McLean*, 2 Johns. Rep. 381, which was so much relied on at the argument, but the value of which depends so much on the language and construction of these Acts.

Supposing, however, that we were inclined to follow that case, and to recognize the privilege as one that we ought, if possible, to allow, it appears to me that there are insuperable difficulties in our own legislation, and in our modes of proceeding. The juries that are to try all causes, criminal and civil, and the

modes of selecting and summoning them, are all prescribed in the *Revised Statutes*. It is said that this is an exceptional case; but I think the exception should come from the legislature, and not from the judges. The commissions of *Oyer & Terminer*, in *England*, the precepts to the various sheriffs, and their selection and return of juries, are unknown to us, and I can see no authority in general principles, or in our commissions to import them, into this Court. It is laid down in 2 *Inst.* 568, that Justices or Commissioners of *Oyer & Terminer*, may award a *venire* to try a party, returnable the same day on which he is arraigned. Can we do so in the face of the 25th sec. of our Act? *Hawkins*, ch. 41, sec. 2 & 4 of his second book, says that the bare award of the justices, that the jury shall come, is sufficient; but questions whether this matter doth not rather depend on practice, and the constant course of precedents, than on any argument from the reason of the thing. It is enough for us to say that we have no such practice and course of precedents, and that to authorize a sheriff by a *venire* new in this Court, to select at his own discretion a mixed jury for the trial of an alien, would be not only abhorrent to the policy of our law, but in many cases might be injurious to the alien himself.

I shall close by referring to the point raised, incidentally, on this argument, that an alien can not legally be a juror in this Province,—a point which I then heard for the first time, and on which, if there be any room for doubt, the legislature ought to be at once appealed to. But, in my opinion, there can be no doubt. At common law, indeed, as it is laid down in *Co. Lit.* 156*b*, and in *Calvin's* case, 7 Co. 18, "an alien born cannot be returned of juries for the "trial of issues between the King and the subject, "or between subject and subject," and the rule is re-affirmed in the 3d sec. of 6 *George* 4, ch. 50. But by our legislation, the privilege, or rather the liability, to serve as jurors, extends to all persons

1861.

THE QUEEN v. BURDELL et al.

(with certain exceptions), qualified in point of estate, and resident for a certain period within the county. It is said that these Acts should be read in subordination to the principle of the common law, and therefore to the exclusion of aliens; but surely, it is too late, with the co-temporaneous exposition of the Courts, and when we have seen aliens again and again sitting as jurors, to disturb the uniform practice of this Court, as I have ever understood it to be, and as I think also it is right and proper in itself. If any change is to come, let it come from the legislature, and not from us. The law, as it stands, in my opinion, makes an alien, qualified and resident as the statute prescribes, equally eligible as a juror with the native born citizen.

Application refused.

CASES

1861.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHÆLMAS TERM,

XXV. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J.
BLISS J.
DODD J.
DESBARRES J.
WILKINS J.

IN RE ESTATE OF McKAY.

December 29.

The real estate of a testator is not liable for the payment of legacies, unless it is manifest from the will that such was the testator's intention.

Construction of the Probate Act, (Chap. 130 Rev. Stat., second series,) sections 13 and 18, settled.

APPEAL from the decree of *Harry King, Esquire*, Judge of Probate for *Hants* County, argued in *Trinity* Term last, by *J. W. Ritchie*, Q. C., and *J. W. Johnston, senior*, Q. C., for appellants, and by *J. R. Smith*, Q. C., and *M. I. Wilkins*, Q. C., for the respondent.

The Court now gave judgment.

YOUNG C. J. The decree appealed from in this case was pronounced in *November*, 1860, and sets out the leading facts, which I extract from it, with some modifications, as follows:—

"The testator, *John McKay*, departed this life in "*November*, A. D. 1826, having executed his last will "and testament, whereby he devised to his wife "*Amelia J. McKay*, certain real estate at *Windsor*, for

1861.

In Re Estate of McKay.

"her life; also the interest arising from all his "monies, whether in the funds or otherwise secured.

"He then disposes of all his real and personal "estate, as follows:

"'From and immediately after the decease of "'my said wife, I give, devise, and bequeath my "'dwelling-house, wharf lot, and store, together with "'the ten acres of marsh land, unto my neice, *Sarah* "'*Thomas*, and the heirs of her body, to be begotten; "'but if she should die before my said wife, and "'without issue, to be begotten as aforesaid, then I "'give, devise, and bequeath the said estate to my "'neice, *Rachel Gore*, wife of *Charles Gore*, and her "'heirs for eve . *It is my wish and request, that neither* "'*of my said neices or their heirs should dispose of or sell* "'*the said estate, or any part thereof.*'

"The testator then gave a number of legacies to "different individuals, and disposed of the residue as "follows:

"'And I do further will and desire, that the "'residue, if any, of my monies, after the payment "'of my debts, and the aforesaid legacies, be divided "'equally among all the legatees, &c.'

"Mrs. *McKay*, the widow and sole acting executrix, "departed this life in *February*, 1860, having first "made her will, with codicils thereto, and appointed "*John Otis King* and *Benjamin D. Fraser* her execu- "tors, who have proved the same, and have taken "upon themselves the execution of them. Captain "*John McKay's* will was executed in the presence of "three witnesses, one of whom was *Sarah Thomas*, "the devisee of the real estate, and also a legatee "under the will. She has since intermarried with "the Honorable *Lewis M. Wilkins*, one of the Judges "of the Supreme Court, and has issue now living, "two daughters, who with their mother have survived "the testator's widow. It appears, from the account "filed in the estate of Captain *McKay*, and also by "the affidavit of Dr. *Fraser*, one of the executors of

"the widow, Mrs. *McKay*, that the personal assets of "Captain *McKay* were insufficient to pay his debts "and the legacies mentioned in his will, and that a "large sum, amounting to near three thousand "pounds, will be required to meet the deficiency "of the legacies. The executors of Mrs. *McKay*, who "was the sole acting executrix of Captain *McKay*, "petitioned the Court of Probate for license to sell "the real estate of the testator, to enable them to "pay the legacies in his will. The application was "made upon the supposition, that the real estate of "the testator was liable, under the provisions of the "Statutes of this Province, chap. 130, sec. 13 & 18, "for the payment of the legacies. It was admitted "that the real estate mentioned in the will of Captain "*McKay*, was the only real estate owned by him at "the time of his decease."

The argument upon this appeal raised a new and very important question, affecting the rights of heirs and devisees, and the true construction of sections 13 and 18 of chapter 130 of the *Revised Statutes*, being as follows:—

"13. In case the personal estate of the deceased "shall be found by the judge on affidavit insufficient "for the payment of his debts and legacies, such "judge, upon security being given by the adminis- "trator or executor, to account for the proceeds of "the sale, or the sum obtained by mortgaging or "leasing the same, may, at his discretion, grant a "license for the sale of the whole or such part of "the real estate of the deceased as he shall deem "necessary, or for the mortgaging or leasing thereof, "provided such lease be for a term not exceeding "twenty-one years."

"18. When any part of the real estate of the tes- "tator has been undevised, and the personal estate "shall be insufficient for the payment of debts, lega- "cies and expenses, the undevised real estate shall "be first sold, unless it shall appear from the will

1861.

In Re Estate of McKay.

"that a different arrangement of his assets for the "payment of his debts or legacies was intended, in "which case they shall be applied for that purpose "in conformity with the provisions of the will."*

These sections having been often acted on, and being of universal application, it is proper that the opinion I have formed, and the grounds of it, should be clearly stated.

It is set forth as one of the reasons of appeal, that the devise of the real estate in Captain *McKay's* will was wholly void, in consequence of its having been made to an attesting witness; and there not being a sufficient number of attesting witnesses to give the said devise any validity according to law, and the said real estate being therefore undevised, it is urged that the *Judge of Probate* had no discretion, but was bound to grant a license for the sale of such land for the payment of the pecuniary legacies, though the will does not charge them on the land, it being admitted that there were no debts, and no other land of the testator's, at the time of his decease.

The contest, therefore, lies between the heirs at law and the legatees, and the Court below having decided in favor of the heirs, this appeal has been brought. It is apparent from this statement that the point at issue is of a purely colonial character, arising out of our own legislation, and drawing only the lights of analogy from the *English* cases cited at the Bar. But as these cases were largely insisted on, let us first of all inquire into their effect and meaning.

In *England* it is the settled law that, under a will so drawn, the legatees could not resort to the real estate, to the disinherison of the heir; unless, indeed, there were other charges attaching to the land, and which a Court of Equity could impose on it, in exoneration of the personalty. Here is the distinction between the two cases as they lie in *England* and in this Province.

* These sections are identical with sections 26 and 31 of chapter 127 of the Revised Statutes, third series.—REP.

In *England*, where there is a burden on the land in express terms, or by necessary implication appearing from the will, the legatee is permitted to get the benefit of it by a side-wind; but there must be a burden and a charge resting on the real estate before that benefit can accrue; whereas, in this case, the legatees insist on their right to a sale of the real estate, not only without any charge thereon, express or implied, but in opposition to the will, which plainly contemplated the payment of legacies, as well as debts out of the monies of the testator. The best epitome that I have found of the *English* law is in a note of Mr. *Cox*, the learned editor of *Peere Williams' Reports*, 1, 679. It being the object, says he, of a Court of Equity that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof; it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund, on which the second has no lien. The same rule is laid down by Lord *Eldon*, in *Aldrich* v. *Cooper*, 8 Ves. 395, "it is the ordinary case to say, "that a person having two funds shall not, by his "election, disappoint the party having only one fund, "and equity, to satisfy both, will throw him, who has "two funds, upon that which can be affected by him "only; to the intent that the only fund, to which the "other has access, may remain clear to him."

This principle is of long standing in Courts of Equity, and in *England* was of more consequence than it now is, since the Statute of 1834, 3 and 4, *Will.* IV., chap. 104, made freehold and copyhold estates assets in all cases, for the payment of simple contract, as well as specialty debts. It is still in active operation in favor of legatees, who were held to be equally within the equity with creditors; and it is obvious, indeed, that there being a burden on the real estate,

1861.

In Re Estate of McKay.

and therefore a double fund, the same principle must prevail. If therefore a specialty creditor, whose debt under the old law was a lien on the real assets, received satisfaction out of the personal assets; a simple contract creditor was permitted to stand in the place of the specialty creditor against the real assets, so far as the latter had exhausted the personal assets in payment of his debt. So also it was decreed in *Haslewood* v. *Pope*, 3 P. Wms. 323, that where one gives a specific, or even a pecuniary legacy, and devises land, (not money as in this case) to pay his debts, if a simple contract creditor comes upon the personal estate, and exhausts it so far, as to break in upon the specific or pecuniary legacy, these legatees shall stand in the place of the creditors, to receive their satisfaction out of the fund raised by the testator for the payment of their debts.

Nothing can be more agreeable to natural justice, but the origin and the limit of the rule are brought clearly out by Mr. *Cox*, who observes that none of the cases above mentioned subject any fund to a claim, to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of the others. In none of the cases have I found the principle so lucidly stated, and to me it seems a sufficient answer to all that was urged at the argument upon this score. The inquiry in most of the cases is as to the *factum* and the extent of a charge; they resolve themselves into so many disquisitions on the construction and meaning of the will, as for example: that of *Foster* v. *Cook*, 3 Bro. C. C., 347, where the testator ordered his trustees to possess themselves of his estates and substance, and to pay debts, this was held a charge of the debts on the real estate; and in *Hays* v. *Jackson*, 6 Mass. 149, where the rules of the common law are concisely laid down by Chief Justice *Parsons*, the contest was on the construction of the will as to the particular lands liable for the payment of debts, and it was held that the residuary

legatee was liable in exoneration of a specific devise of certain lands, and of the heir-at-law of other lands that were undevised. I pass by several other cases that were cited, as having but little bearing on the point we are to settle here.

There is one other principle, however, prevailing as we will find both in the *American* and *English* Courts, that requires to be noted before we touch on the Provincial acts, which, as it was said, recognized scarcely any distinction between real and personal estate. Now, while it must be conceded, that the regard paid to landed property on this side of the *Atlantic* is far less reverential than in the mother country, and that the two classes of property stand very much more upon an equal footing, it is going too far to say that the distinction between them is abolished. Weakened, it certainly is, but it is still marked and visible on the face of our Statute book. In *England* plain words, said the *Chancellor* in 2 P. Wms. 188, are necessary to disinherit an heir,—so also words equally plain are requisite to charge the estate of an heir, for a charge, so far as the value of it amounts, is, *pro tanto*, a disinherison. Heirs have always been looked upon with favor in *English* Courts of justice: and in the *American* Courts, they are equally protected as against legatees, unless the intention of the testator is clear. In the case of *Lupton* v. *Lupton*, 2 Johns. Ch. Reps. 623, Chancellor *Kent* held that the legacies being not specific, but common pecuniary legacies, the usual residuary clause, which was not confined as in this case to the personalty, could not aid them in fastening a charge upon the land. "The real estate," said he, "is not, as of "course, charged with the payment of legacies. It "is never charged unless the testator intended it "should be, and that intention must be either ex- "pressly declared, or fairly and satisfactorily inferred "from the language and disposition of the will." "The general rule," he adds, "does not seem to admit "of dispute." A multitude of *American* cases is cited:

1861.

In Re Estate of McKay.

in support of this rule in a note to *Roper on Legacies*, 670. The case of *Hassel* v. *Hassel* 2 Dick. 527, to which our attention was so pointedly turned, is not at all inconsistent with this. Lord *Bathurst* there merely held that from the use of the word devise and other circumstances, it was manifestly the intent and meaning of the testator to charge the legacies, and that the said legacies were charged on the real estate.

So in *Mirehouse* v. *Scaife*, 2 Mylne & Craig, 695, it was held by Lord *Cottenham*, reviewing all the decisions, that both the debts and legacies were, by the words of the will, effectually charged on the real estate. The distinction in this respect between debts and legacies, I shall hereafter notice, where there is only an implied charge.

In *Livingston* v. *Livingston*, 3 Johns. Chy. Rep., 148, *Kent* Chancellor held that, in marshalling assets, the estate descended to the heir is to be applied to the payment of debts, before the estate devised, unless devised specially to pay debts, for if the devisee were to be made liable in the first instance, it would defeat the gift, and consequently the intent of the testator.

Having these principles in view, let us now trace the history of our own legislation and that of *Massachusetts*, from which it was manifestly derived, and which, in some of its phases, is sufficiently curious.

It appears by the general laws of *Massachusetts*, published in 1823, thirteen years before their *Revised Statutes*, fol. 100, and by the 2nd vol. of *Dane's Abridgment*, fol. 244–5, that the first section of the *American* Act of 1783, chap. 32, was founded on a colonial law of the year 1696, followed up by two Acts passed in 1720 and 1770. Of these three the two first, of the years 1696 and 1720, were the foundation of our Act of 1758, vol. 1, fol. 13, which closely resembles the first section of the foregoing *Massachusetts* Act of 1783, chap. 32. By our Act of 1758, in case that personal assets shall be deficient for the payment of any debts or legacies, and it shall be found necessary

by any executor or administrator to make sale of any part of the real estate of the deceased, for the payment of any debts or legacies, he was to apply to the General Assembly to grant a license for such sale. By the *Massachusetts* Act of 1783, the executor or administrator, on the insufficiency of the personalty, was to apply to the Courts for a license to make sale of the real estate of the deceased for the payment of his just debts, the legacies bequeathed in and by his last will, and charges. There is no distinction in these Acts between pecuniary legacies and legacies charged upon land; none between wills sufficient as the law then was, to pass personal property, and wills executed so as to pass real estate; and no distinction either between debts and legacies, so that both Acts must be regarded as inartificially and carelessly drawn.

The essential features of our Act, with some changes in the mode of procedure, remained till the revision of 1851; but in *Massachusetts*, their Acts were largely modified in 1836, and some of their modifications we adopted in 1851, while there are peculiarities in their system, which we have never incorporated into ours.

In 1817, a question came before their Supreme Court, as it is reported in *Winslow's Case*, 14 Mass. 422, upon the reception of a codicil not duly executed to a will, which was so executed, and the true construction of the Act of 1783, chap. 32, came under review, and the Court then held that the statute would be fully satisfied, if its provisions (that is, its provisions for the sale of the deceased's real estate), were confined to such legacies as were by law payable out of the real estate; that is, to such legacies as were expressly or impliedly charged on the real estate. This is the case, said the Court, with all legacies given in a will which is executed in the manner prescribed for devising real estate; and this being the case which would most commonly occur, the Court presumed that such must have been the view of the legislature in passing the statute of 1783. They gave no opinion

1861.

In Re Estate of McKay.

whether the will in the particular case created a virtual charge on the land, for the legacies therein bequeathed; but they laid down a rule of construction, which their Legislature adopted in 1836 by the 20th sec. of chap. 71, of their *Revised Statutes*, and which is conformable to *English* precedents, requiring every will that charges legacies upon land to be executed in the form necessary before the Act 1 *Vict.* to pass real estate. The rule is so laid down in *Roper on Legacies* 685, and in the still abler work of Mr. *Preston*, fol. 19. "If the produce of real estate is to "be disposed of," says Lord *Eldon*, 6 Ves. 565, "you "must shew an instrument in effect executed by the "testator in the presence of three witnesses, and evi- "dencing from its own contents that it is so."

So also the *Massachusetts* statutes, chap. 62, section 30, introduce a new rule founded on the two cases I have cited from 6 *Mass.* and 3 *Johns. Chanc. Rep.*, and which our legislature closely followed in the Act of 1842, sec. 34, and in sec. 18, of chap. 130, which we are now considering. We thus incorporated into our law, unconsciously it may be, but wisely, the substance of these two decisions of Chief Justice *Parsons* and Chancellor *Kent*, two of the ablest lawyers who have adorned the judicature of the neighboring States.

We retained, however, one and the same provision for the payment of debts and legacies, putting them apparently on the same footing, and creating a confusion of idea which the *Massachusetts* Legislature has escaped, by treating them in separate sections.

There is in truth an obvious and wide distinction between debts and legacies, which must never be lost sight of in the construction of our Act, as it is constantly maintained in the construction of wills. "The "Court," says *Roper*, "must be convinced of the "intent of the testator to charge the real fund with "legacies. These are purely voluntary, while there "is a moral obligation to pay debts." *Roper on Legacies*, 682.

In *Kightley* v. *Kightley*, 2 Ves. Junr. 331, Lord *Alvanley* said:—"Legacies do not stand in the same "place as debts. The principle is perfectly different,— "the one being purely voluntary, the other obligatory. "In directing his debts to be paid, a testator is sup- "posed to do that which conscience obliges him "to do, but the same principle will not apply to "legacies."

Lord *Manners* in approving of this passage said in 1 *Dow & Clark* 378, that to be sure it was an *obiter dictum* and not a decision, but even in that view it was very strong.

It requires indeed no authority to convince us in this very case, how wide a difference there would have been, had the claimants been creditors and not legatees, and that it is impossible on any principle of equity to apply the same rule to legacies and debts. That they are put on the same footing in the 13th and 18th sections of our law proves only the absence of due thought in preparing both sections, and the absolute necessity of separating the consideration of the two according to their several natures. Neither section has been the object of judicial inquiry in this Court, and we must derive their meaning chiefly from the decisions of the Courts in *Massachusetts*.

It was assumed at the argument that the discretion of the *Judge of Probate* in the 13th section was limited to his granting a license for the sale of the whole, or only a part of the estate, and it is one of the grounds of appeal that the Judge, in refusing to grant a license at all, acted in direct violation of the law, and infringed upon the right of the executors. But it is obvious that the Judge has a much larger discretion than would appear at first sight, and while he must exercise it, of course, wisely, and subject to appeal, he has still the power which he has used in this decree. The executor applying may have wasted the personalty, and recourse as against him should be first had; the debts, for the payment of which the

1861.

In Re Estate of McKay.

license is sought, may have been barred by the Statute of Limitations, or secured by mortgage, or recoverable out of other funds, in all of which and many analogous cases the license ought not to be granted to the injury of the heir. These instances are given in 13 *Mass.* 162; 15 *Mass.* 58, and in the case of *Livermore* v. *Haven*, 23 Pick 118, where the rule is laid down by Chief Justice *Shaw* as of familiar use, and the discretion of the Supreme Court to withhold the license is broadly asserted. "It is to be decided," said he, "upon equitable principles, regard being had to all "the circumstances of the case," and in the case in hand, where the creditors had failed through their own *laches* to obtain payment of their debts, out of funds applicable to the purpose in another State, the license was refused.

The provisions of the 18th section of ch. 130 are derived from the 34th sec. of our Act of 1842, 5 *Vic.* ch. 22, which was borrowed from the *Massachusetts* law, as already stated, and is in the same language, adding, however, legacies and expenses to debts. Now, whatever may be the true construction of this section as we have framed it, and it is not easy to give it a consistent and sound construction, it would be too much to infer, that the heir-at-law is to be disinherited by a sale in favor of legatees, having no specific lien or charge in the will, and where it plainly appears that a different arrangement of the assets for the payment both of debts and legacies, was intended by the testator.

The personal estate is the fund out of which legacies are primarily payable, and this maxim holds good in every case where there is not an express provision or necessary implication to the contrary.

A second maxim invests every testator in modern times with the absolute and uncontrolled disposition of his estate, subject only to the claim of his widow for dower, to the payment of debts, and to the effect of any binding obligation or contract. The law is

different in *France*, in *Scotland*, and in other countries equally advanced in the race of civilization; but the *English* rule, as it has long been settled, obtains here, and in the State of *Massachusetts* also it is asserted by Judge *Story*, in the case of *Gardner* v. *Gardner*, 3 Mason 217.

Captain *McKay*, the testator, exerted that power in the disposition, both of his real estate, and of what he must have assumed to be his personalty. His avowed objects may have been defeated by the mode of execution, or the insufficiency of the personal estate; but his intention was clear, and that intention, I think, must prevail for the protection of the heirs at law.

If, at the present day, the construction relied upon by the legatees be sound, it must have been equally so in the interval between the year 1758 and the year 1840, when the present law of wills founded on the 1 *Vict.* was passed. In that long period, a will of personalty, and giving pecuniary legacies, was valid in this Province, though executed with none of the formalities which guarded the devise of real estate. But it will hardly be contended that such a will, wholly inoperative against the heir, by means of a direct devise, could deprive him of his lands indirectly by means of a license for the sale of these same lands to pay pecuniary legacies. This objection was urged on the counsel of the appellants at the hearing, and they were unable to answer it, nor is it possible to suggest any answer that is satisfactory.

Tota re perspecta, therefore, I am of opinion, that the decree was right, and that this appeal should be dismissed with costs.

Bliss J. I think the view of the Provincial Statute (chap. 130 of the *Revised Statutes* of 1858), taken by the learned *Judge of Probate* for the county of *Hants*, was a correct one.

The power invested in the *Judge of Probate*, by

1861.

In Re Estate of McKay.

the 13th sec. of this Statute, may be traced back to one of the first acts of the Legislature of the Province (32 *Geo.* 2, ch. 11, sec. 19), by which it was enacted, that, when the personal assets should be deficient for the payment of any debts or legacies, and it should be found necessary by any executor or administrator, to make sale of any part of the real estate of the deceased, for the payment of any debts or legacies, he was to apply to the General Assembly to grant a license for such sale. This power was very soon after, by the Statute 34 *Geo.* 2, chap. 5, vested in the Governor and Council, instead of the General Assembly, as a more fit and convenient tribunal for the exercise of it, and was subsequently again transferred to the *Judge of Probate*, as it now remains, under chap. 130 of the last *Revised Statutes*. When the earliest of these Acts was passed, the real estate was liable for the debts of the owner, and so necessarily became assets after his death in the hands of his executor or administrator for that purpose. Indeed, by the Statute of the Imperial Parliament, 5 *Geo.* 2, chap. 7, all lands in the plantations were expressly made assets for the satisfaction of debts due by bond and other specialties.

The Provincial Act, 32 *Geo.* 2, ch. 11, sec. 19, recognizing this liability, only pointed out a new mode in the settlement of the estates of deceased persons, by which the real estate might be sold for that purpose; that is, it provided for the granting of a license for the sale of such real estate, instead of compelling parties to resort to the ordinary tribunals of law to effect that purpose. In like manner, as I conceive, with respect to the sale of real estate for the payment of legacies, the statute was intended merely to provide a more expeditious and less expensive way of making it applicable for that purpose, whenever it was then already liable under the law for the payment of legacies. This is all that the statute now in force could have meant. It never could have been the intention of the Legis-

lature, in so indirect a manner, to make the real estate of a testator liable for the payment of the legacies given by his will, when he has himself by that will evinced no intention of making it so liable.

That liability I consider to have been left by the Statute just as it was. It only provided this more easy mode of enabling the executor to apply it to that purpose, where it was already so applicable. This seems to me the whole object and effect of the two sections (13 and 18) of this Statute, and we shall satisfy the whole language and requirements of these by this construction, as was said by *Jackson* J., *ex parte Winslow*, 14 Mass. Rep. 422, in reference to the Statute of *Massachusetts*, which was similar in this respect to our own.

The 18th section appears to me necessarily to require such a construction. It directs that the *undevised* real estate shall first be sold, for the payment of debts and legacies, where the personal estate is insufficient; which very plainly implies that, if the undevised real estate should also be insufficient, then the real estate which was devised should also be sold for their payment, or otherwise there would be no meaning in the word "*first.*"

But it would break in upon all principle, in a very extraordinary degree, if the real estate which had been devised to one should be sold for the payment of a legacy given to another; unless the testator had clearly shewn such to have been his intention.

Another and more restricted interpretation of this section, must obviously, then, be sought for, and all difficulty will be removed, if this section be taken in connection with the 13th section, read as I understand it. The power of selling the real estate, for the payment of legacies, will then be applicable to those cases, where it has been expressly made chargeable with them, or can be so gathered from the will; and then, too, the undevised lands must first be sold, before a resort can be had to the devised portion of

1861.

In Re Estate of McKay.

the testator's real estate. Now, that the real estate here, putting this statute aside, would not be liable for the payment of the legacies given by the will, I cannot entertain a doubt, nor do I think the learned counsel for the legatees ventured to contend it.

However far the Court of Equity may have gone, in compelling creditors to obtain payment of their debts out of the real estate, in order that the legatees may have a fund which will satisfy their claims, too; it has never been held that the real estate could be directly applied to satisfy the legacies. On the contrary, it is because that cannot be done, that the creditors who can resort to the real estate, are compelled to do so, in order to let in the legatees.

It would be going far beyond this, if the *Judge of Probate* had the power of ordering the sale of land to satisfy the legacies. He would then possess a power much more extensive in principle, than any Court of Equity can exercise. But, as I have said, it is clear that the real estate here is not liable to the payment of these legacies.

Legacies are primarily payable out of the personal estate of the testator, and only out of the real estate, when that is made chargeable with them, or it can fairly be implied, that such was the testator's intention. Here there is nothing from which such an intention can be gathered. On the contrary, there is much to shew that this was not intended by him. In the first place, he has devised his real estate absolutely unfettered with any such obligation; and though this devise cannot take effect from an informality in the execution of the will, it shews, at all events, just as clearly the intention of the testator; and now descending to the heirs-at-law, it is equally free from any such burthen. But the subsequent clauses of the will lead to the same conclusion. The testator, it is true, in giving these legacies, makes use of the words: "I give and devise,"—the last term being in strictness applicable to real estate. It is

obvious, however, when we look to the residuary clause, that the testator could not have meant to use it in that sense; but that the legacies were, in the strictest meaning, *bequests*, and were intended to be payable out of the testator's monies, which he supposed to be over and above sufficient for that purpose; for he further wills and *devises* (using, as it will be seen, the same term, when he certainly could only have used it in reference to the personalty): "I will and "devise, that the residue of my monies, after pay- "ment of my debts and the aforesaid legacies, be "equally divided among all the legatees before "mentioned," &c.

I think, therefore, that this was not a case in which the legatees could claim to have their several legacies satisfied out of the real estate of the testator; and that consequently the *Judge of Probate* had no authority given him under the Statute, to grant a license to sell such real estate in this case. His decision was, therefore, right, and this appeal from it must be dismissed with costs.

Dodd J. and DesBarres J.* concurred.

Appeal dismissed with costs.

Proctor for appellants (executors), *J. W. Ritchie*, Q. C.

*Wilkins J. was the respondent in the cause.

END OF MICHÆLMAS TERM.

1862.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

TRINITY TERM.

XXVI. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J. — DESBARRES J.
BLISS J. — WILKINS J.
DODD J.

July 15.

CAHOON ET AL. *versus* MORROW.

The title to a British ship is not affected by the delivery of a writ of execution to the sheriff against the owner of the ship.

Nothing will affect such title except registry, as required by the Merchant Shipping Act of 1854.

Semble, A writ cannot be amended on trial by the addition of a new plaintiff, without such plaintiff's consent.

TROVER for a ship, tried before his Lordship the *Chief Justice*, at Halifax, in the *October* Sittings, 1860, and verdict for defendant. A *Rule Nisi* had been granted to set aside the verdict, and for a new trial, which was argued in *Michælmas* Term last by *J. W. Johnston, junior*, and *J. W. Johnston, senior*, Q. C., for plaintiff, and the *Solicitor General* and *J. W. Ritchie*, Q. C., for the defendant.

All the material facts are fully set out in the judgment of his Lordship the *Chief Justice*.

The Court now gave judgment.

YOUNG C. J. This was an action combining counts in the nature of trespass and trover against the defendant, for the brig *Jerome*, which was registered 22nd *July*, 1854, in the names of *John Morin*, *Edward*

Cahoon, and *Ebenezer Cahoon*. These parties were indebted to the defendant's firm, in a balance of eight hundred and ninety pounds, for outfits and advances on the vessel, up to *November*, 1856, and had given two promissory notes for six hundred and twenty pounds, fifteen shillings and six pence, and two hundred and fifty pounds, eight shillings and six pence, respectively, then overdue and held by said firm. They also owed Mr. *Muir*, one of the plaintiffs, between six hundred and seven hundred pounds, a considerable part of which was for the same vessel. *Stairs, Son & Morrow* and *Muir*, at first tried to secure themselves jointly; but in *December*, 1856, this purpose was mutually abandoned, and the two parties looked, each of them exclusively, to their own protection. In *December*, 1856, the *Jerome* was stranded near *New York*, *Edward Cahoon*, one of the registered owners, being on board; and on the news of this disaster reaching *Port Medway*, the home of the owners, it was agreed that *Eldred Cahoon*, *Asa Morin*, *junior*, and *John Norris*, three of the plaintiffs, should advance five hundred pounds to be remitted to *Edward Cahoon*, towards the refitting of the brig, and that a bill of sale should be given for their security. It was also agreed that the bill of sale should comprehend a security for Mr. *Muir*, though, at that time, without his knowledge or assent. The first bill of sale in evidence was accordingly executed on the 27th *December*, 1856, by which *John Morin* and *Ebenezer Cahoon*, two of the registered owners, transferred to the four plaintiffs 42 shares, to wit: to *Eldred Cahoon*, 11 shares; to *Asa Morin*, 10 shares; to *John Norris*, 10 shares, and to *William Muir*, 11 shares, in the brig *Jerome*. In consequence of Mr. *Muir's* residence at *Shelburne*, the declarations by him and the other parties under the Registry Act, were not completed and filed till the 3d *January*, 1857, when the bill of sale was duly entered at *Liverpool*, being the port of registry. Mr. *Muir*, by making the declaration in terms

1862.

CAHOON et al. v. MORROW.

of the Act, adopted the bill of sale, and claimed to be part owner of 11 shares.

In the meanwhile, the brig had been brought to *New York*, and put into the hands of the resident agents of *Stairs, Son & Morrow*, who advanced on their credit or at their request two thousand four hundred and sixty dollars for repairs on the ship, and took a bottomry bond therefor, which was also in evidence. *Stairs, Son & Morrow* likewise forwarded to their agents the two promissory notes of the registered owners, and on the 30th *December*, 1856, took out a summons thereon at *New York* against the three parties thereto, and on the 31st *December* levied an attachment on the brig. The summons was served on *Edward Cahoon* personally, on the day it was issued, and copies were sent on the 2nd *January*, 1857, by post to the two other defendants therein. The summons comprehended the complaint or grounds of action, and a notice thereof was published for six weeks successively in two of the *New York* papers. No appearance having been put in, the action was referred to a master, and on his report judgment was signed *March* 12th, 1857, for three thousand nine hundred and forty-four dollars and thirty-three cents debt, and four hundred and fifty-three dollars and ten cents costs, as appears by the record. Execution issued on the same day, and on the 19th *March* the Sheriff executed a bill of sale to the defendant reciting the attachment and execution, a sale of the brig thereunder at public vendue, and the purchase by the defendant for the sum of six hundred and fifty dollars, "subject to the payment of all liens "and incumbrances thereon." This bill of sale describes the vessel as in the original certificate, and professes to convey all the right and interest of the three owners, of which they were seised or possessed on the 31st *December*, 1856, but has no reference to the bill of sale of 27th *December*, nor to the subsequent bill of sale which I will presently mention.

Edward Cahoon having returned to *Nova Scotia* on

the 27th *January*, 1857, executed a bill of sale to *William Muir* of twenty-two shares, which was entered on the same day. There was no proof of the bill of sale to the defendant having been registered, but it was admitted at the trial that he had become the registered owner, his firm being the real defendants, and the legal rights of the plaintiffs being reserved for adjudication in this suit. It was in proof that the notice of the attachment having been received before the five hundred pounds had been sent, the three parties plaintiff, who were to have advanced it, applied the money to other uses, and in point of fact paid nothing, and ceased to have any real interest under the first bill of sale of 27th *December*.

"In *February*," says Mr. *Thomas Johnston*, one of the plaintiff's witnesses, "the *Cahoons* told me the money "had gone no further than *Halifax* on account of the "attachment, and they were holding on to the first "bill of sale for the security of Mr. *Muir*, and for his "benefit." In *January*, 1857, the advances and claims on the brig by *Stairs, Son & Morrow* had swelled to one thousand five hundred and nineteen pounds, exceeding what she was then worth, and I directed the jury at the trial, and am still of opinion that the value of the vessel as she lay after the wreck, and before the expenditure of the amount in the bottomry bond, should be taken at the six hundred and fifty dollars for which she was sold by the Sheriff.

On this state of facts it will be perceived that Mr. *Muir* claims the whole of the ship under three titles: first, as owner of eleven shares, representing in fact one-sixth part under the bill of sale of 27th *December*, 1856; second, as the *cestui que trust*, or owner, under the other plaintiffs, in whose name he sues, of thirty-one shares, representing one-half under the same bill of sale; and third, as owner of the remaining twenty-two shares under the bill of sale of 27th *January*, 1857.

Now, as regards the second of these titles, we may at once dispose of it. It is obvious, that at the mak-

1862. CAHOON et al. v. MORROW.

ing of the bill of sale of 27th *December*, no trust for Mr. *Muir* was ever contemplated; there is no grant or assignment of trust in writing, or otherwise; the three parties, if they could maintain an action, must maintain it in their own right; and in a case where it is admitted they have no beneficial interest, and are contending against the *bona fide* possession of the defendant and his partners, it would be contrary to the first principles which obtain in this Court, combining as it does equity and common law jurisdiction, and looking to the substance and the essence of things, that these three plaintiffs should prevail. As respects one-half the vessel, therefore, at all events, the defendant's title cannot be assailed in this action. On the other hand, I would discard the objection that Mr. *Muir*, being part owner with the defendant, cannot maintain trover against him. If he cannot, it is difficult to say what remedy the law allows him, supposing him to be in the right, and as it is plain that both parties in this case claim the whole ship, and neither of them recognizes the other as part owner, so highly technical an objection, I think, even if it were sound in itself, would not apply. Another difficulty, however, deserving a more minute examination, arose at the trial.

The bill of sale of 27th *December*, was made to *Eldred Cahoon* and the three others therein, but by mistake the action was brought, and all the proceedings conducted in the names of *Edward Cahoon* and the three others, so that one of the four parties claiming to be entitled, was not on the record. Mr. *Johnston*, thereupon moved to amend all the proceedings by substituting *Eldred* for *Edward;* and I granted the motion, reserving the question of the amendment, as it went further than any precedent I was acquainted with, for the full Bench. The defendant having obtained a verdict, this point has not the same bearing, as if the verdict had been the other way; but it is still contended, by the defendant's counsel, that such an amendment is not within the power of

this Court, and the record being thus hopelessly defective, that it would be in vain to grant the plaintiffs a new trial. A new party, it was said, could not be added, so as to make, in effect, a new action; and the case of *Doe c. d., Wilton* v. *Beck*, 13 C. B. 329 & 14 L. & E. 9 R. 255, was cited, where an ejectment was brought on a joint demise by *H. W. & Mary*, his wife, and the proof was, that the property had been devised to *H. W.*, in trust for the sole and separate use of the wife. The Judge who tried the cause, declined to allow the declaration to be amended, by striking out the name of the wife, and the Court decided that the amendment was properly refused.

But this decision proceeded on the *English* Statute 3 & 4 *Will.* 4, chap. 42, sec. 23, while the Common Law Procedure Act of 1852, sec. 222, of which the 133d sec. of our Practice Act is almost a literal transcript, goes much further. The extent and meaning of this section have been examined in two very recent decisions, neither of which was known to us at the argument. The first is, that of *Blake* v. *Done*, in the Common Pleas, 5 L. T. Rep. N. S., 429, which was the case of an ejectment brought in the name of a plaintiff, who was a *cestui que trust* having an equitable estate only, and, therefore, incapable of maintaining the action at common law. At the trial, the Judge allowed the proceedings to be amended, by adding the names of the two trustees as plaintiffs, who had the legal estate, and the Court of Exchequer held, that the amendment was right. The counsel for the defendant contended, just as the counsel did in this case, that the expression "in the existing suit" was inconsistent with any such amendment, that a suit meant an action brought by *A* v. *B*, and if you made any alteration by introducing anybody else as plaintiff or defendant, it was not the same suit. But that appeared to the *Chief Baron* "not a sensible and practical view of the subject, but a purely technical one." The expression "in the existing suit" in his view

1862.

CAHOON et al. v. MORROW.

meant nothing more than this, "without bringing another action," that is, that you may take the record in the existing suit, and you may shape it and alter it, adding or taking away plaintiff or defendant, or make any alteration in the pleadings.

The object is to meet the justice of the case between the parties upon that bit of parchment. The word "existing" merely means the parchment which is there, stating who is the plaintiff and who the defendant, and that is the cause of action." "I do "not think," said *Wilde* B., "that an Act of Parlia- "ment of the remedial nature of the Common Law "Procedure Act is to be dealt with in any such criti- "cal way as we have been invited to deal with it, and "I am myself very glad that the Court has, in con- "struing these valuable powers, given a broad and "liberal interpretation to the powers, which the Legis "lature intended to confide to us, for the purpose of "advancing justice between the parties." In this case, I observe that Baron *Bramwell* pursued the same course which I adopted on the trial here,—that is, without determining the matter, as perhaps he had a right to do, he allowed the amendment, that the Court might have the opportunity of reviewing his decision.

This case, however, has itself been reviewed in the still later one of *Garrard* v. *Gubilei*, 5 L. T. Rep. N. S. 609, before the Common Pleas. This was an action against the husband for goods sold to the wife before marriage, in which the wife ought to have been joined as a co-defendant, and the Judge at the trial having allowed the plaintiff to amend the record by adding her name, the Judge concurred with the rest of the Court in holding, after the case had been argued, that the amendment ought not to have been allowed, and the plaintiff became non-suit. The case of *Blake* v. *Done*, which I have just cited, was held not to apply, because that was an action of ejectment, which the Court has always considered a creature of

its own, and has treated it as such to meet the equity of the case. "We must see," said *Erle* C. J. "whether "the legislature intended to give powers to add a party "at the time of the trial; no notice has been given "to the party nor any consent obtained from her, and "if it were not for the fact of her being the wife "of the defendant, it would be a glaring piece of in- "justice to bring in a stranger at that stage of the "proceedings. Amendments in case of nonjoinder "and misjoinder have been provided for in several "sections, as if the Legislature had considered the "important question of joining and adding parties to "a case, and I think all the cases in which the power "is to be exercised are provided for in the earliest "sections, except the case of ejectment, which stands "on a totally different footing."

It appears to me that this reasoning is not quite consistent with that of *Pollock*, C. B., in *Blake* v. *Done*, nor are the opinions of the Judges in *Garrard* v. *Gubilei* quite consistent with each other. *Willes* J. drew a distinction between the adding of a plaintiff and a defendant, and thought it unjust that a defendant should be put on the record without his consent, and be compelled to appear without having been served with the Queen's writ,—whereas, *Keating*, J. says, "there "would be no doubt in an ordinary case that the "Judge at *Nisi Prius* could add a defendant." On the whole, and looking to the authority of this last case, and to the reason of the thing, I am of opinion that no plaintiff should be added in any case without his consent, as provided for in the 38th section of the Practice Act, and the 7th section of the Act of 1861, and therefore that the amendment in this case at the trial, and without the consent of the added plaintiff, though the correction only of an oversight in the attorney, was still beyond the limits of the Act, and the discretionary power of the Judge. But with the assent of the plaintiff to be struck out, and of the plaintiff to be added, at any stage of the proceedings

1862.

CAHOON et al. v. MORROW.

before trial, and, as I incline to think, even at the trial, such an amendment might be made.

The view I have taken of these preliminary objections, leaves me at liberty to consider the main question, that has arisen for the first time in this Court, on the effect of the new Registry Act.

The *Merchant Shipping Act*, 1854, the second part of which touching the ownership, measurement, and registry of *British* ships, applies to the whole of Her Majesty's Dominions, introduced many new and beneficial alterations of the former system, and as it is in full effect in this Province, and enters deeply into the interests and pursuits of a maritime people, it is of importance that its extent and bearing should be thoroughly understood. Or the point more immediately before us,—the necessity of registration for completing the title of a ship; there is a difficulty in construing the act which has been felt in *England*, as well as in this Court, and on which we have been much relieved by finding two decisions of the highest authority in the Courts at home. Before I had fallen in with these, I had traced the history of the Registry Acts from their first origin in the reign of *Will.* 3rd; but it would be a waste of time to travel through the enactments, more especially as the substance of them is given by Mr. *Holt* in the introduction to his *Law of Shipping*, 2nd edition, 1824, and in Lord *St. Leonard's* judgment, in the case of *McCalmont* v. *Rankin*, 19 L. & Eq. R. 176. It became material, however, to ascertain whether the *Merchant Shipping Act*, 1854, contained the whole law, and if all preceding Acts, when it came into operation on the 1st of *May*, 1855, had been superseded or repealed. This was the more essential, as it was urged upon us at the argument that certain regulations in the Registry Acts of 1824 and 1833 were still in force, and this view was favored by a reported case in the *Queen's Bench* in the year 1858. Now, the history of the Registry Acts may be gathered from books familiar to us all, and one cannot but be

surprised at mistakes that have been made in quarters where they were least to have been expected.

The first attempt to rescue the body of Custom House laws from entire confusion, was made in 1815, by Mr. *Jickling*, in his Digest—a huge unwieldy compilation, which Mr. *Hume* praised as a laborious and accurate work, but which was superseded, with the intermediate enactments in 1825, by the consolidating and repealing Statutes, 6 *Geo.* 4, ch. 105 to 116, the first of these repealing no less than 443 Acts, and chap 110 being the Registry Act of that day. A previous Statute, the 4 *Geo.* 4, ch. 41, had consolidated all the previous enactments on the subject of registry, including Lord *Liverpool's* Acts, the 26 & 34 *Geo.* 3rd. Then came the consolidating Acts of 3 & 4 *Will.* 4, ch. 51 to 60, chap. 55 being the Registry Act of that series, and which was again superseded by the Acts of 8 & 9 *Vict.*, the Registry Act of that series forming chap. 89.

I have looked at all these Acts, and it will be found that the 4 *Geo.* 4., ch. 41, was repealed by the 6 *Geo.* 4, chap. 105; that the Acts of 6 *Geo.* 4, including ch. 110, were repealed by the 3 & 4 *Will.* 4, chap. 50; that the Acts of 3 & 4 *Will.* 4, including chap. 55, were repealed by the 8 & 9 *Vic.*, chap. 84, and that the Acts of 8 & 9 *Vic.*, including chap. 89, were repealed by the 17 & 18 *Vic.*, chap. 120. This detailed and somewhat tedious enumeration has become necessary, by the mistakes already referred to. Tracing it up, there can be no question, that the *Merchant Shipping Act*, 1854, when it came into operation, was the only Registry Act in force; and it is not a little singular, that in so accurate a book as *Abbott on Shipping*, 5th edition, fol. 25, the 4 *Geo.* 4 is spoken of as only virtually repealed, when the 6 *Geo.* 4, chap. 105, had repealed it in express terms; and that in the case of *Dickinson* v. *Kitchen*, 8 Ell. & Blackburn, 789, by which the defendant's counsel, in arguing this case, were naturally misled, both the 4 *Geo.* 4, chap.

1862.

CAHOON et al. v. MORROW.

41, and the 3 & 4 *Will.* 4, chap. 55, are claimed by the respondent's counsel, without correction by the opposite counsel, or by the Court of *Queen's Bench*, as statutes still unrepealed, and, to a certain extent, binding. His whole argument, in fact, turned upon the imperfect registration of a mortgage under these statutes, which, as we have seen, had been repealed years before.

It will be proper, however, to trace the enactments, as to the registration of bills of sale from their first origin. This has only been glanced at in the *English* cases, but is essential to a right understanding of the present law, and I shall go through the series as briefly as possible.

By sec. 21 of the first Act 7 & 8 *Will.* 3, chapter 22, which, according to *Holt*, was intended only to prevent abuses and fraud in the trade with the Plantations, it was enacted, that the sale of a ship in the same port shall be acknowledged by endorsement on the certificate of registry.

By the 26 *Geo.* 3, chapter 60, sec. 16, it was enacted that the transferee, besides the endorsement on the certificate, shall have a memorandum thereof made in the register book, and notice thereof given to the Commissioners of Customs. "The great object," said Lord *St. Leonard's*, "was to keep the certificate always "in view, so that the devolution of title on the regis- "ter should shew who the real owner of the vessel "was."

By the 34 *Geo.* 3, chapter 68, sec. 20, the Custom House officers were to require the bill, or other instrument of sale, to be produced to them; otherwise, they were not to make registry, or to grant a certificate *de novo*.

By the 4 *Geo.* 4, chap. 41, sec. 35 & 36, which were repeated with some slight modifications in the Acts of 1825, of 1835, and of 1845 no bill of sale was to be valid and effectual to pass the property in a ship, till it was produced to the officer, and the parti-

culars endorsed on the certificate, and entered in the book of registry, whereupon it was to be valid, except as against such subsequent purchasers and mortgagees, who should first procure the indorsement to be made.

Again, it was enacted by the 29th sec. of the same Act, which is repeated *verbatim* in the Acts of 1825, 1833, and 1845, that property in a ship shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry; otherwise such transfer shall not be valid or effectual, for any purpose whatever, either in law or equity.

Now, it is the omission, whether accidental or designed, of these last words in the *Merchant Shipping Act*, that has created the difficulty; and upon the effect of this omission, the two decisions I have referred to principally turned.

The first of these is the case of the *Liverpool Borough Bank* v. *Turner*, before Vice Chancellor *Wood*, *July* 24, 1860, and reported in 3 L. T. Rep., N. S., 84, where His Honor takes a review of the provisions of the present and former Registry Acts, and held that a contract to assign, by way of equitable mortgage, the mortgagor's interest in a ship, if not made in the form prescribed by the *Merchant Shipping Act*, 1854, is invalid. After quoting the above prohibitory words, he said: "The difficulty, which was a great one, in considering the present Act, was, whether the omission "of those words was to be taken as mandatory, and "not merely directory, for if the Act said that a contract was to be carried into effect in a certain way, "the prohibitory words "not otherwise, &c.," would "be mere surplusage. The question then was, whether "or not the Legislature had departed from that policy, "by which it was provided, that all transactions from "'the original grand bill of sale,' downwards should "appear on the face of the register. Two points of "public policy might be suggested in these Shipping "Acts: one, a national political policy regarding the "interests of the nation at large, as to who should be

1862.

CAHOON et al. v. MORROW.

"entitled to the privileges of the *British* flag,—a "question of deep importance to the nation; the "other, a policy as between individuals, determining "what must be proper evidence of title for those "dealing with the property in question. Several new "and very beneficial provisions were introduced by "the Act, as between the parties to the contract; but "was the national policy hitherto adopted of having "the ownership clear upon the register thereby "altered? It appeared to him (the *Vice Chancellor*) "that throughout the Act no trace was to be found "of such an alteration. * * The plaintiff's counsel had "argued that the object of the Legislature and the "public policy was changed, that it was not thought "necessary any longer for national purposes, especially "having regard to those considerable concessions "made in this Act, and other Acts to foreign vessels; "it was not considered an object of national policy to "have that transparent title on the face of the regis- "try as heretofore. * * But the *Vice Chancellor* said it "appeared to him, that unless he could find some "reason for altering the public policy, that policy, "having a clear and distinct title on the register, "totally unaffected by any of these matters *dehors* "the register, must still prevail."

There was an appeal from this decision reported in the same volume, fol. 494, when the Lord Chancellor *Campbell*, after complimenting the *Vice Chancellor* on his elaborate and masterly judgment, dismissed the appeal with costs. "A disclosure," said he, "of the "true and actual owners of every *British* ship, is con- "sidered to be of the utmost importance, with a view "to the commercial privileges which *British* ships are "entitled to, and still more with a view to the proper "use and the honor of the *British* flag. The State "can only attain the desired information, by the "register disclosing the names of the true owners; "and by the register being considered by the State "the only evidence of ownership. To acknowledge

"the title of a totally different set of owners from "that represented on the register, would, I think, be "at variance with the policy, and a violation of the "enactments of the Legislature. The case of the "appellants seems to depend entirely on a comparison "between the 17 & 18 *Vic.*, ch. 104, with the 8 & 9 "*Vic.*, ch. 89, and the other antecedent Acts respecting "the registration of ships, and upon finding in the "antecedent Acts express, negative and nullifying "words, which are now omitted. But this compari- "son seems to me quite insufficient to indicate such "an important change in the policy of the Legisla- "ture, as is now contended for."

In the subsequent case of *McLarty* v. *Middleton*, decided 25th *June*, 1861, and reported in 4 *L. T. Rep.*, *N. S.*, 852, Vice Chancellor *Kindersley* cited the foregoing case as a conclusive authority.

What conclusions, then, does it afford for our guidance? The Instructions to Registrars, issued by the Commissioners of Customs, with the approval of the Board of Trade, declare (No. 39) that with the exception of the rights and power given by means of certificates of sale or mortgage, "the entries in the register "books will constitute the title to the ship," and that I think must be now accepted as the law. These certificates, which are entirely new features in the Act of 1854, and, while they are outstanding, represent the actual title, and enable the owner to deal with it abroad, would be of no avail if the title could be defeated by any proceeding not entered on the register. By sec. 56, bills of sale are to be entered in the register book in the order of their production to the registrar. So also, by secs. 66 and 67, every mortgage shall be in the form in the schedule, or as near thereto as circumstances permit, and every such mortgage shall be recorded by the registrar, in the order of time, in which the same is produced to him for that purpose. By sec. 43, also a new clause, no notice of any trust, express, implied or constructive, shall be entered

1862.

CAHOON et. al. v. MORROW.

in the register book, or receivable by the registrar. And sec. 58 provides for the transmission of shares by death, bankruptcy, or marriage, "or by any lawful "means other than by a transfer according to the "provisions of the Act."

The main difficulty I have felt, and still feel in adopting this conclusion, is its effect upon a levy under writ of execution. The case of *Bloxam* v. *Hubbard*, 5 East. 407 decided that the Registry Acts up to the 34 *Geo.* 3, related only to transfers made by the acts of the parties, viz., from a former owner to a new owner, and where the transfer was capable of being effectuated in the ordinary way, by the mere operation of an instrument of assignment from one party to the other, and did not relate to transfers deriving their effect by peculiar provision or operation of law, as assignments by Commissioners of Bankrupts to assignees under the bankrupt laws, &c. Now, these are provided for by the Act of 1854, and all such transmissions, as they are called, are to be authenticated by a declaration of the person to whom the property has been transmitted. But how is the purchase of a ship at Sheriff's sale to acquire title; from what period is the title to be held good, and how is it to be entered on the register? There is not a syllable on this subject in the Act of 1854, while the former Acts recognize the title in a ship that has been taken in execution for debt, and sold by due process of law. These expressions are used in the Acts of 1825 and 1833, and again in the 23rd sec. of the Act of 1845, and it is impossible that such a title can be ignored by the law. So far as my experience goes, it has always been apprehended that the delivery of a writ of execution against the owner of a ship, to be executed by the Sheriff, bound the ship like any other goods of the defendant from the time of the delivery; but it would seem that this doctrine must henceforth be abandoned; that the ship is not bound until at all events a bill of sale from the Sheriff is duly executed and

entered on the register, which has been the practice I understand at this port; and that in the intermediate time between the levy and the bill of sale, the owner may convey the ship for a *bona fide* consideration to another person, who will acquire title by the act of registry, notwithstanding the ship is at that moment in the custody of the law. I do not at all conceal from myself the consequences of this doctrine, which is new, I must confess, to my own mind, but seems inevitable from the reading of the Act.

It follows, of course, in the case before us, that the attachment and the sale under execution, and the bill of sale by the Sheriff of *New York*, created no lien, and were of no avail to give title to the defendant, because no registry, under either of them, is in proof; that the bill of sale, which was perfected on the 3rd *January*, 1857, conveyed the title as against the attachment, levied 31st *December*, 1856; and that *Edward Cahoon's* bill of sale to Mr. *Muir*, which was perfected 27th *January*, 1857, conveyed the title in twenty-two shares, making his interest, with the eleven shares in the first bill of sale, equal to one half. As to the other half, for the reasons already given, the other three plaintiffs cannot sustain an action to disturb a *bona fide* possession. The four plaintiffs must, therefore, separate in their interests, and Mr. *Muir* should have proceeded at the trial for one half, only, and not the whole. The value of that half may be fairly estimated at three hundred and twenty-five dollars; and upon that footing, the case might be advantageously settled by the parties.

The effect of the foreign judgment it is unnecessary to consider, because, in the view I have taken, the proceedings connected with it could not prevail against the registry. I may mention, however, that the case of *Cammell* v. *Sewell*, cited at the argument, from 5 Hurlstone & Norman 728, is confirmed by the case of *Castrique* v. *Imrie*, 4 L. T. Rep., N. S., 143, decided by the Exchequer Chamber in *February*, 1861.

1862. CAHOON et al. v. MORROW.

The principle laid down in the former of these cases, that "if personal property is disposed of in a manner "binding according to the law of the country where "it is, that disposition is binding every where," goes further than any previous decision, that I have met with; but is accepted in the latter case, as the law laid down by authority, and declared to be consistent with convenience and good sense.

BLISS J., after stating the facts of the case, gave judgment as follows: At the argument of this case, objections were taken on the part of the plaintiff, to the proceedings in the Supreme Court of *New York*, on the grounds that they were not in accordance with the laws of the State of that country, and were also entitled to no regard in our Courts, as being contrary to natural justice. I do not propose to consider either of these questions; but shall assume that all the proceedings were strictly correct and valid, and are unimpeachable here, either for the want of a personal service on some of the defendants in that suit, or of an appearance by them, or for any other cause or ground upon which, at the argument, these proceedings were assailed.

The questions will then be, whether, first, the plaintiffs have made out any sufficient legal title to the *Jerome;* and, second, whether, under all or any of the proceedings in the suit in *New York*, the present defendant has acquired such a right or title in this ship, as will defeat or prevail over that of the plaintiffs, as the duly registered owners of it.

The case will depend altogether upon the *Merchant Shipping Act* of 1854 (the Imperial Statute of 17 & 18 *Vict.*, chap. 104), and on the true and proper construction to be put upon some of its clauses and provisions. This Act, so far at least as relates to the second part of it — the registry of ships — the subject which touches this question, applies to the whole of Her Majesty's dominions (sec. 17). It enacts (sec. 18)

that no ship shall be deemed to be a *British* ship, unless she belongs wholly to *British* subjects, natural born, denizens, or naturalized; that such ship must be registered, and it points out the way in which this must be done, and the declaration which is required to be made for that purpose: the port where it takes place being her port of registry. And the registrar is required to keep a register book, and to enter therein certain particulars relative to the ship, which are there specified,—one of them being, the names and description of the owners, who are hence subsequently called "the registered owners."

The Statute then passes on to another branch under this head,—the whole Act being framed in sub-divisions,—viz., that of *Transfers* and *Transmissions*; and this includes several very important sections, under which the present case more particularly falls, and which, therefore, require a careful consideration.

The 55th section enacts that a registered ship, or any share therein, when disposed of to persons qualified to be owners of *British* ships, shall be transferred by bill of sale, which is to contain a sufficient description to identify the ship, and is to be according to the form given in the schedule.

By the 56th section, no individual shall be entitled to be registered as a *transferee* of a ship, or a share, until he has made a declaration, as therein prescribed, of which a form is also given.

By the 57th section, every bill of sale for the transfer of any registered ship or share, when duly executed, shall be produced to the registrar of the port where the ship is registered, together with the declaration thereafter required. And the registrar shall thereupon enter in the registry book the name of the transferee, as owner of the ship or share comprised in such bill of sale, and shall indorse on the bill of sale the fact of such entry having been made with the date and hour thereof; and all bills of sale of any ship or share shall be entered in the register book, in the

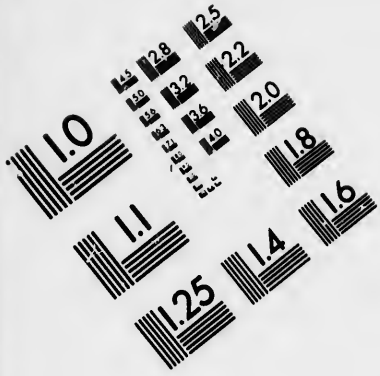
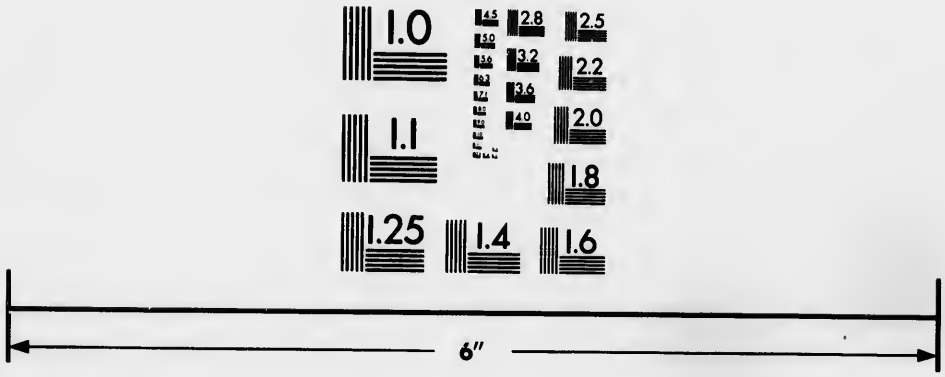
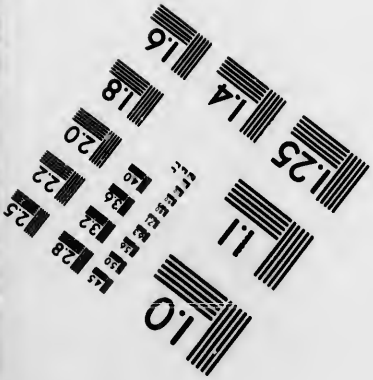
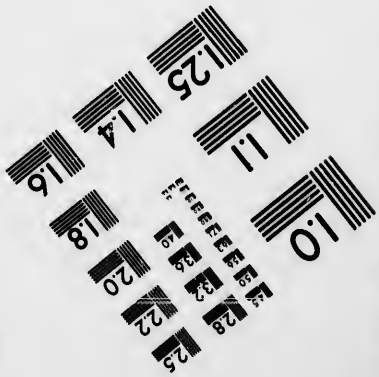


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
3.2
2.5
3.6
2.2
2.0
1.8
1.1
1.0

1862.

CAHOON et al. v. MORROW.

order of their production to the registrar. Then come the provisions where a change of ownership takes place, not by a *transfer* between parties, but by some legal *transmission* of the property.

By the 58th section, if the property in any ship or share therein becomes transmitted, by the death, or bankruptcy, or insolvency, of any registered owner, or by the marriage of any female registered owner, or by any lawful means other than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration of the person to whom the property has been transmitted, in a certain form prescribed, and containing the same statements as required in the declaration made by a transferee, and also a statement describing the manner in which, and the party to whom, such property has been transmitted.

And then by the 60th section, the registrar, upon the receipt of such declaration, shall enter the name of the person entitled under such transmission in the register book, as owner of the ship or share transmitted.

The 62d section provides that, if the person taking by transmission is not qualified to be the owner of a *British* ship, he may obtain from a Court an order for the sale of it.

It will be seen that the present Statute has neither the negative words of the 34 *Geo.* 3, chap. 68, which enacts that the bill of sale shall be null and void, for want of a compliance with the requisites of the 56th and 57th sections, which, as held in *Palmer* v. *Moxen*, 2 M. & S. 50, and in *Dixon* v. *Ewart*, 3 Mer. 322, were only a condition subsequent; nor has it the words of 3 & 4 *Will.* 4, chap. 55, sec. 31 & 34, which state that the bill of sale shall not be valid, until the requisites there prescribed shall have been complied with, which was held in *Boyson* v. *Gibson*, 4 C. B., 142, to be a condition precedent, — the bill of sale under that Statute, deriving all its validity from the subsequent

registration, and being wholly inoperative until then. 1862.

CAHOON et al. v. MORROW.

But though without any such negative words, I think it is impossible to read the present Statute, without seeing that it was intended to have a similar operation and effect. In *Moss* v. *Charnock*, 2 East. 403, *Lawrence* J. speaking of the Shipping Acts of 26 & 34 *Geo.* 3, then in force, remarks that "one of the "great objects of these Statutes was to prevent "foreigners being concerned in *British* ships, without "being subject to the disadvantages belonging to that "character; and, as the most effectual means of com-"ing at an immediate knowledge of such transfer, "has made the validity of the transfer of every ship "or vessel, with a very few exceptions, to depend "upon the compliance with certain circumstances "which must convey to the public the fullest informa-"tion on the subject." So in *Boyson* v. *Gibson*, 4 C. B., 143, *Maule* J. in reference to the later Statute of 3 & 4 *Will.* 4, ch. 55, says,—"the general intention of the "Act, is to prevent the property in *British* ships being "held by any others than those whose titles appear on "the register."

It is perfectly clear, I think, that this was the leading object of the Statute of 17 & 18 *Vict.*, as the 18th section expressly states, as we have seen, that no ship shall be deemed a *British* ship, unless she belongs wholly to *British* subjects; and the forms of declaration, which are required to be made for the purpose of registration, require a statement that none others are entitled to any interest therein. The Statute must, therefore, be construed in reference to this object, which would be wholly disregarded and defeated, if the language of these clauses were not strictly obligatory. When it therefore prescribes that a transfer of a ship, or share in it, shall be by a bill of sale of a certain form, I take it, that it can be made in no other; and, when it adds, that the bill of sale shall be followed by a particular declaration of the transferee, and then that

1862.

CAHOON et al. v. MORROW.

both the bill of sale and declaration shall be registered; these positive enactments appear to me just as obligatory, and as essential to the validity of the transfer, as if the negative words of one or other of the former Statutes had been introduced. The addition of such words may be more emphatic, but I really cannot see what additional force or effect they would give to the enactments themselves, or how the Statute stands in need of them.

Such was the opinion I had formed, before the late cases upon this subject, none of which were referred to at the argument, had come under my notice. These, I think, can leave no room for doubt on the point. Lord Chief Justice *Cockburn* had intimated in *Castrique* v. *Imrie*, 4 Law Times, 144, that under the Statute 17 & 18 Vict., registration might still be requisite. But the matter was expressly settled in the *Liverpool Borough Bank* v. *Turner*, 8 Law Times, 84 (1860), where the Vice Chancellor *Page Wood* says, "the question before the Court was, whether under "an agreement for the sale of a ship, or an agree-"ment for the mortgage of it, not according to the "form prescribed by this Act, any such interest "passed in the ship as would justify the Court, "according to the powers always vested in it of "enforcing the performance of contracts, in exercis-"ing its power by requiring a performance of that "contract." And he held that such contract could not be enforced; that to allow of an unregistered mortgage of a ship would be a contravention of the national policy of the Registry Acts; considering that this was equally the policy of the Act of 17 & 18 *Vict.*, there being no sufficient indication in the Statute of any change in that policy, which runs through the former Acts. This case was brought by appeal before the Lord Chancellor *Lord Campbell*, 3 Law Times 494, and was by him confirmed. After stating his entire agreement with the judgment of the *Vice Chancellor*, on what he calls, "this general

"question," he says: "I will only add, that, if the "Statute 17 & 18 *Vict.*, chap. 104, had been the first "and only legislation respecting the transfer and "mortgage of *British* ships, I should have held, that "the forms of transfer and mortgage required by "sections 55 & 66 must be substantially followed, "although there be no negative words declaring that "all transfers and mortgages in any other form shall "be null and void. No universal rule can be laid "down for the construction of Statutes, as to whether "mandatory enactments shall be considered directory "only, or obligatory, with an implied nullification for "disobedience. It is the duty of Courts of Justice, "to try to get at the real intention of the Legislature, "by carefully attending to the whole scope of the "Statute to be construed. Looking to the great "peculiarity of the forms of transfer and mortgage "here required, and the purposes which they were to "serve, I cannot doubt that the Legislature intended "that those, and no other, forms were to be used. "A disclosure of the true and actual owners of every "British ship, is considered to be of the utmost "importance, with a view to the commercial privi- "leges which British ships are entitled to; and still "more with a view to the proper use, and the honor "of the British flag. The State can only attain the "desired information by the register being consi- "dered by the State the only evidence of ownership. "*To acknowledge the title of a totally different set of owners "from that represented in the register would, I think, be at "variance with the policy, and a violation of the enactments "of the Legislature.*"

If, then, the Statute is thus obligatory and imperative, with respect to the transfer of a ship; so that no title can be acquired by any, which is not attended by a full compliance with the requisites of the Statute, I cannot understand how any other or less forcible construction can be given to those clauses, which relate to the transmission of a ship; for it is by transfer, or

1862.

CAHOON et al. v. MORROW.

by transmission only, that the defendant can lay claim to the ship in question.

The great object which the Statute had in view,—that of preventing any other than *British* subjects becoming owners of *British* ships,—requires surely no less this guard of registration in such a case as this, than in the case of a transfer; and when we look at the particular circumstances, under which the title here is supposed to have passed,—the sale of the ship in a foreign country, and under an execution issued on a foreign judgment, where the ownership was most likely to have passed to others than *British* subjects, the provision of the Statute, which was intended to guard against this, was surely more peculiarly necessary. But transfers and transmissions are included in one and the same division of the Statute, and form together, as is very evident from it, one entire class; and I cannot see how they can be separated in the construction which they should receive on this point, or how the clauses which relate to transfers are to have one interpretation, and those respecting transmissions another. The words of the 58th section are very general and comprehensive. It speaks first of transmissions in consequence of death, insolvency or bankruptcy, and marriage; the three usual, ordinary, and well known modes, by which the property in a ship may pass from the registered owners to others; but it goes on next to provide for transmissions by any lawful means, other than by a transfer according to the provisions of this Act,—which includes every possible lawful mode of transmission, and this, of course, by which the defendant now claims; and it requires that every such transmission, whatever it may be, shall be authenticated by a declaration, which, among other things, must contain a statement that no other than *British* subjects have any interest in the ship, and also describing the manner in which, and the party to whom, such property has been transmitted. And then by the 60th section the regis-

trar shall enter the name of the person so entitled under such transmission, in the register, as the owner of the ship or share.

Now, if all this was not meant as a condition, on which the validity of the title under the transmission was to depend, for what purpose, and to what end, were these clauses introduced at all into this Act? There were none such in the older Shipping Acts, from which the present is distinguished in this very particular. In a case cited in *Hay* v. *Fairbairn*, 2 B. & Ald. 195, Lord *Ellenborough* says, speaking of the Acts then in force: "They were passed for purposes of "public policy, and the means adopted for effecting "that object are such, that every person, claiming "title through the medium of a conveyance, *as the act* "*of the parties*, must shew a conveyance of the form "and character prescribed by those Statutes." "These "Statutes," he adds, "do not affect titles passing "by operation of law, as to executors or administra- "tors, in case of death, or to assignees generally, in "case of bankruptcy. In these cases, a title may be "transmitted without these forms." And the decision in *Hay* v. *Fairbairn*, and that of *Monkhouse* v. *Hay*, 2 B. & B. 120, proceeded upon this ground. But the present Statute has expressly included the very case of transmission by operation of law, requiring certain forms in this case also to be observed, as near as may be similar to those which are required where the transfer is by the *act of the parties;* as if what had been pointed out in the above case had been considered an omission, which was in this Statute intended to be supplied.

It might possibly complicate this case, and increase its difficulties, if the proceedings in the Supreme Court of the State of *New York* had been *in rem*, though I do not see how, even in that case, the defendant would stand in a different situation with respect to this Statute. It is true that then the judgment of the foreign Court would be equally binding on the whole

1862.

CAHOON et. al. v. MORROW.

world, and this Court would have to give, and would give equal effect to it; but still it must be subordinate to the superior control of our own positive enactments. When a purchaser of a *British* vessel, under such a judgment, brings that vessel to the port of its original entry, and claims for it the character of a *British* ship, sails it as such, and seeks for it the advantages and privileges and protection of a *British* ship, owned by *British* subjects, — the *Merchant Shipping Act* must apply to such a case; and the provisions and regulations of it, which relate to the transmission of ships, cannot admit of an exception in favour of a title derived from this foreign judgment. The Statute recognizes no ship which has not been registered according to its enactments.

But I cannot look upon the proceedings in the Court of *New York* as being *in rem*, or entitled to the operation and effect of a judgment *in rem*. It was a suit strictly and solely *in personam*. It was commenced, in the ordinary way, by summons for the recovery of a debt due upon two promissory notes, by the three persons who were the defendants in that suit. After it had been thus commenced, a writ of attachment was issued, under the law and practice which obtain in that country, to attach, not the ship in question in particular, but the property generally of those defendants, and under it the ship was attached — the effect of which was, as we collect from the language of that writ, to keep the property in the hands of the Sheriff to satisfy the plaintiffs' demand, when judgment should be obtained thereon. The judgment which was afterwards given was in no respect against the ship; there is no reference to the ship in it, nor in any of the whole proceedings in the case apart from the writ of attachment itself. Even in the execution, which issued upon the judgment, there is no mention of the property attached; but it directs the Sheriff only to satisfy the judgment out of the personal property of the defendants within the county. There is, indeed,

indorsed on it a direction to the Sheriff "to levy the "amount on the personal property attached in the "action"; but that is merely the act of the attorney, and not the act or order of the Court. So that from first to last, throughout the whole case there is no order, adjudication, or judgment by the Court in respect of the ship,—nothing which can give it the character, or *quasi* character of a suit or judgment *in rem*.

This case, then, is wholly unlike that of *Cammell* v. *Sewell*, 3 H. & N. 617, and the same in error 5 *H. & N.* 728, and also that of *Castrique* v. *Imrie*, in the Exchequer Chamber, 4 Law Times 144. In both of these there was an adjudication upon the ship itself. In the first, *Martin* B. says: "There is an adjudication "upon the *status* of the thing adjudicated upon, and "this seems to conclude all parties and privies to the "suit from saying that the *status* is not such;" for, in that case, the plaintiff in the action then before the Court was also a party in the proceedings in the foreign country. So in *Castrique* v. *Imrie*, the plaintiff had been a party to the suit in the foreign country, where a judgment had been given against him, decreeing the sale of the vessel. *Cockburn* C. J., in his judgment, says: "It is true, that the suit was, in "its inception, a proceeding *in personam*, so far as "regards the master of the vessel; but it was, at the "same time, a suit against the ship in terms; and, in "that respect, it seems to be equally plain that it was "a proceeding *in rem*." He proceeds to say (and this is very applicable to the present case, and shews the distinction between it and *Castrique* v. *Imrie*): "No "doubt, it is true, that a judgment of this Court "decreeing simply the sale of a particular chattel, to "satisfy a money demand, hardly falls within the "strict description of a judgment *in rem*, inasmuch as "it does not determine the *status* of the chattel with "reference to the property, or vest that property at "once in the claimant, as a condemnation of the

1862.

CAHOON et al. v. MORROW.

"Court of Exchequer in a revenue cause vests the property in the Crown, or the sentence of the Court of "Admiralty, in a matter of prize, vests the property "in the captors. But it is strictly analogous to the "sentence of the Court of Admiralty on a claim for "salvage, or in a suit upon a bottomry bond; in both "of which latter suits, a money demand exists, "on which the Court adjudicates, and, to satisfy "which, it decrees the sale of the ship. Now, "if such a decree is a judgment *in rem*, it is difficult "to discover any ground for saying that the decree, "ordering the sale of a ship, is to be considered "merely in the light of an execution, to satisfy a "judgment establishing a pecuniary demand. It "seems, indeed, impossible to find two proceedings "more closely analogous than the proceedings upon "a bottomry bond, and the present suit in its later "stages. Both are proceedings upon the hypotheca-"tion, or *quasi* hypothecation, of a vessel."

I have extracted thus much from this judgment, that it may be clearly seen from it, how greatly that case differs from the one before us: not merely in the character of the suit itself, which is not here as it was there, upon a *quasi* hypothecation of the vessel; for the suit, as we have seen, had nothing to do with the ship; but there the judgment was a decree for the sale of the ship, and so determined the very *status* of the ship, which is wanting in this case.

I may remark, further, that, when under this general execution to satisfy the judgment, the ship had been sold, a bill of sale was executed to the defendant, *Morrow*, the purchaser. It recites that the sale of the ship was subject to the payment of all liens and incumbrances thereon, and then it conveyed to him the ship, subject to all these. The defendant, therefore, bought, subject to the very questions which are in controversy, and cannot set up that purchase, and his claim under it, to defeat whatever lien or incumbrance then existed.

The question then still is as it was before, what are the legal rights of the plaintiffs under the two bills of sale which they have duly registered before the defendant's purchase? If this had been a sale under an execution upon a judgment obtained in our own Courts on the 10th *March*, 1857, it would clearly pass no title to the purchaser, for it would have been the sale of the property of the present plaintiffs to satisfy a judgment against other parties.

If, however, we refer the execution back to the attachment, treating the latter, as it has been called in this country, where we used to be very familiar with such process, as an incipient execution,—and giving the defendant in this case, who purchased under the execution, the full benefit of so considering it,—I still consider he has no answer to the plaintiffs' claim, because he has not fulfilled the requisites of the Statute by a proper registration of his transmitted title, whereas the plaintiffs' title under the Statute is complete.

The defendant has, however, set up another answer to the present claim,—that the bills of sale are fraudulent.

I confess that I can see nothing of fraud in the transaction. As far as *Muir* is concerned, it was strictly fair and *bona fide*. He was the builder of the ship, and, as such, had a large claim against the three original registered owners of it. It was to secure this claim that the first bill of sale for eleven shares, and the second bill of sale for twenty-two shares were made; and though the first of these was made without his knowledge, he accepted it immediately after, and joined in the proceedings by which it became duly registered.

As to the transfer of the thirty-one shares by the first bill of sale to the other plaintiffs, that, too, was at the time a fair *bona fide* transaction. It was made on a good consideration, though that consideration afterwards failed. It was to cover an advance, which

1862.

CAHOON et al. v. MORROW.

these parties had made to relieve the ship, when she had been on shore at *New York*. This money was actually on its way, but was afterwards recalled, in consequence of the attachment which was there levied on the ship; but, in the meantime, the bill of sale had been registered, and these plaintiffs became thus the legal owners of those shares. The three, to whom the thirty-one shares were transferred, may, it is true, have been no longer beneficially interested in them, after the consideration for their transfer had thus failed, and perhaps a jury might not be disposed to award damages in respect of them, as the learned *Chief Justice* intimated in his charge. They would, no doubt, be considered in Equity as trustees for those who had made the transfer of the shares, and subject to all the incidents and liabilities of such a trust.

How far, or in what way, the present defendant might reach them, or whether he could do so at all, would be foreign to our present purpose to enquire. It is enough to say,—and it is all that we are now called on to say,—that the plaintiffs under the first bill of sale are the legal owners of the shares thereby transferred, as *Muir* is the legal owner under the second. Their title is good for the purposes of this suit. Indeed, theirs is the only title which can be recognized at all, for the 43rd section of the Statute vests in them, as the registered owners, the sole, unqualified, absolute power of disposing of the ship.

That section is as follows:—"No notice of any "trust, express, implied, or constructive, shall be "entered in the register book, or receivable by the "registrar; and subject to any rights and powers "appearing by the register book in any other party, "*the registered owner of any ship or share therein shall have* "*power absolutely to dispose, in manner hereinafter men-* "*tioned, of such ship or share, and to give effectual receipts* "*for any money paid or advanced by any of consideration.*"

I am not sure, indeed, whether this one section does not of itself dispose of the whole case before us. For

if such unlimited power and control belong to the registered owner of the ship, there can be no legal right or title in any other whatsoever, or howsoever acquired,—and this seems to be the true governing principle of the whole Act.

I think, then, that the rule for a new trial must be made absolute.

DODD J. concurred.

DESBARRES J. It appears from the evidence that the present action, though brought in the names of *William Muir* and three other persons, is, in point of fact, prosecuted by *Muir* alone, who claims the whole of the brig *Jerome*, in eleven shares under the bill of sale of the 27th *December*, 1856, and twenty-two shares under that of 27th *January*, 1857, making 33-64 shares in his own right, and the remaining 31-64 shares in right of, or rather as the *cestui que trust* of the other plaintiffs under the first bill of sale. The other plaintiffs, *Eldred Cahoon*, *Asa Morin*, *junior*, and *John Norris*, do not claim or pretend to have any interest in the brig themselves, but they have permitted their names to be used as co-plaintiffs with *Muir*, to enable him to establish for his own use and benefit a title in them of thirty-one shares, that he, claiming to be the owner of the other 33-64 shares, may thus become the sole owner of the brig. It is true, the transfer of property in the brig, by two of the registered owners to these three plaintiffs, was not made with any dishonest or fraudulent design, it having been executed as a security to them for five hundred pounds, which they had agreed to advance for the repairing of the brig previously stranded near *New York*; yet, as no part of that sum was paid over to the transferrors, or remitted to *New York*, in consequence of intelligence received that an attachment issued out of the Supreme Court for the State of *New York*, at the suit of *William Stairs* and others, had in the meanwhile been levied on the

1862.

CAHOON et al. v. MORROW.

vessel at *New York;* it was in reality a transfer made without consideration, which ought not to take effect, or have any legal operation as against the defendant and his partners, who were the creditors of the transferrors. In any view that can be taken of it, it cannot be regarded as a transfer made in trust for *Muir*, for there is certainly nothing to shew that it was at the time of execution intended to have any such effect.

The respective transfers to *Muir* himself of shares in the brig *Jerome* were made under different circumstances. He was a creditor for a large amount of the registered owners, and both of the bills of sale under which he claims were executed for valuable considerations. The first bill of sale of the 27th *December*, 1856, was registered on the 3rd *January*, 1857. The second bill of sale of the 27th *January*, 1857, was registered on the same day, and the attachment issued at *New York* against *John Morin*, *Edward Cahoon*, and *Ebenezer Cahoon*, was levied on the brig *Jerome*, on the 31st *December;* and here the question arises, what effect this attachment and the proceedings under it, are to have upon *Muir's* titles or shares in the brig, under the *Merchant Shipping Act* of 1854.

It is contended, on the part of the defendant, that, as the attachment was levied before the registry of the first bill of sale, it rendered that document inoperative; and, from that time, precluded *Edward Cahoon*, the remaining registered owner of twenty-two shares, from making any transfer of his property therein; and that followed up by a judgment, an execution, and a sale under it; and, lastly, a bill of sale of the brig by the Sheriff of *New York*, having reference to the levying of the attachment, it gave the defendant, who was the purchaser, a full and complete title of the whole of the brig, which was not required by the provisions of the *Merchant Shipping Act* of 1854, to be registered, it being vested in him by operation of law, and that Act being applicable only to transfers made

by registered owners, and not to transfers of this description.

If this position be sound, the verdict for the defendant is right; but if there is nothing in the Act of 1854, which dispenses with registration of such a transfer of title as the defendant has received, then *Muir*, having caused both bills of sale under which he claims to be registered, and having thus complied with the requisitions of the Act, before the execution of the Sheriff's bill of sale to defendant, on the 19th *March*, 1857, is clearly entitled to 33-64 shares of the brig *Jerome*.

In considering this case, I may say that I do not attach much weight to the objection, taken on the part of the plaintiffs, to the jurisdiction of the Supreme Court of *New York*, over the subject matter of the suit instituted by *William Stairs* and others against *Edward Cahoon* and others, the first registered owners of the brig. Looking over the proceedings in that suit, without pretending to be conversant with the laws of the State of *New York*, I can discover nothing in them that would warrant the conclusion, that they were either irregular or illegal; nor am I at all prepared to say that those proceedings were unjust, and contrary to natural justice.

The main objections to those proceedings are, that the parties proceeded against were not resident within the State of *New York*, and two of them were not served with the process of the Court. *Edward Cahoon*, it appears, was personally served; the other two defendants, residing in this Province, were not served; but I have no doubt they received the copy of the summons and complaint in that suit, which was proved to have been transmitted to them through the Post Office at *New York*, in accordance with the law of the State and practice of the Court; and that they were aware of the proceedings, and might, if they had chosen, have defended the suit. No defence was made, and a judgment passed in favor of *William*

1862.

CAHOON et al. v. MORROW.

Stairs and others, the plaintiffs in that action for the amount of the debt proved to have been justly due to them. It appears from the testimony of *William Bloomfield*, an attorney and Counsellor of the State of *New York*, of twenty-five years active practice, that residence is not necessary: property within the State of *New York* being, according to the law of that State, of itself sufficient to give the Court jurisdiction; and that the publication of the summons or process in the newspapers for six weeks, and the deposit of a copy of the summons and complaint in the Post Office, directed to the person to be served therewith, was held to be a service of the process. All the requisites of the law of the State of *New York*, as it is understood and stated by this witness to exist, appearing to have been complied with, I think the judgment and proceedings had in the suit of *William Stairs* and others, in the Supreme Court of *New York*, must be considered by this Court as valid and binding between the parties. We must assume the proceedings of this Court, under the circumstances in which they are presented to us, to be right, until they are shewn to be wrong. Viewing them in that light, the important subject of inquiry is, what property the defendant has acquired in the brig, under the bill of sale founded upon them, and that necessarily depends on what application or bearing the provisions of the *Merchant Shipping Act*, 1854, are to have upon that document.

The 57th section of that Act directs, that "Every "bill of sale for the transfer of any registered ship, "or of any share therein, shall be produced to the "registrar of the port at which the ship is registered, "together with the declaration required to be made "by a transferee; and the registrar shall thereupon "enter in the register book the name of the transferee, "as owner of the ship or share comprised in such bill of "sale, and shall indorse on the bill of sale the fact of "such entry having been made with the date and hour "thereof; and all bills of sale of any ship, or shares

"in a ship, shall be entered in the register book in "the order of their production to the registrar."

The 58th section directs that "If the property in "any ship, or in any share therein, becomes transmitted "in consequence of the death, or bankruptcy, or insol- "vency of any registered owner, or in consequence "of the marriage of any female registered owner, or "by any lawful means, other than by a transfer, "according to the provisions of this act, such trans- "mission shall be authenticated by a declaration of "the person to whom such property has been trans- "mitted, made in the form marked H in the schedule "thereto."

The 59th section directs that "If such transmission "has taken place by virtue of the bankruptcy, or "insolvency of any registered owner, the said decla- "ration shall be accompanied by such evidence as "may for the time being be receivable in Courts of "justice, as proof of the title of the parties claiming "under such bankruptcy or insolvency."

And the 60th section directs that "The registrar, "upon the receipt of such declaration so accompanied "as aforesaid, shall enter the name of the person or "persons entitled under such transmission in the "register book, as owner or owners of the ship or "share therein, in respect of which such transmission "has taken place."

Now, it appears by these provisions of the Act that registration of title, by whatever means acquired, is by the policy of the Act rendered absolutely essential. There is no exemption from it in any case, and whether the title is acquired by a bill of sale, or by transmission of shares by death, bankruptcy, marriage, or by any other means, it must, according to the Act of 1854, be registered. In the event of a title being acquired by any other means than by a transfer according to the provisions of the Act, the declaration is to be made as near to the form prescribed as circum- stances will permit, shewing most conclusively that to

1862.

CAHOON et al. v. MORROW.

constitute a good title registration is indispensable in every case.

The 57th section does not refer alone to bills of sale executed by a registered owner, it refers to "every bill of sale for the transfer of any registered "ship, or of any share therein," and it applies, in my opinion, as well to a bill of sale executed by a Sheriff on sale under an execution, as to any other. To hold that such a bill of sale as this does not come within the provisions of this Act of 1854, would, it strikes me, be contrary to the meaning, spirit, and policy of the Act, which, as I take it, was to make registration in the order of production of the instrument to the registrar, the only evidence of ownership. That such was the policy of the Act is, I think, obvious from the language of the forty-third section, which declares "that no notice of any trust, express, implied, or con- "structive, shall be entered in the register book, or "receivable by the registrar; and subject to any "rights and powers appearing by the register book to "be vested in any other party, the registered owner "of any ship or share therein shall have power abso- "lutely to dispose in manner hereinafter mentioned "of such ship or share, and to give effectual receipts "for money paid or advanced by way of considera- "tion."

Under this section of the Act I think *Edward Cahoon*, who appeared by the register book to be, and was the registered owner of twenty-two shares in the brig *Jerome* on the 27th *January*, 1857, had a right to transfer them, as he did on that day, to *William Muir* for a valuable consideration; and that *Muir*, by virtue of that, and the previous transfer to him by *John Morin* and *Ebenezer Cahoon* of eleven shares, became entitled to, and must be considered to be the legal owner of 33-64 shares in the brig *Jerome*, the defendant holding the remaining 31-64 shares under the bill of sale of the 19th *March*, 1857, from the Sheriff of *New York*, instead of the whole for which it seems a register

has been granted to him subject to the legal rights of *Muir*.

In reference to the objection taken at the argument to the amendment allowed at the trial of this case, I may say that I am not at all satisfied that this Court possesses the power, under the 133rd section of our *Practice Act*, to permit the name of a plaintiff to be struck out of the record, and the name of another to be substituted at the trial. On reading the late case of *Garrard* v. *Gubilei*, 5 Law Times, N. S. 609, to which the learned *Chief Justice* has referred, I am inclined to think with him that if such an amendment can be allowed at all, it can only be with the consent of the party whose name is added, for the reason assigned by *Erle* C. J. in that case, "that it "would be a glaring piece of injustice to bring in a "stranger at the time of trial, without any notice and "without his consent." I have not considered this point as having any important bearing in this case, in consequence of the verdict having been found for the defendant, and have, therefore, not given it the consideration I otherwise would. My present impression, however, is, that without the express consent of the party, such an amendment cannot be made. According to my view of this case, the rule to set aside the verdict and for a new trial must be made absolute.

WILKINS J. concurred.

Rule absolute.

Attorney for plaintiffs, *J. W. Johnston, junior.*
Attorney for defendant, *J. W. Ritchie*, Q. C.

July 30.

CROWELL *versus* GEDDES.

Where a vessel insured on a voyage from *Halifax* to *Nassau* and back, arrived at *Nassau*, and sailed thence for *New York*, having previously taken in cargo at *Nassau* for *New York*, and none for *Halifax*; and the captain expressed his determination before leaving *Nassau* to return there or to some other *West India* Island from *New York*, and his disinclination to return to *Halifax*; and the vessel was wrecked while on the track common both to the voyage from *Nassau* to *New York*, and to that from *Nassau* to *Halifax*.

Held, A *change of voyage*, and not merely a *deviation*, or *intention to deviate*, and that the underwriters were not liable.

ASSUMPSIT on a policy of insurance on a vessel, tried before *Dodd* J. at *Shelburne* in *May*, 1861, and verdict for plaintiff, by consent, for fifteen pounds and interest, subject to the opinion of the Court.

The case was argued in *Michælmas* Term last, by *J. W. Johnston, junior*, and *J. W. Johnston, senior*, Q. C., for plaintiff, and *J. R. Smith*, Q. C., for defendant.

All the material facts are sufficiently stated in the judgment.

The Court now gave judgment.

BLISS J.* In this case, there was a verdict for the plaintiff, by consent, subject to the opinion of the Court upon the whole case, who were to have the power of drawing inferences from the facts, as a jury might do.

It was an action on a policy of insurance on the schooner *Valonia*, on a voyage from *Halifax* to *Nassau*, in the Island of *New Providence*, and back to *Halifax*. The vessel sailed on her voyage out, and arrived at *Nassau*, where she took on board a cargo for *New York*, for which place she then sailed. There are two channels or passages from *Nassau*, by either of which they can proceed either to *New York* or *Halifax*: the north-east passage by the *Hole in the Wall*, which is the more usual and safer of the two, and the north-western passage by the *Berry Islands*, which is taken by vessels bound to either of the places before mentioned, when the wind is unfavorable for the north-east passage.

The *Valonia* sailed by the north-western passage, and was wrecked a day or two after on the *Berry*

*YOUNG C. J., having been concerned in the case when at the Bar, gave no opinion.

1862.

CROWELL v. GEDDES.

Islands, which was before reaching the dividing point of the voyage to *Halifax* or *New York*.

If this were a case merely of an intention to deviate, then as the loss took place before the dividing point of the voyage had been reached, it is clear, under the decisions which have been given, that the underwriters would be liable. *Kewley et al.* v. *Ryan*, 2 H. Bl. 343, *Thellusson* v. *Fergusson*, Dougl. 365.

But I am of opinion that, under the facts of the case, this is not so much a question of deviation as of a change of voyage. The distinction between the two was settled in the case of *Wooldridge* v. *Boydell*, Dougl. 16, where it was held that, where the ship, insured for one voyage, sailed on another, and was taken before she reached the dividing point, the policy was discharged. As Lord *Mansfield* remarked in that case, "in deviation, the *terminus a quo* and that *ad quem* are "the same;" or, as it was put by counsel in argument in *Norville* v. *St. Barbe*, 2 Bos. & Puller 439: "In "case of a deviation, the *termini* of the voyage remain, "though the course, by which the *terminus ad quem* is "sought, be changed. But when the *terminus ad quem* "is changed, it is not a deviation but an abandonment "of the voyage; and such an abandonment, at what-"ever time it takes place, whether before or after the "arrival of the ship at the dividing point, discharges "the underwriters." This appears to me a clear and correct exposition of the law on this subject, which is also well illustrated and explained by the case of *Hare* v. *Travis*, 7 Barn. & Cres. 14. There the policy was on a voyage from *Liverpool* to *London*. The ship took in goods at *Liverpool* for *Southampton* as well as *London*, and, having delivered her goods at the first place, proceeded on to *London*. The *London* cargo proved to have been damaged, which, as the jury found, had taken place before the ship had reached the dividing point of the voyage. It was argued that as the vessel intended to go to *Southampton*, she did not sail on the voyage insured,—but it was held that going there was

1862.

CROWELL v. GEDDES.

a deviation only. Lord *Tenterden* said that "The cap-
"tain having loaded his vessel with goods partly for
"one place, and partly for the other, I thought that it
"was to be inferred that he sailed on a voyage to both
"places, and that so long as the vessel continued in
"that course which was common to a voyage either
"to *Southampton* or *London*, she was sailing on the
"voyage insured." *Bailey* J. said, "Where the insur-
"ance is on a voyage to a given place, and the captain
"when he sails, does not mean to go to that place at
"all, he never sails on the voyage insured. But where
"the ultimate *termini* of the intended voyage are the
"same as those described in the policy, although an
"intermediate voyage be contemplated, the voyage is
"to be considered the same, until the vessel arrives
"at the dividing point of the two voyages. The
"departure from the course of the voyage insured
"then becomes a deviation; but before the arrival
"at the dividing point, there is no more than an
"intention to deviate, which, if not carried into effect,
"will not vitiate the policy."

Now, in the present case, the captain took a cargo from *Nassau* for *New York* only, and not for *Halifax*, which was the *terminus* in the voyage insured; and, therefore, that, from which Lord *Tenterden* in the case just cited inferred that the vessel sailed on a voyage to both places, is wholly wanting here. Then we have the further evidence of the expressed determination of the captain, (which though objected to, I think quite admissible for this purpose), to return to *Nassau*, or to proceed to some other *West India* Island, should he be successful in obtaining freight, and of his disinclination to return to *Halifax* at that season of the year, so much so, that he was pleased that no return cargo to *Halifax* from *Nassau* could be there provided,—from which, I think, the inference is very strong that he did not sail on the voyage to both places, and so did not sail on the voyage insured.

It is true that in the case of *Wooldridge* v. *Boydell*,

Dougl. 16, the whole voyage insured was abandoned, and never commenced; but the principle must be the same, whenever, at any time after, the voyage itself is changed; for, if the vessel is not on that voyage which is covered by the policy, but on another voyage, she does not come within the policy, and is not protected by it. It is not a deviation from the *terminus ad quem*, if she did not ultimately intend to go to that *terminus*, but a change of the voyage, and the substitution of another in its place. This is, I think, clearly settled by the case of *Bottomley* v. *Bovill*, 5 B. & C. 210. That is in every respect in point with the present case. There the ship was insured from *London* to *New South Wales*, and at and from there to all ports and places in the *East Indies* or *South America*, with liberty in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports in the *Channel*, *Cork*, *Madeira*, *Cape of Good Hope*, &c., particularly to trade and sail backwards and forwards, and forwards and backwards. The ship sailed to, and arrived at, *New South Wales*. There the captain received a letter from his owner, directing him to proceed to the *East Indies*, instead of *South America*; but *before* receiving it, he had entered into a contract to take passengers and goods to *New Zealand*, and had taken some of the goods on board. After receiving this letter of instructions the captain entered into a contract to bring back one of the passengers from *New Zealand* to *New South Wales*. The ship proceeded to *New Zealand*, and arrived there on the 4th *August*, and landed the passengers; and on the 7th weighed anchor, with the intention of returning to *New South Wales*; but in working out of the harbor, the ship missed stays, and was lost. *New Zealand* lies in the course of the voyage from *New South Wales* to *South America*, but not in the course of the voyage fr *New South Wales* to the *East Indies*. It was contended at the trial (as it was here in the argument before us),

1862.
CROWELL v. GEDDES.

that this was a loss by barratry. But *Abbott* C. J. held that it could only be barratry where the captain acted in fraud of his duty to his owner, and that a mere mistake by the captain, as to the meaning of his instructions, or a misapprehension of the best mode of acting under them, and carrying them into effect, would not amount to barratry. And this, I think, disposes of the objection which was taken by the plaintiff's counsel at the argument, that the captain of the *Valonia*, in sailing to *New York*, acted wrongfully towards his owner, and did not thereby affect his rights under this policy. There is nothing in the case, from which any thing like fraud to his owner can be imputed to the captain, but abundant to shew, on the contrary, that he acted for the best interests, as he thought, of the owner of the vessel, and with the concurrence of her consignees at *Nassau*, in changing the voyage from *Halifax* to *New York*, for which former place, it appears, he had no return freight.

Then, as to the main question. It was held that, though the language of the policy was in that case of very extensive import, yet the ship was only protected by it while sailing on some intermediate voyage, undertaken with a view to the accomplishment of a voyage either to *South America* or the *East Indies;* that the ship, when lost, was on a distinct voyage, not subordinate to, nor connected with, either of the voyages contemplated by the parties; and so she was not at that time on the voyage insured. In the language of *Bailey* J., "The vessel sailed on an "intermediate voyage to *New Zealand* and back; and, "although *New Zealand* is in the way from *New South* "*Wales* to *South America*, yet that voyage was com- "menced without having for its ultimate object the "voyage to *South America;* and *New Zealand* was not "in the way to the *East Indies*. The ship, therefore, "at the time of the loss, *was not on a voyage contemplated* "*by the policy*, and the underwriters are not liable."

1862.

CROWELL v. GEDDES.

Applying that case to the present, we may say, that the vessel, when lost, was on a voyage to *New York*, not having for its ultimate object the voyage to *Halifax*, not connected with, nor subordinate to, the voyage to *Halifax*, and not contemplated by the policy, and, therefore, not within the policy, nor covered by it; so that the underwriters are not liable.

I am, therefore, of opinion, that the judgment of the Court must be for the defendant.

DODD J. Upon the evidence adduced at the trial of this cause, the Court will have to decide, before a verdict can be entered for the defendant, that there was either a deviation before the loss of the vessel, or an abandonment of the voyage insured.

It is quite clear that an intention to deviate is not sufficient to discharge the underwriters, and it requires a nice discrimination to draw the line between an intention to deviate, and an abandonment of the voyage. *Arnould*, in his work on *Insurance*, page 346, says the test in all cases is, whether the *terminus ad quem* specified in the policy remains the ultimate place of intended destination; if it does, then the design, though formed before sailing, of putting into any other port, or taking an intermediate voyage in the way to such ultimate place of destination, does not necessarily amount to a change of voyage.

In the case before us, the intention to deviate by taking in cargo at *Nassau* for *New York*, and sailing for that port, instead of returning direct to *Halifax*, as by the terms of the policy the vessel was bound to do, is clearly in evidence; but whether there was an intention to give up the ultimate port of destination is not so clear. *Johnston*, who was examined upon interrogatories at *Nassau*, proves that the vessel received a cargo there of wood, iron, and sponge, and then left for *New York*. An objection was taken to his answer to the seventh interrogatory, but I do not think the objection can be supported. The master

1862.

CROWELL v. GEDDES.

may not have had authority for changing the voyage, and having changed it, he may be liable to the owners for any loss the change occasioned to them; but as respects third parties, the owners, in general, are liable for the conduct of the master in the management of the vessel, and therefore his acts are admissible in evidence to establish their liability; besides which we have no proof that he was acting outside their authority. The presumption is, that the master was acting with the sanction of the owners, in changing the voyage, when he found freight could not be obtained for a return voyage from *Nassau* to *Halifax;* and, in my opinion, it was for the plaintiff at the trial to rebut that presumption, if he could.

The answer to the seventh interrogatory proves that the intention of the captain was to return to *Nassau* from *New York*, or to another *West India* Island, if he could obtain freight, and that he requested the witness to write to the consignee of the cargo taken on board at *Nassau*, to assist him in that object. Upon this point the witness says the captain expressed his determination to return to *Nassau*, or some other *West India* Island, should he be successful in obtaining freight; and expressed his disinclination to return to *Halifax* at that season of the year, and seemed pleased that we, as consignees, had not the means of providing the vessel with a return cargo to *Halifax*, and thus carrying out the original charter party.

From this evidence then, it may be fairly presumed that the captain came to a fixed determination not to carry out the original voyage, but to abandon it when he found freight could not be obtained for the return voyage to *Halifax;* and he seemed pleased, as the witness says, that such freight could not be obtained. There may have been some floating idea in the mind of the master that should freight not be had at *New York*, that he would in that case proceed to *Halifax*, but the fair and reasonable deduction to be drawn from the evidence is against that conclusion.

Arnould, at page 351, gives the result of the English authorities upon the point in question, as follows: "It "is quite clear, he says," "that if the assured, either "before or after the ship sails, have determined to "abandon the original port of destination, and fixed "upon another, *that* discharges the underwriters from "all loss happening after such determination is finally "formed, though such loss may occur before the ship "has quitted the track of the original voyage, or even, "under a policy "at and from," before she has sailed "from the port where the risk was made to com-"mence."

I must admit that, at first, I considered the conduct of the master as not amounting to more than a conditional intention to give up *Halifax*, the *terminus ad quem* contemplated in the charter party; but looking at the evidence more closely, and being called upon to draw conclusions from it, as a jury would, if submitted to them, I cannot avoid thinking that, at least, the weight of evidence is against the idea that the master contemplated proceeding from *New York*, had he arrived there, to *Halifax*, under any circumstances; but, on the contrary, that the voyage to *Halifax* was entirely abandoned by him.

Chancellor *Kent*, in 14 *Johnston's R.* 57, in giving his opinion, although differing with the majority of the Court, yet clearly defines the rule in the English Courts as respects deviation. He says: "The "voyage is always deemed the same, whatever be the "deviation, provided the original port of destination "be not abandoned. These are plain elementary "rules in the law of insurance; and, because the "question of deviation always pre-supposes and ad-"mits a continuation of the original voyage, it follows "that a mere intention to deviate, whether formed "before or after the commencement of the voyage, "is no deviation, if the intention was never carried "into effect; and the loss happened before the vessel "came to the dividing point. But if the original

1862.

CROWELL v. GEDDES.

"place of destination be abandoned, in order to go to "another port of discharge, the voyage itself becomes "changed, because one of the *termini* of the original "voyage is changed. The identity of the voyage "is gone, and a new and distinct voyage is sub- "stituted. In that case, intention is every thing; "for on that depends the fact, whether the original "voyage was, or was not, abandoned; and, if the "intention to abandon be once clearly and certainly "established, it then becomes perfectly immaterial "whether the vessel was lost before or after she came "to the dividing point; because, in either case, she "was lost, not on the voyage insured, but on a different "voyage."

In the present case, the voyage insured was out to *Nassau* and back to *Halifax;* the first part of the voyage was completed, and the vessel arrived in safety at *Nassau;* and, instead of returning to *Halifax*, we find the master taking in a cargo for *New York*, and expressing his determination to return either to *Nassau* or some *West India* Island, from *New York.*

Lord *Eldon* says: "When a ship is insured at and "from a given port, the probable continuance of the "ship in that port is in the contemplation of the "parties to the contract; if the owners, or persons "having authority from them, change their intention, "and the ship is delayed in that port for the purpose of "altering the voyage and taking in a different cargo, "the underwriters run an additional risk, if such a "change of intention is not to affect the contract." 1 *Bligh* 100. Admitting that the vessel, when lost on the *Berry Islands*, was in the direct track to *Halifax*, does not, according to Lord *Eldon* and Chancellor *Kent*, vary the case, if the intention to abandon the original voyage is clearly established, and, as I have already said, the evidence cannot, when carefully examined, lead to any other conclusion.

In *Bottomley* v. *Bovill*, 5 B. & C. 210, the Court carried the principle further than the authorities

referred to, in discharging the underwriters, for, in that case, it did not appear that the original *terminus ad quem* of the voyage was given up, but merely that an intermediate voyage had been undertaken. *Arnould*, in referring to the case, draws this conclusion from it. If the ship, without necessary or other justifying cause, after accomplishing part of the voyage insured, sails on a distinct intermediate voyage, which is not allowed by the usage of trade, and which is neither subordinate to, nor connected with, the voyage contemplated by the parties as the principal object of the contract, she will be considered as having, for the time at least, given up all intention of proceeding to her primary destination, and the underwriters will be discharged from all loss that may take place after she has engaged in such intermediate voyage, although the captain may still intend ultimately to proceed to the original *terminus ad quem* named in the policy.

Taking this case in *Barn. & Cress.*, as a governing one, and there not being anything to show that the usage of trade justified the *Valonia* in undertaking the intermediate voyage to *New York*, and it not being either subordinate to, or connected with, the voyage contemplated by the parties, as the principal object of the contract, it is clear the underwriter is discharged. But admitting that sailing for an intermediate port, with the intention of finally proceeding to the original port of destination, does not discharge the underwriter, while the vessel is proceeding on a track common to both; in the case under consideration, no such intention is apparent; but, on the contrary, the most reasonable conclusion is that the master, when he sailed from *Nassau* for *New York*, gave up the idea of proceeding from the latter place to *Halifax*. Mr. *Johnston*, at the argument, contended that the sailing of the vessel from *Nassau* to *New York*, was without the authority of the owner, and that the act amounted to barratry upon the part of the master, and that there-

1862.

CROWELL v. GEDDES.

fore the underwriter was liable. I have not the pleadings in the cause to refer to, but I do not think they raise this issue, and, if they did, I do not think the conduct of the master amounted to barratry, and that neither fraud nor crime can be attributed to him; but, on the contrary, his conduct in changing the voyage (if not with the authority of the owner), was not any thing more than the exercise of a mistaken discretion, and, I have no doubt, with the best intention towards promoting the interests of her owner. Barratry imports fraud; it must be something of a criminal nature against the owners of the ship by the master or mariners. 2 *Lord Ray* 1349, 2 *Strange* 1173, 1 *T. R.* 323. The deviation of a vessel from the voyage insured, through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry. *Phyn* v. *Royal Exchange Assurance Company*, 7 T. R. 505.

A deviation from the lawful course of the voyage, through intentional or the result of gross ignorance, will not amount to barratry, "unless accompanied "with fraud or crime, no case of deviation will fall "within the true definition of barratry." Per Lord *Ellenborough* in *Earle* v. *Rowcroft*, 8 East 139. Therefore, upon the whole case, as it is presented to us, I am with the defendant upon the ground of the abandonment of the original voyage, as contemplated between the parties to the contract of insurance; consequently, in my opinion, the verdict must be entered for him.

DESBARRES J. This case was argued before us at the last *December* Term, when the following objections were taken to the verdict by the defendant's counsel:

First. That there was an abandonment of the voyage at *Nassau*.

Second. If there was no abandonment of the

voyage, there was a deviation after the vessel sailed from *Nassau*, on her homeward voyage.

The question for our consideration is, whether the vessel, when wrecked, was within the protection of the policy. I am decidedly of opinion that she was not, and I think that no other conclusion can be drawn from the evidence, than that the original voyage was abandoned, and a new one substituted and entered upon, changing the risk insured against, and rendering the policy void. The well known and established principle in the law of insurance is, that if the vessel departs voluntarily, and without necessity, from the usual course of the voyage, the insurer is discharged; and the shortness of the time, or of the distance of a deviation, makes no difference as to its effect on the contract. In 3 *Kent's Com.* 312, it is said: "The meaning of the contract of insurance for "the voyage is, that the voyage shall be performed "with all safe, convenient, and practicable expedi- "tion, and in the regular and customary track."

Now, it is contended, on the part of the plaintiff, that, although the *Valonia* took in a cargo at *Nassau*, cleared out, and sailed for *New York*, contemplating and intending an entirely new and different voyage, there was no abandonment and no deviation; inasmuch as the vessel was wrecked on a course common both to *New York* and *Halifax*, and before the dividing point; that it was, in fact, nothing more than an intention to deviate, not carried out.

The only evidence we have as to which of the two channels it would be proper for a vessel to take, bound on a voyage from *Nassau* to *Halifax*, one being the north-east, and the other the north-west channel, is that of *Martin Doan* and *Warren Smith*, two ship-masters, examined on the part of the plaintiff. Neither of these witnesses have given any very clear or satisfactory testimony on this point; probably because neither of them had any accurate knowledge of these channels, each having made but one voyage to

1862.
CROWELL v. GEDDES.

Nassau. They agree that the course from *Nassau* to *Halifax*, and from *Nassau* to *New York*, is common to both ports, until the latitude of *Cape Hatteras*, distant about two hundred miles from *Nassau*, which is the dividing point. Neither of them ever went through the N. W. passage, or have any knowledge of it, only that it is the most dangerous passage of the two. *Smith* says: "If I were going to *Halifax* from *Nassau*, I would "choose the north-east passage; but if the wind "prevailed against me, I would take the north-west "passage,"—from which it may be inferred that the north-east passage is the direct and usual course to *Halifax*, and that the other is only to be taken when the wind is adverse; "that, being wrecked on the "*Berry Islands*, the vessel must have been going "through the north-west passage."

It is difficult to discover from this evidence whether the vessel, at the time she was wrecked, was pursuing a voyage to *Halifax* or to *New York;* but as she was laden and cleared out for, and her cargo was consigned to persons in, *New York*, the fair and reasonable presumption, in the absence of any evidence as to the point from which the wind was blowing, is that the intention proved to have been formed at *Nassau* of changing and abandoning the original voyage was then being carried out.

It is not necessary for the defendant to shew, by positive and direct testimony, that the vessel was not in the course of her homeward voyage at the time she was wrecked; it is enough to shew that the voyage was designed for, and her cargo shipped to be landed at *New York*, in order to discharge himself from all liability as an underwriter for loss.

In the case of *Wooldridge* v. *Boydell*, Dougl. 16, the ship was insured "at and from *Maryland* to *Cadiz*." She was cleared from *Maryland* for *Falmouth*, and a bond given that all the enumerated goods were to be landed in *Britain*, and all the other goods in the British dominions. An affidavit of the owner stated

that the vessel was bound "to *Falmouth* and a market," and there was no evidence whatever to shew that she was destined for *Cadiz*. She was taken in *Chesapeake Bay*, in the course both to *Cadiz* and *Falmouth*, before the dividing point; and it was held that the underwriter was discharged upon the ground that the voyage *was changed, and not designed for Cadiz*, and was different from the voyage insured. Lord *Mansfield*, in that case, said: "A deviation merely intended, "but never carried into effect, is as no deviation. In "all the cases of that sort, the *terminus a quo* and *ad* "*quem* were certain and the same. Here, was the "voyage ever intended for *Cadiz?*"

So it may be asked in this case, was the voyage from *Nassau* ever intended for *Halifax?* The answer I think must be, that it was not, and that the original voyage was entirely abandoned.

The case of *Way* v. *Modigliani*, 2 T. R. 30, shews with what strictness the *English* Courts enforce the rule that any change in the *termini* of the voyage described in the policy frees the underwriter from all subsequent liability for loss, even where it occurs while the ship is in the track common to both the original and substituted voyage. In that case the ship was insured "at and from the 20th *October*, "1786, from any ports in *Newfoundland* to *Fal-* "*mouth*, or her ports of discharge in *England*, with "liberty to touch at *Ireland* and any ports in the "*Channel*." The ship on the 1st *October* sailed from her port in *Newfoundland* to fish on the *Banks*, where she continued fishing till the 7th, on which day she sailed from the *Banks* for *England*. On the 20th *October*, the day on which the risk commenced under the policy, she was sailing on a course common both to a voyage from the *Banks* to *England*, and from *Newfoundland* to *England*, and continued on this course until the 30th *November*, when she was lost. The Court held that as the voyage insured was from *Newfoundland* to *England* direct, and that on which the

1862.

CROWELL v. GEDDES.

ship sailed, was from *Newfoundland* to the *Banks*, and then to *England*, the ship had never sailed on the voyage insured, and the policy had never attached.

The case of *Tasker* v. *Cunningham*, 1 Bligh's Parl. Cases 87, stated in 1 *Arnould on Insurance* 351, is, in my opinion, decisive as to this. There the ship, being expected to arrive in *Cadiz* with a cargo of fish from *Newfoundland*, her owners, who resided in *Glasgow*, sent instructions to their agent at *Cadiz* to ballast the ship, after she had discharged her cargo of fish, with salt, and procure freight for her if possible to *Clyde*. When the ship arrived no salt could be procured. The agents wrote to the owners to that effect, telling them that under the circumstances they had resolved, with the advice and concurrence of the captain, to dispatch the ship to *Liverpool* for salt, whence she might proceed to *Newfoundland*. The owners on receiving this communication accordingly insured the ship "at and "from *Cadiz* to her port or ports of discharge in *St.* "*George's Channel*, including *Clyde*." Much time having been spent in discharging her cargo of fish at *Cadiz*, and the agents thinking that the ship would arrive too late at *Newfoundland*, if sent first to *Liverpool* for salt, changed their plans, and resolved, after consulting with the master, to load the ship with what salt they could procure at *Cadiz*, and thence despatch her direct for *Newfoundland*. They accordingly wrote to the owners that, with the assent of the master, they proposed thus to alter the destination of the ship. About a week after the date of this last letter, the ship, which was still in the Bay of *Cadiz*, and had not even entirely discharged her cargo of fish, nor taken any steps whatever towards commencing the direct voyage from *Cadiz* to *Newfoundland*, was taken by the *French*, and burnt where she lay. Upon this state of facts, the Scotch Courts decided that the ship, when so destroyed, was under the protection of the policy; but the House of Lords reversed their decision on the ground *that a fixed determination had been formed to*

abandon the voyage insured before the loss took place. The present case certainly comes within the principle laid down in *Tasker* v. *Cunningham*, for here there was not only a fixed determination formed to abandon the voyage insured before the loss, but that determination had, in fact, been carried out. The vessel had been loaded, cleared out, and had actually sailed for, and her cargo had been consigned to persons in, *New York*. It was not designed or intended to proceed from *Nassau* on her homeward voyage, and she was wrecked, as I infer from the evidence, in the prosecution of her new and substituted voyage, her first consignees, Messrs. *Johnson & Brother*, not having the means, as it appears from the evidence, of providing a return cargo for the vessel from *Nassau* to *Halifax*. There is not, therefore, in my apprehension, the slightest ground for sustaining the verdict for the plaintiff. I think it ought to have been, and that it ought now to be entered for the defendant.

186.
CROWEL v. GEDDES.

WILKINS J. concurred.

Judgment for defendant.

Attorney for plaintiff, *H. W. Smith.*
Attorney for defendant, *John Creighton*, Q. C.

END OF TRINITY TERM.

1862.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHÆLMAS TERM,

XXVI. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J. — DESBARRES J.
BLISS J. — WILKINS J.
DODD J.

December 2.

BANNERMAN ET AL. *versus* FULLERTON.

Interest is recoverable on goods sold on credit from the date at which the credit expired, where such is the usage of trade at the place where the goods are sold, although there may have been no previous dealings between the parties, no engagement to pay interest, and no notice under the statute that interest would be claimed.

ASSUMPSIT for goods sold and delivered, tried before *Bliss* J., without a jury, at *Halifax*, in 1862, and judgment for plaintiff, by consent, subject to the opinion of the Court as to the question of interest.

The case was argued before the whole Court in *Trinity* Term last, by *J. W. Ritchie*, Q. C., for plaintiffs, and *H. Blanchard*, for defendant.

All the material facts are fully set out in the judgment of His Lordship the *Chief Justice*.

The Court now gave judgment.

YOUNG C. J. The plaintiffs in this case are general merchants, resident at *Manchester*, in *England*, from whom the defendant purchased the goods, the price of which is sued for, in the year 1855, and the only

question is, whether interest thereon is recoverable. It appears, by the evidence of one of the plaintiffs, that the goods were purchased in the ordinary course of business, and on the usual credit of four months, at the expiration of which time the price was due and payable in cash; and that there were no other circumstances attending the purchase of said goods. There was no engagement, therefore, to pay interest; there had been no course of dealing between the parties, and there had been no notice under the Statute.

The plaintiffs, however, produced a witness, resident at *Halifax*, who stated that he had dealt with the plaintiffs for years, and was conversant with their trade; that, by the usage of trade in *Manchester*, goods were sold at four or six months' credit, which meant that interest was to be charged from the date of the credit expired, if the amount was not then paid; if paid before, the interest was deducted from the price; that he himself paid cash, and got the six months' interest deducted; that this was the usage of trade in *Manchester*, and this same usage prevailed here.

It was pressed upon us, at the argument, that, upon these facts, there was an implied agreement on the part of the defendant to pay interest; but there is no evidence of agreement, either express or implied, and it is obvious that the plaintiffs must rely solely on the evidence of usage.

It was then objected, on behalf of the defendant, that such evidence could not avail, because the Imperial Act 3 & 4 *Will.* 4, chap. 42, sec. 28, from which sec. 4, chap. 82, of the *Revised Statutes* is borrowed, contains a proviso that is not in ours; that proviso declaring "that interest shall be payable in all cases, "in which it is now payable by law;" and its omissions in ours, excluding, as it was said, every case that is not within the Statute. It is quite impossible, however, to adopt this construction, which would prevent the recovery of interest in a multitude of cases, which

1862.

BANNERMAN et al. v. FULLERTON.

our Legislature never could have intended to abrogate, the more rational conclusion being that the proviso in the English Act was omitted in our *Revised Statutes*, because it was thought to be, as it really was, unnecessary.

Were we governed by the American law, to which our attention was next turned, there would be no difficulty; for I find it laid down as a general rule in the note to the American edition of 9 *Excheq. Rep.* 551, that interest accrues in the *United States* upon every liquidated debt, from the time when it is due and payable, and upon every account, from the time that it is stated and settled.

The American and the English rules, however, differ widely from each other, as they are to be found in *Sedgwick on Damages*, 375-381, and in an elaborate note to the case of *Selleck* v. *French*, 1 Amer. Leading Cases, 510. The American Judge, indeed, in this case dealt with the English rules rather unceremoniously, and declares, that, as they are to be gathered from the cases in *Campbell*, they are neither founded in justice, nor consistent with each other. Why should a man, says he, be liable to pay interest on a contract to deliver a bill of exchange in payment for goods on a certain day, and not be liable on a contract to pay the money for goods on a certain day? It is as valuable to receive money in hand as a bill drawing interest, yet, this is one of the distinctions in the English cases cited at the argument. Why, again, should a defendant be liable to pay interest, if it can be proved that he has made interest by the use of the principal, and not liable if he has made none? It is immaterial to the plaintiff what use the defendant has made of the money, — the injury to him is the being kept out of it himself.

The American writers, too, find fault with the option which the English Statute, and which ours following the English, gives to the jury, who may allow interest in the cases within it, "if they shall

"think fit," creating, as it is said, great uncertainties in the application of the law. Some of these strictures may be not undeserved, but of course we must determine this case upon English rule.

Now, interest, I take it, is recoverable in *England*, even where there is a written contract, only in those cases where the contract reserves interest, or comes within the definition of a commercial instrument. "The giving of interest," said Lord *Ellenborough*, in *Gordon* v. *Swan*, 12 East 419, "should be confined, I "think, to bills of exchange and such like instru- "ments, and to agreements reserving interest."

In *Page* v. *Newman*, 9 Bar. & Cres. 378, Lord *Tenterden* said, "Interest is not due on money secured by "a written instrument, unless it appears on the face "of the instrument that interest was intended to be "paid, or unless it is implied from the usage of trade, "as in the case of mercantile instruments." This ruling was approved of by *Park* J., in *Foster* v. *Weston*, 6 Bing 709, who suggested that the rule ought to be uniform in all the Courts, till the Legislature should alter it. In the same case decided in 1830, three years before the Act, *Tindal* C. J. said, "In the pre- "sent case there is no stipulation for interest on the "face of the contract. The instrument on which it is "sought to recover is not a commercial instru- "ment, nor one on which there has been any usage to "allow interest." And *Bosanquet* J. added, "The "instrument is not a mercantile instrument, though "perhaps originating in a mercantile transaction (it "was a *simplex obligatio*, a bond without a penalty), "nor is it one on which there is any usage for the "allowance of interest."

There are cases, however, quite independent of written contract, in which interest was allowed to be recovered, on evidence of usage in the particular trade to which the transaction referred. In *Eddowes* v. *Hopkins et al., Ex'ors of Harris*, Douglas 376, the plaintiffs were wholesale linen drapers, and the tes-

1862.

BANNERMAN et al. v. FULLERTON.

tator an American merchant, and it appeared to have been the usage of the American trade for merchants here to allow to their American correspondents twelve months' credit, and then to charge them five per cent for interest, and for the tradesmen here to allow the merchant fourteen months' credit, and then to charge five per cent. This was hardly disputed by the defendants, and Lord *Mansfield* held that, though by the common law, book debts do not of course carry interest, it may be lawful by the usage of particular branches of trade, or of special agreement; or in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it. Upon which the jury allowed the interest, and their verdict was upheld.

So in the modern case of *Orme* v. *Galloway*, 9 Excheq. 544, *Martin* B. received evidence on the part of the plaintiff of its being the mercantile usage to pay interest, at the rate of five per cent, upon the settled balance of merchants' accounts, and left the correspondence between the parties, in connection with the proof of mercantile usage, to the jury, who found that the interest was payable.

Supposing these cases to establish the plaintiff's right, it is certainly a startling proposition that the merchants of any particular city or town in the *United Kingdom*, should be permitted to create a usage for their own protection, inconsistent with the general law of the land. The *Manchester* dealer, upon this principle, has an advantage which does not extend to the *London* or the *Liverpool* merchant. The usage testified to by Mr. *Kenny* is not confined to the American trade, that is to the American colonial trade, as in the case from *Douglas*, but is claimed as a general usage, applicable to the whole business and trade of *Manchester;* and knowing, as we do, its prodigious extent, one would have thought, had such a usage been recognized in the mother country, that it would have found its way into some of the decided

cases or text books. I cannot help thinking, therefore, that if the question had been closely investigated, and the real meaning of the witness ascertained, it would have been found that he meant to speak of the transactions in which he had himself been conversant, and not of an established custom and usage giving the *Manchester* merchant a right, which the law withholds in other emporiums of trade. I am the more inclined to this opinion, because the witness says that the same usage prevails here. Now I know enough of the course of business in this Province to be assured, that though the usage to charge interest is well understood, and is the sort of usage which the witness doubtless and in perfect good faith intends, there is no such usage as supersedes the necessity of proving contract, a course of dealing or notice, nor has such usage ever been upheld in this Court.

In the present case, however, we must take the evidence as we find it,—a positive and clear affirmation of a usage of trade in *Manchester*, and going further than has been held sufficient in several of the cases. In *Pollock* v. *Stables*, 12 Q.B. 765, the proof as to usage was slight; but Lord *Denman* remarked that no objection to it had been raised at the trial, as no objection seems to have been raised here. In the language, then, of Chief Justice *Cockburn*, in *Clark* v. *Smallfield*, 4 Law Times Rep. N. S. 405, we must consider the custom as incorporated into the contract, and part of its terms. This disposes of the objection that the defendant ought to have notice of it. In *Pollock* v. *Stables*, the principal did not know of the usage, but was bound by it. And in *Bayliffe* v. *Butterworth*, 1 Excheq. 425, though the defendant was cognizant of the usage, two of the Judges seemed to think that fact immaterial. "A person," said Baron *Alderson*, "who deals in a particular market, must be taken to "deal according to the custom of that market; and "he, who directs another to make a contract at a par- "ticular place, must be taken as intending that the

1862.

BANNERMAN et al. v. FULLERTON.

"contract may be made according to the usage of "that place."

The other cases on the point of usage to which I have had reference, but which do not require a more particular examination, are to be found in 11 *Excheq.*, 405, 642, and in *James' Rep's.* 436.

Upon the whole, I am of opinion that the plaintiffs should have interest at five per cent., though I believe that if the facts had been fully ascertained, the rules of law, applied to those facts, would have entitled the defendant to our judgment.

BLISS J. I do not consider that the question in this case is at all affected by the *Revised Statutes* chap. 82, sec. 4. That clause gives interest in certain cases where it could not have been before recovered. It is copied from the English Statute 3 & 4 *Will.* 4, chap. 42, sec. 28. That, it is true, contains a proviso, "that "interest is to be paid in all cases in which it was "payable at the time of passing the Act;" and this proviso is not in our Provincial Statute; but it could only have been inserted in the former *ex abundanti cautela;* and without such provision, it is clear to me that interest recoverable in all cases theretofore would still have been so,—the object of the Statute being to extend the right to recover interest to those cases mentioned in the Statute, in which interest previous to the Statute could not have been recovered. And such, I take it, was equally the intention of our own Statute. The question, then, is, whether interest in the present case was recoverable before the Statute.

Although interest is not payable generally on goods sold, yet where the goods are sold to be paid for at a certain fixed day, whether interest from that day was recoverable has been a somewhat *vexata questio.*

In *Mountford* v. *Willes*, 2 B. & P. 337 (1800), the goods were sold on credit till *Christmas*, and, the jury having given interest, the Court refused to disturb

the verdict, saying that the plaintiff was entitled to interest from the time mentioned.

In *Gordon et al.* v. *Swan*, 2 Camp 429, note (1810), the goods were sold payable at six months, and the Court held that interest was not recoverable; that, if it was, it must be given in every case for goods sold. There, *Bailey* J., adverting to *Mountford* v. *Willes*, said that the Court of Common Pleas did not decide that interest ought to have been given, but merely refused to set aside the verdict, because it included interest,—a distinction which, I own, I do not clearly understand; for that would leave to the jury the decision of what is a question of law; nor, indeed, does such a distinction appear well founded from the case itself, for it is expressly stated, in the report, that the Court thought the plaintiff was entitled to interest from the expiration of the time of credit.

But immediately after the case of *Gordon* v. *Swan*, in the same year, it was held both in the King's Bench and Common Bench, that where goods were sold to be paid for by a bill at a certain day, and no bill was given, the plaintiff was entitled to recover interest from the day when such bill would have become due, upon the ground, it would seem, that the bill would have carried interest from that time. *Marshall et al.* v. *Poole et al.*, 13 East. 98 (*Nov.* 1810); *Slack* v. *Lowell*, 3 Taunton 157 (*July* 1810). And in both these cases the declaration was for goods sold and delivered only.

Now the distiction between these cases, and that of goods to be paid for at a day certain, seems very right. And so in the last of these cases just cited, *Lawrence* J. seems to have thought, for he asks: "Is "there not this distinction, that if goods are sold "without an agreed day of payment, the price shall "bear no interest; but where payment is to be made "on a day certain, does not the price bear interest "from that day?" And in the same case, *Mansfield* C. J. said: "The question is, where a person promises "to give a bill, does the law imply an engagement, in

1862.

BANNERMAN et al. v. FULLERTON.

"case no bill is given, to pay interest as if the bill "had been given?"

Now, where a person promises to pay for goods on a day certain, it seems to me that it might not unreasonably be implied also that he engages, if he does not do so, to pay interest after that time.

This point, however, of the claim of interest for goods sold, payable at a future certain day, must, no doubt, now be considered as settled by the express provisions of the Statute, and only recoverable in the cases there mentioned and provided for. But the case here goes beyond that. The question is not merely whether interest can be recovered upon goods to be paid for at a day certain; but whether it can be recovered under the usage proved, where the contract was made, to pay interest in such a case.

A person who deals at that place must be taken to be cognizant of that usage, and to contract with reference to it. And that being so, he impliedly undertakes that he will, according to that usage, pay interest, if he does not at the stipulated time pay for the goods.

Nor does the rule laid down by Lord *Ellenborough* in *DeHaviland* v. *Bowerbank*, 1 Camp. 50, by any means exclude the right to recover interest in this case. He says: "Interest ought to be allowed only in cases "where there is a contract for the payment of money "on a day certain, as on bills of exchange, promis- "sory notes, &c.; or where there has been an express "promise to pay interest, *or where from the course of "dealing between the parties it may be inferred that this was "their intention;* or where it can be proved that the "money has been used, and interest has actually been "made."

Now, a course of dealing, founded on the usage of trade, may certainly be comprised within the above rule.

In *Higgins* v. *Sargent*, 2 B. & C. 349, *Abbott* C. J. says: "It is now established, as a general principle, "that interest is allowed by law only upon mercantile

"securities; or in those cases where there has been "an express promise to pay interest,—*or where such* "*promise is to be implied from the usage of trade* or other "circumstances." *Holroyd* J. in that case does, it is true, say, that interest is only payable by the consent of the parties, express, or implied from the usage of trade (as in the case of bills of exchange) or other circumstances,—from which it may be supposed that he limited the usage of trade in this case to mercantile instruments; but the language of *Abbott* C. J. just cited, so far from thus limiting its meaning, seems necessarily to extend it beyond mercantile instruments, for he enumerates the two as distinct and different branches of the rule; nor does there seem to be any good reason why usage of trade should be so restricted in its operation.

In *Foster et al.* v. *Weston*, 6 Bing. 709 (1830), *Tindal* C.J. remarks that "the instrument on which it is sought "to recover interest is not a commercial instrument, "nor one on which there has been any usage to allow "interest"; but there the interest was claimed on a written instrument, and his observations had reference only to that; the general question as to the effect of usage of trade was not before the Court, and he had no occasion to refer to it in that more enlarged sense. The same observation is applicable to what was said by Lord *Tenterden* in *Page* v. *Newman*, 9 B. & C. 381, (1829), "That interest is not due on money secured "by a written instrument, unless it appears on the "face of the instrument that interest was intended to "be paid,—or unless it be implied from the usage of "trade, as in the case of mercantile instruments." He is speaking solely with reference to written instruments,—the action being brought upon one,—and his observations must be confined to the subject matter before him, as they evidently were.

Here the defendant has purchased goods at four months' credit, the question is, what is the meaning of such a contract, and the evidence is, that by the usage

1862.

BANNERMAN et al. v. FULLERTON.

of trade where the contract was made, they were to be paid for in cash at that day, with a discount if paid before, and interest if not then paid. The contract then must be taken to have been with reference to this usage, and must be governed by it. I do not see how its effect upon the contract can be avoided.

If usage of trade can give to certain mercantile instruments a right to carry interest, on what well-founded reason can it be said, that any other contract should not be construed by, and receive its import and meaning from the usage of trade regarding it, which prevails at the place where the contract was entered into? They all alike appear to fall within, and be governed by the old maxim, *in contractibus veniunt ea quæ sunt moris et consuetudinis in regione in qua contrahitur.*

But this point itself has been already expressly decided. In *Eddowes et al.* v. *Hopkins*, Dougl. 376, at the trial the only question was, whether the plaintiffs were entitled to interest on the value of goods sold by them to the testator. They were wholesale linen drapers, and the testator an American merchant, and it appeared to have been the usage of the American trade for merchants here to allow their American correspondents twelve months' credit, and then to charge them five per cent. for interest. This was hardly disputed, and his lordship (Lord *Mansfield*) held that though, by the common law, book debts do not of course carry interest, *it may be payable in consequence of the usage of particular branches of trade*, or of a special agreement, or in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it.

This last instance put by Lord *Mansfield* here, of oppressive delay, may be considered as warranted by later cases; but these do not touch the case of interest claimed under a usage of trade. It stands, indeed, on a totally different ground, being evidence from which an implied contract to pay interest arises.

DODD, DESBARRES, and WILKINS JJ. concurred. Judgment for plaintiffs. 1862.

BANNERMAN et al. v. FULLERTON.

Attorney for plaintiffs, *J. N. Ritchie.*
Attorney for defendant, *H. Blanchard.*

McGREGOR *versus* PATTERSON.

December 2.

REPLEVIN for cattle and goods. Avowry, that "previous to, and at the time of, the alleged "detention, in the plaintiff's writ and declaration men- "tioned, he, the plaintiff, was a ratable inhabitant "of the school district, called the *Big Island* School "District, in the county of *Pictou;* and the trustees of "said school district, legally appointed and acting, did "cause such and all necessary proceedings as are "required and specified in and by sec. 10, chap. 60 of "the *Revised Statutes*, for assessing the ratable inhabit- "ants of said district, for the support of a certain "school existing within said district, to be had and "performed; and the sum of fifteen pounds was duly "and legally voted by the said inhabitants, on the "29th day of *June* last, for the purposes aforesaid, and "was afterwards duly and legally assessed upon said "inhabitants by an equal pound rate on their real and "personal property, respectively; and the sum of one "pound five shillings and eight-pence, parcel of the "sum aforesaid, was assessed upon the plaintiff for "the purposes aforesaid; and the plaintiff wholly "neglected and refused to pay said rate, and the "said rate remaining due and unpaid, a warrant "of distress was duly issued by *William Smith*, "Esquire, one of Her Majesty's Justices of the "Peace for the county of *Pictou*, under and by "virtue of the Statute, in such case made and pro- "vided, and delivered to the defendant as constable "of said county, against the goods and chattels of the "plaintiff, on the 3rd day of *January* now last past;

Replevin will not lie against a constable for property seized by him under a warrant of distress for the non-payment of school rates under *Revised Statutes*, (second series), chap. 60, sec. 10, although such warrant be defective in not reciting that the collector had made the oath required to be made previous to the issue of such warrant, which oath, however, had in fact been made.

By *Young* C. J. The only remedy in such a case is by *certiorari*, or appeal to the Sessions.

Where fraud is relied on as a defence or as an answer to defendant's pleas, it must in all cases be specially pleaded. A school rate is not vitiated by the exclusion of female ratable inhabitants from voting against the rate.

By *Bliss* J. No action lies against a constable for the execution of a warrant, however defective, where the magistrate issuing the warrant has jurisdiction.

1862.

McGREGOR v. PATTERSON.

"and the defendant, as constable as aforesaid, and in "accordance with the requirements of said warrant "and of the Statutes in such case made and passed, "did take and detain the cattle and goods in the "plaintiff's writ mentioned, as for and in the name "of a distress, for the said sum of one pound five "shillings and eight-pence of a school rate, assessed "upon the plaintiff as aforesaid."

Pleas. 1. That no assessment was legally made for the support of a school under the Statute as alleged. 2. That there was no school district in the county of *Pictou* called the *Big Island* School District. 3. That the trustees of the said school were not legally appointed. 4. That "the trustees of the said district "did not cause such and all necessary proceedings, as "are required in and by the said Statute for assessing "the ratable inhabitants of such district for the sup- "port of schools, to be had and performed, nor was "any sum of money duly voted by said inhabitants "and assessed upon them." 5. That the ratable inhabitants of such district were not assessed legally. 6. That the sum of one pound five shillings and eight pence was not legally assessed upon the plaintiff. 7. That the said *William Smith*, Esquire, had no legal right or authority to issue a warrant of distress against the plaintiff. 8. That the defendant was not at the time aforesaid a constable. 9. That no assessment whatever made upon the ratable inhabitants of said school district was returned to general or special sessions as required by section 10, chapter 60 of the *Revised Statutes*.

At the trial before *Young* C. J. at *Pictou* in *October*, 1860, it appeared that a pair of oxen and a yoke, the property of the plaintiff, were seized by the defendant, under a warrant of distress, issued by *William Smith*, Esquire, a Justice of the Peace, which warrant did not contain the recital required by the Statute that the necessary oath had been first made by the collector.

The affidavit required had, however, actually been made by the collector. There was no proof of the

appointment of the defendant as constable, but it was shewn that he had acted as such. The notices calling the meeting which elected the trustees were not signed by the commisssoners of schools for the county, but by their clerk. Three or four ratable inhabitants of the district were not included in the assessment. A meeting was duly held under *Revised Statutes*, chap, 60, section 10, at which ten male ratable inhabitants of the district voted for assessment, and five such inhabitants against it; four males and four females who wished to vote against assessment were rejected, the former on the ground of their not possessing ratable property, and the latter on account of their sex. At the meeting which appointed the trustees, two of these rejected males acknowledged that they had no property, and no right to vote, and the other two had never been assessed for, nor paid rates or taxes of any kind, and were not known to possess any property. Of the four females, one was a minor, and another possessed no property. A copy of the assessment roll, and not the original, was returned to the sessions four months after the assessment was made.

The learned *Chief Justice* told the jury that the election of trustees was, in his opinion, legal; that he considered that the females were not entitled to vote; that the assessors having acted in good faith, the fact of certain ratable inhabitants or ratable property, being left out of the assessment, did not invalidate the whole; that the chairman and the majority of the meeting which authorized the assessment, had a right to reject the votes of such persons as had never been rated before, and as were not known to possess, or did not offer to prove that they had, ratable property within the county.

The jury found for the defendant.

A *Rule Nisi* had been granted to set the verdict aside and for a new trial, for misdirection, and on other grounds, which was fully argued in *Michælmas* Term, 1860, by *M. I. Wilkins, Q. C.*, and *J. W. Johnston*,

1862.

McGREGOR v. PATTERSON.

senior, Q. C., for plaintiff, and *A. C. McDonald* and the *Solicitor General* for defendant; and again in *Trinity* Term last, by *James McDonald* and *J. W. Johnston*, *senior*, Q. C., for plaintiff, and the *Solicitor General* and *Attorney General* for defendant.

The Court now gave judgment.

YOUNG C. J. This is the first instance where an assessment for schools at the instance of the majority of the ratable inhabitants, as authorized by sec. 10, chap. 60 of the *Revised Statutes*, has been brought under review; and if it is subject to the numerous exceptions that have been taken in this case, it may be safely asserted that no prudent man will ever repeat the experiment. That it is regarded with favor by the Legislature, and is to be looked upon, therefore, with a liberal eye, is plain from their having reduced the assenting number of rate-payers from two-thirds, as required by the Act of 1832, to one-half, and the object being highly beneficial, it is only to be regretted that the right thus conferred has been so rarely exercised. I was of opinion, therefore, at the trial, and I still think, that the same principle does not apply to these proceedings as to a statutable title, and that it is enough to shew a substantial and *bona fide* compliance with the law, though a very astute eye might detect some flaws or technical informalities. Were it not so, it would be next to impossible in the rural districts to frame a good poor rate, which depends upon the same principles under chap. 89, and still less a good assessment for schools.

This rule was applied to a borough rate in the case of *Jones* v. *Johnson*, 5 Excheq. 862. "In my opinion," said the *Chief Baron*, "it never could have been "intended that so many difficulties should be thrown "in the way of making a rate. We ought, therefore, "to give such effect to the words of the Statute, as "will best meet the exigencies of the case."

So also in dealing with a church rate, which is laid

upon nearly the same properties as a poor rate, Dr. *Lushington*, in the Court of Arches, 3 *Law Times Rep. N. S.* 418, expresses himself thus: "A statute is not, "as we all know, always obeyed, and in the case of "poor rates it is very often violated. It is averred "that the assessment is unequal and unjust. If the "assessment be substantially unequal, it must be "unjust and illegal. I have used the expression 'sub- "'stantially unjust,' because perfect equality is utterly "unattainable, and the law requires no such impossi- "bility."

The case would be very different, if there were management or collusion, or any of the infinite variety of matters, that amount to fraud. This was freely imputed at the trial, but the evidence, in my judgment, wholly failed; and besides, if the evidence had been excepted to, it would not have been received, because while the pleas in various shapes attack the legality of the proceedings, they are silent as to fraud. Now, it is a well-known principle, that in a Court of justice, fraud must be alleged as well as proved. The party who is called upon to defend himself from a charge which touches his moral standing, as well as his legal rights, must be duly notified, and have the opportunity and time for preparation. I will cite but two of the numerous cases that are to be found upon this point. In *Clarke* v. *Hougham*, 2 Barn. & Cres. 149, the Statute of Limitations was pleaded, and the replication was that defendant promised within six years. On the trial the jury found that a fraud had been practised, but the Court held that to take advantage of the fraud, there ought to have been a special replication; in other words, the charge of fraud must have appeared upon the record.

So in *Uther* v. *Rich*, 10 Adol. & Ellis 784, which was an action by the indorsee against the drawer of a bill of exchange, the second plea stated that the bill had been drawn and indorsed to one *Levy* for a special purpose, who, in fraud of that purpose, handed it to

1862.

McGREGOR v. PATTERSON.

one *Hunter*, and that *Hunter* handed it to the plaintiff not for good and valuable consideration, and that the plaintiff was not the *bona fide* holder. The replication was *de injuria*, and Lord *Denman* held at the trial that these pleadings put in issue nothing but the fact of a consideration having been given, and that the defendant was not at liberty to shew that the plaintiff knew of the fraud, that had been practised by the parties, from whom he received the bill; but should have pleaded that knowledge in distinct terms. This principle is also affirmed in our own Practice Act, sec. 74, and extended to all cases of *tort* as well as contract by the Acts of 1861, chap. 1, sec. 12. I intimated, therefore, at the trial, that fraud, even had it existed, as it had not been alleged in the pleadings, could not be proved, and that the whole question turned upon the true construction of the Provincial Acts, and the legality of the assessment and levy under the justice's warrant.

On the minor points that were insisted on at the argument in *Michælmas* Term, 1860, and at the rehearing in the last *Trinity* Term, I may remark that on the evidence it appears to me that the school district was duly established by the Board of Commissioners; that the notices signed by their clerk, and not with their own hands, were in compliance with the law; that the trustees and collector were duly appointed, and that the assessment was returned in sufficient time to the sessions.

I think also that the assessment was good, though there might be some ratable inhabitants and ratable property not included in it, and some persons rated who were not ratable. These objections were fit matters of appeal to the local authorities, who are the most competent to deal with them, and not to the Supreme Court, who would otherwise encourage and multiply litigious actions. It was objected, too, that the meetings under sec. 10, and the chairmen of these meetings had no power to reject persons who

tendered their votes, whether these persons had votes or not; but the law says that only the ratable inhabitants shall vote, and there must be a power somewhere to discriminate and to determine who are and are not entitled; and that power, as it seems to me, must reside in the majority and in the chairman representing that majority, and must be upheld, where it is *bona fide* and honestly exerted.

A more material question touches the right of women, being of full age and possessed of ratable property, to vote at these meetings. This question is not without difficulty, and much might be plausibly and eloquently said on both sides. There is no doubt that the words "ratable inhabitants" will comprehend both sexes, and that the property of women is ratable, who ought, therefore, it may be said, to have a right to be present, and to vote at all meetings for the support of the poor and of schools. But if this doctrine prevail, women may be called upon by the same rule to fill many offices, for which their domestic duties, their retiring modesty, and the delicacy of their sex, wholly unfit them. This pretended extension of their privileges would be a burden and a snare, in place of a benefit. It is true, that in the case of *The King* v. *Stubbs*, 2 Term Rep. 395, it was decided seventy-four years ago, that a woman might be appointed an overseer of the poor, it being proper, said the Court, in that instance, from the necessity of the case, and there being no danger of making it a general practice. *Ashurst* J. asked, whether there was any thing in the nature of the office that should make a woman incompetent, and the Court thought there was not. But, however it may be in *England*, this Court, I should hope, would have no hesitation in pronouncing a woman incompetent for an office, one of whose duties it is to take charge of cases of bastardy. If the older cases cited in *The King* v. *Stubbs* are to be accounted law at this day, a woman may be appointed the governor of a workhouse, the gaoler and keeper

1862.

McGREGOR v. PATTERSON.

of a prison, a returning officer, and a constable. Nay, if the example of *Ann*, countess of *Pembroke*, is to be followed, she may be Sheriff of one of our counties, exercising the duties of the office in person, and among these duties, when need comes, the execution of a criminal. I am glad for my part that these masculine dames do not appertain to modern times, when the tendencies of public opinion, and a just sense of the true position and the legitimate influence of woman run in the opposite direction. We adjudicate upon the rights and the reputation of women in Courts of Justice, but do not admit them upon juries. We tax their property, but exclude them from Parliament, and from the exercise of the elective franchise, though there is nothing in the law which distinguishes a male from a female elector claiming a right of property. No judicious friend of the sex would involve them in the turmoil, the bodily fatigue and the angry passions of an election, and if we may judge by the present case, there may be almost as much heat, and the danger of as much violence, at the assessment of a school rate, as at the holding of a poll. This is a question of construction, and I am satisfied that our Legislature never intended to introduce women into such scenes, or to confer upon them a right of voting which would only operate to their hurt. *Cushing*, in his *Parliamentary Law*, tells us that in the Constitutions of all the *United States* except *Georgia*, women are impliedly excluded from the right of suffrage by the use of descriptive words in the affirmative, which restrict it to persons of the male sex; but in none of them are women expressly excluded by negative words. Yet they are not permitted to vote, though it used to be the boast of the *United States*, that in no part of the world were the feelings and the rights of women more scrupulously guarded. In *Lieber's Political Ethics*, there is a passage from *Guizot*, defending the exclusion of women on philosophical grounds, in which I entirely concur. I am of opinion, therefore,

that their votes in this case were properly rejected, and that the verdict for the defendant ought not, on that account, to be disturbed.

Here I might pause, as, indeed, I had done after the first argument; but the second having been had by order of the Court, that the meaning of our Provincial Statute might be more thoroughly considered, I have now to enquire into the nature of a general warrant of distress, and its effect upon the action of replevin.

The 10th section of the School Act having provided that "all rates thereunder shall be collected, and other "proceedings had in relation thereto, as prescribed in "case of poor rates,"—the collector made oath in writing, as required by chap. 89, sec. 25, whereupon the Justice issued a general warrant of distress, according to the form in that chapter, except that he omitted in the recital the fact of the oath having been made. This omission, as it would seem from the older cases in *Coventry & Hughes Digest*, 860, 994, 996, and as it was held in the case of *Day* v. *King*, 5 Ad. & El. 366, invalidates the warrant, which must be good on the face of it, and which would not therefore in this case have protected the defendant, had it been attacked in the pleadings. The plaintiff, however, in his seventh plea, having contented himself with averring that the justice "had no legal right or authority "to issue a warrant of distress against the plaintiff as "alleged," without impeaching or pointing out the informality of this particular warrant, we must account it good for all the purposes of this argument.

Two questions, therefore, arise: Does the Act give the magistrate jurisdiction? And had the plaintiff an opportunity of appeal before the magistrate was applied to? These are very material questions, for it was held in *Marshall* v. *Pitman*, 9 Bing. 595, that where the magistrate had jurisdiction, and the plaintiff had an appeal to the Sessions, he could not maintain replevin. See also 10 *Q. B.* 880, *El. Bl. & El.* 256.

Now, the position of the magistrate issuing a war-

1862.
McGREGOR v. PATTERSON.

rant of distress in *England*, is totally different from his position in this country. In *England*, he has a judicial discretion, and must summon the party; here, he is merely a ministerial officer, and a summons is neither authorized nor required. In *Harper* v. *Carr*, 7 Term Rep. 274, Lord *Kenyon* says: "In the instance of "granting a warrant of distress, the justices exercise "a discretion after inquiring into the circumstances "of the case. It is an essential rule in the adminis- "tration of justice, that no man shall be punished "without being heard in his defence; the party must "be summoned before a warrant of distress is granted, "as the Court of King's Bench, decided in *Rex* v. *Benn*; "and on that summons many circumstances may appear "to shew that a warrant of distress ought not to be "granted." So in the case of *Skingley* v. *Surridge*, 11 M. & W. 514, the Court of Exchequer declared that in issuing a warrant of distress, the justices acted judicially. On this principle, it was held in the *Governors of the Bristol Poor* v. *Wait*, 1 Ad. & Ell. 264, that replevin would lie against the overseers of the poor, for levying a rate on the plaintiffs in respect of property which they did not occupy,—a rate which the magistrate had enforced, after summoning and hearing the plaintiffs, but which the overseer had no power to make. Under the particular circumstances of this case, the defendants had judgment; but that does not affect the principle established by it.

As illustrating the practice in *England*, I may here refer to two cases brought before the Queen's Bench, as appears by the *Law Times* of 15th *November* last, shewing at once the control which the Court exercises over Justices of the Peace, and the protection it affords them. In *Regina* v. *Richmond and others* there were two rules calling on certain justices of *Stockton-on-Tees*, to shew cause why they should not issue warrants to levy by distress (1) a fine of ten pounds imposed on one *Bennington* for refusing to act as auditor under the Municipal Act; and (2) a fine im-

posed on one *Craggs* for refusing to act as assessor. In this case, as I take it, the justices before incurring the responsibility of issuing warrants, had referred themselves to the judgment of the Court, who, upon a hearing, made the first rule absolute, and discharged the second.

In *Reg.* v. *Blackburn et al, Barrow* moved for a rule calling on two justices of *Margate* (*Kent*), (just as a counsel might move here under ch. 150, sec. 6), to issue their warrant to levy on the goods of one *Crofts*, a church rate for one shilling and eight pence, and costs seventeen shillings and six pence. At the hearing before the justices three objections were made to the validity of the rate but overruled. The justices were willing to grant the warrant, but required the protection of the Court who granted a rule *nisi*.

Now, in this Province, with a view to an economical and a speedy collection of rates, by a process first introduced into our law in 1838, 1 *Vic.* chap. 35, and having no example that I am aware of in *England*, a process which, upon the whole, I have no doubt, works well, but may produce great individual wrong, and is certainly in violation of that "essential rule," which Lord *Kenyon* praises so emphatically: the justice is bound, upon the mere oath of the collector, to issue a general warrant of distress for county, poor, and school rates against all the defaulters named in the affidavit, without summons or inquiry, and exercising no judicial discretion whatever. Whether the Legislature did wisely or not in giving such a power, is not the question. They have given it in the most explicit terms; for, by the 25th section of chapter 89 *Revised* "*Statutes*, when the oath is made, the justice shall "forthwith issue a general warrant of distress against "the several defaulters in the form in the schedule;" and having done so in this case, his jurisdiction and power, or rather the obligation, incumbent on him to issue the warrant, cannot be denied.

Wilson v. *Weller*, 1 Brod. & Bing. 57, is in point.

1862.

McGREGOR v. PATTERSON.

That was an order under the Statute of Laborers, 20 *Geo.* 2, chap. 19, and *Dallas* C. J. said the question is, whether the magistrate has jurisdiction? Now, he has jurisdiction, on complaint made to him on oath, to inquire whether a servant has wages due to him from his master, and, having exercised that jurisdiction in this case pursuant to the Statute, it was held that replevin would not lie. "Wherever," says *Parke* Baron 2, *Excheq.* 360, "a statute gives to certain "persons the power of adjudicating upon a particular "matter, their decision excludes all further inquiry."

Was any wrong, then, done to the plaintiff in this case, — in other words, had he any redress against the rate, if wrongfully imposed? Now, independently of the remedy by *certiorari*, I can have no doubt that he had an appeal to the Sessions. By the 13th, 26th and 28th sections, an appeal is granted to any person who shall feel aggrieved, or may think himself overrated, and the justices may relieve appellants as they shall think fit. It was contended at the argument that the appeal did not extend to a party who ought not to have been rated at all, — a construction too technical and refined to be favored by this Court in dealing with a beneficial remedy. In the English Acts 49 *Geo.* 3, chap. 99, sec. 24, and chap. 161, sec. 10, which came under review in the case of *Allan v. Sharp*, 2 Excheq. 363, an appeal was given to any person who should think himself overcharged or overrated, and the same objection was urged. "It is ar-"gued," said *Parke* B., "that the wording of the clause "shews that the Legislature meant to apply it only to "persons liable to be rated, but rated for too much." "But I think the word 'overrated' (the very word in "our Act) ought not to receive the narrow construc-"tion attempted to be put upon it. Though, in its "strict sense, 'overrating' means rating for more than "ought to be, yet it may also mean rating when the "party ought not to have been rated at all. If the "latter be not the meaning of the word in the statute,

"this absurdity would follow, that provision is made "for the case of an excess in rating, and none what- "ever for a rate altogether unjust."

The cases of *Hutchins* v. *Chambers*, 1 Burr. 580, and *Durrant* v. *Boys*, 6 T. R. 580, shew that the party who waives his appeal is excluded from an action. *Marshall* v. *Pitman*, already cited, proceeds upon the same principle, that the domestic forum is in the first instance to be resorted to, and that the time of the superior Courts is not to be occupied with matters, which may be disposed of in a cheaper and more expeditious form.

There is one other view of this case which I desire to take, as we are examining the foundations and settling the construction of our Provincial Statutes.

The Imperial Act 11 & 12 *Vic.*, ch. 44, for the protection of magistrates, repeals so much of the 24 *Geo.* 2, ch. 44, as relates to actions against Justices of the Peace, leaving the sixth, and part of the eighth sects. unrepealed, which are applicable to constables and other subordinate officers. These two sections are the origin of our law, chap. 151; and chap. 150, though it does not literally follow, very closely pursues the 11 & 12 *Vic.*, ch. 44.

In the case of *Weaver* v. *Price*, 3 B. & Ad. 409, magistrates were held liable in trespass for granting a warrant to levy poor rates, the party distrained on having no land in the parish in which the rate was made. The party when summoned did not appear before them to object that he had no ratable property, and, as their counsel pertinently asked, how were they to know that he had none? Yet, as he had none, and was not in fact ratable, it was held that the defendants had no authority to issue the distress, and a verdict for the plaintiff was sustained.

This and other cases of the same stamp, involving an obvious injustice, led to the legislation which we have copied in chap. 150. Where a poor or county rate shall be made, and a warrant of distress shall

1862.

McGREGOR v. PATTERSON.

issue against a person rated therein, the fifth section borrowed from the fourth section of the English Act, which, however, is confined to poor rates, enacts that no action shall be brought against the justice who granted the warrant, for any irregularity or defect in the rate, or by reason of any such person not being liable to be rated. It appears from the language of the first section that this comprehensive and novel provision in the fifth must extend to actions of replevin, as well as to any other action; and in an action of tort, where the constable has complied with a demand made and given a perusal and copy of his warrant, he is also exempt, although the magistrate may have had no jurisdiction, so that the party, distained on by a warrant issued in good faith but illegal, has no redress against either.

Here comes the peculiarity and the hardship of this case. It is an action of replevin, and being so, it is urged that the usual demand not being required and not having been made of a perusal and copy of the warrant, the constable loses the benefit of the Statute, Assuming this to be law (as it has been held in the more recent cases, which admit, I think, of some doubt), it follows, that when the warrant is irregular or defective, the constable is liable in the replevin when the magistrate is not. Chapter 150, it is clear, protects the superior, who has all the advantages of a higher position, and is presumed also to have higher intelligence. And chap. 151, it is said, does not protect the inferior officer, whom the law compels to obey the warrant, and indicts him for refusing to execute it, (2 *Starkie on Evidence*, 433.) "It would be absurd," said Lord *Denman*, 3 *Ad. & Ellis* 444, "that an officer "charged with the execution of a warrant should have "to pause and consider whether it was regularly issued "or not." *Littledale* J., in the same case, said: "It "does not belong to him (the officer) to say, 'there is "'an error in the proceedings; therefore, I will not "'execute the warrant'." And Mr. Justice *Williams*

said, "It would be wild work if the officer were "entitled to scan the warrant delivered to him, for "the purpose of ascertaining whether it was regular "or not under the circumstances of the case."

These are known principles, and it is also a leading maxim of the law to protect its own officers when they do not abuse their power, and act in good faith and in obedience to its commands. The constable in this case was indemnified, but he was not entitled to an indemnity, and was compellable to act without it. I ask, then, shall an officer so situated, be liable to an action of replevin, where damages and costs may be recovered, when neither the party who set the magistrate in motion, nor the magistrate himself can be touched? This would be a violation of the first principles of justice; and on this ground alone, I should have held that the action did not lie, but the other grounds I have stated are conclusive, and therefore I am of opinion that the rule for a new trial should be discharged.

BLISS J. The questions, on which the argument before us principally turned, were those raised by the pleas as to the validity of the proceedings in making the school assessment, and the consequent legality of the rate itself, and whether replevin would lie in such a case.

The expression which is sometimes met with, that this action will not lie, is rather ambiguous. It may mean that such an action cannot be resorted to; that the law does not give that peculiar remedy at all in certain cases. Thus, when it is said that replevin will only lie for goods and chattels, it means that the remedy by replevin is confined to these, and so it will not lie for things affixed to the freehold, in which case also trover in the same sense is said not to lie. And so at one time, when it was supposed, but erroneously so, that replevin only lay in the case of distress for rent, the meaning of the expression was

1862.

McGREGOR v. PATTERSON.

that the law did not give such a remedy in other cases.

But, in other places, the same expression refers not to this particular form of action, but rather to its being maintainable under the circumstances of the case, which afford a good defence, and answer not only to this, but to any other form of action. As *Alderson* B. remarked in *George* v. *Chambers*, 11 M. & W. 149, "In many cases, the reasonable meaning of the ex- "pression that replevin will not lie is, that there is "matter which may be pleaded in answer."

The case just cited, and many others, among which *Allen* v. *Sharp*, 2 Excheq. Rep. 352; *Jones* v. *Johnston*, 5 Excheq. Rep. 875; *Mellor* v. *Leather*, 1 E. & Bl. 628, and *Ring* v. *Brennan*, in this Court, James' Rep. 20, have clearly established the general principle, that wherever goods have been illegally or wrongfully taken, replevin will lie. The later case of *Mennie* v. *Blake*, 3 Ellis & Black. 842, may, it is true, appear to throw some doubt on this point. I do not, however, understand the judgment of the Court in that case, which was given by *Coleridge* J., as at all impugning, much less overruling the previous decisions of *George* v. *Chambers*, 11 M. & W. 149, and *Mellor* v. *Leather*, 1 E. & Bl. 619; but as merely expressing a doubt whether the action of replevin was not originally confined to the case of distress. His own words are: "From a review of these (the cases cited) and other "authorities, which might be added, it may appear "not settled whether originally a replevy lay in case "of other takings than by distress."

But still the question in all such cases will be as it is in the present, whether there has been a wrongful taking, and that will depend upon the legality of the warrant of distress, or in other words upon the jurisdiction of the magistrate who issued it—his legal right and authority to do so,—which is the issue raised under the seventh plea in this case.

This authority and jurisdiction under the decisions

of the Courts in *England*, where the distress is made for a poor rate, depend on the validity of the rate itself. These decisions are numerous, several of which were referred to at the argument, and were relied on by the one side or the other, in support of their several views. The apparent discrepancy between them—for there is no real conflict—may be easily explained.

Where those, by whom a rate has been made, in respect of which a distress has been levied, had jurisdiction over the subject, and an appeal is given, there the party complaining of the rate must resort to the appeal, and cannot maintain replevin, for he can maintain no action whatever for the taking of the distress.

But where there has been an entire absence of jurisdiction, or what is the same thing, an excess of jurisdiction on the part of those who made the rate, there the party complaining has no occasion to appeal, but may bring replevin, or may sue in trespass for the distress taken.

This was the principle upon which *Milward* v. *Coffin*, 2 Wm. Black. 1330, one of the oldest cases on the subject, was decided. The plaintiff there had been rated in respect of property which he did not occupy, —that was an excess of jurisdiction in the justices who made the rate, the rate itself was therefore a nullity, and so replevin was held to lie.

The same principle wil be found to govern all the numerous cases on the point. Thus in *Marshall* v. *Pitman*, 9 Bing. 601, *Tindal* C. J. says: "The first "question is, whether the plaintiff can maintain this "action (replevin), not having appealed to the Quar- "ter Sessions against the rate; and that involves the "question, whether the magistrates had jurisdiction "to make the rate; because, if they had, that rate was "the subject of appeal." The Court in that case held that the plaintiff, as an inhabitant, was liable to be placed on the rate, although his ratable property

1862.
McGREGOR v. PATTERSON.

turned out to amount to nothing. The justices were, therefore, considered to have had jurisdiction over the matter, and so replevin for the distress would not lie.

The distinction, then, between the two cases was just this,—in *Milward* v. *Coffin*, the justice, in making the rate, had no jurisdiction over the plaintiff, except as an occupier, and *that* he was not; in *Marshall* v. *Pitman*, their jurisdiction depended in like manner on his being an inhabitant, which he was.

Durrant v. *Boys*, 6 T. R. 580; *Weaver* v. *Rice*, 3 B. & Ad. 409, and other cases, are all referable to the same principle. In some of the cases, the question related to replevin; in others to trespass; but the form of the action is immaterial,—the sole question being, whether any action could be maintained; and so it was put by *Parke* B. in the analogous case of *Allen* v. *Sharp*, 2 Exch. Rep. 363.

If the rate was made without jurisdiction or authority, and so was a nullity, the justices who issued their warrant of distress to enforce it, had themselves no jurisdiction or authority to do so, as is said in the *Governors of Bristol Poor* v. *Wait*, 1 A. & E. 281; and the reason is stated in *Morrill* v. *Martin*, 3 M. & Gr. 593, by *Tindal* C. J. citing from *Nichols* v. *Walker*, Cro. Car. 394; "because the magistrates have but a parti-"cular jurisdiction to make warrants to levy rates "*well assessed.*" And then neither the magistrate who issued the warrant, nor the officer who executed it, are protected; and so the action either of replevin or trespass lay against them. Hence it is that the officer, who justifies or avows under the warrant of a justice, is under the necessity of shewing that he had jurisdiction to issue it; and that depends in the case of the poor rate in *England* on the legality of the rate itself, as appears from the cases on the subject, and which thus become there the principal matter for inquiry.

And so it would be here, and we should be obliged to take up the various objections which have been

urged against the validity of this school rate, and decide upon them for the purpose of ascertaining whether the present action can be supported, if the analogy between the proceedings for enforcing the rate by warrant of the justices in *England*, and those under our own Provincial Statute, is so perfect and complete, that the decisions with respect to the one are applicable to the other, and must govern the present case.

The collection of school rates is by our statute directed to follow the mode and proceedings prescribed by another statute with regard to poor rates, and we must therefore see how far these agree with or differ from the Statute of *Elizabeth*, by which the proceedings in *England* are governed.

Now, by this Statute, 43 *Eliz.*, ch. 2., sec. 4, it is enacted that it shall and may be lawful for the present or subsequent church wardens and overseers, or any of them, by warrant from any two justices, one whereof is of the *quorum*, to levy the sums assessed, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale.

There the very persons, by whom the rate has been made, are those who are to obtain the warrant for levying it; and that, as it would seem, upon the mere application to the justices without any affidavit of its being due or other circumstances. The justices must then necessarily satisfy themselves of the legality of the rate, and of all other matters which give them jurisdiction, before they issue their warrant, which the statute does not make it imperative on them to do, simply upon the application of the church wardens or overseers; it merely permits these to apply for it; and the justices in this matter, as it has been held, exercise judicial functions, and must proceed by summons against the party, before they can issue their warrant of distress. *Rex* v. *Benn*, 6 T. R. 198. *Harper* v. *Carr*, 7 T. R. 270.

1862.

McGREGOR v. PATTERSON.

Our early Provincial Statutes followed pretty much the statute of *Elizabeth*, enacting that, if any person so assessed shall refuse or neglect to pay his assessment, the same shall and may be levied by warrant of distress from any one of Her Majesty's justices of the peace of the township or county where such person shall reside.

But the later statute now in force, (*Revised Statutes* ch. 89 sec. 25), has provided a special, and it would seem a more prompt and speedy mode of levying these rates. It directs that separate suits shall not in future be brought against defaulters, but every collector shall make a general return to a justice within the township, or if none reside there, to any justice of the county, of every person on his list who, after demand made, shall not have paid his rate; and the collector shall make oath in writing before such justice, setting forth the name of every defaulter, the sum assessed, that the demand has been made, and that the rate is unpaid; and thereupon such justice shall forthwith issue a general warrant of distress against the several defaulters, in the form in the schedule, directed to a constable, not being such collector, &c.

Now, observe how particular and explicit are these directions, and the whole proceedings here enjoined to enforce the unpaid rates by warrant of distress. A disinterested person, not one employed in making the rate, but one wholly unconnected with it—a collector appointed specially for the purpose—is to make a return to a single justice, (for one is quite sufficient for the simple duty which he has to discharge,) of all persons who have not paid their rates, and this list of defaulters he is to verify upon oath; and the statute purposely and expressly departing from the former course of proceeding, which, in conformity with the decisions under the English statute, commencing with a summons against each defaulter, was in the nature of a separate suit against each, now

directs that such separate suit shall no longer be brought, but that, upon the collector making the prescribed oath, the justice shall forthwith issue a general warrant of distress against all the defaulters.

A summons to the defaulter is thus in effect taken away by the statute. The justice is here not to enquire and adjudicate, and then issue his warrant, which is in the nature of an execution, but the statute makes the facts stated in the collector's oath, which include a demand on the defaulter for the rate in question, as the sole and sufficient ground work and authority for issuing the warrant. He has thus no judicial functions, strictly so called, to exercise. He has but a simple duty to perform, which the statute not merely empowers him, but makes it imperative on him to do; "he shall thereupon forthwith issue "the warrant."

It is not for us to question the propriety or wisdom of the Legislature, in giving this short and summary remedy for enforcing the rate. It certainly seems an extraordinary one, nor do I know that any similar power is to be found in the statutes of the Imperial Parliament. But the terms and language of our statute are too clear and plain to doubt for a moment its meaning and effect. I cannot see how any thing, in the shape of jurisdiction in the justice to issue the warrant of distress in such a case, can be more clearly and expressly defined, or more perfect and complete. That being so, the consequences, which result from acting in obedience to his warrant in all other cases, must necessarily follow in this.

It is a well settled principle that "wherever a "Court or justice who issues a warrant has jurisdic- "tion, no action lies against him or the officer who "executes the warrant, even though the justice pro- "ceeds *inverso ordine*, or erroneously; but it is other- "wise if he has no jurisdiction, for then the whole is "*coram non judice*." *Case of the Marshalsea*, 10 Co., 76f.

The warrant in this case does not certainly follow

1862.

McGREGOR v. PATTERSON.

the form prescribed in the schedule, but omits a very important part of it, and of the directions in the Statute itself—that is, the oath of the collector, and for this I think the warrant is bad, as perhaps it may be on other grounds; but even if that be so, still the officer is protected who acts under it. *Webb* v. *Batchelour*, 1 Vent. 273. There the justice had not first summoned the party as he ought, but the officer who made the levy under it was protected, for he is not to judge of it, but to execute it.

Similar to this is the language of *Littledale* J. in *Painter* v. *Liverpool Gas Company*, 3 A. & E. 446, "it "does not belong to the officer to say 'there is an "'error in the proceedings, therefore I will not ex-"'ecute the warrant'."

So in *Morse* v. *James*, Willes 128, it is said by *Willes* C. J., in giving judgment, "It has always been "holden that a constable may justify, under a jus-"tice's warrant, in a matter wherein the justice had a "jurisdiction, though the warrant be never so faulty; "but that if a justice of the peace make a warrant to "a constable to arrest a man in an action of debt "(which is put *exempli gratia*), such warrant will not "justify the constable, because he was not obliged "to obey it, and must take notice at his peril that "it was in a matter concerning which the justice "had no jurisdiction."

This principle equally applies to an action of replevin as to any other, as may be gathered from *Allen* v. *Sharp*, 2 Ex. Rep. 352, *Wilson* v. *Weller*, 1 B. & B. 57, and other cases.

As I am of opinion that on these grounds the defendant is entitled to our judgment, it is unnecessary that I should express any opinion on the other points of the case.

DODD J. concurred generally in the opinion that the action of replevin, under the circumstances of this case, would not lie.

1862.

McGREGOR v. PATTERSON.

DESBARRES J. doubted whether, under the existing law, females having ratable property were disqualified by reason of their sex from voting at meetings called for the purpose of adopting, or rejecting the principle of assessment for the support of schools; but he concurred in the opinion that the present action could not be maintained, inasmuch as the defendant, being a constable, was bound to execute the warrant of distress issued by the magistrate, although the warrant itself in consequence of its not reciting the collector's oath, was defective. The magistrate having jurisdiction and a legal right to issue a warrant of distress, it was not for the defendant to question its legality; it was simply his duty to execute it, and having executed it, it was a sufficient justification for what he had done.

Assuming, however, the assessment to have been defective and bad, (though he did not think it was), the plaintiff, according to the ruling of Lord *Mansfield*, in *Hutchins* v. *Chambers*, 1 Burr. 580, had misconceived his remedy, which ought to have been by an appeal to the sessions, as pointed out by chap. 60, sec. 10 of the *Revised Statutes*. That case was recognized to be law in *Durrant* v. *Boys*, 6 T. R. 580, in which Lord *Kenyon* observed that *Hutchins* v. *Chambers* was an authority which had convenience, as well as reason and law, for its foundation. Both of these cases appeared to be decisive of this, shewing that neither trespass nor replevin would lie, nor could, nor ought to be adopted under the circumstances of the present case.

WILKINS J. The defendant in his avowry, after setting out proceedings duly conducted, as he alleges, for assessing the inhabitants of a certain school district, concludes by stating that the sum of one pound five shillings and eight pence, parcel of the gross sum rated, was assessed upon the plaintiff; that because it remained unpaid, *a warrant of distress was duly issued*, under the statute, and delivered to the

1862.

McGREGOR v. PATTERSON.

defendant, as a constable of the county of *Pictou*, against the goods and chattels of the plaintiff; and that the defendant, as such constable, and in accordance with the requirements of the said warrant, and of the statutes in such case made and provided, did take and detain, &c., in the name of a distress for the said sum, in respect of a school rate assessed upon the plaintiff as aforesaid. To this avowry the plaintiff pleads nine pleas, the first denying the allegation of an assessment having been legally made, and the others traversing in effect generally the successive proceedings referred to in the defendant's general allegation, that all acts required by the statute were duly performed in order to establish a legal assessment, and to authorize the warrant. I do not perceive, however, that there is any issue that brings into question the legality of the particular warrant.

The allegation in the plaintiff's plea to the avowry, viz., "that the J. P. had no authority to issue *a* "*warrant*, as alleged," is of very different import from an allegation (had such been made), "that the "particular warrant was not duly issued by the J. "P. as alleged," (and that, by the way, is the only allegation in the avowry.) So essentially different are they, that, under the proof, the issue on the former must have been found for the defendant, seeing that the oath was made, on the making of which the J. P. is commanded by the legislature to issue *a warrant*, whilst under the latter the finding must have been for the plaintiff, inasmuch as a warrant in the form of that before us certainly *was not duly issued.* But, in the view that I take of this case, the defect in not reciting the oath, which is apparent on the face of the warrant, is immaterial, because I think that the magistrate who issued it is shown, by proof of the oath having been taken, to have had full statutable authority to issue it, and if he had, a defect in it could not prejudice the constable, who was bound to obey its mandate.

1862.

McGREGOR v. PATTERSON.

A primary question arises, and that is, "Will "replevin lie under the facts and law before us?"

The 23rd and 25th sections of chapter 89, respecting appeals, give the sessions power to relieve for an excess of rate, and that, perhaps, involves authority to relieve where the party appealing is not a legal subject of the rate. (*Allen* v. *Sharp*, 2 Exch. 352.) It may be, however, that that Court could give to this defendant no effectual relief. But even then he would not, as it appears to me, be without a remedy, for the rate itself might have been removed by *certiorari* into this Court, and there its nullity (if it be void) might have been declared. The reason why it has been held that a poor rate could not be so removed would not apply to this assessment, for *intellectual cravings* are not so urgent as to prevent the operation of a *certiorari*. If, however, the Legislature has not made provision for quashing this rate, if it be bad, still, if replevin will not lie under the circumstances, I am bound, irrespectively of the consequences of unadvised legislation, to say that this form of action is untenable. I proceed, therefore, to enquire whether it can be maintained.

This defendant has, in his avowry, stated many things that it was unnecessary for him to state. Had he merely avowed the taking under a warrant, directed and delivered to him as a constable to be executed, (setting out the warrant), alleging that it was duly issued by E F a justice of the peace of the township of ———, in the county of *Pictou*, (being that township in which was situate the school district, in respect whereof the rate in the warrant mentioned was made), before which said justice before the issuing of the said warrant, one A B being a collector (setting out his official character as required by the statute) had appeared, and made oath in writing that the defendant was assessed in the sum of one pound five shillings and eight pence, for a certain school rate (setting it out), that the said collector had made demand on the

1862.

McGREGOR v. PATTERSON.

defendant therefor, and that the said sum remained unpaid by him. Had the defendant, I say, simply avowed this, no lawyer, looking at our statutes that govern this case, would have ventured to demur to such avowry, although *it does not allege that the rate was a legal one as regards the defendant.*

If he would not, and such avowry would (as I am sure it would) constitute a justification of the taking, how could this action try the validity of the rate mentioned in the warrant?

Now, contrast with this the avowry of the collector and the bailiff, as we find it set out in *Bardons et al.* v. *Selby*, (in Error in Exch. Chamber), 1 Cr. & Mees., 500.

That avowry will show what those defendants in the Court below, were advised to be necessary to set out for their justification of a taking, under a warrant for collection of a poor rate in *England;* and will show also how a declaration in replevin, in such a case, under English laws, demands an avowry *which necessarily puts in issue the validity of the poor rate;* and this accounts for the efficacy of replevin in *England* for that purpose.

That avowry states the inhabitancy of plaintiff, *his ratability by law, and in respect of his occupation;* that the rate was duly ascertained, made, signed, &c.; that notice of it was given, and that it was published according to the statute; that by it plaintiff was duly rated in respect of such occupancy and inhabitancy; that *Bardons*, as collector, gave him notice, and demanded, &c.; that plaintiff was duly summoned to appear &c. to show cause why he refused payment; that he appeared and showed no cause; that a warrant was duly made under the hands and seals of two justices, and directed to *Bardons* as collector, requiring him &c., and was duly delivered to him to be executed, by virtue of which he, as collector, avowed, and the other defendant, as his bailiff, acknowledged the taking of the distress, and prays judgment and a return &c.

Replevin has thus always been in *England* a form of action whereby the legality of a poor rate could be tried. The very form of the pleadings effects that result. Its efficacy for that purpose is recognized rather than created by the 19th section of 43 *Elizabeth*. *George* v. *Chambers et al.* decided that it is maintainable wherever goods are taken under a pretended authority. Lord Chief Baron *Gilbert*, says, "In cases "where there is no jurisdiction, the goods may be "replevied," which implies that in his opinion *that* action cannot be supported where the magistrate issuing the warrant *has jurisdiction*, and later authorities confirm that view.

In applying English cases we must carefully compare our laws with those of *England* in reference to the mode of enforcing a poor rate. The difference between the two will be found to regard the agencies employed, and the responsibilities of the agents. In *England* the parish officers not only make the rate, but are charged with its collection. This last they effect through the intervention of two magistrates, from whom a warrant for collection directly proceeds. In the present state of the English law these officers, (responsible themselves if it turn out that they have no jurisdiction,) act with the concurrent responsibility of the parish officers as to the existence of a valid rate. The former are protected from actions by the 11 & 12 *Vic.*, ch. 44, precisely as our statute, ch. 150, sec. 4, extends protection to justices of the peace in *Nova Scotia*. At this day, however, in *England*, the parish officers have no statutable immunity from the consequences of procuring a warrant to be issued to enforce an *illegal rate*. It follows, then, that *there* replevin still operates as an effectual mode of testing the validity of a poor rate, to collect which a warrant of distress is issued.

Our legislative provisions, however, are in striking contrast with this; and, under them, the party whose goods are taken by the *statutable warrant* even where

1862.
McGREGOR v. PATTERSON.

the rate is void, has, as I construe the law, no remedy whatever by means of the action of replevin, (I might add by means of any other action.)

Under our statutes the overseers, though charged with the support of the poor, act not at all *in collection of the rate.* The only agencies employed for that purpose are those of a collector, of a justice of the peace, and of a constable. The collector is required to state on oath to the justice certain facts, and on that statement the justice is required *forthwith to issue a warrant.*

The peremptory obligation thus imposed on him to act shows clearly that replevin will not lie, *because it cannot be predicated of a levy under the warrant which he was compelled to issue "that the goods were improperly "taken."*

All questions as regards defects in the rate, or the legality of it, are, in my opinion, excluded from our judicial consideration in the case before us, under the proved facts of the prescribed application having been made to, and the oath taken before, the justice, and of a warrant issued by him under the statute.

Any informality in this last, if it contain a mandate to the ministerial officer to act under it, cannot, for reasons that I have already stated, affect a justification set up under it by the officer.

In *Wilson* v. *Weller et al.*, 1 Brod. & Bing. 57, it was decided that, where the Statute of Labourers gives the magistrates jurisdiction to examine on oath any servant, &c., and to make order for the payment of wages to such servant, and a magistrate in his adjudication on this Act avers a complaint made on oath, and an examination on oath, it is not competent in replevin for taking the plaintiff's goods, for the plaintiff to plead in bar of a cognizance made under a warrant of distress and sale, founded on that adjudication "that the servant did not duly make oath be- "fore the magistrate that the sum claimed was justly "due him for wages; *nor can he plead that the sum "claimed was not due.*"

In that case too, there is a *dictum* of *Richardson* J. "that where a magistrate has competent jurisdiction "and adjudges, and on refusal to pay issues a warrant "of distress and sale, the goods taken under it are "not repleviable."

Dallas C. J., in giving judgment in that case, says, "The question is, whether the magistrate had juris- "diction, and he has jurisdiction, *on complaint made to* "*him on oath*, to enquire whether a servant has wages "due to him from his master."

In the particular case, the magistrate had, incontrovertibly, jurisdiction to issue a warrant, because *the oath having been made, he was* COMPELLED *to issue it.*

The learned Chief Justice continued to say, in reference to the case before him, as I think I might say in this, "the magistrate has exercised that jurisdiction "which the statute has given him."

The difference between that case and this is, that the former was a judicial decision on the part of the magistrate, and this a mere ministerial act, but the principle common to both is, that where a magistrate has jurisdiction, (whether to act judicially or ministerially might be immaterial), and, acting within the scope of it, issues a warrant, under which goods are taken; it is not competent to the plaintiff in replevin to question the legality of any matter involved in the exercise of that jurisdiction, or which has conduced to the exercise of it.

In *England* a justice of the peace is not, as I shall presently show, *bound to act* on information of an assessment, of a demand, and of non-payment of a rate made to him by the parish officers.

If the report of his enquiry be a conviction that the party assessed was not a legal subject of the rate, he ought to withhold his warrant.

It was at one time thought that the issuing of a warrant of distress, for collection of a poor rate in *England*, was a mere ministerial act; but a contrary doctrine was held in *Harper* v. *Carr*, 7 T. R. 270, and

1862.
McGREGOR v. PATTERSON.

it is now settled that a magistrate in respect of that duty, acts judicially. Lord *Kenyon*, in the case last referred to, says: "In the instance of granting a warrant of distress the justices exercise a discretion "after enquiring into the circumstances of the case. "The party must be summoned, and on that summons many circumstances may appear to show that "a warrant of distress ought not to be granted." *Lawrence* J., who at first thought the act in question ministerial, uses even stronger language. He says, "If the justices had no discretion on the subject, it "would be hard that they should be bound to grant a "warrant of distress *which they thought illegal*, and "afterwards discuss the propriety of the rate at their "own expense." The cases now referred to, he says, show that the justices do not act ministerially. Besides, the Statute 43 *Eliz.*, ch. 2, requires the warrant to be signed by two justices, which would have been unnecessary, if the justices were not to exercise a discretion *as to whether they should grant or refuse a warrant.* That circumstance, he adds, shows that the legislature did not intend that a warrant should be granted, *as a matter of course*, but that the justices should first enquire into the merits of the case. He continues to observe, that the cases cited show that the party ought to be summoned before the magistrates before they grant a warrant of distress, and then they must exercise their judgment in the same way that they do on hearing any other complaint.

Baron *Parke*, in the modern case of *Skingley* v. *Surridge*, 11 M. & W., 514, approves and adopts this doctrine, as laid down in *Harper* v. *Carr*, to which he particularly refers.

The judgment of Lord *Tenterden*, in *Weaver* v. *Price*, necessarily presupposes that the magistrate, who was the defendant in it, and whose justification failed because he had no jurisdiction, might have ascertained that fact by adequate enquiry; and having ascertained it, might have refused the warrant, the issuing of

which illegally subjected him to costs and damages in an action of trespass.

Now, in contrast with this, take the case of A B, a magistrate, who under our statute is applied to for a warrant against C and twenty others, by a collector, who duly makes the oath prescribed by the statute. A B, from information acquired at Sessions, is aware that C, who stands rated on the collector's statement at five pounds, had been, on appeal, relieved to the extent of four pounds fifteen shillings; and yet, in obedience to the peremptory words of the Act, issues a general warrant which includes C as originally rated. C's property is taken under the warrant, and he brings an action of trespass against A B, who pleads in justification in such a way as brings himself within the words of the statute. C cannot traverse this, nor can he demur to it. How can he confess and avoid it, consistently with the rules of pleading? If he cannot, then, even in this view of the bearings of the question before us, the magistrate in the particular case had complete and perfect jurisdiction to issue a warrant—the warrant prescribed by the legislature.

The case of *Painter* v. *the Liverpool Oil Gas Light Company*, 3 A. & E. 433, concedes that a statute may be so strong in its language when requiring a justice to issue a warrant, that he is not only not bound, but not at liberty to summon the party, and that issuing the warrant in such case would be a purely ministerial act.

I cannot entertain a doubt that the duty imposed on the justice in the case before the Court is precisely of that character,—then he had jurisdiction, and then, although he could not have justified under this particular warrant, which is fatally defective as respects him, it completely shields this defendant, whatever the form of action may be in which he may be sought to be made responsible for acting under it; and not only so, but justifies whatever he does in

1862.

McGREGOR v. PATTERSON.

obedience to its commands. The very form of the warrant prescribed by the legislature, viewed in connection with the requirements of section 25 of chap. 89, would of itself serve to show that this action will not lie.

There is something very peculiar in this. Section 25 enacts that separate suits shall not in future be brought against defaulters, but every collector shall make a general return to a justice within the township of every person upon his list, who, after demand made, shall not have paid his rate; and the collector shall make oath in writing before such justice, setting forth the name of every defaulter, the sum assessed, that the demand has been made, and that the rate is unpaid; and, thereupon, such justice shall forthwith issue a general warrant, &c., directed to the constable, &c. Now, here the justice is not required, expressly or impliedly, to summon the parties, or to enquire into the validity of the rate; and yet, when we refer to the form of warrant which he is commanded to adopt, we find the legislature assuming a legal rate as the foundation of the magistrate's proceeding. In the first recital, the legislature makes the magistrate say: "Whereas, by a rate and assessment made in "conformity with law, the persons named in the "schedule have been assessed," &c. Surely, with this dictated to him thus, the justice was not bound to consider that question.

Here, let me notice that, though the form of warrant ordinarily used in *England*—the model, probably, of this—is in its general character like that adopted by our legislature, yet it differs from it in many essential respects: 1st. It is not a general warrant. 2nd. It recites a summons to the party to be affected. 3rd. It recites that *that* party has not shown cause for refusal or neglect to pay the rate. 4th. It is issued on the grounds of such summons, and refusal or neglect, and not on the mere oath of a collector. 5th. The recital in it of an assessment made, allowed and

published, according to the statute, is a recital made by the justices, on their own responsibility, and as the result of their enquiry, whilst the recital to that effect in our warrant is the language of the legislature itself. 6th. The form of warrant prescribed by our Act is not a mere form suggested, which may or may not be strictly followed; but it is absolutely required to be used, and it is as much a part of the statute as if in the body of it; for it contains the only provisions enacted as to the time and mode of disposing of the goods to be levied under its authority.

In *Dane's Abridgement*, vol. 5, p. 114, will be found an accurate description of the nature of the action of replevin: "When the defendant," he says, "justifies the "taking for the cause stated in his avowry, and so "claims a return of the goods, he undertakes to show "that he ought to recover back the property in dispute, "and thence he must make out a title to recover, and "have the thing delivered to him." Now, all that I have observed in relation to the peculiar provisions of our Act concurs to show, that he has, in this case, an indisputable title to have the thing taken delivered to him: he took it by the express authority of law. Our legislature instructs and requires the magistrate to declare, in the warrant to the constable charged with the execution of it, that the rate was made in conformity with law. How, then, could a judgment be given for the plaintiff against the defendant, this constable, which would, in effect, say that "the rate "was not made in conformity with law"?

This question as regards the constable would be presented under very different circumstances in *England*. *There*, where replevin lies against him, or against goods taken by him under warrant for a poor rate, his justification depends not on the form of the warrant, nor on facts proved on oath before the magistrates, but on the question, "Whether the parish "officers have caused that warrant to issue legally;" and that depends on "Whether the subject of the

1862. "warrant were a legal subject of the rate." Here, however, the overseers exercise no agency in putting the warrant in operation. This case is very distinguishable from *Weaver* v. *Price*. There the justice assumed that he had jurisdiction, where whether he had it or not depended entirely on the result of *an enquiry* (which he should have made), "Whether the "plaintiff had land in the parish liable to the rate?" The party, in effect, was not liable to the assessment, and there was, therefore, a total want of jurisdiction in the magistrate. There was no statutable provision, which relieved him from a necessity of ascertaining that there existed a rate, of which the plaintiff was by law a subject. In this case, however, as has been shown, the magistrate's duty to issue the warrant in question was imposed on him by the legislature.

McGREGOR v. PATTERSON.

The truth is, the difference between the English law and ours, in reference to the use of the action of replevin to try the legality of a poor rate, is, that under the former the issuing of a warrant to enforce the rate is not *of course*, whilst under the latter it is *strictly* so. Under the former, the officer charged with the execution of the warrant is presumed to know that if the party against whom it is issued is not ratable, he cannot justify under it; whereas, under the latter the officer required to execute the warrant has a perfect immunity, if the collector made before the magistrate the affidavit required by the statute. Under the former the parish officers never cease to be connected with the proceedings whilst under the latter the overseers are *functi officio* when the rate is made. In *England* the parish officers are charged with the collection of the rate, whereas, here the overseers have nothing to do with the collection of it. Moreover, the general rule of English law is, that where a statute prescribes a distress and sale, the warrant therefor is a statutable execution, and replevin in such case will not lie.

If, then, in this case, arising under precisely such

a statute, replevin *will lie*, it must be because the English usage or common law sanctions it, or because the case is an exceptional case as regards the rule just mentioned, and, as such, is supported by some particular authority. The case of poor rates in *England*, under the Statute of *Elizabeth*, is confessedly the only exception to that general rule which is found in English books; but its authority can only govern an exactly similar case in this Province, which the case before us most certainly is not.

The plaintiff then must support this replevin by the authority of an English case, which he has failed to do; or, if he rely on our statute of replevins, he must show that when the writ issued, the warrant detained the goods in question, *unlawfully, or under a pretended authority*. Here, again, he has failed, for incontrovertibly, they were held under the warrant of a justice, who having express statutable jurisdiction to issue a warrant in the form prescribed by the legislature, issued this warrant, the mandatory part of which (all that the constable has to look to where the magistrate has jurisdiction), is in accordance with that form. The goods therefore were detained, not by a pretended, but by a lawful authority. On the whole, being convinced that our legislature did not, when it prescribed a general warrant, contemplate that the validity of a poor rate (or school rate) should be questioned after the warrant had issued, and being clear that the foundation on which the warrant in question rests for its support, is not *a valid rate*, but *the affidavit of a collector*, I am of opinion that this Rule *Nisi* must be discharged.

Rule discharged.

Attorney for plaintiff, *James McDonald*.
Attorney for defendant, *A. C. McDonald*.

END OF MICHÆLMAS TERM.

1863.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

TRINITY TERM,

XXVII. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J.
BLISS J.
DODD J.
DESBARRES J.
WILKINS J.

MEMORANDA.

In last *Michælmas* vacation the honorable *Adams G. Archibald* resigned the office of Attorney General, and the honorable *Jonathan McCully* that of Solicitor General; and in the same vacation (*June* 11, 1863) the honorable *James W. Johnston* was appointed Attorney General, and the honorable *William A. Henry* Solicitor General.

In the same vacation (*May* 1, 1863) the honorable *Jonathan McCully*, *Beamish Murdoch*, *Esquire*, *Hiram Blanchard*, *Esquire*, and *Alexander C. McDonald*, *Esq.*, were appointed to be of Her Majesty's Counsel.

1868.

July 21.

McKAY ET AL. *versus* ANNAND.

Where a testator devised lands to his son R "for and during his natural life time, then to devolve to his eldest child lawfully begotten in a line of succession for ever."

Held, that the rule in *Shelley's* case did not apply, and that R took only an estate for life.

SPECIAL case on the construction of a clause in a will, argued in *Michælmas* Term last, by *J. W. Johnston, senior*, Q. C., for plaintiffs, and *J. W. Ritchie*, Q. C., and *J. R. Smith*, for defendant.

The Court now gave judgment.

BLISS J.* This was a special case stated for the opinion of the Court, and was argued before my brothers *Dodd* and *DesBarres* and myself.

Ann McKay and *Mary Jane Benjamin*, plaintiffs in the cause, are two of the daughters and heirs of *Daniel McHeffey*, deceased; and the action is brought by them and their husbands, to recover certain lands, devised by the will of their said father to his son *Richard McHeffey*.

Richard McHeffey died several years subsequent to his father, having by deed conveyed the lands in question to the defendant in fee, under which deed the defendant claims to hold, maintaining that *Richard* took under his father's will an estate tail, which, by force of the *Revised Statutes*, ch. 112, was converted into an estate in fee, and so the property under his deed passed to, and was legally vested in, the defendant.

The plaintiffs on the other hand contend that the Act, chap. 112, abolishing estates tail, having been passed subsequent to the death of the testator *Daniel McHeffey*, could have no operation or effect upon the devise under his will; and, secondly, that under this devise, *Richard* took only an estate for life, — in which case his deed to the defendant could convey no greater estate than he himself had; and that, therefore, after his death, the estate for life, which he only had, having terminated, the lands in question reverted to the heirs of the testator *Daniel McHeffey*.

* YOUNG C. J., having been concerned in the cause when at the Bar, gave no opinion. WILKINS J., having an interest in the suit, also gave no opinion.

1863.

McKAY et al. v. ANNAND.

The devise under the will, out of which these questions have arisen, is as follows:—"I give to my "beloved son *Richard* all that certain tract of land (de- "scribing it), for and during his natural life time, "then to devolve to his eldest child lawfully begotten, "in a line of succession for ever."

The devise to *Richard* here is in express terms for and during his natural life. The defendant, however, relies on the rule in *Shelley's* case, which, if it applies to the present devise, will enlarge this life estate either into an estate tail, or in fee.

The rule in *Shelley's* case is this, that where an estate for life is given to a person, and in the same instrument the estate is limited by way of remainder, mediately or immediately, to his heirs or to the heirs of his body, these latter words are words of limitation and not of purchase, and enlarge the former life estate into an estate in fee, or in tail.

Now in this devise there is no limitation over in express words, to the "heirs," or "heirs of the body" of *Richard;* nor, indeed, is it at all necessary that there should be; for the rule will equally hold good, if words are used which have the same equivalent signification, or which the will, taken all together, clearly proves to have been intended by the testator to have the same force and meaning.

The devise over to the eldest child of *Richard* lawfully begotten in a line of succession forever, which is the language in this devise, may, and doubtless does, create an estate in remainder in tail or in fee in such eldest child; but how can such a remainder be considered equivalent to the heirs of the body of *Richard*, so as to give an estate tail to him. The eldest child lawfully begotten might be a daughter, who, if there were a son or other children, could not be properly the heir of the father, and so could not be looked upon as *nomen collectivum*, and equivalent to the expression, "heir of the body." But even if the devise over were to the eldest son, it will still fall short of the

requisition of the rule; for neither can this, *per se*, be synonymous with "heirs of the body." It is limited to one individual in the singular, — to one particular child, — and cannot have an enlarged signification, and be considered a *nomen collectivum* to take in and include the heirs of the body generally. Without something more to enlarge its import and effect, it is merely a description of the person who is to take after the death of *Richard*, to whom the estate for life is first given. Nor can such a devise over to the eldest child, or eldest son, by any the most forced construction, as it appears to me, give it the same effect, as if it were a devise to the heirs of the body of *Richard*, so as to enlarge his life estate into an estate tail, under the rule in *Shelley's* case.

There is, indeed, a variety of cases, in which words of a less general import than "heirs of the body," — words which of themselves would be but a description of the person, — have been held to be a *nomen collectivum*, and equal to the term, "heirs of the body"; but they derived that force and effect, not *ex vi termini*, but from some other expressions in the will, from which it has been held, by necessary implication, that the testator intended to give an estate tail to the first taken.

A reference to a few of these cases will, I think, put the matter in a very clear light.

In *King* v. *Melling*, 1 Vent. 225, the devise was to *Barnard Melling* for life, and after his death to the *issue* of his body by his second wife (his first wife being then alive), and for default of issue, over. *Rainsford* and *Twisden* JJ. held that *Barnard Melling* took only an estate for life; but *Hale* C. J., who at first agreed with them, afterwards changed his opinion, and held it be an estate tail in *Barnard Melling*, for several reasons; and among these, because the word '*issue*' is *nomen collectivum*, and takes in the whole generation *ex vi termini*, and is stronger than if it were *children*, and meant all that should come of the second wife;

1863.

McKAY et al. v. ANNAND.

and again, because here was a devise over for want of such issue, which words in a will do often make an estate tail by implication. This opinion of Lord *Hale* was afterwards affirmed by all the judges in the Exchequer Chamber, and, as it would appear from the report in 3 *Salk* 296, for the above reasons.

In *Robinson* v. *Robinson*, 1 Burr. 38, the devise was to *Lancelot Hicks* for life and no longer, he taking the name of *Robinson;* after his decease to such son as he shall have, taking the name of *Robinson*, and for default of such issue, then over in fee. *Lancelot Hicks*, it was held, took an estate tail by implication, in order to effect the manifest general intent of the testator, that the estate should not go over till the failure of issue male of *Lancelot Hicks*.

Doe c. d. Bean v. *Halley*, 8 T. R. 5, is more like the present case, in respect of the remainder being limited to the *eldest son* of the person to whom the life estate was given. The devise was to the testator's nephew, *Michael Halley*, and his assigns for life, and after his decease to the eldest son of *Michael Halley* and to the heirs of such eldest son, upon condition that such eldest son be christened and called by the name of *Fielding*, and *in default of issue male* of his said nephew to his nephew, *S. Bean*, and his eldest son in like manner, and for want of such issue to the testator's own right heirs. It was held that *Michael Halley* took an *estate for life*, remainder to his eldest son in tail male, with remainder to *Michael Halley* in tail male by implication, in consequence of the devise over being limited *in default of issue* male of *Michael Halley;* and in that case, *Michael Halley* never having had issue, the remainder never took place, and was as if it never had existed; so that the devise might be read to *Michael Halley* for life, and in default of issue male of the said *Michael Halley*, then over.

That case, then, in its circumstances is very like the present case, only here we have no devise over in default of issue, on which alone the life estate was

held to be enlarged to an estate tail, and without which it is manifest that *Michael Halley* would have taken an estate for life only.

In *Doe d. Burrin* v. *Charlton*, 1 M. & G. 429, there was a devise also much like the last: to *Samuel Charlton* for his life, and after his decease to his *eldest son*, but, for want of such issue, then to his daughter or daughters, share and share alike, forever; but in case *Samuel Charlton have no issue*, then to hold to him, his heirs and assigns forever. And there, by a like implication, the words "in case he have no issue" were held to give *Samuel Charlton* an estate in tail.

I will but mention one other case, that of *Lewis* v. *Puxley*, 16 M. & W. 733 The devise there was as follows: "I give all my real estate in the counties of "*P.* and *C.* to my eldest son for his life, and to his "eldest legitimate son after his death; and in default "of such issue, I give it in like manner to my son "*Richard;* and in case that he has no legitimate issue "male, I then give it in like manner to the offspring "about to be born from my dearest wife; and in de- "fault of such issue, to my own right heirs forever."

The Court held that the devise to *John* must be read as explained by the devise to *Richard*,—that is, "I give the estate to my son *John* for life, and to his "issue male after his death;" and in that case *John* would take an estate tail; and so the words in the devise over "the eldest legitimate son," must be taken as *nomen collectivum*, and not as a *designatio personæ*, in order to carry out the intention of the testator. In this case *Peacock*, who argued on behalf of the plaintiff, that is *John*, the devisee, set out by saying, "If "the words 'eldest legitimate son' had stood alone, "they would have amounted to words of purchase, "but that, coupled with the rest of the clause, they "were words of limitation." And *Parke* B. says: "If "the only clause in the will had been the bequest of "the real estate to *John* for life, and to the eldest son "after his death, that probably would have been, as

1863.

McKay et al. v. Annand.

"Mr. *Rudall* (the defendant's counsel) contended, an "estate for life to *John*, with remainder in fee to his "eldest son." Not that the learned judge supposed there could be a doubt about *John* taking in such a case an estate for life only, but that probably the remainder over to his eldest son would have been a fee, not an estate tail, for that was what the defendant's counsel had contended. There was no question made about its being a life estate only in *John*, if the words had stood alone.

But in the will of *Daniel McHeffey* there is no such or any devise over, nor any word or expression which can enlarge the term "eldest child" from its proper meaning, as a *designatio personæ*, into a *nomen collectivum*. In the cases which I have cited, the general intention of the testator being, that the issue of the first taker should inherit the estate before it went over, that intent could only be effected by giving an estate tail by implication arising out of the words "in "default of issue," and thus it was necessary to consider the term "eldest son" as *nomen collectivum*, which could not have been done, except for those other words. Here, however, no such implication can arise. The devise is to *Richard* for his life, and then to devolve to his eldest child in a line of succession for ever, without any thing more. There is, therefore, nothing to control, or vary the plainly expressed intention of the testator of giving him a life estate only, with a contingent remainder after his death to his eldest child. It is unimportant whether that remainder is an estate in fee or in tail, though I should be disposed to consider it the latter, — a devise to one in a line of succession must mean in a line of succession from that one, which is exactly equivalent to the expression "heirs of the body." I find this same expression with the same signification in a late writer (Serg. *Hayes*), in a treatise in which the rule in *Shelley's* case is considered. Speaking in reference to that rule, he says: "It is not necessary that the technical deno-

"mination of 'heirs of the body' should be employed "in the devise; but that the words 'issue,' 'descend- "'ants', &c., may be used as synonymous therewith, "or any other term *designed to comprehend the whole line "of succession.*" And again, he says: "The proper "force of the words 'heirs of the body' is to describe "*the lineal succession to an estate tail,*" thus making the "two expressions almost convertible terms.

The case then before us is in all respects precisely the same as *Archer's Case*, 1 Co. 66. There the devise was to *Robert Archer* for his life, and afterwards to the next heir male of *Robert*, and to the heirs male of the body of such next heir male; it was adjudged that *Robert* had but an estate for life, because he had an express estate for life devised to him, and the remainder is limited to the next heir male in the singular number. And *Hale* C. J., referring to this case in *King* v. *Melling*, 1 Vent. 232, which I have already cited, says: "In *Archer's Case* the words of limitation "being grafted upon the word 'heir,' it shows that "the word 'heir' was used as *designatio personæ*, and "not for the limitation of the estate."

In *Ginger* v. *White*, Willes 353, Lord Chief Justice *Willes*, referring to *Wild's Case*, 6 Co. 17, says: "If a "devise be to A and his children, if there be no "children then in being, it gives an estate tail, be- "cause the devise is in words *de presenti;* and there "being no children in being, they must take by way "of limitation." (That is in order to carry out the intention of the testator, as they could not otherwise take at all under such a devise.) "But if a devise be "to A, and after his decease to his children, A has "only an estate for life, because these words plainly "show that the children were intended to take by "way of remainder."

I am, therefore, of opinion that *Richard McHeffey* took but an estate for life under this devise; and I have perhaps gone more at large than was necessary into that, which, when fully examined, appears to be

1863.
McKay et al. v. Annand.

a very simple and plain question. The result is, that the plaintiffs are entitled to recover the shares of the two daughters, as heirs of the testator, and the reversioners in the property devised after the termination of the life estate of *Richard McHeffey*.

Dodd J. In all the cases referred to upon the part of the defendant, the words in the will were held to be words of limitation, the devise generally being upon the devise for life, to the heirs or issue of the body lawfully begotten; those words have always been held to create an estate tail, and not merely a life estate, in the first taker. The intention of the testator has, in all the cases, been the first object with the Court, to ascertain and give such a construction to his will as will best effect that object.

In *Buffar* v. *Bradford*, 2 Atkyn's Rep. 222, the Lord Chancellor said: "It must be allowed that children in "their natural import are words of purchase, and not "of limitation, unless it is to comply with the in- "tention of the testator, where the words cannot take "effect in any other way; but suppose a devise was "to A, and after his death to his children, here it is "a word of purchase. Words of limitation, grafted "on the words 'heir male' or 'heir of the body,' in "the singular number may convert them into words "of purchase, as in *Archer's Case*, 1 Co. 66, Fearne "178."

A devise to A for life, remainder to the heir of his body in the singular number, and to the heirs of the body of such heir creates but an estate for life in A. *Richards* v. *Lady Bergavenny*, 2 Vern. 325.

Goodtitle e. d., Sweet v. *Herring et al.*, 1 East. 264, is an important case in point in favor of the life estate.

A devise to A for life, then to the children of A successively, and their heirs, and if A die without issue, then to B (son of the elder brother of A), in fee,—held, that A only took an estate for life. *Ginger* v. *White*, Willes 348. Lord Chief Justice *Willes*, in

this case after five arguments, in delivering the judgment of the Court, said, that, "if a devise be to A, "and after his decease to his children, A has only an "estate for life, because, then the words plainly show "that the children were intended to take by way of "remainder"; and he refers to *Doe d., Cooper* v. *Collis*, 4 T. R. 294. In *Wild's Case*, 6 Rep. 17, this distinction is laid down, that if land be devised to husband and wife, and to the men children of their bodies begotten, and they have no issue male at the time of the devise, they shall have an estate tail. But if a man devise lands to A and his *children or issue*, and *they then have issue of their bodies*, there his express intent will take effect, and A will take only an estate for life.

In *Clark* v. *Day*, Cro. Eliz. 313, the words were "to R (her daughter) for life, and if she marry after "my death, and have heir of her body, then I will "that the heir after my daughter's death shall have "the land, and to the heirs of their body begotten." Held, that R had only an estate for life. In the case of *Legatt* v. *Sewell, et al.*, reported in 2 Vern. 551, the words were, to *William Legatt* for life, and after his decease, to the heirs male of his body, and to the heirs male of the body of every such heir male, severally and successively, as they should be in prioity of birth and seniority of age; and for want of such issue, remainder over, &c. There three judges to one held that *William Legatt* took an estate tail; *but they were all of opinion that if the first words* had been "issue" or "children," *William Legatt* would only have had an estate for life.

Chief Justice *Willes* in *Ginger* v. *White*, lays down a rule of law, that *a precedent estate devised by express words cannot be lessened, increased, or altered by implication*, though it may be by express words, and he cites *Doe d. Bean* v. *Halley*, 8 T. R. 5.

In *Bamfield* v. *Popham* 1 P. Wms. 54, it was held that no estate raised by implication in a will can

1863.

McKAY et al. v. ANNAND.

destroy an express estate, as where a devise was to A for life, remainder to his first son, and so to every other son in tail male; and for want of issue male of A, remainder over,—this was not an estate tail in A by implication.

"The words 'heirs,' or 'heirs of the body,' create "a remainder in fee, or in tail, which the law, to pre- "vent an abeyance, vests in the ancestor, who is "tenant for life, and by the conjunction of the two "estates he becomes tenant in fee or in tail, and "whether the ancestor takes the freehold by express "limitation, or by resulting use, or by implication of "law; in either case the subsequent remainder to his "heirs unites with, and is executed in his estate for "life." 4 Kent's Com. 215.

But, he says, (p. 220) "There are several cases in "which, in a devise, the words 'heirs,' or 'heirs of "'the body' have been taken to be words of pur- "chase, and not of limitation, in opposition to the "rule in *Shelley's Case*. * * Where the testator annexes "words of explanation to the word 'heirs,' as to the "heirs of A *now living*, showing thereby that he meant "by the word 'heirs' a mere *descriptio personarum*, "(personal description), or specific designation of "certain individuals, (2 *Vent.* 311), or where the "testator superadds words of explanation, or fresh "words of limitation, and a new inheritance is grafted "upon the heirs to whom he gives the estate. Thus "it is in the case of a limitation to A for life only, "and to the next heir male of his body, and the heirs "male of such heir male. * * In such cases it ap- "pears that the testator intended the heirs to be the "root of a new inheritance, or the stock of a new "descent, and the denomination of heirs of the body "was merely descriptive of the persons who were "intended to take." *Kent*, in the passage I have just read, refers to *Archer's Case*, 1 Co. 66; 1 *Lord Raymond* 203; 1 Eq. Cas. Abr. 184; 2 *Lord Raym.* 1437; 2 *Johnston's Cases* 384; and other cases.

In a devise to A and his male children and their heirs, to be equally divided among them and their heirs for ever,—Judge *Story* held that A took a life estate, with a contingent remainder in fee to his children, he having no children at the making of the will. *Sisson* v. *Seabury*, 1 Sumner 235.

Upon a review of all the cases, and particularly the leading ones, and which were not referred to by either side at the argument, I have come to the conclusion that *Richard McHeffey* took an estate for life under his father's will: first, because the estate is given to him by express words for life, and there are no express words in the will to give him a larger estate; and secondly, because the words "child" or "children" have, in general, (indeed I am not aware of any exception) been held to be words of purchase, and not of limitation. The words in the will after giving *Richard McHeffey* the estate "for and during his natural life," are "then to devolve to his eldest child lawfully begotten in a line of succession for ever." The words here "eldest child" equally refer to male or female without distinction, making it stronger in favor of a life estate to *Richard*, than if it had been to his "children" generally; but naming, as the testator does, the particular child, I think he thereby shows the intention that such child should be the root of a new inheritance, or the stock of a new descent, and in all such cases where the intent is plain, then the ancestor takes but a life estate. This being my opinion, it becomes unnecessary to give any opinion upon the remaining points that were raised at the argument.

DESBARRES J. The plaintiffs claim the property devised to *Richard McHeffey*, upon the ground that the devise gave to him an estate for life, which, on his death in 1856, reverted to the donor. The defendant, on the other hand, claims title to the property under a deed, executed to him in 1838 by *Richard*

1863.

McKAY et al. v. ANNAND.

McHeffey the devisee. He contends that the devisee was tenant in tail, and that having, as such tenant in tail, conveyed to him all the right he had to this property, he, the defendant, by virtue of that conveyance and the operation of the Act, ch. 112 *Revised Statutes*, abolishing estates tail, is now seised of an estate in fee therein. There are, therefore, two questions in this case depending on the construction to be given to the devise to *Richard McHeffey*.

By this devise it seems to me that the estate created thereby, and that which *Richard McHeffey* took, and had under it, was clearly an estate for life, with a contingent remainder over to his eldest child in fee tail; leaving in the donor, by necessary implication, the ultimate fee simple of the land, expectant on the failure of issue. It is admitted by the parties, in the case submitted to us, that *Richard McHeffey* died unmarried, and left no child, in whom the remainder did or could vest. Being then an inoperative remainder, which never did and never could take effect for the want of issue of *Richard McHeffey*, it follows as a natural consequence, from the implied condition annexed to the donation, that the estate on the death of the tenant for life reverted to the donor, whose heirs are now, in my opinion, entitled to it, and not the defendant, whose estate ceased to exist on the death of the tenant for life.

This, it appears to me, is the true construction to be given to this devise, and therefore I agree that the judgment in this case ought to be entered for the plaintiffs.

Judgment for plaintiffs.

Attorney for plaintiffs, *A. G. Archibald*, Q. C.

Attorney for defendant, *J. R. Smith*.

HENNESSY *versus* NEW YORK MUTUAL MARINE INSURANCE COMPANY.

Jul 21.

Where a cargo insured "at and from *Arichat* to *Halifax*" was shipped at *Petit de Grat*, a port nearer to *Halifax*, and distant 9 miles from *Arichat* by water, and 1¼ mile by land, and which, by the usage of trade in *Richmond*, the county wherein both ports are situate, appeared to be generally considered and treated by merchants there, and by the masters of coasting vessels in *Isle Madame*, the large island wherein said ports are situate, and also partly by merchants in *Halifax*, as one and the same port with *Arichat*; the custom-house for both ports was at *Arichat*; and the vessel and cargo were lost shortly after the vessel left *Petit de Grat*.

Held, that this usage did not bind underwriters unless known to, or acquiesced in by them; and no evidence of such knowledge or acquiescence having been given, that the policy never attached, and the underwriters, therefore, were not liable.

Usage must be proved by *instances*, and not by the *opinion* of witnesses.

ASSUMPSIT on a policy of insurance on "property, shipped on board schooner *Mary Jane*, "at and from *Arichat* to *Halifax*," tried before *Wilkins* J. at *Halifax*, in the last *October* sittings, and verdict for plaintiff contrary to the charge of the learned Judge.

A rule *Nisi* for a new trial had been granted, which was argued in *Michælmas* Term last, by *J. W. Johnston, senior*, Q. C., for plaintiff, and *J. W. Ritchie*, Q. C., for defendants.

A large number of witnesses was examined at the trial, but the substance of the evidence sufficiently appears in the judgments. The property insured was shipped at *Petit de Grat*, and the vessel was lost shortly after leaving there, about *Whitehead*, and on the direct course to *Halifax*.

The Court now gave judgment.

YOUNG C. J. This was an action on a certificate of insurance issued under a general policy held by the agent of the defendants, whereby the cargo of the schooner *Mary Jane* was covered on a voyage from *Arichat* to *Halifax;* and the vessel having sailed from *Petit de Grat*, and been totally lost, the sole question is, whether, for the purposes of this insurance, the port of *Petit de Grat* is to be accounted one and the same as the port of *Arichat*. That they are geographically distinct, is conceded; and it appears from Captain *Bayfield's* chart, published in 1850, and from Mr. *Le Vesconte's* deposition, that it is about nine miles by water from the custom-house at *Arichat* to *Petit de Grat*, and that, going from one to the other, you go round Cape *Au Guet*. The bill of lading is dated "*Petit de Grat*, 5th *January*, 1862," and describes the cargo as

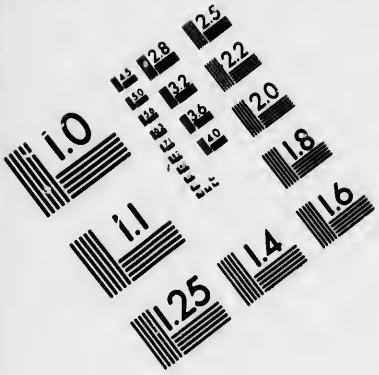
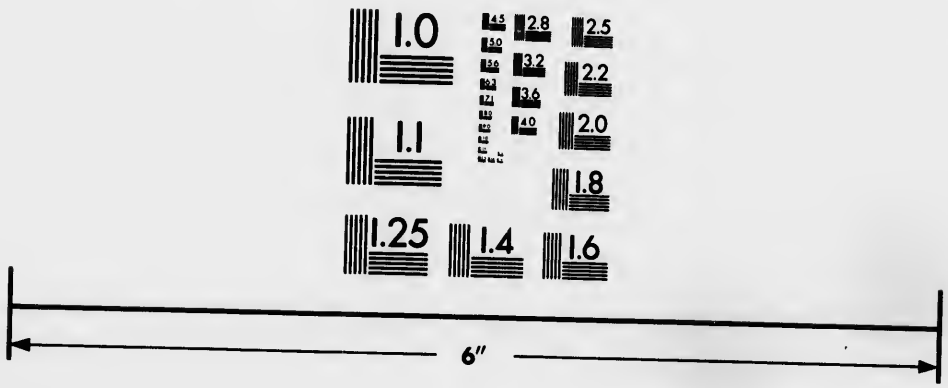
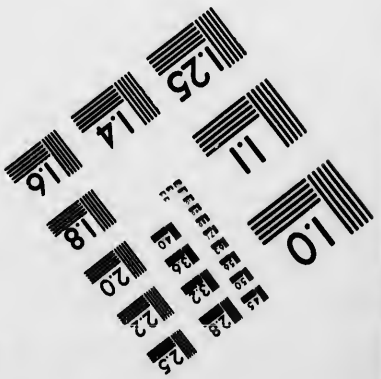


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE CO.

shipped, and the vessel as lying in the port of *Petit de Grat*. The telegram sent by Mr. *Ballam*, the owner, to the plaintiff, as his agent, is dated the same day at *Arichat*, which is distant by land one and a half mile from *Petit de Grat;* and the plaintiff, supposing the vessel to be at *Arichat*, effected the insurance accordingly, though it appears by the books of the Union Insurance Company, that he asked the question of them as for an insurance from *Petit de Grat*.

There is no dispute as to the *bona fides* of the shipment and loss of the cargo: the sole point being as to the true construction of the instrument. This, again, turns entirely upon the usage; for the cases sufficiently show that the description of the voyage in a policy, must be taken in its commercial acceptation, and not in its strict geographical meaning.

On this principle, it was held in the case of *Robertson* v. *Clarke*, 1 Bing. 445, that the *Mauritius*, which belongs to the *Madagascar* archipelago, and lies off the coast of *Africa*, may be shown to be, in mercantile acceptation, an *Indian* island; and evidence to that effect having been adduced on the second trial, the plaintiff recovered from the underwriters.

A still more striking example is afforded by the case of *Higgins* v. *Aguilar*, referred to in 2 *Taunt.* 406 & 3 *Camp.* 200, where, on a policy at and from *Demerara* to *London*, it was held that a loading at *Essequibo* was a loading at *Demerara*. "That case," says *Mansfield* C. J., "was decided upon the particular "usage of the trade." As the case is not in print, we can say nothing of the amount of evidence which established it; but we learn from an inspection of the chart of *British Guiana*, that the two rivers of *Demerara* and *Essequibo* have distinct entrances, with a tongue of land separating them of not less than twenty-five miles in width.

There is no question, therefore, that in the construction of a policy, as in that of other mercantile instruments (*Taylor*, sec. 1063, 2 *Sumn.* 567), evidence

may be adduced to ascertain the true meaning of a descriptive or other particular word, and the sense in which it has been used; and the meaning being ascertained, the construction of the instrument, of course, belongs to the Court. (8 *M.* & *W.* 823.)

In this case, there is a large amount of evidence; and the jury having found for the plaintiff, the question whether their verdict can be sustained depends entirely upon the character of the evidence which the law requires.

The authorities seem to me not quite consistent with each other upon this point. In *Vallance* v. *Dewar*, 1 Camp. 508, Lord *Ellenborough* said: "Although there should be exceptions to a usage, that "would be immaterial. Things are presumed to go on "in their ordinary course; and if a usage be general, "though not uniform, the underwriters are bound to "take notice of it."

So also *Taylor on Evidence*, sec. 1076, tells us that the usage to explain the terms of a written instrument need not be immemorial, nor is it necessary that it should have been established for a considerable period, or uniform, or capable of being defined with precision and accuracy. Whereas *Phillips on Insurance* says (2d ed., vol. 1, p. 53), that "a usage to be binding upon a party "must be definite, general, uniform and well known." To make a usage obligatory on the parties, "it "should," says Mr. Justice *Story*, in *Trott* v. *Wood*, 1 Gall. 444, "be so well settled, that persons engaged "in the trade must be considered as contracting with "reference to it."

If we adopt the American cases, which seem to me to go much further, or, at all events, to be much more direct and stringent than the English, we must adopt the rule that the usage to control and explain a policy of insurance, must not only be a usage by mercantile acceptation, as in the case I have cited, but a usage known to, and recognized by, the underwriters. This is laid down in the most explicit terms by Mr. *Duer*,

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE Co.

in his very able work on Insurance, who defines in his first volume (pp. 180 to 187) the sort of usage that is to obtain between the assurers and the assured, and illustrates the extent of the "use and practice," and the "known and definite import" which alone ought to bind them. These suggestions receive the approval of Mr. *Arnould* in his *Treatise on Insurance*, vol. 1, pp. 75, 79 *in notis*, and are strengthened by Lord *Ellenborough's* judgment in *Parr* v. *Anderson*, 6 East. 207.

The case of *Rogers* v. *Mechanics' Insurance Company*, 1 Story's Rep. 603, is still more emphatic. Judge *Story* in that case (page 607) says: "The usage "or custom of a particular port, in a particular "trade, is not such a custom, as the law contemplates "to limit, or control, or qualify the language of con- "tracts of insurance. It must be some known general "usage or custom in the trade, from its character and "extent so notorious, that all such contracts of insur- "ance in that trade must be presumed to be entered "into by the parties, with reference to it, as a part of "the policy. If the usage ustom be not so noto- "rious; if it be partial, or local in its existence or "adoption; if it be a mere matter of private and per- "sonal opinion of a few persons engaged therein: it "would be most dangerous to allow it to control "the solemn contracts of parties, who are not, or "cannot be, presumed to know it, or to adopt it, as a "rule to govern their own rights or interests. * * "This Court has nothing to do with the private "opinions of witnesses, however respectable, upon "matters which respect the interpretation of con- "tracts. * * I own myself to be no friend to the "indiscriminate admission of evidence of supposed "usages and customs in a peculiar trade and busi- "ness, and of the understanding of witnesses relative "thereto, which has been in former times so freely "resorted to; but which is now subjected by our "Courts to more exact and well defined restrictions. "Such evidence is often, very often, of a loose and

"indeterminate nature, founded upon very vague and "imperfect notions of the subject; and, therefore, it "should, as I think, be admitted with a cautious "reluctance and scrupulous jealousy; as it may shift "the whole grounds of the ordinary interpretation of "policies of insurance and other contracts."

Upon these principles, which have found, I must confess, a more ready acceptance with my learned brethren than with myself, it will scarcely be contended that the evidence given in this case was sufficient. That, in the opinion of many of the witnesses, and of the mercantile community of the county of *Richmond*, and to some extent also in *Halifax*, *Petit de Grat* is considered as included in the port of *Arichat;* or, in other words, that the two ports are considered as identical; that bills of lading have been dated indiscriminately from, and addressed indiscriminately to, both; and that goods shipped at or for *Petit de Grat* have been sometimes insured as shipped for, or from, *Arichat*, may all be perfectly true; but the opinions of witnesses, the impressions prevailing in a community, and isolated acts, though performed in good faith, will not of themselves establish a usage. Besides, the evidence in this case would prove too much; for according to some of the witnesses, a policy from *Arichat* would cover a voyage from *Grande Digue* and *Descousse*, or any other part of the *Isle Madame*, equally as from *Petit de Grat*, — a proposition which it is impossible to maintain. Had any instances been adduced of the settlement and payment of losses under circumstances like the present, these would have come within the rule; but there is no such evidence, and all the insurance brokers in *Halifax* unite in declaring that they know of no such usage, as it was incumbent on the plaintiff to prove. Neither is it of any avail that the risk of a voyage from *Petit de Grat* is less than of a voyage from *Arichat*. If a vessel were insured from *Pictou* to *Boston*, and the voyage in fact commenced at *Yarmouth*, which is not above half the risk, the policy in

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE CO.

case of loss would be void,—the *terminus a quo* not being the *terminus* in the contract. The *Bridport* and *Lyme*, and the *Cærmarthen* and *Llanelly* cases, sufficiently show this.

While I feel, therefore, that the equities of the case are with the assured, and that he is losing the benefit of his insurance by an unfortunate slip, I cannot withhold my assent from a principle that has been recognized to some extent in the English, and so much more fully in the American Courts. It follows that the plaintiff cannot prevail on this evidence, and that the rule for a new trial must be made absolute.

BLISS J. This was an action on a policy of insurance on "property shipped on board the *Mary Jane* "at and from *Arichat* to *Halifax*."

The property in question was in fact shipped on board at *Petit de Grat*, from which place the vessel sailed to *Halifax*, and was lost on the voyage. At the trial, the plaintiff by a large number of witnesses sought to show a usage, by which *Petit de Grat* was considered as a part of the port of *Arichat*. The learned judge thought that no evidence had been given, which could in this respect qualify or control the express language of the policy, — that *Arichat* the *terminus a quo* of the voyage meant the harbor of *Arichat* properly so called; and as the vessel had not sailed from that, the defendant was not liable under the policy. The jury, however, found for the plaintiff, and the case is now before us on a rule *Nisi* for a new trial.

Arichat is a port or harbor of *Isle Madame*, and the only one in the island having a custom-house; so that all vessels from whatever part of the island have to enter and clear from that port.

Petit de Grat is another harbor lying about seven miles distant by water from *Arichat*, and nearer to *Halifax;* separated from *Arichat* by a projecting head land, of which *Cape Hogan* or *Au Guet* is the principal

or extreme point on the *Arichat* side. By land the communication between the two places is nearer; the distance in this way being somewhat about two miles.

Petit de Grat then, politically speaking, may be considered as a part of the port of *Arichat;* but geographically, as a glance at the chart or map will show, it is another and distinct harbor. Vessels can and do load and unload there, — and it is the place of business of *Ballam*, on whose behalf, and for whose benefit, this insurance was effected, — though they necessarily have to clear out and enter at *Arichat*. The bill of lading too of the property insured was, it appears, from *Petit de Grat*.

In all points then, this case is in its circumstances almost minutely identical with that of *Constable* v. *Noble*, 2 Taunt. 403. There the policy was on a voyage from *Lyme* to *London*, but the goods were shipped at, and the vessel sailed from *Bridport* harbor, which was a member of the port of *Lyme*, having no custom-house of its own, and lying nine miles nearer to *London*. It was held in that case that the cargo laden at *Bridport* was not covered by the policy on a cargo from *Lyme*.

There can be no doubt, then, under this authority, that the plaintiff here is not entitled to recover, unless he has shown a clear well known usage of trade, by which, under a policy from *Arichat*, a voyage from *Petit de Grat* will be covered.

The plaintiff did give evidence of several instances, in which insurances had been effected on vessels sailing from *Petit de Grat* and other out harbors of *Isle Madame*, in which the voyage was described from *Arichat* as in this policy; and this would certainly have been very strong evidence against the present defendant, who must be taken to know the usual course of business on this very point, if it could have been shown that this practice adopted by the owners of vessels, or goods laden therein, had been also

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE Co.

known, or recognized, or acquiesced in by the insurers on those occasions.

But in this respect the evidence wholly failed. It was not shown that the underwriters in any one such case were made acquainted with the fact, or knew that they were not insuring on a voyage from *Arichat*, when in fact it was from *Petit de Grat*, or some other outport. There had been no dispute, as it appeared, respecting any of such insurances; and indeed no room for dispute, for no loss had occurred under any of these policies, except a partial loss in one of the instances mentioned; and that, it appeared too, had been settled without any knowledge that the vessel had not in reality sailed from *Arichat*, as stated in the policy, though she had in fact, as was now shown, sailed from the *Lennox Passage*, which was still further from *Arichat*, and more on the opposite side of *Isle Madame*.

It must be obvious, and hardly requires to be remarked, that such a practice adopted only by the insured, and wholly unknown to the insurers, could never set up a usage as against the latter, so as to enlarge their policies beyond their proper and legal meaning. For if so, then the continued and successful concealment of an important fact from the underwriters, would at length ripen into a usage against them, and other underwriters; without their knowing or having reason to suspect its existence. But we have on the other hand, on the part of the defendant, the evidence of their own broker, by whom the policy was executed; and the evidence of three other brokers of as many other insurance offices, and that of the president of a fifth; that they never knew or heard of the usage in question that the two ports of *Arichat* and *Petit de Grat* were considered as one, nor had they ever recognised it as affecting insurances. And one of these brokers (*Goudge*) testified that the plaintiff himself had applied to him to insure on this same vessel from *Petit de Grat*, and that he had applica-

tions to insure from other parts of the island than *Arichat*.

The whole evidence then on this point, taken together, would seem well nigh conclusive upon the case. It is not easy to understand how any evidence, after that which I have mentioned, can establish a usage which is to affect the underwriter, or control in this respect, his policy.

A single underwriter may be ignorant of a usage which he ought to have known, and must, therefore, be supposed to have known; and if so, his ignorance will not prevent the applicability of that usage to his particular policy, which must be still construed by that usage. But, in such a case, it is a usage which obtains not merely in other matters or transactions, but in cases of insurance themselves. And that usage must be of little notoriety, and of little value with respect to underwriters, of which not one of them has been shown to have ever heard.

Let us, however, look at the usage as it is endeavored to be made out, and the evidence in support of it.

Though there was a great number of witnesses examined,—and they may have somewhat differed in their language and expressions,—it will be found that, apart from the particular practice of insuring from *Arichat*, which I have already disposed of, the rest of the testimony is substantially as follows: that they have always considered *Petit de Grat* and *Arichat* to be commercially, and in a business way, one and the same; that *Petit de Grat* is included in *Arichat*, and is a part of it; and that it is so generally regarded there in the mercantile world; that when goods are sent from *Halifax* to *Petit de Grat*, the bills of lading are generally, though not invariably, made out to *Arichat*,—and so when shipped from *Petit de Grat*, they are described as shipped at *Arichat;* though, as we have seen, the bill of lading in the present case is an instance to the contrary.

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE Co.

I may remark here, in the first place, with respect to this evidence, that all which the witnesses say with respect to their own opinions of the existence of the usage in question, is entitled to little or no weight as proof of it. In *Cunningham* v. *Fonblanque*, 6 C. & P. 44, *Park* J. intimated that usage must be proved by instances, and not by the opinion of witnesses; and to the same effect is the language of *Tindal* C. J., in *Lewis* v. *Marshall*, 7 M. & Gr. 744.

Nor is there any evidence that the two places were regarded as one by the mercantile world generally; that opinion seems rather confined within their own locality; and even there it may be questioned whether it was generally so regarded; for while some of the witnesses say that this, as they considered it, was the understanding of the mercantile community there, others state that it was so considered by coasters. It is apparent, too, from the whole of the testimony, that the fact of there being but one custom-house, and that at *Arichat*, where all vessels from all parts of the island were obliged to enter and clear, was inseparably connected with the idea of the two places being considered as one; and hence, not only *Petit de Grat* was considered as part of the port of *Arichat*, but *Grande Digue* and *Descousse* also, which lay at the very back of the island. Indeed, the whole island was thus included in the port of *Arichat*, according to this evidence. But when the witnesses came to particular instances of the usage in question, they all refer alone to that of bills of lading being usually addressed to *Arichat*, instead of *Petit de Grat*, when goods were shipped to the latter place.

No doubt, convenience in some cases, and necessity in others, as most vessels would naturally resort to *Arichat*, the custom-house port, would lead to this practice; but it is a practice, however general it might be, which was between the shippers and the consignees alone. They may have become bound by it, as a usage in transactions relating to such shipments; but

what have underwriters to do with it, or how can such a usage become binding on them, if it has never been recognized between them and the insured? The evidence at most is evidence of a particular usage in a particular course of dealing, and is not to be transferred and applied to another and distinct subject matter, with which it has no immediate connection. Nor is there any notoriety in this usage. The shipper may transmit goods to *Arichat* intended for *Petit de Grat*, and the merchants there may receive them without the world at large knowing any thing about it, however often it may occur, and without regarding it if they did know it, because it affects no one in such case but the parties themselves in such transactions. And though the small mercantile world of such petty towns or ports may be all well aware of the mode in which such business is usually conducted, why is it to be taken for granted that it will reach those who reside elsewhere, and how are underwriters, upon such a supposition, to be affected by it? The rule is thus laid down by *Arnould* on this subject: "The "usage, in order to be binding, must be either a "general usage of the whole mercantile world, or a "particular usage of universal notoriety in the trade "upon which, and of the place at which, the insur- "ance is effected. The usage of a particular place, or "of a particular class of persons, cannot be binding "on non-residents, unless they are shown to have "been cognizant of it." 1 *Arnould on Insurance* 71.

And when the same author, almost immediately afterwards, speaks of the matter directly under our consideration, he uses this language: "A policy effected "on goods 'at and from' any port or place named as "the *terminus a quo* of the voyage insured, will not "protect goods unless loaded on board at the very "place or harbor town itself, even though they may "be loaded at a place which is within the political "limits of the port, unless, indeed, evidence can be "adduced to show that the word used in the policy to

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE Co.

"describe the *terminus a quo*, is generally understood "by mercantile men to comprise every place within "the legal limits of its port." 1 *Arnould on Insurance* 431.

In the margin of that paragraph, the American editor, as I take him to be, thus expresses it: "A policy "effected on goods for a voyage 'at and from' a named "port or place, will only attach on goods loaded on "board at the harbor town, so called, unless, by mer- "cantile usage, such policies are understood to protect "goods loaded at any place within the legal limits "of the port of such harbour town."

Arnould himself evidently considered that the usage which was thus to enlarge the meaning of the *terminus*, was one which prevailed in reference to policies of insurance, for he says: "Like every other part of the "policy, the interpretation of the words describing the "*terminus a quo* of the voyage, is governed by the "usage of trade in the particular voyage insured; and, "therefore, if it be proved that there is a mercantile "usage to ship goods under such policies, not at the "very place specified, but at some place adjoining "thereto, the policy will be held to attach on goods "shipped in compliance with the usage." 1 *Arnould on Insurance* 432. And he refers to the case of *Constable* v. *Noble*, 2 Taunt. 406, which I have already noticed as being so like the present. Now, there in giving judgment, *Mansfield* C. J., says: "If the plaintiff in this case "could have proved an usage for ships to load at "*Bridport* upon a policy at and from *Lyme*, it might "have assisted him, but no such usage was proved "here, — probably the underwriters never underwrote "a voyage from *Bridport* in these terms before." So that here the usage, which it is said might have controlled the *terminus* mentioned in the policy, is spoken of, not as a usage of the place with reference to other transactions or matters of business, but a usage for ships to load at the one place instead of the other upon policies of insurance.

Now, if we turn to the other cases, upon which a similar question has arisen, as in this case, we shall find that the evidence was directed to establish the particular usage itself.

Moxon v. *Atkins*, 3 Camp. 200, may at first sight appear not to be of that class. It was a policy on goods at and from the ship's loading port or ports in *Amelia Island* to *London*. *Amelia Island* lies at the mouth of the river *St. Mary's*. *Tigre Island* lies higher up the river, and there the vessel loaded, as appears to have been the usage of the place. There was in truth no port of any sort in *Amelia Island* at which vessels could load, and so the policy could not be literally understood. It was under such circumstances that Lord *Ellenborough* thought that in mercantile contracts *Amelia Island* might be considered to include *Tigre Island*, and so the cargo, according to the usage, to have been loaded at *Amelia Island*. The underwriters, therefore, by entering into a policy which would have been wholly inoperative, unless *Amelia Island* was considered to have included *Tigre Island*, may have been with every reason supposed to have recognised the usage, and to have adopted it when they made their policy.

In *Uhde* v. *Walters*, 3 Camp. 16, the question was whether on an insurance to any port in the *Baltic*, the *Gulf of Finland* was included, and evidence was admitted to prove that it was so considered; that licenses meant to protect ships to the *Gulf of Finland* were made out generally to the *Baltic;* and that policies were usually in the same form, although in *Baltic* risks leave is sometimes expressly given to proceed to ports in the *Gulf of Finland*.

So in *Robertson* v. *Money*, 1 Ry. & M. 75, where the question was, whether under a policy of insurance the *Mauritius*, which geographically was an *African* island, could be considered an *East Indian* island in mercantile acceptation, — the evidence of such a usage was that of several eminent *East Indian* merchants and

1863.

HENNESSY v. N. Y. MUTUAL MARINE INSURANCE Co.

others *conversant with underwriting*, who stated that the *Mauritius* was considered amongst merchants an *East Indian* island, and that *losses were usually paid* on that principle.

In both of these last cases the usage was, therefore, shown to have been recognised and adopted generally by underwriters themselves.

The language of *Duer*, an American writer of authority, is particularly strong on this point: "When "the interpretation of words, or the construction of a "clause in the policy, that may be understood in a "sense more or less extensive, has not been fixed by "judicial decisions, parol evidence may be admitted to "show whether they have obtained, by use and prac- "tice *between the assurers and the assured*, any, and what "known and definite import. * * Where the terms "of the clause, in their plain and ordinary sense, exhi- "bit a consistent meaning, that meaning must pre- "vail, unless it can be shown that it ought to be "modified and controlled by a positive usage; and "the concurrent opinions of any number of witnesses "would be unavailing to prove that such a usage, in "fact, exists. They would only prove that, in their "judgment, it ought to exist. In this, as in all other "cases, the usage is only to be established by proof of "distinct and successive acts. The proper and sole "enquiry is, what has been the interpretation in prac- "tice of the same words or clause in former policies? "What claims have been preferred by the assured, and "how have they been adjusted by the insurers? What "construction has been followed in the settlement and "payment of losses? If no claims have been ad- "justed, no losses paid or refused to be paid, there "has been no use or practice whatever in the inter- "pretation of the words or clause." And even then he proceeds to say: "The question still remains, "whether they have been so frequent and so general, "as to have given to the words or clause a known and "definite import, in reference to which, the parties

"may be justly presumed to have formed their contract." 1 *Duer on Insurance*, 185, 186, 187.

I do not know that I am prepared to adopt the rule here laid down in all its integrity without some modification; for there may, it appears to me, be circumstances in the case to show that a particular usage has been recognized by the underwriter, and is binding on him, though it has never been actually adopted in practice, as in *Moxon* v. *Atkins*, already cited.

Confining myself, however, to English authorities alone, and looking at the nature of the whole evidence, I am of opinion that no usage was shown, which could control the language of this policy, and enlarge the *terminus a quo* of the voyage described in in it. The evidence of a usage, whatever it was, did not carry it to this point, and, so far as there was any evidence touching it at all, it rather disproved it. I agree, therefore, with the view taken by the learned judge at the trial. The verdict which was found in opposition to this cannot be supported, and the rule for a new trial must be made absolute.

DODD, DESBARRES, and WILKINS JJ. concurred.

Rule absolute.

Attorney for plaintiff, *Miller*.

Attorney for defendants, *J. W. Ritchie*, Q. C.

1863.

July 21.

SMYTH *versus* McDONALD ET AL.

The Crown cannot grant lands, of which a subject has been in adverse possession for twenty years, without first re-investing itself with the possession by office found. The Imperial Act, 21 James I, chap. 11, is in force in this Province.

Where a party, who has been put into possession of Crown lands by a Crown surveyor, whom he paid for the survey, and who ran the base line of the lot, sighted the side lines, and marked two of the corners, afterwards sells without writing to a third party, who goes into possession, claiming the whole lot, such possession is *adverse* to the Crown, and is co-extensive with the limits of the lot, and not confined to the actual occupation.

Where a son of such third party went into possession of the lot two years after his father's death, made improvements, and died on it, leaving a widow and children (some of whom were the present defendants) who continued in possession, and extended the improvements.

EJECTMENT for lands in *Cape Breton*, tried before *Dodd* J. at *Port Hood* in *October* last, and verdict for defendants by agreement, subject to the opinion of the Court.

The case was argued in last *Michælmas* Term, by *Henry* Q. C., and *J. W. Johnston, senior*, Q. C., for plaintiff, and *C. F. Harrington* for defendants.

All the material facts sufficiently appear in the judgments.

The Court now gave judgment.

YOUNG C. J. This is an action of ejectment, tried in the last *October* Term at *Port Hood*, in which it was agreed that a verdict should pass for the defendants, subject to the opinion of the Court upon all the issues, "with power to order a new trial or a verdict for the "plaintiff, and the Court to draw conclusions of fact "from the evidence, in the same manner a jury might "or could do." Verdicts are often taken in this form in the mother country,—more often, indeed, than in this Court,—and from the scope they afford in moulding the issues and the decision, they are very conducive to the ends of justice. It would be better, however, to enlarge the power of the Court, by substituting, for the words I have placed within quotation marks, "*with power to dispose of the cause*, and to draw "conclusions, &c."

On the argument of this case, some difficulty was found in dealing with the amended pleas and appear-

Held, by all the Judges, that the possession of such son, and of his widow and children were adverse to the Crown, and co-extensive with the limits of the lot.

By *Dodd* J., that such possession being by *descent*, was a possession under *color of title*.

Decisions in *Uniacke* v. *Dickson*, (James' Rep. 267), *Scott* v. *Henderson*, (2 Thomson's Rep. 115), *Gibbons* v. *Kilday*, (M. S. M. T. 1861) reviewed.

ance by *James* and *Angus McDonald*; and it was finally agreed that the case should be argued upon the first plea put in by *Jane*, *Donald*, and *Sarah McDonald*. These three defendants are the widow and children of *Allan McDonald*, one of the sons of *Donald McDonald*, deceased; and the plaintiff claims, under a grant from the Crown, being the only grant that has ever passed, of the land in dispute, dated 4th *June*, 1861, and recorded in the county 12th *July*, 1862. The *locus* is the northern half of a two hundred acre lot comprehended in the grant.

It appeared at the trial that *Archibald Beaton*, who was examined as a witness, at one time claimed the whole lot as his own. "I went to *Sydney*," he says, "thirty-eight or forty years ago, and paid for a "warrant of survey for the lot. It was before the "annexation. I obtained the warrant about a year "after; and *Giles*, the Government surveyor, surveyed "the lot for me. He made two corners, and sighted "up on each side line. I paid him forty shillings "for the survey, and held after that for five or six "years, and then sold it to *Donald McDonald*, but not "in writing. I gave him possession of the lot, and "he gave me fourteen pounds for it. I did not read "the warrant, but was with *Giles* when he made the "survey." *James McDonald*, one of the defendants, was also examined, and said: "I was with *Giles* as "chainman when he surveyed the lot. He surveyed "two or three other lots at the same time. He fixed "corners for all the lots: there is a general rear line. "My father (*Donald McDonald*) took possession of the "lot. This was thirty-two or thirty-three years ago. "He built a barn and planted upon the land. He "had twenty acres cleared before he died; he has "been dead thirty-one years, last *Christmas*. He made "no will; had six boys and four girls, who survived "him."

On the case, thus far, I have to remark, that had *Beaton*, or his heirs, been the defendants, or had he

1863.

SMYTH v. McDONALD et. al.

conveyed to *Donald McDonald* by an instrument under seal, it would have come within the principle which we upheld in *Michælmas* Term, 1861, in the case of *Gibbons* v. *Kilday*. In that case, which was tried before me at *Sydney*, in *June* Term, 1861, the land held by the defendant had been granted to the plaintiff, by a misapprehension of the officers and agents of the Crown, who believed that there were two lots, each of two hundred acres, in place of one; and, in that belief, had accepted payment of the purchase money of defendant's lot. The Government surveyor had run the front and set the corners for the defendant, who had built and improved on the land for ten years before the date of the grant, had fences on it running back about half-a-mile from the shore, and was living on it at the time of action brought. There was no warrant nor order of survey; but this Court held, that the defendant, having entered with the knowledge and assent of the officers of the Crown, it was incumbent on the Crown to re-invest itself with the possession, before it could grant to a stranger. This decision was impugned at the Bar, because, as was said, it had been hastily come to; but on reviewing it, it seems to me to be consistent with the soundest principles of justice. The possession of *Kilday*, it is true, was not an adverse possession as against the Crown, nor did our decision proceed upon the ground of adverse possession. His possession, in one sense, was the possession of the Crown, and would probably have been so considered on an inquest of office. It was, in fact, a permissive and *bona fide* possession under the Crown; and why should the Crown, having by the act of its own officers induced one of the Queen's subjects to enter upon wilderness land, to expend upon it the sweat of his brow, to raise his family, and, perhaps, to die upon it, be allowed to perpetrate so gross an injustice, as to pass the title and right of possession to a stranger, and turn out the innocent and meritorious settler, or his widow and

children, without notice or compensation. That this ought not to be the law, will be readily allowed; and I am very clear that it is not the law. This is a case widely different from that of the squatter having no shadow of right, and stands entirely apart from a possession short of twenty years, and without the sanction or assent of the Crown, on which it is unnecessary that I should pronounce an opinion at the present time. The doctrine in *Scott* v. *Henderson* not having come before me as a judge, though I argued it as counsel, and the Court in that celebrated case having been equally divided, I am not called upon to say any thing on it now.

Returning to the case before us, I have further to remark that *Beaton* having transferred his possession to *McDonald* without deed or other writing, it is a principle well established in the American Courts and adopted in this, that the two possessions cannot be tacked, so as to make a continuity of possession, and *McDonald* and his heirs must therefore rely upon their own. *Angell on Limitations* 446-449.

Now, the possession of *Donald McDonald*, the father, as has been already said, commenced thirty-three years ago, and he had twenty acres cleared at the time of his death. His children worked upon the land from time to time, and part of them conveyed their interest to *Donald McDonald*, the defendant, in 1860, before action brought. *Allan McDonald*, the husband of *Jane*, and father of *Donald* and *Sarah*, went upon the land two years after his father's death, that is twenty-nine years ago,—he put up a house upon it twenty-four or twenty-five years ago, and died upon the lot; his son *Donald* was born upon it, and still resides there with his mother and sister, one-third of the land being cleared.

Under these circumstances we are dealing with a grant made to the plaintiff in 1861, against the remonstrances of *Donald McDonald*, the defendant, who applied to the government for a grant to himself, but

1863.

SMYTH v. MCDONALD et al.

on what grounds did not appear at the trial, nor was it shown what representations were advanced by either of the two parties. It is not unlikely, indeed it was stated at the argument, that the plaintiff was endeavoring to secure a debt from the *McDonalds;* but of that, or of the nature and extent of his interest there was no proof, and, for all the purposes of this decision, the plaintiff must be considered as a stranger to the land.

The argument then turns wholly on the Imperial Act, 21 *James* 1, ch. 14, whereby it was enacted that whensoever the king, his heirs, or successors, hath been, or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information of intrusion brought, or to be brought to recover the same; that, in every such case, the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that, in such cases, the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the king.

This statute is referred to in various passages of the judgments delivered in *Scott* v. *Henderson*, 2 Thomson's Rep. 115. It was the impression of the late Judge *Hill*, who abstained from giving a decided opinion, that the Statute ought to be held as extending to this Province, and conferring on the subject, after a possession of twenty years, a right to hold the possession till the title be adjudged for the Crown. The late *Chief Justice* seemed to acquiesce in this view, and Judge *Bliss* to have no doubt that the Statute was in force with us. The case of *Uniacke* v. *Dickson*, James' Rep. 287, is the most luminous enquiry to be found among our adjudged cases on the extension of English Statutes to this colony, and, as I entirely approve of that decision, I need not go over

the ground that was then traversed. It was held, in that case, that the Statutes 33 *Henry* 8, ch. 39, and 13 *Eliz.* ch. 4, which gave the Crown a lien upon the real estate of certain public officers, were not in force here; but the Statute of *James* is of a different character. The object of the former was to extend, that of the latter is to limit and restrain, the prerogative of the Crown, and that for a highly beneficial purpose, and for the protection and benefit of the subject. What class of persons is better entitled to the favor of the Legislature and of the Courts, than the men who transform a rude country into smiling habitations, and fit it for the use and enjoyment of man. I look upon this Statute of *James* as peculiarly suited to our condition and circumstances, and to have the same title to be considered a part of our law, and on the same principle, on which we have always recognized the Statute of Uses, or the Statute *de donis*, till the recent enactments abolishing estates tail.

Much was said at the argument upon the doctrines of abatement, disseisin, and intrusion, in all of which the entry of the tenant *ab initio*, as well as the continuance of his possession, is unlawful. 3 *Steph. Com.* (1st ed.) 483. Strictly speaking, intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. But when we speak of an intrusion upon the king's possession, we mean the act of a wrongdoer who has entered on the demesne of the Crown and taken the profits. Against such an intruder an information of intrusion lies within the limitations in the Statute of *James*, such information being in the nature of an action of trespass *quare clausum fregit* against the *tort-feasor* or his executor for trespasses committed on the land of the king, as by entering thereon without title, holding over after a Crown lease is determined, taking the profits, cutting down timber, and the like. *Chitty on Prerogative*, 332. *Cro. Jac.* 212. *Doe e. d. Watt* v. *Morris*, 2 Bing. N. C. 189.

1863.

SMYTH v. McDONALD et al.

We need not perplex this case, then, with distinctions which have little or no bearing on it. The case last cited, that of *Doe e. d. Watt* v. *Morris*, if not precisely in point, is very nearly so. We are not enquiring whether there was a descent cast on the heirs of old *Donald McDonald*, or whether they were tenants in common as among themselves. The present defendants and their ancestor have had possession of the most valuable parts of the *locus*—the buildings and the cleared land—for upwards of twenty years, and are protected, therefore, by the Statute of *James*.

The question narrows itself down to the extent of that possession. The defendants' counsel contended that it embraced the whole of the one hundred acres, and relied, in the absence of English authority, on the doctrine of the Supreme Court of the *United States* (*Angell on Limitations* 428, *Ewing* v. *Burnett*, 11 Peters 53), where it was held that, to constitute an adverse possession, there need not be a fence, building, or other improvement made; and that it suffices, for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy, for the time limited by the Statute.

So in *Ellicott* v. *Pearl*, 10 Peters 442, it is said that there are many acts, besides the erection of a fence, which are equally evincive of an intention to assert an ownership and possession over the property—that is the whole property or lot of land,—such as entering upon the land and making improvements thereon; raising a crop of corn, felling and selling the trees thereon, &c., under color of title. The case of *Heiser* v. *Richel*, 7 Watt's Penn. Rep. 35, cited in *Angell on Limitations* 426, extends the same doctrine to an intruder, and to the woodland, as well as the improved parts of the lot. In an earlier case, (3 *Johnson's Cases*, 119), *Kent* J. said: "Possession may be shown "not merely by a visible fence, but by acts of owner- "ship applicable to the nature of the property, it is "not requisite to show the print of the axe or plough

"in every part of a tract of land, to constitute a "possession of it." Now, without adopting these American cases to the full extent, I think there is abundance of proof in this case to give the defendants a constructive possession of the whole lot, and therefore, that they are entitled to our judgment.

BLISS J. concurred in the opinion that the judgment of the Court should be for the defendants.

DODD J. The case of *Scott* v. *Henderson*, 2 Thomson's Rep. 115, appears to me to have settled the important point that has arisen in the present case; that is to say, the right of the Crown to grant when out of possession for a period of twenty years. It is true, the Court was divided in opinion in *Scott* v. *Henderson*, as to the right being exercised when the Crown was out of possession for a period less than twenty years; but they were unanimous in opinion that, under the Statute, 21 *James* 1, ch. 14, that before the Crown could grant where an adverse possession had been held for twenty years, the intruder must be dispossessed. His Lordship the *Chief Justice* went the full length of deciding against the Crown upon the same principle that he would decide against the subject, who undertook to convey lands that were held adversely to him. He said both common law and statute law, in his apprehension, were against any exemption of the Crown from the general principle, that no man can grant or convey land of which another has the adverse possession.

It is not, however, necessary to adopt the principle to the extent thus laid down by his lordship, to give full effect to the Statute of *James*, which evidently was passed to give protection to the subject; and where can the provisions of the Act be more valuable than to the people of *Nova Scotia?* I believe there are many settlers in the extreme eastern parts of the Province, that have been in possession of their lands

1863.

SMYTH v. McDONALD et al.

for over fifty years, holding adversely to the Crown, and who have cultivated and improved nearly to the whole extent of the land thus claimed. To allow such persons, after the Crown slumbering over its rights for so extended a period, to be dispossessed by some fortunate applicant to its favor, who has succeeded in obtaining a grant, without the slightest notice to the party in possession, would, in my opinion, be an act of great injustice. And fortunate for the people it will be, if this Court can, under such circumstances, so construe the law as to afford them, if not any thing else, the opportunity of having their case fairly submitted to the Government of the country, before being deprived of possessions they have made valuable by years of toil and labor.

The elaborate opinion delivered by Mr. Justice *Bliss* in *Scott* v. *Henderson*, has exhausted the subject, and the various authorities both ancient and modern, to which he has referred, show how diligent his research must have been; and fully coinciding as I do in that opinion, it becomes unnecessary for me to say further on the subject.

The next point for consideration is, as to the nature of the defendants' possession, whether that possession is to be considered as confined to the actual improvements upon the land, or extend to the whole lot. The lot we find was first claimed by *Beaton*, under a warrant of survey obtained from the Crown Land office at *Sydney*, before the annexation of *Cape Breton* to *Nova Scotia;* and, a year after his application for the warrant, the lot was laid off for him by a government surveyor, who ran the base line, marked the corners, and sighted up from them the side lines, for which *Beaton* paid the surveyor forty shillings. He had been working upon the lot a few years before the survey, and continued to improve upon it for five or six years afterwards; at the expiration of that time he sold the lot to *Donald McDonald*, the grand-father of one of the defendants, for fourteen pounds, but no writing passed

between them. I, therefore, admit that the possession of *Beaton* under these circumstances cannot be added to the possession of the *McDonalds*, but it is important in another point of view, showing what *Beaton* sold and *McDonald* purchased, that is the whole lot, and not merely a portion of it. *Beaton* appeared upon the stand as an old and feeble man, whose recollection of the time of the survey, and what then was performed by the surveyor was indistinct; but the next witness, *James McDonald*, who acted as chainman at the survey, gave a full and clear, and I may say an uncontradicted account of the transaction. By his evidence, it appears that the surveyor then laid out three lots, one for *Beaton*, another for *Beaton's* brother, and a third for the witness, the lots adjoining each other, that of *Beaton* being between the other two, and each lot containing two hundred acres. The surveyor then ran the base line of the lots, making corners for them, and by that survey their owners have ever since held the lots, now over a period of forty-six years. The same witness states that there was a general rear line, but there is not any evidence when it was made. The surveyor, *Murphy*, who ran out the side lines before the grant came out to the plaintiff, says there was then a rear line, which he had previously renewed, and it then appeared from fifteen to twenty years old, but when he renewed it he did not say. So much then for the possession of the lot by survey.

Now, then, let us refer to other acts of possession. *Donald McDonald*, after he purchased from *Beaton*, built a barn upon the lot, and planted upon it, and when he died had twenty acres cleared. Two years after his death, which was thirty-one years before the trial, *Allan*, his son, went upon the lot, built a house upon it, and continued in possession until his death, sixteen years ago; and his wife and children have remained upon it ever since, continuing to cultivate and extend the improvements. Five years before the death of *Allan*, he sold the southern one hundred acres of

1863.

SMYTH v. MCDONALD et. al.

the lot to *McDougall*, who still retains the possession of that one hundred acres. The lot remaining in the possession of the defendants has one-third cleared and improved.

Taking, therefore, into consideration all the circumstances of this case, I cannot avoid coming to the conclusion that they are sufficient to establish an adverse possession to the whole lot.

Angell on Limitations says, (2nd ed'on, p. 428, sec. 21,) "There is an important distinction between the "possession of a mere intruder, and a possession taken "by a person under a colorable title. It is, that the "possession of the former is confined to the land "actually in occupation, whereas, the possession of "the latter is construed to be co-extensive with the "premises, as described by the deed or will, under "which he claims, and which he believes gives him a "sound title." Mr. Justice *Story*, in *Prescott et al.* v. *Nevers et al.*, 4 Mason's (Cir. Rep.) 330, likewise took it to be a clear principle of law, "that where a person "enters into land, under a claim of title thereto by a "recorded deed, his entry and possession are referred "to such title; and he is deemed to have a seisin "of the land co-extensive with the boundaries stated "in his deed, where there is no open adverse possession of any part of the land, so described, in any "other person." This Court has acted upon the principle thus laid down by Mr. Justice *Story* in more cases than one.

It, therefore, now becomes necessary to extend our enquiry, and ascertain if the defendants hold the land in question under color of title; for, if they do not, there is no pretence whatever for an adverse possession of twenty years against the Crown, so as to prevent the Crown granting, before resorting to the information of intrusion. Had there been a deed from *Beaton* to *McDonald*, then, there would have been color of title in the latter; so that he and those that now claim under him would have held the whole lot

by a constructive possession; but as the doctrine of tacking possessions, where there has not been any thing in writing between the parties, has never been recognized as law by this Court, we cannot go back beyond the possession of the first *McDonald*, which commenced not less than thirty-five years before action brought. He died in possession, having erected a barn upon the lot, and cleared twenty acres of the land. It was said at the argument that his possession could not be united with that of his children, that when he died, the possession of the Crown was restored, and the subsequent entering of his children was the commencement of a new possession as against the Crown, and that so likewise the possession of *Allan McDonald* could not be united to that of his children; but no authority was cited in support of this principle. The reverse, however, is well established in the Courts of the *United States*, and it appears to me consistent with the law of descent in *England*.

Angell, to whom I have already referred, says (*Angell on Limitations*, 2nd edition, pp. 446, 447, sec. 34, 35): "It is a principle well established that where several "persons enter on land in succession, the several "possessions cannot be tacked, so as to make a con- "tinuity of possession, unless there is a privity of "estate, or the several titles are connected. * * There "must be such a privity, that the possessions may "each be referred to one entry, as in the case of "landlord and tenant, or in the case of the heirs of "a disseisor, as father and son." If this be law, then there is not any thing to prevent the possession of the first *McDonald* being united with the possession of his children and grand-children; there being privity of estate between them, and the possession of each referred to the first entry by the ancestor.

Chief Justice *Tilghman*, in giving the opinion of the Supreme Court of *Pennsylvania*, in *Overfield* v. *Christie*, 7 Serg. & Rawle (Penn.) R. 177, said, that one who enters on land as a trespasser, and continues to reside

1863.

SMYTH v. McDONALD et al.

upon it, acquires something which he may transfer by deed, *as well as by descent;* and if the possession of such person, and others claiming under him, added together, amounts to the time limited by the Act of Limitations, and was adverse to him who had the legal title, the Act is a bar to a recovery. So it has been held in *Tennessee*, that color of title is where the possessor has a conveyance by deed or will, or has the inheritance. 4 *Tenn. R.* 182. And in *Williams* v. *McAuley*, Chreeves (S. C.) R. 200, it was held that the possession of a tenant under the ancestor enures to the heir.

We have, then, authority for showing that possession derived by descent may be united to that of the ancestor; also, that possession so derived is considered as possession under color of title; and that when there is color of title, the possession is not confined to actual improvements, but is co-extensive with the property claimed by the ancestor. So far for a possession under color of title, but had there not been color of title in this case, and the question had rested upon possession to the whole lot, I think, under the American authorities, and also under the authority of this Court, the defendants would not have been confined in their possession to their actual cultivation, but that the evidence is of that character to extend that possession to the whole lot.

Angell says (p. 426, sec. 18), "An intruder will be "protected after the expiration of the time limited by "the Statute, not only in that which he has cultivated "and enclosed, but also in all which may be made "useful and advantageous, as part of the farm, without "being enclosed, and which he has used as a part of the "farm in that way; and hence, woodland, in a reason- "able quantity, may be protected, if there be any "intent shown by the occupier to designate it as part "of the farm." And at p. 427, sec. 19, he says: "The "doctrine of the Supreme Court of the *United States* "is, that to constitute an adverse possession, there

"need not be a fence, building, or other improvement "made; and that it suffices for this purpose, that "visible and notorious acts of ownership are exercised "over the premises in controversy for the time limited "by the Statute. * * That it is difficult to lay down "any precise rule, in all cases; but that it may with "safety be said, that where acts of ownership have "been done upon lands, which, from their nature, "indicate a notorious claim of property in it, and are "continued sufficiently long with the knowledge of "an adverse claimant, without interruption or an ad-"verse entry by him, such acts are evidence of an "ouster of a former owner, and an actual adverse "possession against him." So, in this Court, in *Phalen* v. *Phalen*, James' R. 184, the Court held the running of one of the side lines of a large tract, to which the plaintiff had no title, but of part of which he was in actual occupation, a sufficient act of possession to enable a jury, with other evidence, to infer a constructive possession of the whole lot.

There was no secret possession by the parties in the present case, all their acts were open and notorious, and the notority of the possession is largely considered in a question of adverse possession; the object being to bring home, to those claiming the land by a superior title to possession, the fact that it is held adversely to that title, and it is impossible to suppose any thing else, than, that the Crown in this case was fully aware through its officers that the whole lot was held and claimed by the defendants adversely to the rights of the Crown. The act of *Allan McDonald*, selling one-half the land to *McDougall*, shows very significantly what rights he claimed to the whole lot, and if the transfer was in writing, then *McDougall* would have a constructive possession of all that was conveyed to him, notwithstanding the land was in a state of wilderness! a strange anomaly, if we now held that the possession of the defendants was confined to the improvements, which extend to one-third of the lot claimed by them.

1863.

SMYTH v. McDONALD et al.

After giving to this case the best consideration in my power, I am of opinion that the verdict entered for the defendants should not be disturbed.

DESBARRES J. concurred in the opinion of the *Chief Justice*.

WILKINS J. I think the English Statute of 21 *James* 1, ch. 14, applicable to this case, and that the report of my brother *Dodd* furnishes satisfactory evidence, even against the Crown, of an adverse possession *in fact;* first, by *Donald McDonald, senior*, who purchased verbally from old *Beaton*; and, subsequently, by his descendants, these defendants, of the whole northern half of the tract of land recently granted to the plaintiff, and for a continuous period of twenty years before the date of the grant.

The defendants are, in my opinion, by force of the Statute, notwithstanding the grant, which places the plaintiff in no better situation than the Crown would have been in, if it had not passed, entitled to retain their possession of the whole one hundred acres until the Crown, which has been advised to grant improvidently, reinvests itself with the possession in fact by office found.

The evidence of adverse possession of the whole tract is very strong, and it is a striking and significant feature in the testimony, that, from the very remote time of old *McDonald's* entry to the date of the grant, we have no proof of any claim being asserted by any than some member of the *McDonald* family, claiming under his ancestor, who entered under oral contract with *Beaton*. He (*Beaton*), thirty-eight years before the trial, paid for, and obtained, a warrant from the Crown for a survey of a tract of two hndred acres, that comprehended the one hundred acres now in contention. The Crown surveyor laid it off to him, as contradistinguished from adjacent lots, then, also, surveyed for others, and as a defined tract, marking

the corners, sighting the side lines, and running *that* distance in front necessary to give the due acreage, exacting from him the price of the survey. He thus took possession, and continued to claim the whole lot for five or six years, exercising some small acts of ownership, as cutting wood and preparing house logs.

His possession, however, may be regarded as held *under* the Crown; but at the end of six years, he sold *verbally* for £14, to *Donald McDonald, senior*, and, of course, sold *that particular tract*, which he claimed. There is not a particle of proof of any recognition, then or afterwards, by old *McDonald*, of title in the Crown; therefore, *he* may be considered as holding *ab initio* adversely to the Crown. His descendants, or some of them, have claimed ever since his death.

It is not necessary particularly to advert to the acts of occupation subsequently exercised by these last, which were, however, be it observed, exercised without the slightest interruption from the Crown, or from strangers; and though the precise localities of their exercise do not appear, they were exercised on portions of the one hundred acres, and were, in themselves, unequivocal acts of dominion, and were never restricted in any manner that showed an intention to relinquish a claim to any part of the whole tract.

I inquire, then, whether the *uncontradicted* facts of this case do not raise a presumption of a grant by the Crown to old *Donald McDonald*, a presumption which a jury might fairly draw?

Being, myself, placed in the position of a a juryman in reference to this case, and, as such, perceiving much to warrant, and nothing to repel, that presumption, I can only say that I, unhesitatingly, do entertain and draw it in favor of these defendants' manifest equities.

If drawn, the legal consequence is, that the possession of the defendants is *with title*, and, therefore, constructively co-extensive with the limits of the one

1863.

SMYTH v. McDONALD et al.

hundred acres claimed. (See *Jackson* v. *Lunn*, 3 Johnson's Cases 109.)

We were told, indeed, at the argument, that the title of the Crown to grant to the plaintiff was admitted by the conduct of the defendants. I can see nothing, however, that necessarily involves such an admission, which, I confess, I should be slow to perceive to their prejudice. Not the least weight in that respect do I attach to the application made to the Crown by *Donald McDonald*, (defendant), and by him alone, for a grant, after he had obtained a deed from the other heirs. It was, then, not unnatural for him to consider his a doubtful title; and if he desired to confirm it by means of a grant from the Crown, I feel that I ought to regard such an act on his part as one of mere prudence and discretion, and not one that at all derogated from the title that he actually had.

I am, therefore, of opinion that there must be judgment for the defendants on the verdict that they have obtained.

Judgment for defendants.

Attorney for plaintiff, *Henry*, Q. C.

Attorney for defendants, *C. F. Harrington.*

MARTIN ET AL. *versus* BARNES ET AL.

July 21.

EQUITABLE suit for the foreclosure of a mortgage, to which defendants pleaded (among other things) the Statute of Limitations, and that the alleged mortgage was not under seal, and, therefore, wholly inoperative and void.

At the hearing before the whole Court, in *Michaelmas* Term, 1862, the case was argued by *J. W. Johnston, senior*, Q. C., for plaintiffs, and *J. W. Ritchie*, Q.C., for defendants.

All the material facts are fully set out in the judgments.

The Court now gave judgment.

YOUNG C. J. This was an equity suit brought for the foreclosure of a mortgage for twenty-five pounds, dated so far back as the 25th *February*, 1817, and on which sixty-five pounds six shillings was claimed as being also due for interest to the date of the writ, no part either of principal or interest having ever been paid. The plaintiffs are the representatives of *George Paw*, to whom the mortgage was assigned on the 16th *March*, 1819, and the defendants are the widow and heirs of *John Barnes* the mortgagor. *John Barnes* and his wife executed the mortgage by their marks in presence of two witnesses, and it has the usual *testatum* clause before the signature of the parties, and the usual form "signed, sealed and delivered in the presence of" before that of the witnesses. In the registry of the alleged mortgage, two years after its date, the registrar had placed opposite the signatures both of the alleged mortgagor and his wife, (who signed by marks,) the usual mark, [L. S.] The wife of the alleged mortgagor had also acknowledged her release of dower, before a justice of the peace, and the assignment of the alleged mortgage two years after its date was under seal.

The alleged mortgagor, fifteen years before action brought, verbally acknowledged that the debt secured by the alleged mortgage was a just debt, but declined to give any further security, or to pay the money, alleging poverty as a reason, and asking time to consider, and shortly afterwards positively refused to sign any papers, or to take any other course in the matter.

No payment on account of the alleged mortgage had been made for more than forty years before action brought, except six dollars for interest thirty-one years before the issue of the writ, which was immediately returned on the alleged mortgagor's pleading poverty, and was not credited on the back of the alleged mortgage, nor in the account book.

Held, in an action for foreclosure of the alleged mortgage, (*Young* C. J. and *Dodd* J. dissenting,) that the existence of seals to the alleged mortgage at the time of its signature, might be presumed.

By *Bliss*, *DesBarres* and *Wilkins* JJ., that the verbal acknowledgment by the alleged mortgagor of the justness of the debt, rebutted any legal presumption of payment.

1863.

MARTIN et al. v. BARNES et al.

"sence of" before that of the witnesses. The release of dower was acknowledged on the 29th *April*, 1817, but the instrument was not recorded till the 20th *March*, 1819, when opposite to the signature of the two parties in the book of registry there is the usual mark of L. S. The mortgage is in the proper form, and is clearly written, and there can be no doubt that if not sealed, it was intended to be so, but on the face of it not the slightest trace or mark of a seal is discernible. Having been assigned by *Abner Stowell*, the mortgagor, on the 16th *March*, 1819, to *George Paw*, who died in 1825, it is in proof that *Barnes* and his wife, sometime between 1827 and 1830, paid to the widow, who had in the meanwhile inter-married with *Martin*, six dollars on account of the mortgage, but, pleading poverty, the wife gave it back to them. "I had not the "heart," she said, "to take it;" and the payment was not credited on the back of the mortgage, nor in the account book. The claim was then suffered to sleep till 1846, that is from sixteen to nineteen years, when it was put into the hands of Mr. *James*, and *Barnes* acknowledged it was a just debt, and had not been paid; but on being urged to execute a deed of the premises, and to take a lease for two years, he decidedly refused to do so, or to take any other course in the matter. The payment of the six dollars was not mentioned to Mr. *James* by the Messrs. *Paw*, who again permitted the claim to lie over till *September*, 1861, that is fifteen years more, when the action was brought; *Barnes* and his family who had continued to occupy the premises, having in the meanwhile left the Province, and gone to the *United States*, where *Barnes* died about 1857, four years before action brought. There can be no question, therefore, that this, although it may be an honest, is a stale demand; the mortgage being dated upwards of forty years before action brought, and there being no acknowledgment in writing, nor any actual payment except the thirty shillings which rests entirely on the evidence of the

plaintiffs. "The mortgage was not enforced," says Mr. *James*, "in 1846, 1847, because it did not appear from any information I had that the mortgage "had ever been recognized by Mr. *Barnes* since it was "made, and he had been in possession of the property over twenty years. There was no information "of any payment ever having been made or tendered. "I never heard of any. There was a difficulty also "about there being no seal to the mortgage; but it "was not treated as a principal difficulty." "I never "received," he adds, "any further instructions to proceed from *January*, 1847, and in the course of time I "considered the matter abandoned." It was revived, however, by an attempt to sell the property on the part of the defendants, and the present action was brought.

The main question that was argued before us last Term, was the effect upon equitable principles of the *laches* attributed to the plaintiffs, and of the uninterrupted possession for so long a period by the defendants and their ancestor, and the presumption of payment arising from these facts. It was insisted that there was a distinction in this respect between mortgages and bonds; and no doubt the older cases of *Toplis* v, *Baker*, 2 Cox 118, and *Leman* v. *Newnham*, 1 Ves. Sen. 51, recognize such a distinction; but it is repudiated in other cases, particularly *Trash* v. *White*, 3 Bro. C. C. 289; and in the very leading case of *Christophers* v. *Sparke*, 2 Jac., & Walker 233, Sir *Thomas Plumer* inclines strongly to the opposite doctrine. I have not found any late English authority upon this point, but the American cases are clear. The rule is laid down in 4 *Kent's Com's.* 223, and *Angell on Limitations* 80, 490. So also in the case *Giles* v. *Baremore*, 5 Johns. Chan. Reps. 545, and in *Jackson* v. *Wood*, 12 Johns. 245, where it is said, that "twenty years' possession of mortgagor without any demand, or any "interest having been paid, has always been deemed "a sufficient length of time to warrant the presump-

1863. MARTIN et al. v. BARNES et al.

"tion of satisfaction." *Buller's Nisi Prius* 110, and the case of *Hillary* v. *Waller*, 12 Ves. 239, decided some years before *Christophers* v. *Sparke*, are to the same effect. In this last case, the *Lord Chancellor* said, p. 266: "I remember a case before Lord *Mansfield*, where a "mortgagee brought his ejectment; the deeds proved, "accompanied with a bond, all went for nothing; "he had not received for twenty-five years, though "living within a street of the mortgagor, any money "upon the mortgage; and upon that the mortgage "was considered satisfied." Stale and long neglected demands, while they are discountenanced by the Legislature, are little favored in Courts of Equity, of which many examples are given by *Fonblanque*, in his Treatise, vol. 1, p. 329, and I must confess that I have no difficulty in holding that in the case equally of a mortgage, as of a bond, the presumption of payment arises from lapse of time. Not that there is any presumption that the debt never existed, or any belief that in point of fact it has been paid,—for legal presumptions do not always proceed on a belief that the thing presumed has actually taken place; but for the sake of ending controversies and preventing litigation. Grants, for example, and why not payments as well as grants, are frequently presumed, merely for the purpose, and from a principle as stated by Lord *Mansfield*, 1 Cowp. 215, of quieting the possession. (See also 3 *Johnson's Cases* 109, S. P.)

This presumption, however, like every other, may be rebutted by circumstances. In one of the cases, Lord *Mansfield* seemed to think that it would be enough to show that the debtor had not been in circumstances to pay, but this appears to me to be too vague, especially as it is elsewhere laid down, that to rebut the presumption there must be direct and positive proof. Proof of this character, showing an actual payment within twenty years, or a recent acknowledgment of the debt would clearly be enough; and in the present case it would have been an inter-

esting and rather a nice enquiry whether the proof came up to the mark, but for the other difficulty, the want of a seal, on which I am of opinion, after an attentive examination of the cases, that the law is with the defendants.

I must acknowledge that my impression lay the other way at the argument, being somewhat influenced by the rule in 1 *Sugden on Powers*, 232, where, after remarking on the importance which the common law attaches to the ceremony of sealing, the learned writer remarks (contrary to the old rule, as demonstrated by *Chan. Kent*), that "the impression need not be made "with wax or with a wafer. If the seal, stick, or "other instrument used, be impressed by the party "on the plain parchment or paper, with an intent to "seal it, it is clearly sufficient;" (on which I would remark, that, if it be so, it reduces the sealing to a most inconclusive and idle ceremonial;) "and, there- "fore, where the instrument is a deed, and on proper "stamps, and it is stated in the attestation to have "been sealed and delivered in the presence of the "witnesses, it will, in the absence of evidence to the "contrary, be presumed to have been sealed, although "no impression appear on the parchment or paper. "This, I am told, Lord *Eldon* decided, when in "the Common Pleas." And this passage from *Sugden* is cited in *Taylor on Evidence*, 144, and in 7 *Q. B.* 238. Now, it must be observed that the deed having the proper stamps is a very material circum- stance wanting in this country, and, without this authentication, it would be a dangerous thing to adopt the rule as universally prevailing. The virtue of a piece of wafer or wax stuck upon a paper has been often sneered at in Courts of justice; and I am not disposed to value it too highly. Still, that same bit of wax, or wafer, makes all the difference between "deed" and "no deed"; the seal being of the very essence of the deed. "Notwithstanding," says *Perkins*, sec. 129, "that words obligatory are

1863.

MARTIN et al. v. BARNES et al.

"written on parchment, or paper, and the obligor "delivereth the same as his deed, yet, if it be not "sealed at the time of the delivery, it is but an escrol, "though the name of the obligor be subscribed." In the case of *Ripley** v. *Baker*, in this Court, in 1861, we re-affirmed the doctrine that certain licenses lay only in grant; and, in obedience to that rule, decided against the apparent justice of the case.

The efficacy of deeds has been recognized in the *Merchants' Shipping Act*, 1854, and unless our legislature interfere, as they have done in *Connecticut*, (which I would not be understood, however, as approving,) and enact that conveyances and bonds shall be valid without seals, we must adhere to the common law rule. In *Warren* v. *Lynch*, 5 Johns. 245–247, *Kent* C. J. points out, as *Stephens* has done in his Commentaries, that the civil law understood the distinction and solemnity of seals, as well as the common law of *England*, and proceeds to say that ingenious criticism may be indulged at the expense of this and many other of our legal usages; but we ought to require evidence of some positive and serious public inconvenience, before we at one stroke annihilate so well established and venerable a practice as the use of seals in the authentication of deeds. Of the use of seals in the authentication of writs, we had a memorable instance in this Court in the recent case of *The Queen* v. *Burdell and Lane*, when the want of a bit of wafer reduced the crime of homicide from murder to manslaughter.

Blackstone (2 Com. 306,) lays it down that the Statute of Frauds has restored the old Saxon form of signing, and superadded it to sealing and delivering in case of a deed. (See 2 *Q. B.* 597. 1 *Steph. Com.* 502.) Mr. *Preston*, on the other hand, in his edition of *Sheppard's Touchstone*, p. 56, note 24, treats this passage in *Blackstone* as a mistake, from not attending to

* Ante p. 23.

the words of the Statute, and holds it clear that no signature is necessary in the case of a deed. So in a case cited by *Starkey* (*Sharswood's* edition, 462), where a certificate under the Statute 8 and 9 *Will.* 3 *ch.* 30, (which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens), was signed by two churchwardens and one overseer, but bore two seals only, the Court held that it was not a valid execution.

The argument in this case, however, turned not upon the necessity of a seal, which could not be disputed, but upon the presumption that there had been one. In the case of *Sprange* v. *Barnard*, 2 Bro. C. C. 587, Lord *Kenyon* held the stamp upon a will to which, by the words of the power, a seal was required, to be equivalent to a seal, without having recourse to the wafer which annexed the stamped paper to the former. But besides that this case is questioned by Mr. *Sugden* (p. 231); here there is no stamp and no wafer, and therefore it does not apply. In *Clerke* v. *Heath*, 1 Mod. 11, the plaintiff produced a certificate of the bishop that had only a small bit of wax upon it, and *Twisden* J. said, "If it were sealed, though "the seal were broken off, yet it may be read, as we "read recoveries after the seal broken off; and I "have seen administration given in evidence, after "the seals broken off, and so wills and deeds." Accordingly it was read. So in the *Mayor of Beverley* v. *Craven*, 2 Moody & Rob., 140, where an exemplification, which came from the corporation chest, had a slip of parchment at the foot, like those to which the Great Seal is usually attached (as we have sometimes seen grants in this Court), *Alderson* Baron presumed that the seal had been accidentally removed. But there is no bit of wax, no slip of parchment, nor the smallest vestige of a seal here.

This does not at all resemble the cases in 9 *Car &*

1863.

MARTIN et al. v. BARNES et al.

Payne 112, 572, 8 *B. & Cres.* 16, and others, where the deed being perfect on the face of it, and the witness having no recollection of the circumstances, but seeing his own signature has no doubt that it was duly executed. This is familiarly held as sufficient *prima facie* proof, but here there is no proof. The clauses in the deed were evidently written in the expectation that it would be duly sealed, and besides, Lord *Denman* asks (2 *Q. B.* 589): "Can we take any notice of "the attestation, it is no part of the deed." The only circumstance of any avail is the entry of the L. S. in the book of registry; but that might have been a compliance with the established usage in copying, without indicating the actual presence of a seal. I can see no ground, therefore, for presuming that a seal was there; and if not there, the law says that the mortgaged lands did not pass to the mortgagee.

It must be recollected that, had the holders of this mortgage looked to their interest in any reasonable time, Equity, at all events in the life time of *Barnes*, would have afforded them relief. I have not found any case where a seal accidentally omitted was ordered to be supplied; but the principle is clear, that a Court of Equity will supply any defects of circumstances in conveyances, and will interpose its authority, where the persons interested fully intend to contract a perfect obligation, though by mistake or accident they omit the set form of law. (1 *Fonblanque on Equity*, 40-41. 1 *Madd. Chanc.* 48-50.)

Parties having thus a complete remedy in this Court, when applied for in due time; and the plaintiffs seeking to enforce a mortgage of such ancient date, and where the last acknowledgment was fifteen years before action brought, and therefore cannot be deemed a recent acknowledgment; one cannot but feel that it is one presumption against another, and that the judgment, to which, as I think, the defendants are entitled, while sustained by the rules of law, may not be at all inconsistent with the justice of the case.

1863.

MARTIN et al. v. BARNES et al.

BLISS J. The declaration in this case alleges that *John Barnes* and his wife executed a mortgage, dated 25th *July*, 1817, to *Abner Stowell*, to secure the payment of twenty-five pounds, with a proviso for the payment thereof on 26th *July*, 1820; that on 16th *March*, 1819, *Stowell* assigned the mortgage to the said *George Paw*, and that no part of it has been paid; that *Barnes* ever acknowledged the debt, but pleaded poverty and inability to pay it.

The first question in the case arises under the defendants' third plea, that this mortgage was not under seal, and was wholly inoperative and void. The mortgage itself, when produced, was without any seal, nor was there any visible trace, or mark, or impression of any seal on it; and this is relied on by the defendants in support of their plea.

The instrument, upon its face, purports to be an indenture for securing the payment of money paid by the mortgagee to the mortgagor, "before the sealing "and delivery thereof." It concludes in these words: "In witness whereof, the parties to these presents "have hereunto their hands and *seals* subscribed and "set," &c.; and the witnesses thereto attest to the sealing as well as the signing of it.

It is, then, an instrument which ought to have been, and was intended to have been, under seal,— the very term "Indenture" imports that it was, and the language of it speaks to this effect. The mortgagor himself expressly declares that he had signed and *sealed* it, and the witnesses, whom he has called in, attest to its having been done.

In the face of all this, I think the present appearance of the mortgage without a seal, or any mark or trace of a seal, is not of itself sufficient to establish the fact that it never was sealed; and that it was necessary that the defendants should give some positive and direct evidence of that fact. The passage in 1 *Sugden on Powers*, p. 300 (6th edition), cited in *The Queen* v. *Inhabitants of St. Paul*, 7 Q. B. R. 238, is to

1863. MARTIN et al. v. BARNES et al.

that effect, and no higher authority, short of a judicial decision, can be adduced, than that of the very learned and celebrated author of that work. (The learned judge here read the passage from *Sugden on Powers*, which had previously been read by the *Chief Justice*.)

The absence of a seal, or of any trace of a seal, is by no means a sound test or proof that the instrument never had one. The impression, good enough at the time, may have become wholly effaced after the lapse of so many years, and this deed is now forty-five years old. The seal, too, may have been, and very likely was, the very common one of a wafer, which, put on hastily or carelessly, might fall off, or be rubbed off, without leaving any visible mark whatever on the deed itself.

But, besides the presumption of its having been sealed, which Lord *St. Leonard's* speaks of in the passage cited from his writings, arising from the nature of the instrument, and the attestation of the party and the witnesses that it was so sealed, there are in this case other circumstances, which strengthen that presumption greatly. The mortgage, as an instrument under seal, would require, if assigned, that the assignment should also be under seal; and, accordingly, this appears to have been so formally assigned by the mortgagee, and, therefore, at that early day, to have been treated as a sealed instrument. Again, the dower of the wife, a party to the deed, was released by acknowledgment before a justice of the peace, recognizing it to have been under seal; and when the mortgage was recorded, as it was in *March*, 1819, the registrar in his book has placed opposite to the signature of the mortgagor who executed it, the letters [L.S.], showing that at that time there actually was a seal there; at least, that is the fair inference of his record. And, lastly, it may be mentioned, that when, in *December*, 1846, Mr. *James*, who then acted as the attorney of the plaintiff, called, on their behalf, upon

Barnes, the mortgagor himself, to pay or secure this mortgage, he not only did not assert that it was not under seal, and so a void instrument, but he acknowledged it was a just debt; that is, he acknowledged it to be an existing mortgage, which I consider to be a recognition of its being under seal; and so I think we must now consider it on these facts, and the high authority of Lord *St. Leonard's*.

The remaining question is, whether the presumption of payment arising from length of time is rebutted by the facts in evidence.

I pass by the evidence relative to the payment of a small sum of money by *Barnes* and his wife, between the years 1827 and 1830, because giving the utmost credit and effect to it, more than thirty years have elapsed since that,—a sufficient time, if there were no proof of a subsequent recognition or acknowledgment of the debt, to establish the presumption that the mortgage had been paid and satisfied. But the evidence of Mr. *James*, to which I have already had occasion to refer, brings the acknowledgment of *Barnes* down to a period within twenty years, and upon that the present point must turn. He states that shortly before 12th *December*, 1846, he called upon *Barnes* and asked him to pay or secure the mortgage in question,—that *Barnes* said he knew it was a just debt, and that it had not been paid. He hesitated about taking any course upon it, either for securing or paying the money; he alleged his poverty as a reason. He declined to execute a deed upon receiving twenty-five pounds, which was proposed to him, and asked for time to consider of it. On the 31st *December*, Mr. *James* again called upon him,—but nothing is stated to have taken place. On the 13th *February*, 1847, Mr. *James* called once more, when *Barnes* decidedly refused to sign any paper, or to take any course in the matter.

There is no positive statutable bar, which would prevent the holder of a mortgage from enforcing it

1863.

MARTIN et al. v. BARNES et al.

after a lapse of twenty years and upwards; but assuming that a mortgage stands on the same footing in this respect as a bond, the defence to it, after such a length of time, is founded upon the presumption that it has been paid. The Statute of Limitations is a positive bar, and no acknowledgment that the debt has not been paid will defeat its operation; nothing short of a new promise to pay will suffice. But the bar, which arises from a presumption of payment only, may be met and answered by any fact or circumstance which fairly rebuts the presumption, and shows that the debt is still unpaid; an acknowledgment therefore by the party to this effect is a full and complete answer to this defence. It seems, indeed, the most decisive answer that can be given to rebut the presumption, since payment cannot be presumed in the face of the party's own admission that it has not been paid. Payment of interest on the bond within the twenty years only rebuts the presumption of payment, because it amounts to a clear acknowledgment that the bond has not been satisfied. Per *Parke* J. *Saunders* v. *Meredith*, 3 M. & R. 121.

Now, the acknowledgment of the mortgagor, made to Mr. *James*, is as clear, positive, and unequivocal as can well be conceived. It is not an admission derived from loose conversations, liable to be misunderstood or misrepresented. Mr. *James* was then the attorney of the plaintiffs. He subsequently became the attorney of the defendants in a matter connected with this property. As the attorney of the plaintiffs, he called on *Barnes*, the mortgagor, in 1846, to pay or secure the mortgage. *Barnes* then, thus applied to professionally, with his attention called immediately to the mortgage, replies that it was a just debt, and that it had not been paid. Can any acknowledgment be more plain or more positive? It is true, that he hesitated to take any course upon it, either to secure or pay the money, alleging poverty as a reason, and that he subsequently decidedly refused to do so. But

refusal to pay has nothing, as I conceive, to do with the question. The admission that the mortgage was a just debt, and had not been paid, establishes his liability to pay it, because it absolutely and completely destroys the presumption that it had been paid.

1863.

MARTIN et al. v. BARNES et al.

The English Statute, 3 & 4 *Will.* 4, ch. 42, sec. 3. limits the right to sue on bonds, or to bring an action to recover any land, to twenty years; and any acknowledgment to take the case out of the Statute, must be in writing. But that Statute has not been adopted by us in this Province, and we must be governed by the law, as it stood before it was passed; and prior thereto, it was certainly never considered that the acknowledgment, which was to rebut the presumption of payment, must be in writing.

Indeed, before the English Statute of 3 & 4 *Will.* 4, ch. 42, the possession of mortgaged premises by the mortgagor for twenty years, without payment of interest, or acknowledgment by him of the mortgagee's title, was held no bar to an action of ejectment, upon the ground that the possession of the mortgagor was not inconsistent with the right of the mortgagee, nor adverse to him. *Hall* v. *Doe d. Surtees*, 5 B. & Ald. 687, and *Doe d. Jones* v. *Williams*, 5 A. & E. 291. And if so, it may be doubted whether such a possession would be a bar to a foreclosure brought against the mortgagor. But, however that may be, which it is not necessary to decide in this case, I cannot understand how the action to foreclose can be defeated after such an acknowledgment by the mortgagor, as is proved by Mr. *James* to have been made by him. I am, therefore, of opinion that the plaintiffs are entitled to their judgment.

DODD J. I will confine my observations to the want of a seal to the mortgage, as, upon that point, I think the plaintiff must fail in his attempt to foreclose.

If a party seal a deed with a seal, that is not his

1863.
MARTIN et al. v. BARNES et al.

own seal, "or with a stick, or any such like thing, "which doth make a *print*, it is good; and although "it be a corporation that doth make the deed, yet "they may seal with any other seal besides their com- "mon seal." *Sheppard's Touchstone*, ch. 4, p. 57.

But although sealing, as here mentioned, with any thing making an impression, thereby showing an intention to make the instrument a deed, may be sufficient in law for that purpose, yet I cannot find any authority for inferring a seal, where no appearance of a seal, or any thing denoting an intention to seal, is found on the deed, beyond the attestation of the witnesses, that the instrument was signed, sealed, and delivered, in their presence.

"Every deed ought to have writing, sealing, and "delivery; and sealing has always been considered "of more importance, to give validity to the deed, "than signing; and at common law, it is essential "only that it be sealed and delivered; for any agree- "ment in writing, sealed and delivered, becometh a "deed." *Co. Lit.* 171 *b.*, *Sheppard's Touchstone*, ch. 4.

Addison on Contracts, p. 10, in referring to sealed instruments, says: "It would be advisable, indeed, in "all cases, to require strict proof that the seal attached "to a written contract was affixed thereto and acknow- "ledged by the party, and that the contract was "delivered, with the intention of giving to the instru- "ment the character and effect of a deed, inasmuch "as the contract, though bad as a deed, might yet, "under certain circumstances, be good as a common "agreement or simple contract." (See *The King* v. *The Inhabitants of Ridgewell*, 9 D. & R. 678, 6 Barn. & Cress. 665, *S. C.*)

If strict proof is considered necessary or advisable, where there is a seal to the deed, how much stronger should that proof be, where there is not a seal, to show the intention of giving it the character of a deed? Although much of the solemnity formerly attached to sealing has abated, yet the contract, under seal, still

retains all its original force and vitality. "The burden of proof of the formal execution of a deed, "is upon the party claiming under it. This proof "consists in producing the deed, removing any suspicions arising from alterations made in it, and "showing that it was signed, sealed, and delivered by "the obligor" (or party required to execute it); "and "where any particular formalities are required by "statute, as essential to its validity, such as a stamp, "or the like, the party must show that these have "been complied with." 2 *Greenleaf on Evidence*, sec. 294.

There may be, and there is great difficulty in finding always a case precisely in point with the one under consideration, and it is quite clear that neither of the learned counsel that argued this case were successful in doing so. In *Talbot* v. *Hodson*, 7 Taunton 251, cited by Mr. *Johnston* at the argument, there was a seal to the deed, and there the Court, upon proof of the signature, and the deed bearing on its face a declaration that it was "signed and sealed," thought there was evidence to be left to the jury that the party sealed and delivered it, although the witness did not recollect whether or not it had a seal at the time of attestation. There are several other cases to the same effect in the books, but not any, that go the length contended for, that where the deed on the face of it has not a seal, and there is not any thing to show there ever was a seal, but the attestation of the witnesses, that such would be sufficient to estalish a sealing. The note to *The Queen* v. *The Inhabitants of St. Paul*, 7 Q. B. 239, which was read by Lord *Denman*, from a passage in 1 *Sugden on Powers*, p. 300, (6th edition), is as follows: (The learned judge here read the passage from *Sugden on Powers*, quoted by the *Chief Justice*.)

So far as this case goes it is conclusive, and I question much if any person on this side of the Atlantic would presume to doubt so high and great authority,

1863.

MARTIN et al. v. BARNES et al.

as the two great and profound jurists here referred to. But still that opinion does not fully meet this case. Here we have the deed with the witnesses attesting that it was signed and sealed in their presence, but we have not the other equally important feature in the case referred to in the note, that the deed is on proper stamps. There was not any occasion to have referred to stamps, unless stamps gave a character in proof of sealing equally as significant as the attestation of the witnesses. An instrument in *England* requiring a seal could not be received in evidence without a stamp, although it had a seal; and the fact of its having a stamp equal in value to a deed, which is very much greater than stamps for any instrument not under seal, would be pretty conclusive evidence that the grantor intended to give it the character it purported to bear on its face, and would greatly strengthen the presumption of the attestation of the witnesses that it had been sealed.

We have in the present case a deed over thirty years old, which, in ordinary cases, proves itself, but when there are any suspicious circumstances attached to it, then the witnesses that were at the execution, if alive, should be called to explain them; and the want of a seal to an instrument requiring one is of such vital importance, that, although the deed is over thirty years old, I think they should have been produced, as the best evidence to account for it. In 2 *Phillips on Evidence* 205, it is said, "If there is any blemish in the "deed by rasure or interlineation, it has been said "that the deed ought to be proved, though above thirty "years old, and the blemish satisfactorily explained." The same principle will be found in 1 *Greenleaf on Evidence*, sec. 21 and sec. 570. Had the witnesses been called in this case, presuming, as I do, that they are alive, there not being any evidence of their death, it is probable they could have proved the state of the mortgage when executed; and, if then sealed, proof of its delivery would have been sufficient to establish

by inference that it was properly executed. *Gresley on Evidence*, page 121, says: "If the witness who saw "the delivery can say that the deed had a seal on it "at the time, it is enough." See also upon the same point, *Powell* v. *Blackett*, 1 Esp. R. 97. But "it does "not follow, because the words 'in witness whereof "'we do put our hands and *seals*,' are used in the "conclusion of the agreement, that therefore it was "sealed." 1 *Saunders' Rep.* 320, n. 3.

In *Burling* v. *Paterson*, 9 Car. & Payne 570, cited by Mr. *Johnston*, one of the points of the case turned upon the attestation of the deed, which was in the usual form, and the attesting witness recollected seeing the party sign the deed, but did not recollect any other form being gone through; and it was there held it was for the jury to say whether the deed was not duly signed, sealed, and delivered, as that was likely to have occurred, though the witness did not remember it. In that case there was a seal to the deed; and *Paterson* Justice who tried the cause, in submitting it to the jury, said: "Did the party 'sign, seal, and "'deliver the deed?' The witness recollects her sign- "ing it, which is the least material point; however, "you will say whether this evidence satisfies you that "the party authenticated the seal, either by touching "it, or the like."

Had the deed been without a seal, I cannot believe that the learned judge, who attached so much importance to sealing and delivery, would have told the jury they might have inferred the sealing from proof of signing, which, he said, was the least material point. There is a note to that case, stating what I have already referred to in the extract I have made from *Co. Litt.* 171 *b.*, showing that deeds, before the Statute of *James*, were never signed, and were rendered valid by the seal only. I will now refer to two other cases, which were not cited at the argument, but which have much weight with me, in supporting the view I have taken of this case.

1863.

MARTIN et al. v. BARNES et al.

The first is that of *Ball* v. *Taylor*, 1 Carr. & Payne 417. There the witness, to prove the execution of a bond, did not recollect whether, at the time it was executed, it had any seal, and he swore that he did not read the attestation at the time he witnessed the execution; but there being a seal at the time of the trial, and the bond itself saying, "sealed with our seals," it was held to be sufficient proof of sealing. But *Best* C. J., in his address to the jury, said: "If, on inspection, no "seal had been found affixed, then I should have held "it would not do." If the observation of the *Chief Justice*, in that case, is to be considered as authority, then it is conclusive against the plaintiffs.

The other is an American case, *Armstrong* v. *Pearce*, 5 Harring. (Del.) 351, referred to in 4 *Kent's Com.* 543, n. 2. In that case it is said that a seal must appear upon the face of the instrument, and that the words "Witness my hand and seal," are not sufficient.

Had there been the least mark of a seal, or any thing to denote a mark, seal, or impression of any kind, upon the mortgage, where the seal is usually placed upon deeds, I would have been satisfied with the execution of the instrument, so far as to make it a question for a jury to say, if intended for a seal. But there not appearing any thing upon the instrument, from which a jury could infer a sealing, beyond the attestation of the witnesses, I am of opinion that judgment should be entered for the defendants.

DESBARRES J. On the facts proved in this case two questions have arisen:—

First. That the instrument purporting to be a deed is inoperative and void as a deed, because it has no seal.

Second. That, assuming the mortgage to be valid, the amount secured thereby must from lapse of time be presumed to have been paid.

That no instrument, however formally executed, can operate as a deed, without a seal, or something

representing a seal, is undeniable; but it is said not to be necessary, in order to constitute a valid sealing, that an impression shall be made with wax or with a wafer; an impression made with a stick or wooden block, will, it seems, suffice.

(The learned judge here read the passage from *Sugden on Powers*, p. 232, already cited.)

There is no doubt that the mortgage in this case was executed with the usual formality of, and recognized throughout as, a deed, as well by the mortgagor as the mortgagee; for it was assigned by the latter by deed poll two years after its execution, and then recorded as a deed on the oath of one of the subscribing witnesses, who, for the purpose of its being recorded, must have sworn that it had been signed, sealed, and delivered in his presence, as a deed in the usual form. The fact that the registrar, in recording this mortgage, wrote the letters "L. S." opposite to the names of the mortgagors, to indicate the places of, and represent the seals affixed thereto, goes far to show that it either had seals affixed to it at that time, or some impression representing a seal; otherwise, he would not have inserted these letters in the registry. And the assignment of it by deed also shows that it must have had, and borne on the face of it, the essentials and requisites of a deed; otherwise, it can hardly be supposed that the assignee would have paid his money, and taken an assignment of it as he did.

These circumstances, taken together, appear to me sufficient, in the absence of proof to the contrary, to warrant the presumption that the mortgage must have had a seal affixed to it at the time of its execution and registry; although there are now no marks, or traces, or any impression of a seal upon it.

Assuming, then, as I am inclined to do, that this mortgage either was sealed, or that an impression was made upon it at the time, *with an intent to seal it*, which has since disappeared; the next question is, whether there is sufficient evidence to repel the presumption

1863.

MARTIN et al. v. BARNES et al.

arising from lapse of time, and a long possession in the mortgagor, that the mortgage has been discharged. The evidence of Mr. *James* particularly applies to this point. He states that he was employed to collect or secure the mortgage from *Barnes*, and that he called upon him several times, once with Mr. *George Paw*, and again with Mr. *William Paw*, and that, in an interview with *Barnes*, on, or shortly before, the 12th *December*, 1846, on being asked to pay or secure the mortgage, he said "it was a just debt, "and that it had not been paid." Mr. *James*, it is true, says that *Barnes* hesitated about taking any course upon it, either for securing or paying the money, and that he refused to accede to his proposition to give a deed of the property on payment to him of twenty-five pounds. But as this refusal may have proceeded from an unwillingness on his part to take twenty-five pounds for his equity of redemption in the property, which he may have considered was worth a larger sum, I do not think it destroys or weakens the effect of his previous admission, and that it can, or ought to, be regarded as an admission so qualified that it cannot be received as evidence of the justness of the plaintiffs' claim, and of its being unpaid. There is, besides this, the evidence of *George Paw*, who says he was present with Mr. *James* at an interview with *Barnes;* that *Barnes* made no pretence, on that or any other occasion, that the debt was not just, or that it had ever been paid; but, on the contrary, acknowledged that it was a just debt, and still due, and merely pleaded poverty.

This evidence, it appears to me, puts an end to the legal presumption, arising from lapse of time, of the mortgage being discharged, and gives it a vitality that it could not otherwise have had. This admission made by *Barnes* is binding on the defendants, and it places the mortgage before us as a document now outstanding and unpaid. I can view it in no other light, and therefore think that the judgment of this Court

ought to be for the plaintiffs. But although I consider the debt on this mortgage to be justly due to the plaintiffs, I feel exceedingly reluctant and unwilling to give my assent to the exaction of interest on the principal money down to the present time, and think that, as the plaintiffs have slumbered over the mortgage, and neglected to take proper measures to foreclose it, since 1846, they are not justly entitled to, and ought not to demand and have interest allowed to them, under the circumstances of this case, beyond that time, when they must have known, (if they did not know it before), from *Barnes'* refusal to accept the proposition made to him, that a foreclosure was inevitable, and must be resorted to for the purpose of obtaining payment of the amount secured by the mortgage.

WILKINS J. This case presents substantially three questions for our consideration:—

First. Whether, as the right of action accrued more than forty years before action brought, there is a legal or equitable bar?

Second. Whether, under the facts, the Court must presume the consideration money to have been paid? and this last includes the question whether, supposing there be no bar, there has been a valid acknowledgment of the debt within twenty years before commencement of the suit?

Third. Whether the instrument on which the action is founded was a sealed instrument at the time of its execution?

There is no peculiar difficulty, I think, in resolving either of these questions; nor is there any novelty in either of them, except, perhaps, that which raises the point as to a seal.

As to the first, there is no statute that in terms affects it, and there can be no reasoning about it from analogy to a statute, except so far as such has been adopted in Courts of Equity, as the foundation of

1863.

MARTIN et al. v. BARNES et al.

decisions in similar cases. I have found none such, nor any that bears on the particular subject of our enquiry, except those that relate to the presumption of a discharge of a debt secured by bond or mortgage, from the unexplained and unqualified fact of non-payment of principal or interest on account, for a period of twenty years before action brought.

This is not an action of ejectment at common law, and in equity an instrument purporting to be a mortgage is regarded as a mere security for the payment of money.

The second question is, in substance, whether this debt must be presumed to be paid?

Assuming that nothing, as principal or interest, appeared to have been paid on the instrument in question for twenty consecutive years, after the principal became payable under it, still that fact would constitute no bar, and would be no more than a presumption, though practically a conclusive one, if unqualified by circumstances.

This doctrine is common to Courts of Law and those of Equity, and is supposed to be derived from analogy to the Statutes of Limitation.

But as in cases of strict statutable limitation, a debt, once barred by lapse of time, could be revived by a subsequent verbal admission of its existence, such qualification was held also to apply to what may be called the statutable analogies. To import into the equitable rule, however, the principle of Lord *Tenterden's* Act, which in terms excludes *specialties* from its operation is, of course, out of the question.

There is positive evidence of an acknowledgment, by the mortgagor, of this as a subsisting debt, and of the mortgage itself, as a then binding instrument, within twenty years before action brought, afforded by Mr. *James* and by Mr. *George Paw*.

We may proceed, then, to consider the remaining question respecting the seal, which, though of the first impression, perhaps, in our Courts, does not, I

think, present any real difficulty. In *Sugden on Powers*, p. 232 (edition of 1861), we have a light to guide us, in investigating this point, which we may safely follow.

Before considering the passage, I may observe that, after a careful research, I have found no English authority, that contradicts this eminent author's view of the result of English principles, which it embodies. It were, indeed, strange, that if there were any such, they had escaped his observation.

Obiter dicta occur, but such, even if directly in point, would weigh little, in my judgment, against his deliberate opinion expressed in the learned treatise that bears his name.

One of these *obiter dicta* has been already noticed, viz., the *Nisi Prius* case of *Ball* v. *Taylor*, 1 Car. & Payne 417, in which Lord Chief Justice *Best* says "he "should have taken a different view of the question "under consideration, if, on inspection of the bond, no "seal had appeared." But, in the first place, the expression of that opinion was not necessary to a decision of the point before him, and he neither heard argument, nor consulted authority on it; and secondly, that opinion, if sound and confirmed by a full Court, and made applicable to the then subject of enquiry, viz., "the fact of the absence of a seal from the bond," would not at all militate against the view of Mr. *Sugden*, which I am about to consider.

The question in *Ball* v. *Taylor* was whether there had been a delivery of the bond. The facts were these: The subscribing witness said he could not say, whether wax or a wafer was on the instrument when he subscribed it, and that he did not read the attestation clause before signing it, and that, though defendant signed the bond in his presence, he saw no actual delivery of it.

Chief Justice *Best* said that as the attesting clause was in the usual form, and a seal appeared on the instrument, he should instruct the jury to presume

1863.

MARTIN et al. v. BARNES et al.

delivery; but, he added, that had no seal appeared, he should not have thought the evidence sufficient. In other words, he intimates that, where there was no proof of an actual delivery, and the subscribing witness stated that he saw none, and added that, though he had subscribed the attesting clause, he had done so without reading it or considering what it expressed, and that he was not prepared to say whether there was or was not a seal used at execution, and none appeared on the trial, he, the judge, would not, in such a case, have told the jury to consider execution of the instrument duly proved. But from such a condition of facts the case before us is fundamentally distinguished by this circumstance, amongst many others, that I shall have occasion to notice, viz.: that in the latter no subscribing witness appears and testifies as to what did, or did not, occur at the proposed time of execution of this deed, whilst the attestation clause purports *omnia rite acta* at that particular time.

I shall presently show that the views of Mr. *Sugden* are the necessary result of undisputed principles.

The passage in his work is in the following terms: (The learned judge here read the passage from *Sugden on Powers*, cited by the judges who preceded him, together with the following clause (which was not read by them), at the close of the passage:—

"But in *Sprange* v. *Barnard*, Lord *Kenyon* rested his "decision on the single circumstance of the instru- "ment being upon stamps.")

Now, when this learned author thus uses the qualifying expression, "if the instrument be on pro- "per stamps," I do not certainly feel myself at liberty to reject that qualification, or to read the passage as if he merely meant to say, "there being no other "objections to the validity of the instrument, *qua* "*deed*, except in regard to the seal."

On the contrary, the context shows that he attached some weight on the point of sealing to the existence of a stamp. As to the degree of it, we are fortu-

nately not left to conjecture, for on the preceding page he combats, and as far as very conclusive reasoning goes, he confutes the grounds of Lord *Kenyon's* decision on the point, in *Sprange* v. *Barnard*, and shows, that the stamp acts have no respect to *the act of sealing*, in order to giving validity to an instrument, and that a stamp cannot, on principle, be regarded as the act of a party to that instrument, done with a view to that object.

Nothing can be more clear, therefore, than that Mr. *Sugden*, when declaring the legal presumption that an instrument purporting to be a deed has been duly sealed, because attested in the usual manner, and having proper stamps, although no vestige of a seal appeared on the paper, must, necessarily, to be consistent with himself, have viewed the stamp merely as a circumstance ancillary to the inference to be drawn from the attestation clause, whereby the witnesses acknowledge that the instrument was sealed in their presence at the time of execution. The stamp obviously aids that inference no further than this, viz., that the parties, or one of them, having incurred the expense of a *deed-stamp*, in that respect treated the instrument as a *deed*.

The instrument before us has no stamp; but it presents subsidiary circumstances, that greatly exceed in importance any weight that could have been derived from the mere presence of a stamp (if such had been required by law). If the appearance of a stamp was held to aid the inference from the attestation clause, on account of the parties so treating the instrument as a deed; let us, in contrast with this, consider in how many ways these parties have treated this document as a deed. We have, first, the formal character of the instrument, and its being attested and subscribed by two literate witnesses, as to the fact of sealing; secondly, the entry of a transcript in the books of registry by a sworn officer, affording some inference that the original bore marks of a seal, at the now.

1863.

MARTIN et al. v. BARNES et al.

remote time of its registration; thirdly, the assignment endorsed, itself being under seal, technically drawn, and treating the subject of the assignment as a then valid mortgage deed; fourthly, actual delivery (which could have been made only in order to operation as a deed) by *Barnes* to *Stowell*. This is proved by the fact of the document having been in the possession of the *Paw* family, receiving it from *Stowell*, as far back as 1820, and of its having so continued ever since. Fifthly, payment of interest on account of the mortgage, three years after the date of it, as appears from old *Paw's* ledger. (On this point, see *Percival* v. *Nanson*, 7 Exch 1; *Davies* v. *Humphreys*, 6 M. & W. 153.) Sixthly, the tender of thirty shillings as interest on account of the mortgage; seventhly, the acknowledgment within twenty years before action brought of a subsisting debt under this instrument, as proved by Mr. *James* and Mr. *George Paw*. *Then Barnes* admitted his liability; but, if liable at all, it was on this very instrument, which he, at all events, treated as a mortgage deed.

Apart from all this, the Court, as matter of logical deduction from a legal principle, must regard this as a sealed document. Neither wax, nor other medium between the instrument used to impress, and the substance impressed, is required to the validity of *sealing*. An impression, however faint, made with intent to seal, by means, it may be, of a coin or of the end of a stick stamped on the paper is a perfect act of sealing. But such an impression may, even from natural causes, be effaced in a few hours. Suppose, then, an instrument, so once sealed, produced as evidence, not, as here, after thirty years, when mere proved possession of it in accordance with its tenor gives it efficacy, *per se*, as a deed, which in every respect save the absence of traces of a seal it now purports to be, but within a few months after its date (the witnesses being at the time of production dead), and suppose objection made "that no seal appears,"

1863.

MARTIN et al. v. BARNES et al.

the answer would be obvious and conclusive, viz., the instrument shows that the men who subscribed as witnesses attested that at the time of execution there was the impression of a seal on it, and the fact that none now appears is consistent with a circumstance not in any way negatived, that the impression originally made has been since effaced, as a faint impression without a medium naturally might be. I must, therefore, regard this document as a valid deed of mortgage, and I must decide that, as an incident to its validity, the principal secured by it is, with the interest, due by the defendants.

Judgment for plaintiffs.

Attorney for plaintiffs, *J. W. Johnston, Jr.*
Attorney for defendants, *J. W. Ritchie*, Q. C.

IN RE ESTATE OF JOHN SIMPSON.

July 21.

The Provincial Act (chap. 112, *Rev. Stat.*, second series,) is retrospective, and abolishes absolutely all estates tail, even although a valid remainder be limited thereon.

APPEAL from the decree of *Harry King*, Esquire, Judge of Probate, for *Hants* county, argued in *Michælmas* Term last, by *J. W. Johnston, senior*, Q. C., for appellant, and *J. W. Ritchie*, Q. C., for respondents.

All the material facts are fully stated in the opinion of his Lordship the *Chief Justice*.

The Court now gave judgment.

YOUNG C. J. This case was an appeal from a decree of the Court of Probate for *Hants* county, founded on an application made to said Court by *James Simpson, Ira Simpson, Sarah Turrey, Charlotte Hawkins*, and *Hannah M. Simpson*, for a commission to be directed to five freeholders, to divide the real estate of said *John Simpson* amongst themselves and the other children of the deceased, under the following circumstances:—

James Simpson, the father of the deceased *John*

1863.

In Re Estate of SIMPSON.

Simpson, in the year 1797, made and executed his last will and testament, and departed this life in the same year, and his will was duly proved in the Probate Court for the said county in the month of *October* in the same year. By his will the said *James Simpson* devised all his real estate to his wife for her life. "And from and after her decease, I give and devise "the same to her *children* in manner following: first, "my will and mind is, and I do hereby give and "bequeath unto my son *John Simpson*, (the father of "the applicants), the farm or lot of land I now dwell "on, together with all the chattels, household goods, "farming utensils, to him for his natural life, and "after his decease to his issue in tail forever, to the "heirs male of his body, and for default of such issue, "to the daughter or daughters as tenants in common, "and for default of such issue, to go to the next "entitled to the said estate, with all interest for the "same."

John Simpson named in the will went into possession of the property, which he occupied until his death, which took place in the year 1859, he having made no will.

John Simpson, the eldest son of *John Simpson* deceased, the grand-son of the testator, claimed the property *as tenant in tail* under the will of his grandfather, *James Simpson* above named, and resisted the application for a commission to divide the property among the heirs of his father, the deceased *John Simpson*.

The petitioners rested their claim upon the Statute of this Province, ch. 112 *Revised Statutes*, (second series). The judge was of opinion that the Statute applied to this case, and decreed on the 16th *December*, 1861, that a commission should be issued to five freeholders, authorizing them to divide the real estate, of which the said *John Simpson*, deceased, died possessed, amongst his children in equal proportions, from which decree this appeal was entered.

It will be seen, therefore, that the question turns upon the construction of Chap. 112, which became a part of our legislation at the first revision of the Statutes in 1851, and is in these words:

"1. All estates tail are abolished and every estate "which would hitherto have been adjudged a fee-"tail, shall hereafter be adjudged a fee-simple; and "if no valid remainder be limited thereon, shall be "a fee-simple absolute, and may be conveyed or "devised by the tenant in tail, or otherwise shall "descend to his heirs as a fee-simple."

Two distinct questions were raised at the argument:

First. Whether the Statute was or was not to be taken as retrospective? and

Second. If retrospective, whether an estate tail, on which, as in this case, a remainder was limited, came within its operation?

As to the first point, the rule of construction is well settled. Acts of Parliament are not to be taken as retrospective; but the legislature may show, by the language they employ, that an Act is intended to be so. Illustrations of the rule are to be found in numerous cases; the leading ones, in the English and American Courts, being those of *Moon* v. *Durden*, 2 Excheq. 22; *Dash* v. *Van Kleeck*, 7 Johns. Rep. 477; *Towler* v. *Chatterton*, 6 Bing. 258; and *Charles River Bridge* v. *Warren Bridge*, 12 Curt. 496.

That statutes shall be construed to be prospective only—to regulate the future, and not the past—to leave the obligation of contracts and existing rights untouched: these rules are consistent with the plainest principles of justice. Were it otherwise, the enactments of law would become an intolerable tyranny, and a maxim, as old as Lord *Coke*, "*Nova constitutio futuris formam imponere debet, non præteritis*," would be violated and set at naught, though it was endorsed by all the judges consecutively in the recent case of *Moon* v. *Durden*.

But, however it may be in the *United States*, where

1863.

In Re Estate of Simpson.

the Constitution expressly condemns and forbids retrospective laws which impair the obligation of contracts, or partake of the character of *ex post facto* laws (1 *Kent's Com's.* 455, 12 *Curt.* 500), there can be no doubt that the Imperial Parliament and Colonial Legislatures, within the limits of their jurisdiction, have a more extended authority; and where their intention is to make a law retrospective, it cannot be disputed that they have the power. That intention is to be made manifest by express words, or to be gathered, clearly and unmistakably, from the purview and scope of the Act. It is a question of construction; and the Act being its own chief exponent, still the surrounding circumstances are to be looked at.

Now, it is to be noted that our legislature, so far back as the year 1815, manifested the same dislike to estates tail, which has marked the legislation of the adjoining States, and was common to Lord *Bacon* and Lord *Coke;* the latter of whom (*Co. Lit.* 19 b), after enumerating the evils produced by the Statute *de donis*, tells us that, "by the wisdom of the common "law, all estates of inheritance were fee simple; and "what contentions and mischiefs have crept into the "quiet of the law by these fettered inheritances, "dailie experience teacheth us." The law of entail is to be regarded, in fact, as an invention of the feudal age; it indicates the spirit of the past, and is quite inconsistent with our political and social condition in this colony.

By the Provincial Act, 55 *Geo.* 3, ch. 14, after reciting that the method then in use for barring estates tail by common recoveries, was liable to many objections, it was enacted that the tenant in tail might convey the lands so held by indentures of lease and release, which, being duly enrolled, should be sufficient and effectual in law to bar all estates tail in the lands so conveyed. Indentures under this statute, though by no means frequent, were occasionally in

use, they afforded a simple and effectual means for converting the estate tail into a fee simple; and that without the assent of the heir in tail, express, or implied.

So also in *Massachusetts*, by an Act of 1792, upwards of twenty years before ours, (4 *Dane* 621), it is held that estates tail can be conveyed away in fee simple, and are liable for debts; and it is laid down in the cases *Lithgow* v. *Kavenagh*, 9 Mass. 170; and *Nightingale* v. *Burrell*, 15 Pick. 116; that a deed by a tenant in tail, executed as this statute prescribes, is as sufficient and effectual to convey a fee-simple as the deed of a tenant in fee-simple would be. The *New York* Statutes I shall presently refer to; they had the same object in view, showing that analogous circumstances had produced analogous legislation, and that the tone of society on this side of the Atlantic had created a common desire to cripple or abolish estates tail, and to substitute for them the "*feodum simplex*," the lawful or pure inheritance, which is the favorite of *Littleton* and his learned commentator. With these views it is not at all wonderful that our legislature should abolish estates tail by the Act of 1851, which did nothing more than to do for the tenant in tail what he might have done for himself if he thought fit, and by a parliamentary enactment to supersede the necessity, and save him the cost, of executing indentures of lease and release. The Act of 1815 enabling him to execute such indentures was repealed at the same time. If chapter 112 were prospective only, he had, therefore, lost the power of barring the estate tail by deed, and the legislature, in place of simplifying and extending the law, were defeating their own object. For these reasons I have not a doubt that the intention and the effect of the Act were to abolish estates tail then and thereafter to be created.

As to the second question, it must be confessed that the framers of the law cannot be complimented on the skill with which they proceeded to effect their

1863.
In Re Estate of Simpson.

object. A more ambiguous and inartistic sentence, than the sentence which forms chapter 112, it will be difficult to discover in our statute book. It is to be found verbatim in the Acts of *New Brunswick;* but whether they borrowed from us or we from them, I know not. I can only hope that the honor of the paternity is theirs. It draws a distinction between a fee-simple, and a fee-simple absolute, which, to an English lawyer, would be unintelligible. "Of fee-"simple," says Lord *Coke*, (1 *Inst.* b.), "it is com-"monly holden that there be three kinds, viz., fee-"simple absolute, fee-simple conditionall, and fee-"simple qualified, or a base fee. But the more "genuine or apt division were to divide fee, that is, "inheritance, into three parts, viz., simple or absolute," (treating the two as one and the same thing) "condi-"tionall, and qualified or base; for this word (simple) "properly excludeth both conditions and limitations, "that defeat or abridge the fee." So in *Cruise's Digest* by *Greenleaf*, Tit. 1, sec. 44, 72, an estate in fee-simple is designated as the entire and absolute interest and property in the land; and fee-simple and fee-simple absolute are spoken of as identical terms. In 1 *Thomas' Co. Lit.* 566, note *D.*, it is said that the term *absolute* is of the same signification with the word *simple*, and expresses that the estate is not determinable by any other event than the one which is marked by the clause of limitation. And *Littleton* saith well, "*Simplex donatio et pura est, ubi nulla addita est conditio* "*sive modus; simplex enim datur, quod nulla additamento* "*datur.*" I was at a loss then to conceive how this distinction had crept into our law, till I turned to the *N. Y. Revised Statutes*, Tit. 2, p. 7 ch. 717, the third section of which is plainly the origin of ours, and is preceded by a definition in section 2 which is not in ours; but is necessary to make the third intelligible. "Every "estate of inheritance," says sec. 2, "notwithstand-"ing the abolition of tenures, shall continue to be "termed a fee-simple or fee; and every such estate

"when not defeasible or conditional, shall be termed "a fee-simple absolute, or an absolute fee."

It is difficult, too, to understand what is meant by "a valid remainder," if it is to be distinguished from a "remainder" simply, which can have no effect unless it is "valid," that is, conformable to law. Lord Chief Baron *Gilbert* says the word "remainder" is no term of art; nor is it necessary to create a remainder, for any other word sufficient to show the intent of the party will create it. Therefore, if a man gives lands to A for life, and that, after his death, the lands shall revert and descend to B for life, &c., this is a good remainder. *Bac. Abr.*, Title Remainder B.; 1 *Greenleaf's Cruise*, Title 16, ch. 1, sec. 7.

The expression "valid" in the *New York* Act, may be supposed, at first sight, to have meant a remainder good in point of law, without the word having been used. Such a remainder, since the Statute *de donis*, though it cannot be limited upon a qualified or base fee, may be limited after an estate tail. (1 *Greenleaf's Cruise* Tit. 16, chap. 1, *supra* sec. 6.)

By *Littleton*, sec. 215, *Co. Lit.*, 143 a, "It appeareth "that if a man maketh a gift in taile, the remainder in "fee, without deed," (that was before the Statute of Frauds), "the remainder is good, and passeth out of "the donor by the livery of seisin."

Section 3 of the *New York* Act stops at the words "fee-simple absolute;" and section 4 provides that where a remainder in fee shall be limited upon an estate tail, such remainder shall be valid as a contingent limitation upon a fee.

Now, it appears from what is stated by *Kent* (4 *Com's* 317), that the *New York Revised Statutes* have changed the whole doctrine of the common law, by which a fee cannot be limited upon a fee, and have provided for the preservation of remainders, which they have declared to be valid as conditional limitations upon a fee, to vest in possession on the death of the first taker without issue living at the time of the

1863.

In Re Estate of Simpson.

death. But, without changing the doctrine of the common law, or incorporating into our Act the second or fourth section of the *New York Revised Statutes*, we have taken the third section, which requires the aid of the other two to render it intelligible.

What is to be done under these circumstances, except to get as we best can at the intent of the legislature, and to give to the Act a fair and liberal interpretation? It is contended that whenever a remainder is limited on the estate tail, the Act has no operation on the estate; that is, the legislature, intending to abolish estates tail, permitted any party to defeat the intent, simply by adding a remainder, which remainder may be to his right heirs, and in that form would be perfectly good. Our chapter of entails would then be in the same plight with the Statute of Uses, which, aiming at the most beneficial purposes, had so strict a construction put upon it, (to use *Blackstone's* expression, 4 *Bl. Com.* 430), by the narrowness and pedantry of the Courts of common law, as in the language of Lord *Hardwicke*, (1 *Atk.* 591), to have no other effect than to add at most three words to a conveyance.

Were we to assign the estate to *John Simpson* the present claimant, to the exclusion of his brothers and sisters, it is material to enquire what estate he would have. Would he be accounted a tenant in tail-male? It is said he cannot be so, because the Statute has expressly abolished estates tail; but the argument is, that estates tail are not abolished where there is a remainder. If tenant in tail, then, he would stand in a very anomalous position; he would have an estate which there is no means of barring (for common recoveries have been abolished in *England*, and are obsolete here, if, indeed, they were ever in use); his estate could neither be sold nor mortgaged, but must descend, irrespective of the wishes of the occupant to the heirs male in perpetual succession, with a possible but distant reversion to the general heirs. Is his estate, then, to be accounted a fee-simple, conditional

at common law, convertible by the birth of issue into an absolute estate? If this be the true construction, I do not see why it should not apply equally to *John* the father, who survived till 1859 and had issue, and whose estate, therefore, upon this principle, might have been easily turned into an estate in fee. But I really cannot attribute to our legislature these niceties and refinements, which, I am persuaded, never entered into their contemplation. The language they have used, and the repeal of the Act of 1815, convince me that the abolition of estates tail was intended to be general and without exception; and where the intent is clear, and the expression only mistaken, or confused, the intent must prevail. The case of *Van Rensselaer* v. *Kearney*, cited at the argument from 18 *Curtis* 631, would have been in point, had the *New York* Statute of 1786, abolishing estates tail, been expressed in the same terms as the *Revised Statutes* of 1836, from which I have quoted. In that case there were successive estates tail in remainder, one after the other, under a will made in 1782, on which the Act of 1786 was permitted to have a retrospective operation; and it was held that on the birth of the first tenant in tail, his father being tenant for life, his remainder, which was before contingent, became vested in interest, and was converted by the Statute into a fee-simple.

The case of *Barlow* v. *Barlow*, is cited also in the note to 1 *Hilliard on Real Property* 62, where it was held that, by the operation of the Statute, a vested remainder in tail, expectant on the termination of a life estate, was converted into a fee simple.

These cases have a certain analogy to the present. The first of them confirms the view I have taken upon the first point; upon the second, I rely not so much on these, or the other decisions I have referred to, as on the plain intent of the legislature, leading me to the conclusion that all estates tail, past and future, were designed to be, and were, in fact, abol-

1863.

In Re Estate of SIMPSON.

ished; and, therefore, that the decree of the Court below in this case should be confirmed.

BLISS J. dissented.*

DODD J. The single point for consideration, in this case, is the construction of chapter 112 of the *Revised Statutes*, as to whether that Statute was retrospective in its operations, or otherwise.

In the construction of remedial Statutes, there are three points to be considered: the old law, the mischief, and the remedy; that is, how the common law stood at the making of the Act; what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief; and it is the business of the judges so to construe the Act, as to suppress the mischief and advance the remedy. 3 *Rep.* 7, 1 *Co. Lit.* 11, 42.

These principles for the construction of remedial Statutes will not, I imagine, be questioned at the present day; and my intention is to apply them to the case under consideration, to assist me in forming my judgment.

The law, as it stood in this country previous to 1815, gave to the party wishing to bar an estate tail the same remedy which at that time existed in *England*, a remedy attended with many inconveniences, and ill-suited to the condition and situation of the people of this Province, particularly the expense of the proceedings, when, generally speaking, the lands were not of sufficient value to justify the outlay. The Act of 1815, chapter 14, which has usually been called Mr. *Fairbanks'* Act, was introduced to give a more simple and easy method of barring estates tail. The preamble to the Act recites that the method then in use, for barring such estates in lands and tenements by common recovery suffered at common law, was

* BLISS J. delivered an elaborate written opinion, which I have hitherto been unable to obtain. If obtained in time, it will be published at the close of this volume.—REP.

liable in this Province to many objections. It then enacts that, in all cases, where in *England*, by the laws of that country, such estates could be barred, the same estates might be barred in this Province; and directs the course and proceeding thereafter to be used and adopted for that object. The Act of 1815 continued in force until the first series of the *Revised Statutes* was passed, when the provisions of chap. 112 were enacted; and the same Act is now in the second series of the *Revised Statutes*, being the chapter already referred to, and is as follows. (The learned judge here read the chapter.)

The language of the Act appears to be free from ambiguity, and could not have been made more clear, unless express words had been used declaring that it should not be retrospective in its operation. The words "all estates tail are abolished," are, in my judgment, equally as applicable to the past as to the future; neither do I see that, by giving it that construction, it is going to work greater injustice than the law as it previously stood; it has not done any thing more for persons having estates tail in lands, than they could do for themselves, with this exception, that it has saved them the expense attendant upon barring such estates. It could never have been the intention of the legislature after passing the Act of 1815, in consequence of the law that then existed being liable to many objections, to repeal that Act and to force parties back upon the old objectionable mode of barring estates tail, and at the same time declare that as to the future "all such estates were abolished." The policy of our legislature for some time past has been to get rid of fictitious proceedings in our Courts of law, and to reduce the expenses that follow in their train, and it was quite consistent with that policy to pass chapter 112, with the intention of giving to it retrospective as well as prospective operation.

Blackstone, in his *Commentaries* (vol. 2, page 361), recommends very nearly what chap. 112 has done. In

1863.

In Re Estate of Simpson.

referring to the barring estates tail by common recovery, he says; "It hath often been wished that the "process of this conveyance was shortened, and ren- "dered less subject to niceties, by either totally re- "pealing the Statute *de donis*, which, perhaps, by "reviving the old doctrine of conditional fees, might "give birth to many litigations; or by vesting in "every tenant in tail of full age the same absolute "fee-simple at once, which now he may obtain when- "ever he pleases, by the collusive fiction of a common "recovery." This idea has been fully carried out by our legislature, but, instead of waiting until the tenant in tail has arrived at full age before his estate is turned into an absolute fee, we have abolished the estate altogether.

Ex post facto laws are very naturally repugnant to our feelings, and that operation is never given to statutes, unless the words are clear and free from ambiguity: the objection, however, to retrospective laws is largely confined to penal and criminal proceedings. By the Constitution of the *United States*, no State can pass any *ex post facto* laws. In 1 *Kent's Com.* 409, it is said these words were "technical expressions, "and meant every law that made an act, done before "the passing of the law, and which was innocent when "done, criminal; or which aggravated a crime, and "made it greater than it was when committed; or "which altered the legal rules of evidence, and re- "ceived less or different testimony than the law "required at the time of the commission of the "offence, in order to convict the offender." Therefore, when the legislature of *Connecticut* had, by a law, set aside a decree of the Court of Probate rejecting a will, and directed a new hearing before the Court of Probate, and the point was, whether the law was an *ex post facto* law prohibited by the Constitution of the *United States*; the Supreme Court concluded the law was not within the letter or intention of the prohibition, and was, therefore, lawful.

We have also numerous cases in our own books of authority showing that retrospective laws are not uncommon, where they do not affect *life or liberty*. A single case is all that is necessary to refer to on the point. In *Freeman et al., Executors of Freeman*, v. *Moyes*, 1 Ad. & Ellis 338, the Court held, 3 & 4 *Will.* 4, chap. 42, sec. 31, retrospective, making executors liable to costs. The action was brought before the passing of the Act, but the cause was not tried until afterwards, neither were there any words in the Act making it retrospective; yet the Court held it to have that operation. Lord *Denman* C. J. said that, upon enquiry, he found both the Court of Common Pleas and the Court of Exchequer held that actions already commenced when the Statute came into operation were within the meaning of it. Here, then, we have the opinion of three of the highest Courts of common law in *England*, deciding in favor of a retrospective law; and where *Littledale* J., in the cause referred to, could not avoid the observation, that it seemed to him a strange consequence of the Act, that a party should commence a suit, and find, only on the eve of the trial, that he was liable to costs, which, if he had known before, he probably would not have brought the action. That case is certainly much stronger in favor of its not receiving such a construction as those Courts have given to it, than the case under our immediate consideration; and I must confess I do not see how, by giving to chap. 112 the construction contended for in favor of the decree of the Court of Probate, we shall do injustice to any person. Before the passing of the Act, a person could have done for himself that which the Act now does for him. The limitation in the Act in favor of a valid remainder might have been expressed in less doubtful words, and left the meaning clear and express. As it is, however, I cannot suppose there was any intention to limit the general words, "all estates tail are abolished," beyond the limitation

1863.

In Re Estate of SIMPSON.

referred to in the Act of 1815. By that Act, in all cases, where, in *England*, by the law of that country, estates tail could be barred, the same estates might be barred in this Province; and as the case before us is such as might be barred in *England*, I think, for this and the other reasons given, that the decree of the Judge of Probate should be confirmed.

DESBARRES J. Two questions are involved in this case; first, whether this Act (chapter 112 *Revised Statutes*, second series), is retrospective; and secondly, whether it applies in a case like this, in which there is a valid remainder in fee-tail created by the will of *James Simpson*.

Upon the first point I entertain no doubt, for there is no ambiguity in the words of the Act in relation to it, and, construed according to their plain and natural import, I think they clearly show that the Act was intended to be, and is, retrospective.

The second point presents, to my mind, much greater difficulty than the first. It rests on the construction to be given to chapter 112 of the *Revised Statutes*, the meaning of which it is not easy to comprehend, one part of it appearing to be at variance with, and irreconcilable with, the other. It begins by declaring "that all estates tail are abolished, and "that every estate which would hitherto have been "adjudged a fee-tail, shall hereafter be adjudged a "fee-simple," giving to it, so far, a general operation, and making it applicable to all estates tail; but it goes on to say, "and if no valid remainder be limited "thereon, shall be a fee-simple absolute, and may be "conveyed or devised by the tenant in tail, or other-"wise shall descend to his heirs in fee-simple."

These latter words create the difficulty of which I have spoken, to give the Act such a construction as will give effect to all the words used therein, and make the whole of it intelligible and consistent with itself. This is by no means a matter easily accom-

plished, for, while the first part of the Act gives it, as already observed, a general application, the latter restricts its operation to estates tail in which no valid remainders are limited, giving to it an operation which does not seem to have been ever contemplated. It may be asked, then, what the legislature really did mean, for the words of the Act clearly show that it was not intended to be construed literally. To do so would make one part of it inconsistent with the other, and, therefore, I can come to no other conclusion than that the words which gave the Act a limited operation were introduced through some inadvertence, and without considering the effect they were to have by thwarting the very object which the legislature would seem to have had in view, to convert all estates tail into estates in fee. We must, therefore, either infer that the restrictive words in the Act were unintentionally inserted in it, or we must presume, what is very improbable, that the legislature intended to give the Act a limited operation, by abolishing some estates tail, and allowing others to remain, and to be afterwards created just as they were before the Act passed. That, I think, could never have been intended, and that view is strengthened by the fact of the repeal of the Act of 55 *Geo.* 3 chap. 14, passed, as its title declares, for the purpose of providing an easier method than was then used for barring estates tail in lands, thus furnishing a strong argument to show that the legislature really meant to abolish *all estates tail without distinction*, otherwise it would not have repealed the Act, and left a class of tenants in tail, (if such estates tail were still to exist), to pursue the more difficult and expensive remedy of barring such estates by common recoveries suffered at common law. The repeal of the act of 55 *Geo.* 3, satisfies my mind that chap. 112 of the *Revised Statutes* was really intended to abolish all estates tail without distinction, and make them from that time estates in fee-simple.

1863.

In Re Estate of Simpson.

It may be observed that the construction given by the American Courts to the *New York* Act of 1786, from which our Act is copied, is that it includes estates tail in remainder, and vests in the remainderman a fee-simple, subject to the life interest of the tenant in possession. I am disposed to give our Act the same construction, by rejecting, as unmeaning, the words which give to it a limited operation, and to construe it as having a general application, extending to all estates tail, whether in remainder or not, in order thereby to carry out what seems to me to have been the great and important object for which it appers to have been passed.

I, therefore, think that the estate devised by *James Simpson*, the grandfather, to his son *John Simpson*, deceased, in fee-tail, has now, by the operation of chapter 112 of the *Revised Statutes*, become an estate in fee-simple, and that the devisee, *John Simpson*, having died intestate, th estate which he had under his father's will is now divisible among all his children, and that the proceedings taken by the *Judge of Probate* for the purpose of causing such division to be made, must be confirmed.*

Appeal dismissed.

Proctor for appellant, *O. Weeks.*

Proctor for respondents, *W. H. Blanchard.*

WILKINS J., having an interest in the case, was not present at the argument, and gave no opinion.

In re THOMAS SPENCE.

July 21.

Where a party elected as alderman in *October*, 1862, had been several times convicted of drunkenness, assaults, and disorderly conduct, between the years 1856 and 1862, but there was no such conviction for six months previous to his election, and no evidence that he was a *common* drunkard.

Held, That the City Council had no power to declare his election a nullity, and to direct that another alderman should be elected in his place.

A corporation has no power to remove a duly elected member of its own body for crimes committed previous to his election.

Practice with regard to proceedings on application for a *quo warranto* information.

J. *W. Johnston, senior*, Q. C. (now Attorney General), obtained a rule *nisi* in *Michælmas* Term last, on the relation of *Thomas Spence*, calling upon *William Roche*, Esquire, to show cause why a *quo warranto* information should not be exhibited against him to show by what authority he claimed to be one of the aldermen of the city of *Halifax* to represent ward number five of the said city.

The rule was argued in the same term on the several affidavits of *Thomas Spence*, the relator, and of *Daniel J. Smith*, *William D. Cutlip*, and *John Y. Payzant*, on his behalf; and of *William Roche*, *David P. Rockwell*, *John L. Cragg* (City Clerk), and *Thomas Rhind* (Assistant City Clerk), *contra*; by *J. W. Johnston, senior*, Q. C., for the relator, and *W. Sutherland*, Q. C., and *J. W. Ritchie*, Q. C., for *William Roche*.

All the material facts stated in the affidavits are sufficiently set out in the opinion of his Lordship the *Chief Justice*.

The Court now gave judgment.

Young C. J. At the annual election of aldermen for the city of *Halifax*, held on the 1st *October*, 1862, the relator, *Thomas Spence*, being duly qualified in point of property, was chosen by a majority of fourteen as one of the aldermen for ward number five; but a petition having been presented against his return, the City Council passed a unanimous resolution that certain charges against him had been fully sustained by the evidence adduced, and that he was not a fit and proper person to hold the office of magistrate; that he should not be allowed to take the prescribed oaths under the city charter as an alderman and justice of the peace; that his return should be

1863.

In Re SPENCE.

deemed a nullity, and the office being thereupon vacant, that a new election for ward number five should be forthwith held. A poll was accordingly opened on the 14th *October*, which resulted in the return of *William Roche*, Esquire, and in the last *Michælmas* Term a rule *nisi* was granted on an affidavit of Mr. *Spence* for an information in nature of a *quo warranto*, and was fully argued before us on the alleged incapacity of Mr. *Spence*, and the alleged illegality of the second election. This proceeding is of rare occurrence in this Court, as we have few corporations or municipal bodies to which it applies. In the mother country it is common, having been introduced as a substitute for the ancient writ of *quo warranto* by the Statute 9 *Ann*, ch. 20, and the practice with relation to it is well settled. In 1839 the Court of Queen's Bench found it necessary to introduce a new rule, 11 *Ad. & Ell.* 3, 163; that, when such information is moved for, an affidavit shall be produced, by which some person or persons shall depose upon oath, that such motion is made at his or their instance as relator or relators. Mr. *Spence's* affidavit did not contain this clause, and although there is no doubt that he is here the relator, and would be answerable in costs, the omission would have been fatal, had the rule of 1839 been in force in this Court. Fortunately for him, however, our Practice Act, sec. 238, excludes all rules of the superior Courts of common law in *England* subsequent to 1831, which have not been adopted by ourselves, so that the rule passed in 1839, but not incorporated into our Practice Acts, does not extend to this Court. I take this opportunity of stating this principle broadly, as it comes frequently into play, and does not appear to be sufficiently understood or appreciated.

The affidavit of Mr. *Spence* was met by affidavits of the city clerk and his assistant, and of Mr. *Roche;* and under sec. 43 of the Evidence Act, R. S. ch. 135, we allowed Mr. *Spence* to bring in new affidavits, in reply

1863.

In Re SPENCE.

to the new matter in Mr. *Roche's*, but not in answer to the other affidavits; and, thereupon, two other affidavits having been received on behalf of the city, four other affidavits, including one from Mr. *Spence*, were read at the argument.

The main object of these was to establish, or to explain away, an alleged concurrence of Mr. *Spence* in Mr. *Roche's* election, which would incapacitate him from being a relator. As the Courts exercise a discretionary power in permitting informations in the nature of a *quo warranto* to be filed, and as the essence of the inquiry is the usurpation of an office by the party attacked, it is an established rule that a relator will not be allowed to impeach the title of the party who has acknowledged it, by acting with him, or has concurred in his election. There are some modifications of the rule, which have no bearing upon this case, the sole question here being, as it is put in the two cases of *The King* v. *Benney*, and *The King* v. *Parkyn*, 1 Barn. & Adol. 684, 690, whether the relator did or did not concur in the second election, whether he incited or encouraged Mr. *Roche* to come forward as a candidate, and, as Mr. Justice *Taunton* expressed it, played fast and loose to suit his own particular interest. He did not vote, it is true; that would have been decisive; but a concurrence short of voting would satisfy the cases; and had the affidavits of Mr. *Roche* and Mr. *Rockwell* remained uncontradicted, or rather unexplained, I should have held them enough. It was a strange thing, certainly, and no doubt an imprudence, with Mr. *Spence's* ulterior views, that he should hold out any encouragement whatever to Mr. *Roche*, or express any preference for him over his rival; and still more, that he should go to Mr. *Roche's* house, on the night of the election, and congratulate him on his success. This, I should think, was a concurrence, within the principle of the cases; but, on the other hand, there is the fact of Mr. *Spence* abstaining from delivering his vote, though he took a warm

1863.

In Re SPENCE.

interest in the result; there is the protest made by Mr. *McKay*, at the opening of the poll, and entered in the poll-book; there are the affidavits in reply, denying Mr. *Spence's* interference; and there is his own affidavit, that he apprised Mr. *Roche*, from the first, that he intended to prosecute his claim, and had directed the prosecution to be commenced; that he went to Mr. *Roche's* house, at his request, and on that same evening reiterated his determination to contest the seat in the Supreme Court.

With these statements before us, it is quite impossible, I think, to contend that Mr. *Spence* had disqualified himself from being a relator.

We come, therefore, to the main question, which presents itself certainly under very remarkable circumstances, and the more so as the facts have not been disputed.

By the first and second clauses of the city charter, 14 *Vic.*, ch. 1, the inhabitants of the town and peninsula of *Halifax* are constituted a corporation, with the usual powers of suing and being sued, and acquiring and holding property; and by the 8th, 157th, 158th, and other clauses, the City Council are to conduct the local government, to enter into and accept all necessary contracts, and to have power to make bye-laws, and to exercise within the city all the powers, jurisdiction, and authority of the Court of Sessions. The mayor and aldermen, while in office, are also justices of the peace within the city, and represent, in fact, and embody the powers of, the corporation. But it was insisted on at the argument, that the inhabitants are, and that the mayor and aldermen are not, the corporation; and, not being so, cannot exercise the power for their own protection, which belongs to corporations in the mother country. This construction, however, is so opposed to principle, and would involve us in so many absurdities, that it must of necessity be rejected.

The 12th and 13th clauses of the Act, prescribing

1863.

In Re SPENCE.

the qualifications of a voter, and of the mayor and aldermen, provide that "they must not have been "attainted of treason or felony"; and, thereupon, it was insisted that the disqualification is confined within these limits; in other words, that a person having been convicted of the most infamous offences short of felony (and there are many misdemeanors far more infamous than many felonies) was entitled to take and to hold his seat as an alderman, and to exercise the functions of a justice of the peace, to act as a guardian and an administrator of the law, without any power in the City Council to purge their own body, or in this Court or any other to remove him. How far this position is sustainable I will presently inquire.

The leading case upon this point is that of *James Bagg*, 11 Coke's Rep. 99, in which it was resolved that if a citizen or freeman of a corporation (and a *fortiori*, if a member of the governing body), be attainted of forgery, or perjury, or conspiracy, (the two latter being misdemeanors only), at the king's suit, &c., or of any other crime whereby he is become infamous, the corporation may remove him. In such cases, says Lord *Hardwicke*, in *The King* v. *the Mayor and Burgesses of Derby*, Cases Temp. Hardwicke 154, "it is the loss of "credit which is the ground of his forfeiture; and "therefore conviction, which is the ground of his "infamy, ought to precede the disfranchisement."

The power of amotion or disfranchisement of a member for a reasonable cause, says Chancellor *Kent* (2 *Com's* 297), is a power necessarily incident to every corporation. This was not the doctrine in the time of Lord *Coke*, nor the ground of the decision in *Bagg's* case; but in Lord *Bruce's* case, 2 Strange 819, the Court adopted the modern opinion that a power of amotion is incident to a corporation; and in the leading case of *The King* v. *Richardson*, 1 Burr. 539, Lord *Mansfield* said: "We all think this modern opinion is "right. It is necessary to the good order and govern-"ment of corporate bodies that there should be such

1863.

In Re SPENCE.

"a power, as much as the power to make bye-laws." So in the *King* v. *Ponsonby*, 1 Lord *Kenyon's* cases, 28, Chief Justice *Ryder* says: "The modern opinion is, "that the corporation," (being in that case the *Burgesses of Newtown*), "have necessarily a power to amove "their own members, though not particularly given "by their charter."

On these authorities, which might be easily multiplied, and on the reason of the thing, I have no doubt myself that the City Council have power to remove any one of their number convicted during his incumbency of an infamous offence, whether felony or misdemeanor.

The books, *Tapping on Mandamus* for example, 195-198, enumerate many grounds of removal. So also *Grant on Corporations* 242; and the general principle is quaintly but well stated in *The King* v. *The Mayor and Burgesses of the City of Gloucester*, 3 Bulstrode 189, decided so far back as the year 1617, when *Croke* J. said: "A common drunkard is an unfit "person for government"; and *Coke* C. J. laid down the rule that the Common Council (not the corporation, mark, but the Common Council) may remove an alderman "if they have good cause; but "yet with this observation, that they are to do that "which is *justum* and *juste*—*justum* for the matter, and "*juste* for the manner; and clearly if a magistrate, an "alderman, be *ebriosus*, common, and not by accident, "he is an unfit person for government, and this is a "good cause to remove him."

So, also, writing a scandalous libel upon the mayor was held a good cause upon conviction in *Lane's* case, cited *Cases Temp. Hard.* 155, as to which, however, there is a query by Chief Justice *Holt*, and a simple assault is not an offence of this class. *Buller's Nisi Prius*, 206.

Let us now consider what were the charges against Mr. *Spence*, and when they occurred.

It appears, by the records of the Police Court, that,

between *June*, 1856, and *April*, 1862, *Spence* was brought before it no less than ten times; and on nine of these cases was sentenced for abusive and obscene language, for drunken and disorderly conduct in the streets, and for various assaults on police officers and others. In *November*, 1856, he was sentenced to bridewell for seven days for an assault of which he pleaded guilty, and to three days more for an assault on the constable. His conduct on this last occasion was most outrageous; and, finally, he was put upon a truck, and carried to the lock-up. In *April*, 1862, we find him again in the lock-up, charged with being drunk and disorderly in the street, and making use of abusive or provoking language towards *Maurice Power*, a police officer, when he was sentenced to pay a fine of four dollars.

That a man of these habits, whatever redeeming qualities he may possess in the eyes of his neighbors—and, surely, there must be some—should have been chosen, in less than six months after his last conviction, one of the aldermen of the city, entitling him to try and punish offences against the good order and peace of the community, is certainly a remarkable thing, and provocative of much serious reflection. Without raising too high a standard of morality, or expecting that members of the City Council shall not occasionally err like other men; that they may not sometimes, though rarely, be guilty of intemperance, or use abusive language, or commit assaults: one cannot wonder at their anxiety to reject a companion, who has made himself so unhappily conspicuous on the records of the Police Court. A man who has been once in bridewell, and twice in the lock-up, has far transcended the conventional line, which society has drawn between the reputable and disreputable. These convictions indicate a very different *status* and tone of feeling from cases that may be put of breaches of the moral law, that may be almost as culpable, but are not quite so notorious, or so damaging to character.

1863.

In Re SPENCE.

I have not a doubt that several of the offences upon these records—I do not say all—would have justified the City Council upon conviction in removing any of their members. The difficulty here is, that it is not an amotion of a member who had taken his seat and then been convicted; but of a party elected by the legal constituency after the conviction and punishment. I have found no case that comes up to this. Although Mr. *Spence* was drunk several times between 1856 and 1862, there is no evidence that he was a common drunkard, and no evidence at all of his habits at the time of his election. It is said that the Act of incorporation is defective, but it would be difficult to frame any clause that would meet a case like the present. Where the legislature trusts the power of suffrage, they must take all the consequences that may follow it. The electors of ward number five have thought fit to repose their confidence in the relator; and it is to be hoped that this confidence rests on some reformation of manners, some qualities of head or heart, which the electors know, but this Court has no means or opportunity of knowing. Our duty and function is to ascertain the law, and to declare the law as we find it; and having been unable to discover any law that would justify us in excluding the relator from the office to which he has been elected, I am of opinion that this rule must be made absolute, and that the information, if necessary, must go.

BLISS J. The relator, in this case, was duly elected in *October*, 1862, an alderman of ward number five, by a majority of the electors. Before he could be sworn in, a petition was presented to the mayor and aldermen from certain electors of that ward, stating that *Thomas Spence* was not a fit and proper person to hold the office of magistrate, and praying that he might not be sworn in until a thorough investigation was had into the case.

The City Council, thereupon, proceeded to the inves-

tigation, and ascertained that the said *Thomas Spence* had been repeatedly convicted at the Police Court of the several offences of using abusive and filthy language, of assaults, and of drunkenness, on various occasions between *June*, 1856, and *April*, 1862; for some of which he had been fined, and for others, sentenced to imprisonment in bridewell and the common jail. After hearing him by his counsel, the City Council passed a resolution stating the above facts, and declaring that the said *Thomas Spence* was not a fit and proper person to hold the responsible office of magistrate; that the offences, of which he had been so convicted, rendered him ineligible to exercise the office and duties of alderman and justice of the peace, and therefore, resolved, that he should not be sworn into office; that the return of his having a majority of votes was a nullity; that the office of alderman for ward number five was vacant, and that it be filled up according to law. The mayor, thereupon, issued his writ for a new election. An election was accordingly held under it on the 14th *October*, at which *William Roche*, Esquire, was elected over another candidate, and was returned and sworn into office.

The object of the present rule was to try the legality of these proceedings on the part of the mayor and aldermen, and the case was argued very fully before the Court during the last term.

It must now be taken as a well established principle, though the contrary had been formerly decided in *Bagg's Case*, 11 Co. 99, that a power of amotion of any of its members for just and sufficient cause is incident to every corporation. *Rex* v. *Richardson*, 1 Burr. 539.

It may be a power, which, if wholly without limit or control, would, perhaps, be liable to abuse, as all arbitrary power is; but, under the salutary checks which the Courts of law exercise over corporations in this respect, it appears to me to be a wholesome and indispensable right, without which no order or de-

1863.

In Re SPENCE.

corum could be maintained within the body corporate, and no government either within or without could be carried on.

This general power incident to corporations was not so much denied by the counsel who supported the present rule, as its applicability to the City Council, who, it was argued, did not constitute the corporation of the city of *Halifax*. It is true, that, by the Provincial Statute 14 *Vict.* (1851), the inhabitants of the town and peninsula of *Halifax* are incorporated by the name of the City of *Halifax;* but, except for the purposes of electing a mayor and aldermen, the inhabitants generally have themselves nothing further to do. The mayor and aldermen are, by the Act, constituted the Common Council, in whom, by sec. 8, the power of making bye-laws, and the whole administrative and executive authority, and the government are exclusively vested. Whatever power, therefore, belongs to the corporation, belongs to this executive body; and this particular power, which is incident to every corporation, becomes under this Act transferred to the same jurisdiction, in which all its other delegated power and authority reside. It is the obvious and necessary consequence of the Constitution which the legislature has given to it. The very power of making bye-laws, one which also is incident to every corporation, and which the Statute has vested in this case in the City Council, is conclusive in my mind to show that the power of amotion of any of its members where it can be exercised, must belong to the City Council. In *Rex* v. *Richardson*, Lord *Mansfield* says: "Suppose a bye-law made to give power of amotion "for just cause, such bye-law would be good. If "so, a corporation, by virtue of an incident power, "may raise to themselves authority to remove for "just cause, though not expressly given by charter or "prescription." Now, as the power of making bye-laws is, by the Act of incorporation, vested in the City Council alone, they could, by a bye-law, have

given to themselves this power of amotion; and, therefore, following out the reasoning of Lord *Mansfield*, the same body must have this incidental power of amotion, which they could acquire by a bye-law, but for which no bye-law is requisite.

But, taking this to be so, and conceding that the causes alleged would be good and sufficient grounds for the amotion of this person from the City Council, where they could legally exercise that power, the principal question still is, whether the City Council have any right or authority to do what they have done in this case?

This is not an amotion from their body of one, who had been sworn into office, and was an actual member of it, and for causes arising while he was so a member of the City Council. The complaint against him is, that he was a drunkard, a brawler, and a disturber of the peace, and so was unfit to fill the office of an alderman and a justice of the peace. All the instances, however, of his alleged misconduct and unfitness, were from the year 1856 to the month of *April*, 1862, the latest of them having occurred some months before his election; and this misconduct, the City Council have declared, had rendered him ineligible for the duties of his office, and his return a nullity, which they, therefore, set aside, and proceeded to fill up, what they call a vacancy, by a new election.

All that is, therefore, alleged against this person, amounts to a disqualification to be elected at all; and so the City Council have expressly treated it. That was, however, a matter for the consideration of the electors, and upon which they were to exercise and pass their judgment. The offences with which *Spence* is charged were committed, not against the Common Council, nor yet against the corporation itself, but against the electors at large of his ward, number five. They, and they alone, as I conceive, could take any cognizance of this. If, with a full knowledge of these facts, which appear so notorious, the electors

1863.

In Re SPENCE.

still thought him a fit and proper man to represent them as alderman of their ward, who is to say he was not? I know of no power, certainly of none that is inherent in the City Council thus to disfranchise a party, and to declare him ineligible, who has been duly elected by law. The Act of incorporation does indeed give such a power to the Council by the 15th section, but by the clause immediately preceding that, it had specified the grounds which would disqualify; and these, and these alone, were those about which the City Council were authorized to enquire into, and decide upon. If not disqualified by any of these statutable causes, a person has been elected, that is duly elected, whatever his character may have been, however low and degraded theretofore, it is not in the power of the City Council, as I conceive, to set the election aside, and, declaring the office to which he has been elected vacant, supply the place by a new writ.

If, indeed, now, after admission to office, there should be a commission of such offences as would constitute a just and reasonable ground for amotion, then would be the time for the legitimate exercise of this power. For all others, except those which the Statute has made grounds of disqualification, the electors may charitably be supposed to have considered them, trusting to the reformation of the party; but whether this be so or not, it is a subject in which the electors, and they only, can exercise any judgment or control.

I am sensible that this may place the City Council in no pleasant situation. It must be a subject of great annoyance to so respectable a body, and a matter of no little public concern with reference to the magisterial duties annexed to the duties of an alderman, that they must receive and be associated with one, whose frequent appearance before their own civic court in the character of a culprit has rendered him very unfit to preside in it as a judge;

but the remedy for this, in whatever way it is desirable that it should be had, must be sought for and obtained from the same source, from which the corporate existence is itself derived.

A preliminary objection was, however, taken in this case, that *Spence* was precluded from moving in the matter from his having concurred in this election of *Roche*. In support of this objection, *Roche* states in his affidavit that he was encouraged and induced to contest the office, not only by many of *Spence's* former supporters, but by *Spence* himself, who appeared to him to be a zealous supporter of him, and to be anxious that he should be returned; for, on different days and occasions after he had become a candidate, *Spence* met and stopped him in the street, and stated that he was doing all he could to secure his (*Roche's*) election; and that, after *Roche* had been declared elected, *Spence* on that evening went to *Roche's* house, stated his satisfaction at the result of the election, congratulated *Roche*, and expressed himself much pleased at it. *David Rockwell* confirms this last statement. He says he was present, and heard *Spence* congratulate *Roche*, and express his satisfaction that he had been returned; and he added that he had done all he could to secure *Roche's* election, though he had not voted himself. *Daniel Smith* also says that a day or two before *Roche's* election, *Spence* told him that he and his party intended to support *Roche* at the election.

The authorities are numerous, and need not to be particularly cited, which show that no person can be heard as a relator who has concurred in the election which he now seeks to disturb; and the above facts, if unexplained or uncontradicted, would, without question, I think, bring the party who applies in this case within that rule. But I think a sufficient answer has been given to them. In the first place, it is clear from *Roche's* own affidavit, that he was perfectly aware from the first of all the circumstances under

1863.

In Re SPENCE.

which *Spence's* election had been set aside, and his own had taken place, and that the legality of his depended altogether upon the legality of the proceedings of the City Council. Now, *Spence* distinctly swears that, before the election of *Roche*, the latter having asked him what he intended to do about the matter, he informed *Roche* that he intended to prosecute for his seat in the Supreme Court, and had instructed a prosecution to be commenced,—a determination which he had never abandoned, and of which *Roche* was fully aware; that he was instructed by his attorney not to take any part in the election, and did not; that he did not go near the poll, and did not exert himself to procure the return of *Roche;* and he denies that he ever told him that he was doing all he could to secure his return, but that he did tell him if he (*Spence*) had not been a candidate at the first election, he would have voted for the other, and so would many of his friends; that, on the evening of *Roche's* election, he was in the house of the latter, and shook hands with him, and expressed his satisfaction that *Roche* had succeeded over his opponent; that *Roche* then well knew that he (*Spence*) still persevered in the prosecution to obtain his office; and that *Roche* then told him that if he (*Spence*) succeeded in establishing his right, he would give up his seat, and leave it. *Spence* further swears that he did not induce or encourage *Roche* to offer as a candidate, or to contest the seat; but that the latter, as he believes, acted under the conviction that he engaged in the contest subject to the result of *Spence's* prosecution to establish his right to the office. *William Cutlip* also swears that he was at *Roche's* house on the evening of his election, and that *Roche* then told him that he did not consider himself the alderman elect for the ward, as there was another man (*Spence*) previously elected, and if so declared by the Supreme Court, he (*Roche*) would cheerfully vacate his seat for him. This person also

denies, according to his belief, that *Spence* interfered in any way in *Roche's* election.

All concurrence, then, in the election of *Roche* on the part of *Spence*, which could alone disqualify the latter as a relator in the present proceedings, is distinctly denied. But it is not difficult out of these apparently contradictory affidavits to see the real state of the case. *Spence* was contending for his seat, of which he had been deprived by a resolution of the City Council, and *Roche* was aware of this: what the result might be, appeared uncertain to both when the second election took place. *Spence* preferred *Roche* to the other candidate then offering, and after the election, and this certainly is not an unfavorable trait in his character, congratulated him on his success, though at the same time still bent on contesting his own right to the seat, satisfied if he did not get it, that *Roche* should; while *Roche*, on the other hand, engaged in and carried on the election with the knowledge and conviction that *Spence* was pursuing his own claim, and that upon the decision of it, the validity of the second election would depend, as he was content it should. It is clear, that in this there was and could be no such concurrence on the part of *Spence*, which could prevent his contesting the legality of *Roche's* election; for that was the very question which both of them understood was to be settled in this Court. It was as it were reserved, if not expressly, yet tacitly, between them; and I should doubt, even if *Spence* had actively supported *Roche* in the election, under these circumstances, whether that would have debarred him from now contesting the legality of the election. *Spence* has not been playing fast and loose in this matter; he is not impeaching the title of the other after having led him to engage in the pursuit of the office. In fact, there has been no concurrence on the part of *Spence* in the matter, as opposed to his present proceedings. In now vindicating his claim, he is only doing what he had all along during *Roche's*

1863.

In Re SPENCE.

election avowed openly to be his intention. *Roche* knew it, acted upon this knowledge of it, and, after his election, still recognized the intention of *Spence* to appeal to this Court, and his right to do so, declaring his willingness to submit his own right to the office to the decision which should be given upon *Spence's* prosecution of his claim. I think it would be straining the principle, by which a concurrence in the election precludes a party from impeaching it, if it were extended to a case like this.

Another objection was also taken to this rule, arising out of the English rule of practice, in the Queen's Bench, which requires, in cases of *quo warranto*, an affidavit to be filed by a relator, stating that the motion is made at his instance; there being no such affidavit here. But this rule was made in *Michælmas*, 3 *Vict.* (1839), and is not included in our own Practice Act, by which our practice in other respects is directed to follow that of the English Courts in force previous to 1 *Will.* 4; so that this particular rule in question does not affect us.

On the whole, therefore, I am of opinion, for the reasons which I have stated, that the present rule for a *quo warranto* must be made absolute.

DESBARRES J.* The first question for consideration in this case is, whether the relator, *Thomas Spence*, having been elected by a majority of votes, and returned as an alderman for the city of *Halifax* for ward number five, in *October*, 1862, is disqualified from taking his seat at the Council Board, and assuming the duties of that office, by reason of his conviction of certain offences, with which he was charged in the police office in this city. The charges preferred against him, and on which convictions were had, were for drunkenness and disorderly conduct, assaults, and for abusive and obscene language in the

* DODD J., not having been present at the argument, gave no opinion.

streets. All these offences were committed by the relator before he became a candidate and was returned as an alderman for ward number five. For some of these offences fines were imposed upon him, for others, he was sentenced to imprisonment in the county jail and in the city prison, and on two occasions he was sentenced to bridewell, at one time for seven, and at another for three days. It must, therefore, be presumed from the numerous charges from time to time preferred against the relator in the Police Court, that the electors were quite aware of the nature of the offences committed by him, and the punishment awarded him for these offences; and yet, with full knowledge of his previous conduct and general character, they have thought fit to elect him to the responsible and honorable office of an alderman for this city for ward number five; and we are now called upon to say whether, under the law as it exists, the relator is eligible for, or disqualified from, holding that office on the ground of immorality and misconduct. If I were asked merely to express my opinion of the conduct of the relator, as evidenced by the acts imputed to him which he has not denied, I would not hesitate to say it was disreputable, and any thing but a qualification for office; but I am not called upon to express an opinion as to the conduct he has pursued, my duty simply requires me to declare whether, under the Act for the incorporation of the city, the relator was disqualified from being elected an alderman by reason of the offences previously committed by him. Turning to section 12 of the Act of incorporation, I find that, "In order to qualify a citizen to vote at any election "of mayor, alderman, or ward assessor, he must be a "natural born or naturalized male subject of her "Majesty of the full age of twenty-one years, not "attainted of *treason or felony*, and must also have "resided in the city of *Halifax* for one year previous "to the election, and have paid rates (poor and city "rates) therein during the year preceding such elec-

1863.

In Re SPENCE,

"tion." Section 13 of the same Act declares what the qualification as mayor, alderman, or ward assessor, shall be, in the following words: "To qualify a citizen "to be eligible as mayor, or alderman, or as ward "assessor, he must, in addition to the qualifications "necessary to a voter, be the owner in his own right "of property within the city, real or personal, to the "value of five hundred pounds beyond the amount he "may justly owe."

It is quite clear, then, that having the property qualification, which is not disputed in this case, no offence short of treason or felony is, under this Act, a disqualification for election as an alderman, and though it may not be usual or judicious to elect to a civic office any other than a person of irreproachable character; there is certainly nothing in the Act itself to preclude a person, convicted of the offences imputed to the relator, from being elected to that office from which the City Council have excluded him. The electors have overlooked the offences committed by the relator, either from some well grounded belief of his having abandoned the discreditable practices attributed to him, or from some improvement which they have observed in his general conduct. They have, at all events, for reasons best known to themselves, thought fit to make him their representative at the Council Board, and conferred upon him the right of assuming and discharging the duties of an alderman for ward number five; and, having done so, I think he is entitled to a seat at that board, and has a right to take upon himself and discharge the duties of his office on taking the oaths prescribed by law.

In arriving at this conclusion, I have not overlooked the objection taken at the argument to this application, founded on the statement contained in the defendant's affidavit, "that he (the defendant) was "encouraged and induced to contest the seat for "alderman, on the 14th day of *October* last, for ward "number five, not only by many of the electors, who

"had previously supported *Thomas Spence*, but by "*Thomas Spence* himself," which statement, if uncontradicted and unexplained, would, according to the cases cited, have been a sufficient answer to this application. But this statement is denied by *Spence*, who expressly swears that very soon after the City Council had decided to declare his seat vacant as alderman of ward number five, he informed the defendant that he intended to prosecute for his seat as alderman for ward number five, in the Supreme Court, and that he had instructed the prosecution to be commenced; and, further, that he never afterwards informed the defendant that he had altered that purpose, or that he had abandoned, or had any intention to abandon, proceedings for procuring his seat as alderman for ward number five. At the conclusion of his affidavit, *Spence* says: "I did not invite, induce, or encourage "the said *William Roche* to offer as a candidate, or "contest the seat for alderman at the said second "election, on the fourteenth day of *October*; but, on "the contrary, I fully believe that the said *William* "*Roche* offered as such candidate, and contested the "said election in the conviction that he was doing "so, subject to the result of my prosecution in the "Supreme Court to be established in the said office."

Under these conflicting statements, I think the last objection taken on the part of the defendant to this application cannot prevail, there having been, in point of fact, no actual abandonment of his right or claim to the office of alderman, nor any expression used, or act done, by *Spence*, from which any other inference could be drawn, than an apparent willingness or desire on his part that the defendant should succeed in obtaining the seat, provided *he failed in getting it for himself*. The defendant could not, therefore, have been misled by that negative and qualified support, which *Spence*, it seems, was willing to give him; and he must have entered upon, and contested, the election, with the understanding that if he succeeded in

1863.

In Re SPENCE.

being returned, he could only hold the seat of alderman, subject to the result of the plaintiff's application to this Court to be established therein.

I, therefore, agree with the rest of the Court, that *Thomas Spence*, under the law and the circumstances of this case, is entitled to his seat at the Council Board as alderman for ward number five, and that the rule granted therein must be made absolute.

WILKINS J. concurred.

Rule absolute.

Solicitor for relator, *Miller*.

May 21.

FREEMAN *versus* HARRINGTON ET AL.

Replevin will not lie for logs cut by defendants on lands purchased by plaintiff on their joint account, and of which they have had a joint possession which has not been regularly terminated, although the deed of the land was to plaintiff alone, and defendants had not paid their share of the purchase money, according to the agreement.

REPLEVIN for four hundred pieces of timber. Pleas (among others), that two of the defendants (*Ebenezer Harrington* and *Joseph Freeman*) were tenants in common with the plaintiff of the said timber, and that the remaining defendants acted as their servants in cutting and detaining the said timber; that the said timber was cut upon land purchased by plaintiff, under agreement between himself and certain of the defendants and others, on their joint account, which agreement also provided that the parties thereto were to own and possess the said land in common, for the purpose of cutting timber thereon; and that the said *Ebenezer Harrington* and *Joseph Freeman* paid their proportion of the purchase-money, under said agreement, and entered into and possessed the said land in common with the said plaintiff and the other parties to said agreement; and that the said timber in plaintiff's writ mentioned was taken from the land while so possessed under said contract.

At the trial before *Wilkins* J., at *Shelburne*, in *October*, 1862, the learned judge, at the close of the plain-

tiff's case, directed a non-suit, on the authority of the case of *Mennie* v. *Blake*, 6 El. & Bl. 842, which, in his opinion, established the doctrine that replevin will not lie merely to try title to chattels, and that, to maintain it, there must be an interference by the defendants with the actual possession of the plaintiff, which interference, from the admission of the plaintiff himself in this case, did not appear to exist here, the property being found in the actual possession of the defendants, who had not divested the plaintiff of any actual possession of it. The learned judge further stated that he considered it very doubtful whether the plaintiff had a constructive possession, legally exclusive of the possession of the defendants.

No legal evidence was given at the trial, of the payment of any part of the purchase money of the land, by any of the defendants.

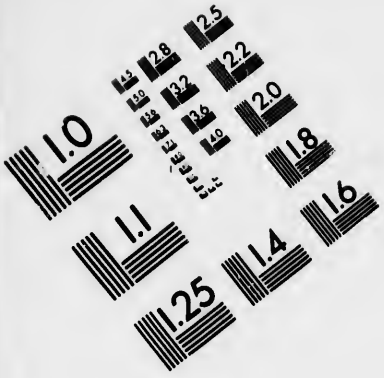
A rule *nisi* having been granted by the learned judge to set aside the non-suit, it was argued in *Michælmas* term last by *Charles Morse*, *J. W. Johnston*, *Junior*, and *J. W. Johnston*, *senior*, Q. C., for plaintiff, and *J. R. Smith* for defendants.

All the material facts are sufficiently stated in the judgments.

The Court now gave judgment.

YOUNG C. J. This is an action of replevin, in which Mr. Justice *Wilkins* ordered a non-suit, in the last *October* term, at *Shelburne*, mainly on the authority of the case of *Mennie* v. *Blake*, decided in 1856, and reported in 6 El. & Bl. 842, and 37 L. & Eq. Rep. 169. The argument before us, in the last term, brought up the question, under what circumstances of the taking or detention of personal chattels, a writ of replevin, not founded on a distress for rent, or damage *feasant*, can be maintained in this Court,—a question not at all affected by our decisions in *Ring* v. *Brenan*, James' Reports 20, and in *McGregor* v. *Patterson**,

* Ante, p. 211.



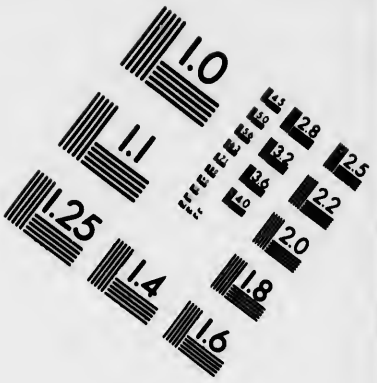
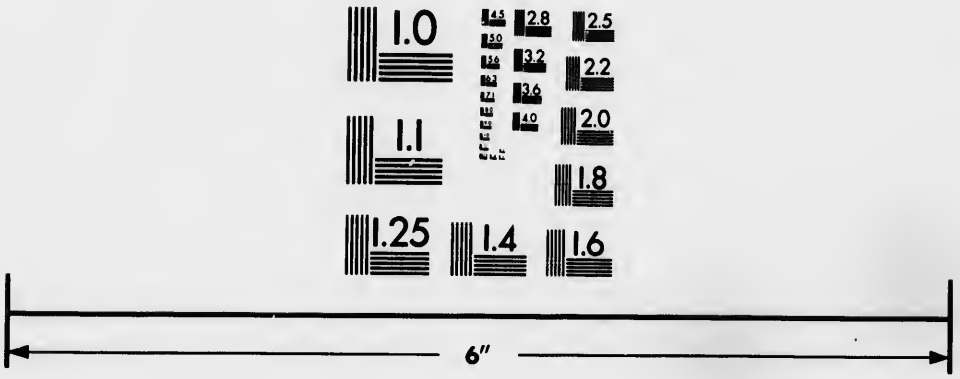
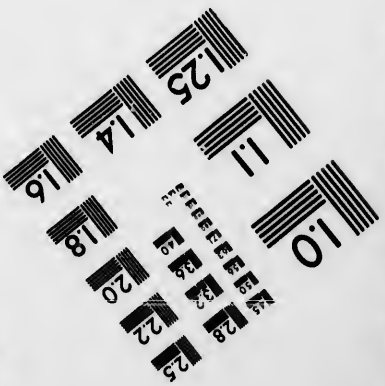


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1863.

FREEMAN v. HARRINGTON et al.

which rested on different grounds. The non-suit here introduced a new principle, being in opposition, as I take it, to our recent judgment in *Mack* v. *Mitchell*, which is unreported; to that of the late *Chief Justice* and Judge *Hill*, to whose opinions we have had access, though they have not been reported, in the case of *Seaman* v. *Baker*, in 1845; and to many other judgments, which all of us have been in the habit of rendering on circuit. It deserves, therefore, an attentive consideration; and, as the action has come into general use, and the rules which govern it appear, from the recent arguments, to be quite unsettled, I have taken some pains to look into them, and to enquire into the effect of our own Practice Act, (chap. 134, R. S.) sects. 171–175.

It may be safely averred that no action, either in its foundation or its practice, has given rise to so many contradictory expositions as that of replevin in the English Courts. Even now, the text writers are scarcely agreed on its true character; and *Morris*, in his American treatise, published in 1849, contrasts the definitions of *Spelman*, *Gilbert*, and *Blackstone*, preferring the former as the most comprehensive and most accurate. According to *Spelman*, "A replevin is a justicial "writ, complaining of an unjust taking and detention "of goods or chattels; commanding the sheriff to "deliver back the same to the owner, upon security "given to make out the injustice of such taking, or "else to return the goods and chattels." In *England* the action is founded on the tortious or unjust taking, (*Bull. N. P. Replevin*, 52, *Cro. Eliz.* 824), and an unlawful detention is equivalent to a wrongful taking, (5 *Ad. & Ell.* 142). It is to prevent the party, from whom the goods have been taken, from being put to his action of detinue or trover, unless the defendants can show property. According to Lord *Redesdale* in re *Wilsons*, and in *Shannon* v. *Shannon*, 1 Sch. & Lef. 320–324, the writ is merely meant to apply to the case where A, who becomes the defendant in replevin, takes goods

wrongfully from B, and B, who becomes plaintiff, applies to have them re-delivered to him upon security, until it shall appear whether A, the defendant, has taken them rightfully. But if A be in possession of goods in which B claims property, this, according to these two decisions, is not the writ to try that right.

The reason, I would remark, is this, that in the latter case there has been no taking by A; the goods are in his quiet possession by other means than a taking; the law presumes that his possession is a rightful one, and it carries with it the presumption of property, which the Court will not allow a party to disturb by a summary and *ex parte* proceeding, but remits him to his action, where the *onus* of establishing his right rests, as it ought to do, upon the plaintiff.

These decisions are, therefore, inconsistent with the American cases, and with the extreme view which some persons would impose upon our own Statute.

It is further to be noted, that in *England* the general issue is still in use, being the plea of *non cepit* which admits the property to be in the plaintiff, (*Bull. N. P.* 54, 3 *Stark. Evid.* 1295). When a taking is to be shown it must be an actual taking, and where the issue raises the question of title the plaintiff must prove, that at the time of the taking which he avows, he had a general or special property in the goods taken, and the right of immediate and exclusive possession. (2 *Greenleaf on Evidence*, sec. 561; *Co. Lit.* 145 b.) A mere possessory right in the plaintiff is not sufficient. (10 *Mod.* 25; *Selwyn's N. P.* 1207). *Blackstone's* notion that replevin obtains only in case of a wrongful distress, though it is favored by Sergeant *Stephen* so recently, as in his edition of 1844, is no longer law.

In *Mennie* v. *Blake*, Mr. Justice *Coleridge*, delivering the judgment of the Court of Queen's Bench, recognizes most of the foregoing principles. "As a general rule," says he, "it is just that a party in the "peaceable possession of land, or goods, should re-

1863.

FREEMAN v. HARRINGTON et al.

"main undisturbed, either by the party claiming "adversely, or by the officers of the law, until the "right be determined, and the possession shown to "be unlawful." "From a review of the authorities," he also says, "it may appear not settled whether origin- "ally a replevy lay in case of other takings than by "distress; nor is it necessary to decide that question "now; for, at all events, it seems clear that replevin "is not maintainable in a case in which there has "been first a taking out of the possession of the "owner." The judgment then speaks of the possession being disturbed by a strong hand, and seems to me to confine the proceeding by replevin to cases (not being cases under distress) where there has been either fraud or violence in the defendant. This case of *Mennie* v. *Blake*, in which, it must be observed, the plea was *non cepit* only, and the property admitted to be in the plaintiff, not having been appealed from, must be taken to be English law; and the question is, whether, under the sections 171 to 175 of our Practice Act, it is to be received also as law in this Court.

These sections were reported by the Law Commissioners to our legislature in 1852; but, the rough drafts having been lost, none of us can recollect from what quarter they were derived. That they are of American origin, is clear; and my own opinion is, from a perusal of *Morris' Treatise on Replevin*, that they were borrowed from the law of *Pennsylvania;* they differ *toto cœlo* from the English law, and adopt "the "claim property bond," as it is called, permitting the defendant, on security, to retain the possession of the goods replevied, which defeats one of the main objects of the writ. It is unknown to English practice, and in the Union is confined to the States of *Pennsylvania* and *Delaware*, although the *New York* Code of Proceedure has introduced a very similar proceeding. Section 171 of our Act permits the writ to be brought (and the form of the writ number two is given as) for an unlawful detention, although the original taking

may have been lawful, which, as I think, is at variance with the English rule; for, in the case of *Evans* v. *Elliott*, already cited, from 5 Ad. & Ellis 142, Lord *Denman*, while he holds that every unlawful detention is a taking, adds that the damages recovered would be only for such unlawful taking as could be shown to the jury.

This case also, and the authorities cited in it, while they show that replevin lies for detaining cattle taken damage *feasant*, or for rent, after a tender of amends, or the rent in arrears, may be considered as much more applicable, if not altogether confined, to these two cases, and would not extend to the more enlarged purposes of the writ, as it has been recently used.

Our Act, therefore, unwittingly perhaps, has brought the writ more closely within the American, than the English definitions. (See also the American note to 37 Law & Eq. Rep. 175, *Morris* 39–42). In *Pennsylvania*, says *Morris*, p. 17, it may be defined to be the remedy for the unlawful detention of personal property, (a definition founded upon their Act of 1705); and at page 37, he says, it may be brought whenever one person claims personal property in the possession of another, and this, whether the claimant has ever had possession or not, provided he has the right to the possession; that is, although there may have been no taking by the defendant.

I must confess, however, an extreme repugnance to act upon this construction, which is entirely opposed to the English rule, and never, as I think, could have been in the mind of our legislature. To do so would be to revolutionize all our notions of this writ, and it will be infinitely more convenient, I think, and better adapted to our condition, to adhere to the principles that have hitherto obtained in this Court.

I am of opinion, therefore, that outside of the cases of distress for rent and damage *feasant*, which do not at present come into question, the writ of replevin will lie for goods and chattels that have been in the

1863.

FREEMAN v. HARRINGTON et al.

possession of the plaintiff, and wrongfully taken, or if lawfully taken, or received from the plaintiff, unlawfully detained from him with or without violence or fraud; that the plaintiff must be prepared to show an absolute or special property in the goods, and not a mere possession or possessory right; and that the defendant, who is bound to make a good title *in omnibus*, can meet a *prima facie* case, only by showing a superior right of property in himself, either absolute or special, by bill of sale, delivery from the plaintiff, or otherwise. Property in a stranger may also be pleaded in bar. (*Selwyn's Nisi Prius* 1210).

I have had some doubt whether I ought to say any thing in this judgment on the point of damages, but as that question came before us in the case of *Mack* v. *Mitchell* in the last term, and our judgment was unwritten, I think it better to add that where the property has been delivered to the plaintiff, and the jury find for him, they may award him damages for the detention; and, according to the American cases, he is entitled to compensation for any deterioration in value of the goods replevied while they were in the hands of the defendant, and also for his time lost and expenses incurred in searching for his property. (*Morris*, 139.)

So, also, by the Statute 7 *Hen.* 8, ch. 4, the defendant is entitled to damages for the unjust detention, and when the cause comes to trial the jury assess these damages, and they form part of their verdict. (1 *Saunders* 195, note 3.) These rules are quite consistent with section 175 of our Act.

If the defendant has given the claim property bond, and retained the possession of the goods, and the issue of property is found for the plaintiff, he has judgment in his favor for the value of the goods, which the jury must find, adding such further damages as they may award for the detention. These two they ought to distinguish in their verdict, so as to avoid the difficulty which arose in the case I have

just referred to. Other rules illustrating the practice in *New York* and *Pennsylvania*, are to be found in *Sedgwick on Damages*, 499–503.

We have now to inquire into the position of the case before us, where the plaintiff replevied logs and timber cut from his land by the defendants, and the defendants having pleaded that he was not entitled to the possession of the timber so cut, the plaintiff gave his deed in evidence. It was asserted at the argument that title to land cannot be tried in replevin; and the case of *Eaton* v. *Southby*, Willes Rep. 131, shows that it cannot be tried *ex directo*. Neither can the writ be maintained for things affixed to the freehold. (*Niblet* v. *Smith*, 4 T. R. 504). But the moment the things are severed from the freehold, the trees cut from the land, or the stones dug out of the quarry, they become personal chattels, the property of the owner of the land, and the subjects of replevin. The degree of labor that may be expended on these trees or stones, so that they shall no longer be the subjects of this action, is an inquiry that does not arise here. We have allowed plaintiffs in replevin to recover for boards, poste, and staves, made from the trees cut on their lands, and for grindstones dug therefrom, and these decisions which are analogous to the American (*Morris*, 57) I entirely approve of.

The plaintiff's title to the land, therefore, in replevin may come into proof incidentally, and, in this case, the plaintiff's title would have enabled him to maintain his action, but for the special circumstances that were also in proof. It has been already seen that the plaintiff in replevin must not only have property, but a clear unequivocal possession of the goods taken, and the defendant must be in the position of a wrong-doer.

The American cases hold that if a person claiming title to land cut down trees, split them into posts and rails, and carry them away, they cannot be recovered in replevin. If the person cutting the trees had

1863.

FREEMAN v. HARRINGTON et al.

neither possession, title, nor claim, he would be a mere trespasser, and the owner would have an undoubted right to recover in replevin. The case of *Elliott* v. *Powell*, 10 Watts 454, and other cases cited in *Morris* 57, affirm this doctrine. Now, in this case, it appeared that, although the plaintiff acquired title to the land in 1845, it was agreed that the defendants were to have certain shares in it, upon their paying a proportion of the purchase money. It further appeared that the survey of the lot conveyed to the plaintiff included an adjoining location lot, the two lots forming one block; and the plaintiff himself says that, while the agreement was in force and not broken, he and the defendants held, and used, and cut in common over the whole block. He then alleges that the agreement was broken by the defendants failing to pay their share of the purchase-money, and he forbade them to cut upon his lot. But his son proved that the trees had been cut by the defendants before the notice was communicated to them, and all the trees had defendants' marks on them. The surveyor says: "I think the plaintiff informed me that "the survey was for a joint concern between him and "the defendants;" and it is obvious that the cutting was in pursuance of the joint possession, and in the assertion of a right. This is a case in which the plaintiff might, perhaps, have maintained trespass, or trover, but he cannot maintain replevin; and, therefore, I think the non-suit was right, and that the rule for a new trial should be discharged.

BLISS J. The logs in question in this case, were cut by the defendants on what is called the *McGowan* lot. This lot was purchased by the plaintiff in 1845. About the time of the purchase, he entered into an agreement with the four defendants, that they should all have shares in the lot, they agreeing to pay their proportion of the purchase-money, and of the expense of the survey of this lot, and of the adjoining loca-

tion lot, which the defendants were to have surveyed. It would seem probable that the purchase itself had been made by the plaintiff, in reference to this agreement, and on the joint account of all the parties, though the deed was taken in the name of the plaintiff. But whether the agreement was made before or after the purchase: at all events, about a week after it, a surveyor was employed to run out the land, who, as he says, was told by the plaintiff that "the "survey was for a joint concern between him and the "defendants," some of whom were present at the survey, at which the *McGowan* lot and the adjoining location lot were run out together in one block, without any division line between them. After the agreement was made, and while it continued in force, the plaintiff himself says that "the defendants would "cut a stick or two where they pleased, and he "would do the same," and, again, he says, "they "all held, and used, and cut in common."

There was, then, beyond all doubt, a clear and explicit verbal agreement between the parties, under which the defendants were equally with the plaintiff interested in this land, the title to which was thus held in the mean time by the plaintiff, till the defendants should pay their share of the purchase-money; and, carrying out this agreement, it was surveyed for them jointly; and the defendants were further in the actual joint possession of it, holding it, using it, and cutting logs on it in common with the plaintiff, who, on his part, would appear to have been entitled to, if not actually exercising the same right and privilege over the adjoining location lot, which the defendants seem to have had surveyed on their own behalf.

I think such a possession and use of the land must be considered, under the decisions, to be such a part performance of the agreement, as will meet the Statute of Frauds, and make the verbal contract binding in equity. In *Morphett* v. *Jones*, 1 Swanst. 181, the Master of the Rolls says, that "admission into

1863.

FREEMAN v. HARRINGTON et al.

"possession, having unequivocal reference to contract, "has always been considered an act of part perform- "ance." And it would seem that one reason for holding this to be a part performance of the contract, so as to give it effect in equity, was to prevent a party from being liable to just such suits as the present. In *Clinan* v. *Cooke*, 1 Sch. & Lef. 41, the Lord Chancellor, Lord *Redesdale*, says: "I take it that nothing "is considered as a part performance, which does not "put the party into a situation that is a fraud upon "him, unless the agreement is performed; for in- "stance, if, upon a parol agreement, a man is admitted "into possession, he is made a trespasser, and is liable "to answer as a trespasser if there be no agreement. "This is put strongly in the case of *Foxcraft* v. *Lister* "(Prec. Chan. 519, 2 Vern. 456). There the party was "let into possession on a parol agreement, and it was "said that he ought not to be liable as a wrong-doer, "and to account for the rents and profits. And why? "Because he entered in pursuance of an agreement. "Then, for the purpose of defending himself against "a damage which might otherwise be made against "him, such evidence was admissible; and, if it was "admissible for such purpose, there is no reason why "it should not be admissible throughout. That, I "apprehend, is the ground upon which Courts of "Equity have proceeded in permitting part perform- "ance of an agreement to be a ground for avoiding "the Statute."

At the outset, then, there was a valid agreement between the parties; and the defendants could neither have been sued in trespass for cutting and carrying away logs from the land, nor would replevin lie in such a case; and whatever difficulty there might have been formerly in setting up this defence in a Court of Law, or a resort to a Court of Equity have been necessary, that is no longer the case here; and there is an equitable plea here to meet the very case. When then did this state of things cease to exist, and how

1863.

FREEMAN v. HARRINGTON et al.

has this right of the defendants to hold, and use, and cut logs on the land, free from any liability to an action for it, been put an end to. The plaintiff says that the defendants not having paid for the land, the agreement fell through; but that amounts to nothing without some sufficient step or act on his part, or an acquiescence on the part of the defendants, which certainly has not been shown; on the contrary, the very cutting of these logs by them was under an assertion of their right to do so by virtue of this agreement. The plaintiff, however, further says, that "*Joseph Freeman*, "one of the defendants," refused to "comply with his part of the agreement, and so I "paid him a balance I owed him on account as per "receipt of 2nd *March*, 1857. This is the last time I "asked any of them to carry out his agreement." This, it may be remarked, is not very clear as to the refusal of *Joseph Freeman* to pay his part, for the plaintiff has not stated any positive or express demand for it, nor does he say that when he paid this defendant his balance, that the latter understood that the agreement was thereby at an end, and that he acquiesced in it; and we find, from the evidence of *Josiah Pearce*, that this very defendant, when cutting the logs in question, said, "that he had paid his "honestly earned money, and had a right to cut, and "would cut." It is, indeed, clear from this evidence of the plaintiff himself, that the agreement was recognized by him as a valid subsisting one, at least down to *March*, 1857; and the manner in which he says he then terminated it on his part alone, is altogether too loose, and uncertain, and unsatisfactory to have the effect of doing this, and of converting the rightful act of this defendant of cutting on the land as before into a wrongful act, for which an action would lie against him. But conceding, for the moment, that it would, that, at most, would affect the case of the defendant, *Joseph Freeman*, and leave the right of the other three untouched; and as the agree-

1863.

FREEMAN v. HARRINGTON et al.

ment as to all four was in force confessedly down to *March*, 1857, when nothing took place to annul or terminate it as to the three; and as the plaintiff has admitted that he has never since made any application to any of them to carry out his agreement, it must be in full force and effect still as to these, and their situation and rights continue just what they were from the first. It is, no doubt, very true, that, if the defendants have not paid their proportion of the purchase-money, they cannot claim to have a specific performance of the contract from the plaintiff, though I do not know if they were now prepared to pay it, that any objection on the part of the plaintiff could be successfully raised, as far as the facts now appear. But, however this may be, the plaintiff has not put himself in a condition, according to his own evidence, to set aside thus summarily the contract which existed between the parties relative to the land. Even if he could treat it as put an end to with respect to *Joseph Freeman*, it continued as to the other three defendants. They, at all events, cut the logs in the exercise of the right which this agreement gave them, and what they had a right to cut, they had equally a right to take away; they were then in the lawful possession of them, and if *Joseph Freeman*, who had a joint possession with them, had no such right, that cannot affect or destroy the lawful possession of the other three who had. As to the notice which was served on all the defendants, prohibiting them to cut upon the land, or to take away that which they had cut; that was after the logs in question had been cut, and could not deprive the defendants of the fruits of their labor on the land, obtained by the lawful exercise of their right on it. But such a notice was wholly ineffectual for any purpose. If the agreement still subsisted, as I consider it did, the plaintiff was not in a situation to give any such notice, and certainly that was not the way by which the agreement would be terminated.

I think, therefore, that the non-suit was right, and that the present rule must be discharged.

DODD, DESBARRES, and WILKINS JJ. concurred in in the opinion that the judgment should be for defendants.

Rule discharged.

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

END OF TRINITY TERM.

I think
that the

Dodd,
in the o
defendant

Attorne
Attorne

I think, therefore, that the non-suit was right, and that the present rule must be discharged.

DODD, DESBARRES, and WILKINS JJ. concurred in the opinion that the judgment should be for defendants.

Rule discharged.

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

END OF TRINITY TERM.

1863.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHÆLMAS TERM,

XXVII. VICTORIA.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J. — DESBARRES J.
BLISS J. — WILKINS J.
DODD J.

MEMORANDA.

In last Trinity Vacation (*Sept.* 30, 1863), *Charles Twining*, *William Sutherland*, *James R. Smith*, *Esquires*, Honorable *Robert B. Dickey*, and *Charles F. Harrington*, *Esquire*, were appointed to be of Her Majesty's Counsel.

December 2.

TWINING *versus* STEVENS.

Where the position of the natural boundaries described in a grant cannot be ascertained, and there is no proof of the original survey, the limits of the grant cannot be extended by implication beyond the courses and distances mentioned in it.

EJECTMENT for a lot of land in *Cumberland*. Plea, limiting the defence to part of the land claimed, and disclaiming as to the residue.

At the trial before *Young*, C. J., at *Amherst*, in *June* last, it appeared that the question was mainly as to the northern boundary of the grant under which plaintiff claimed, and that the main point in dispute was the locality of the north-west corner of such grant. Plaintiff contended that this corner was marked by a fir stump seventeen chains south of *Dewar's* river. Defendant contended that a hemlock

seventeen chains fifty links south of this fir stump was such corner. Plaintiff claimed under a grant passed in 1810, founded on a survey alleged to have been made in 1809, but no evidence was given with regard to this survey, except that of *James McNab*, who stated that he was present at the time with his father, *Alexander McNab*, who was the surveyor, but that he did not recollect where the beginning bound was,—that the northern boundary line was not then run all the way to the disputed corner,—and that he did not remember the marking of that corner. He said, however, that he knew this north-west corner in 1819, and that it was then clearly defined, though he did not recollect the tree, but that it was on a low piece of ground. He also said that he was laying off land in 1819 for the *McKenzies*, and that he then saw this corner, and ran from it to the river seventeen chains. He admitted, however, that he had no minutes of the *McKenzie* survey, and that he only spoke from a copy of a plan which he sent to *Halifax* at the time of the survey. He further stated that he was employed by the plaintiff in 1849 to subdivide the grant, and that he then ran all the lines of it, and ascertained this north west corner to be correct by running from an adjoining grant (the *Murphy* grant), the northern line of plaintiff's grant. He said, however, that the lines and corners of the *Murphy* grant were then all gone, and that he had not been on the lines of that grant between 1809 and 1849.

In the plaintiff's grant the disputed corner was described as a pine tree marked D W B, and its distance from the south-west corner, the position of which was not disputed, was given as one hundred and forty chains.

No evidence was given with regard to this pine tree or its position, and the plaintiff's witness, *James McNab*, admitted that the hemlock was one hundred and forty chains from the south-west corner.

In the plan annexed to the grant, and which was

1863.

TWINING v. STEVENS.

given in evidence with it, the whole of the northern boundary, including, of course, the north-west corner, was marked as being on the *north* side of the river.

On the part of the defendant, five witnesses proved that the hemlock was blazed as a corner tree, and four of them proved that it was marked with the letters A McN, being the initials of the surveyor, who, it was said, made the original survey for plaintiff's grant, and that there was an old line running easterly from it the course of the northern line of plaintiff's grant. *Byers*, a surveyor, proved that the distance from the south-west corner to the hemlock was one hundred and forty-five chains.

Defendant claimed under a grant to himself, passed in 1855, which bounded him on the hemlock, and he proved a possession since 1835.*

The jury found for the plaintiff. A rule *nisi* was granted to set aside the verdict, as contrary to law and evidence, and it now came on for argument.

Oldright (with whom was *Blanchard*, Q. C.) in support of the rule. Plaintiff must prove the *locus* to be within the courses and distances given in his grant, within the natural boundaries mentioned in it, or within the limits of the survey made for the grant; and he has proved none of these things, and therefore must fail. His own witness admits that the hemlock is in the course of the grant, and that it gives the plaintiff his full complement of one hundred and forty chains. *Byers*, the surveyor examined on the part of the defendant, proves that it gives plaintiff one hundred and forty-five chains. The natural boundary mentioned in the grant is a pine tree marked D W B, and there is not a particle of evidence of its position. "Parol evidence is perfectly "competent to fix, identify, or locate any boundary, "or local object, or mark called for by a deed, and

* Considerable evidence was given with regard to defendant's possession, but as the case was ultimately decided on a different point, it has been considered unnecessary to report such evidence.—REP.

"then the deed adopts it and gives it effect; but it "pre-supposes the *actual existence* of the local object "then *presently existing*, or placed there by the parties "as and for the monument or mark referred to in the "deed. The entire absence of any monument or "mark to which the deed refers, is not a latent am- "biguity; it is a failure in the application of the deed "to the subject of the same character, as if the deed "in that respect had been left a blank." 2 *Greenleaf's Cruise's Digest* (2nd edition), p. 631, note. "A deed "conveying a right to flow, gave the grantees a right "to raise and keep up the water of their dam to the "height of a hole drilled in a certain rock described "in the deed. There was no hole at the time at said "point, and it was held that a hole drilled nineteen "years afterwards, without notice to the grantor, by "one of the grantees, who had in the meantime con- "veyed away his interest under the deed, and after a "disagreement had arisen respecting the right to "flow, could not be treated as the monument referred "to in the deed, although drilled at the place agreed "on by the parties when the deed was made." *Ibid*, p. 639, note, citing *White* v. *Bliss*, 8 Cush. 510. There was no notice to the defendant of the running of the lines of plaintiff's grant by *James McNab* in 1849, nor of the running of part of one of the side lines in 1819. "Lines actually marked on the earth will prevail over "those which are only delineated on a plan or not "marked at all." *Ibid.* The hemlock and the line running from it are actually marked on the earth, and the hemlock line by the blazes on the trees is proved to have been run forty years ago. "In the absence of all "the foregoing monuments, resort is had to the courses "and distances given in the deed. * * * * * * "So, if the length of a line be given as being 'about' "so many rods or feet, and no monument be given, "or the place of the monument given cannot be as- "certained, the grant will be limited to the number "of rods or feet mentioned." *Ibid.* The plan an-

1863.

TWINING v. STEVENS.

nexed to the grant shows the disputed corner *north* of the river. In trespass, a party must prove an actual possession, or that the land is within the boundaries described in his documentary title, *a fortiori* in ejectment. *Cameron* v. *McDonald*, 2 Thomson's Rep. 240. There is no evidence at all of the boundary claimed by plaintiff, except *McNab's* copy of his plan of the *McKenzie* grant, which, properly speaking, was not evidence at all, and there is no proof of its having been compared with the original. Independent of positive evidence, there is a strong presumption that this is not the *true* boundary. The defendant is in actual possession, and every presumption is to be made in favor of an actual possessor. 2 *Esp.* 9. On this principle it is to be presumed that the line from the hemlock would strike the northwest corner of the *Murphy* grant. Defendant said that he believed it would, and there is no positive evidence to the contrary. (*Oldright* was here stopped by the Court, who called on the other side.)

W. Twining showed cause. The boundary was found by the jury, it was left open to them, and the Court will not disturb the verdict, where there is, as here, sufficient testimony on which to found it. No doubt there was a survey before the grant issued. (*Bliss* J. You must show a fair inference in favor of the boundary which you claim).

Smith, Q. C., follows on the same side. It is clear from the plan annexed to the grant that the hemlock cannot be the true bound, as it is on the *south* side of the river. [*Young* C. J.—You are destroying the evidence of *James McNab*. It is impossible to reconcile that plan with his evidence. *Wilkins* J.—By the same reasoning the fir stump could not be the bound]. There is a strong presumption that the corner which we claim was made by *Alexander McNab* according to the grant. *James McNab* settled and established the corner in 1819 when defendant was not in possession.

He tried the line from the hemlock, and found it not the true course of the grant. Is there anything to prevent my running out my land ten years after I obtain my grant? Have we not held under the survey since 1819? [*Bliss* J.—You must rely either on title or actual possession. When you failed in showing title, it was sufficient for the defendant to show that you had no actual possession. *Wilkins* J.—There is not a particle of positive proof that the north-west corner was ever marked.] It was known to all the world. There is no evidence that *Alexander McNab* marked the hemlock.

THE COURT here, without calling on *Blanchard*, Q. C., or *Oldright* in reply, ordered a new trial.

Rule absolute.

Attorney for plaintiff, *Macfarlane*.
Attorney for defendant, *Oldright*.

BURROWS *versus* ISENER.

December 5.

An execution binds the goods of a defendant, as against himself or his personal representatives, from the date of its issue, and can be levied on them notwithstanding his death. (*Young* C. J. *dissentiente*.)

Construction of section 127 of the Practice Act, (*Revised Statutes*, 2nd series, chapter 134.)

APPEAL from the decision of *Young* C. J. at Chambers, argued in *Trinity* Term last, by *Ritchie*, Q. C., for plaintiff, and *Shannon* for defendant. All the material facts sufficiently appear in the judgments.

The Court now gave judgment.

YOUNG C. J. This was a judgment for one hundred and thirty-eight dollars and ninety cents, on which an execution was taken out 27th *March*, 1862, and levied on the defendant's goods, but the execution was withdrawn by Mr. *Wallace*, the plaintiff's attorney, and the property levied upon discharged, as appears by his order to the sheriff on file. On the 13th *December*, 1862, an *alias* execution was taken out, and delivered to the sheriff, with the usual indorsement, but with instructions which the sheriff noted in his book, as follows:—"Mr. *Wallace* directed that nothing is to

1863.

BURROWS v. ISENER.

"be done under this execution, as it is placed in my "hands for a particular purpose, which he did not "explain."

On the 28th *December*, the defendant died intestate, and on the 9th *January*, 1863, the plaintiff's attorney for the first time directed that the *alias* execution for one hundred and forty-three dollars and ten cents, should be executed on defendant's goods. On the 10th *January*, the present applicants obtained letters of administration, and proceeded to make an inventory of the goods in defendant's shop; but on the 15th, they were levied upon by the sheriff under the plaintiff's execution, and the legality of that levy is the point in dispute. The question came before me at Chambers on a rule *nisi* to set aside the execution and return the goods to the administrators, which I made absolute on the 6th of *February*, but without costs, as the point of practice was new, and seemed to me very doubtful. There was an appeal from this decision, and after looking into it a second time I am of opinion it was right. The rule ought in strictness to have set aside the levy only, and not the execution; but that is a point of very little consequence, the execution, if the levy was bad, being of no avail.

That there are cases on both sides of this question, I stated in the notes of my former judgment, and I was governed mainly by the equities of our own statute in the conclusion I then came to. I think now that the *rationale* of the rule, as well as the equities, is with the administrators. If the estate were not insolvent the question would not arise; the plaintiff would be paid without the cost or the necessity of a levy; so that the real point is, whether he is to have a preference over the other creditors by virtue of an execution, taken out, it is true, before the death of the defendant, but suspended in the sheriff's hands during his lifetime, and executed more than a fortnight after his death, and after the goods levied on had ceased to be the goods of the defendant,

1863.

BURROWS v. ISENER.

the property therein having passed to his representatives. The delivery of the writ to the sheriff can be counted only from the 9th of *January*, and to maintain this levy it must be held that the mere issue of the writ bound the property of the goods from the date of it. No question arises in this case as to the *teste* of the writ, the *teste* and the date of a writ being equivalent terms under our law. Now, if the common law doctrine, that the property of the goods is bound from the *teste* or date of the writ, irrespective of its delivery to the sheriff, and that our Act protects no one but purchasers, is to be received as law in this Court, all I shall say is, that it is a doctrine new to me, and, as I imagine, to the great majority of the practitioners; for we shall presently discover that there is another question behind, what class of purchasers are protected, and how many of the ordinary transactions of life is the rule to affect.

Our original Statute of Frauds, Province Laws, vol. 1, fol. 27, sec. 15, was in the words of the *English* act, and our present Act, *Revised Statutes*, chap. 134, sec. 127, means the same thing—"no writ of execu-"tion shall bind the goods of the defendant, but from "the time the writ shall be delivered to the sheriff "to be executed"—words sufficiently plain and sufficiently ample. In this case it is contended that the writ of execution did bind the goods of the defendant, not from the time when it was delivered to the sheriff to be executed—that is, from the 9th of *January*—but from its *teste* or date, that is, the 13th *December*. Now, I contend that it took effect only from the delivery, and I find sufficient authorities for this position, which is clearly within the letter, and, as I think, also within the spirit of our law. In 2 *Equ. Cases Abr.* 381, Lord *Hardwicke* said: "Before "the Statute of Frauds the defendant's goods were "bound in the sheriff's hands from the *teste* of the "writ of execution. To avoid this the statute was "made, whereby it is enacted, that the goods shall

1863.

BURROWS v. ISENER.

"only be bound from the delivery of the writ to the "sheriff; but neither before this statute nor since, is "the property of the goods altered, but continues in "the defendant till the execution executed. The "meaning of these words, that the goods shall be "bound from the delivery of the writ to the sheriff, "is, that after the writ is so delivered, if the defen- "dant makes an assignment of his goods, unless in "market overt, the sheriff may take them in execu- "tion." Now, here is an authority going the full length that I contend for, quite independent of the cases in *Noy* and in 16 *Meeson & Welsby*, which were taken exception to at the argument as unreliable or inapplicable.

In the case of *Waghorne* v. *Langmead*, 1 Bos. and Pul. 571, which was said to be on all fours with the present, the Court said that with respect to the creditors (and I look upon the administrators here as representing the creditors), though the property in the goods of the deceased was not bound till the delivery of the writ to the sheriff (the very doctrine I am contending for), yet the right of the creditors to pursue that property till the delivery of the writ, would not make the execution irregular; and so far as the execution is concerned, as I have already said, I concur in this case; though *Impey*, in his *Office of Sheriff*, fol. 108, note *a*, says that if a *fieri facias*, be *tested* before, but delivered to the sheriff and executed after, defendant's death, the execution is irregular,—being the very case here.

In *Houghton* v. *Rushby*, Skinner, 257, which was much relied on, the Court was of opinion that the Act concerning fraud did not design to aid the party, but a purchaser in market overt, and left the party as he was at common law, when such execution was good. And *Treby*, from the bar, said that it was said in Parliament, when this Act was made, that the mischief was great; that in long vacations, when goods have been sold in a market overt, or taken upon a distress,

and a *fi. fa. tested*, the last term should come and overreach them; and for this mischief they intended to provide a remedy, and not for the party himself, — and of this opinion were the Judges.

Now, I think, also, there would be great mischief here, if an execution which may be made returnable at the option of the plaintiff to a particular return day may remain secretly in his hands for six or eight months, affecting the defendant's rights over his personal property, and in the event of his death, giving the plaintiff a preference over his other creditors.

If we are to be involved also in questions as to sales in market overt, it will be found no easy matter to determine what is a sale in market overt in this country. We have no open markets or fairs in the *English* sense, and the decided cases turn upon very nice distinctions. A sale of goods in a shop in the city of *London* alters the property; but a sale of goods in a shop in the *Strand* does not. *Temple Bar* between them, it seems, makes all the difference. So it was questioned, so late as 1840, whether a sale in a warehouse was protected, and it was only upheld because the jury thought it was an open shop. 11 *Ad. & Ell.* 326. I confess, I should be sorry to see this Court perplexed with such inquiries.

In the case of *Hutchinson* v. *Johnston*, 1 T. R. 731, *Ashhurst* J. said: "The general principle of law, and "which has not been contradicted by any of the cases, "is, that the party whose writ is first delivered to the "sheriff, is entitled to priority, and that the goods of "the party are bound by the delivery of the writ. But "the Legislature saw the inconvenience and hardship "which would fall upon innocent purchasers, if the "vendee under the second writ were liable to be "dispossessed of the goods which he had *bona fide* "bought; and therefore they guarded against it by "the Statute of Frauds. This, I understand, was the "sole object of that part of the Act."

It will be observed that this latter view of the ob-

1863.

BURROWS v. ISBNER.

ject and design of the section, being the 16th of the Statute of Frauds, differs from that of Lord *Hardwicke*, and from that I have cited from *Skinner*. Are we not at liberty, then, to adopt as our rule of construction the plain and explicit language of our own section 127, and to give no effect to an execution against the goods of the defendant till it is delivered to the sheriff to be executed? We have here a simple and effective rule, promoting, as I think, the ends of substantial justice; and while the Imperial Legislature, by its recent enactment, has enlarged the operation of the Statute of Frauds, I do not see why we should be desirous of limiting it. By the Act of 1842, the Legislature restrained the operation of judgments entered against a party in his life time, so that they should no longer be preferential claims, as they were by the law of 1812, beyond the value of the lands on which they are a lien; the object being to secure a more equal division among the creditors, and upon the same principle I would prohibit a plaintiff from availing himself of his execution, as has been done in this case, and acquiring a preference after the death of the defendant; and I think, therefore, that the goods levied on or their proceeds should be returned, and that the plaintiff should stand on a footing with the other creditors of the deceased.

BLISS J. This was an appeal from the decision of the *Chief Justice* at Chambers.

The plaintiff obtained judgment in 1862. Execution was issued thereon and delivered to the sheriff on the 13th *December* in that year, with directions not to levy. On the 28th *December* the defendant died. On the 9th *January* the sheriff was directed to levy, and did levy on the 15th. Prior to this last day, that is, on the 10th *January*, administration was granted on defendant's estate and effects.

The *Chief Justice* decided against the levy.

It is perfectly clear that the directions to the sheriff,

when the execution was first placed in his hands, not to levy under it, neutralized altogether the delivery of it, and we must consider the case just as if the execution had only been put in his hands on the 9th of *January*, and after the death of the defendant. The question then is, whether in that case the execution which was taken out before his death, could or could not be lawfully levied upon his goods and effects in the hands of his administrator.

The authorities on this point are numerous, and with one single exception, distinctly and clearly support the validity of the levy. They decide that where an execution of *fieri facias* is taken out after the death of the defendant, if it be *tested* of a day before his death, it may be levied upon his goods in the hands of his executor or administrator, and that the clause in the Statute of Frauds (the same as sec. 127 in our Practice Act), "that the execution shall "only bind the goods of the defendant from the time "of the delivery of the writ to the sheriff," only related to purchasers; but as to the defendant himself and his representatives, the execution still bound, as it did at common law, from the *teste* of the writ. 1 *Saund.* 219, *note*, and the cases there cited; *Waghorne* v. *Langmead*, 1 B. & P. 571; *Bragner* v. *Langmead*, 7 T. R. 20; *Ranken* v. *Harwood*, 10 Jurist, 794 and 5 Hare (26 Chanc. Rep.), 215, before Vice Chancellor *Wigram*.

The single case which militates with this long continued stream of authorities is *Thoroughgood's* case, Noy 73, "where a party against whom a writ of "execution has been taken out died, and the sheriff "levied the money on his executors, it was held bad, "for the mandate of the writ was *fieri facias de bonis et* "*catallis* of such a person, which cannot be after his "death. But, on the other hand, if, after execution "awarded, the plaintiff die, the sheriff may levy the "money."

Now, *Noy* is not regarded as a reporter of much authority; and it is remarkable, too, that this case is

1863.

BURROWS v. ISENER.

not even mentioned in those which I have cited, probably for this very reason. It is, however, cited in *Ellis* v. *Griffith*, 16 M. & W., 106, and is supposed to have received sanction and support from the notice there taken of it by *Parke* B. In *Ellis* v. *Griffith*, however, the question was, whether an execution could be levied on the defendant after the death of the judgment creditor; and so far, and so far only *Thoroughgood's* case was in point, and noticed by the learned Judge, without a single word of comment or approbation of it as it relates to the question now in controversy. Indeed, considering that in this respect that case was so wholly at variance with the law, as it had long been universally established by repeated decisions in all the Courts — that of *Ranken* v. *Harwood* was in the same year, 1846 — with which *Parke* B. must have been perfectly familiar, *Thoroughgood's* case itself can be entitled to no weight now, nor can it be taken to have received any support or weight whatever from the allusion made to it by *Parke* B., upon its being cited by counsel. Perhaps all that that learned Judge meant was, that even in that case, where the Court held that the execution could not be levied on the goods of the *defendant after his death*, it still ruled that it might be levied upon the defendant after the *death of the plaintiff*, without intending to express any assent to the first proposition, which most certainly he does not do; and could not do, without noticing the many numerous cases which expressly establish the contrary.

Now, however, in *England*, by rule 72 *Hilary* Term, 1853, "Every writ of execution shall bear date on the "day on which it shall be issued." And by our own Practice Act, section 3, "The *teste* of all writs, whether "of *mesne* process, or otherwise, shall be abolished; "and every writ shall be dated by the prothonotary "the day it is issued."

The authorities, then, which I have mentioned, can no longer be used to the extent of supporting a levy

made upon the goods of a defendant, who had died prior to the issuing of the execution; because now there can be no relation back by the fiction of law, derived from the *teste*, beyond the actual date of the issuing of the execution; but they will still equally apply to the case of an execution issued in the lifetime of the defendant, though levied after his death. The principle upon which these cases proceeded is, that the execution binds the goods of the defendant from the first moment of its legal existence, which then was from the *teste;* now its legal existence dates only from the day on which it is issued, and dated by the prothonotary; but from that it does bind — though from that time only — the defendant's goods, as against him and his representatives, and can be levied on them, notwithstanding his death; and that is the state of the case here, the defendant being alive when the execution issued.

Something like a doubt appears to have been entertained from the expression used by text writers on this point. Thus, it is said in *Chitty's Archbold*, 582, (10th edition): "If the defendant die after execution "is sued out, the writ may, *it seems*, notwithstanding, "be executed on his goods in the hands of the ex- "ecutor"; and *Williams on Executors*, p. 1804, is to the like effect, the one adopting the expression of the other. But the law, when these wrote, we must recollect, had been altered, and the execution then bore date only from the time it was issued, since which no case upon the point, that I am aware of, had been decided. These writers, then, could not assert positively that the law was as they conceived it to be; for that might imply that it had been so settled, when it had not; but they use the apt and proper expression in such case to denote their own opinion, and they could do no more, as they deduced it from the former decisions, to some of which they refer.

That is the conclusion to which they lead me; and

1863.

BURROWS v. ISENER.

I am, therefore, of opinion that the levy in this case was rightful.

DODD J. The current of authorities is in favor of supporting the execution, and the one in *Noy*, which was principally relied upon by the counsel for the defendant at the argument, is not such an authority as would justify over-ruling subsequent decisions adverse to it. The case of *Ellis* v. *Griffith*, 16 M. & W. 106, which apparently influenced the *Chief Justice* in his judgment at Chambers, with all respect to his lordship, I do not think touches the case. *Parke* B., there referring to *Noy*, did not intend, in my opinion, to give weight to that decision as against the right of an execution creditor to levy upon the goods of an intestate in the hands of his administrator, where the execution had been issued, or was *tested*, before the death of the intestate; it made no part of the argument before the Court, and was incidentally referred to by the *Baron*.

I find an old case in 2 *Ventris' Rep.*, 218—and I think there will not be much difference of opinion in our profession, that, as an authority, his reports stand very much higher than those of *Noy*. The case is a short one, and I therefore give it in full: "A *fieri* "*facias* was taken out, which was executed, after the "party was dead, upon the goods in the hands of the "executors, but the *teste* was before death. But it "appeared that the delivery to the sheriffs, and "endorsement thereupon, according to the new "Statute of 29, *Car.* 2, was after his death. The "Court held that at common law the execution had "been clearly good. But the statute is, that the "property of the goods shall be bound but from the "delivery of the writ to the sheriff; and the Court "rather inclined that the execution was good, and "that the statute was made for the benefit of stran-"gers, who might have a title to the goods between "the *teste* of the writ of execution and time of the

"delivery thereof to the sheriff. But as to the party "himself, the goods were bound from the *teste* ever "since the Statute of 29 *Car.* 2. But it was ordered "to be further spoken to." The opinion of the Court in that case, although not conclusive, if it stood unsupported, is yet entitled to some weight; but what the Court there rather inclined to be law has been fully established by almost uniformity of decision to the present day.

The cases cited at the argument of *Bragner* v. *Langmead*, 7 T. R. 20, and *Waghorne* v. *Langmead*, 1 B. & P. 571, are referred to, and supported by the Court in *Calvert* v. *Tomlin*, 5 Bing. 1. But supposing this case not to be a confirmation of previous decisions, there cannot be anything stronger than the language of Lord *Kenyon* in delivering the judgment of the Court in *Bragner* v. *Langmead*. He says: "It "is now too late for us sitting in a Court of law at "the close of the eighteenth century, to consider "whether or not that which has at all times been "considered as law should continue to be law now. "In this case," he proceeds, "we are bound by "a current of authorities all speaking the same "language." That language was in affirmance of a judgment and execution, where the judgment had been entered in vacation after the death of the defendant; and it was held to relate back to the first day of the previous term, and the execution against the goods of the defendant *tested* on the first day of the term was held good. It is true, that the *teste* of all writs is abolished by our Practice Act; but they bear date on the day of their issue, and the date for all practical purposes may be considered the *teste*. In the case under consideration the judgment was signed, and execution issued before the death of the defendant, and the execution in the hands of the sheriff, although it appears with instructions in the first instance not to levy; but without withdrawing the

1863.

BURROWS v. ISENER.

execution from the sheriff, after the death of the defendant, the plaintiff then directed that officer to proceed and make his levy. The instructions to the sheriff not to levy might have affected the plaintiff's interests, if a second execution creditor had placed a writ in the officer's hands while acting under those instructions; but I do not see how in the present case it affected the rights of the plaintiff so as to prevent his cancelling the instructions previously given to the sheriff, and directing him to proceed and make his levy. It certainly would not put the plaintiff in a worse position than if he had retained the writ after it was issued in his own hands, and not given it to the sheriff until after the death of the defendant, in which case there would not, in my opinion, be anything to prevent the levy being made.

In the case of *Calvert* v. *Tomlin*, which, I believe, was not cited at the argument, and which is in accordance with the previous decisions, a *cognovit* was given on the 8th *February* in *Hilary* Term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing 1st of *April*, and the defendant died in *Hilary* Vacation before the 1st of *April*. Judgment entered up on the 10th *April*, in *Hilary* Vacation, after the death of the defendant, was held regular as relating to the first day of *Hilary* Term; and also execution *tested* of a day in that term, anterior to the defendant's death. Upon these facts a rule was obtained for setting aside the judgment and execution. *Best* C. J. said the cases referred to were direct authorities to support the judgment and execution; and *Parke*, *Burrough*, and *Gaselee*, Justices, being of the same opinion, the rule was discharged. This case, so far as my investigation of the authorities goes, stands unimpeached. I am, therefore, of opinion that the appellant is entitled to our judgment, and that the rule for setting aside the execution should be discharged with costs.

DESBARRES and WILKINS JJ. concurred with BLISS and DODD JJ. 1863.

BURROWS v. ISENER.

Attorney for plaintiff, *Wallace*. Judgment reversed.

Attorney for defendant, *J. N. Ritchie*.

DUNPHY ET. AL. *versus* WALLACE.

December 31.

An executor and trustee who has by his pleas admitted that he has funds of the testator's estate in his hands, may be compelled, at the suit of his co-executor and co-trustee, on sufficient grounds shown, to pay such funds into Court, and also to lodge in Court all securities representing such funds.

THE *Attorney General* obtained a rule *nisi* early in the term, calling on the defendant to lodge in the office of *Charles Twining, Esquire*, a Master of the Court, the mortgages and other securities for the sum of one thousand two hundred pounds, which by his pleas he admitted that he had invested out of monies in his possession of the estate of his testator, the late Very Reverend *James Dunphy*; also all other securities in his hands and under his control, or which ought to be taken and held for principal and interest monies of the estate of the said *James Dunphy*; also to pay to the said *Charles Twining*, the Accountant General of this Court, the sum of three thousand five hundred pounds, which he, the said defendant, had also admitted by his pleas that he had of funds of the said estate in his hands, ready to be invested. It appeared that the plaintiffs, *Patrick Dunphy* and *John McSweeny*, as well as the defendant, *Thomas J. Wallace*, were executors and trustees under the will of the said *James Dunphy*. The rule was argued at great length on numerous affidavits on the 17th inst., and following days, by the *Attorney General* for the plaintiffs, and *McCully*, Q. C., for the defendant. All the material facts appear sufficiently in the judgment of his Lordship the *Chief Justice*.

The Court now gave judgment.

YOUNG C. J. This motion calling on the defendant as one of the executors of the late Very Rev. *James*

1863.

DUNPHY et al. v. WALLACE.

Dunphy, a Dean of the Roman Catholic Church, to lodge in the office of one of the masters of this Court certain mortgages for the sum of one thousand two hundred pounds, and to pay to the *Accountant General* the sum of three thousand five hundred pounds, belonging to the estate, and admitted to be in his hands, was made at the instance of the Rev. *Patrick Dunphy*, another of the executors, and also one of the heirs at law of the deceased, and of Mr. *John McSweeny*, the remaining executor. It has been argued before three of my learned brethren and myself, by the *Attorney General* on behalf of the plaintiffs, and by Mr. *McCully* for the defendant, with great ability and at great length, a multitude of cases having been cited, and the argument having occupied upwards of four days of the present term. This is not, perhaps, to be wondered at, as the abolition of the *Court of Chancery* and the transference of Equity jurisdiction to this Court, by the Act of 1855, have not had time as yet to mould themselves into form; and the principles and practice incident to this new, but most wholesome and beneficial fusion of law and equity in this Court, must be settled as they arise. In the present case, I incline to think that the argument would not have occupied an *English* Court as many hours as the days it has taken here, for none of the material facts are disputed, and the principles which are to govern us, however new to this Court, are, as it seems to me, susceptible of little doubt.

The will of the testator was executed at *Kilkenny*, in *Ireland*, and bears date the 2nd of *January*, 1861. After appointing the three parties above named his executors, the testator devises to two of them, Mr. *Dunphy* and Mr. *Wallace*, "the sum of three thousand "eight hundred pounds, *Halifax* currency, to be dis- "posed of by them in accordance with a private letter "of instructions, directed by the testator to them, "which letter is to form no part of said will, the said "bequest to them being a private trust reposed in

"them, and in no way to be questioned by any "Court."

The testator then devises the residue and remainder of the estate and effects to the three executors in trust to keep the same invested, and out of the interest arising, or to arise thereon, to pay yearly and every year forever, two sums each of one hundred pounds currency towards the support of a school to be conducted by the Christian Brothers, professing the Roman Catholic religion, at the cities of *St. John*, *New Brunswick*, and *Halifax*. He then directs the executors to collect the amounts due upon certain mortgages, and to apply the same in payment of the foregoing legacies: and for any balance remaining due thereon, he directs them to sell a sufficient portion of the securities held by him in the corporation of the city of *St. John*. The will then closes with the revocation of all former wills and bequests.

Now, there are two remarkable things connected with this will: First, that the letter of instructions to Mr. *P. Dunphy* and Mr. *Wallace* for the disposition of the sum of three thousand eight hundred pounds has not been found, and instead thereof a letter of the testator to Mr. *P. Dunphy* only is produced, dated 18th *February*, 1861, six weeks after the date of the will, and directing him to dispose of various sums, amounting to four thousand and eighty pounds, exceeding by the sum of two hundred and eighty pounds the three thousand eight hundred pounds in the original letter; and this letter of *February* is alleged to be the letter of instructions mentioned in the will — a point that will come up at the hearing.

Secondly, it appears by the Master's report of 31st *August*, 1863, that the estate is of the value of eight thousand six hundred and thirty pounds in the hands of Mr. *McSweeny* at *St. John*, to wit: five thousand eight hundred and eighty pounds in corporation bonds, two thousand pounds on mortgage, and seven hundred and fifty pounds on deposit receipt. To this

1863.

DUNPHY et al. v. WALLACE.

are to be added the sums of one thousand two hundred pounds, and three thousand five hundred pounds in the hands of the defendant; making the ascertained value of the estate, besides the accruing interest, thirteen thousand three hundred and thirty pounds currency, — the will, as has been seen, disposing, or professing to dispose, of only three thousand and eighty pounds, and two perpetual annuities, equal to a capital of four thousand pounds, and leaving a residue of six thousand pounds, and upwards, undevised. This residue, it is contended, belongs by the law of this Province, not to the next of kin, but to the executors in their own right; and the interest thus claimed by the defendant was strongly urged as a reason for refusing this motion.

The plaintiffs set out in their writ, as originally framed, that the testator having died at *Kilkenny* on the 10th *May*, 1861, and left assets at *St. John*, they had obtained probate and administration there of his said will, and that the defendant had gone from this country to *Kilkenny* and obtained probate and administration thereon to himself, to which the plaintiffs have now added an allegation that all three executors have proved the will and taken joint administration thereof in the Probate Courts, both at *St. John* and *Halifax*.

The defendant in his pleas admits that he obtained probate at *Kilkenny;* he does not deny, and the absence of a denial is equivalent to an admission, that the plaintiffs obtained probate at *St. John*, but alleges that they had not obtained probate in this Province; while in his amended plea he alleges that they had not proved the will, or been admitted to, or received or taken probate thereof, either in this Province, or elsewhere.

On these allegations, which it is impossible to reconcile, it was urged by the defendant's counsel that the plaintiffs had no *locus standi* in this Court; that it was incumbent upon them, first of all to obtain pro-

bate in *Ireland*, as the place of the testator's last domicile, and at all events, that they ought to have taken probate in this Province before filing their bill in this suit.

The plaintiffs in their writ allege that the defendant had converted the securities of the estate into money to a large amount, exceeding four thousand pounds, sterling, which he had in his hands, but refused to account for, or to give the plaintiffs any intimation or knowledge of its disposition; they allege further that there are no debts of the testator or his estate remaining unpaid, and they pray for an account, which they tender on their own behalf, of all monies received by the executors and an investment thereof, according to the directions, and for the purposes of the will.

To this, the defendant pleads, that the said *Patrick Dunphy* had possessed himself of the funds and effects of the estate to a large amount, which is shown by Mr. *Dunphy's* affidavit, and by the Master's report, to be at variance with the fact, the property in Mr. *Dunphy's* hands being of trifling value.

The defendant then vindicates himself in his second and third pleas for having withdrawn the sum of four thousand two hundred and eighty-four pounds five shillings, sterling, invested, and bearing a small interest of only one and a-half per cent. in *Ireland*, and transferred the amount to this country; and having, in the meantime, placed it where it would produce three per cent., he proposed to the plaintiffs, he says, that it should be invested on mortgage, and it would long since have been so invested if the plaintiffs had not objected to its being invested, till the executors could meet at *Halifax*, and decide upon what was best to be done.

In his fifth plea the defendant alleges that he is now and always has been ready and willing to do all in his power to have the estate settled agreeably to the terms of the will, and that he has never, on any occasion,

1863. DUNPHY et al. v. WALLACE.

intimated an intention on his part to hold the property for his own use, but what is held by him he is ready to apply towards the trusts and purposes contained in the will,—allegations which it is difficult to reconcile with what has been advanced on the part of the defendant in this argument.

The material plea, however, for our present purpose is the eighth, which runs thus:—"And this defendant further saith that he has appropriated no part "of the funds of the estate to his own use, but after "paying certain debts, charges, and expenses, out of "the money obtained in *Ireland*, he lodged the balance "for safe-keeping, till otherwise invested, at three per "cent—while out of the funds received by him he "has invested on mortgages on real estate the sum of "twelve hundred pounds, and has the sum of three "thousand five hundred pounds ready to be invested, "and which would have been invested, but for the interference of the plaintiffs and the objections raised "by them."

In considering these pleadings, and the other papers referred to in the rule *nisi*, it is impossible for us to shut out of view the previous argument in this term on the motion for an attachment.

Mr. *Johnston*, the Attorney General, in his affidavit of 3rd *August*, 1863, after stating his retainer and several applications to the defendant, orally and in writing, declares that he had endeavored to obtain from the defendant information where and how the money he had procured in *Ireland* belonging to the estate was deposited or disposed of, but without success; that the information had also been withheld from Mr. *P. Dunphy;* that the defendant had intimated his intention to remove to and permanently settle in the *United States of America;* that the deponent had applied to the Probate Court at *Halifax*, to compel the payment of the said money into a chartered bank, pursuant to the Provincial Statute, to abide the order of the Court; that the said application was resisted,

and before judgment the deponent, believing the jurisdiction of that Court to meet the exigency to be less extensive, and authoritative than the jurisdiction of this Court, abandoned the further prosecution of the application in that Court; and that the defendant in that Court was charged with, and admitted, his contemplated purpose of removing to the *United States*. The affidavit then proceeds in these words: "I do apprehend and believe that the "assets of the said estate which came to the hands "of the said *Thomas J. Wallace*, as aforesaid, in whole "or in part, have been appropriated to uses of his "own, or to purposes otherwise inconsistent with the "trust under which they were received by him, and "inconsistent with the security of the said assets, "and the just protection of the interests of those "who may be entitled under the said will." The deponent further says that he believes the assets to be in danger of loss; and that the rights of the parties are in jeopardy, and will be imperilled by the said assets being allowed to remain in the defendant's hands, or under his sole control.

On this affidavit, and after argument, three rules were granted by the Court in *August*: the first allowing an amendment of the writ, which, by our practice, is almost a matter of course; the second, to permit the next of kin to come in as plaintiffs, which is also of familiar practice; and the third and most material one, requiring the executors severally to account before a Master in respect of all monies received and paid by and to them and each of them, respectively, and in respect of the securities under their control, and of the disposition and deposit of all monies of the estate in their hands, — the Master to have power to examine the parties and their witnesses on oath, and to call for the production of necessary documents and papers.

It has not been unusual in this Court to grant orders of a similar kind to this last one before the

1863.

DUNPHY et al. v. WALLACE.

hearing of a cause; and there can be no question that as it had passed in this case in the presence of the defendant's counsel, and with slight opposition, it ought to have been obeyed. It was obeyed by Mr. *P. Dunphy* and Mr. *McSweeny*, but not so by Mr. *Wallace*, who refused or neglected, after ample notice, to attend the Master, and to this hour has rendered no account of his transactions or dealings with the estate. We refused to issue an attachment against him, because the order requiring him to account had not been personally served; but expressed in strong terms our sense of the obligation which lay upon him to submit to an account.

The Master's report of 31st *August*, founded as respects the defendant solely upon the admission in his pleas, I have already referred to. It was confirmed by Mr. Justice *Bliss* on the 13th *October*. On the first instant Mr. *Johnston* made another affidavit, stating, among other things, that from the pertinacity with which Mr. *Wallace* had refused to account, from his expressed purpose of removing from the Province, and from the disposition of his property, the deponent believed the monies in his hands, or under his control, belonging to the estate, to be in danger of being lost, unless he shall be compelled to account, and unless the said monies be removed from his possession and control.

We thereupon granted a rule *nisi* for the defendant's lodging the securities and paying in the money to the Accountant General, which came on for argument on the 7th, when it appeared by the statements of counsel on both sides, that a reference to the pleadings and other papers in the cause not recited in the rule was essential to the argument, and we directed the rule to be amended accordingly; the amendment of rules upon argument, so as to bring out the real points and to effectuate the object of the parties, having been occasionally permitted by our practice. In the very next case that was argued on the 7th

December, an amendment of a rule *nisi* for a new trial was directed with the same view.

The rule so amended was argued on the 17th, and three subsequent days, when it appeared that the amendments of the writ, authorized by the rules in *August*, had been made by the plaintiff's counsel in the interval between the 7th and 17th *December*, to which the defendant's counsel strongly objected in the absence of any renewed order or permission by this Court.

On the 18th *December*, the defendant made an affidavit in vindication of himself, and of his dealings with the estate, in which he stated that he was not then, and never had been, in insolvent circumstances, nor in danger, nor under any apprehension of being in a state of insolvency; that the funds of the estate under his charge and control are entirely safe, and in no danger of being wasted or lost; that although he had had in contemplation at some future period to remove to the *United States*, and had openly spoken of his intention, yet it had never been his intention within twelve months from the present time, to remove, or in any case to leave, until all his business affairs were honorably and honestly settled and arranged, and his liabilities legally discharged; that he was then the owner of real estate in the city of *Halifax* of four thousand pounds value and upwards, and that the counsel of the plaintiffs had no just ground for the imputations sought to be cast upon him in the affidavits referred to in the rule.

On the 19th *December*, the defendant filed his amended plea; this as well as the last affidavit having been brought in while the argument was in progress.

The foregoing are all the facts that bear upon this motion, and they sufficiently indicate the object of the plaintiffs, and the grounds on which they proceed. Let us now consider the grounds on which the motion is resisted.

1863.

DUNPHY et al. v. WALLACE.

These are, first of all, of a technical kind. It is urged that the motion ought to have been preceded by a notice according to the rule in the *English* Chancery, as laid down by *Maddock* and *Daniell;* that the amendments of the bill under the orders granted in *August* ought to have been made within three weeks, as prescribed by Lord *Lyndhurst's* orders of 1828; that the amendments ought to have been made by the prothonotary or clerk of the Court, and not by the solicitor or counsel of the plaintiffs, nor in the form in which they are made; and, at all events, that they ought not to have been made between the time of the granting and the argument of this rule, so as to affect the argument.

Now, it is to be noted that, by the second section of the Act of 1855, abolishing the Court of Chancery, and forming now the 127th chapter of the *Revised Statutes*, it was enacted that in all cases theretofore determinable in Chancery, and thenceforth to be conducted in the Supreme Court, the practice of the Supreme Court, then and thereafter to be established, as far as it was applicable thereto, should be observed, except in so far as the practice was altered or modified by that Act; and in any case to which such practice and the provisions of that Act should not apply, but in no other, the practice of the *English* Chancery should be adopted. For our Legislature to have transferred Equity jurisdiction and power to this Court, and at the same time to have retained the cumbrous and expensive practice of the *English* Chancery—which is not only unfamiliar, but absolutely unknown, to the great body of the practitioners—would have been a practical absurdity. The Legislature have substituted the cheaper and simpler modes to which we are accustomed in this Court, and which upon the whole, though they are susceptible of improvement, have worked admirably well. The rule *nisi* in this case answered all the purposes of a notice, and Lord *Lyndhurst's* orders of 1828 are

not in force in this Court. A reasonable time, to be sure, is generally allowed to a party, within which he must amend his pleadings, and the Court would have limited a time in their order of the 3rd *August*, had it been suggested on either side. The original writ has been interlined, and the additions made to it in the usual way. I see nothing objectionable in that, but some of us cannot altogether approve of the time at which the amendments were made. That new parties should have been added, and material allegations introduced into the writ, between the granting and the argument of this rule, and after the amendment, appears to me, I must confess, inconsistent with the practice of this Court, and with the rights of the defendant. If the amendments were essential to the plaintiffs' case, their counsel ought to have attended to them long before; and strong as my opinion and that of my brethren is, upon the merits of this application, some of us would have felt ourselves constrained to reject it, rather than establish so inconvenient a precedent. We are not, however, reduced to this necessity. In answer to the amendments the defendant has put in a plea, which, we are sure, in point both of form and of substance, would never have appeared upon the record but for the purposes of this argument. We prefer, therefore, to reject from our consideration both the amendments and amended plea, and found our decision wholly upon the record as it originally stood.

Two objections of a much more formidable character were next insisted on by the defendant's counsel, to which I have already alluded in my preliminary statement. If the plaintiffs have not armed themselves with the proper Probate, it is urged, that they had no right to institute this action; and if the surplus belongs in whole or in part to the defendant, he ought not, it is said, to be called upon to pay in or to secure the funds.

1863.

DUNPHY et al. v. WALLACE.

These two, we may assume, will form the principal grounds of contention on the hearing of the cause, and we intimated more than once in the course of the argument that we felt ourselves under no obligation, and had no intention whatever, to decide them on this interlocutory motion. We recognize the wisdom of the rule laid down by Lord Justice *Turner*, in the case of *Bates* v. *Brothers*, 23 L. & E. Reps. 531, 2 Equity Rep. 327, that the Court will give no encouragement to any attempt to obtain its decision on important questions of law before the hearing. We have looked, indeed, into the cases cited upon both points, and into several that have not been cited, and are aware, as to the first, of the distinction between the proof of an executor's title, or of an administrator's, at law and in equity, (3 *P. Wms.* 349, 1 *Atk.* 291, &c.); and as to the second, we could anticipate much that will doubtless be said to us hereafter upon the effect of our Provincial Statute and the operation of the *English* Act; but we abstain, if possible, from forming, and at all events from expressing, any opinion upon either point, till after a full hearing shall have been had upon evidence to be taken in the subsequent progress of the cause.

These objections being disposed of, I have now to consider the real point that is at issue, and which, being new in this Court, and calling upon us to settle for the first time an important rule, demands an attentive consideration. We have looked, therefore, into all the cases, most of which are to be found in the treatises of *Hill*, *Lewin*, and *Williams*, and the material passages of which I will cite, as the foundation of what will appear, I think, to be a clear and well defined rule.

In *Strange* v. *Harris*, executor, &c., 3 Bro. C. C. 365, Lord *Thurlow* said: "The Court will now, imme-
"diately upon coming in of defendant's answer, order
"so much as he admits to have in his hands of the
"defendant's property, to be paid into the bank. It

"was formerly thought necessary for the plaintiff to "shew that the executor had abused his trust, or that "the fund was in danger from the insolvent circum- "stances of the executor."

This *dictum* was pronounced in 1791; it was followed up in 1793 by the case of *Yare* v. *Harrison*, 2 Cox 377; in 1812 by the very leading case of *Freeman* v. *Fairlie*, 3 Mer. 29; in 1825 by that of *Rothwell* v. *Rothwell*, 2 Sim. & Stu. 217; in 1844 by *Roy* v. *Gibbon*, 4 Hare 65; and by *Ross* v. *Ross*, 12 Beav. 89, in 1849.

In *Rothwell* v. *Rothwell*, Vice Chancellor *Leach* held that where the answer admits that there is trust money in the hands of a defendant, the Court will always, on an interlocutory application, order it to be paid into Court, and that an executor admitting himself to be a debtor of the testator at his death, will be ordered to pay the amount into Court.

In *Roy* v. *Gibbon*, Vice Chancellor *Wigram* said that the rule was perhaps less strict in the present day than it was stated to be in *Freeman* v. *Fairlie*. The practice now was, that where a party — in this case an *Indian* executor — charged himself with the receipt of a fund, he was bound by that charge until he had relieved himself from it by a proper application of the money.

What is the principle, I ask, to be gathered from these and numerous other cases? Not, as the language of some of them would seem to infer, that an executor in every case is to pay into this Court estate money admitted to be in his hands; that would be to transfer to the officers of the Court a trust which testators have confided to parties of their own selection, and who will, in general, fulfil the duty more satisfactorily than this Court could do it. Neither does it restrain the power of the Court to cases where the fund shall be manifestly in danger. Were that the rule, we could not carry out our convictions in this instance — the affidavits being contradictory, and our own know-

1863.

DUNPHY et al. v. WALLACE.

ledge of persons and things not appearing upon the record. The medium between these extremes is well stated, I think, by the *Master of the Rolls* in *Ross* v. *Ross*: "There was a time when it was almost "considered as a mere matter of course to order trust "funds to be brought into Court; but now the ques- "tion always is, whether there exists any sufficient "ground for such an interposition."

Is there, then, any sufficient ground for our interposition in this case? Our opinion on that point is already apparent. That the fund. is in danger, is obviously believed by the plaintiffs and their counsel, and not without reason. That it has not been invested as the will directs, is admitted in the defendant's plea, and is not denied in his recent affidavit; and it is a fact under our eyes, that the defendant has persisted, notwithstanding the strong opinions of this Court and our repeated recommendation, in refusing an account.

On this latter point, the judgment of Lord *Eldon*, in *Freeman* v. *Fairlie*, has a very significant bearing: "The executor in this case," he said, "has done that "which no executor is justified in doing. Among "other things, he does not even give the plaintiffs "any account, or description of the books, accounts, "or papers, in which the narrative of his administra- "tion is to be found"; and in another place: "it is "the bounden duty of an executor to keep clear and "distinct accounts of the property which he is bound "to administer."

The refusal of the executor to appear before the Master, or to exhibit, even in the course of this argument, the securities and deposit receipts which he ought to hold for so large a sum as four thousand seven hundred pounds, naturally and strongly inclines this Court to protect the parties who may be ultimately entitled, if we have the power. We refrain from indorsing the strong terms of reprobation with which the conduct of the defendant was assailed on the

argument; but it is impossible for us to say that it meets our approval.

I have next to inquire, upon what evidence an interlocutory application of this kind is sustainable. In the case of *Richardson* v. *The Bank of England*, 4 Myl. & Craig, 176, Lord *Cottenham* reviews the cases upon this point. The grounds, he says, must be found in the defendant's admission: evidence cannot be resorted to for this purpose.

So in ——— v. *Bailey*, 2 Madd. Ch. Pr., 400, the Court declined to act upon a stated account, the answer denying its correctness.

The rule is laid down more explicitly by the *Master of the Rolls* in *Boschetti* v. *Power*, 8 Beav., 98: "A "motion to pay or transfer money into Court is "founded upon the answer of the defendant; and "therefore the Court cannot, on motion, order money "be paid, or stock transferred, into this Court, unless "it has a distinct admission of the defendant, that "the money is in his hands, or that the stock is in "his name. The Court proceeds alone upon the "admissions of the defendant."

In the case of *Hinde* v. *Blake*, 4 Beav. 597, the defendant in his answer on interrogatories, admitted the possession of eleven thousand pounds, consols belonging to the lunatic, of whose estate he was the administrator; and the *Master of the Rolls* said: "I "must deal with this case in the same way as if the "motion were made upon admissions contained in "the answer of the defendant. He apparently has "charged himself with this sum; therefore, he is "*prima facie* liable for it; but then he says he has "disposed of it, but does not explain how."

That is exactly the case of the present defendant. He admits the possession of the securities and money in the most explicit terms; and as to the latter, he will not disclose the way in which he has disposed of it. These cases shew that the defendant's admission of the amount in his hands may be in his answer in

1863.

DUNPHY et al. v. WALLACE.

express terms as it is here, or to be gathered from his answer, as was the case in *Freeman* v. *Fairlie*, or in his answer to interrogatories.

The defendant's admission of the plaintiff's title, which is also required, stands on a different footing. We were told that the admission must be absolute and unqualified; but that is not the modern rule.

In the case of *McHardy* v. *Hitchcock*, 11 Beav., 73, decided in 1848, where the plaintiff claimed as next of kin, and the defendant knew nothing of her title, the *Master of the Rolls* said: "The point is simply "this, whether the plaintiff has shown, from the "answer, such a title as to entitle her to call for the "payment of money into Court. It is said that a "plaintiff cannot have any relief on an interlocutory "application until his title is made out. That is not "so: the Court does not require him to produce any "absolute admission of title, but merely such a pro- "bability of title as the Court can safely act on." And in *Whitmore* v. *Turquand*, 1 Johns. & Hem., 298, decided in 1860, it was held to be enough that the plaintiff had "a reasonable expectation of success."

Two cases were much insisted on by the defendant, *Dubless* v. *Flint*, 4 Myl. & Cr., 502, and *Edwards* v. *Jones*, 13 Sim., 632. In the former, the plaintiff claimed as heir-at-law, and the defendant in his answer (which in *England* is required to be under oath, but not so in this country) declared that he did not know and could not set forth as to his belief, or otherwise, whether the plaintiff was heir-at-law to his testator, or was not. In the latter, the plaintiff's title to relief depended upon *A*, whose administrator he was, having survived *B*. The answer stated that the defendant did not know and could not set forth whether *A* did survive *B*, or whether *A* was living or dead.

In both cases, the Court refused the order on the executor; and we perfectly acquiesce in that ruling. I have already said that we would not take the estate

money out of an executor's hands on light and insufficient grounds, and certainly would not do so at the instance of a stranger, whose title was dubious or unknown. The case of *Schmidt's* estate, in this Court, would be in point, where parties resident in *Prussia*, and claiming to be next of kin, failed in their proof. But here it is not denied that one of the plaintiffs is the nephew of the testator, and that both plaintiffs are co-executors and trustees with the defendant.

And this last consideration leads us to the only other point which we have found it necessary to look into. It was strongly urged upon us by the plaintiff's counsel, that it was absolutely incumbent on them, as the co-executors and trustees of the defendant, to institute this suit, and that they would have incurred a personal liability had they neglected it. In support of these positions, the *Attorney General* cited the case of *Walker* v. *Symonds*, 1 Swanston, 41, to which may be added that of *Bone* v. *Cook*, McClel. 168.

In *Booth* v. *Booth*, 1 Beav. 125, the question arose before Lord *Langdale*, and he held the passive co-executor liable for property of the testator's improperly left in the hands of the acting executor.

The same principle was upheld in *In re Chertsey Market*, 6 Price, 279, where it is said that a trustee ought to have applied to a Court of Equity to prevent a misapplication of the trust funds by a co-trustee.

And by the marginal note in *Styles* v. *Guy*, 1 McNaghten & Gordon, 422, it appears that it is the duty of executors, no less than of trustees, to keep a check upon each other's conduct; and an executor is equally chargeable with neglect in allowing a part of the estate to remain outstanding in an improper state of investment, whether the party in whose hands it is so outstanding be a co-executor or a stranger.

On the authorities which I have thus succinctly reviewed, we are all of opinion that this rule should be made absolute; and Mr. Justice *Dodd*, who looked

1863.

DUNPHY et al. v. WALLACE.

into the cases before he left town, desired me to say that he concurs in our judgment. The main questions it leaves untouched; and these, of course, will receive at the proper time our patient and anxious consideration. Our present ruling can do no injustice to the defendant, nor ought it to impose any hardship on him. He ought to have the securities and money of the estate — and I trust he has them — ready at a moment's warning. For his own sake as a barrister of this Court, I should be sorry to think that it was otherwise; but we have no disposition to press him too hard. If he desire it, we will extend the time in the rule *nisi* for a few days, that he may have opportunity to prepare himself; and I have no doubt, that if he evince a disposition to obey our order, the *Attorney General* will afford him every reasonable facility. We wish it also to be understood, that if in the interval from the filing of his original pleas, the three thousand five hundred pounds then in his hands, or any part of it, has been invested in good and available securities, we will hold the lodging of such securities as equivalent to the paying in of the money. The costs of this application, and of the motion for an attachment, we reserve for future consideration.

We think it proper, also, to suggest to the *Attorney General*, both on the reason of the thing and on the authority of the case of *Ashley* v. *Allden*, 10 L. & E. Rep., 314, 16 Jur., 460, that the executor in *New Brunswick*, before this case is brought to a hearing, should lodge in the office of the *Master* the corporation bonds, mortgage, and deposit receipts in his hands, that all the funds of the estate may be here subject to our final decree.

DESBARRES J* concurred.

* BLISS J. was not present during the argument or delivery of the judgment, having been absent from indisposition from and after the 7th inst.; and DODD J. was present during the argument, but had left town before the delivery of the judgment.

1863.

DUNPHY et al. v. WALLACE.

WILKINS J. The plaintiffs have obtained a rule *nisi* for this interlocutory order, pending a suit in which they, with others, are parties, and we have heard it argued by counsel.

The following, as deducible from the authorities, are the rules of *Chancery* that govern the question before us:

1. The Court will make an order for paying in trust funds, if sufficient grounds exist for such interposition; but the modern practice requires neither allegation nor proof of fraud, insolvency, or other danger, to support the application. *Ross* v. *Ross*, 12 Beav., 89; *Hinde* v. *Blake*, 4 Beav., 597; *Mortlock* v. *Leathes*, 2 Mer., 491; *Roy* v. *Gibbon*, 4 Hare, 65; *Bartlett* v. *Bartlett*, 4 Hare, 631.

2. The order proceeds on the admissions *alone* of defendant.

3. The fund must be admitted to be in the defendant's hands under circumstances which show that it will not be unjust to him to withdraw it from his control. *Richardson* v. *The Bank of England*, 4 M. & C., 175.

4. A trustee, charging himself with the receipt of a trust fund, is liable to be made to pay in, on motion, unless he relieves himself by shewing a proper application of the money. *Roy* v. *Gibbon*, 4 Hare, 65; *Collis* v. *Collis*, 2 Sim., 365.

5. Plaintiff, unless his title be expressly admitted, must show *a reasonable probability* of being enabled to establish, at the hearing, that he is entitled in the character in which he sues. *Whitmore* v. *Turquand*, 1 Johns. & Hemm., 296; *McHardy* v. *Hitchcock*, 11 Beav., 73.

6. An executor, deriving his authority from the will, and probate, when obtained, having relation to the time of the death of the testator, it is sufficient for such executor to aver probate, and to show, at the hearing, that he has then obtained it.

The present subject of inquiry, apart from the

1863.

DUSPHY et al. v. WALLACE.

general questions to be discussed at the hearing, is, "Can plaintiffs, as co-executors or co-trustees with "defendant, call on him to lodge the securities and "pay into Court the monies in his hands?"

This involves the following questions, viz.:

1. Do plaintiffs stand to defendant in the relation of co-executors and co-trustees, and in respect of any portion of the trust monies admitted by defendant to be in his hands?

2. Is any and what amount of trust funds admitted by defendant to be in his hands?

3. Does the Court, looking first to the responsibilities of the co-executors and co-trustees for the defendant, and, secondly, to the interests of the *cestuis que trust*, see sufficient ground for interposing, as asked to do?

4. Referring to any apparent or probable claims of defendant on the fund in his hand, or to his possible liabilities as executor or trustee, does it appear expedient or necessary that he should be allowed to retain the control of it?

It appears to me that all these questions are answered by the case before us unfavorably to the defendant's contention "*of his immunity from the oper-* "*ation of this order,*" and for the following reasons, viz.:

This proceeding is not promoted by certain persons calling themselves executors or trustees *as against a stranger*, but by them against him who is named co-executor and co-trustee in a will, which on its face gives them, in common with him, a representative and a fiducial character, and an equal right to probate of the will.

Plaintiffs and defendant are in equity regarded as mutual guarantors, each for the other's carefulness and diligence in the exercise of the common trust. *Styles* v. *Guy*, 1 McN. & G., 432; *Lewin*, 202; *Lincoln* v. *Wright*, 4 Beav., 430; *Phillipo* v. *Munnings*, 2 M. &. C., 315. Each has acted and possessed himself

of a portion of the trust estate; each, therefore, is entitled to demand from the other a full disclosure of the disposition and state of such portion. That disclosure plaintiffs have demanded, and defendant has withheld. It becomes, then, imperative on the former, *for their own security*, not less than for that of the *cestui que trust*, to apply, to this Court, as they have done.

Defendant does not pretend that any ground exists (none could exist) why he has not made the disclosure asked, nor why, in relation to his personal security and protection, the fund should be left in his hands, nor why he should not comply with the terms of the rule *nisi*. He does, indeed, assert in his plea that *Patrick Dunphy* has refused to disclose to him; but, on the one hand, plaintiffs declare their readiness to account, respectively, and on the other, the report of the *Master* shews that each of them has accounted to his satisfaction.

Defendant admits, and it is shewn by the *Master's* report, duly confirmed, "that he has invested one "thousand two hundred pounds on mortgage, and "that he has three thousand five hundred pounds in "hand, ready to be invested."

It is true that, in his further plea, filed since plaintiffs' amendments, he denies this, as he does every allegation in the plaintiffs' writ; but in the plea, which was alone on file when this rule was obtained, he acknowledges that investment to have been made, and that sum to be in his hands. Here it may be observed that, when the sweeping denials of the *further* plea are contrasted with the qualified denials, with the *admissions*, indeed, of the original plea, an inference seems irresistible, that, to embarrass the plaintiffs in regard to this interlocutory proceeding is the motive that induced a denial in the amended plea of *that* which was not denied in the original one.

It may be observed also, that, though defendant alleges that his co-executors and co-trustees prevented

1863.

DUNPHY et al. v. WALLACE.

his investing the funds in his hands—a point to be decided at the hearing—he was clearly bound to invest, and their refusal would constitute no valid excuse for his not investing to the *cestuis que trust*, nor for these plaintiffs conniving at his not doing so.

It is scarcely necessary to add a remark on the point taken by Mr. *McCully* at the argument, viz.: "that the defendant had no notice of the intended "motion of an order for him to pay in." The rule *nisi* in the spirit of our Equity Act was amply sufficient for that purpose, to say nothing of the fact, that during the whole period between *August* last, when defendant was required to account, and the date of this rule, during which the chain of proceedings has been "dragging its slow length along," the defendant has been kept, from day to day, substantially notified of the ultimate object of these plaintiffs, which is sought to be accomplished by making this order absolute.

Affidavits referred to in the rule *nisi* show that, though duly notified by the Master, the defendant has filed no account in the Master's office, nor exhibited any account of the estate monies in his hands, nor submitted to an examination, nor otherwise conformed to the order of one of the Justices of this Court.

All this the plainest dictates of justice and equity, to say nothing of the positive order of a Judge—I may say of the Court—made it his duty to do,—a duty so obvious, that I should, indeed, have been surprised to find a rule or precedent of Chancery under which he could screen himself from an obligation to perform it. I have found none such, and, therefore, and for the reasons above stated, I think this order should be made absolute.

Rule absolute.

Attorney for plaintiffs, *J. W. Johnston, Junior.*
Attorney for defendant, *Ritchie*, Q. C.

1863.

[In the two cases below, no *written* judgments were delivered, and the following minutes have been copied from the *Chief Justice's* manuscript notes of the decisions. On account of the great importance of these cases, it has been thought desirable to publish even these brief notes of them.—REP.]

ALLAN *versus* CASWELL.

December 5.

THIS was a motion to set aside an attachment against an absent debtor, and all proceedings thereon, and was argued on the first day of the term by *McCully*, Q. C., for defendant, and *J. W. Johnston*, junior, for plaintiff.

It appeared that the affidavit for the attachment began with the names of the plaintiff and defendant as a heading, and then proceeded as follows: "*J, A,* "of *Shelburne*, merchant, the *defendant* in this cause, "maketh oath, &c," stating the debt to be for goods sold and for interest, without alleging a contract to pay interest, or distinguishing the amount due for interest.

THE COURT now delivered judgment; and held, on the authority of *Hargreaves* v. *Hayes*, 5 Ell. & Bl., 272 (over-ruling *Harris* v. *Griffith*, 4 Dowl. 289, and other cases), that the heading of the affidavit was not an objection, and that the words, "the defendant in this "cause," might be rejected as surplusage.

The Court also intimated on the authority of *Chitty's Archbold*, (8th ed., p. 661); 4 *Dowl.* 34, 72; 2 *Cr. & Mee.* 406, 1 *Bing. N. C.*, 369, that the objection which had been taken by *McCully*, Q. C., as to interest, would have been fatal, but for the waiver. The attachment having issued in *June*, 1862, a letter was written from *Boston* by defendant in *July*, 1862, speaking of the suit, and admitting the debt. In *May*, 1863, the plaintiff took

1863.

ALLAN v. CASWELL.

judgment. In *September*, the defendant returned to *Shelburne*, and on 3rd *October* filed an appearance and plea without leave. On the 5th *October* the plaintiff issued execution. The Court held that these facts constituted a waiver by lapse of time, and a step taken in the cause, though the step itself was a nullity. (See *Perry* v. *Fisher*, 6 East., 549; *Lockhart* v. *Mackreth*, 5 T. R., 661.)

The execution having been taken out without the bond required by the statute (*Revised Statutes*, second series, chap. 141, sec. 23) having been allowed by the Court or a Judge, the Court set it aside, though the sureties were unexceptionable, and gave no costs (see *Preedy* v. *Lovell*, 4 Dowl. 671) on either side.

Rule accordingly.

Attorney for plaintiff, *McCoy*.

Attorney for defendant, *N. W. White*.

December 31.

NELSON *versus* CONNORS.

ASSUMPSIT for the balance of purchase money of land sold and conveyed by plaintiff to defendant.

At the trial before *Dodd* J. at *Guysborough* in *November* last, a deed was produced by the plaintiff under notice, which conveyed the land in question, and which contained a receipt for the whole purchase money. The defendant offered to prove that the plaintiff had admitted a large part of the purchase money to be due after the execution of the deed; but the evidence was objected to as inconsistent with the deed, and the learned Judge declined to receive it. A non-suit was then entered by consent, with leave for the plaintiff to move during the first four days of the present term.

1863.

NELSON v. CONNORS.

C. F. Harrington accordingly so moved, and the question was argued during the present term by *C. F. Harrington* for plaintiff, and the *Solicitor General* (*Henry*) for defendant.

YOUNG C. J., now delivered judgment. He stated that he considered that a plea in estoppel was unnecessary, though his brethren had not decided that point. See *Shelley* v. *Wright*, Willes 9; *Lainson* v. *Tremere*, 1 Ad. & Ell 792; *Carpenter* v. *Buller*, 8 M. & W. 212; *Vooght* v. *Winch*, 2 B. & Ald. 662; *Bowman* v. *Rostron*, 2 Ad. & Ell. 295. (*C. F. Harrington* had contended at the argument that the defendant could not take advantage of the receipt in the deed without pleading it specially in estoppel.) He further observed that by the *English* cases (see *Taylor on Evidence*, sec. 77; *Rowntree* v. *Jacob*, 2 Taunt. 14; and especially *Baker* v. *Dewey*, 1 B. & C. 704) differing from the *American*, (14 *Johns.* 210, 17 *Mass.* 257, 20 *Pick.* 250), the receipt of the consideration money in a deed is conclusive at common law; but that a Court of Equity looked to the real character of the dealing, and gave the vendor a lien on the estate. *Leman* v. *Whitley*, 4 Russ. 423; *Winter* v. *Lord Anson*, 1 Sim. & Stu. 434, 444. As the practice of the Court, therefore, permitted large powers of amendment, and the Equity Act, (*Revised Statutes*, second series, chap. 127, section 66), allowed legal and equitable suits to be united, he said that the Court would grant the following rule:

"After argument it is ordered that the non-suit in "this case be set aside, and a new trial granted upon "the plaintiff's attorney within sixty days amending "his writ, so as to make it a summons in equity, setting forth therein distinctly and concisely the equitable relief which he asks and the grounds on which "his application rests,—the questions of costs on the "non-suit and argument to be hereafter determined."

The *Chief Justice* also referred in this connection to

1863. NELSON v. CONNORS. the Act of 1860, chap. 32, as conferring large powers of adjudication on the Court.

Rule accordingly.

Attorney for plaintiff, *S. Campbell.*

Attorney for defendant, ————.

END OF MICHÆLMAS TERM.

CASES IN VACATION.

1864.

MICHÆLMAS VACATION,
XXVII. VICTORIA.

SALTER *versus* HUGHES.

May 7.

EJECTMENT for lands in *Cumberland*, tried before *DesBarres* J. at *Amherst*, in *October*, 1862, and verdict for plaintiff.

A rule *nisi* for a new trial had been granted, which was argued in *Trinity* Term last, before all the Judges except *Young* C. J., by the *Attorney General* and *Ritchie*, Q. C., for plaintiff, and *J. R. Smith*, Q. C., and *Murdoch*, Q. C., for defendant.

The Court now gave judgment.

The children and grand-children of natural born *British* subjects, though born in a foreign country, are not aliens, and are therefore capable of transmitting real estate in this Province by descent, and otherwise.

Where there is a failure of inheritable blood by reason of alienage, the lands do not escheat, but go to the next heir.

BLISS J.* This was an action of ejectment for lands at *Parrsborough*, originally granted to Major *John Vandyke*. The plaintiff claims by purchase and conveyance from various parties, being all who are the legal descendants and representatives and heirs of the said *John Vandyke*, and of the devisees under his last will and testament, and has thus established a good and perfect legal title in himself, provided these parties who have conveyed to him were capable of taking and conveying the lands in question. The objection raised by the defendant is, that they are all aliens, subjects and citizens of the *United States of America*, incapable of holding lands in this Province, and under whose conveyance the plaintiff can set up

* *Young* C. J., having been concerned in this cause when at the Bar, was not present at the argument, and gave no opinion.

1864.
SALTER v. HUGHES.

no legal claim or title. Major *John Vandyke* was an officer in the *British* army in the Revolutionary war, after the close of which he came to this Province, where he obtained, with a number of other persons in 1785, a grant of certain lands from the Crown, including the land in question to himself. After a residence here of some time, he returned to the *United States*, where he died in the State of *New Jersey* many years ago.

Nothing, however, in the case turns upon this, for beyond all question, and indeed it is so conceded, *he* was not under any disqualification of alienage, but continued up to the time of his death a *British* subject, fully capable of holding and transmitting by devise or descent the lands in question.

Previous to his death, by his last will and testament, dated 31st *May*, 1811, and made while residing in the State of *New Jersey*, he devised among other matters all the residue and remainder of his real estate, which included the land in dispute, to his son *Rulif Vandyke*, and his daughters *Margaret*, *Catherine*, *Anne*, *Rebecca*, *Elizabeth*, and *Sarah*, their heirs and assigns forever, to be equally divided among them, share and share alike.

These were all the children of Major *John Vandyke* then living; but he had a son *John Vandyke*, who died before his father, leaving four children, *John*, *Alexander*, *James*, and *Rebecca*, who have all joined in the conveyance to the plaintiff. The six daughters of the said Major *John Vandyke* are all likewise dead, and were so at the time of the conveyance to the plaintiff; but all their legal representatives who could claim under them — and it is unnecessary to state all the particulars here — have joined in this conveyance.

Rulif Vandyke, or *Ralph*, as he was otherwise called, the eldest son of Major *John Vandyke*, died subsequently to his father, unmarried and without issue. By his last will and testament, made in the State of *New Jersey*, where he was then living, and dated 29th

December, 1843, he devised all his real estate to his nephew *Alexander* (the son of *John Vandyke*) above mentioned.

Major *Vandyke* himself then being and continuing to be a *British* subject up to the time of his death, we are to consider the question of alienage as it relates to his several children. Those of them who were born before the treaty of peace in 1782, and being in the *United States* at that time, continued to remain and reside in that country afterwards, elected thereby to become citizens of the *United States*, and under the treaty lost their rights as *British* subjects, and were aliens. *Doe c. d. Thomas* v. *Acklam*, 2 B. & C. 779.

But this could not apply to *Rulif* or *Ralph Vandyke*. He was, it is true, born before the treaty of peace; but he left the country of the *United States* with his father, Major *Vandyke*, and came with him to this Province at the close of the war, where he resided with him several years in succession. He thus kept up and maintained his original character and the rights of a *British* subject; and though he afterwards returned to the *United States* and lived and died there, he did not thereby forfeit and lose the character and rights of a *British* subject which he already had, any more than his father did, or than any other *British* subject would, who went to the *United States* and lived in that country after the treaty. They were all in the same situation as any *British* subjects who go abroad and reside in any other foreign country; that does not divest them of their original allegiance, nor deprive them of their rights as *British* subjects. Nor would a son of Major *Vandyke*, if born after the treaty of peace, though he continued to live in the *United States* up to the time of his death, become thereby an alien; for as a son of a natural born *British* subject, he was himself, though born out of the ligeance of the Crown, a *British* subject also, (Imp. Acts 7 *Anne* chap. 5, sec. 3; 4 *Geo.* 2, chap. 21), and entitled to all the rights and privileges which his father possessed,

1864.

SALTER v. HUGHES.

though born and continuing himself to reside in a foreign country,—the *United States* in this respect being like any other foreign country.

Now, there is no evidence that *John Vandyke*, the son of the Major, was born before the treaty of peace. It may be highly probable that he was; for all Major *Vandyke's* children were born before he removed after the war to *Nova Scotia*, (evidence of *I. D. Ten Broeck*); but still there was an interval of longer or less duration, between the close of the war and the removal of the father to this Province, in which *John* might have been born; and I do not see how upon this evidence the Court can say he was not. The *onus* of establishing the alienage of a person, which is asserted as a bar to his inheriting property, to which but for such alienage he would be clearly entitled, is upon the party who sets it up; and I think he is bound to make out strictly and beyond a doubt an objection of such a character. This defendant has failed to do, since he has not shewn that *John* was born before the treaty, for if he was not, then consequently he still, notwithstanding his residence in the *United States*, retained his original and inherent rights as a *British* subject. And if *John* was, and continued to be, a *British* subject, so by the same rule the sons of *John*, notwithstanding their birth and residence in the *United States*, did not thereby become aliens, and so forfeit their right of inheritance to land in the *British* dominions; for they too were the children of a father who was a natural born *British* subject, and their rights, as those of their father, *John Vandyke*, were, are protected by the Statute 13 *Geo.* 3, chap. 21, which extends the Statutes of 7 *Ann*, chap. 5, 4 *Geo.* 2, chap. 21, to grand-children.

But supposing any of the daughters of Major *Vandyke* to have been born after the treaty, and so, like *John*, not to be considered themselves as aliens, still their children born and living in the *United States* would be aliens, and incapable of inheriting lands here, for they do not come within the Statute of 13 *Geo.* 3,

chap. 21, which only protects those whose fathers were natural born *British* subjects; that Statute appearing to consider that the children of daughters followed the character and fortunes of their fathers, rather than those of their mothers, and owed allegiance where their fathers owed it.

The daughters of Major *Vandyke* being also dead, and their children being, as we have said, aliens and incapable of holding or inheriting the lands in question, the plaintiff can derive no claim or title from their conveyance to him.

To return then to the will of Major *Vandyke*, we have *Rulif* entitled under it to one-seventh equal share of the lands in question, which, under his will, passed to *Alexander*, the son of *John*, and by conveyance from him to the plaintiff; and the *status* and condition of all these, *Rulif*, *John*, and *Alexander*, being free, as I have shown, from the objection of alienism, the title of this one-seventh of the lands is fully and legally vested in the plaintiff.

The other shares or six-sevenths of the lands were devised by the will of Major *Vandyke* to his six daughters. If they, like their brother *John*, were born after the treaty of peace, like him they were *British* subjects, and capable of taking and holding under the will of their father; but that point is altogether immaterial, for their children, as I have shown, were incapable of inheriting, and therefore of transmitting title to these six-seventh shares. The line of descent as to them is interrupted and ended. What then is to become of the six shares which the daughters of Major *Vandyke* took under his will? Do they escheat to the Crown, or will they pass to the next heirs who are not aliens: that is, to the sons of Major *Vandyke* or their heirs, who being free from the taint or objection of alienage, are capable of taking and holding lands here.

This point is of some importance, and one at all events which must be disposed of by us. It was

1864.

SALTER. v. HUGHES

scarcely, if at all, noticed at the argument, having been regarded perhaps, as indeed it is, as one of no great doubt or difficulty.

The whole subject was so fully considered in the case of *Jackson* v. *Jackson*, 7 John. 214, in which the *English* as well as *American* state of the law was fully considered by *Kent* C. J., that I shall content myself with a reference to that case, and the judgment therein given.

(The learned Judge here read from this case.)

If then the six daughters of Major *Vandyke* were themselves aliens, having no inheritable blood, and incapable of holding lands here, the devise to them would have no effect—they were incapable of taking under it. "The law *quæ nihil frustra* never casts the "freehold upon an alien who cannot keep it, 2 *Kent* "54." Then the lands so devised would, upon the death of Major *Vandyke*, go to his heirs at law who were capable of inheriting, that is, to *Rulif* and the children of his deceased son *John*, and so would ultimately vest after the death of *Rulif* in *Alexander* and the other children of *John*. If the daughters of Major *Vandyke* on the other hand were not incapable of taking, then, as their children clearly all were, and thus there was a failure of inheritable blood in the line of the daughters, then the next heirs will take and these were *Rulif*, if then alive, and the children of *John*; but whether *Rulif* was alive or not, and could take or not, matters not. For after his death the property would still vest either in *Alexander* under *Rulif's* will, or in all the children of *John*; and the plaintiff claims under a conveyance from them all.

For a like reason it is wholly immaterial to consider the objections which were taken to the will of both Major *Vandyke* and *Rulif*, which otherwise were perhaps not without weight. For if these wills are not to be regarded, the land in question, after the death of *Rulif*, would pass under the law of descent to the children of *John*, as the next heirs having inheritable

blood or succession to the several daughters of Major *Vandyke*, with whom the inheritable blood terminated. So that the legal title to the land was in these children of *John* when they conveyed, as they then legally could, to the plaintiff.

Since this judgment was written, I have seen the Statute of 7 & 8 *Vict.*, chap. 66, which I was not before aware of. By the 3rd sec. of that statute, "Every person now born, or hereafter to be born out of "her Majesty's dominions, of a mother being a natural "born subject of the *United Kingdom*, shall be capable "of taking to him, his heirs, executors, or adminis- "trators, any estate, real or personal, by devise, or "purchase, or inheritance of succession." If then the daughters of Major *Vandyke* were born after the treaty of peace with the *United States*, which would leave them still natural born subjects, then it would seem that under this last statute their children would be capable of taking the land in question, and they have all conveyed to the plaintiff. But this is another point, which is after all immaterial also, since, as we have seen, if they are incapable of taking as aliens, the land then goes to the heirs of Major *Vandyke*, who are free from that objection, and who also have conveyed to the plaintiff.

The plaintiff, then, has fully made out his legal claim to the land, and this disposes of the whole difficulty in the case as far as regards the right of the plaintiff to sustain the present action.

This, however, leaves still the equities of the defendant to be considered; and these have by no means been so fully discussed before us, that we can without further argument feel ourselves prepared to pass any judgment upon them. Now, however, by having thus disposed of the legal question which was raised to the plaintiff's right to sue at all, the way has been cleared for the full enquiry into the equities which the defendant's case presents. It is possible that some fair and amicable arrangement may be

1864.
SALTER v. HUGHES.

come to between these contending parties; but if that cannot be accomplished, we will hear their counsel upon the subject, and then decide upon it.

DODD J. After the argument of this cause, an intimation was given by the Court, that it was advisable for the defendant to arrange it upon the equitable terms that had been offered to him by the plaintiff at the trial before my brother *DesBarres*, and I regret that intimation had not the desired effect. This we were informed by Mr. *Smith* of counsel with the defendant, in the Term of *Michælmas* last, and since then the subject in dispute has occupied much of my attention, but the result has not been to change the opinion generally entertained by the Court at the argument; and it is now sufficient for me to say that I fully concur in the opinion delivered by my brother *Bliss*, sustained as it is by *English* and *American* authority.

DESBARRES J. concurred.

WILKINS J. At one stage of my deliberations in this case, I felt a difficulty, which was entirely removed when my brother *Dodd* called my attention to the provisions of the 13 *Geo.* 3, chap. 21, which really govern our decision.

Assuming that the objection of alienage, which clearly applies to all the other descendants of *John Vandyke* the eldest, who executed the deed to *Salter*, does not apply to his grand-children, the children of *John Vandyke* the 2nd, the case from *Johnson*, noticed by my brother *Bliss*, shows the whole title and legal interest of and in the lands in question to have been in them at the time of the execution of that conveyance.

In examining the testimony, I was surprised to find many points of importance in order to a satisfactory decision of this case, respecting which we have no

evidence whatever: for instance, as to "whether *John* "*Vandyke* the 2nd was born before or after the recog- "nition by *Great Britain* of *American* Independence;" and as to "whether the children of *John Vandyke* the "2nd were respectively born before or after that "event." Both of these questions may be answered affirmatively or negatively, consistently with the testimony reported. We are not informed whether *John Vandyke* last mentioned was the eldest, or youngest, or an intermediate child of Major *John Vandyke*. All we know of him is, that he was a son of the old Major, that he was born at some time or other before his father after the war first visited this Province, (whilst the time of his father's so leaving *New Jersey* may have been at the evacuation of *New York*, in *November*, 1783, or at the time of the recognition in *September* of that year, or before or after that time); that he died before his father, in *New Jersey*, either when it was in the dependent, or in the independent state. If, again, we regard the testimony as it affects the children of *John Vandyke* the 2nd, we have, if we are not permitted to look into the will of the old Major, which shows inferentially that they were all born since 1789, no evidence, except that they were born in that which is now the territory of the *United States*, and that, in *New Jersey*, when it was a foreign country, they executed the conveyance in question.

A moral conviction exists in my mind, that *John Vandyke* the 2nd was born before, and some considerable time before, the recognition of Independence, and that he died many years after it. Had *Stryker* or *Ten Broeck* been interrogated on these points, and as to whether the last named *John Vandyke* adhered to the *American* cause, answers would, I feel satisfied, have been given that would have cut the ground from under the plaintiff's feet.

Consistently with the testimony, however, that we have, it is indisputable, that *he may have been born* after the recognition; and in that view nothing can

1864.

SALTER v. HUGHES.

be more clear than the title of his children on which the case of the plaintiff rests.

They are amongst the nearest lineal descendants of Major *John Vandyke*, whilst all the others in the same degree are aliens. These grand-children are by the Statutes 13 *Geo.* 3, chap. 21, and the 4 *Geo.* 2, chap. 21, clothed with the characters and attributes of *British* subjects. They are, in the language of the first mentioned statute, children of a father, who, by the last named statute, was entitled to the privileges of a natural born *British* subject: that is to say, they are the children of *John Vandyke* the 2nd, and he was born in, or out of, the ligeance of the *British* Crown, of a father, who, at the time of his son's birth, *whenever it took place*, was, as through life he continued to be, a natural born *British* subject.

Thus, these grand-children are clearly brought within the 13 *Geo.* 3rd, and, *prima facie*, at least, are *British* subjects. If the defendant would destroy that presumption, and show, as he possibly might have done, either that *John Vandyke* the 2nd being once a *British* subject, forfeited his rights as such, or that the grand-children were born before the recognition, and duly made their election to become citizens, *it was for him to show the fact.* Not having shown it, the plaintiff has title, and the rule must be discharged.

I concur also in the views expressed by the Court as to the mode of dealing with the equitable considerations involved in this case.

Rule discharged.

Attorney for plaintiff, *R. B. Dickson.*
Attorney for defendant, *Dickey.*

[It was subsequently proposed by the Court, and acceded to by the counsel for both parties, that it should be referred to a master to ascertain what was now due by the defendant for the land, taking his agreement with one *Ratchford* for the purchase of it the basis of the computation.—REP.]

HAWKINS *versus* BAKER ET AL.

May 7.

TRESPASS. Pleas, leave and license, public highway, and special pleas alleging a public right of way by user and dedication for the purpose of gathering and hauling sea manure from the shore, and a crossing of the lands by defendants by that way for that purpose.

At the trial before *Young* C. J., at *Halifax*, in *November*, 1862, it appeared that the *locus*, which was situate on the shore of *Cow Bay*, at the *Eastern Passage*, had been cut out for a road upwards of thirty years ago by the proprietors of the lands through which it passed, and that it had been used as such in winter for upwards of twenty years for the purpose of hauling sea manure from the shore, and firewood and poles. It appeared, however, that such user had not been uninterrupted; that on several occasions the parties who used the road obtained permission to do so from the proprietors of the lands; that the road had several times been obstructed by the proprietors to prevent persons from passing thereon; and that bars and swing-gates were always kept thereon, except during the winter season. The jury found for the defendants solely on the ground, as expressed in their verdict, of dedication to the public of a road from the church near the *Eastern Passage* to the north side of *Romkey's* lot, and terminating there,—this being only a portion of the *locus* over which the right of way was claimed.

A rule *nisi* to set aside the verdict and for a new trial having been granted, it was argued in *Michælmas* Term last before all the Judges, by *J. W. Ritchie*, Q. C., for plaintiff, and the *Attorney General* and *J. W. Johnston, junior*, for defendants.

The Court now gave judgment.

There may be a public highway without its being a thoroughfare, but where such highway is claimed by dedication, the acts or declarations relied on to support it must be clear and unequivocal, with manifest intention to dedicate.

There is a difference between a *cul-de-sac* in the city and one in the country, much stronger acts being required to establish a public highway by dedication in the latter than in the former.

The mere acting so as to lead persons to suppose that a way is dedicated, does not amount to a dedication, if there be an agreement which explains the transaction.

1864.

HAWKINS v. BAKER et al.

YOUNG C. J. This case was tried before me in *November*, 1862, and a verdict found for the defendants,—the defence set up being the dedication to the public of a road running from the church near the north-east passage of *Halifax* harbour to the north side of *Romkey's* lot, and terminating there. The jury have thus found a road to be a highway, which is not a thoroughfare; and after some fluctuations of opinion, it may be now considered, I think, as settled law, that such a highway may exist. In the case of *Regina* v. *The Inhabitants of Hawkhurst*, in 1862, reported in 7 *L. T. Rep., N. S.*, 268, and in 1 *New Rep.* 18, the opinion of *Cockburn* C. J. is stated on both sides—a proof that these unauthorized reports are to be received with caution. The leading case is that of *Bateman* v. *Bluck*, 18 Q. B. 870, 14 L. & Eq. Rep. 69. It seems, at all events, that if a highway were stopped at one end, so as to cease to be a thoroughfare, it would in its altered state continue a highway. Per *Patteson* J. in *The King* v. *The Marquis of Downshire*, 4 Ad. & Ell. 713; 2 *Smith's Leading Cases*, 94.

Where a road, however, claimed as a highway, is not a thoroughfare, this fact will have a material bearing on the point of dedication. The rule laid down in one of the *American* cases (*Angell on Highways*, 151), recommends itself to one's good sense, "That the "same acts which would warrant the inference of an "intention to dedicate in cities and towns, would be "quite insufficient in sparsely settled agricultural "districts." A *cul-de-sac* in a city,—a square, for example, with only one entrance to it, like *Panton* Square at the head of the *Haymarket*, or *Poplar* Grove,—is a very different thing from a *cul-de-sac* in the country, which, as in this case, would defeat the main object and use of the highway, being a free access during the winter to the seashore for manure. I told the jury at the trial, that to constitute a highway by dedication, there must be a clear, unequivocal dedica-

tion to the public, with intention to dedicate, and not the mere opening of a road by the owners of the land, through which it passed, for their own use. I called their attention, also, to the petition presented to the Sessions in pursuance of the statute by the *Cow Bay* and *Cole Harbor* people, including one of the defendants, in 1852, and remarked that if there had been a highway by dedication thirty-seven years ago, it was singular that the road was still impassable for carriages in summer, and that no public money had ever been applied for or expended in repairing it, nor any statute labor laid out upon it. Although I left the question of dedication with these observations to the jury, the inclination of my own opinion was sufficiently obvious, and that opinion has been strengthened by a reference to the cases.

Nothing is to be gained by a review of these cases, or going over them in detail. Two of the strongest for the defendents are those of *Jarvis* v. *Dean*, 3 Bing., 447, and *Regina* v. *Petrie et al.*, 30 L. & Eq. Rep. 207. But the present case is distinguishable from both; for here there was no assent by the owners of the soil, either in express terms, or reasonably to be inferred from their acts, or the user of the public. There is no evidence of such a dedication, as the law plainly requires; and to hold that there is a highway would be an encroachment on private rights for the convenience and benefit of the public. If the use of the road in winter is really so essential as it was represented at the trial, the application to the Sessions may be renewed, when the public convenience will be consulted, and if the road is opened, the proprietors will receive an adequate compensation for their land, and the cost of fencing both sides of the road, which ought not to fall on them. In the meanwhile, the rule for a new trial, as we all think, must be made absolute.

BLISS and DODD JJ. concurred.

1864.

HAWKINS v. BAKER et al.

DesBarres J. My impression at the argument was, that there was no evidence of a dedication to the public for a highway of the land, over which the trespasses were alleged to have been committed, nor of any intention on the part of the owners to dedicate it even for the special purpose of hauling sea manure, and on more careful consideration of the subject, I am still of that opinion. The witnesses on both sides agree that the road was cut out by the proprietors of the land through which it passes upwards of thirty years ago, for the purpose of hauling out wood for fuel, and poles for their fences. It appears that bars were placed across the road when it was first opened, then swing gates, and subsequently fences, shewing that the owners intended to retain their right and control over the land. Several of the witnesses on the part of the plaintiff state that they always asked for leave to travel on this road, and obtained it from the owners, a fact which shows, that though used at times by others besides the owners of the land, it was not considered to be a public road. It is a remarkable fact, too, that there is not a witness on the part of the defence with the exception of *Sowards* (to whom it is of great accommodation), who has ventured to say that the road was open for the use of the public, and even he, on his cross examination, admits that it was made by the proprietors of the land to enable them to go to market and provide their fuel, and that the *Cole Harbor* people had nothing to do with it. *Baker* himself, one of the defendants, states that *Himmelman's* bars and gates always remained on the road, but that they were open in winter, as most bars and gates generally are throughout this country at that season of the year. It may be that these bars were put up to save the expense and labor of fencing, but considering the object and purpose for which the road was first opened, I think it may very fairly be presumed that the bars were intended as an assertion

of right, and to indicate to the public that it was a private road. In the case of *Poole* v. *Huskinson*, 11 M. & W. 830, *Parke* B. says: "In order to constitute "a valid dedication to the public of a highway by the "owner of the soil, it is clearly settled that there must "be an *intention* to dedicate, there must be an *animus* "*dedicandi*, of which the user by the public is *evi*- "*dence*, and no more; and a single act of interrup- "tion by the owner is of more weight, upon a question "of intention, than many acts of enjoyment." The right exercised by the respective owners over the land, the obstructions placed in the road from time to time, and the means taken by the owners to retain the control of it, are, I think, strong circumstances to shew that there never was any intention on their part to relinquish their right in, and to dedicate the land to the public use. In the case of *Barraclough* v. *Johnson*, 8 Adol. & Ellis 103, Lord *Denman* says: "The mere "acting so as to lead persons into the supposition that "the way is dedicated does not amount to a dedica- "tion, if there be an agreement which explains the "transaction." In the present case there could be no misapprehension as to the object and purpose for which this road was opened, as it appears to have been well known in the neighborhood to have been made by the proprietors of the land for their own especial use and accommodation, and therefore the user of it from time to time against their will and consent did not give it the character of a public road. The land through which the road passes is represented to be for the most part a bog, which, for the greater part of the year, is impassable with teams, and although it has been opened for upwards of thirty years, no statute labor has ever been performed, or improvement made on it, and not a shilling of public money has ever been expended upon it. It is now in the same state as when it was first cut out, and when it is considered that all the public roads in this country are made by

1864.

HAWKINS v. BAKER et al.

statute labor and the expenditure of public money, the fact of its never having to this day received any public attention, of itself, I think, goes far to warrant the conclusion that it is not, and never has been considered to be a public road. I therefore, think, that the verdict in this case cannot be sustained, and that the rule for setting it aside and for a new trial must be made absolute.

WILKINS J. It appears from the learned *Chief Justice's* report, that the jury found a verdict in this cause for the defendants, on the express ground of a dedication to the public of the land, on which the alleged assumed trespass was committed, as a public highway. But, at the same time, their finding is explicit in showing that the dedication thus found was of a way beginning at a church, extending to the north side of a lot of one of the defendants, *Romkey*, and *terminating there*. This alone is, in my opinion, decisive to show that the verdict cannot be sustained. It is quite true that the old doctrine, that a highway implied *a thoroughfare*, has been so far modified by more recent decisions, that there may be, *in a square in a great city, lighted and paved at the public expense, which the public in fact frequent, passing along its three sides, or to the houses thereon situate, a highway in legal contemplation, although it is a cul-de-sac;* but the reasons for so modifying the old rule are so utterly inapplicable to the case of a way in a wilderness, such as that before us, that it is impossible to bring this last within the principle that governs the exceptional case referred to. Supposing, however, that a highway could legally exist in the place and under the circumstances stated in the report, and indicated by the verdict, it is nevertheless to my mind quite clear that there is no sufficient evidence to support the dedication found. *That* may be established in either of two ways, namely, usage warranting inference of an intention of the owner of

the soil affected by the act of trespass complained of to dedicate his land to the public for the purpose of a highway, and an express act of dedication for such purpose by such owner. Both alike fail in the particular case. All the usage proved not only does not support such an inference, but absolutely precludes it. As respects an express act of dedication, we have only to consider what the law requires it to be to make it effectual, namely, that it must be clear, absolute, express, and unequivocal, to perceive that in the testimony we find nothing that approaches to such an act. Unless an *English* authority were cited to establish that declarations made by the owner of the soil, which may mean either that he meant to give *the whole public* a privilege, at pleasure, and forever, of passing over his soil in the exercise of a way, or that he designed to give a limited privilege of such a nature to his neighbors, for their local convenience, or in reference to their agricultural or other interests, it is impossible consistently with cases or principles to hold that there was a dedication here.

I am, therefore, of opinion that this verdict must be set aside.

Rule absolute.

Attorney for plaintiff, *J. N. Ritchie.*
Attorney for defendants, *J. W. Johnston, jr.*

May 7.

NOVA SCOTIA TELEGRAPH COMPANY *versus* AMERICAN TELEGRAPH COMPANY.

By the terms of a lease of property situate in *Nova Scotia*, it was provided that certain payments should be made periodically in "dollars and cents of *United States* currency." After the execution of the lease the Congress of the *United States* passed a law authorising an Issue of treasury notes not bearing interest, and provided that they "shall be lawful money and a legal tender in payment of all debts public and private, within the *United States*—except in payment of duties on imports and interest on *United States* bonds or notes."

Held, That the tender of *United States* treasury notes, issued under this act, was not a legal and sufficient tender of the payments due under the lease.

THIS was an action to recover the sum of six thousand five hundred dollars and interest, under a lease executed by the plaintiffs on the 4th *May*, 1860, to the defendants, whereby the plaintiffs granted and leased to the defendants all the telegraph lines, with the appurtenances belonging to them, in and throughout the Province of *Nova Scotia*, for the term of ten years, commencing from the 15th May, 1860, subject to the payment of the rent of six thousand dollars per annum, payable semi-annually; and the further sum of five hundred dollars per annum, also payable semi-annually towards the taxes of that company, it being stipulated and agreed that all such payments should be made "*in dollars and cents of United States currency.*" In the month of *November*, 1862, and again in the month of *May*, 1863, the agent of the defendants tendered to the treasurer of the plaintiffs in *Halifax* certain *United States* treasury notes, issued under an Act of Congress of *February*, 1862, entitled: "An Act to "authorize an additional issue of *United States* treasury "notes and for other purposes," to the amount of three thousand two hundred and fifty dollars, in full payment of each of the semi-annual payments which had respectively become due under the lease. The treasurer objected to the tender, and refused to receive the notes when so tendered, requiring such payments to be made in specie, which not having been done, the present action was brought.

The question came before the Court on a special case, which was argued in *Michælmas* Term last before all the Judges, except *Young* C. J. and *Bliss* J., by the *Attorney General* and *J. R. Smith*, Q. C., for plaintiffs, and *J. McCully*, Q. C., and *J. R. Ritchie* for defendants.

The Court now gave judgment.

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

DODD J.* It may be and no doubt is difficult to find a case precisely in point with the present, and when that occurs, we must look to general principles, which must govern us in this instance as in all others. One of those principles is, that the law of the place where the contract is made, and where the money is to be paid, when these places are one and the same, shall prevail, unless words are used in the contract that would lead to a different conclusion.

The defendants have established themselves in this Province, their business extending to every part of it, and while they contend that the plaintiffs are bound to receive their rents in a spurious currency, they may claim to shelter themselves under our Provincial Currency Act, and receive no debts in any moneys unless made a legal tender by that Act; and in addition to this advantage, which they would possess over the plaintiffs by giving to the contract that unequal construction, the plaintiffs would be placed in this unreasonable position, that after receiving the amount due to them in the paper currency, they could only use it for limited purposes in the *United States*, and not for purposes that they might expressly require it for. I cannot suppose that either party, when the contract was entered into, looked to such a result as that, but that their arrangements and calculations were founded in good faith, and their contract based upon the currency of the *United States* that was then in existence in that country — that currency being a metallic one.

If I am correct in this view of the case, then the plaintiffs come before the Court with large equities in their favor, and unless restrained by some known principles of law, would be entitled to a judgment in their favor. The contract having been made in this Province respecting property within it, and the rents accruing under it, to be paid into one of the banks of

Young C. J. and *Bliss* J. gave no opinion—the former being a stock-holder in the *Nova Scotia Telegraph Company*, and the latter not having been present at the argument.

1864.

NOVA SCOTIA TELEGRAPH COMPANY. v. AMERICAN TELEGRAPH COMPANY.

the Province, makes it purely, as between the parties to it, a Provincial contract, and in my opinion gives it a different position, and requires a different construction from a contract made in the Province, and a debt becoming due under it and payable in the *United States*. In that case there might be some show of reason for bringing it within the purview of the Act of Congress. The Act can have no legal or binding effect upon debts in this country, and how far the Congress may have the power to make such an enactment I am not prepared to say. That question has been argued in the Supreme Court in two districts of the State of *New York*,—in one the decision of the Court was against that power, and in the other it was different,—and in both cases I understand an appeal was taken to the highest appellate jurisdiction of the *United States*, but, up to the present time I have not heard the result; neither is it my intention to decide this case upon the point that the Act of Congress was not intended to be *ex post facto* in its operation, although taken at the argument by the *Attorney General*, and I cannot help thinking, that a large amount of solid reasoning might be urged in support of it. The paper issue of the *United States* under the Act of Congress, may be admitted, would liquidate a debt contracted and payable in that country; but there is a marked distinction to a debt contracted in this Province and payable here, notwithstanding the payment is to be made in dollars and cents of the currency of the *United States*. The parties to this suit, we must remember, are the *Nova Scotia Telegraph Company*, incorporated by an Act of the Province, and the defendants a foreign company incorporated under a charter granted by the State of *New Jersey*. Now the rents to be paid the plaintiffs could only be legally tendered to them in the coins made a legal tender by the Provincial Currency Act, (chap. 83 of the *Revised Statutes*) unless otherwise provided by the contract, and by that Act, although several foreign coins are made a legal tender, yet the

coins of the *United States* are not so, consequently the contract giving to the defendants the advantage of paying their rents and liabilities in dollars and cents of their own country was extending to them an important advantage, but not in my opinion to be enlarged beyond making their payments in the currency that existed in the *United States* when the contract was made. If, since the contract was entered into, circumstances have occurred in the *United States* to justify that country issuing a paper currency and making it a legal tender for debts due and payable there, surely it would be great injustice to the people of this Province to allow the citizens of the *United States*, under a contract entered into here, where no circumstances exist to change the commercial or political relations of the Province since the contract was made, to pay their debts due and payable here in a paper currency of little more than half its value as expressed upon its face.

The Act of Congress declares the notes to be a legal tender in payment of all debts, public and private, within the *United States*, except duties on imports and interest, &c.; but it cannot be said that the debt claimed by the plaintiffs is a debt due and payable either as a public or private debt within the *United States*, and to no other class of debts than those referred to in the Act can it be applicable. A debt due and payable in *Nova Scotia*, in law, can only be liquidated by the moneys mentioned in the *Currency Act* of the Province. Dollars and cents of the *United States* currency, if not referable solely to the dollar and cent current in that country when the contract was made, must refer to a dollar and cent current for all purposes; but, as I have said, the paper issue under the Act of Congress is not for all purposes, but limited in its operation, and if the plaintiffs were now held to the tender made by the defendants, and had moneys to pay in the *United States* for either of the excepted purposes of the Act, the moneys received

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

from the defendants would not be available for that purpose; that consequence, then, cannot, in my opinion, be a just and reasonable solution of the contract.

If I had any doubt respecting this case, as to the justice of my views with reference to the defendants being liable to the plaintiffs in the current money of the *United States* when the contract was entered into, or what is equivalent to that currency, the case of *Pilkington* v. *Commissioners for Claims*, 2 Knapp R. 17 to 21, would remove the doubt. That case is fully referred to in *Story on the Conflict of Laws*, sec. 313 *a*, and from that work I now quote: "The *French* "Government, during the war between *England* and "*France*, had confiscated a debt due from a *French* "subject to a *British* subject, and subsequently an "indemnity was stipulated for on the part of the "*French* Government; and there having been a great "depreciation of the *French* currency after the time "when the debt was confiscated, the question arose "whether the debt was to be calculated at the value "of the currency at the time when the confiscation "took place or subsequently, and it was held it ought "to be calculated according to the value at the time "of the confiscation. * * * Sir *William Grant*, in "delivering the opinion of the Court, said, 'Great part "'of the argument at the bar would undoubtedly go "'to show that the commissioners have acted wrong in "'throwing that loss upon the *French* Government in "'any case, for they resemble it to the case of depre-"'ciation of currency happening between the time "'that a debt is contracted and the time that it is "'paid, and they have quoted authorities for the pur-"'pose of showing that in such a case the loss must "'be borne by the creditor, and not by the debtor. "'That point, it is unnecessary for the present pur-"'poses to consider, though *Vinnius*, whose authority "'was quoted the other day, certainly comes to a "'conclusion directly at variance with the decision

"'in Sir *John Davies's* Reports'" (an authority strongly relied upon by the counsel for the defendants in the present case). Sir *William*, in a subsequent part of his opinion, again reverts to the same subject, and remarks: "We have said that as this "point is not directly or immediately before us, it can "make no part of our decree. At the same time it "may not perhaps have been without some utility "to have given an opinion upon it, inasmuch as it "was argued and discussed at the bar; and we think, "therefore, the commissioners have proceeded on "a perfectly right principle in those cases in which "we understand they have made an allowance for the "depreciation of paper money." Here, then, we have the opinion of the Court delivered by that profound lawyer Sir *William Grant*, that in a case between when the debt was contracted and payable, and when it was paid, a depreciation in the currency of the country had taken place, the creditor was not to be the sufferer, but that he was to have an allowance made to him by the debtor to the extent of such depreciation. It is admitted in this case, that the paper money tendered to the plaintiffs is depreciated since its issue in the *United States*, and is of much less value than the dollar which was the currency of that country when the contract was made. Apart then from other considerations, under the opinion of the Court as delivered by Sir *William Grant*, the defendants would not discharge their liability to the plaintiffs by tendering as they did in depreciated notes not equal in value to the currency when the contract was made, unless making an allowance for that depreciation. But without giving any positive opinion upon that point, I think, for the reasons previously stated, that the tender was not in accordance with the contract, therefore not a legal one, and that judgment should be entered for the plaintiffs for the amount of their claim, payable in the metallic dollar and cent of the *United States* currency, or that which is equivalent

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

thereto, with interest from the 15th *November*, 1862, and 15th day of *May*, 1863, upon the respective sums due at those dates, according to the terms of the lease, with costs of suit.

DESBARRES J. The question submitted for the judgment of the Court is, whether the tender of *United States* treasury notes, issued under the Act of Congress referred to, is a legal and sufficient tender of the semi-annual payments due in *November*, 1862, and *May*, 1863, under the lease. By the Act of Congress of *February*, 1862, the *Secretary of the Treasury* is authorized to issue on the credit of the *United States* one hundred and fifty million dollars of *United States* notes not bearing interest, payable to bearer at the treasury of the *United States*, of such denominations as he may deem expedient, not less than five dollars each, provided that such notes shall be receivable in payment of taxes, internal duties, debts, and demands of every kind due to the *United States*, except duties on imports, and of all claims and demands against the *United States* of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, "*and shall also be lawful money, and a legal tender* "*in payment of all debts, public and private, within the* "*United States, except duties on imports and interest as* "*aforesaid.*"

It was contended at the argument, that the defendants by the terms of the lease were bound to pay the rent reserved therein in specie, viz., in dollars and cents, the current coin of the *United States*, and that the tender made by the defendants in treasury notes was not, therefore, a fulfilment of the contract; first, because the contract or lease entered into between the parties was made in *Nova Scotia;* secondly, because the rent reserved, and the allowance of five hundred dollars a year for taxes, are payable in *Nova Scotia;* and, thirdly, because the property demised is within the Province of *Nova Scotia*. It was also

insisted that assuming the rent to be payable in the currency of the *United States* as contended for on the part of the defendants, the plaintiffs were not bound to receive the notes tendered in payment, because Congress had no power under the Constitution of the *United States* to make such notes a legal tender for private debts, and if it had, the Act of Congress declaring them a legal tender could not be construed as having a retrospective effect. The two last objections are substantially the same as were raised in the case of *Meyer* v. *Roosevelt*, which was decided in the Supreme Court for the State of *New York* in *March* Term, 1863, and cited at the argument by the *Attorney-General*. In that case the plaintiff desiring to pay a mortgage held by defendant, in premises purchased and conveyed to the plaintiff subject to the mortgage, tendered to the defendant the amount due on the mortgage in *United States* notes, such as were tendered here. The defendant refused to receive them as a legal tender, claiming payment in specie. The question as to the legality of the tender was submitted to the learned judges of that Court, who unanimously expressed the opinion that the framers of the Constitution intended to make coin and nothing else a legal tender in payment of debts, and while they conceded that Congress had power to issue paper money to meet the exigencies of the Government, they held that it had no power to pass an Act declaring such money a legal tender in payment of private debts, such at least as were created before the passage of that Act. If the ruling in that case had not been questioned, the present case, I presume, would never have been presented to us for consideration, but on being brought up before the learned judges of the *Court of Appeals* for the same State, the decision in *Meyers* v. *Roosevelt* (of which I cannot say I disapprove) was reversed, and treasury notes were by that Court held and declared to be a legal tender for payment of all debts contracted there. I do not know whether the decision of the

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

appellate Court has been acquiesced in or not. If approved, and there is no intention of demanding a review of it by the Supreme Court of the *United States*, the important question involved must be considered as judicially settled in that country; but it does not follow that this decision is to be considered as binding or affecting any contracts made here. It is not my intention to express any opinion as to the constitutional right of Congress to declare these treasury notes a legal tender within the *United States*, nor is it necessary, in the view I take of this case, to decide whether that Act has or not a retrospective operation. The consideration of these points would open up a large field for inquiry, not connected with this case, which I think more appropriately belongs to, and may more fitly be left, as it has been, for the investigation and decision of the Federal Courts; but looking at these questions in all their bearings, without intending to do more than merely to state my present impressions with regard to them, I may say, with all deference to the learned judges of the appellate Court, that I have not been able to remove the impression resting in my mind, that the conclusion arrived at by the Supreme Court in *Meyer* v. *Roosevelt* is a sound conclusion. Assuming, however, that Congress had the power it has exercised in making these treasury notes a legal tender within the *United States*, and that the Act was intended to apply to past as well as future transactions, the question here is, whether the plaintiffs, according to the terms of the lease granted to the defendants, are bound to receive these treasury notes in payment of the rent due them, — in other words, whether the tender made in these treasury notes for rent payable in *Nova Scotia* is a legal tender, and can be considered as a fulfilment of the terms of that lease. The parties had a right to make the rent payable in coin or bills, or in any other thing they pleased. They have thought fit to make it payable "in dollars and cents of *United States* currency," and

there being now metallic money, and treasury notes called paper money in circulation in the *United States*, we are called upon to decide whether it is optional with the defendants under this lease, to pay the rent in either, or whether the plaintiffs have a right to demand and insist that payment shall be made in metallic money, that is in gold and silver current in the *United States*.

If the words of the stipulation are construed to mean coin, or any notes or bills of credit to be issued under the authority of Congress, as a substitute for coin, giving to the defendants the alternative, it follows that the tender must be held sufficient, but if the words were meant to be regarded as descriptive of the denomination or kind of money in which the payments were to be made, the tender cannot be held good.

It may reasonably be supposed, that the stipulation for payment was made in reference to the then existing state of the currency of the *United States*, and of the value of that currency here. At that time these treasury notes had no existence, and the possibility of such notes being substituted for coin, and made a legal tender for private debts within the *United States*, and of their being offered here as such, could not have been contemplated by either of the parties. If, indeed, such notes had been in circulation, and the plaintiffs had agreed to receive the rent in dollars and cents of *United States* currency, without discriminating whether they were to be metallic dollars or paper dollars, the case would have presented a different aspect, and probably have necessitated an inquiry, not now essential to the decision of this case. It was conceded at the argument, that before the passage of the Act of Congress of *February*, 1862, there was no lawful money of the *United States* other than gold and silver coin, that could be used as a legal tender, and it is not pretended that any other could have been so used. That fact, of which both parties must have been

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

aware, I think explains the meaning of the stipulation, and shows that the understanding between them was, that the rent should be paid in coin, designated and known as metallic dollars and cents of *United States* currency, or in money of equal value. I do not see that any other interpretation can reasonably be given to the stipulation, for if that which is insisted upon on the part of the defendants be the true and proper interpretation, it will produce this result, that the plaintiffs will be compelled to receive in payment depreciated paper called money, which is not current in this Province as money, and not uniformly current in the *United States*, it not being receivable there in payment of duties on imports, nor for interest on bonds, &c., due by the Government of the country. Surely nothing so unjust as this could ever have been intended, nor can I imagine it was for a moment contemplated, that while receiving and putting into their own pockets the money of extrinsic value, which the property demised produces in *Nova Scotia*, the defendants were to be at liberty to pay the rent as well as the taxes in depreciated paper money of the *United States*. I do not mean, however, to say, that the defendants are bound to pay the plaintiffs metallic money, simply because the property demised produces such money here; on the contrary, I readily admit that, if the plaintiffs by the terms of the lease have unwisely agreed to receive payment in any description of money that may be made or declared to be current in the *United States*, be it metallic or paper money, the tender of the latter must in that case be a fulfilment of the contract; but it must be borne in mind, that the rent is not expressed to be paid in *United States* currency, whatever that may be, it is expressly stipulated to be paid "*in dollars and cents of United States* "*currency*," a stipulation, which I take it points to and means that particular denomination of money know as metallic dollars and cents of *United States* currency. In common parlance, dollars and cents mean *metallic*

dollars and cents stamped under the authority of Government, and current at the mint value. Such are properly called money. It is true bank notes and bills of credit issued by authority and exchangeable for and redeemable in coin, are also called money, as such notes are used as a substitute for coin; but they are not a substitute, unless they are redeemable in coin.

The treasury notes issued under the Act of Congress of 1862 are not, and do not upon the face of them profess to be, redeemable in specie, nor are they considered, as I have already said, in all cases as a substitute for specie in the *United States*. In this respect they differ very essentially from Bank of England notes, which, by Statute 3 & 4 *W.* 4, chap. 98, are made a legal tender "to the amount expressed in such "notes, and shall be taken to be valid as a tender to "such amount for all sums above five pounds, on all "occasions in which any tender of money may be "legally made, *so long as the Bank of England shall "continue to pay their notes on demand in legal coin.*" This Act shows the wisdom and sound policy of the *British* Parliament, in providing that Bank of *England* notes shall be a legal tender only so long as the bank shall continue to pay them on demand, *in legal coin*. These notes may well be called money, for money can be obtained for them at any time; but no money can be obtained at the treasury for treasury notes issued under the Act of Congress of *February*, 1862, for they are not redeemable in money, and yet they are by that Act declared to be a legal tender for all debts, except for duties on imports, &c., which must be paid in coin.

In considering this case, I have regarded these treasury notes as money current in the *United States* for all the purposes declared in the Act, but I have arrived at the conclusion that this is not the description of money which the plaintiffs have a right to demand, and the defendants are bound to pay, according to the terms of the lease. In my opinion the

1864.

NOVA SCOTIA TELEGRAPH COMPANY. v. AMERICAN TELEGRAPH COMPANY.

defendants are bound to pay the rent in metallic dollars and cents of *United States* currency, or in other money being of the value of such metallic dollars and cents, and, therefore, I am of opinion that the tender made to the plaintiffs in treasury notes of the *United States* was not a sufficient tender, and that the plaintiffs are entitled to have judgment for such amount as may be found to be due, calculated according to the value of the money in which I think the rent and taxes ought to be paid.

WILKINS J. When this contract was made, "dollars" was a legalized denomination of the currency of *Nova Scotia*, and accordingly the rent is reserved payable in dollars. In a subsequent part of the lease, however, which defines the medium of payment, different language is used. The phraseology adopted in this last respect is, "Such payment shall be made "in dollars and cents *of United States currency*." It was contended by the plaintiffs' counsel, that the effect of this was to give the plaintiffs a right to demand from the defendants metallic dollars and cents. That argument, however, cannot be sustained. We must construe the language, "dollars and cents," occurring in the passage of the lease in question in its relation to *United States* currency, as we should have to construe it in regard to *Nova Scotia* currency, if the qualifying words had not been adopted. Let us enquire, then, what would be the necessary judicial construction of this instrument if the qualifying language had been omitted, and the contract were, as in that case it would be, a strictly internal or domestic one.

In interpreting such a contract we should unquestionably hold that the phrase "dollars and cents" did not, either in a strict sense, or in a familiar one, import "coined money" or "metallic dollars and cents." The immediate and instinctive understanding of it, as interpreted by men of every degree of intelligence in

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

every day's transactions of buying and selling, lending and borrowing, would be that its meaning was identical with that which the words "lawful currency of the Province of *Nova Scotia*" would have conveyed had they been substituted.

The president of a banking company established in this city, the most enlightened merchant, or the pettiest trader doing business in it, would alike interpret the language of a contract made in *Halifax* on the first day of *January*, 1864, whereby his debtor stipulated to pay him a hundred dollars on demand, as giving him no right to demand one hundred dollars of that particular metallic coin which is denominated a dollar, but he would acknowledge that the stipulation was performed by payment of twenty *British* sovereigns, or by a payment in paper money, if our Legislature had made it a legal tender for payment of all debts. His business instincts would at once suggest to him that "dollars and cents" was synonymous with "legal currency." He would not, in the case put, feel himself obliged to accept paper money, because he knows that there is none such in circulation in this Province, which is made a legal tender *for all purposes*, and which would, therefore, constitute a medium of compulsory payment of the particular debt.

Thus, then, as "dollars and cents" is, and at the time of the making of this contract, and when the sums became due, was, in the *United States* as in *Nova Scotia*, the legalized denomination of moneys of account or of "the currency" of either country, and as our inquiry is by the special case directed to a state of things existing in the *United States of America* in *November*, 1862, and *May*, 1863, that inquiry is reduced to the mere question, "Were these particular notes of the *United* "*States* Treasury, in which the tenders by the defend- "ants were made, at the times when such were made, "'*the legal currency*' or a constituent part of 'the legal "currency' of the *United States of America* in the sense

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

"of the contracting parties?" To interpret this contract according to their intentions we must adopt the well-known rule, and regard the surrounding circumstances at the time when the contract was entered into.

The then "legal currency" of the *United States* was coined dollars and cents, or their equivalent in other coins, recognised and legalized by Congress, and at that time paper money was not in any form a portion of that legal currency: it was not then a legal tender within the Union. Such coined money was then the only legal tender throughout the *United States* in payment of *all* debts or duties, public or private, *without any qualification or limitation whatsoever.*

The immediate subject of contemplation, therefore, at the time of making this contract, in the minds of the contractors, must have been an agreed medium of payment of the accruing rents, which, as an instrument of exchange and commerce in any and every relation of business in the *United States of America*, would be as available in that country for every trading purpose, at the times appointed for the payment of the rents, &c., as "dollars and cents of *United States* currency," the existing legal currency at the time of the contract, at *that time* practically was for every commercial purpose within and throughout the Union.

The parties, moreover, must be reasonably taken to have contemplated a medium of payment which would be so available in every *Nova Scotian* hand into which it might pass, for purposes of business or money exchanges, in any relation of commerce in the *United States*, after payment therein should be actually made in *Halifax* as stipulated.

In my judgment the medium so contemplated would have been, in legal effect, subject to any changes, for better or for worse, which might after the contract be operated on it by the authorized constitutional legislation of Congress; and assuming such legislation, I have no doubt that if the treasury notes

tendered had been made in an unlimited sense "legal currency" throughout the Union, they would have been made, for the purposes of this contract, dollars and cents of the *United States* currency.

At the same time, I think that it cannot be reasonably held to have been contemplated by the parties, that the lessors bound themselves to receive, in satisfaction for the accruing rents, any medium of payment that would be only in a qualified, and not in an absolute sense, a portion of the lawful currency of the *United States* at the time appointed for payment. Now the greenback issue unquestionably was not, in an unlimited and unqualified sense, such currency. This view may be thus illustrated by reference to the actual relations of one of these contracting parties — the lessors — to the appointed medium of payment, *at the date of the lease*. Adverting to the nature of the legal currency of the *United States* at that time, it is clear that a *Nova Scotian* receiving it in *Halifax*, in payment of a debt due to him by a *New York* merchant, could in the exercise of commercial transactions with that city, which are in fact of frequent occurrence, pay his duties on his import of goods into the *United States*, in that which was, at the time of the making of this contract, dollars and cents of the *United States* currency.

He would have received at *Halifax* the metallic coins then legalized, or something which gave him a right to receive them in the *United States*, and with what he received he could pay such duties at the custom house in the city of *New York*. *And surely, it was dollars and cents of United States currency, that formed, and would form practically, a medium of commerce as unqualified and unlimited as that which I have described, which was really in contemplation of both these contracting parties when this lease was executed.*

If, however, we subject to this test the question submitted, what do we find as a necessary consequence of upholding the contention of these defendants,

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

namely, "*that they made a legal tender in the treasury notes in question?*" We find, as the effect of an express provision in the Act of Congress, that in *November*, 1862, and *May*, 1863, the times of payment, these plaintiffs could not, neither could those to whom they might have transferred these notes (had the plaintiffs accepted them), have made them *so available* for all the purposes to which the metallic coins or their equivalents could have been made subservient at the time of this contract, and that consequence results from a legislation of Congress *so special* that it affects some and *not all* even of the citizens of the Union.

The merchant, for instance, who has to find gold for payment of duties on importation of goods at the custom house, is placed on a different footing from that on which the merchant's customer stands, who can pay a debt that he owes to the merchant with the greenback issue.

These views would, I think, derive support from the following consideration, though in reality it is involved in them.

This Act of Congress has not superseded or annulled the previously existing metallic currency by the substitution of a currency of a different nature; but it has merely superadded a paper currency which it has made in common with the precious metals a legal tender, *sub modo*, for the payment of debts within the Union. This, too, has been done avowedly as matter of special and anomalous legislation, to meet the exigencies of a crisis in the affairs of a great nation, which its statesmen and legislators did not foresee nor anticipate at the time when this particular lease was executed, and which, therefore, we cannot suppose to have been contemplated as a future contingency by the parties to that instrument. They, as I have already said, must be taken, nevertheless, to have foreseen and contemplated the possible contingency (which fortunately for these plaintiffs has not happened) of there being, at the times named for payment, a dif-

ferent currency, *legally substituted for that which was the legal currency when the contract was entered into.* In the respect "that there has been in this case instituted by Congress a mere subsidiary, and not a substituted currency," the case is not governed by a class of well-known authorities that would, otherwise, have affected and regulated the question under consideration. Those to which I more particularly refer are *Faw* v. *Marsteller*, 2 Cranch 10; *Denmon* v. *Executors of Denmon*, 1 Wash. (Virg.) Rep. 26; *Pong* v. *Lindsay et al.*, Dyer 82, A.; and a case reported in Davies, p. 28.

In the judicial construction of contracts in the Courts of the Union, these distinctions would of course have no weight, because in that country an express provision of this Act of Congress precludes the creditor—a subject of the law—from demanding payment of the debt due him in a metallic currency. "What is a legal tender to him for a debt due him "in the *United States*," is, however, one question. "What is such in our Courts, and in reference to a "contract made here, and to be performed here, by "payment in dollars and cents of *United States* cur- "rency," is, I apprehend, another and a very different question. I have considered it judicially according to the best of my abilities. In doing so, it affords me much pleasure to reflect that I am not called on to express an opinion on the difficult and delicate point of *the constitutionality of the Act of Congress*, respecting which a grave question has been raised in Courts of the *United States*, whose enlightened decisions we have learned to respect.

The conclusion at which I have arrived is, that the notes tendered by these defendants were not "dollars "and cents of *United States* currency" in the sense in which that phrase is used in the lease before us: in other words, that they were not, at the time of the tender, "the legal currency of the *United States of "America*," for the purpose of forming a medium of performance of the covenant to pay the rents, &c.,

1864.

NOVA SCOTIA TELEGRAPH COMPANY v. AMERICAN TELEGRAPH COMPANY.

reserved in the document set forth in the special case submitted.

Judgment for plaintiffs.

Attorney for plaintiffs, *C. Twining*, Q. C.

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

May 7.

ORANGE ET AL. *versus* McKAY.

Moral necessity is sufficient to justify a master in selling a ship-wrecked vessel, and the existence of such necessity is a question of fact for the jury.

It is not absolutely necessary in such a case that there should be a survey of the vessel before the sale, nor that such sale should be by auction, though both, where they can be had, are prudent and proper steps.

The title to a ship-wrecked vessel can be transferred without bill of sale.

REPLEVIN for a vessel, tried at *Baddeck* in *October*, 1862, before *Dodd* J., and verdict for defendants.

All the material facts, and the charge of the learned Judge, sufficiently appear in the judgments.

A rule *nisi* having been granted for a new trial, it was argued in *Michælmas* Term last, by the *Attorney General* and *Solicitor General* for the plaintiffs, and *J. W. Ritchie*, Q. C., for defendant.

The Court now gave judgment.

YOUNG C. J. This is an action of replevin for the schooner *Mary*, of the burthen of twenty-one tons, claimed by the plaintiffs as registered owners, and by the defendant as purchaser at a sale made by the master, and alleged to have been a sale of necessity. At the trial, which was had before my brother *Dodd* at *Baddeck*, and a verdict found for the defendant, the plaintiffs produced the certificate of registry dated 11th *July*, 1859, from which it appeared that *Edward Orarge*, one of the plaintiffs, owned two sixty-fourth parts, and that the other sixty-two were owned by *James Robin*, *Clement Hennessy*, the heiresses of *Elizabeth Robin*, *Isaac H. Gossett*, *John Lane*, and *John Robin*, co-partners carrying on trade under the firm of *Philip Robin & Co.* Of these persons, at least eight in all, and it may be more than eight, three only, *Edward Orange*, *James Robin*, and *John Lane*, sued as plaintiffs, and no account was given of any change of property

or succession, nor is any indorsed on the certificate. The *Attorney General* suggested that the plaintiffs may have been survivors or vendees from the others; but there is no rule authorizing such a presumption without some proof to sustain it, and on the facts as they stand, if the plaintiffs had obtained a verdict, I am at a loss to know on what principle we could have given them judgment. Whether the registered owners are to be accounted tenants in common or joint tenants, it is the rule in replevin that all of them may and should join in the action (1 *Chitty on Pleading*, 183, *Buller's Nisi Prius* 53). The 7th section of our Provincial Act of 1861, extends the 38th section of the *Practice Act* to all actions, including, therefore, replevin; but these sections were not acted on, and the rule that in an action *ex delicto* the omission of a person who ought to be joined as plaintiff is only ground of plea in abatement, and is no variance, does not extend, as I take it, to an action of replevin. The defendant pleaded that the plaintiffs are not entitled to the possession or property of said schooner *Mary* and appurtenances as alleged,—a position which, as it appears to me, is completely established by the plaintiffs' own evidence.

This ground, however, was taken only incidentally, as I may say, at the argument, as was also another objection equally fatal, if it could prevail, and that is, that replevin will not lie in a case like this: a point which must be fully and deliberately argued before we are called upon to review it.

The argument turned almost wholly on the right of sale exercised by the master, and the circumstances under which the defendant became the purchaser of the vessel in the character of a wreck. The cases on this head are numerous, both in the *English* and *American* books, and are so confused or conflicting that it is impossible to extract from them any certain rule. The whole subject is examined at large and with great ability in *Gordon* v. *Massachusetts Fire*

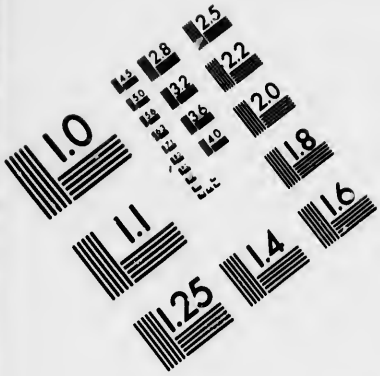
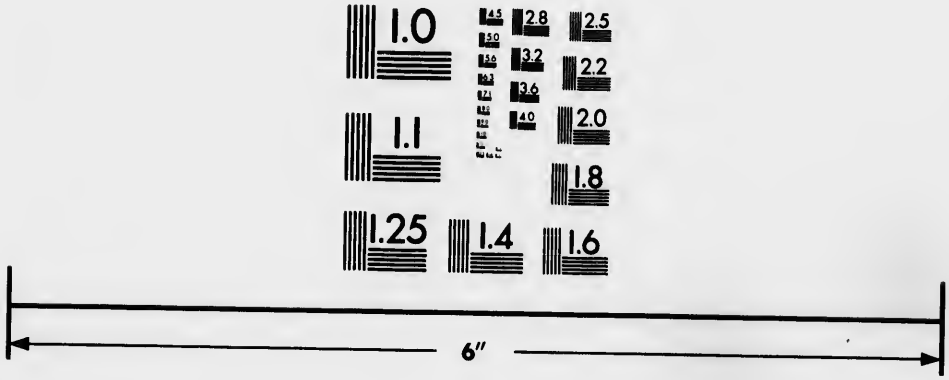
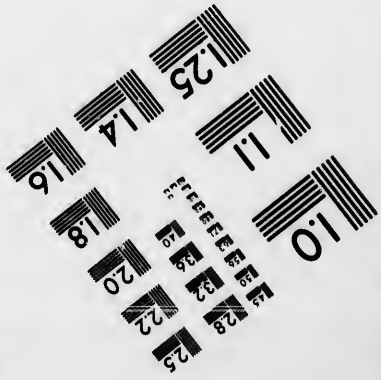


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1864.

ORANGE et al. v. MCKAY.

and Marine Insurance Company, 2 Pick. 249, where it is well remarked, that the power of the master to sell — a power which has so often been abused in this Province — and the ground on which it rests, namely, extreme necessity, are pregnant with uncertainty, as the facts which create it will vary in their effect upon minds differently constituted. This necessity, according to Chief Justice *Tindal*, in one of the ablest of the *English* cases, though it is only a *nisi prius* decision, that of *Somes* v. *Sugrue*, 4 Car. & Payne, 276, is not to be confined, or so strictly taken as it is in its ordinary acceptation. There can in such a case be neither a legal necessity nor a physical necessity, and therefore it must mean a moral necessity; and the question will be, whether the circumstances were such that a person of prudent and sound mind could have no doubt as to the course he ought to pursue. Other cases cited in *Parsons' Mercantile Law*, 376, apply a stricter rule, and speak of an imperious and overruling necessity; but I have met with no case in which the rule is laid down more favorably for the ship-owner than in the present in my brother's charge. He told the jury that if the sale were a conditional one, subject to the approval of the owners, as the master and other witnesses for the plaintiffs alleged—an idea which the defendant's letter of 11th *October*, 1859, rather sustains—then the plaintiffs were entitled to a verdict; but if the jury believed it was a positive sale, as the defendant himself testified, then their inquiry should be as to the necessity of such sale, and they were told that it must be an extreme necessity; that it was the duty of the master to communicate with his owners by telegraph or otherwise, if he could do so without greatly enhancing the risk before he could legally sell, and that he must act honestly and for the benefit of all concerned, and without collusion with the purchaser. With these instructions, the jury found for the defendant, and we are urged to set aside the verdict upon various grounds, some of which, as

it was said, were conclusive, and others addressed to our discretion. On the first head, it was objected that there was no survey, no auction, and no bill of sale. If either of these be indispensable, it is clear that the sale to the defendant was bad. Now, although a survey is usual, and is a proper precaution, when it does not degenerate into a form or something worse, none of the cases have decided that it must be held, and I doubt if, in the position of this vessel, any survey could have been had that would have been worth the paper it was written on. The same remark will apply to a sale by auction where there was no one to bid; no one at least but the defendant who had anything to pay. Under these circumstances, an auction would have produced no real competition, and the law does not absolutely require it, though where it is practicable, it ought never to be omitted. As to the want of a bill of sale, we must distinguish between the transference of a registered vessel by the owner, which must be in writing, and under the statute must now be under seal; and the conveyance of a wrecked ship by the master, which, however formal, is not a muniment of title, but takes effect only under the law merchant. The main use of it is to induce the Government to grant a registry to the purchaser, and if the sale is *bona fide*, and justified by necessity, I do not see that a bill of sale by the master is a whit better than a bill of parcels. In the case even of a perfect ship, it is laid down by *Kent* (3 Com., 10 ed., 191) that a sale and delivery, without any bill of sale, writing, or instrument, will be good at law as between the parties; and though the rule of the Admiralty and the law maritime is different as it is expressed by Lord *Stowell*, 5 *Rob.* 155, and by Judge *Story* in 4 *Mason* 172, the Supreme Court of *Massachusetts* in the case of *Bixby* v. *Franklin Insurance Company*, 8 Pick. 86, thought that the common law did not require a written transfer, and that a bargain, a consideration

1864.

ORANGE et al. v. MCKAY.

paid, and a delivery will pass the property from one to another in a ship or vessel.

None of the three requisites, then, that were urged being indispensable to the sale, we are thrown back upon the evidence and the effect of the verdict. For my own part I would have been content with a verdict either way. It depended very much, if not altogether, upon the degree of credit to be given to the witnesses, and it is plain that the jury preferred the testimony of the defendant and his workmen to that of the Frenchmen. It is probable, too, that the jury had local knowledge of the exposed and dangerous spot on which the schooner was stranded, and it is certainly a striking fact that three other vessels, one of which belonged to the defendant, went on shore in the same bay and in the same gale with the *Mary*, and that none of them were saved. This has a direct bearing on the question of necessity, and might be thought by the jury to excuse or justify the sale, which under other circumstances and for so small a figure, they might have refused to sanction. We must not forget, too, that the Judge who has himself a knowledge of the *locus* approves of the verdict, and that in all the cases the question of necessity is stated as a question of fact to be determined by the jury. It is so laid down in 2 *Phil.* 296, in 3 *Brod. & Bing.* 152, and in 6 *Mees. & Wels.* 138. Great stress also is laid on the verdict in the case I have already cited from 2 *Pick.*, and in the case of *Hunter* v. *Parker*, 7 Mees. & Wels. 322, where all the authorities are reviewed; and on the whole I am of opinion that the verdict in this case ought not to be disturbed, and that the rule for a new trial must be discharged.

DODD J.* This was an action of replevin tried before me at *Baddeck* in *October*, 1862, and after explaining to the jury the nature of the law as appli-

*BLISS J., not having been present at the argument, gave no opinion.

cable to the case, I left the facts with them, and they found the verdict for the defendant. At the argument of the cause, the law as laid down by me to the jury was not so much impugned by the counsel for the plaintiffs, as the grounds of a new trial, as that the verdict was against the weight of evidence. The evidence was certainly conflicting, but it was the province of the jury to decide upon it, and unless it was clear that it largely preponderated in favor of the plaintiffs, I think we ought not to disturb the verdict; and I agree with my brother Judges, that this is not a case to send to a second trial. The rule should, therefore, be discharged.

DESBARRES J. It is a principle clearly established that wherever there exists an imperative and urgent necessity for the sale of a ship, arising from actual and impending peril in which the ship is exposed, the master, who has no authority under other circumstances, may in that case sell for the benefit of all concerned. In this case the learned Judge before whom it was tried properly instructed the jury that in order to make the sale of the shallop *Mary* valid, there must have existed an extreme necessity in order to justify the master in making such sale; that they must be satisfied that the master had acted honestly and for the benefit of all concerned, and if there was any collusion between him and the purchaser, although a necessity for sale did exist, the sale would be void, but if they thought the owners, if present on the spot and uninsured, would, in the exercise of their discretion, have themselves sold the vessel, the sale by the master was binding upon them. Now the jury under these instructions having found a verdict for the defendant, we have only to inquire whether upon the state of facts detailed in the report they were at liberty to find such a verdict. We have it in evidence that the shallop *Mary*, when on the northern coast of *Cape Breton*, in *October*, 1859, met a heavy gale of wind,

1864.

ORANGE et al. v. MCKAY.

in which her sails were split and otherwise injured. She anchored about three-quarters of a mile from a lee shore on the 8th *October*, and finding she was dragging towards a cliff the cable was cut, and the vessel ran on shore at high water at a place called *White Point*, in *Aspey Bay*. On examining the vessel after she was stranded, it was discovered that three or four of her planks were smashed, and that she had received other injuries.

The sea it appears was heavier on *Monday*, 10th *October*, than on the previous *Saturday* when she ran on shore. On that day she was full of water, and rolled and labored on the shore more than before. The defendant swears that the captain and crew could not have saved the vessel, and that when he purchased her for the small sum of seven pounds ten shillings, he did not think he could save her, but expected he would make his money out of her materials. With such facts as these before them, showing the perilous condition of the vessel at the time, and the improbability of saving her from destruction, I am not prepared to say that the conclusion to which the jury arrived was wrong. Three other vessels went on shore in *Aspey Bay* during the same gale, one belonging to the defendant, neither of which were saved, a fact which goes to show that the shallop *Mary* must have been in an exposed and extremely perilous situation, and that may account for the apparent haste of the master in selling the vessel without calling a survey upon her, (as is usual in all cases wherever it can be done) and without public notice. Contrary to the expectations of the defendant, who was the purchaser, he succeeded in saving the vessel, and has repaired her at a considerable expense; but it must be borne in mind that the master had not the same appliances, nor the same means and facilities that the defendant had, and it does not at all follow that because the defendant saved the vessel the master could have done so. The question is, whether there was at the time a moral

necessity to sell the vessel, and whether the master, in the perilous condition of the vessel at the time, and the circumstances in which he was placed, acted in good faith, and exercised a sound discretion in selling her. The jury by their verdict have approved and sanctioned the act of the master, and they have in effect, though not in words, declared it to be their opinion that if the owners had been present and uninsured, they would probably have acted as the master did. There can be no ground then for disturbing the verdict, and therefore I agree that the rule for a new trial must be discharged.

WILKINS J. After carefully weighing the evidence reported in the light of the authorities that must govern this case, I am of opinion that it was properly submitted to the jury, and that the verdict for the defendant ought not to be disturbed. The evidence does not produce a conviction in my mind that the master in selling the vessel in question was not under a moral necessity to sell. The honesty of purpose of the master is not questioned. In view of all the circumstances, I cannot say that he did not exercise a sound discretion in selling; nor am I sure that the owners, if personally present, would not have deemed it for their interest to sell. It is true, the master sold for an inconsiderable sum; but if the chances of saving the vessel were desperate, and we must assume that they were, then it was his duty, instead of sacrificing anything in an attempt to save, to abandon, and get for his owners what he could, however small in amount.

Rule discharged.

Attorney for plaintiffs, *Solicitor General.*
Attorney for defendant, *A. Halliburton.*

1864.

May 7.

HILL versus ARCHBOLD.

Where a verdict was found on the ground of fraud, but there was no plea of fraud on the record, the Court set the verdict aside.

Unless fraud be specially pleaded, no evidence can be given of it.

TROVER for a vessel. Pleas, sale by Sheriff under judgment and execution against *Charles W. Hill*, at the suit of the now defendant, and a purchase from the Sheriff by the present defendant; and denial of the seizure and conversion.

At the trial before *Dodd* J. at *Baddeck*, in *October*, 1862, it appeared that plaintiff claimed under a bill of sale, dated 24th *May*, 1860, from his brother *Charles W. Hill*, the then registered owner, who was at the time largely indebted to the defendant, and on the jail limits at his suit. The defendant's bill of sale from the Sheriff was dated 31st *July*, 1861.

The learned Judge told the jury that the right of the plaintiff to recover depended upon the *honesty* of the transaction between himself and his brother, *Charles W. Hill*, in the sale of the vessel; that if they thought that the plaintiff had in any manner lent himself to his brother to defraud the defendant of a just debt, and that the sale of the vessel was not a fair *bona fide* transaction between them, their verdict should be for defendant.

The jury found for the defendant, and a rule *nisi* having been granted for a new trial, it was argued in *Michælmas* Term last by the *Attorney General* and *C. F. Harrington*, Q. C., for plaintiff, and the *Solicitor General* and *J. W. Ritchie*, Q. C., for the defendant.

All the material facts are fully set out in the judgment of his Lordship the *Chief Justice*.

The Court now gave judgment.

YOUNG C. J. This is an action of trover for the schooner *Marion* and her appurtenances, boats, &c., claimed by the plaintiff under a bill of sale in the usual form, from his brother, *Charles W. Hill*, the registered owner, dated 24th *May*, 1860, and by the

defendant, under a bill of sale from the Sheriff of *Cape Breton*, dated 31st *July*, 1861, and founded on the judgment and execution set out in his principal plea.

The other pleas are merely the usual denials of the seizure and conversion, which were fully proved; the vessel having remained in the plaintiff's possession for more than a year after his purchase, and having been sold in the face of his prohibition, and on a bond of indemnity. The sale by *Charles W. Hill* was had while the vessel was at sea, and while he was on the limits under arrest by the now defendant for supplies furnished to this same vessel; and the suspicious circumstances attending that sale, and tainting, or supposed to taint, the title of the plaintiff, formed the main subject of inquiry at the trial, and entered largely into the argument before us. But the objection I then stated remains in full force. On what principle, looking to our own decisions, independently of the *English* cases, could this evidence have been received, if objected to; and how is it to operate against the plaintiff now, clothed as he unquestionably was with the legal title, and in the actual possession of the ship, as the apparent owner, without a plea of fraud. This is by no means so strong a case as that of *Newell* v. *Crowell*, decided in *December*, 1862, and which I refer to now that I may not be under the necessity of repeating myself.

The learned *Chief Justice* here read from his judgment in the latter case, as follows:

"A conversion, then, in my opinion having been "shown, we are brought to the second point on which "I would remark that had fraud been pleaded, though "there was no fraud in the plaintiff's dealing with the "particular goods in this action, I would have been "strongly tempted to allow the jury to inquire into "the whole transaction, and, if they found the plaintiff "affected with fraud in any part of it, to have found "their verdict against him. But in the face of the

1864.
HILL v. ARCHIBOLD.

"established principle in this Court, which formed "one of the foundations of our judgment in the case "of *Dodge* v. *Turner;* in the face, too, of the recent "legislative enactment, that where a defendant intends "to set up fraud as a defence it must be pleaded, we "would hardly be justified, I think, in holding that "the plaintiff could be defeated of a legal right by a "charge of fraud, of which he had no notice on the "record, and which he was therefore unprepared, and "was not bound to meet. There may be cases in "which it will be necessary to modify this rule and to "permit evidence of fraud where it could not have "been pleaded. It is enough that this is not one of "these cases, and therefore I think that the rule for a "new trial should be discharged."

On this single ground, though it was but slightly urged at the argument, not at all, indeed, by the opening counsel, I hold it impossible to sustain this verdict for the defendant. The plaintiff in his letters disclaims any act that was not consistent with honest and upright dealing, and appears to be more desirous even of guarding his reputation than of saving his property. The jury in effect have found that his transactions with this vessel and with his brother in relation thereto were fraudulent: that is, they have found an issue not upon the record, and of which the rules of law in the mother country, and still more emphatically in this Court, and the plainest principles of reason require that the most ample notice and opportunities of explanation should be afforded. The course of this trial offers the best illustration of the practical working and propriety of the rule. It was admitted on both sides that the testimony of Mr. *C. F. Harrington* was indispensable to a right understanding of the case as it really occurred. The plaintiff's counsel allege that they did not call him in the expectation or the hope that the defendant would, and the defendant did not call him because the plaintiff had not. And what is the

result? An obscure and imperfect view of the real facts, a groping in the dark after what should be made as clear as day. Now, with a plea of fraud upon the record, the plaintiff would never have ventured to close his case till he put Mr. *Harrington* upon the stand, or if he had, that itself had been decisive. While I feel, therefore, from the trial had before me at *Sydney*, in *June*, 1861, between the now defendant and *Charles W. Hill*, and from what transpired before us last term in the argument of *Slattery* v. *Archbold*, that this is a case of great hardship on the defendant, and in which the right may possibly be with him, it would be wrong, I think, to sustain this verdict. He should have the opportunity of amending his pleas, and it will be competent for the plaintiff, if he can, upon a second trial, to acquit himself of the charge of fraud, and show to the satisfaction of a jury in his own county that his purchase from his brother, under circumstances that must be admitted to be suspicious, was fair and honorable. With these views, I am of opinion that the rule for a new trial should be made absolute.

DESBARRES J.* I do not think there is any sufficient evidence in this case to warrant a finding for the defendant on the ground of fraud in the plaintiff, or of fraud and collusion as between him and *Lorway*, who purchased the vessel in question at public auction, and subsequently sold her to the plaintiff at a profit of forty-five pounds, which was actually paid to him by the plaintiff. Whether the conduct of *Charles W. Hill*, the former owner of the vessel, and at whose instance she was sold at public auction, is entirely free from all suspicion of dishonesty, in respect to the debt which he at the time owed to the defendant, is a matter upon which I am not called upon, and do not intend to express any opinion further than to say that

* *Bliss* J. and *Dodd* J. not having been present during the whole of the argument, gave no opinion.

1864.

HILL v. ARCHBOLD.

if his conduct were fraudulent in respect of that debt, and his dealings with the defendant, I do not see how it could affect a sale or transaction as between *Lorway* and the plaintiff. But the main ground of objection to the verdict is, that fraud was not imputed to the plaintiff by the pleadings, and therefore it was not a subject for inquiry by the jury. Upon that ground alone I think the verdict must be set aside, that a new trial may be had upon the issues joined in the cause.

WILKINS J. It is impossible, I think, to read my brother *Dodd's* report of this case without entertaining strong doubts as to the good faith of the transaction of sale out of which it has arisen, and which is impeached by the defendant, and negatived by the verdict of the jury.

Still, I consider it impossible to sustain that verdict consistently with legal principles.

Assuming that plaintiff had, himself, bought at the sale, and *Lorway's* intermediate acts were out of the question, still the circumstances would only form grounds — very strong ones indeed — of suspicion of fraud, on the part of the plaintiff, towards his brother's creditors,—towards this particular creditor, the defendant, who alone appears asserting the invalidity of the sale.

But, taking *Lorway's* statement to be true, *and it is not only entirely uncontradicted*, (but in material points confirmed by other witnesses) and bearing in mind, that there were bidders — independent bidders, at the sale, that the defendant, *himself*, bid thereat, that the sale was duly advertized, that *Lorway* purchased, *being the highest bidder*, and that he transferred by contract to the plaintiff for forty-five pounds, which sum was actually paid, how can this sale be impugned by this defendant?

I think the question must, necessarily, be viewed precisely as it would have been if the bill of sale had

been given to *Lorway*, and he had subsequently transferred to the plaintiff, as the *direct* transfer was merely a convenient arrangment, and advised by a professional man.

It is very far from unimportant, in my opinion, to consider that *Lorway's* positive statement "*that he did "not engage to bid for defendant, and that he was not "specially asked to do so,*" is confirmed by the testimony of the defendant himself. He acknowledged that he bid at the sale, and said, "*I took Lorway by the coat "and said I wish you and Jost would come and bid the "vessel in for me.*" Thus we see that the defendant first expressed a wish that *two* particular individuals, and not *one*, as is usual, should bid for him, and secondly, he attends the sale and bids himself.

On the whole, then, as there is not a particle of evidence to warrant an inference of collusion at the sale between plaintiff or any other person and *Lorway*, or of an understood arrangement before the sale between the latter and defendant, that *Lorway* should buy for *Archbold*, *I can perceive nothing fraudulent in the conduct of Lorway.*

That is the turning point of the case, for if there were no fraud in him, he bought honestly on his own account, and sold honestly on his own account; and it does not lie in the mouth of *Archbold*—a creditor of a third party—to impeach the validity of the sale which *Lorway* made.

Of course, if this plaintiff bought from *Lorway* with an understanding between the plaintiff and *Charles W. Hill* that the purchaser should hold for the benefit of *Charles W. Hill*, this defendant would not be remediless, although his remedy for the amount of his judgment would be of a different nature from that which he has thought proper to pursue.

My opinion is, that the rule *nisi* for a new trial should be made absolute.

Rule absolute.

Attorney for plaintiff, *C. F. Harrington*, Q. C.
Attorney for defendant, *Solicitor General.*

1864.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

MICHÆLMAS TERM,

XXVIII. VICTORIA.*

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J.
JOHNSTON E. J.
DODD J.
DESBARRES J.
WILKINS J.

MEMORANDA.

In last *Michælmas* vacation the honorable *James W. Johnston*, Attorney General, was appointed Equity Judge and a Judge of the Supreme Court; and on the same day the honorable *William A. Henry*, Solicitor General, was appointed Attorney General, and the honorable *J. W. Ritchie*, Q. C., Solicitor General.

* No written judgments of any great importance were delivered during last *Trinity* Term.—REP.

BRUSH *versus* ÆTNA INSURANCE COMPANY.

December 6.

ASSUMPSIT on a policy of insurance, tried before *Wilkins* J. at *Halifax*, in the last *April* sittings, and verdict for plaintiff.

A rule *nisi* having been granted to set the verdict aside, and for a new trial, it was argued in *Trinity* Term last, by the *Solicitor General* (*J. W. Ritchie*), for plaintiff, and *W. Sutherland*, Q. C., and *Richey*, for defendants.

All the material facts are sufficiently set out in the judgment of his Lordship the *Chief Justice*.

The Court now gave judgment.

Where property was insured in the name of *O.*, but the policy contained the following clause: "Loss, if any, payable to the order of *B.*, if claimed within sixty days after proof, his interest therein being as mortgagee."

Held, (*Dodd* J. dissenting), that *B.* might bring an action on the policy in his own name, and that he must be taken to be the party insured.

Held, also that it was no objection to *B's* recovery that the preliminary proofs were furnished by him, and not by *O.*

YOUNG C. J. This is an action on a policy of insurance, dated 16th *December*, 1861, whereby *John Ogilvie*, the then owner of the premises, was insured in the sum of one thousand dollars, against loss or damage by fire for one year, the policy containing also the following clause: "Loss, if any, payable to the order "of *Peter Brush*, (the plaintiff), if claimed within sixty "days after proof, his interest therein being as "mortgagee." The premises were burnt down on the 17th *November*, 1862, and notice of the loss was given by *Ogilvie* to the agent of the defendants; but *Ogilvie* having left the Province, the preliminary proof was furnished by the plaintiff in his own name. The premises were subject to another mortgage subsequent to the plaintiff's, which was foreclosed, and the premises sold by the Sheriff previous to the fire. They were purchased by Mr. *Lynch*, but no deed had passed to him, and "he bought for the accommodation of "*Ogilvie*, and told him that he would always allow "him to redeem on payment of the purchase money "and interest." The ground was also sold under the plaintiff's mortgage, and brought two hundred pounds,

1864.

BRUSH v. ÆTNA INSURANCE CO.

of which, after deducting expenses, he received one hundred and seventy-five pounds, leaving twenty-five pounds due on his security with two years interest. It was admitted at the argument that the whole amount of mortgage was due to the plaintiff at the time of the loss and of action brought. Strong suspicions were entertained by the defendants of the fairness of the loss, which were not dispelled by an investigation at the Police Office, and have prompted the present defence. If the fire were really a fraud on the part of *Ogilvie*, it is difficult to discover any adequate motive for it. The building was proved at the trial to have been worth from two hundred and fifty pounds to three hundred pounds, the latter valuation proceeding from the defendant's surveyor, and the plaintiff's claim, with the other mortgage, effectually precluding *Ogilvie*, as one would suppose, from profiting by the crime. The fourth plea raised the issue of fraud in direct terms, and was negatived by the jury; so that for all the purposes of this argument, and whatever the character and standing of *Ogilvie* may be, we must consider the loss as *bona fide*, while, as regards the plaintiff, no suspicion has ever attached to him. The minor questions that arose on the argument I shall touch by-and-by, first of all adverting to the larger and more material issues.

We are called upon now to deal with a class of contracts of more extensive application and of larger values than any other perhaps in our Province, excepting only the promissory notes in ordinary use. In this city, especially, there are at this moment many hundred thousands of dollars insured upon properties in which the policies in some shape or other, either by assignment or by indorsement, or by a memorandum, as in this case, in the body of the policy, are declared to be in whole or in part for the benefit of the mortgagees. Many of these mortgagees are trustees for children and others, and it is deeply interesting to them to ascertain to what extent, and under what limita-

tions, these policies afford security against loss. Nothing is more vague and unsettled than the ideas usually entertained upon this subject, which has now, for the first time, come before this Court; and I may venture to add, it has been little thought of, even among the profession. I think it right to suggest the difficulties and the conflicting views that naturally belong to this inquiry, though, in accordance with modern usage, I shall abstain from pronouncing judgment upon any other than the points immediately before us.

In the ordinary course of business a capitalist lends a tradesman or other party, having built or being about to build a house, a sum of money, looking to the property as his security. If he be a prudent man, he looks also to the character of the borrower; but his main dependence is the property, and he requires a policy against fire to secure him from loss. Some cautious lenders take the policy in their own names; but, as the premium is always paid by the mortgagor, this is rarely done, and it is generally distasteful to mortgagors, as the sum they insure often exceeds the amount of the mortgage, and a policy in the name of the mortgagee implies, or is supposed to imply, a certain doubt or mistrust of the mortgagor. I have reason to believe, therefore, that nine-tenths of the insurances now subsisting for the protection of mortgagees are in the names of mortgagors.

Is the mortgagor, then, to be taken as the sole party insured, and are his acts conclusive as against the mortgagee? Let us see the consequences of this doctrine. Fraud on the part of the mortgagor as alleged in this case would be fatal to the mortgagee, though he is entirely innocent of it, and is not at all aware that he is insuring without premium the moral habits and character of the man to whom he has lent his money, looking chiefly to his property. But where there is no fraud, if the mort-

1864.

BRUSH v. ÆTNA INSURANCE CO.

gagor after loss neglects, or for purposes of extortion refuses, except upon terms, to furnish the preliminary proof, the mortgagee, on the given supposition, has no right of action against the insurers, but must depend on their generosity, or on their sense of justice. This would also be the case where the mortgagor has sold to another, subject to the mortgage, without notice to the mortgagee, or having the transfer or change of title endorsed on the policy. Or to go a step further, where, as in this case, there has been a foreclosure of a second mortgage, and the title has passed out of the mortgagor *in invitum*. Again, a further insurance is made by the mortgagor without notice, either from negligence or fraud: the policy is clearly void as against him, and so also, it is said, against the mortgagee, who loses his money for a neglect or fault which he has not committed.

If all these and others that might be put are the legitimate consequences, and really and truly represent the legal effect of these policies, it is plain that they afford a very inadequate security to the lender—a security of a very different kind from what the vast majority of lenders imagine they possess; and if all these consequences were affirmed by this Court, I cannot doubt that a very general alarm would be excited, and that the insurance offices would find their business at once and most injuriously affected. Nor is there any remedy that I can perceive for these evils. The only safety to the mortgagee would be an insurance in his own name; but that, independently of the considerations I have already suggested, is subject to very grave objections on the part of the mortgagor. Such an insurance covers only the interest of the mortgagee; the insurer in case of loss is bound to pay only the amount remaining due on the mortgage at the time of action brought. On paying the loss, the insurer in some of the *American* cases, though it is doubted in others, is entitled by way of subrogation to an assignment of the securities; and when the

mortgagor has been paid from the proceeds of the land, or from other sources, the policy does not enure to the use of the mortgagor.

(In illustration of these positions, his Lordship here cited several *American* cases, particularly 16 *Peters*, 495; 17 *N. Y. Appeal Reports*, 391; 10 *Peters*, 507.)

Again, though, as we have seen, the mortgagor and mortgagee may each separately insure his own distinct interest, this will never be done unless in exceptional cases: first, because the double insurance would be regarded by a prudent office with suspicion and dislike, and would in fact be a temptation to fraud: and, secondly, because the premium being in all ordinary transactions a charge on the mortgagor, he would be paying two premiums for one and the same property.

It will be perceived, then, that whenever the insurers, from a belief of fraudulent dealing or from any other motive, refuse to act liberally as they usually do, but insist before a Court on their extreme rights, as the defendants are doing here, there are many difficulties in determining the true meaning and effect of this contract. From *English* cases we have little or no assistance; not a single case of modern date was cited at the argument, and in the *Law Times Reports* since 1859 there are but three or four decisions on fire policies, none of them bearing on the present. The truth is, that technical and extreme objections are seldom if ever raised by *English* companies: they resist claims only on the ground of fraud, and that resolves itself into a question of fact.

Let us turn, then, to the *American* cases, to such of them at least as we have access to in this Province. We will find them by no means clear or consistent with each other, insomuch that in the Appeal Court of *New York*, one of the Judges remarks so recently as in the year 1858, (17 *N. Y. Rep.* 405), "that in case "of fire policies effected by the mortgagee upon the "property, with a view to his own protection, the

1864.

BRUSH v. ÆTNA INSURANCE CO.

"relative rights of himself, the mortgagor and the "underwriters, as between each other, have not yet "been determined upon any very satisfactory legal "principles."

The case put is that of a mortgagee insuring for his own benefit, and it has been held in that case that he may recover the full amount insured, and recover also the full amount due on his mortgage. This is maintained in a case cited in *Parson's Merc. Law*, 510, notwithstanding respectable opinions to the contrary.

But the case we are dealing with is a policy by the mortgagor, recognizing on the face of it the interest of the plaintiff as mortgagee. This recognition, in the contract itself, distinguishes the case from that of *Grosvenor* v. *Atlantic Insurance Company*, 17 New York Rep. 391, where the interest of the plaintiff did not appear on the face of the policy, though the word mortgagee is used; the words being, "Loss, if any, "payable to *Seth Grosvenor*, mortgagee," and the deciding Judge treated him merely as the appointee of the insured to receive the money which might become due to him from the insurers upon the contract. The bearings of this case have been minutely surveyed by one of my brethren in his opinion, and therefore I forbear from enlarging on them.

It is urged by the defendants that *Ogilvie* was the only party they contracted with—the only person who must be taken under the policy as insured. The parol evidence on this point affects my judgment but little. *Brush* says he paid the premium, which he admits, however, having received from *Ogilvie*. He says the insurance was got for him by his agent at his request, while *Scott* says he was applied to by *Ogilvie*, and took his signature and description. Both parties have doubtless stated what is true, but the written contract controls both, and must speak for itself. The defendants cannot deny that in recognizing the plaintiff's interest they have incurred some obligation to him, and the point is, what is the extent

and scope of that obligation? Are they to be held as having contracted with him, either alternately with, or independently of *Ogilvie*; and if so, can he in either case, maintain this action in his own name, and recover on his own preliminary proof?

If I am asked what I believe to have been the real intention of the parties, and the course of business with all such policies, I would answer without hesitation that this policy was to cover *Ogilvie's* interest as owner, the defendants at the same time agreeing or contracting, in case of loss, to pay the amount to *Brush* as mortgagee, if claimed, and if not claimed, or if the mortgage had been satisfied, then the amount to be paid to *Ogilvie*. In these two cases the right of action would have been in *Ogilvie*; so that, if a right of action exists in the plaintiff, there is an alternate right according to the circumstances of the case. Now, I am not insensible to the difficulties of this position. The policy would seem to contemplate only one party as the party insured, and if *Brush* is insured, it may be argued that *Ogilvie* cannot be so. This point, however, it is not necessary to determine, as we are considering the rights of *Brush*, and not of *Ogilvie*. One case is of frequent occurrence, where the action surely cannot lie with the party who effected the policy, and that is, where he conveys the property, and the policy is endorsed with the assent of the insurers, to the purchaser. Here the insurers must be held to have substituted one party for the other under the same policy—to have entered, in fact, into a new contract. This is the view taken by *C. J. Shaw* in *Wilson* v. *Hill*, 3 Metc. 68, cited in the notes to *Smith's Mercantile Law*, 490, 491; and it seems to follow as a necessary consequence, that the action in such a case should be brought in the name of the assignee, and that he should be entitled and obliged, as he alone is competent, to furnish the preliminary proof.

Now, if in this case the defendants have entered

1864.

BRUSH v. ÆTNA INSURANCE CO.

into a contract with *Brush*, or if *Brush* cannot enforce it by action, and if *Ogilvie* cannot enforce it, or neglects or refuses to do so, there is a right in *Brush*, without any legal means, to recover it,—a conclusion to which no Court will be driven if it can possibly avoid it. I am not surprised, therefore, to find that there are *American* cases upon the point, which I take from *Parson's Mercantile Law*, 511, and *Angell on Fire and Life Insurance*, sec. 60, as the reports are not here: "If a mortgagor procure insurance in his own name, "but with a stipulation that the amount of loss, if "any, shall be paid to the mortgagee, a suit on the "policy may be maintained in the name of the mort-"gagee." 16 *Shep.* (*Me.*) *R.* 337. "The fact," says *Angell*, "of bringing such suits, ratifies the act of pro-"curing insurance for his benefit." "It seems," says *Parsons*, "that an order indorsed by the assured on a "policy issued by a mutual insurance company, 'to "'pay the within in case of loss' to a mortgagee, "and assented to by the company, will enable the "mortgagee to sue on the policy in his own name." *Barrett* v. *Mutual Fire Insurance Company*, 7 Cush. 175. "Where the policy provides that the insurance, in "case of loss, shall be paid to a third person," (that is, not describing him as mortgagee,) "the action "should be in the name of the party to the policy." *Nevins* v. *Rockingham Fire Insurance Co.*, 5 Foster, 22.

These cases are somewhat assisted by the analogy drawn from marine policies, where it is the common practice to bring the action in the name of the party really interested, and for whose benefit the insurance was made, though not named in the policy. The cases to this effect are referred to in 2 *Phil. on Insurance*, 593; *Arnold on Insurance*, 1249. Nor is this doctrine confined to policies of insurance; it is applicable to other contracts in writing not under seal. 1 *B. & P.*, 101; 2 *Lev.*, 210; *Cowp.*, 443.

I am of opinion, therefore, that *Brush* had a right to bring this action in his own name; in fact, that he is

1864.

BRUSH v. ÆTNA INSURANCE CO.

to be taken, to the full extent necessary for his own protection, as the party insured. It follows that preliminary proof furnished by him in terms of the policy is sufficient; nor is the company any worse off than if they had effected a policy for him as mortgagee, when they must have been content with proof equally vague and unsatisfactory as they complain of here. In ninety-nine cases out of a hundred, a mortgagee having no possession or control of the premises, and residing perhaps at a distance, can have no personal knowledge of the circumstances or fairness of a loss; he is to make oath "when and how "the fire originated, so far as he knows or believes," but in fact he knows nothing of the circumstances, and his attestation dwindles into a form.

The other objections urged at the argument do not, in my judgment, amount to much. It is obvious that they came in merely as *succedanea* in aid of the main question, and but for that would never have been heard of. The involuntary transfer of title, if there be any transfer on the part of *Ogilvie*, cannot, and ought not to affect the plaintiff; and as for the plaintiff's affidavit not being sworn to before, and a certificate procured from, the nearest notary, it is obvious, from the evidence both of Mr. *Hartshorne* and Mr. *Scott*, that the objection was not to the form of the proof, but to the proof as coming from *Brush*. "What I required," says Mr. *Scott*, "was proof from "*Ogilvie*."

The want of this proof—the absence of *Ogilvie* at the trial, the fact that no opportunity of examining or cross-examining him has been afforded—is really the only thing the defendants can reasonably complain of. Now, although the whole amount insured was due to *Brush* at the time of action brought, his claim has been since reduced by the proceeds of the land to about ninety pounds, and the balance of one hundred and sixty pounds, if paid to him, would be in his hands as trustee for *Ogilvie*, or parties under *Ogil.*

1864.

BRUSH v. ÆTNA INSURANCE CO.

For my own part, therefore, I think that the justice of the case would be answered by the plaintiff's receiving the sum due on his mortgage, with interest to the time of payment, and his costs, and that the balance should be paid into Court, subject to all such equities as may attach to it, when claimed by or on the part of *Ogilvie*, his creditors, representatives, or assigns.

JOHNSTON E. J. *John Ogilvie*, the owner of a dwelling house and shop in the city of *Halifax*, mortgaged the property in fee to *Peter Brush*, the plaintiff, for securing two hundred and fifty pounds. By a proviso in the mortgage, *Ogilvie* was bound to insure the buildings to the amount of one hundred and fifty pounds in some office "*to be chosen by, and* IN THE NAME, "*and for the benefit*" of the plaintiff, who, in case of default, was authorized to effect the insurance, and to charge the premium on the mortgaged estate.

The plaintiff procured insurance, to be effected at the office of the defendants, and advanced the required premium, which *Ogilvie* afterwards repaid him. The plaintiff did not personally apply at the defendants' office for the insurance. He says one *Whitley* got the insurance for him, and at his request, and paid the premium to Mr. *Scott*, the defendants' agent; and all that Mr. *Scott*, when examined as a witness, says on this point is, that he was applied to by *Ogilvie* to insure these premises; that he took his signature and his description, and that he had no interview with the plaintiff; and no papers, information, or instructions given by *Ogilvie*, nor any order for insurance or declaration of the interest intended to be insured, are in evidence. But the mortgage shows the agreement between *Ogilvie* and the plaintiff in this respect, and the consequent duty of *Ogilvie;* and the policy bears on its face the evidence that the defendants, in making the contract and receiving the consideration, were aware of the plaintiff's interest, and engaged that the plaintiff not only should receive the benefit of the insur-

ance, but should do so in relation to his interest as mortgagee.

The terms of the policy are, that the defendants, "in consideration of the premium to them paid by "the assured thereinafter named, did insure *John* "*Ogilvie* against loss by fire to the amount of two hun- "dred and fifty pounds on the frame building, situate, "&c., owned and occupied by him as a dwelling and "liquor store; loss, if any, payable to the order of "*Peter Brush*, if claimed within sixty days after proof, "his interest therein being as mortgagee."

The question arises in connection with the construction of the policy, whether the defendants are affected to any and to what extent by the agreement between *Ogilvie* and the plaintiff in relation to this insurance. On Mr. *Scott's* evidence it must have been from *Ogilvie* that he derived his information of the interest of the plaintiff, and of the intention that the insurance should protect that interest. It is fair to believe in the absence of testimony to the contrary, that Mr. *Scott* was made acquainted with the exact relation in which *Ogilvie* and the plaintiff stood as regarded the insurance. But if it were otherwise, I think the facts that were brought to Mr. *Scott's* knowledge were more than sufficient to have put him upon enquiry, and that the stipulations in the mortgage relating to the insurance enter legitimately into the enquiry as to the intention of the parties, when the construction to be put on the policy is under consideration.

On this point the *American* case of *Kernochan* v. *The New York Bowery Fire Insurance Company*, 17 N. Y. Rep., 428, on appeal, goes a great length. The plaintiff had been insured as owner. After he had sold the property, he informed the defendants that he desired to secure his debt, and the policy was changed by interlining after his name the word "mortgagee." After the loss the defendants offered to pay the plaintiff, if he would assign his debt, or so much as would cover what they should pay him. This he refused,

1864.

BRUSH v. ÆTNA INSURANCE CO.

and the preliminary proofs were put in by and in the name of the *Cooledges*, the mortgagors. At the trial the plaintiff, or rather the mortgagors, who prosecuted in his name, were permitted to prove that *Kernochan*, the mortgagee, had agreed that the policy should be kept on foot for the *Cooledges*, the mortgagors' benefit, and any proceeds accruing under the policy paid to the mortgagee toward satisfaction of the mortgage debt, the *Cooledges* paying, as they did pay, the premiums. It was also permitted to be proved that the value of the property and the solvency of the *Cooledges* rendered secure the mortgagee's debt, irrespective of the policy; and the *Cooledges* were accepted as the parties entitled to make the proofs. It was a disputed question, whether the defendants were informed, till after the loss, of the agreement between the mortgagee and mortgagors. Under the ruling of the Judge at the trial, a verdict was found for the plaintiff, which was sustained by the Supreme Court and was affirmed by the Court of Appeal; it being held that the agreement between the mortgagee and mortgagors, whether known to the defendants or not, was properly admitted for explaining the rights of the parties, and that the policy should be considered as kept up for the security of the *Cooledges*, and as covering the property, and not the debt only, as its subject. The right of the *Cooledges* to make the preliminary proofs was not determined; the learned Judge who delivered the opinion of the Appeal Court saying that *probably* in strictness the plaintiff was the person who should have made the proofs, but that the objection had been waived by not having been earlier taken. In that case the construction of the policy was varied, the rights of the defendants were affected, and their claim for subrogation [illegible] by agreements to which they were not parties, and of which they might have been, and not improperly were, ignorant.

Many cases might be quoted from *English* authorities, especially upon marine policies, where the acts

and agreements of other persons than the underwriters have been allowed to show who were the real persons interested, and what the nature and extent of the interest insured. But I think it unnecessary to refer to them particularly, as I shall have occasion to notice again the practice in marine insurances.

The legal construction of the policy is the principal question in the present case, and to its decision the other points that have been raised will be found to be in a great measure subordinate. To determine the construction it is necessary to ascertain the intention of the parties, as evidenced by the policy and the attendant facts.

The policy makes it apparent that the security of the plaintiff—whether it was or not the exclusive—was certainly the primary object.

This was conformable with *Ogilvie's* obligation; but his *entire* obligation was not fulfilled, unless the security was placed under the sole control of the plaintiff, and was made independent of all acts but the plaintiff's own; for *Ogilvie* had not only engaged to effect insurance for the benefit, but in the name of the plaintiff. Now, the law will presume that a man intends to do what his duty requires, unless his conduct unequivocally declares an opposite purpose; and I have shown that the defendants stand affected by this obligation resting on *Ogilvie*.

If, therefore, the policy in this case is ambiguous or doubtful, or capable of two meanings, that which is conformable with the duty of *Ogilvie* and the rights of the plaintiffs must be taken as expressive of the intention of the parties; if such a construction can be adopted without doing violence to the language of the instrument, or the rules of exposition.

The argument on the part of the defendant is, that the policy was made with *Ogilvie* to insure his interest with an appointment for payment of loss to the plaintiff, and that consequently the right of recovery was

1864.

BRUSH v. ÆTNA INSURANCE CO.

dependent on the continuance of *Ogilvie's* interest, and his fulfilment of the conditions.

The objection to this view of the subject is, that it makes the plaintiff's interest derivative and secondary, and not primary, and therefore varies from the agreement between the mortgagor and mortgagee; and also from what I have endeavored to show must be legally considered as the intention of the several parties including the defendants. Nothing can better illustrate the inadequacy of this construction to fulfil the right reserved to the plaintiff under his mortgage, than the objection taken by the defendant that the money was lost by the foreclosure of the second mortgage—the act of a stranger—whereas the stipulation in the plaintiff's mortgage secured him against any contingency of the kind, by engaging for insurance in his own name.

Besides, this construction does not satisfy the terms of the instrument. The whole loss is absolutely to be paid to *Brush*, qualified by a declaration of his interest, which must be understood to mean that the payment was to be made in reference or relation to that interest. Suppose that between the making of the policy and the loss, the plaintiff's debt had been reduced from two hundred and fifty pounds to one hundred pounds: would the legal liability of the insurers have become divided between the mortgagor and mortgagee so that each could maintain an action? To effect this, words must be imported into the contract essentially altering the nature, intention, and obligations of the defendants' engagement, for payment of the loss. It cannot be said that *Brush* could recover the whole, partly for himself and partly as trustee for *Ogilvie*, without extending the responsibility of the defendants to *Brush*, and the amount of his interest as mortgagee, contrary to the apparent meaning of their engagement; and should it be alleged on the contrary that *Ogilvie* would be entitled to recover the whole,

partly for himself and partly as trustee for his mortgagee, then the distinct engagement of the defendants to pay the plaintiff to the extent of his interest would be abrogated, and his insolvent debtor be substituted as the medium of payment.

The defendants' counsel at the argument, in opposing a construction of the policy more consistent with the plaintiff's intention, took exceptions which seemed to be inconsistent with a well known rule of law; and the view I then took has been strengthened by further consideration.

In *Carnegie* v. *Waugh*, 2 D. & R., 277, the rule to which I refer is stated in these words by counsel in argument while opposing the application of the rule to his case: "It must be admitted," Mr. *Chitty* said, "that a third person may sue upon a parol contract, "or upon a deed poll made between two others, if it "be for his benefit, but he cannot sue upon a deed "*inter partes*." *Abbott*, C. J., acknowledged the correctness of the principle, and recognized as law the case of *Fermer* v. *Meares*, 2 Bl., 1269, where the assignee of a *respondentia* bond made to one *Cox*, with an indorsement by the obligor, declaring that he would pay it to any assignee of *Cox*, was held entitled to recover against the obligor in *assumpsit*. The defendant's counsel referred to *Addison on Contracts*, p. 244; but the same doctrine is clearly laid down by that author, and a number of cases illustrative of it are given; and at p. 249 he says: "In "these cases, the promise, though in fact made to a "third party, is in point of law made to the plaintiff, "and should be declared upon according to its legal "effect." "If a promise," says *Eyre* C. J., "be "made to *A* for the benefit of *B*, and an action be "brought by *B*, the promise must be laid as having "been made to *B*, and the promise actually made "to *A* must be given in evidence to support the "declaration."

It is true, *Addison* mentions the case of *Price* v.

1864.

BRUSH v. ÆTNA INSURANCE CO.

Easton, 4 B. & Ad., 434, on which the defendants' counsel relied, while endeavoring to combat the effect of this rule on their argument. That case, however, is plainly inapplicable. There the debtor of the plaintiff agreed to work for defendant, and defendant agreed *with the debtor* in consideration of his leaving his earnings in defendant's hands to pay plaintiff's debt; but neither plaintiff's procurement or forbearance, nor a promise by defendant to plaintiff, was alleged, and the Court held there was no consideration nor any privity between plaintiff and defendant.

In the present case the plaintiff, *Brush*, was intimately connected with the consideration and the contract. The policy was procured at his request, and for his security, and, it is to be presumed, at the office of his solicitor; and he advanced the premium. As mortgagee, he stood in immediate and insurable relationship to the property. The defendants contracted on the foundation of that relation, and by promising to pay him the amount to accrue on the policy in reference to his interest as mortgagee, established a privity between themselves and him. That *Ogilvie* repaid the premium to the plaintiff, and that he applied for the policy—if in fact he did apply—and gave the subscription and description, are unimportant in view of the plaintiff's relation to the contract, because these facts are not inconsistent with the plaintiff's right to be insured, or with his being the procuring cause of the insurance, and interested therein.

In marine cases nothing is more common than actions for and in the name of persons different from those mentioned in the policy, and whose interests were unknown to the underwriters. The *English* Statutes on this subject, with the judicial construction they have received, and many cases on the subject are stated in 1 *Arnould on Insurance*, page 165, Chapter on "Description of the Assured in the Policy," and the notes of the *American* editor state the law and practice in the *United States*. At page 170, note 2, it is

said: "Under appropriate expressions of this kind, "that is, 'on account of whom it may concern,' the "rules of law authorize extrinsic evidence as to the "parties in interest, and who may enforce their "claims upon the policy, though not particularly "named therein. The persons on whose account the "insurance is thus made are really parties to the "contract. They have not simply a beneficial inter- "est, but they are the persons whom the insurer "directly promises to indemnify, and it is only on "this ground that an action on the policy is main- "tainable in their name;" citing 1 *Phillips on Insurance*, p. 152, and several decided cases.

It is quite true that between policies on marine risks, and insurances against fire, there are important distinctions, but I am not aware that the general principle of which I have been speaking is not alike applicable to both. And if in a policy on account of whom it may concern, extrinsic evidence may so control the construction as to displace the person named as the insured, and substitute a third person, and define an intention, both of which were unknown to the insurers when the policy was entered into, it would not be extending the analogy unduly, were it necessary, to apply the principle to a party whose right is acknowledged, and whose interest is declared in the policy itself.

A distinction may be taken in this case which is entitled to consideration. *Ogilvie*, the person named in the policy as insured, had an insurable interest at the time; and it must be admitted that the construction, that would treat him to be but an agent in effecting the insurance for another, should be less readily adopted, than in cases where the person named had no interest in himself. This, however, is but an element in the exposition, and ought not, I think, to control the construction, if the policy in its general bearing and the extrinsic evidence do — as I think they do — lead to an opposite conclusion; and in this relation it

1864.

BRUSH v. ÆTNA INSURANCE CO.

is to be observed that although *Ogilvie* is mentioned to be owner and occupier of the premises insured, it is by way of description; his interest as owner is not professed to be insured, while the interest of the plaintiff as mortgagee is clearly expressed and protected in the policy.

After the best consideration in my power, I am of opinion that by the policy under consideration the defendants' contract of insurance was, in legal construction, made with the plaintiff and not with *Ogilvie*.

I adopt this opinion on the ground of the rights created, and duties imposed by the mortgage, and on the consideration of the terms and stipulations of the policy taken in connection with the mortgage. This construction draws strength and support from the rule of law to which I have referred, and it maintains the rights of all the parties in their just relations.

The interest of the mortgagee is placed beyond the power of the mortgagor, or those deriving under him, to defeat. The right acquired by the mortgagor by the payment of the premium is indirectly protected, because the moneys paid in case of loss to the mortgagee must, by virtue of his payment of the premium, be applied toward discharge of the mortgage debt, and so far exonerate the mortgage and the land. The insurers have no right to complain. They receive full premium, and there is no reason to suppose that the mortgagee will be less trustworthy than the mortgagor.

It may, indeed, be objected that the interest of the mortgagor may be destroyed by the assignment of the mortgage before loss. The answer is, that the mortgagor agreed to take that risk when he covenanted to insure in the name of the mortgagee; whereas on the opposite construction the mortgagee is exposed to have his security defeated, not only without having agreed to incur such a risk, but after a solemn stipulation to guard him against exposure to it.

Considering the plaintiff as the party insured, the objections that *Ogilvie's* interest had ceased before the

fire, and that the preliminary proof had not been given by him, are disposed of.

The objections taken to the form, time, and manner of the preliminary proof, cannot, I think, prevail under the authorities cited at the argument. The only objection made having been that the proof should have been furnished by *Ogilvie*, it is to be assumed that in all other respects they were accepted as satisfactory.

I am, therefore, of opinion that the verdict should be maintained, and the rule discharged.

It would have been great injustice to the subject, and to the defendants and their counsel, to have failed carefully to consider the *American* authorities cited on the argument. I have laboriously studied them, and most earnestly considered their bearing on the present case. My conclusion being that they did not apply, I thought it most convenient not to interrupt the remarks I had to make in support of my opinion, by intruding and discussing those cases in the course of these remarks. It is proper, however, that I should now state my reasons for deeming them inapplicable or inconclusive.

The learned counsel for the defendants pressed upon the Court the consideration of the nature and consequences of assignments of policies, and referred to many cases on the subject. The difference of the relation of the plaintiff under the view I have taken, and the assignee of a policy, is such that those cases do not seem to me to have any immediate bearing, and can be useful chiefly as furnishing principles that might be applicable inferentially. The law, however, on this branch, appears in the *United States* to be unsettled. This is shown by the learned editors of the *American Leading Cases* in their comments on *Carpenter* v. *The Washington Insurance Company*, 2 Leading Cases, 485. They say: "Another of the questions decided in "*Carpenter* v. *The Washington Insurance Company*, has "also received a different construction in some of the

1864.

BRUSH v. ÆTNA INSURANCE CO.

"State tribunals. In *The Traders' Insurance Company* "v. *Robert*, 9 Wend. 404, 474, it was decided that the "assignment of a policy by a mortgagor, with the "consent of the insurers, as one of the securities "attendant upon the mortgage, vested an equitable "interest in the policy in the mortgagee, which could "not be defeated by the omission of the assignor "to give notice of a subsequent insurance on the "property." After showing the reasons assigned for the decision—its consideration by the editors, and its opposition to a principle affirmed in *Carpenter* v. *The Washington Insurance Company*—the comment proceeds: "*The Traders' Insurance Company* v. *Robert* was, not- "withstanding, followed in the case of *The Charleston* "*Insurance Company* v. *Neve*, 2 McMullin, 237, where it "was decided, that the omission of the assignor of a "policy, to give notice of a subsequent insurance, "would not prejudice the assignee, to whom it had "been assigned, with the consent of the insurers; "and again in *Tillon* v. *The Kingston Marine Insurance* "*Company*, 7 Barbour, 570, where the case of *Carpen-* "*ter* v. *The Washington Insurance Company*, was said not to "be law in *New York*, and an assignment of the "policy, with the consent of the insurers, held to put it "beyond the reach of forfeiture by the subsequent "acts of the insured."

While these decisions remain unreversed, they may furnish inferences in support of the views I have taken of the present case; but no decision of this class of cases can militate with the exposition that regards the right of the plaintiff here as primary and immediate, and not derivative.

Two cases were cited by the defendants' counsel, and much relied on, which have a nearer resemblance to the case under decision.

In *Carpenter* v. *The Washington Insurance Company*, 2 American Leading Cases, 470; 16 Peters, 495, the facts as applicable to the present inquiry may be briefly stated as follows: *Wheeler* mortgaged to *E.*

Reed, and covenanted to effect and continue insurance on the property in his own name, and assign the policy to *Reed* as collateral security, and if he failed *Reed* might effect the insurance at *Wheeler's* expense. The policy contained a clause "*that the assured may "assign this policy to E. Reed,*" and "the argument "was that this liberty to assign, when the assignment "to *Reed* was actually executed, transferred the whole "interest in the property insured as well as in the "policy to *Reed*, and made the policy to all intents a "policy for the sole benefit of *Reed* as mortgagee, as "much as if the insurance had been made in his name."

The Court rejected this view, and *Story* J., in delivering judgment, gave the reasons on which the decision proceeded. These reasons are worthy of notice in their bearing on this case.

First. "It was never disclosed to the insurance "company," says the learned judge, "for what pur-"poses the assignment was to be made; whether to "*Reed* as trustee, or agent of the insured, or for "fugitive and temporary purposes, or as security for "debts; or whether it was designed to be absolute "and unconditional. Neither was it disclosed to the "company that *Reed* was, in point of fact, a mort-"gagee; nor were the company requested to insure "his interest as mortgagee, or to make the insurance "exclusively upon his interest and for his account."

Secondly. "The policy itself upon its very terms "admits," says the learned Judge, "of no such inter-"pretation." He adds: "How can any Court be at "liberty, *without other explanatory words*, to construe a "policy to *A*, in his own name, on his property, to be, "not a policy on his own interest, but on the interest "of *B*, *who is a stranger to the policy?*" Again: "It "would seem, then, repugnant to the terms of this "policy to construe it to be not what it purports to "be, an insurance for the owner of the property, but "an insurance for an *undisclosed* creditor or mort-"gagee."

1864.

BRUSH v. ÆTNA INSURANCE CO.

Thirdly. He says: "In the next place, it would, "in our judgment, be inconsistent with the manifest "intention, as well of the insured as of *Reed*, to give "it such an interpretation." He then repeats the terms of the agreement between the mortgagor and mortgagee, and proceeds in this emphatic style: "Now, language more direct than this can scarcely "be imagined to express the intentions of the parties, "that the insurance was to be made in the name of "the owners," &c. "Not one word is said that the "insurance was to be solely and exclusively for *Reed*, "as mortgagee; for in such a case he would hold the "policy as a principal, and not as a collateral secu- "rity."

Fourthly. It was objected that *Reed's* interest did not exist at the time of the execution of the policy, the assignment not being then actually made.

Such being the facts, and the reasoning in the case of *Carpenter* v. *The Washington Insurance Company*, as far as immediately touched the present case, it is too apparent to require illustration that it does not assist the defendants. But when it is remarked that every thing which the learned Judge deemed wanting in that case to establish the mortgagee's title exists here; and every thing which he stated as hostile there to that title is here absent; it may well be asked, whether it does not in reality strongly favor the opinions I have just advanced. In one particular, and that which I consider a most important one, it does so directly. The learned Judge felt at liberty to look into the agreement between the mortgagor and mortgagee to discover their intention in relation to insurance, and to carry that intention with him into the exposition of the policy. I may, then, claim the high authority of that learned judge for having used the mortgage for the same purpose; and when its terms are seen to be that *Ogilvie* engaged to insure the property in some office, to be chosen by, and in the name, and for the benefit of, the plaintiff, may not

his emphatic words be justly borrowed with a converse application to this case? "Now, language more "direct than this can scarcely be imagined to express "the intention of the parties, that the insurance should "be made in the name of *Brush*, the mortgagee, upon "his interest and for his account, and that the policy "should be held by him, not as a collateral, but as a "principal security."

The next case approached more nearly in its circumstances to the present—*Grosvenor* v. *The Atlantic Fire Insurance Company of Brooklyn*, 17 New York Rep., 391.

The defendants in that case insured *McCarty* against fire on his brick dwelling-house, &c.,—"loss, "if any, payable to *Seth Grosvenor*, mortgagee." The policy contained the condition to be void in case of transfer of the assured's interest either in property or policy without consent; and before the fire *McCarty* did sell the property without consent. Nothing is said of any agreement between mortgagor and mortgagee.

Judgment for the plaintiff was brought up to the Court of Appeal of *New York*, and there reversed,—three Judges concurring and one dissenting, with this striking peculiarity, that while one of the three (*Harris* J.) condemned in no measured terms as unsound law the decision in *The Traders' Insurance Company* v. *Robert*, before referred to, two of them (*Seldon* and *Strong* JJ.) declared their opinion that the doctrine of that case should be maintained, distinguishing it from the case before them in that they were of opinion that on an assignment with consent there was privity of contract between the mortgagee, assignee, and the insurers. *Harris* J., who delivered the judgment, went upon what he considered the clear intention of all the parties, that the interest of the mortgagor, and not that of the mortgagee, should be insured. The plaintiff he looked upon merely as appointee of the party insured, to receive the money

1864.

BRUSH v. ÆTNA INSURANCE CO.

which might accrue to the latter upon the contract, and regarded the provision in the policy in that respect, as having no more effect upon the contract itself, than it would, had it been provided that the loss should be deposited in a specified bank, to the credit of the party insured.

American decisions have not the weight of absolute authority here, although they are uniformly considered with the attention due to the learning and ability conspicuous in them; and many important causes have been determined in this Court by the light thrown on the law in *American* decisions.

In the case, however, of *Grosvenor* v. *The Atlantic Fire Insurance Company*, there appears a difference in the facts that weakens very greatly its application to the present case. The two circumstances on which my judgment is chiefly made up in this case are wanting in that, that is to say, the agreement that the policy should be effected in the name, and for the benefit of the mortgagee, and the relation established in the policy between the payment of the loss and the interest of the mortgagee.

This difference, and many expressions in that case, lead me to believe that the opinions of the Judges who determined it would have been different, had the facts been of similar character to those that distinguished the case before the Court.

But I am bound to say that if I am mistaken in this, and the opinions of the Judges would have experienced no change, although the facts had corresponded with those of the present case, I should feel bound with every deference to the learned Judges in that case to say, that my mind not being convinced by their reasoning, or satisfied with their conclusions, I could not allow my judgment to be controlled by the decision they arrived at in *Grosvenor* v. *The Atlantic Fire Insurance Company*.

I have extended my remarks on the leading *American* cases cited on the argument, in consideration of

the great confidence with which the learned counsel for the defendants appeared to rely on them, and from the respect due to the Courts in which they were decided.

1864.

BRUSH v. ÆTNA INSURANCE CO

DODD J.* dissented.

DESBARRES J. concurred in the opinion of YOUNG C. J. and JOHNSTON E. J.

WILKINS J. The questions that have arisen in this case will, in effect, be decided by ascertaining the legal meaning of this policy. It is not necessary to inquire whether in any contingency *Ogilvie's* interest *as owner* was insured, but it is important to determine whether *Brush's* interest *as mortgagee* was designed to be protected; and, assuming that it was insured, whether he has taken the necessary steps to entitle him to recover. It may be, that this policy has a double aspect, and that its legal operation is, according to contingencies, to cover the respective interests of *Ogilvie* and of *Brush*; in other words, to protect *Brush* in respect of the debt due to him by *Ogilvie*, and to protect *Ogilvie*, as owner, in case when the building happened to be destroyed the debt referred to had been wholly or in part paid. But how, on legal principles, that second object could be accomplished under this policy, which provides, *without any qualification whatever*, that, in the event of a loss, the sum insured "shall be paid to *Brush*" substantially for his own benefit, and without any ulterior reference to *Ogilvie*, although this form of policy may be commonly used for the purpose of effecting insurance of the respective interests of an owner and of a mortgagee, might, as it strikes my mind, become a question not free from difficulty. The instrument contains no express contract to pay the loss to *Ogilvie*, and there are no words

* *Bliss J.* was absent.

1864.

BRUSH v. ÆTNA INSURANCE CO.

from which such contract could be implied, except language which is in terms, indeed, expressive of insurance of *John Ogilvie*, but which is nevertheless so restrained and qualified by other language as to be limited to an insurance of *Peter Brush*. (On this point see the case of *Farrow* v. *The Commonwealth Insurance Company*, 18 Pick. 53.) I consider the effect of the whole phraseology used to be an insurance of *Brush's* interest as a mortgagee; and therefore I thus read the policy:

"By this policy of insurance the *Ætna Fire Insur-*
"*ance Company*, in consideration of ten dollars to them
"paid by the assured hereinafter named, (and *Brush*
"is, as well as *Ogilvie*, thereinafter named, and *Brush*
"in fact, by his agent, handed the premium to the
"Company), the receipt, &c., do hereby insure against
"loss or damage by fire, to the amount of one thou-
"sand dollars, on the framed building, &c., *John Ogilvie*
"(*for the benefit of Peter Brush*)."

These last words are the only words I have ventured to introduce, and I have not hesitated to do so because a benefit to *Brush* is immediately afterwards expressed *in terms*, as follows: "the loss, if any, payable (within
"sixty days after proof) to the order of *Peter Brush*, if
"claimed, his interest being as mortgagee."

Relatively to the legal questions under review in this case, I cannot but regard *that* person as substantially insured by this policy, to whom the insurers have not only agreed to pay the money in case of loss, but whom they have recognised as having that particular interest which is expressed concerning him.

The case of *Grosvenor* v. *The Atlantic Fire Insurance Company of Brooklyn*, 17 N.Y. Rep., 391, was relied on at the argument by the defendants' counsel; but if we contrast that case with this, it will be perceived that it was because the *American* case wanted two circumstances which mark this, that the mortgagee's interest was therein held not to be covered by the policy. Those were, first, payment of the premium by the

mortgagee; secondly, an express statement in the instrument of the plaintiff's interest being that of a mortgagee. In the *New York* case, the policy afforded no evidence that the assurers recognized any *interest* of the plaintiff's assignor in the subject of the insurance, in respect of which the money, in case of loss, was to be paid to him. The word "mortgagee" added to the name of *Kellog* might have been vaguely descriptive, and used consistently with the ignorance of the insurers of his actual interest — used consistently with an inference, that he was designed by *McCarty*, the owner, as his *appointee* to receive the money for his (*McCarty's*) benefit, in the event of a loss. There was nothing in the policy which contradicted this. It was, therefore, under the circumstances of that case (in which, by the way, the whole Court did not concur), not unnaturally inferred that the insurers intended to carry out a designation by *McCarty* of the *mere hand* that he wished to receive the money, in case of loss, *for him*, whilst as they, in receiving the premium, and making the contract, *knew McCarty alone*, he was reasonably enough regarded by them *as the party actually insured*. Circumstances, however, of a very different character distinguish this case. *Brush* is not merely described as "*Peter Brush*, mortgagee"; but the insurers expressly stipulate to pay the loss to the order of *Peter Brush* (not inferentially for the benefit of *Ogilvie*, but) indisputably for his own benefit, as the sole and ultimate object of the payment. And what, I ask, is the declaration of *Brush's* recognized interest, in connection with the engagement to pay the loss to him, but a stipulation that such loss shall be so paid to him, because he is interested in the *corpus* of the insurance as a mortgagee of it? And what is that but an insurance of the interest of a mortgagee? If I am asked, Why, then, is *Ogilvie* named in the policy? I answer, Simply because he, under his personal covenant, happened to be bound to keep *Brush's*

1864.

BRUSH v. ÆTNA INSURANCE CO.

debt insured (and insured, as it appears from the mortgage, *in the mortgagee's name*), and because that circumstance substantially may be supposed to have been communicated to the insurers. In the *American* case, it does not appear that the insurers knew, otherwise than inferentially, before the trial, that before the execution of the policy the insured property had been mortgaged by *McCarty* to *Kellog*. In the case before us it is certain that the insurers, at the date of the policy, were aware "that *Brush* was interested in "the subject of the risk as a mortgagee," and, as *Ogilvie's* name is mentioned, it cannot be doubted that they knew it was as mortgagee of him. On the hypothesis that such was not the fact, how could the language noticing *Brush's* interest have found its way into the policy? On an opposite hypothesis, it would have sufficed to have said, "*the loss, if any, to* "*be paid to Peter Brush.*"

The Appeal Court of *New York* viewed the plaintiff's assignor (the mortgagee) as merely *the appointee* of the owner, (who was, as they thought, the party insured,) to receive the money which might become due him (the owner) from the insurers. Could they, possibly, under the language of this policy, have taken the same view of *Brush's* relation to *Ogilvie*, and to the premises insured? Is not, I ask, the supposition that *Brush* was intended to be a mere channel of conveying, in any event, the money, when paid, *to Ogilvie*, absolutely excluded by the language used, which directs it, *without qualification or limitation*, in the case of a loss, *to be paid to Brush?* If that supposition can be made, "*expressum facit cessare* "*tacitum*" is no longer a governing maxim in the law of *England*. Recollect, the *New York* Court likened the relation of *Kellog* (called mortgagee) to the insurers, and to *McCarty* (the owner), to a mere banking-house, in which the insurance money was to be paid, thence to be drawn out by the owner at his pleasure. Is this Court, I ask, at liberty to regard *Brush*, in

in case of payment of the loss to him, *as the mere banker, or depositary of the money for Ogilvie?* If *Brush's* mortgage debt from *Ogilvie* was unpaid (as we know it was unpaid) when the fire took place, *Brush* was entitled to receive the insurance money to *respond his personal interest as a mortgagee according to this contract;* if, when he shall receive the insurance money, any portion of his mortgage debt shall have been paid by or on account of *Ogilvie* since the loss, *Brush* will of course, on general principles of equity, irrespective of this contract, be, *pro tanto*, a trustee for *Ogilvie*. The learned *American* Judge notices the fact of payment of the premium by *McCarty*. In the case before us, it was indeed paid *from Ogilvie's funds* under his contract with *Brush;* but it does not appear that the *Ætna Company* knew this, and, therefore, as *Brush's* agent's was the hand that actually paid it, the effect of the payment in the construction of this contract is precisely the same, as if the premium had been paid out of *Brush's* own pocket. *Scott*, the agent of the Company, says he was applied to by *Ogilvie* to insure the premises, and that he had no interview with the plaintiff, and he would convey an impression that he knew *Ogilvie* alone in the transaction; but *that* is consistent with his recognizing on the face of the policy, an interest *which is not that of Ogilvie*, and not entirely consistent with the facts of his having received the premium from *Brush's* agent, and his having delivered the policy to that agent. The learned *American* Judge (*Harris*) after remarking that he agreed with the Court below "that there was nothing in the policy on which "the Court could adjudge that in legal effect it was "a contract *insuring the interest of the mortgagee as such*, "except in the provision which declares that the loss, "if any, which occurs under the contract insuring the "mortgagor's interest shall be payable to the mort-"gagee"; went on to observe, as the very groundwork of his judgment, "that that provision merely "designates a person to whom such loss is to be paid,

1864.

BRUSH v. ÆTNA INSURANCE CO.

"and shows that he is a person who *may have* an "interest in its being so paid." These words are to my mind very striking and significant. They appear to me to suggest an inevitable inference, that if the language in the case before him had been sufficient (as in our case the language unquestionably is) to indicate a person having an acknowledged subsisting interest in the insurance money being paid to him, he would have regarded *that* person as the insured party. In this view, the opinion of *Harris* J. is, inferentially, a judgment favorable to this plaintiff. The ground of his decision appears to have been the absence from the policy before him of qualifying language which occurs in this; language, the insertion of which alone could vary the legal effect of a contract, which, but for that insertion would have been, as I concede this would, in such a case have been, *a contract of insurance with the owner alone.* This is plainly the *rationale* of the *New York* case, and beyond this it does not decide anything that bears on the subject of our present inquiry. Whatever other meaning then may be attributable to the words, I, for the purposes of our present inquiry, regard the phrases "*the assured*," and "*the "said assured*," and the pronoun "*his*" occurring in this policy as indicating *Brush;* and I consider him also as a person insured in the sense of the phrase "*all persons insured*," which is used in the eleventh condition subjoined to the policy. In this view of the case, and regarding *Brush*, and not *Ogilvie*, as the real contracting party, there is substantially only one point necessary for me to consider under the pleadings, and that is, "*whether proof as required by the policy was given "by Brush.*" There is, indeed, a plea "that no claim "by him was made within sixty days," but this seems to me to have no foundation in the terms of the contract as rightly interpreted. The phrase has manifest reference to the time of payment, and not to the time of claim to be made by *Brush*, relatively to the time of loss.

Adverting, then, to the only plea on which defendants could rely, and assuming for the present that *Brush* was the party who was bound to give the proofs, let us see how the question stands on the evidence respecting the plea, which alleges that they were not duly given by him. The company's agent, on receiving from *Brush's* agent, or solicitor, the proofs in evidence, not having objected any defect in *them*, which, if stated and existing, might have been supplied, but having stated "that the documents received were no proof at all, but *what he "required was proof from Ogilvie,"* and not having objected to the certificate, which was one of them, that it was not the certificate of a magistrate or notary public nearest to the fire, (even supposing that under the plea in question he could have insisted on that objection at the trial,) I am of opinion that we must regard the evidence as shewing a complete performance by the assured of all that was required of him by the eleventh condition. But, within the meaning of that condition, and of this policy, was *Brush* the assured who was bound to furnish the proofs? On this point my mind long wavered, and when at last it settled into the conclusion which now governs it, that conclusion was influenced by the views already expressed, and in connection with them, by the following considerations. At one time it occurred to me as reasonable that the Company should have designed to protect itself by reserving a right to demand from *Ogilvie*, who, as occupant, would be thought most likely to know the truth, a statement on oath of all circumstances connected with the fire; but, then, I reflected also, that if the policy had been one which, in terms, *without naming Ogilvie*, had insured *Brush as mortgagee*, the insurers could by the terms of their printed conditions have obtained no more information from *Brush*, than he has actually given in this case; that is, information founded to a limited extent, if at all, on his own knowledge. Such, obviously, in a great

1864.

BRUSH v. ÆTNA INSURANCE CO.

majority of cases must be the nature of the proofs furnished by a mortgagee.

Again, states of facts that are within the range of contingencies likely to have been in the contemplation of the *insurers*, may be supposed to have marked this case, which would have made it *for their interest* that the mortgagee, under a policy, framed precisely as this is, should be regarded as the insured. Suppose, after notice of the fire, that they had grounds to suspect, though they could not prove, that *Brush* had, before the calamity, secretly assigned his mortgage, and was colluding with his assignee, for the protection of the latter. In that case, the company, treating *Brush* as the assured, would have been, on obtaining proof of the assignment, exempt from all liability, and, to protect themselves against his claim, would have only to avail themselves of condition eleven, and require him to declare on oath what was his interest at the time of the fire. Again, assume that this policy in its legal effect covers the interests of the owner and of the mortgagee. On that assumption, if, at the time of the fire, the mortgagee's debt were unpaid, he was the insured, primarily, at least, protected by the policy; and he was the person who, within the meaning of the eleventh condition, primarily "*sustained loss or damage by the fire*," and would, therefore, be the person whose duty it was to furnish the proofs. So on the other hand, if at the time of the loss, the mortgagee's debt was fully paid, the owner would be he who suffered by the fire, and would be bound to give the proofs. Again, suppose the building burnt in this case to be the only security of the mortgagee, and it to be worth one thousand dollars and no more, and the rock on which it stood worth nothing, and *Ogilvie* insolvent: in such a case, *he* would have no interest at stake, would sustain no loss, and therefore would feel no solicitude. *Brush*, on the other hand, if aware of the fire, and enabled to be present at it, looking to his obligations under

printed condition ten, would feel that it was for his interest "*to use all possible diligence in saving and preserving the property insured*," and would therefore, it may be assumed, make efforts to that end, which might save the building. *Ogilvie*, however, feeling no interest, would probably fold his arms and regard with indifference the ravages of the fire. So that I think we are, on the whole, not likely to prejudice this company in their general transactions by so construing these conditions, as to consider in the case before us, *that* party bound to perform them, who has primarily and directly sustained damage by the fire insured against.

That this action was rightly brought in *Brush's* name cannot, in any view of the case, be questioned. The whole chapter which contains the passage cited at the argument from *Addison on Contracts* shows this; and abstracts of certain *United States* cases which we find in text writers are in entire accordance with common law principles, that of themselves would be decisive. For a full recognition of these last as entirely supporting *Brush's* right to sue, see *Farrow* v. *The Commonwealth Insurance Company*, 18 Pick. 53.

Angell on Fire and Life Insurance, sec. 60, thus notices the effect of an *American* decision, reported in 16 *Shep.* (*Maine Rep.*) 337. "If a mortgagor procures insurance in his own name, but with a stipulation that "the amount of the loss, if any, shall be paid to the "mortgagee, a suit on the policy may be maintained "in the name of the mortgagee." It is added, "the "fact of bringing such suit ratifies the act of procuring insurance for his benefit."

In the case before this Court, ratification, indeed, would scarcely be necessary to give validity to the contract as respects *Brush*, for so far as the defendants' company knew, when the policy was executed, the consideration for their promise moved from *Brush*, who, by his agent *Whitley*, paid the premium to *Scott*.

"It seems," *Parsons* writes (511), "that a mere order

1864.

BRUSH v. ÆTNA INSURANCE CO.

"by mortgagor indorsed on the policy to pay to mort-
"gagee, and assented to by the insurers, will enable
"the mortgagee to sue in his own name."

In my judgment, *Brush's* interest as a mortgagee of *Ogilvie*, in the building destroyed by fire, which existed at the time of the contract and at the time of the loss, was intended to be insured, and was insured by this policy. Whether the then existing or any future contingent interest of *Ogilvie* in that building was also covered by the policy, is a question on which I am not called on to give, and I do not express any opinion.

Rule discharged.

Attorney for plaintiff, *Coombes*.

Attorney for defendant, *W. Sutherland*, Q. C.

NOTE.—In this case the defendants pleaded, among other things, that the building insured was wilfully set fire to by *Ogilvie*. The various issues raised by the pleadings, were put to the jury in the form of questions, and they distinctly negatived the charge of wilful and fraudulent burning by *Ogilvie*.

1864.

GRANT *versus* JOHNSON ET AL.

December 6.

The plaintiff, by agreement under seal, contracted to serve the testator in the business of bookseller and stationer, as he should direct, for a term of three years, only two of which had expired at testator's death. It was also agreed that testator should pay the plaintiff in consideration of such services, a fixed yearly salary; but no mention was made in the agreement of the personal representative of either party, nor any provision made therein in case of the death of either party before the expiration of the term. The testator, by his will, directed his executors (the defendants), on his decease, to dismiss the plaintiff, which they accordingly did. Held, that the agreement was a mere personal contract, determinable by the death of either party, and that no action could be maintained against the executors by the plaintiff for his dismissal, nor for the insertion in the will by the testator of the clause directing it.

DEMURRER to the declaration, argued in *Trinity* Term last, before *Young* C. J., *Dodd*, *DesBarres*, and *Wilkins* JJ., by *J. McCully*, Q. C., for plaintiff, and the *Solicitor General* for defendants.

The grounds of demurrer were, first, that the declaration did not disclose any cause of action against the defendants, inasmuch as they were not, as executors of their testator, liable on the contract set forth; second, that the contract was of that nature that the liability of either party terminated by the death of the other; third, that the contract set out did not show any obligation on the part of the testator or his executors, to keep the plaintiff in employment during the three years therein mentioned.

The substance of the declaration is fully set out in the judgment of his Lordship the *Chief Justice*.

YOUNG C. J. This is a demurrer to the plaintiff's declaration containing three counts, being, in substance, as follows:

In the first, he alleges that *Murdoch McPherson*, the testator, by an instrument under seal, in consideration that the plaintiff had agreed to enter into his service, and diligently to serve him for three years in the business of bookseller and stationer as the testator should direct, and to do other things connected therewith, as set out in the count, he, the testator, would pay the plaintiff in consideration of such services, the yearly wages or salary of one hundred and fifty pounds; that the plaintiff performed such services for nearly two years, when the testator

1864.

GRANT v. JOHNSTON et al.

died, leaving the defendants his executors; that the plaintiff was ready and willing to continue his services for the residue of the three years under the agreement, but the defendants refused to permit him to continue the same, and had given him notice to that effect.

In the second count, the plaintiff sets out the material parts of the testator's will, the proving thereof by the defendants, and the death of the testator, and alleges that the defendants, "without any reasonable "grounds or cause, afterwards, to wit, on the 17th "day of *July*, 1863, in order to carry out the direction "of the said *Murdoch McPherson*, discharged and dis- "missed the plaintiff, and he hath from the date of "such dismissal up to the commencement of this "suit, and *without any complaint, or cause of complaint, "given on his part*, by the act and direction of the said "*Murdoch McPherson*, in his lifetime, so prepared to "take effect at his death, been dismissed;" the direction of the testator, as set out in the count, being as follows: "And, whereas I have now ascertained "that the annual profits of said business will not "fairly afford the payment of the salary at present "given by me to Mr. *W. Grant* for managing the same, "and the said salary is now wholly paid out of my "private funds, it is my wish and desire, and I do "hereby direct and require my said trustee, *George "W. Johnson*, immediately after my decease, to termi- "nate the engagement of the said *William Grant*, for "the reasons aforesaid, and for other causes not now "necessary to mention, but which can hereafter be "given, if required."

In the third count, the plaintiff complains that the testator, having made such agreement, wrongfully prepared and executed such will and gave the foregoing direction therein, which the defendants obeyed, and discharged the plaintiff, refusing to allow him to fulfil and complete his term of service as he had a right to do.

The argument of this case raised, first of all, the question, under what circumstances, and to what extent, executors are liable for the contracts of their testator. The general rule on this head is well understood, and, in the case of debts and other ordinary obligations, is of familiar application. The executor to the extent of the assets in his hands stands in the place of his testator, and the administrator in the place of his intestate. In contracts for work and labor, and for personal services, other considerations often come into play, and nice distinctions will sometimes arise. It would often be a great injustice to the estate of a contractor, and to the party with whom the contract was made, if the executor were not at liberty, and were not compellable, too, to complete the contract. It may be difficult to lay down a universal rule; but common sense and reason show that a rule of pretty large application must exist.

In *Marshall* v. *Broadhurst*, 1 Cr. & Jer., 403, it was accordingly held that executors, as such, might recover the value of materials belonging to their testator, which they had worked up to complete a contract made by him with the defendant. And in *Corner* v. *Shew*, 3 Mees. & Wels., 353, Lord *Abinger* asked, "Supposing a testator, in his lifetime, to have contracted with a builder to build a house, and to have "died before it was completed, and the builder to "have completed the contract after the testator's "death; could he not sue the executor, as executor, for "the work done in his time, so as to charge the assets "of the testator?" And the defendant's counsel replied that he could, upon a special count stating the facts, or so much of them as to show a contract with the testator, or that the work was done at his request.

The liability of the executor to fulfil a contract of the testator after his death depends upon the nature of the contract. If the contract be for the writing of a book, the modelling of a statue, the conduct of a cause by a solicitor or attorney, or any other work

1864.

GRANT v. JOHNSTON et al.

dependent on the personal talents and capacity of the contractor, there of necessity the obligation of the contract ceases with his life, just as it would have ceased with any hopeless infirmity overtaking him, and creating an impossibility by the act of God.

In *Wentworth et al.* v. *Cook, Adminstrator*, 10 Ad. & El., 42, the declaration stated an agreement between the plaintiffs and defendant's intestate, that plaintiffs should supply to intestate a certain quantity of slate-block monthly, to be delivered in *London*, at a specified price; that they should also supply to him immediately from one hundred to one hundred and thirty tons of blocks at the same price, but of different dimensions, and any further quantity, monthly, that the intestate might require. The intestate died before the period to which the agreement extended, and the question was, whether his administrator was bound to receive the slate. This he resisted on the ground that it was a personal contract; and that the intestate was required not merely to pay, but to exercise a discretion as to the quantity required. But the Court held that there was nothing in the defence. It was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for. Per *Littledale* J.; "No doubt the personal representatives "are bound, although not named; and they are "bound to pay damages out of the assets, if they "do not take the contract upon themselves." Per *Coleridge* J.: "If the contract had been merely to "supply what the intestate might require, a different "question would have arisen."

In *Siboni* v. *Kirkman*, 1 M. & W. 423, *Parke* B. lays down the rule, thus: "Executors are responsible "on all the contracts of the testator broken in his "lifetime, and there is only one exception with regard "to their liability for contracts broken after his death; "that is this, that they are not liable in those cases "where personal skill or taste is required." And in the case I have already cited from 10 Ad. & Ell.,

Patteson J. referred to a case at *Liverpool*, where a contract to build a light-house was held to be personal, on the ground of its being a matter of personal skill and science.

I cannot help thinking, however, that the rule as so stated is rather too narrow, and that it is better stated in the old case of *Hyde* v. *The Dean and Canons of Windsor*, Cro. Eliz. 552, where it is said, "that a "covenant lies against an executor in every case, "although he be not named; unless it be such a "covenant as is to be performed by the person of the "testator, which the executor cannot perform."

So a testator may make his estate liable by the form of his contract, as in *Powell* v. *Graham*, 7 Taunt. 580, where, in the eighth count of the plaintiff's declaration, she averred that, in the testator's lifetime, in consideration that she was in his service, and would be therein at the time of his decease, the testator promised her that his executor should, in a reasonable time after the testator's decease, pay, as such his executor, a certain sum besides her wages, and upon proper averments suited to this promise, *Gibbs* C. J. held that the executor was liable without any promise on his part, and could only defend himself by proving want of assets.

So also in *Alden* v. *Kemerley*, 7 L. T. Rep. N. S. 312, decided in *November*, 1862, where considerable repairs had become necessary to certain houses held by the testator as lessee, and dilapidations had taken place in his lifetime, Vice Chancellor *Wood* held that the trustees and executors were bound to make such repairs, in accordance with the covenants in the leases, and the amounts were to be defrayed out of the general personal estate of the testator.

The cases arising out of contracts of apprenticeship were pressed upon us on both sides at the argument; but these apply to the present case only by a remote analogy, and appear to be uncertain. The case in 1 *Lev.* 177, is denied, and that in 1 *Salk.* 66.

1864.

GRANT v. JOHNSTON et al.

was overlooked—at least it is not mentioned in the late case of *Baxter* v. *Burfield*, 2 Str. 1266, where the Court said: "The binding was to the *man*, to learn "*his* art, and serve *him*, without any mention of ex- "ecutors. And as the words are confined, so is the "nature of the contract; for it is fiduciary, and "the lad is bound from a personal knowledge of the "integrity and ability of the master." In the recent case of *Cooper* v. *Simmons*, on appeal to the Court of Exchequer, 5 L. T. Rep. N. S. 712, where an apprentice was bound to a lockmaker, his executors and administrators, such executors or administrators carrying on the same trade or business, in the same town of *Wolverhampton*, the Court held that, the indenture being in this form, the apprentice was bound to the executors as much as to the testator. "Were "the executors left out of the indenture altogether, "the case might be different." "Generally speak- "ing," said *Martin* B., "an apprentice is bound to "the master only, and in many cases this is the pro- "per and necessary arrangement, as the business may "be one which it would be impossible to have taught "by an executor; that is, however, not so here, and it "is not improbable such may have been in the con- "templation of the parties when the indenture was "entered into, and provision made for it to be con- "tinued in the same way and in the same town."

Let us apply these principles to the case before us. The plaintiff, by the agreement under seal, was to serve the testator for three years, only two of which had expired at his death, in the business of bookseller and stationer, as the testator should direct; and it was further agreed that the testator would pay the plaintiff, in consideration of such services, the yearly wages or salary of one hundred and fifty pounds. No mention is made of the personal representative on either side, nor is there any provision for the death of either.

It was argued that the business of bookseller or

stationer required no extraordinary skill or taste; that the plaintiff was as much bound to serve the defendants, if they chose to carry on the business, as if he had contracted to bind so many books; and, therefore, as he was willing to serve, that they were bound to pay him. Are the cases, however, analogous? A contract to bind so many books, unless they were to be done with uncommon taste and elegance, implying a peculiar aptitude in the workman, would probably have bound the personal representatives both of the employer and the employed, just as in the case of the slate-blocks, or of the building of a house. But here, suppose the plaintiff had died and his personal services were no longer possible, would the law then have made his estate liable in damages? I think not. Must not the obligation then be mutual. The testator has died, and he can no longer personally direct the plaintiff who was to obey his reasonable orders, not those of his executors or administrators, while the executors, as appears from many cases, are under no obligation to carry on the trade and could do so only at eminent hazard to themselves. 1 *M. & Wels.* 422.

Lord *Eldon* held, 10 *Ves.* 121, that an executor ordered by the will to carry on a trade for the benefit of a child, makes himself personally liable in so doing.

I have not touched the objection, that the testator, having agreed only to pay the wages of the plaintiff, in consideration of his services, without covenanting to employ him, no implied covenant arises, nor any obligation to pay damages in respect of services tendered, but not performed. The cases cited from 5 *Q. B.*, 671, 685, to which those in 9 *Ad. & El.*, 693, 5 *Q. B.*, 175, and *Cro. Jac.*, 417, may be added, go a long way in support of this argument; but it is not necessary, in the view I have taken, to examine them.

It remains only to consider the second and third counts, complaining of the terms in which the testator made his last will, and the directions given therein to his executors, or one of them, after the contract

1864.

GRANT v. JOHNSTON et al.

entered into with the plaintiff. I have looked at all the cases cited, and at several others on this head, and have found nothing in them to sustain either count. If the law had made the contract with the plaintiff binding on the estate of the testator, nothing he could have put in his will would have affected the plaintiff. In this view, therefore, the will has done him no injury, and, in the nature of things, could have done him none. The cases cited from *Fry on Specific Performance*, 60, note *p.*, do not apply; neither does the case I have already cited from *Cro. Jac.*, 417. There a will was made in contravention of the testator's agreement, and the making of the will was the *gravamen;* here it is the dismissal of the plaintiff, which no will of the testator could excuse, if the plaintiff had a right independent of it. I think that the law did not give him that right; he omitted to guard himself from the consequences of the testator's decease within the three years; and though it is a hard case, in which we would be disposed to relieve him, if we could, we are all of opinion that the defendants must have judgment on the demurrers.

DODD J.* I entirely agree with the *Chief Justice*, that this is a personal contract, and ceased at the death of the testator. In the case of *Cutter* v. *Powell*, 6 T. R., 323, it was said in argument by the counsel for defendant, that in the common case of service, that if a servant, who is hired for a year, die in the middle of it, his executor may recover part of his wages in proportion to the time of his service; but if the servant agreed to receive a larger sum than the ordinary rate of wages, on the express condition of serving the whole year, his executor would not be entitled to any part of said wages in the event of the servant dying before the expiration of the year; and that principle was affirmed by the judgment of the Court. A note

* *Johnston* E. J. having been concerned in the cause when at the Bar, gave no opinion. *Bliss* J. was absent.

to that case says the old law was different. *Lawrence*, J., in giving his opinion, refers to the case of *The Countess of Plymouth* v. *Throgmorton*, 1 Salkeld, 65, which he says is a strong case, and that "there debt "brought upon a writing, by which defendant's tes- "tator had appointed the plaintiff's testator to receive "his rents, and promised to pay him one hundred "pounds *per annum* for his services; the plaintiff "showed that the defendant's testator died three "quarters of a year after, during which time he "served him, and he demanded seventy-five pounds "for three quarters; after judgment for the plaintiff "in the Common Pleas, the defendant brought a writ "of error, and it was argued that, without a full "year's service, nothing could be due, for that it was "in the nature of a condition precedent; that it "being one consideration and one debt, it could not "be divided, and this Court were of that opinion, "and reversed the judgment." The case will also be found in 3 *Mod. Reports*, 153.

Addison on Contracts, 743, refers to the above cases, and gives them as authority for saying: "When the "contract is for a year's service at wages, payable "yearly, the contract is entire and *indivisible;* and the "servant or workman cannot recover from the em- "ployer wages *pro rata*, unless the contract has been "rescinded or abandoned, or has been put an end to "by the exercise of a power of defeasance vested in "the parties; so that if the servant dies in the middle "of the year, his personal representatives will not "be entitled to recover a proportionate part of the "salary in respect of the time he actually served."

DESBARRES and WILKINS JJ. concurred.

Judgment for defendants.

Attorney for plaintiff, *H. Blanchard*, Q. C.

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

1864.

December 31.

SLAYTER *versus* JOHNSTON ET AL.

Where a mortgagor, by two distinct transactions, has mortgaged two properties, one of which on sale under foreclosure has not realized the sum for which it was mortgaged, the mortgagor will be allowed to redeem the other property without payment of the balance due on the first mortgage.

Where there is a discrepancy between the rules of a building society and the tables annexed thereto, and referred to in them, the tables will govern, and a mortgagor of the society will be allowed to redeem on payment of the sum indicated by the tables.

EQUITABLE suit for the redemption of a mortgage, heard before *Young* C. J., *DesBarres*, and *Wilkins* JJ., at an Equity Sittings, in *January* last, argued by *Shannon*, Q. C., *James Thomson*, and *J. W. Ritchie*, Q. C., for plaintiff, and *J. W. Johnston, Junior*, *J. R. Smith*, Q. C., and the *Attorney General* (*J. W. Johnston*), for defendants.

An argument was also had during the present Term, in which the same counsel (except Hon. *J. W. Johnston*, now Judge in Equity) were engaged, as to the effect of the bankruptcy of *Billing* in the case. The plaintiff was the assignee of *Billing*, who had been declared a bankrupt in *England*, and defendants contended that plaintiff had no right to bring the action.

The Court now gave judgment.

YOUNG C. J. This is an equitable suit, brought by the plaintiff as the *English* assignee in bankruptcy of *Edward Billing, Junior*, to redeem a mortgage made by said *Billing* to the defendants, as trustees of the *Nova Scotia* Permanent Benefit Building Society, on which they claim one thousand nine hundred and sixty-seven pounds and upwards to be due, exceeding by a sum of between three and four hundred pounds what the plaintiff is willing to allow; and the right to this excess is the principal question to be determined. The case was heard before my brothers *DesBarres* and *Wilkins*, and myself, on the 22nd, 23rd, 25th, and 26th days of *January* last, under the 70th section of the Equity Act, then in force, on the writ and pleas, and twelve affidavits, made at various periods, and considered by agreement as evidence in the cause. Some of the statements in these affidavits are contradictory of each other, but the leading facts may be said to be

1864.

SLAYTER v. JOHNSTON et al.

undisputed on either side, and our first object, therefore, is to obtain a clear and succinct view of the circumstances as they really stand.

On the 12th *July*, 1858, Mr. *Billing* subscribed for thirty-six shares, each of sixty pounds, in the Building Society, for which he gave them a bonus of five per cent., equal to one hundred and eight pounds, and for the amount of these shares, making two thousand one hundred and sixty pounds, he executed the mortgage in this suit, conveying the lot and dwelling house subsequently occupied by him and now by Mr. *McCully*, in *Brunswick* Street, and binding him to pay twenty-one pounds twelve shillings a month, or twelve shillings per share, according to the rules of the Society for a period of one hundred and thirty-nine months. The payments were regularly made from the date of the mortgage to the first *Monday* in *June*, 1862, making in all one thousand and thirty-six pounds sixteen shillings, and the balance then claimed by the Society was one thousand five hundred and sixty-one pounds thirteen shillings, or thereabouts, according to their tables, less a sum available as profits on said shares, as evidenced by a memorandum in writing. At this time Mr. *Billing*, having previously become embarrassed in his circumstances, was declared a bankrupt in *England*, and the monthly payments went in arrear. Certain fines were thus incurred according to the rules, amounting in *May*, 1863, to twenty-eight pounds six shillings. The arrears, yearly dues, fines, and insurance amounted in *February*, 1863, to two hundred and four pounds twelve shillings, in discharge of which sum the plaintiff paid into Court two hundred and five pounds, and claims to be liable for nothing more than the amount in the tables, being one thousand four hundred and twenty pounds ten shillings, to *April*, 1863, that is thirty-nine pounds nine shillings and two pence on each share, to the end of the fifth year, as stated in the late Mr. *Burton's* affidavit, No. 5. There is no doubt that a settlement

1864.

SLAYTER v. JOHNSTON et al.

would have been had upon this equitable footing, and this suit would never have been heard of, had it not been for a new claim that intervened.

Mr. *McCully* had bought the property from the *Nova Scotia* assignee, and the sale was confirmed by the plaintiff, but before any release of the mortgage in this suit, or any transference of Mr. *Billing's* thirty-six shares to Mr. *McCully* had been assented to by the defendants, they had foreclosed another mortgage made to them by *Billing* in 1860 for a distinct sum on property in *Granville* street, the two mortgages being entirely independent of each other, and the latter property, as appears by Mr. *Burton's* affidavits, having been bought in for the Society at two thousand pounds. A loss, after charging the costs of foreclosure, accrued to the sum of three hundred and fifty-nine pounds nineteen shillings and nine pence, which sum the defendants insist they are entitled to have, before they can be compelled to redeem the present mortgage.

This claim they maintain upon two grounds: first, they say that, by the rule in equity, the plaintiff, standing in the shoes of *Billing*, must make good the deficiency in one security before he can redeem the other; and, secondly, they rely upon their sixth bye-law, and upon the terms of the mortgage, giving them the power, as they allege, of demanding the whole payments to the end of the one hundred and thirty-ninth month, in advance, without allowance either for discount or profit, amounting to one thousand nine hundred and sixty-seven pounds, as set out in the pleadings; and thus, by the exercise of a legal, though it may be an extreme right, protecting themselves from loss on the *Granville* street mortgage.

The first of these contentions brings under our notice a rule in equity of extensive application, and which has not been agitated before, so far as my experience goes, in this Province. I have therefore looked into it with much curiosity and interest, and,

in common with the counsel at the Bar, must confess my surprise at the extent to which it has been carried in *England*. Here, we are dealing with the assignee of the mortgagor; but if the rule is binding, it will operate equally on a purchase of the equity of redemption without notice. Here, also, the mortgagees have proceeded to a foreclosure and sale of the deficient security; but having offered to re-convey the premises, their counsel insist that the equity is thereby opened, or if lost, that it was thereby revived, and that the right of redeeming the outstanding mortgage is still clogged with the condition of paying the full sum that is due upon both.

In the case of *Ireson* v. *Denn*, 2 Cox, 425, decided in 1796, the plaintiff was the purchaser of the equity of redemption—that is, he had bought the property from the mortgagor subject to the mortgage—a case of every day occurrence in this Province—and brought his bill against the mortgagee to redeem. Defendant by his answer, stated a subsequent mortgage made to him by the same mortgagor of distinct premises and for a distinct debt; and insisted that the plaintiff had no right to redeem the first mortgage without redeeming the second. And the *Master of the Rolls* said he did not know why such a rule was ever laid down, but that it had been decided by many cases, (cases to be found in all the books, and several of which were cited at the argument), that a mortgagee of two distinct estates upon distinct transactions from the same mortgagor, was entitled to hold both, even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage, until payment of the whole money due on both mortgages.

In 1 *Hilyard on Mortgages*, 202, it is said that the rule in *Ireson* v. *Denn* has been severely criticised, and somewhat modified in recent cases, which, however, leave the main features of the rule intact. "For it is a known rule in equity," says *Fonblanque*,

1864.

SLAYTER v. JOHNSTON et al.

(2 Eq. 273,) "that where there is an estate subsisting "at law, equity will not destroy it, unless the party "redeeming will satisfy all equitable demands out of "the estate; and, therefore, if there be two mortgages, "and one be defective, the Court will not suffer one "to be redeemed without the other." "The ground "of this doctrine," says *Story* (Eq. Jur., sec. 1023, n. 5), "is, that he who seeks equity must do equity; "and a Court of Equity will not assist any person "in depriving a mortgagee of any security, which "he would have against the mortgagor."

It appears, therefore, that this rule, though its wisdom has been often questioned, and it has been repudiated by some of the *American* Courts and Legislatures (1 *Hilyard*, 205; 2 *Greenleaf's Cruise's Digest*, 106, *n.*), is firmly established in *England*, insomuch that in a case decided so recently as 1861, that of *Selby* v. *Pomfret*, 1 John. & Hem., 336, the defendants holding a mortgage, which was a deficient security, and having taken a second mortgage, and sold under a power of sale therein, and the proceeds leaving a balance beyond the amount due on that mortgage, were held entitled to apply that balance to make up the deficiency on their first mortgage. In this case, too, the Court recognized the doctrine in *Watts* v. *Symes*, 1 DeGex, McNaughton & Gordon's Rep., 240, that the right of a mortgagee holding two securities to have both redeemed together, exists equally in a foreclosure, as in a redemption suit. "You "must redeem entirely," said Lord *Cranworth*, "or "not at all."

It is certainly a very interesting and a very grave enquiry, how far the rule is in force in this Province, and to what extent it is modified by our Registry Act. The rule proceeds on a different principle from tacking, as it is technically called; that is, the uniting of a first and third mortgage to the exclusion of an intermediate mortgagee; although the circumstance that the union of two or more securities is common to

both, has caused it to be treated in argument, and elsewhere, as a branch of that doctrine. The distinction is pointed out both by *Story* (Eq. Jur., sec. 1010, *n.*), and in *Fisher on Mortgages*, 388. "Tacking, "properly so called, could not have existed," says Lord *Hardwicke*, 2 *Ves., Senior*, 574, "in any other "country but *England*" (and, I may add, in countries like *England*), "where the jurisdiction of law and "equity is administered in different Courts, and "creates different kinds of rights in estates;" that is, where the legal title is allowed to have superior force and strength to the equitable. The rule, then, would have ceased in this Province, by the mere fusion of law and equity, in 1855, had we not destroyed it in 1851 by the *Revised Statutes*, chapter 113, section 18, now section 20.

But this section can have no effect, as I think, upon the sort of tacking we are now considering, and which was obviously not in the contemplation of the Legislature. It is affected by the ninth section of the *Registry Act*, where the lands mortgaged lie in different counties. How far it is affected by the nineteenth section, or by the doctrines of implied or express notice, are points of more difficult and subtle enquiry, which I throw out for the consideration of the Legislature; but as they are not directly in issue here I forbear from expressing what would be only an extrajudicial opinion. One thing is certain, that the sooner the rule is determined and known, the better will it be for all parties. Thousands of titles have been searched, and numerous securities have been taken without reference to such a rule, and no class of transactions will be more affected by it than those of the defendants themselves. It is notorious that in many cases the same individual has borrowed from the Society distinct sums on distinct properties, and if they have the power they now claim of using the mortgages as guarantees for each other, the rights of the mortgagors in dealing with

1864.

SLAYTER v. JOHNSTON et al.

their property, and of purchasers from them, will be trammeled in a way of which hitherto they have had no conception. This inconvenience must have occurred in the case of kindred Societies elsewhere, for it is provided for, I see, in the 90th bye-law of the Provincial Building Society, lately enrolled here, to whose rules, but not to this rule, our attention was called at the argument. Their 90th rule runs thus: "Shares "advanced on the security of real estate, shall be con- "sidered as advanced on that individual estate only; "nor shall any other estate held by the Society be "liable for any advance, save and except the advance "secured on that individual property."

I have said that these considerations do not come directly into issue in this case, though they were largely pressed upon us by counsel; for it is impossible to extend the rule to a case where a deficient security has been foreclosed, and still more where a sale has been had agreeably to our practice, and the premises conveyed to and let by the purchaser. In *Jones* v. *Smith*, 2 Ves. 376, the *Master of the Rolls* said he understood the doctrine to be, that if two separate estates were mortgaged, that is, the legal estate absolutely, and at law irredeemably, conveyed, the Court will not interpose in favor of the redemption of the one without the redemption of the other. It must be, therefore, understood says Mr. *Coote*, that with respect to third persons, it is necessary that the mortgagee should have the legal estate, to entitle himself to the benefit before referred to. Now, the legal estate here spoken of is the estate under the mortgage, not a new estate under a deed from the master. In 2 *Hilyard on Mortgages*, 125, it is said that a decree of foreclosure extinguishes the mortgage lien, though merely enrolled and not docketed; and after satisfaction of the mortgage by a sale of the land, the decree ceases to be a lien thereon. We were told that the foreclosure might be opened, which would be a strange thing, at the instance of the mortgagee, and a very startling

thing if it could be done at the instance of the mortgagor in this country after a sale. What equities might apply if a mortgagee, having bought at an inadequate or a nominal price, were to proceed on the covenant or bond of the mortgagor for the real or apparent deficiency, I need not at present enquire. That is not this case, and the case of *Tooke* v. *Hartley*, 2 Bro. C. C. 125, does not apply, and is too confused to be an authority. If the Building Society were offered a profit of one thousand pounds on the *Granville* street property, shall it be said, that the mortgagor, after foreclosure and sale, has a right to participate? And if he have no such right, how is it possible to open up the equity to his disadvantage, and independently of his consent. It is manifest that the first ground relied on by the defendants cannot be upheld, and that they must prevail, if at all, upon the second and more material one.

Building Societies are constituted in *England* under the Imperial Act 6 and 7, *W.* 4, chapter 32, and in this Province under the Act 12 *Vic.*, chapter 42, enabling such societies to make "proper and whole-"some rules and regulations for the government and "guidance of the same," such rules to be approved of by the Governor in Council, and when so approved of and certified, "to be binding on the several mem-"bers and officers of the society, and all persons "having interest therein." By the third section of the Act, it shall be lawful for the society to describe the forms of conveyance, mortgage, bond, or other instrument necessary for carrying the purposes of the society into execution, and which shall be specified and set forth in a schedule to be annexed to the rules. The Provincial Act is closely borrowed from the Imperial, and the rules of the Society we are now dealing with have been framed after the *English* models, with some material differences to be hereafter noticed.

In the mother country, a great variety of opinion prevail as to the value and use of these Socie-

1864.

SLAYTER v. JOHNSTON et al.

ties. The treatises handed me by the defendants' solicitor all speak of them in terms of eulogy; and a writer in the *Law Times*, of the 5th *March* last, does not hesitate to term the Act of 6 and 7 *W.* 4, the *Magna Charta* of the industrious classes. Lord *Cranworth*, however, when Chancellor, held a very different opinion, and described the whole scheme as only "an elaborate contrivance for enabling persons having "large sums, for which they have no immediate want, "to lend them to others at a very high rate of inte-"rest;" while the Statute protects the mortgages they take from the operation of the laws, which, until 1853, were in force in the mother country, and are still in force in this Province, against usury. Which of these views ought to recommend itself to our judgment, it is not perhaps for us to say. The benefits of the Society were warmly defended, its alleged oppressions and shortcomings as warmly assailed, at the argument of this case. There was no want certainly, perhaps there was a little too much, of vehemence and ardor on both sides; but after all, the policy of maintaining these societies is a question for the community and the Legislature. We have to deal with the law as we find it, whatever our opinion may be of its justice or its wisdom.

That the case is difficult and complicated, no one can deny. At the close of a four days' argument, the counsel were as widely apart on the true meaning of the bye-laws as at the beginning; and the same fatality has occurred in the *English* cases. The principal of these are four in number: *Mosley* v. *Baker*, 6 Hare, 87, 27 L. & E., 512, 1 Hall & Twells, 301; *Seagrave* v. *Pope*, 1 DeG. McN. & G., 783, 15 L. & E., 477; *Flemming* v. *Self*, 3 DeG. McN. & G., 997, 27 L. & E., 491; and *Farmer* v. *Smith*, 4 Hur. & Nor., 196. In each of these cases the difficulty of dealing with the subject is recognized. In *Mosley* v. *Baker*, the *Lord Chancellor* contrasts two of the bye-laws, complaining of the fifty-eighth as inaccurate and obscure. In

Seagrave v. *Pope*, Lord *Truro* speaks of the articles on bye-laws as ambiguous and difficult to reconcile. "It may materially assist," he says, "in arriving at "the true construction, as well of the rules as of "the mortgage, to consider the Statute (6 and 7 "*W.* 4, chapter 32), the rules, and the mortgage in "connection. Unfortunately, each of them is very "inaccurately framed, with little attention to the "consistency of language in the different parts of "them; not always using the same words in the same "sense, nor considering the applicability and correct-"ness of the expressions in reference to the subject-"matter to which they refer." In *Farmer* v. *Smith*, Baron *Martin* declares that the state of things then existing had neither been contemplated nor provided for by the rule. It is remarkable, too, that in two of these cases the decisions of Judges so eminent as Sir *J. L. Knight Bruce* and Sir *W. P. Wood*, were reversed by the *Chancellor*. When it is added, that the sixth bye-law of this society is far more stringent against the borrower, and the power of the trustees far more extensive and dangerous, than in any other which I have found, either in *England* or *America;* and that it is impossible to reconcile it with the illustration and tables at the end, it will be seen that the difficulties felt in the *English* decisions are not diminished here.

These decisions, however, announce one cardinal rule, to which we entirely assent. Our business is not with the policy or reasonableness of the bye-laws, their inconveniences, or their absurdities. The mortgage referring in terms to the rules and regulations, and to be interpreted by them, constitutes the contract between the parties, and that contract binds them. The real question is, what is the meaning of the bye-laws. If the meaning be clear, it is the duty of the Court to give effect to it. If the meaning be obscure, we must get at the essence of the contract as we best may.

Now, I have already said that the plaintiff, seeking

1864.

SLAYTER v. JOHNSTON et al.

to redeem this mortgage, admits his liability for one thousand four hundred and twenty pounds ten shillings, in *May*, 1863, besides the two hundred and five pounds he paid into Court, and that these sums represented all that was due according to the tables to the end of the sixtieth month — the difference of three hundred pounds, or thereabouts, being claimed by the defendants for the payments in advance to the end of the one hundred and thirty-ninth month, allowing thereon neither profits nor discount.

The sixth bye-law was obviously taken from the fourteenth rule of the *Camberwell Society* in the note to 27 L. & E., 495.

The two were said by the late *Attorney General* to go hand in hand; but it will be found on comparing them, that there are material differences. By the first clause of the *Halifax* rule, "If any member of this "Society, having received an advance of money upon "any shares, and secured the repayment thereof upon "mortgage of premises, shall sell such premises, it "shall be lawful for the purchaser to take the same, "by the consent of the Board, chargeable with the "debt to the Society;" the words "by the consent of "the Board," not being in the *Camberwell* or *English* rule, so that the latter gives an absolute, the former only a conditional right to the mortgagor. By the *English* rule, "if a member desirous of discharging "his property from the debt shall do certain specified "things, the trustees shall release him, at the cost of "such member, from all future liability in respect of "the monies secured upon the premises he has sold." By the *Halifax* rule, the trustees shall so release him, "if they see no objection." But the most striking and essential difference is to come. By the *English* rule, "if a member shall be desirous of paying and "satisfying the security he has given, and shall give "notice of his desire, the directors shall within one "month thereafter, award to such member the same "proportion of profits, as is allowed on the withdrawal

"of unpurchased shares: and the directors shall "make a deduction of such profits and of the amount "of subscriptions paid in by such member, from the "full amount expressed to be secured in and by the "mortgage; and the directors are empowered to "receive the balance in one payment, or by such "instalments as the directors and members shall agree "upon." By the *Halifax* rule, "if a member who "shall have received his shares, or any portion of "them, shall be desirous of paying and satisfying the "security or securities which shall have been given "for the same, he shall be at liberty so to do, by pre-"payment to the directors of the subscriptions that "would thenceforth become due on the shares ad-"vanced on such property up to the end of the seventh "month in the twelfth year," (that is to the end of the one hundred and thirty-ninth month as claimed in this case,) "and shall be allowed on such payments "discount, at the discretion of the board; but the "board may, if expedient, settle any other terms, "according to the particular circumstances of the "case." Here, as will be perceived, there is no award-ing of profits, and a power reserved to the directors of demanding the whole payments in advance, allowing discount thereon at their discretion.

I have said that this rule operates against the bor-rower to an extent to be found in the rules of no other society, and I have not said so without due inquiry. In the *English* treatises I have already spoken of, by *Stone*, *Thomson*, *Scratchley*, and *Pratt*, are various forms of redemption clauses, differing from each other, but all of them more favorable to the borrower than this *Halifax* rule. Two forms are given by *Thomson*, 90 and 91, by the first of which the member redeeming is to receive such proportion of the profits as the trustees and he shall agree upon; and by the second he is to have a discount at the rate of six per cent. on the present value of the future repayments, calculated to the end of the original

1864.

SLAYTER v. JOHNSTON et al.

term. In *Stone*, 248, this discount is to be allowed at the rate of five per cent. on such future repayments, upon the principle of repayments made at the end of each year. In *Scratchley*, 106, the discount is to be after a rate of interest to be fixed by the consulting actuary, not lower than three and a half per cent. And in *Pratt*, 112, the power to redeem is reserved to every mortgagee upon the same terms as are offered by the plaintiff in this case, that is, the payment on a fourteen days' notice of the monthly subscriptions to the time of redemption, with any arrears and fines that may be due, and a small redemption fine on each share. But in none of these forms, as has been seen, nor in those of any of the societies in the *United States* or *Canada*, that have come under my observation, nor in the bye-laws of the society lately constituted here, have the directors reserved to themselves any such power as the defendants claim in this case.

Still, if they have the power by virtue of the rule, and the mortgage recognizing it, we are bound to give it effect. It was urged by the plaintiff's counsel that, as the directors, under the sixth bye-law, were to allow a discount on prepayments at their discretion, that some discount, at all events, must be allowed, and where no losses had been shewn, that the exercise of their discretion was subject to the control of this Court. Something may be said in favor of both these positions, but a much stronger argument for the plaintiff is to be derived from the illustration and tables, and the explanation thereof, at the end of the bye-laws. In the explanation, it is said: "The third column B contains the advance that "subscribers are entitled to receive for each share on "account of subsequent subscriptions; consequently, "what would be advanced to a member taking addi- "tional shares, or to a new member, if the advance "be granted when the subscription commences." And in the illustrations two cases are put, VI. and VII., the sixth putting the case of a lender, or investor,

as Mr. *Scratchley* calls him, who has paid in his twelve shillings a month to the end of the fourth year, and is desirous then of paying up his share, so as to be on a footing with the lender who paid in his sixty pounds in the first instance. The illustrations then run thus:

"VI. Suppose a member subscribes to the end of "the fourth year, and then desires to pay up his "share, what amount could the society demand in "lieu of his future subscriptions? Answer, Forty-"four pounds, two shillings, and nine-pence," and so forth.

"VII. Suppose a member desires to redeem a pro-"perty he has mortgaged to the Society, what should "the Society demand? The same amount which, "according to the tables, the Society could advance "on subscriptions for the same period."

Now, this amount for the end of the fourth year is forty-four pounds, two shillings, and nine pence, and at the end of the fifth is thirty-nine pounds, nine shillings, and two pence, per share, being the amount which the plaintiff has offered to pay, and which, according to the illustration, the Society should demand. That the illustration and tables, then, are inconsistent with the bye-law is abundantly clear, and the point is, which of them are to stand.

The defendants' counsel contend that the tables are no part of the bye-laws, and ought not to bind the Society. But how can we hold this, when the tables are referred to in several of the rules, and are published with them? Every member, including of course every borrower, must purchase a copy of the rules under a fine of five shillings; and are we to remit him to the bye-laws only, whose construction and meaning have puzzled the ablest lawyers, and set Chancellors and Vice Chancellors in opposition, and shut his eyes to the plain and familiar illustrations which the tables afford for his instruction and guidance?

1864.

SLAYTER v. JOHNSTON et al.

But, then, it is contended, that the tables cannot afford a guide in all cases, because the Society might be exposed to serious losses, when it would be a manifest injustice to act on them. Now, I am free to admit that a borrower from the Society becomes to all intents a member, and is not to be taken as a common mortgagor, and if any large part of the capital were lost, that it would be unjust to permit the members either to pay up or redeem their shares on the terms in the sixth or seventh illustrations. Why, then, it may be asked, did they not contain the exception, and notify the members, and especially the borrowing members, of the obligations they were incurring. Here is an omission, of which the only explanation I can think of is the one I suggested at the argument, that the bye-law was prepared by one mind, and the tables and illustration by another. No man that understood both would have prepared both. The rule contemplates a contingency which the tables do not contemplate, and, therefore the borrower relying, as he has a right to do, upon the tables, would be misled.

As for the Society, even had it sustained losses, it would be much in the same position as the *British* Building and Investment Company in *Farmer* v. *Smith*. It appears by the report of that case, that by the twenty-first rule a shareholder, desirous of paying and satisfying the securities he had given — desiring, in other words, to redeem his mortgage — shall be at liberty to do so by paying to the directors the subscriptions that would have become due up to the thirteenth year of the Company, and shall be allowed on such payments discount at four per cent. On payment thereof, with all fines due, he was to receive his deeds, and have a receipt or acknowledgment endorsed on his mortgage; that is, he was to have the same right as the plaintiff would have here, if the illustrations and tables are the rule. The *British* Society, however, had sustained losses, and at the end of the thirteenth year, there was not enough to pay

the unadvanced shareholders — that is, the investers or lenders — their one hundred and twenty pounds a share. *Martin* Baron, in his judgment, distinguishes the two classes of shareholders. "Want of success," he said, "was not contemplated; the state of things "which now exists, losses and embarrassment, were "never thought of; but dealing with the twenty-first "rule as it is, the defendant was entitled to redeem "his mortgage at any time within the thirteen years; "that is, in *July* 1858, the thirteen years not termi- "nating till *September*; but still he is liable, on his "covenants, for the payment of his monthly sub- "scriptions, as long as the full sum of one hundred "and twenty pounds was not realized."

The *Nova Scotia* Society is fortunately distinguished from the *British* in this, that there is no embezzlement, and we have heard of no losses of any account. Its first operations were eminently successful, and we have no reason to believe that its later operations have been less so. Their solicitor told us at the hearing that borrowers have paid up their amounts, and the investers, therefore, paying their sixty pounds at once, have doubled their capital in ten years and four months. To the capitalist who advances the money, and to the borrower who pays only a small bonus, who never gets into arrear, who pays no fines, and who continues to the end without redeeming, I can easily understand that this Society is at once a convenience and a gain. Its advantages are not so obvious where the borrower pays any thing beyond a very moderate *bonus*, and they disappear altogether when he gets into arrear, and becomes subject to fines. I have endeavored to understand the operations of this Society, and I think I have mastered them. Some benefits they will probably derive from this discussion. Their sixth rule, I presume, they will modify in the interest of the borrowers, and they should reduce the fines, which are much too high. I will illustrate this by what appears in the present

1864.

SLAYTER v. JOHNSTON et al.

case. *Billing*, after his bankruptcy, failed to pay the twenty-one pounds twelve shillings a month for ten months, and computing the interest thereon at six per cent., it comes to five pounds, nineteen shillings, and two-pence; but the fines, as stated in Mr. *Burton's* affidavit, came to twenty-seven pounds; that is, he was charged according to the rules of the Society, and paid twenty-seven per cent., a rate of interest which no legislature or government that knew what it was sanctioning, would ever have assented to. If, as is now alleged, the fines of the new Society are equally oppressive, all I can say is, that the scale of both Societies should be reduced. But this is a matter for their own consideration, and that of the legislature. Our judgment is that the defendants are not entitled to the three hundred pounds they have demanded, and that the plaintiff shall be at liberty to redeem the mortgage in this case on paying the net amount in the tables, with six per cent. interest since *February*, 1863.

The argument that was had before us this term on the right of the plaintiff, as assignee, to come into this Court, I shall pass by, the defendants having conceded that right, and the two parties having agreed at the same time, upon the recommendation of the Court, each to bear their own costs.*

DESBARRES J. concurred.

WILKINS J. We are required judicially to expound a contract made, in this case, between *Edward Billing* and the defendants, which is embodied in a mortgage, and therein declared to be subject to the rules of the Building Society; but we are not called up[on]

* In this case the Court was not called on to pronounce any final judgment, the suit having been eventually settled by the parties themselves; but the judgment of the *Chief Justice*, which had been prepared previous to the settlement, was, by request of the counsel on both sides, read in open Court. It has been thought advisable to publish the judgments, as the first point decided by them is of great practical importance, and, it would seem, has never hitherto been raised in this Province.—REP.

express an opinion as to the policy of that Society, or as to the expediency or propriety of those rules.

The real question submitted to us was stated by Mr. *Ritchie*, in his argument, to be, in his opinion, a very simple one, and I must say that I have risen from a careful consideration of it, with a conviction that he was right in saying so.

The following clause is found in the mortgage:

"In case default shall be made in the payment "of such sums of money as aforesaid," (meaning, the subscription monies, fines, interest, insurance premiums, and other payments which shall become due, according to the rules and regulations for the time being of the said Society, in respect of his said shares), "or any of them, or any part thereof, respec- "tively; or in case the said *Edward Billing*, his heirs, "executors, administrators, or assigns, shall neglect "or refuse to observe, perform, and keep any of the "present, or any new or amended rules or regulations "hereafter to be made, or the covenants hereinafter "contained, then, and in such case, and immediately "thereupon, all and every the sum and sums of "money, which, but for these presents, would, accord- "ing to the rules of the said Society, have thereafter "been payable by the said *Edward Billing*, his heirs, "executors, administrators, or assigns, for subscription "money, fines, and other payments, shall become "due, and payable to the said Society *in advance*, and "shall be considered to be then in arrear, and it shall "be lawful for the said trustees, or the survivor or "survivors of them, &c., without the concurrence, &c., "of the said *Edward Billing*, or his heirs, &c., at any "time hereafter, if they shall think fit so to do, abso- "lutely to sell," &c.

This clause explicitly shows that on failure of *Billing* to perform any of these specified conditions, his subscription money became immediately payable *in advance*. He has made default, and the question,

1864.

SLAYTER v. JOHNSTON et al.

that which we have to decide, has arisen, namely, in substance, *What was due in advance?* The answer, as I read and interpret the contract, is, *Precisely that sum, the payment of which, if there had been no default, would entitle him as a mortgagor* TO REDEEM. He being obliged, *also*, to pay all fines, and make all other payments due, *besides* the subscription money, *his liability* in respect of this last, resulting from failure, must be co-extensive with his *privilege* in case of performance. It follows, then, that what he *may* pay in order to redeem, is that same amount which he *must* pay, if coercion be necessary. When I speak of this as a logical consequence, it is, of course, on the assumption that there is nothing in the rules which makes the phrase, "*in advance*," have a different meaning in the one case from what it has in the other. That there is no distinction in the meaning of it relatively to the two cases, is, to my mind, clear, from the following considerations: First, from the nature of the contract, and from the reason of the thing; secondly, from the provisions of the sixth rule (last paragraph), as explained by the tables, which are themselves explained and illustrated in the printed rules; thirdly, from the view of the question taken by the late Mr. *Burton*, when Secretary and Treasurer, for his statements B. and C., appended to his affidavit, most clearly show, that, independently of his and the trustees' views of *Billing's* liability, *as affected by the deficiency under the Granville street mortgage*, the amount, in the then Secretary's judgment, to be paid for the redemption sought, was, in respect to the subscription money, *to be determined by the tables alone*. In this last-mentioned view, all he claimed for the Society, besides the arrears, fines, and insurance, was as follows, namely: "*Balance of advance, thirty-six shares, sixtieth month* (to "*May*, 1861), *one thousand four hundred and twenty* "*pounds ten shillings.*" That particular sum was regulated by column two, year five, month twelfth; or,

thirty-nine pounds nine shillings and two-pence multiplied by thirty-six. It was contended, however, that we were to fix our eyes on rule VI., and shut them to "the tables," "the explanation of the tables," and "the illustrations," — all appended to the rules, and printed with them.

If, indeed, we found anything in rule VI. which contradicted the appendices referred to, a difficulty would arise as to the construction of the rule, but I find nothing of the kind. By the terms of that rule there may be redemption of a security on prepayment of subscriptions, that would thenceforth become due on the shares advanced on such property up to the end of the seventh month, in the twelfth year. Thus far the language is explicit, and the effect of it *standing alone*, would be that redemption could only be on payment of all future annual subscriptions *in full to the prescribed term;* but it does not stand alone, for first, these words follow, "and the "mortgagor shall be allowed on such payments dis- "count at the discretion of the Board; but the Board "may, if expedient, settle any other terms according "to the particular circumstances of the case;" and secondly, whilst we find the tables to be a part of the rules, and necessarily inseparable from them, we find also, "an explanation and illustration" of them carefully prepared and printed with the rules and tables. Referring then, to them, as it is our clear duty to do,—clear, because they are proclaimed guides, no less to the mortgagor than to the trustees; we find *that* which was left discretionary with the Board by rule VI., namely, *the amount* of discount so far made obligatory, as that, though the Board may give *more* favorable terms to a mortgagor than the tables prescribe, it cannot give *less*.

The following is in effect the language of these trustees, spoken to all the world, and specially to every man who deals with the association, and it is found

1864.

SLAYTER v. JOHNSTON et al.

thus expressed in illustration VII. "Suppose a mem-
"ber desires to redeem a property he has mortgaged
"to the Society, what should the Society demand?"
"Answer, The same amount which, according to the
"tables, the Society could *advance* on subscriptions for
"the same period." This question is thus asked, and thus answered, by the Society, *by these very defendants* It is answered, not in any contradiction to, but in perfect consistency with, the language used by the Society in rule VI., already referred to.

It is of course, then, our duty to regard and respect that illustration which is thus furnished by the Society of its own rule. The illustration thus given affects, and, I think, decides the question that is before us.

The amount, therefore, of redemption money, independent of arrears, fines, &c., about which there is no contention, is in respect of this mortgage, fixed and settled *by the printed tables.*

But the defendants contend that this mortgage can only be redeemed on payment of a deficiency of principal and interest which occurred on foreclosure and sale of other and different premises, covered by another mortgage, executed by *Billing* to this Society, to secure the amount of certain other shares advanced by the Society to him. At the sale of these premises the Society purchased them for its own security, and now offers to reconvey them on payment of the deficiency referred to.

The mortgage sought to be redeemed bears date on the 12th *July*, 1856; the other that was foreclosed was dated the 7th *January*, 1860.

If there had been, and there has not been, so far as we are informed, an instance in this Province, of opening a decree of foreclosure *after sale*, where there was no fraud or illegality, and if an authority were adduced, as there has not been, warranting us to take that judicial course in a case where a mortgagee elected to purchase at the sale; still, it would be our

duty to proceed further, and, considering the origin of the doctrine contended for, to inquire, how far it would consist with adjudicated cases, or (in the absence of these) with equitable principles, to apply it to such a case as this.

The doctrine thus sought to be applied, is dependent entirely on the authority of decided cases; and it is not clear that it ought to be extended to a case so peculiar and anomalous as this—a case in which the very documents in question are not strictly, but only *quasi* mortgages; a case marked by stern severity and rigor, as regards the obligations of the mortgagor.

It is impossible to believe, under the evidence before us, that this Society, when the *Granville* street mortgage was taken in 1860, was at all induced to take it by any considerations connected with the previous mortgage, executed in 1858. I am convinced that the notion of making the better security available to meet the deficiency of the inferior one, was purely an *afterthought* in relation to the unexpected event of an actual deficiency.

The *Attorney General* was understood to contend at the argument that the mortgage sought to be redeemed contains language sufficient to make the mortgagor liable for other debts due, or to become due, to the Society, besides that which formed the subject of that mortgage; but there is not a sentence in it that is not most clearly limited in meaning and effect to the provisions and conditions of that particular instrument. There is not a phrase in the mortgage that will bear the construction so contended for.

I am, therefore, of opinion that payment of the deficiency on the sale of the *Granville* street premises, cannot be made a condition to affect the plaintiff's right to redeem the mortgage respecting which we are called on to adjudicate—the only mortgage that,

1864.

SLATTER v. JOHNSTON et al.

in effect, existed when redemption was claimed, the latter mortgage being merged in the decree that foreclosed it.

Attorney for plaintiff, *W. A. D. Morse.*

Attorney for defendants, *J. W. Johnston, Jr.*

NOTE.—His Lordship Mr. Justice *Bliss* was absent, from indisposition, during the whole of this Term.

END OF MICHÆLMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NOVA SCOTIA,

IN

TRINITY TERM,

XXIX. VICTORIA.

1865.

The Judges who usually sat *in Banco* in this Term, were

YOUNG C. J.
JOHNSTON E. J.*
BLISS J.
DODD J.
DESBARRES J.
WILKINS J.

MEMORANDUM.

In the last *Mich[illegible]as* Vacation, (*June* 20, 1865,) *Henry Oldright, Esquire*, Barrister at Law, was appointed Reporter of the Decisions of the Supreme Court.

IN RE T. J. WALLACE.

July 19.

M'CULLY, Q. C., moved on the first day of Term (*July* 18th), for a writ of *certiorari*, on the affidavit of *T. J. Wallace*. *Rev. Statutes*, chapter 148. The writ, without any rule therefor, should be granted in the first instance. [BLISS J. I can see no objection to a rule *nisi* being granted in the first place.] There is this difficulty: there should be a uniformity in the

It is discretionary with the Court on an application for a writ of certiorari, either to grant the writ in the first instance, or merely a rule *nisi* therefor.

* The Act 27 *Vict.* ch. 10; *Revised Statutes*, chap. 125), authorizing the appointment of the Judge in Equity, enacts that he shall sit in the Supreme Court *in banco*, (and when necessary, at Chambers,) and have precedence next to the Chief Justice.

1865.

In Re WALLACE.

practice, and no commissioner would grant a rule *nisi* for the writ. [BLISS J. I do not wish to be hampered at all by reference to what is done by commissioners. It is an anomaly to grant the power of dealing with writs of *certiorari* to them at all.] The law does not contemplate a rule *nisi* for a *certiorari*, any more than a rule *nisi* for a capias. [YOUNG C. J. It is quite impossible to sustain that position.] The writ is granted as a matter of course. 2 *Chit. Arch. Prac.*, 1264 (10th ed.) In some cases in *England* it is necessary to have leave of a Judge to issue a writ of *certiorari*, in other cases no such leave is necessary. Here we have no Statute law on the subject, except *Revised Statutes*, chap. 148. This is a high Prerogative Court which holds strict control over all the other Courts in the Province. [DODD J. I think the practice was pretty uniform during the existence of the Court of Common Pleas in this Province, to issue the writ in the first instance.]

Cur. adv. vult.

YOUNG C. J. now (*July* 19) delivered the judgment of the Court, and stated that all the Judges concurred in thinking that it was entirely within the discretion of the Court to grant on the first application either a rule *nisi*, or a rule absolute for a writ of certiorari; and that in the present case a majority of the Court considered that rule should be absolute in the first instance.

Rule absolute.*

* See as to the *English* practice, *Chit. Arch. Prac.* (8th ed.) 1153; 3 Dowl. 90; Q. B. 78, 89.

McDONALD ET AL. *versus* McKINNON ET AL. *July* 19 & 20.

EJECTMENT for lands in *Antigonish* (formerly *Sydney*) county.

At the trial before *DesBarres* J., at *Antigonish*, in *July*, 1863, the following facts appeared in evidence: The land in dispute was conveyed to *John McDonald* and *Angus McDonald*, in 1824. *John McDonald* (Kilty), the father of *John* and *Angus*, had the following children by *Margaret Kennedy*: *John*, *Angus* (the above named), *Sally*, *Donald*, *Mary* (now *McKinnon*). *Mary McKinnon* was the wife of *Hugh McKinnon*, one of the defendants. *Margaret Kennedy* had a child by her first husband, the plaintiff, *Catherine*, who was the wife of the other plaintiff. *John McDonald* died in 1826, intestate, unmarried and without issue; and his interest in the land then, therefore, vested in his father, *John McDonald* (Kilty), who died in 1834. *Sally* died in 1842, *Donald* in 1853, and *Angus* in 1860, all unmarried and without issue, and *Sally* and *Angus*, as admitted on both sides, intestate. The plaintiffs also contended that *Donald* died intestate. The plaintiff, *Catherine McDonald*, claimed as heir-at-law of *Sally*, *Donald*, and *Angus*, being their half-sister.

At the close of the plaintiffs' case, defendants' counsel moved for a non-suit, on the ground (*inter alia*) that title in *Catherine McDonald*, as heir-at-law, had not been proved. The learned Judge was also of this opinion, but declined to non-suit. He, however, reserved the point.

Defendants claimed under a will of *John McDonald* (Kilty), made in 1834, shortly before his death, by

Two of the subscribing witnesses to a will, nearly thirty years old, and supposed to have been lost, could not remember that they had witnessed its execution, but one of them said that he believed that he signed it, and both admitted that it might have been signed by them and the other subscribing witness, without their recollecting it. The will itself was found near the close of the trial, after these witnesses had been examined, and it purported to be signed by these witnesses and another. Another witness on the trial, but not a subscribing witness to the will, swore that it was executed by the testator, she believed, in the presence of the three subscribing witnesses, and that she had seen them sign their names to it as such.

Held, (the Court having all the powers of a jury under special verdict,) that the will was sufficiently proved.

Query, Rule of descent as to half-blood.

1865.

McDONALD et al. v. McKINNON et al.

which he devised his interest in the land in dispute to his son *Donald*, subject to the support (during her natural life, and while she remained unmarried) of his daughter *Sally*. Plaintiffs disputed the validity of the will. Two of the subscribing witnesses to this will (which appeared never to have been recorded or proved in the Probate office) were examined at the trial; but neither of them could swear positively that they were present at its execution, though one of them said that he believed that he signed it, and both of them admitted that it might have been signed by them and the other subscribing witness without their recollecting it. The will, which appeared to have been lost for some years, was found near the close of the trial and produced in Court after these witnesses had been examined. *Mary McKinnon* swore positively that it was executed by the testator, in the presence of the three subscribing witnesses who had signed their names to it as such, and that she saw them sign it; and also that it was in the handwriting of Dr. *Alexander McDonald*, who was one of such witnesses. *Donald McDonald*, by will, dated shortly before his death in 1853, devised his share of the *locus* to his brother *Angus*. Administration of the estate of *Angus* was granted to *Hugh McKinnon* and *Mary McKinnon* on the 20th *June*, 1860, and license to sell his real estate was also granted to them by the Judge of Probate on the 1st *August*, 1862, his personal property being found insufficient to pay his debts. Under this license, *Hugh McKinnon* and *Mary McKinnon* sold the land in dispute to the other defendant, *Roderick McDougall*, and on the 18th *September*, 1862, conveyed it to him by deed. The action, it appeared, however, was brought before the license to sell was granted.

It further appeared that *Angus McDonald* and *Donald McDonald* mortgaged the land in dispute to *Patrick Power*, on the 7th *March*, 1849, and that this mortgage was assigned by his executrix to *Roderick McDougall*,

on the 23rd *February*, 1856, he having at that date paid her the full amount of principal and interest (forty-seven pounds sixteen shillings and eight pence) due thereon.

A verdict was entered for defendants, by agreement, subject to the opinion of the Court, who were to draw conclusions from the evidence in the same manner that a jury might or could do, and have power either to direct that the verdict should stand, or that a verdict should be entered for plaintiffs, if the Court should be of opinion that, upon the law and facts of the case, the plaintiffs were entitled to recover.

Blanchard, Q. C. (with whom was *Miller*), now moved to enter the verdict for plaintiffs. *Catherine McDonald* is the half-sister of *Angus* and the other deceased children of *John McDonald* (Kilty), and their heir-at-law. *Revised Statutes*, appendix, page 748, section 6. [BLISS J. The half blood must be traced *ex parte paterna*. WILKINS J. *John McDonald* (Kilty) is the *propositus*, you must trace up from him, and see if you can find any of his blood in *Catherine*. YOUNG C. J. Assuming that no will was made by *John McDonald* (Kilty), *Sally* had a share in the estate. Did that vest in her heirs generally, or in her heirs by her father's side only? Was *Catherine* of the half blood to *Sally*, within the meaning of our Statute, or was she not? that is the question. *Solicitor General*. That is not exactly the question. The question is, Was there any of the father's (*John McDonald* (Kilty) blood in her? BLISS J. A brother cannot inherit to a brother except through the father.]

The will of *John McDonald* (Kilty) is not sufficiently proved. The presumption is, that it was not written by Dr. *McDonald*, as there were fifty persons in *Antigonish* who could have proved his hand-writing. [BLISS J. I think that that fact was pretty clearly proved.

1865.

McDONALD et al. v. McKINNON et al.

Further evidence was probably not adduced on the point, because it was considered already clearly proved.] The Statute prescribes certain requisites to a valid will, and these were not proved. How can these requisites be proved by a person who is not a witness to the will? It is not proved that the witnesses signed in the presence of each other. [BLISS J. It is not necessary that they should do so.] *Mary McKinnon* should have been recalled to prove the contents of the will, and should not have been allowed to be recalled to prove its execution. (Refers to *English Statute of Wills*, 1 Vic. chap. 26, sec. 9; 2 *Blackstone's Comm.* (*Sweet*) 240 n.)

Solicitor General contrà was not called on.

YOUNG C. J. We all think that the will of *John McDonald* (Kilty) is sufficiently proved, the question being left to us to find as a jury might do. The verdict for defendants must therefore stand.

Judgment for defendants.

Attorney for plaintiffs, *Attorney General* (*Henry*).

Attorney for defendants, *H. McDonald*.

July 20.

CUNNINGHAM *versus* HADLEY.

In an action for trespass to plaintiff's dwelling house defendant admitted that plaintiff at his (plaintiff's) own door had told him he did not want to hear him, and had closed the door, and that he (defendant) had then said that he should hear him, and had gone immediately to plaintiff's window, and there struck on the sill for about five minutes. Several witnesses testified that defendant had struck the sill in a violent manner, and had used, while so doing, violent and abusive language toward plaintiff, alarming the inmates of the plaintiff's house.

Held, That a trespass had been proved which entitled the plaintiff to some damages, and the jury having found for the defendant, the Court set the verdict aside, and ordered a new trial.

TRESPASS for breaking and entering plaintiff's dwelling house, &c. Plea. General denial.

At the trial before *Dodd* J. at *Guysborough*, in *June*, 1865, it appeared that defendant went to plaintiff's house, and saw him at the door, that some altercation

occurred between them there, in the course of which plaintiff told defendant that he did not want to hear him, and then closed the door. Defendant then said to plaintiff that he should hear him, and went to the window and struck on the sill for about five minutes.

Several witnesses on the part of the plaintiff testified that the defendant struck the window-sill in a violent manner, that while doing so, he used violent and abusive language towards the plaintiff which alarmed the inmates of the house. The plaintiff also swore that the defendant had used language of the same character to him at the door, and had endeavored to prevent his entering it; but all this was denied by defendant.

Defendant, who was the only witness examined on his side, stated that at the commencement of the conversation at the door, he and plaintiff shook hands. He denied having used any language to alarm or frighten plaintiff's family, or having threatened to ill-use plaintiff. He admitted that he had told the plaintiff when he closed the door, that he should hear him. He also admitted having struck the window-sill as described by plaintiff's witnesses, but added that he had done so with his hand, and had not injured his hand in the act.

The learned Judge instructed the jury that if the defendant opposed the plaintiff's closing the door when plaintiff said he did not want to hear him, it was a trespass, for which plaintiff could maintain the present action; but that if they did not believe the plaintiff's statement of what took place at the door, then as the defendant in his evidence had admitted that the plaintiff told him he did not want to hear him, and then closed the door, it was a sufficient intimation for him to leave the premises, and that his, notwithstanding this intimation, going immediately to the window and there striking on the sill with violence for about five minutes, and during that time using violent and abusive language to plaintiff and

1865.

CUNNINGHAM v. HADLEY.

alarming the inmates of his house, fully in his opinion established the trespass; and, therefore, that their verdict should be for plaintiff. The learned Judge further told the jury that in estimating the damages, they might consider the intention with which the act was done, whether for insult or injury.

The jury found for the defendant, and a rule *nisi* having been granted to set the verdict aside, as contrary to law and evidence, and the Judge's charge, it now came on for argument.

Blanchard, Q. C. in support of the rule. The plea here operates merely as a denial of the commission of the act of trespass. *Practice Act* (Rev. Stat. chap. 134) sec. 84. The jury under the charge should have found for the plaintiff. [BLISS J. Must we not consider the case now on the evidence of the defendant alone? DODD J. He says himself that he committed the trespass at the window. BLISS J. Yes, but we must assume that he did it as he said. We must assume that the jury believed him in all that he said.] The jury in this case have acted perversely. The defendant himself admits a trespass, and a trespass, however slight, is still a trespass.

Solicitor General contrà. In one view this case is important, in another very unimportant. [BLISS J. Is it so trifling?] In the view the *English* Judges take of such actions as this, the cause of action is trifling, I think excessively trifling. Under this verdict we cannot consider the *language* charged. It is not pretended that the defendant struck the window for the purpose of injuring the house. Suppose he had brushed along the front of the house, and knocked off a little white-wash, it would have been a trespass. In point of strict law I admit that the verdict should have been for plaintiff. If he struck the house with his fist, there might have been a right of action; but when the jury came to estimate damages, there would

have been a difficulty,—half a cent would have been too much. [YOUNG C. J. The point for which you are contending was settled contrary to your view, against my strong remonstrance.] In strict law, an action of trespass may be maintained for an unintentional act.

Had this verdict been found in *England*, the Courts there would not disturb it. Will this Court violate the law of the land? The Legislature has said that the *English* practice shall be adopted in all cases not governed by our own statutes. *Practice Act*, sec. 243. [WILKINS J. The law of *England* has great respect for the *domus*.] "The Court will not, in general, grant a "new trial where the value of the matter in dispute, "or the amount of damage to which the plaintiff "would be fairly entitled, is too inconsiderable to "merit a second examination. The value or amount "must, in general, be twenty pounds to induce the "Court to interfere, and this whether the verdict be for "plaintiff or defendant." *Chitty's Arch. Prac.*, 1463 (10th edition); *Tidd's Practice*, 913; 1 *Cr. Mees. & Ros.*, 585, 93; 2 *Cr. & Jer*, 14; 4 *Ad. & Ellis*, 892; 1 *Cr. & Mees.*, 26; 2 *Y. & Jer.*, 264; 1 *Y. & J.*, 402; 1 *Chit. Rep.*, 265. [YOUNG C. J. I think all these cases were carefully reviewed in *Anderson* v. *Ritcey*.* JOHNSTON E. J. How do you find this case to come under the £20 rule?] I have already shown what the material damage was. [YOUNG C. J. Your position is, that no new trial can be granted where the actual damages do not exceed twenty pounds.] 1 *Burr.*, 11; 2 *W. Bl.*, 851. This was not a perverse verdict.

Blanchard Q. C. in reply. The solemn decision of the Court in *Anderson* v. *Ritcey* is binding. [BLISS J. Mr. *Ritchie* would tell you that that case is a perversion of law. I may say that the twenty pound rule has never been considered binding in this Court since I came on the Bench. DODD J. The late *Chief Justice* always held that it was not. BLISS J. It is a rule

* M. S. Trinity Term, 1862.

1865.

CUNNINGHAM v. HADLEY.

applicable to a rich country, and not to a poor one. YOUNG C. J. There is a wide distinction between a verdict for plaintiff for a small sum, and a verdict for defendant. What are the damages claimed in the writ?] Five hundred dollars. [BLISS J. I do not see how you can estimate the damages.]

THE COURT here ordered a new trial.

Rule absolute.*

Attorney for plaintiff, *S. Campbell*, Q. C.

Attorney for defendant,

* This case was subsequently tried before the *Chief Justice*, when a verdict was found for plaintiff for eight dollars, and full costs awarded.

July 21.

GILPIN *versus* SAWYER.

Trust funds settled on a married woman, for the benefit of herself and children, were expended by her and her husband contrary to the provisions of the deed of settlement. The husband afterwards repaid to the trustee, out of his own earnings, the amount so expended, but while repaying it he said to the trustee that he wished to make his wife a present of a horse and waggon. The amount so repaid was drawn by the husband a day or two afterwards out of the bank, on a check given him by the trustee, and a horse and waggon bought with part of the money. The articles were used by the wife, and also by the husband, (who was a physician,) in his practice. One witness said that the horse and waggon were placed in his charge by the wife with instructions not to give them to her husband without her orders, which instructions, he (witness) said he obeyed.

Held, That the horse and waggon were not *trust* property, but the property of the husband and could be taken on an execution against him.

REPLEVIN for a horse, harness, and waggon. Pleas, denying the property to be the plaintiff's, and avowry, justifying the taking (the defendant being the Sheriff of the county (in execution on a judgment *John Stewart* v. *John Slayter*, M. D., the said horse, &c., being his (*Slayter's*) property.

At the trial before *Johnston* E. J. at *Halifax*, in *May* last, it appeared that the plaintiff claimed the property in question as trustee of *Mary Slayter*, the wife of the above named *John Slayter*. Certain funds had been bequeathed to *Mary Slayter* by her uncle *Joseph Robinson* previous to her marriage, a portion of which funds consisted of shares in the Union Bank. By deed of settlement, executed previous to her marriage,

these funds were conveyed to certain trustees. By another deed, the plaintiff and another person now deceased, were substituted for the original trustees. The shares in the Union Bank were drawn out by one of the original trustees and sold, and the proceeds, being a little over one hundred pounds, paid to *Mary Slayter*. This money appeared to have been expended largely by her husband. Some time after this Dr. *Slayter* put one hundred pounds to the credit of plaintiff in the bank. He at the same time said to plaintiff, "You know that money, one hundred pounds, I took "from *Mary;* I want to give that money back to her, "and I want to make her a present of a horse and "waggon." A day or two after this Dr. *Slayter* went to the plaintiff for a check to pay for the horse, &c., which were accordingly paid for out of this one hundred pounds. Plaintiff said that he would not have given Dr. *Slayter* the money had his wife forbidden; but he also added that he did not put this money in his account of the trust funds, and that he never considered it as trust money.

The horse, &c., appeared to have been used by Dr. *Slayter* in his practice, and also by Mrs. *Slayter*, though one witness said they were placed in his charge by Mrs. *Slayter*, with instructions not to give them to her husband without her orders, which he obeyed.

The cause was tried, by consent, without a jury, and the learned Judge gave judgment for the defendant. A rule *nisi* having been obtained to set the judgment aside, it now came on for argument.

LeNoir, in support of the rule, read the trust deed. [JOHNSTON E. J. The shares in the Union Bank were required by this deed to be invested in a particular way, not in a horse and waggon. Mrs. *Slayter* obtained the proceeds of these shares for a particular purpose. That purpose was not carried out, and she used the money for her own purposes, and it then became appropriated to her husband's use. The husband

1865.

GILPIN v. SAWYER.

says that subsequently his money went to Dr. *Gilpin* to replace it. BLISS J. Dr. *Gilpin* says that he did not consider the money so paid by Dr. *Slayter* as trust money.]

Murdoch Q. C. follows on the same side (by consent). By the trust deed, the interest and dividends arising from the funds bequeathed to *Mary Robinson* (now Mrs. *Slayter*), were to be paid to her sole and separate use. If she should have no children, she was empowered to dispose of the funds by her will. If she should have children, it was provided that the property should go to them on her death. She was empowered, however, even in that event, to dispose of five hundred pounds by her will. Her father, who was one of the original trustees, died some years since. Through want of business habits, the shares in the Union Bank were allowed to remain in her name, and she obtained the money arising from their sale. [YOUNG C. J. She expended it and her husband replaced it. I consider that under those circumstances it was, when repaid, different from what it had been before.] That might have been the case had this occurred before she had any children; but the moment a child was born, she had only a life estate in the funds, and her position became very different from what it was before. She had not the power to convey any of the property away from her children. The money replaced became invested with the character of the money which had been taken. It is submitted that this is the case both at law and in equity. A clerk unlawfully takes away a five pound note, he replaces the amount in dollars. Do not the dollars assume the character of the original? Otherwise there would be no *locus penitentiæ*. Equity considers every thing to be done, which ought rightfully to be done. Equity would say the money when repaid by Dr. *Slayter* was put into the right pocket, and it assumed its former character. The money was allowed to be used for a purpose not contemplated in

the trust I admit. It was invested in a horse, harness, and waggon, for Mrs. *Slayter's* benefit. The question here is, not whether there was a deviation from the trust, but whether the horse, &c., were Dr. *Slayter's* property or not. If the imprudence of a *femme coverte* in a case like this is to be allowed to affect the interests of her children, then the whole capital might be easily swept away by creditors who knew of the trust. Where matters of law and equity arise in a cause, the Court, before which it comes for consideration, trial, or hearing, can determine both. *Revised Statutes*, chap. 124, sec. 3. If the doctrine be correct, that the moment the money of a married woman comes into the hands of her husband, he can take it absolutely: the protection of a marriage settlement is gone. The legal estate is then in the husband, it is true, but he becomes a trustee for his wife. *Hill on Trustees*, 641, *n*. *Messenger* v. *Clarke*, 5 Exch. Rep., 392. A portion of Mrs. *Slayter's* funds have now assumed the shape of a horse and waggon. The Court will follow any property. The trustee should have the right of *recouping*, if he is to be hereafter held liable. Where money is paid by a party expressly for a particular object, the party receiving it must take it for that object. He may refuse to take it, but unless the appropriation desired by the party paying is negatived by him at the time of payment, he cannot change the appropriation afterwards. The trustee here accepted the money. [BLISS J. Not as trust money.] He did not tell Dr. *Slayter* that he did not take it as trust money. It is true, he gave his opinion at the trial, to my utter surprise, as to the legal effect of the payment. The Court will protect children and heirs from the errors and *laches* of their parents or trustees, and will not, by a forced construction of Dr. *Slayter's* act, prevent him from giving his children this money. [BLISS J. The horse and waggon were bought for the wife; if they belonged to the wife, they belonged to the husband.] Admitting that the *cestui que trust* has his

1865.

GILPIN v. SAWYER.

remedy against the *trustee*, he is not limited to that. The Court will follow the property. *Nash* v. *McCartney*, 2 Thomson's Rep., 167. [JOHNSTON E. J. In the present case, the husband earned the money himself.] When the money was *put back*, I consider it as equivalent to a *recapture*.

Solicitor General contrà. I shall argue this case mainly on the facts. Both Dr. *Slayter* and his wife knew that they had no right to expend the trust funds in the purchase of a horse and waggon. He has himself earned a considerable amount of money, and paid off eight hundred pounds' worth of his debts. He speaks of purchasing a horse, and buys one from Dr. *Jennings* as for himself. He gets the money out of the bank for the purpose of a *cover*, and to keep it away from his creditors. When Dr. *Gilpin* was asked about it, he said he had nothing to do with it, that he did not even put it into his account of the trust monies. When sold under the execution the horse, &c., are bought in by *Slayter*. The cover is transparent. The money was *Slayter's* own money, put into the bank one day and taken out the next. [WILKINS J. The learned Judge who tried this cause, exercising all the functions of a jury, has found that the transaction by which Dr. *Slayter* endeavored to make horse, waggon, &c., *trust* property, was not *bona fide*. How can we go beyond that?]

Murdoch Q. C., in reply. The money with which the horse, &c., were purchased did not belong either to Dr. *Slayter* or Mrs. *Slayter*. If the trustee did give it to either of them, he had no right to do so. The parties really interested are the children. I can perceive no *fraud* on the part of Dr. and Mrs. *Slayter*, though there was *error*. A party may be desirous, without fraud, of protecting property from creditors. But suppose there was a trick on the part of Dr. *Slayter*, that should not prejudice the rights of his children.

1865.

GILPIN v. SAWYER.

YOUNG C. J. I always have the strongest disposition to protect trusts. I admit that this one hundred pounds belonged equitably to the wife and children of Dr. *Slayter*. In common prudence, however, when paying the money to Dr. *Gilpin*, he should have said distinctly that he paid it for the separate use of Mrs. *Slayter*. Dr. *Gilpin* would then have taken it as trustee, and given a receipt for it as trustee. Dr. *Slayter* [illegible] the money out, and Dr. *Gilpin* says that he told him that he intended to make his wife a present of a horse and waggon. A husband cannot make gifts to his wife in law, though in equity the rule is different. The moment he used that expression, he showed that the property could not be hers.

There is another difficulty also. This action had to be brought in the name of Dr. *Gilpin*. In replevin a right of property in the plaintiff must be shown, and Dr. *Gilpin* himself admits that he did not consider the money with which the horse, waggon, &c., were bought as trust money.

JOHNSTON, E. J., BLISS, DODD, and WILKINS* JJ. concurring, the rule was discharged.

Rule discharged.

Attorney for plaintiff, *Murdoch*, Q. C.
Attorney for defendant, *Wallace*.

* *DesBarres* J. was absent.

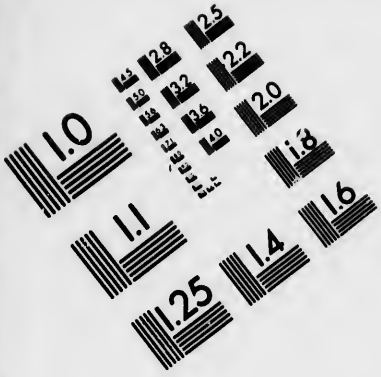
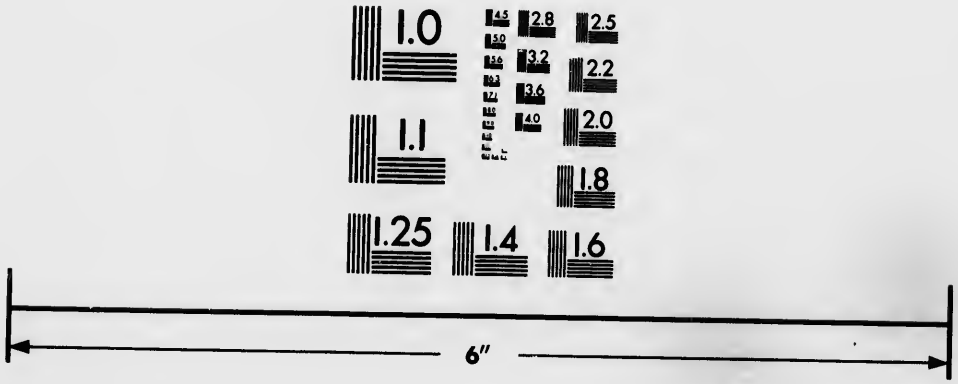
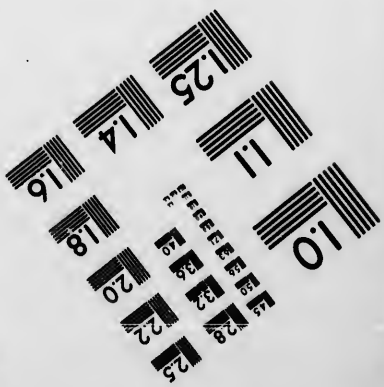


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

July 25.

KEANE ET AL. *versus* SHARP.

It is no objection to a notice of trial that it is headed with the name of only one of the plaintiffs, if the defendant has not been misled thereby.

EJECTMENT, tried at *Sydney*, *Cape Breton*, before *Dodd* J. in *June* last, and verdict for plaintiffs.

A rule *nisi* was obtained to set the verdict aside, on the ground that the notice of trial for the term at which the suit was tried, was headed "*John Keane*, "plaintiff, v. *George Sharp*, defendant;" the names of the other plaintiffs being omitted. Defendant's counsel at *Sydney* (*D. N. McQueen*), relying on this irregularity in the notice, did not defend the cause at the trial.

LeNoir in support of the rule. *John Keane*, the party named in the notice, did not obtain the verdict in this case; but *William Metzler* and *William Taylor*,— the verdict being specially for the last two plaintiffs alone. The trial, therefore, was a mis-trial. *Henbury* v. *Rose*, 2 Strange, 1237; 1 *Chitty's Arch. Pr.* (10th ed.), 294. *Benthall* v. *West*, 1 D. & L., 599. 3 *Chitty's Gen. Practice*, 777.

Solicitor General contrà. Was the defendant misled? That is the only question. The case in 1 *D. & L.* 599, is overruled by *Fenn et al.* v. *Green*, 6 Ell. & Bl., 656. The defendant received the notice without objection. 3 *M. & G.* 630, 12 *Jurist*, 898. Defendant here has by his conduct waived all objection. *Brown* v. *Whitfall*, 8 Dowl. 592; *Brown* v. *Wildbore*, 1 M. & G. 276. (The *Solicitor General* here read the affidavits of *J. N. Ritchie*, *W. A. Johnston*, and *W. J. Croke*. From the first of these affidavits, it appeared that there was no other cause entitled *Keane* v. *Sharp*, besides this, to be tried at *Sydney* last *June*, and that there was a peremptory undertaking to try it then, and that *LeNoir* understood from *J. N. Ritchie*, that it was to be then tried.

W. A. Johnston testified to a conversation with *LeNoir*, ten or twelve days before the trial, from which he (*LeNoir*) must have known that the cause was to be tried last *June;* and that he (*Johnston*) was to be the counsel to conduct the trial on behalf of the plaintiffs. *W. J. Croke* swore that he served the notice on *LeNoir*, and that the only objection he made to it was, that too short notice was given.)

LeNoir, in reply. The affidavits might have some weight, if the cause had been for trial here, and the defendant had been here. As it is, they can have no effect. Withdrawing plaintiffs from the record is an irregularity. Although the plaintiff has undertaken peremptorily to try, the defendant is still not bound to be ready unless he is served with a notice of trial. *Ifield* v. *Weeks et al.*, 1 H. Bl., 222.

YOUNG C. J. None of us have any doubts as to this case. The defect complained of is an irregularity, no doubt. *John Keane*, it appears, is the real claimant. The executors of the original mortgagee were added as plaintiffs to avoid the trouble of tracing the title. The irregularity here is simply the omission of the words "*et al.*" Where a simple mistake of this kind has taken place, and the plaintiffs, not being notified of it, have incurred large expense in retaining special counsel, and bringing their witnesses, we think it a wholesome rule, that the verdict should not be disturbed, as the defendant has not been misled.

Rule discharged.*

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

* See *Taylor on Evidence*, sec. 328, 14 *M. & W.*, 251.

July 27 & 28.

THORNE *versus* SHAW.

Where a verdict is found against uncontradicted evidence, and the charge of the Judge, the Court will set it aside.

Affidavits on which a rule is obtained must be read at the argument; and affidavits in reply may be used in showing cause against it.

ASSUMPSIT on a promissory note. Pleas, payment, and set-off. (The *Statute of Limitations* had been pleaded, but the plea setting it up was abandoned at the trial.)

At the trial before *Wilkins* J. at *Annapolis*, in *June* last, it appeared that the action was brought on a joint and several promissory note for £62 10, dated 22nd *April*, 1843, made by the defendant and two others (*Francis Tracey* and *William Spurr*), to one *Catherine Thorne*, of whom the plaintiff was the son and executor. Payments to the amount of £68 1 9, were endorsed on the note, and the plaintiff admitted the following payments, beside those so endorsed: 26th *November*, 1855, £3; 20th *April*, 1855, £5; 30th *March*, 1859, £5; 14th *September*, 1860, £3; 20th *October*, 1861, £3; 30th *December*, 1861, £5; 24th *April*, 1862, £10; 24th *June*, 1862, £2 10; also £5 omitted. The defendant swore to a number of other payments, and claimed a large balance. He produced his book of accounts, which he stated contained the original entries of payments made by him on the note. He testified that he paid *George Milledge* (who was admitted by the plaintiff to have done business for the testatrix) £15 5, and obtained his receipt for it, which he also produced at the trial. He also stated that he paid this money just after the note was drawn, and long before its maturity, because he had the money at command, and it was convenient to do so. He also swore that he never had any business transaction with the testatrix but this note. He further said that he paid the testatrix a year before her death £7, which by mistake was endorsed on the *Burrill* note, and of which mistake he was first apprised by the plaintiff after the death of the testatrix. The testatrix died in *February*, 1860.

1865.

THORNE v. SHAW.

It appeared, from the plaintiff's testimony, that the note was given for a vessel sold to defendant and to *Burrill*, who each gave a note.

Plaintiff swore that he did the business of the testatrix in her lifetime; that defendant had been often called on for payments by him, and always promised to pay, and never intimated, until he was sued, that the note was paid. He admitted that several receipts produced at the trial were in his handwriting, and that the amounts stated in them had not been endorsed on the note. He denied having told the defendant in his office that £7 paid by him had been endorsed by mistake on the *Burrill* note.

Letters from defendant to plaintiff in 1861 and 1862 were put in evidence, in which the former makes general promises of payment of the balance due, and in one of which, dated *April* 24, 1862, he states that he has just sent £15 to *T. D. Ruggles*, for plaintiff. A letter from defendant to testatrix, dated *November*, 26, 1855; one from plaintiff to defendant, dated *August* 5, 1861, enclosing an alleged statement of the endorsements on the note (containing, however, two items which were not actually endorsed); several receipts from plaintiff to defendant; one from *Milledge* for the £15 5, and one from *Ruggles & Thorne* for £10, were also put in evidence.

The learned Judge suggested to the jury that they should find item by item of the disputed payments, in order that a computation might be afterwards made, under his directions, relatively to interest, in order to ascertain the true balance. This suggestion, however, the jury did not adopt, but found a general verdict for the plaintiff for $100. They stated that they had not found that the £15 5 was paid on account of the note. The Judge was of opinion that on the facts proved, they were bound to refer that payment to the note. The learned Judge also instructed the jury that they should give the defendant credit for the

1865. £7 alleged to have been paid by him to the deceased, but endorsed by mistake on the *Burrill* note.

THORNE v. SHAW.

A rule *nisi* having been granted to set the verdict aside, as against evidence, and for a new trial, it now came on for argument.

(*Weatherbe*, for plaintiff, handed in the following list of the disputed payments:—

1843.
April 25. Cash paid *Geo. Milledge*, (£15 5,)..... $61.00
1845.
September. 6. Cash per mail,..... 10.00
1850.
May 17. Cash said to be paid to *A. B. Thorne*,..... 4.00
November 8. *Chisholm's* order,..... 5.00
1859.
October 10. Cash per mail,..... 4.00
1860.
Sept. 14. Cash said to be paid to Mrs. *A. B. Thorne*, 12.00
Amt. said to be endorsed on *Burrill's* note in error, 28.00
Amt. paid by *Robert Chute*,..... 10.77
Amt. paid by *John Long*,..... 7.00
Amt. paid by *Kennedy & Crosscup*,..... 6.00)

O. Weeks (with whom was the *Solicitor General*), in support of the rule. A balance of $96.35 in favor of defendant was clearly proved. The jury not only disallowed that, but gave a verdict for plaintiff for $100. Even disallowing defendant the £15.5, the verdict is still wrong. *Milledge*, the party to whom it was paid, was in Court during greater part of the trial, and yet was never called. His receipt was produced at the trial, and there is no contradictory testimony as to that payment to him. (The second item was abandoned by *Weeks*, on the intimation of BLISS J., that the jury were at liberty to reject it.) The defendant proved that he paid the $4, *May* 17, 1850, to plaintiff; and the plaintiff was present during the whole of the trial, and was not called on to disprove it. The fourth item was clearly proved. The

$4, *October* 10, 1859, is admitted by plaintiff's own statement, in *August*, 1861, and it was also positively sworn to by defendant. The $12, *September* 14, 1860, is also in plaintiff's own statement, though it is there dated by mistake, *September* 4, 1860. The $28 was proved to have been paid by defendant, and endorsed on the *Burrill* note. A letter was written to the testatrix by defendant on the 26th *November*, 1855, stating that he had been informed by the plaintiff that this amount had been so erroneously endorsed; and this letter, coming out of the possession of the plaintiff, amounts to an admission of the payment; at all events, it precludes the idea of fraud in claiming it now. The eighth item we abandon, as we could not prove it. Of the ninth item, we claim only $4, which was proved by defendant's oath and plaintiff's receipt. The tenth item we abandon. We claim a balance of $96.35, as due defendant, after deducting all the items which we have abandoned.

Weatherbe contrà. The rule in this case states on its face that it was obtained on reading the affidavits of *Moses Shaw* and *George S. Milledge*. [WILKINS J. Those affidavits should have been read here.] I claim the right to argue upon them, and to introduce affidavits in reply. (*Solicitor General* objects.) [YOUNG C. J. If counsel takes out a rule on affidavits, he cannot afterwards abandon them at the argument. He cannot blow hot and cold. We must hear the affidavits in reply.]

(*Weeks* then read the affidavits of the defendant and *George S. Milledge*. Defendant swears that he was taken by surprise, on the trial, by the plaintiff denying that the £15 5s., paid by him to *Milledge*, was paid on account of the note in suit. He also swears to having unexpectedly discovered, since the trial, corroborating evidence as to the said payment, which evidence is contained in *Milledge's* affidavit. *Milledge* swears to having received the payment on account

1865.

THORNE v. SHAW.

of the note, as stated by defendant, and says that he derives his knowledge of the fact from his ledger of the year 1843.)

A verdict will not be set aside as against evidence where the Judge who tried the cause is satisfied with it, even though the Judges who hear the argument are of a different opinion. A jury may not believe a witness. They are not bound to find item by item. Sometimes it is convenient for a jury to do so, but in the present case it was utterly impracticable, as there would probably have been four or five divisions among them with regard to the items. A jury may reason inconclusively. A verdict will not be set aside as against evidence, unless there is gross misconduct on the part of the jury. There was neither gross misconduct nor partiality in their conduct here. I will show from a statement that they have not disallowed any of the disputed items except the £15 5. (Puts in a statement made up with interest which, he contends, shows plaintiff's claim to be £47 10 4, after allowing every payment claimed by defendant, except the $10 he has now abandoned, the £15 5, and the £7 endorsed on the *Burrill* note.) The £7 with interest amounts to £11, which, deducted from the £47 10 4, would leave £36 10 4. The jury must therefore have allowed part of the £15 5.

[YOUNG C. J. If the defendant is entitled to claim the benefit of the £15 5 payment, the verdict cannot be sustained.] Even if the jury disallowed part of the £7, the verdict should be sustained. They had a right also to disallow the £15 5. (Reads an affidavit from *Milledge*, and one from plaintiff in reply to the affidavits mentioned in the rule. *Milledge* swears in this affidavit that he has discovered by comparing the note in suit with his ledger, that he was in error when he stated that the £15 5 was paid on the note in suit, that he now finds it was paid on another note of defendant to testatrix, being the only note with which he had any thing to do, and which he believes

was paid in full in the year 1846. Plaintiff states that he has, since the trial, examined the *Burrill* notes, and found that there is no endorsement thereon of any payment of £7, either on the original note given in *April*, 1843, or the renewal given in *March*, 1854.)

The defendant's ledger was not before the Judge. I did not think it necessary to call his attention to it, as I considered it peculiarly for the consideration of the jury, and that he would tell them so. The jury had it before them for four hours, and it may have influenced them. Where a fact has escaped the attention of the Judge who tried a cause, it is a good reason for him, as well as for the Court, to reconsider the charge. [BLISS J. The Court has often granted a new trial against the opinion of the Judge who tried the cause, who thought there should be no new trial.] The payment of the £7 was peculiary a a question for the jury. [BLISS J. The rule is, that the Court will examine the evidence to see whether there is any thing to sustain the verdict. If there is, the Court will sustain it, but if otherwise, will not.] A verdict will not be set aside as against evidence, where the Judge who tried the cause is not dissatisfied with it. *Fraser* v. *Cameron*, James' Rep., 192. Have not the jury the right to disbelieve a witness? The defendant's evidence as to certain payments is said to be uncontradicted,—it is inferentially contradicted. The £7 is not in defendant's books until after 1862. It is not in plaintiff's statement sent to defendant in *August*, 1861. [WILKINS J. The question is, what is the legitimate effect of the evidence. The jury are not to be uncontrolled judges of that. Suitors would be in a bad position, if such were the case.] The first endorsement on the note is £7 5, *June* 18, 1847, and was proved to be in defendant's own handwriting. It was put to the jury to say from that circumstance, whether that was not the first payment. [BLISS J. That argument loses its force, when it

1865.

THORNE v. SHAW.

is shown that there was another previous payment (£7 9 2, *September*, 1844) for which a receipt from plaintiff was produced, which is also not endorsed. You shut out direct evidence for mere surmises.]

The alleged original entries in defendant's ledger are suspicious, from the page, the indexing, and the ink.

(Cites *Bank of Nova Scotia* v. *Haliburton*, James' Rep., 352; 1 *Phillips on Evidence*, chapter 2, page 18; *Buller's Nisi Prius*, 290, *b*; 2 *Chitty*, 271; 3 *M & G.*, 59; 3 *Bing.*, 170; 1 *B. & P.*, 339; 14 *C. B.*, 110, 95; 1 *Best & Smith* (Q. *B.*), 437.)

YOUNG C. J. We are willing to grant a new trial, with the condition that the costs of the argument abide the event. Are the defendant's counsel willing to accept it on these terms?

Solicitor General. Yes. I accede to it on the principle that, if the defendant is guilty of what is insinuated, it becomes a question of character, in which he should have the fullest opportunity of explaining his conduct.

Rule absolute, the costs of the argument to abide the event.*

Attorney for plaintiff, *Ruggles*.

Attorney for defendant, *O. Weeks*.

* DESBARRES J. was absent during the latter part of the argument.

1865.

IN THE ESTATE OF MICHAEL O'SULLIVAN.

July 29.

A testator devised his real estate to his wife, "in trust to sell and dispose of the same, at such times, and in such manner, and in such portions, as she might deem suitable and prudent, and to invest the proceeds arising from such sale in some safe and profitable security, and to apply the proceeds arising from such investments in the support and maintenance of herself, and in the support, education and maintenance of such of his children as should be under age at the time of his death, and until such sale to receive, take, and enjoy, the rents and profits arising from such real estate, during the term of her natural life, and to apply the same as above directed."

By a subsequent clause he devised and bequeathed, from and after the death of his wife, all his real and personal estate, and the moneys so invested as aforesaid, to and amongst his sons, of whom *M.* was one, their heirs and assigns, share and share alike.

M. died intestate, his mother was appointed administratrix of his estate, and application was made to the Court of Probate by the assignees of certain of his judgment creditors, (his personal estate being sworn to be insufficient for the payment of his debts), for license under sections 13 and 17 of the Probate Act, (*Revised Statutes*, second series, chap. 130,) to sell his interest in the real estate of the testator.

Held, *First*, by *Young* C. J., *Dodd* and *DesBarres* JJ., *Wilkins* J. dissenting, that the wife of the testator took an estate for life only, with a contingent remainder in fee to his sons.

By *Wilkins* J., That the wife took an estate in fee.

Secondly, By *Young* C. J., and *Dodd* J., That the granting of a license for the sale of real estate under *Revised Statutes* (second series), chap. 130, sec. 13 and 17, is discretionary with the Court of Probate, and that that discretion was rightly exercised in the present instance by the refusal of such license.

By *DesBarres* and *Wilkins* JJ., That the Court of Probate had no power whatever to grant such license.

APPEAL from the decree of *William Sutherland, Esquire*, Judge of Probate, for *Halifax* county, argued in *Michælmas* Term last by *James*, and *McCully*, Q. C., for appellants (assignees of judgment creditors), and by *J. W. Johnston, junior*, and the *Solicitor General*, for the administratrix and heirs, respondents.

All the material facts sufficiently appear in the opinion of his Lordship the *Chief Justice*.

The Court now gave judgment.

YOUNG C. J. This was an appeal from the Court of Probate at *Halifax*, arising out of the last will and testament of *Cornelius*, the father of *Michael O'Sullivan*, dated 16th *January*, 1855. After disposing of his personal effects, the testator devised his real estate, being of the value of two thousand pounds and upwards, as the same was subsequently appraised and returned in the inventory of *Michael's* estate, by the two following clauses, being the fourth and fifth of the will:

1865.

In Re Estate of O'SULLIVAN.

"I give, devise, and bequeath all my real estate, "wherever situate, to my said wife *Bridget*, in trust, "to sell and dispose of the same, at such times, in "such manner, and in such portions, as she may deem "suitable and prudent, and to invest the proceeds "arising from such sale in such manner as I have "above directed, with regard to my personal estate, "and to apply the proceeds arising from such invest- "ment and investments in the comfortable support "and maintenance of herself, and the support, educa- "tion, and maintenance of such of my children as "shall be under age at the time of my death; and "until such sale, to receive, take, and enjoy the "rents and profits arising from such real estate, "during the term of her natural life, and to apply "the same as above directed.

"And from and after the death of my said wife "*Bridget*, I give, devise, and bequeath all my real and "personal estate, and the monies so invested as afore- "said, to and amongst my sons, *Timothy N.*, *Michael*, "*Cornelius*, *John*, and *William*, their heirs and assigns, "share and share alike."

The widow, being the sole executrix of the will, permitted some portion of the property, and various sums of money belonging to the estate, to pass into the hands of *Michael*, who died largely indebted to the estate, whereupon the mother became his sole administratrix.

Three judgments were recorded against *Michael* in his lifetime, the second of which was assigned to Messrs. *Bauld & Gibson*, who presented a petition to the *Judge of Probate* at *Halifax*, stating the insolvency of the estate, and praying that an order should pass for a sale of the undivided interest of the intestate in the real estate devised by his father.

This was refused by the Judge, on the ground that any right which the intestate would have possessed in the real estate of his father was contingent on the property remaining unsold at the death of his mother,

1865.

In Re Estate of O'SULLIVAN.

and that if the Court granted the order, no present possession could pass to the purchaser, and any title under such order would be liable to be defeated at any moment by a sale under the directions of the widow and trustee.

The case was argued before us last term on an appeal from this decree, and the main question that was raised was the title of the intestate, if any, in the real estate of his father. If he had any interest devisable under our statute of wills, or descendible to his heirs, or assignable in his lifetime, whether such interest was absolute or contingent, the judgment creditor, as I take it, has a right, subject to the discretion of the Court, to have such interest offered for sale. There is a contingency here, most certainly; for the widow is empowered (or, as some may think, is compellable) to sell and dispose of the real estate at such times, in such manner, and in such portions, as she may deem suitable and prudent, and to invest the proceeds, and to use the interest accruing therefrom for her own support, and that of her children. A sale, therefore, by the judgment creditor under section seventeen, may be defeated, as the *Judge of Probate* justly remarks by a subsequent sale of the trustee; and under these circumstances a sale by the judgment creditor might be an imprudent, and would apparently be a useless step.

Treating, then, the interest of the intestate as a contingent interest, Lord *Mansfield* held in *Roe e. d., Noden* v. *Griffiths*, 1 Black. Rep., 606, that all contingent, springing, and executory uses, where the person who is to take is certain, so that the same might be descendible, were devisable; the two are convertible terms, and whatever is descendible or devisable, may be levied on or sold. The same doctrine, shewing an alteration in the law as it was formerly held, is affirmed in 6 *Greenleaf's Cruise, m. p.* 424. The same authority shews that executory interests, or possibilities in freehold estate, may be passed at law by

1865.

In Re Estate of O'SULLIVAN.

deed, fine and common recovery by way of estoppel, and in certain cases they may also be released. And now, by virtue of the Imperial Act, 4 & 5 *W.* 4, chapter 92, section 22, as regards lands in *Ireland*, the owner of a contingent or executory estate or interest, may convey it at law, and not, as heretofore, merely bind it in equity by contract. 6 *Greenleaf's Cruise*, *m. p.* 425, note.

It is the opinion, however, of one of my learned brethren, that the trustee in this case is not only empowered, but is under an absolute obligation to sell; and if she failed in it, that equity would direct a sale by her heirs, or by a trustee appointed for that purpose. This view, for my own part, I am unable to concur in, nor was it at all suggested at the argument. If at no period during her lifetime, the trustee should deem it prudent to sell — if she deliberately preferred to hold the real estate in whole or in part, and died in possession; then, as I cannot but think, the intentions of the testator, and the directions in his will, would be observed, and the devise over to his children would come into operation. In *Alcock* v. *Sloper*, 2 Mylne & Keen, 701, the *Master of the Rolls* remarked, that where a testator limits his residuary property to one for life, with remainder over, it is *prima facie* to be intended that the testator means that the same property, which is given to the tenant for life, should go to those entitled in remainder.

It is to be noted here, that the wife is to have no power over the principal, either of the personal, or the proceeds of the real estate. She is to use the interest of the personalty, and until a sale of the real estate, to receive, take, and enjoy the rents and profits arising from such real estate, during the term of her natural life, and to apply the same in the maintenance of herself and her children. But the will gives her no power of disposition, or division among the children, or otherwise, and in this respect the case is distinguishable from several that were pressed upon us at

1865.

In Re Estate of O'Sullivan.

the argument. It is upon this distinction, as it appears to me, that the question depends, whether the wife took an estate in fee, or only an estate for life. The rule seems to be the same in the *English* and *American* authorities, and I turn to the latter, first, as the more explicit of the two.

In a note to 6 *Greenleaf's Cruise*, 227, it is laid down thus: "If the devisee of land has the absolute right "to dispose of the property at his pleasure, the devise "over is inoperative. But where a life estate only is "clearly given to the first devisee, with an express "power, in a certain event, or for a certain purpose, "to dispose of the property, the life estate is not in "that case enlarged into a fee, and the devise over "is good. 8 *Shepl.*, 288; 16 *Joh.* 537."

So in 4 *Kent's Comm.*, 10th edit., 658: "If an estate "be given to a person, generally or indefinitely, with "a power of disposition, it carries a fee unless the "testator gives to the first taker an estate for life "only, and annexes a power of disposition of the "reversion. In that case the express limitation for "life will control the operation of the power, and pre-"vent it from enlarging the estate to a fee. 2 *Johns. Rep.*, 391, 12 *Johns.*, 389."

The decision in *Jackson* v. *Robins*, 16 Johns. 588, is to the same effect.

In *Jackson* v. *Coleman*, 2 Johns. 391, *W.*, devised to his wife "the use of all his real and personal estate, "to use and dispose of at her pleasure;" and after her death he gave one-third to his daughter in fee, and the other two-thirds to be disposed of at the pleasure of the wife after the decease of his grand-son. The plaintiff's counsel contended that the first clause of the will gave to the wife a life estate only, and that the second was a mere power coupled with an interest for life. But the Court held that the will amounted to a devise in fee to the wife. It is to be distinguished from a mere power, for here the estate was in the first instance devised to the wife.

1865.

In Re Estate of O'Sullivan.

It will be observed that these *American* authorities carefully distinguish an estate given with an absolute power of disposal from an estate given with a restricted power, and *a fortiori* from an estate given with a mere power accompanied with no discretion whatever, as in the case before us.

The *English* cases proceed upon the same principle, which, as I cannot but think, my learned brother who differs from us, has overlooked.

In *Goodtitle e. d. Pearson* v. *Otway*, 2 Wils., 6, the testator devised the lands to *Agnes Pearson* (who was his heir-at-law) for and during her life, to be enjoyed by her without molestation, and after her death to her lawful issue, and if she had no issue, that she should have power to dispose thereof at her will and pleasure; and the Court held, that as the wife had no issue, and the testator in that case had given her power to dispose of the lands at her will and pleasure, she had a fee simple.

Here was the case of an absolute power as in 2 & 16 *Johns.* The next two cases are examples of a restricted power, where a different rule was upheld.

In the leading case of *Tomlinson* v. *Dighton*, 1 P. Will. 149, 171, 1 Salk. 239, the testator devised the premises to his wife *Margaret* for her life, and then to be at her disposal, provided it be to any of his children, if living, if not, to any of his kindred that his wife shall please. I take the description of the devise from *Peere Williams*, as the fuller of the two, but the judgment from *Salkeld* because it brings out the point more distinctly. *Parker* C. J. delivered the opinion of the Court, that this was only an estate for life, and that the disposing power was a distinct gift, because the estate given is express and certain, and the power comes in by way of addition; and that this differs from the other cases, which are general and indefinite, namely, a devise to *J. S.*, and that he shall sell, or a devise to *J. S.* to sell, &c. In these cases, because the party is empowered to convey

a fee, he is construed to have one; he having no express estate divided from the power; but here the power is a separate gift distinguished from the estate, and the estate given is a certain and express estate.

This decision appears to me to apply with irresistible force to the case we are considering: the widow having an express estate given her for life, with a restricted power as a separate gift.

The last case I shall cite favors the same view, though the decision went upon a different ground.

In *Crossling* v. *Crossling*, 2 Cox, 396, the testator devised a freehold estate to his wife for her life, after which followed these words, "And she shall dispose "of the same amongst my children by her at her "decease, as she shall think proper." The wife made no disposition of the estate, and it was held that she had but an estate for life, and that the fee descended upon her death to the heir-at-law, to the exclusion of the children, in whose favor there had been no execution of the power.

It may be said, however, lastly, that as the wife may dispose of the whole estate at her pleasure, and by her deed confer a fee on the purchaser, the fee for that purpose must be in her, upon the admitted principle, that wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied.

Mr. *Jarman*, I perceive, does not altogether approve of the length to which this principle has been carried. By means of a power, he thinks, a trustee (or devisee) might be empowered to convey, without himself having the estate. 2 *Jarman on Wills*, 204. See also the case of *Doe e. d. Hampton* v. *Shotter*, 8 Ad. & El., 905.

Supposing, however, that a trust to sell, even on a contingency, confers a fee simple as indispensable to the execution of the trust (*Lewin on Trustees*, 4th ed., 164), the question arises, What becomes of the estate

1865.

In Re Estate of O'SULLIVAN.

when the purposes of the trust are answered, and the trustee has not sold.

Take the leading cases of *Bagshaw* v. *Spencer*, 1 Ves. Len., 144; *Shaw* v. *Weigh*, 1 Eq. Ca. Abr., 184; *Gibson* v. *Rogers*, Ambler 95, S. C. nom.; *Gibson* v. *Montford*, 1 Ves., 491; *Watson* v. *Pearson*, 2 Exch., 581: to what conclusion do they lead us?

In *Gibson* v. *Montfort*, the devise was to the trustees, their executors, administrators, and assigns, (not to the heirs; the word estate, however, as remarked by Mr. *Jarman*, though overlooked by Lord *Hardwicke*, was used in the devise), in trust to pay sums and legacies by and out of the produce of the personal estate; if that were deficient, then to pay the same out of the rents, issues, and profits, arising by the real estate. And Lord *Hardwicke* said: "It has been often deter-"mined, that in a devise to trustees, it is not neces-"sary the word 'heirs' should be inserted to carry the "fee at law; for if the purposes of the trust cannot "be satisfied without having a fee, courts of law will "so construe it. Here are purposes to be answered, "which, by possibility (and that is sufficient) cannot be "answered without the trustees having a fee, namely, "the payment of debts and legacies, if the personal "estate is deficient, which will probably be the "case."

But suppose they did not sell, that the produce of the personal estate was sufficient, and there was no necessity to resort to the real estate: did the inheritance still vest in the trustees—did a rule of construction still apply where there was no longer a purpose to be answered? I doubt it much. The fee in that case, as I take it, remains in the heir-at-law, or reverts to him when it has passed, and the objects of the trust are fulfilled. Many conveyances in this Province have passed within my own knowledge upon this footing, and I think it is sound. The authorities also seem to go that length. In *Doe dem. Player* v.

Nicholls, 1 B. & Cres. 336, *Bayley* J. in delivering his judgment, says: "It may be laid down as a "general rule, that where an estate is devised to "trustees for particular purposes, the legal estate is "vested in them as long as the execution of the trusts "requires it, and no longer, and therefore, as soon as "the trusts are satisfied, it will vest in the person "beneficially entitled to it." And he adds, that *Doe dem. White* v. *Simpson*, 5 East 162, and *Doe dem. Pratt* v. *Timins*, 1 B. & Ald. 530, are authorities upon that point. And *Holroyd* J. in the same case says, that a trust estate is not to continue beyond the period required for the purposes of the trust. So also in a note to 4 *Kent's Com.* 346, 9th edit., it is laid down that the legal estate is in trustees so long as the execution of the trust requires it, and no longer, and then it vests in the person beneficially entitled.

I have not gone into the cases cited in *Hill on Trustees, m. p.* 253, where a surrender or reconveyance by trustees will be presumed, when it is no longer necessary or proper that the legal estate should remain in them.

The present case does not depend on these niceties. The testator gives to his wife in express terms only an estate for life, with a power of disposition, which she may or may not execute, and a devise over which in my opinion is good.

The question, however, still remains, whether, under the thirteenth section of the Probate Act, second series, the Judge did not exercise a wise discretion in refusing to grant a license for this sale; and, upon the whole, I am of opinion that he did, and as the title of a purchaser under such license would have been liable to be defeated by a conveyance of the trustee, an innocent purchaser would have been very apt to be misled.

The appeal, therefore, must be dismissed; but as the construction of the will is of so doubtful a kind as to have led to a difference of opinion upon the

1865. In Re Estate of O'SULLIVAN.

Bench, although we are agreed as to the dismissal of the appeal, we do not award the costs of the appeal against the judgment creditors, and direct the costs of the administratrix to be paid out of the estate.

DODD J.* We must first enquire what estate, if any, the intestate *Michael O'Sullivan* took under the will of his father *Cornelius O'Sullivan*, to the lands now claimed to be sold by his creditors. Upon their part it was contended at the argument before us that he had a vested interest, which could be sold and disposed of, subject only to a life interest in the widow of *Cornelius*, with power on her part to sell and dispose of the said real estate, and that if she exercised that power, then the interest of *Michael* attached to the proceeds thereof, in the same manner that it did to the real estate itself, as the widow was entitled only to the interest of the monies arising from such sale during her life, when, at her death, it would go under the devise in the will to his five sons in fee-simple, the said *Michael* being one. Upon the part of the widow, it was contended that she had the fee-simple, and the entire disposal of the real estate for her own benefit, and that of her children that were under the age of twenty-one at the death of the testator, and that only in case she did not sell the real estate, *Michael* would have a contingent interest in it, which could be defeated at any time previous to her death by the exercise of the power given to her under the will.

In examining the will, the ordinary reading of it would draw the mind to the conclusion that the testator intended to give a life estate only to his widow. All the books agree that the intention of the testator is the first and great object of inquiry. *Kent* (vol. 4, 655) says, "And to this object technical rules are, to a "certain extent, made subservient. The intention of

*Johnston E. J. and *Bliss* J. gave no opinion, the former having been concerned in the cause when at the Bar, and the latter not having been present at the argument.

"the testator, to be collected from the whole will, is "to govern, provided it be not unlawful, or incon- "sistent with the rules of law."

The testator in the present case by the first clause of his will, directs his executrix to collect in outstanding debts and accounts, and to apply the same to the payment of his just debts, and if insufficient for that purpose, to pay the balance out of his personal estate so far as the same may be adequate, and the balance, if any remain, out of such parts of his real estate as his executrix should deem most convenient to dispose of for that purpose. It is apparent that there is not anything in this first clause that can assist the widow in claiming any estate whatever under the will. If the testator had given her his real and personal estate subject to the payment of his debts, she in that case would have taken the whole estate; but instead of that he merely directs her as to how his debts are to be paid.

The second clause gives certain furniture, together with implements of husbandry and cattle, to his wife for life. I think this clause assists in reading the intention of the testator, for if he had intended to have given his widow a larger estate in his real estate, and the residue of his personal estate, than for life, he would not have limited the devise of his household furniture in the manner he has.

The third clause disposes of all other his personal estate to his wife in trust, to convert such parts of the same as she may see fit into money, and invest the same in some profitable security, and to use the interest accruing therefrom for her support, and the support, education, and maintenance of such of his children as shall at the time of his death be under the age of twenty-one years. This clause in the will, if standing alone, might leave some doubt as to what estate in his personal property was intended for his widow; but if we call in the light of the subsequent parts of the will to assist us in the construction of

1865.

In Re Estate of O'SULLIVAN.

the bequest, I think the intention of the testator is clear, that she was to have a life interest only. The clause, however, upon which depends the rights of the respective parties in this case, is the fourth. (The learned Judge here stated the substance of the fourth and fifth clauses of the will, which appear in full in the judgment of the *Chief Justice*) By the last clause the testator appoints his wife sole executrix of his will.

There were few authorities cited at the argument on either side, and not any upon the part of the creditors beyond a reference to our *Revised Statutes*. In the devise of the real estate by the testator, if he had given it to his wife in trust, with power to sell for the benefit of herself and children, it would have given her a larger estate than for life; but limiting those general words by expressly stating it to be for her life, reduces her estate to one for life only. The third and fourth clauses of the will must be read together, for in the fourth the testator expressly refers to the third, and reading them in that way, and not selecting merely one passage or expression from them, the intention of the testator is apparent that he intended a life estate only for his wife, leaving to her discretion a power to sell the real estate, to invest the monies arising therefrom, and to take the interest for the benefit of herself and children, or if she preferred not selling, then to take the rents and profits arising from the real estate during the term of her natural life. Those last words in the fourth clause, "during the term of her "natural life," are equally applicable to the interest she takes in the real estate, whether she sells or prefers keeping it intact.

We were referred to the 25th section of chapter 114th *Revised Statutes*, (second series,) but I do not think it assists the counsel for the widow in favor of a higher estate than for life. That clause declares that when any real estate shall be devised to any trustee or executor, such devise shall be construed to

pass the fee, unless a definite term of years, absolute or determinable on an estate of freehold, shall thereby be given to him expressly or by implication. In this case, the trustee and executrix come within the exception, having a freehold estate by express words, consequently the first part of the section does not apply. The 23rd section of the same Act, which makes words of limitation not necessary in a will to pass the fee, makes the exception, where a contrary intention appears, and, as I have already said, the intention of the testator, in this case, is apparent, that no higher estate than one for life is intended. "If an "estate be given to a person generally or indefinitely, "with a power of disposition, it carries a fee, unless "the testator gives to the first taker an estate for "life only, in that case the express limitation for life "will control the operation of the power, and prevent "it from enlarging the estate to a fee." 4 *Kent's Com.*, (10th ed.) 658. If the devise be not general, but expressly for life, with a power of disposal, the devisee will take only an estate for life with a power of disposal. *Anon*, 2 Leon., 71; *Noy*, 80; *Tomlinson* v. *Dighton*, 1 P. Williams, 149. A devise with power to convey in fee, carries a fee. 8 *Cowen*, 277. "But "where the estate is given for life only, the devisee "takes only an estate for life, though a power of dis- "position, or to appoint the fee by deed or will, "be annexed, unless there should be some manifest "general intent of the testator, which would be de- "feated by adhering to this particular intent." 4 *Kent* (10th ed.,) 319; *Jackson* v. *Robins*, 16 Johns., 588. It appears from the cases that, although a devise generally, which only gives an estate for life, may be preceded or followed by limitations, which give larger estates, yet, if the words themselves only give a life estate, and there is nothing in any other part of the will from which it can be collected, that a larger estate than for life was intended to be devised, such

1865.

In Re Estate of O'SULLIVAN.

person will take an estate for life only. *Watkins on the Principles of Conveyancing, Tit. Devise*, p. 596.

Before the passing of our Wills Act, words of inheritance were not necessary to pass the fee, any more than at present. Any words showing that the testator intended to pass all his interest in the estate devised, was sufficient to pass the fee; as, a devise of all my estate, or all my interest, or all my right, or all I shall die possessed of, or any other expression equally expressive of his intention to give a fee; so a devise of the rents and profits of land, is a devise of the land itself. *Co. Litt.*, 4, *b*; 2 *Ves. & Beames*, 68; *Shadwell* V. C. in *Stewart* v. *Garnett*, 3 Sim., 398. But where the testator did not intend to pass the fee, and annexed words that clearly showed a contrary intention, as in the present case, for, although he gives to his wife a power to dispose of his real estate, and to invest the monies to arise therefrom, and to receive and take the interest, and, until such sale, to take and receive the rents and profits for and during her natural life, thus limiting her estate by express words to her own life; words of implication do not merge or destroy an express estate for life, unless it becomes necessary to uphold some manifest general intent. There could have been no such intent here, otherwise the testator would not have given his real estate, after his wife's death, to his children in fee.

In *Doe* v. *Morgan*, 6 B. & C. 512, in which the Court held that the word "property" would pass the real estate, Lord *Tenterden* C. J. said it had been decided in many cases, that in a will the word "property" is of itself sufficient to pass real estate, unless there be something in the other parts of the will to show clearly that the word was used in a more confined sense; and in *Licfe* v. *Saltingstone*, 1 Mod. 189, where the testator devised to his wife for life, and by her to be disposed of to such of his children as she should

think fit, it was held to give the wife but a life estate, with power to dispose to any of the children. *Ellis*, *Wyndham*, and *Atkyns*, Justices, held she could not take a larger estate to herself by implication than a life estate, because a life estate is given to her by express limitation. Upon this point the cases appear to be uniform, and those that are distinguishable, are those cases where the estate is given in general terms, or there are other parts of the will clearly showing an intention to give a higher estate.

I am therefore of opinion that the widow takes but an estate for life, with power to sell when she deems it prudent. Having arrived at the conclusion that the widow takes but an estate for life, under the will of the testator, yet I am not disposed to give to the creditors of *Michael O'Sullivan* the empty advantage of selling a contingent right, which he had in the estate of his father, but which cannot by them be made available for any valuable purpose until after the death of his mother, who up to that period has the right to sell the real estate, when, and in what proportions she may deem it most for her own interest. A sale under those circumstances by the creditors of the interest of *Michael*, would put them and others in a false position, which it is the duty of the Court to prevent. I am therefore of opinion that the judgment of the Court of Probate in refusing to grant the prayer of the petition of the creditors of *Michael O'Sullivan* for the sale of his interest in his father's real estate was correct, although arriving at that opinion from different reasons given by the learned Judge of that Court.

DesBarres J. The question to be considered in this case is, whether *Bridget O'Sullivan*, under her husband's will, took an estate for life in his real estate, with remainder over to *Michael* and his brothers, or an estate in fee. If it were an estate for

1865.

In Re Estate of O'SULLIVAN.

life, then *Michael* had an interest in his father's estate liable to be sold for payment of his debts, under sections 13 and 17 of the Probate Act (*Revised Statutes*, second series, chapter 130); but if the fee passed to the widow, then he had only an interest in the proceeds and monies to arise from the sale of that estate,—an interest not to be touched or affected by any order that could be made by the *Judge of Probate*, under either of these sections of that Act.

In 2 *Jarman on Wills*, 204, it is said that, where the duty imposed on the devisee is to sell or convey the fee simple, he is held to take the inheritance to enable him to comply with the direction of the testator, and he refers to *Doe c. d. Booth* v. *Field*, 2 Barn. & Adol., 564; *Doe c. d., Shelly* v. *Edlin*, 4 Adol. & Ellis, 582; and *Garth* v. *Baldwin*, 2 Vesey Sen'r, 645, which fully establish that principle.

It cannot therefore be doubted, that where it is clearly the duty of the trustee to sell, and he is under an obligation to sell, he must necessarily take a fee to enable him to fulfil his trust; but we are to consider whether the will makes it imperative upon the executrix in this case to sell, or whether a power of disposition only is given to her by the will; that is, a power giving her the right, but not making it imperative upon her to sell. She is directed by the will to sell at such times, in such manner, and in such portions, as she may deem it suitable and prudent; and until such sale to take the rents and profits arising from the real estate, for and during the term of her natural life, and apply the same to the support of herself and children. Looking at this devise with the view of giving it the effect it was intended to have, my impression is that the testator intended to leave it optional with the widow to sell or not as she thought fit. That such was his intention is, I think, apparent from the last clause in the will, by which, after his wife's death, he devises all his real estate to his sons,

which it is not to be supposed he would have done, if he had intended to make it imperative upon her absolutely to sell.

[The learned Judge here referred to the case of *Tomlinson* v. *Dighton* (cited ante p. 552), and read the judgment of *Parker* C. J. therein.]

This case has an important bearing on the present, inasmuch as it shows that if the widow took an estate for life, as I think she did, the disposing power given to her must be considered as a separate gift distinguished from the estate itself.

[His Lordship here referred to the passage in 4 *Kent's Com.*, 319, cited ante p. 561.]

In *Jackson* v. *Robins*, 16 Johns. 588, the *Chancellor*, in delivering judgment, says: "We may lay it "down as an incontrovertible rule, that where an "estate is given to a person generally or indefi- "nitely, with a power of disposition, it carries a fee, "and the only exception to the rule is, where the "testator gives to the first taker an estate for life "only, by certain and express words, and annexes to it "a power of disposal. In that particular case the de- "visee for life will not take an estate in fee, notwith- "standing the distinct and naked gift of a power of "disposition of the reversion."

The devise to the widow in this case, in my opinion, gives her in express terms an estate for life, with a power of disposition, which she may execute or not at her option, and a contingent remainder over to the testator's sons, to take effect in the event of the power of sale not being executed at her death. *Michael*, according to my view, had therefore an interest in his father's estate of a nature liable to be sold for payment of his debts; but I do not think the *Judge of Probate* had any authority under sections 13 and 17 of the *Probate Act*, to grant to the appellants as his creditors the order prayed for, because it is clear that no sale can be made, and no title given upon such an order under these sections other than by the adminis-

1865.

In Re Estate of O'Sullivan.

tratrix, or some other person to be appointed administrator of the estate, on refusal or neglect of the administratrix to give security to account for the proceeds. The appellants having then applied for an order of sale, which, in my view, the *Judge of Probate* had no power under the circumstances to grant them, I think their appeal to this Court cannot for this reason prevail.

WILKINS J. This is an appeal to this Court from a decree of the learned Judge of the Court of Probate for the County of *Halifax*.

A petition, dated 15th *January*, 1864, by *Alexander James, Esquire*, as proctor for *John Gibson* and *William Bauld*, was presented to the learned Judge, in which the petitioners represented that the administratrix of the estate had made oath that the estate was insolvent, and that a large amount was due them from that estate, which was secured on the real estate of the deceased, by judgment duly recorded in the life time of the intestate. The petitioners prayed for a decree ordering a sale of the undivided interest of the intestate in such real estate. *Bridget O'Sullivan*, the administratrix, was cited, and appeared before the Court. The following facts were made to appear at the hearing: The intestate possessed no real estate at the time of his death, any further than he might be entitled to such under the will of his late father, *Cornelius O'Sullivan*, deceased. The testator last named made his will, duly executed, to pass real estate, and appointed his widow, the same *Bridget O'Sullivan*, executrix thereof.

[The learned Judge here stated the substance of the fourth and fifth clauses of the will.]

Bridget O'Sullivan, in her capacity of administratrix of the estate of *Michael O'Sullivan*, on the 29th of *January*, 1864, made an affidavit, "that she believed "the estate to be insolvent;" and the same was declared to be so by an order of the learned Judge,

1865.

In Re Estate of O'SULLIVAN.

made on the 17th *June*, 1864. This last mentioned order was, however, made subsequently to the decree made by the learned Judge on the petition of the judgment creditors of the intestate above mentioned, and to the appeal therefrom to this Court.

On the 4th of *March*, 1864, the learned Judge, in the matter of the petition of the judgment creditors last referred to, made a decree refusing to grant the order of sale that was applied for, and his decree thereon, and his reasons therefor, are before this Court. That decree was made after hearing *Bridget O'Sullivan*, who, in her character of executrix, opposed the petition, and, in her affidavit, disclosed strong equities on behalf of herself, and the brothers of the intestate, in respect of large advances from the estate of the testator made to the intestate, whilst, as she alleged, none had been made therefrom to the other children of the testator.

As respects the objections stated to the decree, I feel it unnecessary to notice them further than to say, that they proceed on an entire misconception of the legal effect of the dispositions of the real estate in question made by the testator, *Cornelius O'Sullivan*. If we turn our attention to chapter 130 of our *Revised Statutes*, we find that section 13 supposes application for a license for sale of real estate to be made by, and the license to be granted to, the administrator or executor. The bond also for sale, the form of which is prescribed by section 16, recites a license granted to the executor or administrator. The Statute does not give any power to the *Judge of Probate* to compel an executor or administrator to apply for such license. In view of this, it is remarkable, that, if in this case the learned Judge had ordered a sale, it would have been ordered, not on the application of the administratrix, but in direct opposition to her desire. It has already been decided in this Court, that, under section 13, it is discretionary with the *Judge of Probate* to grant or to withhold a license.

1865.

In Re Estate of O'Sullivan.

Under sections 83, 84, 85, which particularly refer to insolvency, the Judge's authority to "settle and distribute" is confined to claims that are to be adjusted ratably, save in cases of domestic and farm servants. Mortgagees and registered judgment creditors, up to the amounts of their mortgages and judgments, are, by section 85, saved from the operations of sections 83 and 84; so that, in declaring this estate insolvent, the learned Judge had no jurisdiction over these judgment creditors' claims on any real estate owned by *Michael O'Sullivan*, the intestate.

It is important to bear in mind, that general equity jurisdiction as to trustees and trusts does not reside in a *Judge of Probate*. His equity powers are confined to the settlement of accounts of executors or administrators as such, (sec. 79.) All the real estate of the late *Cornelius O'Sullivan* being indisputably vested in *Bridget O'Sullivan*, as a trustee; no recourse can be had on it, save in that Court which has cognizance of trusts; and with especial reason in this case, for in such Court alone the equitable claims on the estate of *Michael O'Sullivan* (part of that trust estate), assuming he had an interest in it, can be considered and adjusted.

The registration of these judgments bound those interests alone of *Michael O'Sullivan* in the real estate of his father, which his father by his will declared his intention to bestow beneficially on *Michael*, and as they were declared and defined (if, at all,) by the testator. There was an utter fallacy in the contention "that, in case a sale had been ordered, and had taken "place, the rights and interests of *Bridget* would "remain as they were at the time of the sale." The effect of a conveyance under such a sale is defined by section 93, which enacts in terms, "that it shall have "the same effect as if made by the deceased." It would, therefore, override and cut off all the claims on the real estate that have arisen subsequently to *Michael's* death, which *Bridget* sets up in behalf of

herself, and of the brothers of the intestate. A sale, then, if ordered, would have been a coerced sale by an administratrix against her wishes, and destructive of her interests and of those whom she represents, and a sale without the protection of equity thrown over the overriding trusts under the testator's will.

But there are other and more important considerations involved in our inquiry, which are decisive against the pretensions of these judgment creditors. The estate of the testator is to my mind so clearly devised to *Bridget O'Sullivan*, with the obligation of a personal trust to sell it imposed on her, without any discretion on her part as to whether she would sell or not; that I was surprised to learn that a contrary opinion would be expressed. It thus becomes necessary for me to investigate that point, and in order to do so, to repeat the language of the devise in question, which is in terms, as follows:

[The learned Judge here stated the substance of the fourth and fifth clauses of the will.]

Now, if there be any force in language, the plain sense of this, in other words, is, and can only be, "I "direct my wife, at some time during her life, and in "such manner, and in such portions, as she may "approve, to sell all my real estate; and I direct her "to invest the proceeds in the manner specified; and "I direct her further, up to that point of time when "she shall make such sale, to enjoy the rents and "profits." Here the directions of the testator to his wife to sell are absolute, except as to the time and the manner of sale, and the portions in which the land shall be sold. The whole clause manifests his personal confidence in his wife, and he makes her the sole instrument for disposing of his estate after his death. Thus the testator declared an absolute trust, and made his wife his trustee. She, then, is bound to perform the trust, at some time during her life. It is to be presumed she will perform that legal duty. If she does not, she violates the delegated trust; and

1865.

In Re Estate of O'SULLIVAN.

if she were to declare her intention not to perform it, or if she dies, leaving it unperformed, the interposition of equity will not be invoked in vain. In *Lewin on Trustees*, p. 391, we have this definition of a power as distinguished from a trust: "Again, powers, in the sense "in which the term is commonly used, may be dis- "tributed into mere powers, and powers coupled with "a trust. The former are powers in the proper sense "of the word; that is, not imperative, but purely "discretionary; powers which neither the trustee can "be compelled to execute, nor, on failure of the "trustee, can be executed vicariously by the Court. "The latter, on the other hand, are not arbitrary, but "imperative; have all the nature and substance of a "trust, and ought rather, as Lord *Hardwicke* observed, "to be designated by the name of trusts." "It is "perfectly clear," said Lord *Eldon*, "that where there "is a mere power, and that power is not executed, "the Court cannot execute it. It is equally clear, that "wherever a trust is created, and the execution of the "trust fails by the death of the trustee or by accident, "this Court will execute the trust. But there are not "only a mere trust and a mere power, but there is "also known to this Court a power which the party "to whom it is given is entrusted and required to "execute; and with regard to that species of power, "the Court considers it as partaking so much of the "nature and qualities of a trust, that, if the person "who has the duty imposed upon him does not dis- "charge it, the Court will to a certain extent discharge "the duty in his room and place."

This testator expressly directs an act to be done by his trustee that cannot be done without a sale; that is, the conversion of his realty into personalty, and the investment of the latter in a prescribed way; and the wife is, in terms, herself required personally to see to this. Now, to call his express directions to her to do this, a mere authority or power, which she may or may not exercise, is to my mind utterly inexplicable.

1865.

In Re Estate of O'SULLIVAN

If this be, as is asserted, a mere power, it is a mere power to do what? The only answer can be "to sell, "or not to sell, during the life of *Bridget O'Sullivan*." But, whilst the testator has not used an expression which can be tortured into giving a discretion on that point, the exercise of such a discretion by an expressed determination not to sell, will be in direct violation of the testator's expressed direction to sell.

No man can call this a mere power, without in effect striking out from the clause the testator's words "in trust to sell." Again, he who contends for the wife's absolute life estate, must reject the testator's words in connection with the period of the wife's enjoyment, viz., "until such sale."

But, I presume, nobody will venture to deny that *Bridget* can sell, and give a title in fee simple; if she can, she can only sell as a trustee. If so, she is a trustee, and then the estate in her, which she is to convey in fee, is an estate in fee.

If so, the subsequent limitations are void, as we shall see, on acknowledged principles.

It is in accordance with an elementary principle of equity law, "that as a duty to sell this estate was "imposed by the testator on his wife, she was thereby "invested with the fee simple of it."

In 2 *Jarman on Wills*, 204, it is said: "Where the "duty imposed on the devisee is to sell or convey the "fee simple, he takes the inheritance to enable him to "comply with the direction." To this rule there is no exception to be found in the authorities; none, I say, where there is a duty to sell imposed. There is an exception in cases of gifts or devises with power to sell, and it is thus clearly stated in *Jackson* v. *Robins* 16 Johnson, 588. "We may lay it down," said the Court in that case, "as an incontrovertible rule, that "where an estate is given to a person generally "or indefinitely, with a power of disposition, it car- "ries a fee; and the only exception to the rule is, "where the testator gives to the first taker an estate

1865.

In Re Estate of O'SULLIVAN.

"for life only, by certain and express words, and "annexes to it a power of disposal" (in other words, empowers the devisee to dispose, or not), "in that "particular or special case, the devisee for life will "not take an estate in fee, notwithstanding the dis- "tinct and naked gift of a power of disposition of "the reversion." "The distinction," he adds, "is "carefully marked and settled in the cases, *Tomlin- "son* v. *Dighton*, 1 Salk., 239; S. C., 1 P. Williams, 149; "*Crossling* v. *Crossling*, 2 Cox, 396; *Reid* v. *Shergold*, 10 "Ves., 370; *Goodtitle* v. *Otway*, 2 Wils., 6."

The same exception to the same rule is thus stated by *Jeremy* (p. 99): "If the devise were to one for life "only, with authority to dispose of the same among "certain individuals after his death, the legal estate "would descend, in that event, to his heirs at law, "and consequently such authority could not be con- "strued to be a trust, but, being a power, if the "devisee should not appoint, this Court would give "no interest to the nominees." He cites the above noted case of *Crossling* v. *Crossling*. The leading case of the class of cases cited in *Johnston*, viz.: *Tomlin- son* v. *Dighton*, illustrates the exception and the rule. *Tomlinson* seised in fee of the premises in question, devises to his wife *Margaret* for her life; and then to be at her disposal, provided it be to any of his chil- dren, if living; if not, to any of his kindred that his wife shall please.

Parker C. J.: "With respect to the first question, "'What estate passes by the will to *Margaret*, the "'testator's wife;' we are all of opinion she has but "an estate for life, with a power of disposing of the "inheritance. And as to this, the difference is, "where a power is given with a particular description "and limitation of the estate (as here), and where, "generally, as to executors to give or sell; for, in "the former case, the estate limited being express "and certain, the power is a distinct gift, and comes "in by way of addition; but in the latter the whole

1865.

In re Estate of O'SULLIVAN.

"is general and indefinite; and as the persons in-
"trusted are to convey a fee, they must, consequently,
"and by a necessary construction, be supposed to
"have a fee themselves." The same learned *Chief Justice*, as reported in the same case in *Salkeld*, used these expressive words: "In the case before the "Court the power is a separate gift, distinguished "from the estate, and the estate given is a certain "and express estate."

The case of *Jackson*, on the demise of *Livingston, et al.*, v. *Robins*, 16 Johns., 589, shows what, strangely enough, was not noticed at the bar on the argument, viz., that in the case before us, the limitations of the estate, after the death of *Bridget*, are simply void, and on the well known rule, "that it is necessary in order "to constitute a good executory devise, that it cannot "be destroyed by the act of the first taker." In the case just referred to, it was held that where *A* devises all his real and personal estate to his wife, and in case of her death without giving, &c., by will, or otherwise selling the said estate, then he devises the same to his daughter *D*; the wife takes the entire fee simple, both by force of the word "estate," and of the absolute power given by the will; and the subsequent limitation, being repugnant thereto, is void, either as a remainder, which cannot be limited on a fee, or as an executory devise, to the validity of which it is essential, that it cannot be affected by any act of the first taker.

Now, in the particular case it is clear that a sale by *Bridget*, which she not only may, but must make, if she perform the directions of her testator, will destroy the limitations to her sons. They, therefore, are void. These are the words of a great *American* lawyer and judge, *Chief Justice Parsons*, in *Ide* v. *Ide* (5 Mass., 504): "Whenever it is the clear intention of the testa-
"tor that the devisee shall have an absolute property in
"the estate devised, a limitation over must be void, be-
"cause it is inconsistent with the absolute property

1865.

In Re Estate of O'SULLIVAN.

"supposed in the first devisee; and a right in the first "devisee to dispose of the estate devised at his plea- "sure," (*a fortiori*, an obligation to dispose of it in fee), "and not a mere power of specifying who may "take, amounts to an unqualified gift."

There is another aspect of this case, not presented at the argument, in which the appellants' contention must appear utterly without foundation. There never was, and never can be, any *real* estate of *Michael O'Sullivan*, the judgment debtor, for these docketted judgments to operate on. His interest, if any, in the estate of his father, under the will, was an interest in *personalty*, for by an inflexible rule of equity it must be regarded as actually converted into personal estate. The testator commanded his trustee so to convert it, and *Michael* died without having declared, as he might have done, his election that it should remain unconverted. If, therefore, there were any interest in *Michael* (and I think I have proved that there is none) in the estate of his father, it would have been personalty distributable *pari passu* amongst all the creditors to that estate.

The equitable rule which effects this cannot be questioned. See *Adams' Equity*, 135–138; *Lewin on Trusts*, 623, 625; *Story's Equity Juris.*, sec. 792; *Harcourt* v. *Seymour*, 2 Simon, N. S., 45.

Michael O'Sullivan, then, took no interest in the real estate of his father; and, therefore, if the order of sale applied for had been granted by the learned Judge, there would have been nothing for it to operate upon.

I should not have felt it necessary to consider in detail the question of the estate which *Bridget* took under the will, but for the respect I have for the opinions of those of my learned brethren, whose views on that point are not in accordance with my own.

Appeal dismissed, without costs.

Proctor for appellants, *James*.

Proctor for respondents, *J. W. Johnston, Jr.*

LANE *versus* DORSAY.

July 29.

REPLEVIN by the owner of a vessel against the master for the vessel and a quantity of fish.

Plaintiff, who was the owner of an *American* fishing vessel, enrolled at the port of *Vinal Haven*, in the State of *Maine*, put the defendant in possession of her as master, for a fishing voyage from that port. The shipping articles provided that the defendant and the crew should be paid with, and interested in the fish to be caught in the prosecution of the voyage, in certain specified proportions thereof. Plaintiff, becoming dissatisfied with the defendant, through an agent demanded possession of the vessel and fish. Defendant replied "There is the vessel on the flats, you can take her; but as for the fish, neither you (the agent) nor *Lane* (plaintiff) shall have it. I am going to sell it to pay myself and crew." Plaintiff thereupon brought replevin for both vessel and fish. Defendant in his pleadings, and at the trial, insisted on a right to retain possession of the vessel from the date of the writ (9th *October*) until the 31st *December*, when the fishing season closed for the year. The jury found for the plaintiff.

Pleas. 1. Not the property of plaintiff. 2. Plaintiff not entitled to the possession. 3. Vessel a fishing vessel, and defendant put in possession of her as master by plaintiff, for a fishing voyage, and that the fish were caught in the said voyage, and not taken from plaintiff. 4. Defendant put in possession of vessel under a written agreement for a specified time, not yet expired, and defendant, under said agreement, was to be paid with a share of the fish to be caught in the voyage, and a commission on the whole cargo of fish so caught. 5. Vessel an *American* vessel, enrolled at the port of *Vinal Haven*, in the State of *Maine*, according to an Act of Congress of the *United States of America*, entitled, &c., and a written agreement (setting it out) between plaintiff, defendant, and the crew, under which defendant went into possession of the vessel, and in the course of the voyage under said

Held, *First*, by *Johnston*, E. J., *Dodd*, *DesBarres* and *Wilkins* JJ. (*Young* C. J. dissenting), that there must be a new trial.

By *Young* C. J., That the action was maintainable for both vessel and fish.

By *DesBarres* J., That it was maintainable for the vessel, but (by *Dodd* and *DesBarres* JJ.,) not for the fish, the parties being tenants in common of the fish, and the plaintiff never having been in actual possession thereof.

Secondly, By *Young* C. J., *Dodd* and *DesBarres* JJ. (*Johnston* E. J. and *Wilkins* J. dissenting), That section 171 of chap. 130 *Revised Statutes* (second series), extended the common law remedy as regards the action of replevin.

By *Johnston* E. J. and *Wilkins* J., That the said section was merely declaratory of the common law, that the "taking" mentioned therein was therefore a taking against the will of the owner, and there being no such taking in this case, that the action could not be maintained.

1865.

LANE v. DORSAY.

agreement caught the fish, and that at the time of issue of writ fish had not been divided and apportioned, nor defendant otherwise paid for his services.

Replication. As to fourth plea, that as regards the alleged agreement, if any, defendant, at the time of issuing the writ, had avoided and put an end to the same by wrongfully dismantling the vessel, &c., and by surreptitiously and wrongfully taking and carrying away, and converting to his own use, the whole cargo of fish, contrary to the said alleged agreement.

At the trial before *Young* C. J., at *Clare*, in *September* last, the jury, under the direction of the learned Judge, found for the plaintiff.

A rule *nisi* having been granted for a new trial, it was argued in last *Michaelmas* Term, by the *Solicitor General* for plaintiff, and *Weatherbe* and *Savary* for defendant.

All the material facts sufficiently appear in the judgments.

The Court now gave judgment.

YOUNG C. J. This is an action of replevin, tried before me last *September*, at *Clare*, in which the plaintiff obtained a verdict under my direction, subject to the question whether replevin would lie. Independently of this question, I would not have granted a rule for a new trial, and although the verdict was warmly assailed at the argument on the merits, I think that the merits of the case admit of but little doubt. The action was brought for a fishing vessel owned by the plaintiff, who is a citizen of the *United States*, and resident there, and who put her in charge of the defendant as master, on a fishing voyage, under the articles commonly used in that country, and for part of the fish caught in the course of the voyage. The plaintiff, becoming dissatisfied with the conduct of the defendant, empowered one of the witnesses to demand possession of his property. The witness exhibited his power of attorney to the defend-

ant, with a letter from the plaintiff, on which the defendant said: "There's the vessel on the flats; you "can take her; but as for the fish, neither you nor "*Lane* shall have it: I am going to sell it, to pay "myself and crew." He carried off, accordingly, one hundred and fifty quintals of codfish, leaving in the store forty-nine barrels of mackerel, for which, as well as for the vessel, the writ of replevin was sued out.

The writ was in the form given in the *Revised Statutes*, charging the defendant, not with unlawfully or wrongfully taking, but with "unjustly detaining" the said vessel and fish, and as the defendant had pleaded that he had not unjustly detained them, I think that, as regards the vessel, he would have been entitled, on the above evidence, to a verdict. But both in his pleadings and at the trial, he insisted on a right, under the shipping articles, to retain the possession of the vessel as against the owner, from the 9th of *October*, when the writ issued, to the 31st *December*, when the fishing season closed for the year. This right was said to be in unison with the laws of the *United States*, of which, however, no evidence was given; and as there was nothing in the articles to sustain it, and the principles of the law merchant, as understood in this Court, are opposed to it, I am of opinion that the verdict, as regards the vessel, should not be disturbed.

The merits seem to me to be equally clear as regards the fish. Nothing, as I take it, but an express clause in the contract, could authorize the master, not only to carry off, secretly and by stratagem, the greater part of the fish, and dispose of it at his pleasure, but to claim, as matter of right, the possession and disposal of the remainder. That right belongs surely to the owner, who furnishes the outfits, and is the party most largely interested in the proceeds of the catch, and is also the trustee and guardian for the crew. To assign it to the master, against the will,

1865.

LANE v. DORSAY.

and in defiance of the rights of the owner, would be establishing a precedent for which no authority was cited, and which would certainly be of a very dangerous kind.

It was argued that the fish being held in shares, there was no exclusive property in the plaintiff to justify replevin; and this would be true if the plaintiff and defendant are to be accounted joint tenants, or tenants in common. But why limit the doctrine to the owner and master? Upon the same principle the crew are equally entitled, and any one of the seamen having an interest in the proceeds might also take possession, and leave the shipmaster and owner to their action. Nay, we must go a step further, and hold that no action would lie; the master or seamen so acting would be equally protected from trespass or trover as from replevin; for in the case of *Jones* v. *Brown*, 38 L. & Eq. R., 304, it was held that the secret removal of entire chattels by one tenant in common, without the knowledge or consent of the other, for the purpose of selling them, and applying the proceeds to his own use, does not amount to a conversion; nor is it an unlawful act, for which the co-tenant can maintain an action at law, even although the removal has created a lien on the chattels by a third party. The case of *Holliday* v. *Camsell*, 1 T. R., 658, was an action of trover where the parties were members of a friendly society, and the rule that one tenant in common cannot bring trover against another was affirmed. So in the *American* case of *Taylor* v. *True*, 2 Hilyard on Torts, 296, where the majorty of a fire company, owning certain property, voted to disband, and appointed a committee to remove the property; and a minority of the company remained, and filled up the company with other persons, and then united with the new members in an action of replevin against the committee; it was held that the action could not be maintained. But is it to be said that there is any analogy between these cases, and the claims of a

master and crew under shipping articles, regulated doubtless by Acts of Congress which were not in proof, and relieving so simple a transaction from the manifest absurdities which an adhesion to the doctrine of a joint tenancy would necessarily involve?

The argument, therefore, is reduced to the question which I reserved at the trial—whether replevin in such a case under our *Revised Statutes*, second series, chap. 134, sec. 171–175, would lie. I was aware at the trial that a difference of opinion existed among the Judges on this point, and brought it up that it might be duly considered. As the language of the third series, chap. 134, secs. 174 to 178, does not differ essentially from the second, this inquiry retains all its interest.

The difficulty first occurred to my brother *Wilkins*, in the case of *Freeman* v. *Harrington*, tried at *Shelburne*, in *October*, 1862, and rested mainly on the case of *Mennie* v. *Blake*, decided in 1856, and reported in 6 Ell. & Black, 842, and 37 L. & Eq. Rep, 169. It does not apply to replevin for distresses in case of rent, or damage feasant, neither of which, as I take it, is within the purview of our Act. In these cases the form of the writ and the subsequent proceedings remain as at common law. Whether the section, enabling the jury to award damages to either party in the suit, extends to these cases or not, is a point on which I give no opinion.

The main question I looked into with a good deal of care on the argument of *Freeman* v. *Harrington*,* and part of what I have now to say, I derive from the judgment I pronounced in that case.

[His Lordship here read from his judgment in *Freeman* v. *Harrington* (reported *ante*, page 352,) from the fifteenth line of page 354, to the twelfth line of page 358.]

It will be perceived that I found this opinion altogether upon the Provincial Act, freely admitting that it is at variance with the *English* rule. The Courts

* Ante p. 352.

1865.

LANE v. DORSAY.

of *Massachusetts* and *Maine*, indeed, contend that at common law the action lay for an unlawful detention, and cases to that effect are cited by *Morris* in his notes to page 39. But the language of C. J. *Best*, in *Galloway* v. *Bird*, 4 Bing., 299, "that no instance can "be found in the digests or abridgements of replevin "having been brought upon a delivery under a contract," and other decisions to the same effect, establish the necessity of a taking at common law against the will of the owner; and that is admitted by the Courts of *New York* to be the principle of the *English* decisions. The maintenance of this principle would deprive ship owners in this Province, and the owners of other personal property from whom it is unlawfully detained, of what I consider a most wholesome and effective remedy. An action of trespass or trover, with a right to recover damages and costs, from a bailee who may be a pauper, or a shipmaster, as in this very case, setting his owner at defiance, is the form of a remedy without the substance. I am not disposed, therefore, to put a narrow construction on our revised Act, or to confine it, as by an ingenious and forced interpretation it might possibly be confined, to a single case, — to a seizure, for example, under a warrant, where the original taking was lawful, but the detention had ceased to be so. I think that the words admit of a wider scope, and that the interests of justice require the wider scope to be given. I would not go the full length of the *American* Courts, extending the action to all cases, where chattels in the possession of one person have been claimed by another, because our Act, as I read it, does not go so far as that; and I would not disturb, by this summary proceeding, a possession not derived from the plaintiff; but wherever the possession has passed out of the plaintiff, and there is an unlawful detention by the defendant — to constitute which, in many cases, there must be a demand and a refusal — then I would award the writ, leaving the defendant the

protection of the "claim property bond," under section 174.

1865.

LANE v. DORSAY.

It remains only that I should notice the case of *Nightingale* v. *Adams*, cited by the defendant's counsel, from *Showers' Reports*, 91. It was there held by C. J. *Pollexfen*, that replevin did not lie for goods taken beyond the seas, though afterwards brought to *England* by the defendant; because, it was said, the taking, which was the gist of the action, was beyond the seas. In this country, however, Mr. *Morris* remarks, where the unlawful detention is as much in question as the taking, this ruling of *Pollexfen* would hardly be recognized.

For these reasons, I am of opinion that the rule for a new trial should be discharged.

JOHNSTON E. J. The plaintiff is an *American* citizen, the owner of an *United States* fishing vessel, which the defendant sailed in as master on the cod fishery from an *American* port, under a written agreement between the plaintiff and the defendant, and the crew, by which they were all to participate in the results of the adventure, the master and crew being interested in proportion to the fish caught by each.

The defendant, who is a *Nova Scotian*, resident in the county of *Digby*, after having for some time pursued the cod fishery, brought the vessel to that part of the Province, whence he followed mackerel fishing, and where the vessel and a quantity of mackerel that had been caught in her were seized by the Sheriff under a writ of replevin in this action. On the trial, the evidence on the plaintiff's part went to charge the defendant with violation of his agreement, in the management of the voyage and disposition of the vessel, and in not bringing her home, and by the sale of fish caught during her voyage; the defendant, by his pleading, claimed that the period for the adventure to continue had not expired, and he offered evidence with a view to excul-

1865.

LANE v. DORSAY.

pate and explain. The jury, under the direction of the learned *Chief Justice*, found a verdict for the plaintiff for the value of vessel and fish; objections raised by the defendant's counsel at the trial being reserved.

On the argument of the rule *nisi* for a new trial, several questions were raised. One of these is, whether replevin lies in such a case?

It is clear, from *Mennie* v. *Blake* and other cases, that in *England* under similar circumstances, replevin could not be maintained. But the plaintiff's counsel contended that it could be upheld in this Province by virtue of *Revised Statutes*, chap. 134, second series, secs. 171–175, and Appendix A, form No. 2; and the Court is required to expound these enactments.

In performing this duty the object is to ascertain the intention of the Legislature, and this is to be done under the guidance of known rules of construction. *Pollock* C. B., in *Mallan* v. *May*, 13 M. & W. 517, expresses the necessity of applying the ordinary rules of construction, although in some instances defeating the real intention; because such a course tends to establish a greater degree of authority in the administration of the law; and the books abound with similar declarations of learned judges.

Prominent among these rules, ancient sages of the law considered to be that which required the Court, "to know what the common law was before the mak-"ing of a statute, whereby it may be seen whether "the statute be introductory of a new law, or only "affirmative of the common law."

More strongly will this apply when the enactment, as in the case before us, is not passed to meet some occasion requiring legislation, but is for the first time introduced into the statute law as part of a system of codification of existing law. Mr. Justice *Cowen*, in 24 *Wendell's Rep.*, 45–47, cited in 1 *Kent's Com.*, 530, 531, note *c*, says: "The transmutation of a principle of "the common law, or a rule of practice into a statute, "or an old statute, or its received construction, into

"a new one, without a palpable design to depart "from the former, ought not to be considered as a "departure."

By another rule of exposition, statutes are to be construed in reference to the principles of the common law; the law inferring that the Act does not intend to make any alteration *other* than what is specified, and beside what has been plainly pronounced; the common law being deemed the best interpreter of positive laws. See *Stowell* v. *Zouch*, Plowd., 365; 2 Inst., 301; 3 Rep., 7–12; *Dwarris on Statutes*, 694; 1 *Kent's Com.*, 524.

Following these rules, it comes to be noticed that, by the common law, replevin was a speedy remedy provided for the tenant against wrongful distress, which was extended to all cases of the unlawful or improper taking of goods out of the possession of the owner, and which was necessarily confined to the original parties, except in cases of husband or executor, when the taking had been before the marriage or death, and when the right of property being transferred by the law, the right to the possession followed.

It is important here to observe the policy, and, I may say, the wisdom and equity of the common law. It did not violate — it respected — the fundamental rule of property in chattels, which, from the possession, infers title. The tenant but got back the cattle which the distrainer had taken from his possession, and in return he gave security for the value, the law thus protecting the right also of the landlord. So the same principle is maintained in giving back to him, from whom property has been taken wrongfully or without his consent, that of which he was deprived, on giving security for the value to meet the claim of the taker. If the distrainer, or taker, alleged property in himself, the replevin was arrested until the question should be decided (for the time, at least), under the writ *de proprietate probanda*.

1865.

LANN v. DORSAY.

When property taken *in invitum*, or against the owner's will, but for lawful cause, as under distress or execution, was wrongfully detained after the cause had ceased, as by payment, &c., the replevin but restored a possession that had been invaded, rightfully though it may have been in the first instance.

Hence replevin at common law, and as the law remains in *England*, being only allowed where there has been a taking against the will of the possessor, is a remedy that protects the right consequent on possession of chattels, and only transferred property from one suitor to another, on the ground that it had been taken from the first possessor against his will, to whom it was consequently restored; and it was not an instrument for transferring property on a contention of title, where the claimant had not the presumption of right to the present possession from a prior possession interrupted against his will.

It is necessary to the argument to consider the effect that will be produced on the law, by introducing the construction contended for by the plaintiff's counsel. The learned *Solicitor General*, at the argument, confined his reasoning to cases between the original parties; that is, where the defendant had received the goods from the plaintiff in the first instance, but he would not say it might not be pressed further. I think, before a principle is adopted, it is proper to know how far it may justly lead; and I know of no rule of grammar or of exposition, which, if the language of the enactment is flexible enough to bear the plaintiff's construction, will justly limit it; nor any reason why, if the Legislature adopted the policy of the innovation so far, it should not follow it to its utmost extent. If the plaintiff may have a replevin, why not his assignee, in case of sale? If the defendant is liable, why not another master, taking his place upon some emergency, when the plaintiff could not be consulted? Why not let

replevin, in all cases as well as in this, take the place of trover, with change of possession supervened?

That the construction contended for on the part of the plaintiff, although limited, as his counsel partially limited it, would effect a change in the law of a fundamental character, altering alike the principle on which this ancient remedy has ever rested in *England*, and its consequences on the possession and removing of chattels, is made very manifest in the judgment of *Coleridge* J., in *Mennie* v. *Blake*, and still more in the sentiments expressed by Lord *Redesdale*, reported in 1 *Sch. & Lef.*, pp. 320–327, who condemned the practice as he found it in *Ireland*, to which the construction contended for would assimilate the law here, as subversive of the right conferred by the possession of personal property, and productive of hardship, inconvenience, and wrong. At page 326, in *Shannon* v. *Shannon*, that distinguished Judge uses this language: "I have, in consequence of what "passed the other day, conversed with the *Lord* "*Chief Justice* on this subject, and he thinks (and it "is the opinion of the other Judges, as he informs "me), that the use of the writ of replevin, in cases "like the present, is a crying grievance: the Courts "of law are put into a difficulty: they do not know "how to deal with it. How is a party to be put into "the situation he ought to be in when a right of property is to be tried? The first evidence of property "is possession, and that you take from him in the "first instance, and you throw the *onus* of proving "title upon him, on whom, as having the *prima facie* "title, possession, that *onus* ought not to be thrown."

The cases referred to are these. *Matter of Wilsons*, bankrupts, p. 320, note *a*. In this case a person claiming property in some corn, which was in possession of the bankrupt, and which the assignees insisted on holding, brought a replevin and took the corn. His Lordship said: "Replevin is merely meant to apply to this

1865.

LANE v. DORSAY.

"case, namely, where *A* takes goods wrongfully for "*B*, and *B* applies to have them redelivered upon "giving security until it shall appear whether *A* has "taken them rightfully. But if *A* be in possession of "goods, in which *B* claims a property, this is not the "writ to try that right; there are other actions to try "the right of property," and he ordered the replevin to be discontinued, the claimant paying the cost thereof; and directed a special issue to try the property. The next case, *Ex parte Chamberlain*, was a motion for leave to issue replevin. *Murphy* owed *Chamberlain*, and in part payment assigned to him the ship *Friendship*, which *Chamberlain* took possession of by going on board, but the master refused to give her up, alleging he had a lien on her; it was sworn that he was about to sail with her for the purpose of defeating the claim of *Chamberlain*, who offered to give security for the master's reasonable charges. No rule, however, was granted. The next is *Shannon* v. *Shannon*, page 324. On the part of the plaintiff it was sworn in that case that the plaintiff was aged and of weak understanding, that he had been obliged by ill usage to leave the house of the defendant, his natural son; that the goods were plaintiff's, and had been in his possession while he lodged in defendant's house, and that defendant wrongfully detained them. His Lordship said: "At least the possession was equi-"vocal, and that is not a case to which replevin can "be applied; it must be to the case of an *unequivocal* "possession, and of a *taking*." The motion was for attachment against plaintiff for the abuse of the writ; and his Lordship said: "As the practice has existed "in this country of issuing the writ in cases like the "present, I shall not grant the attachment, provided "the goods are returned, and the costs of this motion "paid." It is also shown that the ordinary pleadings in replevin are inapplicable to cases that would arise, were the common law principle departed from.

It will be seen that these reported cases are not

extreme in their circumstances, but such only as may be expected were the construction of the plaintiff to obtain; and that the difference between that construction and the common law is a difference in principle.

I do not say whether it may not have been really the intention of the Legislature to make such a change, guarded and qualified to some extent by provisions unknown to the *English* law; a thing the more probable in view of the legislation in some of the States of *America* in relation to the action of replevin; nor do I say whether or not with such qualification it might not be a salutary change in the law, of which I give no opinion, although I am constrained to say that it were well that the sentiments of such a man as Lord *Redesdale* should be carefully examined and considered before so great a change shall be adopted in our practice, in opposition to his opinions.

The question at present, however, which we have to consider, is simply this. Has the Legislature so framed its enactments that the Court ought to or can *judicially* pronounce it to have been the intention of the law makers to effect the change contended for, bearing in mind that the rules of construction to which I have referred in the commencement, require that as the common law rule and practice will be materially altered, the intention of the Legislature should be expressed with certainty?

This brings us to the examination of the language used by the Legislature.

Section 171 of chapter 134, *Revised Statutes* (2nd series), enacts as follows: "Replevin may be brought "for an unlawful detention, although the original "taking may have been lawful." This is no new law. *Blackstone's* language is strikingly similar in stating the common law on the subject. He says (*Com.* vol. 3, page 151): "Deprivation of possession "may also be, by an unjust *detainer* of another's "goods, though the original *taking* was lawful." He

1865.

LANE v. DORSAY.

instances distress damage feasant, and detention after tender of sufficient amends, for which, he says, replevin may be had.

Then, expounding the clause according to its grammatical and ordinary meaning, or according to the common sense of its words, agreeably to C. J. *Jervis*, in *Abbey* v. *Dale*, 11 Com. Bench, 390, or to *Cresswell* J., in *Biffin* v. *Yorke*, 6 Scott, N. R., 235, and we still find ourselves bound to the common law; for although the word "taking" is capable of a great variety of modifications of meaning, yet in the relation in which it here stands, no one would understand the term in its ordinary sense as meaning a receiving with consent of the owner rather than a taking without his consent. An expression of Lord *Redesdale* in 1 *Sch. & Lef.*, 323, places the terms in contrast in a manner that forcibly represents their meaning and relation. "I do not see," he says, "in what man-"ner a person who had possession of the goods, *not by* "*taking, but by delivery*, and who claims a right to hold "these goods till he is paid a sum of money, is to "bring this question to an issue in replevin."

There remains, however, another rule of construction to consider, and that one of controlling influence, and on which the plaintiff's counsel, with much reason, principally relied: the intention of the lawgiver, and the meaning of the law, are to be ascertained by viewing the whole and every part of the Act, so that one part may be construed by another, that the whole, if possible, may stand. And, in the Act under consideration, there are not wanting indications of the intention of the Legislature to extend the writ of replevin to cases beyond the common law limits.

Except in cases of distress for rent and damage feasant, an affidavit is required before the writ issues, by section 172, and the defendant, by section 174, may retain possession by giving security.

These provisions are unknown in the common law,

and raise an inference of a more extended application of the writ. But I apprehend that, to give them *judicial* weight as evidence of an intention to alter the common law, they must be inconsistent with the common law, or, at least, out of harmony with its course of procedure, and requirements.

Now there is nothing in those enactments thus inconsistent or incongruous. Not only may they stand, but they may very reasonably stand, without change in the law. It is not unreasonable to require from a party who seeks to acquire possession of property, on the ground that it has been wrongfully taken from him, an affidavit of his right to the possession, nor to give to a party against whom, under such circumstances, the writ is obtained, a right to retain the property on giving security, especially in view of the ancient procedure, *de proprietate probanda*, where the bare claim of property arrested proceedings under the replevin, and for which old, dilatory, and expensive procedure, this clause would furnish no inexpedient substitute.

Lastly, by the first section of chapter 134, it is enacted that all personal actions shall be commenced by writ of summons or replevin, &c., in the forms given in a schedule, and the only form given for replevin alters the old writ, and, instead of the words, "*has taken and unjustly detains*," uses but the words, "*unjustly detains*," leaving out "*has taken*," the very essence of the complaint under the common law; and it is contended that the change is applicable to a detaining, where there has been no previous taking. The argument has weight, but is not sufficient, I think, for the object in view. As this is the only form given, if it was intended for all cases, as the language intimates, it must have been with the understanding that the words "unjustly detains," should apply to cases where there had been a wrongful taking, otherwise there would be no remedy for such cases; and in that view the writ would be applicable under

1865.

LANE v. DORSAY.

the common law, and if so, must, I think, under the principles of exposition referred to, be construed as intended to be so applied. If, contrary to the terms of the first section, the writ in the schedule is given in addition to the common law writ, it is still applicable to cases under the common law, where replevin lies for unlawful detention after lawful taking; although assuredly not necessary, since at common law such detaining is deemed an unlawful taking.

I cannot explain, and I am happy I am not required to explain, why the ordinary form of writ was omitted from the schedule,—why in the form given the essential and traversable portion, the taking, is left out; and why the detaining, not traversed in *English* pleading, is raised from an immaterial incident to the substance of the complaint. But I am convinced the change is an unfortunate one, and when attention shall be more directed to correct pleading in this action, it is one that must lead to perplexity, confusion, and inconvenience; and I cannot but hope that the whole of the enactments we are now considering, and the forms of the writ and pleadings, may become the subject of careful revision in the legislature, with a view to making clear and explicit the object of the law, as well as to prevent embarrassment from needless alteration in the accustomed forms.

But meanwhile, although this altered form of writ may give occasion to doubt, I cannot deem it of sufficient importance to warrant a construction of the statute opposed to that required by the ordinary laws of exposition, and leading to a material change in the existing law.

Looking, then, at the principal enactment under consideration, we find it to stand in consistency with the existing law; trying its language in its legal and technical import, in its ordinary and grammatical meaning, and by the common sense of the words used, it still maintains its harmony with common law principles; and testing its context

and associate enactments, and examining these with each other, and as a whole, nothing is found which may not exist in correspondence with those principles.

The only remaining argument for a construction that would alter the existing law, is, that if no alteration was intended, the enactments were needless and futile; and this, indeed, is what mainly affects the mind in favor of the construction contended for, and it would be cogent were it the rule of construction, that the legislature, when it passes an Act, must be taken to intend an alteration in the law; but the rule, as I have shown, is just the reverse, and therefore this argument, however plausible at first sight, ought not to influence the *judicial* mind of the Court,—that judicial spirit of which Baron *Parke* speaks in *Miller* v. *Salomons*, 7 Exch., 547. Besides, the argument is deprived of much, if not all its apparent force, when applied to an enactment, first appearing in a system of codification to which I have already adverted.

I am, therefore, constrained to the judicial opinion that the Act does not bear the construction contended for by the plaintiff's counsel, and that, under its enactment, replevin was not maintainable, unless in a case in which there had first been a *taking* out of the possession of the owner.

This opinion is opposed to that I entertained when I entered upon the examination of this case, and I have not reached it until after repeated and protracted investigation, and the most earnest consideration; nor until the conviction was irresistible that the recognized rules of construction demanded the conclusion I have expressed.

Using the language of a learned Judge (*Pollock*, C. B., in *Walter* v. *Adcock*, 7 H. & N., 554), I do not say it is impossible that an alteration in the law was intended, but if it were, I think there would have been — there certainly ought to have been — something in the Act to plainly indicate it.

1865.

LANE v. DORSAY.

If the opinion I have expressed is opposed to what was the real intention of the legislature, the error may soon be set right, and its consequences are limited and transient. To maintain even the real intention of the legislature by the sacrifice of the principles of exposition, on which the certainty of the administration of the law depends, is an evil that cannot soon be set right, and the consequences of what are neither limited nor transient.

The construction I have intimated was long since propounded by Mr. Justice *Wilkins*, but while I have the satisfaction of knowing that the judgment I have formed is in accordance with the opinion of that learned Judge, I have the misfortune to differ from the opinions of others of the learned Judges on this Bench.

In concluding this branch, it seems pertinent to notice that the power given to the Court by chap. 124 *Revised Statutes* (third series), sec. 27, in any action for detention of chattels to order specific return, diminishes the reasons urged for change, by answering one of the objects for which replevin may be required, without the objectionable power of changing possession before the title has been determined.

Had my construction of the Act coincided with the views of the plaintiff's counsel, I must still have decided in favor of a new trial. I must have done so as regards the vessel, because there was no detention. To the first demand made on him, and a demand was certainly necessary, the defendant said to the plaintiff's agent: "There 's the vessel; take "her;" and I think the third plea is sufficient to support the evidence. In that plea, after alleging possession of the vessel under retainer of the plaintiff, and of the fish as having been caught on the voyage in which she was engaged, the defendant concludes that "he did not take the same from the plain-"tiff, as by the writ supposed." I think this denial may be applied to the detention alleged in the

writ; and if it is to be confined to the possession before the demand, the plaintiff should have replaced the demand by way of new assignment.

Evans v. *Elliot*, 5 Ad. & E., 142, was an action of replevin for taking. Avowry. Taking for rent. Plea. Tender of rent, and refusal, and that defendant afterwards unjustly detained. Demurrer. Lord *Denman* C. J.: "It is said that the plea in bar distinguishes "between the taking and detention, and the plaintiff "might have pleaded that after the tender, the de- "fendant again *took* and detained. But I do not see, "that even as the plea stands, the taking complained "of is necessarily confined to the taking before the "tender." *Littledale* J.: "The detention after the "tender satisfies the declaration." *Patterson* J.: "The "authorities cited show that replevin lies for detain- "ing, and that is as for a new taking."

As regards the mackerel, I cannot bring myself to believe that any construction of the law would warrant replevin for property so situated, the defendant and the seamen having an equal interest in it with the plaintiff, according to their several proportions. It is stronger than the case of property held subject to a lien, in which Lord *Redesdale* said replevin could not be made to subserve the settlement of the necessary issue, and in the case of *Shannon* v. *Shannon*, we have seen that it was held that the plaintiff in replevin is strictly required to have an exclusive right of possession.

There is another reason why I think the plaintiff cannot maintain his verdict. It arises from the pleadings. The third and fifth pleas set up defences, true in fact, and correct in law, namely, a rightful possession of vessel and fish under the agreement with the plaintiff. This evaded the plaintiff's case, and it was necessary the plaintiff should bring the matter back to the point he intended in his writ, by replying that the lawful possession of the defendant had been terminated by demand and refusal, or in some other

1865.

LANE v. DORSAY.

way, and that the action was brought for a subsequent unlawful detention. Instead of doing this, the plaintiff, by not replying, denies the truth of the pleas, and the issue thus raised is against him in fact and law. The only replication that appears on the issue roll is to the fourth plea, which is of much the same general import as the fifth and third; and the replication does not allege demand and refusal, but that the defendant had dismantled and laid up the vessel, and had converted the cargo to his own use. The effect is to make the misconduct of the defendant under the contract equivalent, without demand and refusal, to the unlawful detention set out in the writ. This is going a great length, and the pleadings in this case show how great is the departure from *English* precedents that would be required for the construction contended for.

My opinion is that the verdict cannot be upheld, but should be set aside, and a new trial granted.

I have thought it unnecessary to consider the other questions suggested by the defendant's counsel on the argument.

DODD J.* It is of importance to the profession that this Court should set at rest that which appears to be a vexed question, and decide how far the legislature intended to extend the law of replevin by section 171 of chapter 134 of the *Revised Statutes* (second series), or whether the enactment is anything more than declaratory of the common law. A decision upon the point may not decide the case under consideration, but as it was raised at the argument, and some doubts were expressed upon it by one of my learned brothers, whose opinions are always entitled to great respect, I think it better that the question should be disposed of; and if apt words have not been used by the legislature in framing the Act to extend its operation beyond the common law remedy,

* *Bliss* J., not having been present at the argument, gave no opinion.

our decision may induce further legislation upon the subject.

Since the argument of this case in *December* last, the legislature have again had the subject before them, and by the last revision of the Statutes, substantially to my mind the language used in the Act does not differ materially from that used in the previous one. Section 171 of chapter 134, second series, enacts that replevin may be brought for an unlawful detention, although the original taking may have been lawful. Section 174 of the last Act declares that replevin may be brought for an unlawful taking, or for an unlawful detention, whether the original taking may have been lawful or not. Considering, then, both Acts in substance the same, the legal construction of one would be applicable to the other.

It is very uncommon in our legislature to pass laws declaratory of the common law, and at present I cannot call to mind a single case where it has been done. I admit, if the language of the Act is not sufficiently large to give it the construction contended for by the *Solicitor General* in this case, that the forms appended to the Act cannot be used for that purpose, but they can be used to assist in reading the Act to show the intention of the legislature in making the law. The common law, as it stood before the passing of our Act, was sufficiently clear, and the decisions upon the subject in the Courts of law in *Great Britain* were for some time past consistent and uniform—that is to say, that in replevin there must be an unlawful taking from the possession of the party claiming a right to the replevin. The case of *Mennie* v. *Blake*, 37 L. & Eq. R., 169, which was much relied upon at the argument, did not in my opinion overrule *George* v. *Chambers*, and *Allan* v. *Sharp*, and some other cases that occurred about the same time in the Courts at *Westminster Hall*, as we were led to suppose by the counsel for defendant. They were all decided on the same principle. In *Mennie* v. *Blake*, *Coleridge* J.,

1865.

LANE v. DORSAY.

in giving the opinion of the Court, refers to several cases, showing where replevin would lie, and says that from a review of the authorities it might appear not settled whether originally a replevy lay in case of other takings than by distress; nor was it, he says, necessary to decide that question then, but observes that at all events it seemed clear that replevin was not maintainable, unless in a case in which there has been first a taking out of the possession of the owner; and he referred to two *Irish* cases, in which the law is laid down by Lord *Redesdale*,—*Ex parte Chamberlain*, and *Shannon* v. *Shannon*, 2 Sch. & Lef. R., and which, he says, are cases of great authority. (The learned Judge here read the passage from *Matter of Wilsons*, Bankrupts, cited by *Johnston* E. J., ante p. 585.)

In *Mellor* v. *Leather*, 1 Ell. & Bl., 619, it was held that replevin would lie for goods unlawfully taken, and that the remedy was not confined to the case of goods taken by way of distress. Lord *Campbell*, in giving the judgment of the Court in that case, said, with respect to the question whether replevin could be maintained in such case, "We are of opinion, upon "the authority, not only of text books, but of decided "cases" (and he referred to several), "that replevin "will lie when goods have been unlawfully taken, "though not as a distress." In *Chitty's Archbold's Practice* (10th ed.), p. 1034, it is said that replevin is a remedy that may be adopted by a party in all cases where chattels are unlawfully taken from him, except where the taking was in execution under a judgment of a superior Court, or in order to a condemnation under the revenue laws, or for a duty due to the Crown, and, with other authorities, he cites *Mennie* v. *Blake* in support of his position.

With such authorities as those I have referred to, I cannot understand how it is that our Provincial Act can be considered as merely declaratory of the common law. As a general principle it may be stated that in *England* replevin is not maintainable for an unlaw-

ful detention, where the original taking was lawful, consequently the conclusion inevitable to my mind is, that the legislature intended to extend the common law remedy of replevin, and give it in cases where there was an unlawful detention, notwithstanding the original taking may have been lawful, and I think the language used in the Act sufficient to carry out that intention. The *New York Revised Statutes*, vol. 2, p. 522, have granted the writ of replevin wherever goods have been wrongfully taken, or are wrongfully detained; and in *Massachusetts* and *Maine* the decisions of the Courts in those States are that replevin will lie for goods unlawfully detained, though not preceded by a tortious taking, founded upon their State legislation. See *Badger* v. *Phinney*, 15 Mass., 359; *Baker* v. *Fale[illegible]* Mass., 147; *Marston* v. *Baldwin*, 17 Mass., 606; *Argus* v. *Hewitt*, 19 Maine, 281. In those States it was early decided that this remedy (replevin) had been extended by statute to cases of unlawful detention of chattels, the possession of which had been lawfully obtained.

I am, therefore, of opinion that our Provincial Act extends the common law remedy, and gives to a party the writ of replevin where there is an unlawful detention, notwithstanding the original taking may have been lawful.

As respects the pleadings in this cause, I agree with the learned *Judge in Equity*, in the opinion he has just delivered. It is impossible not to feel how difficult it is for a judge in this country to decide a case founded upon the laws and customs of a foreign country, and which are referred to and ingrafted upon the contract upon which the action here is brought, unless those laws and customs are proved. The agreement in this case between the plaintiff and defendant, and the crew engaged in the vessel, declares that the owner, skipper, and fishermen are respectively entitled to all the benefits and privileges, and subject to all the duties and liabilities provided

1865.

LANE v. DORSAY.

by an Act of the Congress of the *United States*, entitled, "An Act for the government of persons engaged in certain fisheries." There was no evidence at the trial offered respecting this Act, and which appears to me was necessary to the plaintiff's case, for otherwise he could not establish his right to take the fish caught by the master and crew, unless the Act gave him that power. By the terms of the agreement, he and the master and crew were tenants in common in the fish taken during the voyage, and there is no law in this country that will enable one tenant in common to take property out of the possession of his co-tenant by writ of replevin. I am, therefore, of opinion that there should be a new trial.

DESBARRES J. I agree with his lordship the *Chief Justice*, that replevin will lie in this case, under sections 171 to 175 of chapter 134, *Revised Statutes* (second series), and that the present action was rightly brought by the plaintiff, to repossess himself of his vessel; but I do not think it can be maintained for the mackerel taken out of the defendant's possession under the writ, the same not having been apportioned between the plaintiff and the respective sharesmen therein, of whom the defendant was one; and the plaintiff never having been in the actual possession of such fish until they were delivered to him by the sheriff under the writ. The verdict was found for plaintiff, as well for the fish as the vessel, and therefore it cannot, it appears to me, be sustained.

WILKINS J. On the principal question raised in this case, I mean that which refers to the form of the action, my judgment is with the defendant. The question on this point is purely one of "construction "of a statute." It must be conceded, and it was scarcely, if at all, contested, that "replevin" is not applicable to the facts of this case if common law principles are to govern the inquiry. The vessel in

question, (and in my view of the case it is sufficient for me to consider her alone, as the subject of the operation of the writ) was not taken from the plaintiff, originally, *in invitum*, tortiously, by force or by fraud. On the contrary, the defendant obtained that possession of her, in which she was found by the sheriff, under a contract between him and others with the plaintiff who was her owner.

If replevin can be supported in this case, it must be by virtue of the provisions contained in sections 171 to 175, inclusive, of chap. 134 of the second series of the *Revised Statutes*. The learned counsel for the plaintiff contended "that, viewing these as a whole, an "intention is manifested by the legislature to change "the common law principles of replevin, and make "the writ remedial in all cases where the possession "of personal property, obtained in any manner by "the defendant from the plaintiff, is unjustly detained "from the owner of it." He argued that the words of section 171, "Replevin may be brought for an unlawful detention, although the original taking may "have been lawful," must be construed as indicative of that intention; that "the original taking," mentioned in the section, does not necessarily mean an original taking *in invitum*, but includes "a mere voluntary receiving of the possession of a chattel, as a "subject of tradition or delivery." It was contended that such interpretation is consistent with the words, and that it derives confirmation from the prescribed form of writ, in which there is no reference to a taking, as there is in the *English* precedents. Before proceeding to consider whether this asserted intention is thus apparent, I will lay a foundation for my course of reasoning which conduces to an opposite conclusion, by referring to certain common law principles, and rules of statutable construction. First, then, the common law rule relative to the action under review, as settled by the Court in *Mennie* v. *Blake*, is thus, on the authority of that case, stated by

1865.
LANE v. DORSAY.

Selwyn in his *Nisi Prius* (1200). "It is clear," he says, "that replevin is not maintainable, unless in a case "where there has been first a taking out of the pos- "session of the owner." In the case thus relied on by him, let it be borne in mind, the taking is defined to be "a taking *in invitum*, by force, or fraud." That case, also, expressly decides, adopting the language of Lord *Redesdale*, "that if *A* be in possession" (meaning, of course, merely in possession without qualifying circumstances) "of the goods in which *B* claims pro- "perty, replevin is not the writ to try this right." It is established, also, that a mere wrongful and illegal withholding of chattels from him, who has an unques- tionable right to the possession of them, will not support that action. Secondly, it is a canon of statut- able interpretation, "that where words in a statute "are equivocal, and may be merely declaratory of the "common law, or may be intended to innovate upon "it, the former interpretation must be adopted." *Smith, in his Commentaries*, says: "As a rule of ex- "position, statutes are to be construed in reference to "the principles of the common law. For it is not "to be presumed that the legislature intended to make "any innovation upon common law further than the "case absolutely required." "The law rather," he adds, "infers that the Act was not intended to make "any alteration other than what is specified, and be- "side what has been plainly pronounced." Again, and for this he cites the high authority of *Dwarris*, "When "a statute alters the common law, it shall not be "strained beyond the words, except in cases of public "utility, when the ends appear to be larger than the "enacting words."

It is argued, "that to apply replevin to all cases of "wrongful detention of goods, and to make it, for "instance, cover the case of a master wrongfully and "illegally withholding a vessel (of which he has been "placed in charge) from its owner, would be very "convenient in practice." But the obvious answer

18, "the common law does not make the remedy so "applicable, and if the legislature has not clearly "altered that law, it is matter of mere speculation, "upon which a Court of justice is precluded from "entering, whether such alteration would be beneficial to the public, or otherwise." If the want of such an alteration be an inconvenience, it is an inconvenience to which the people of *England* are subject at this hour. (*Mennie* v. *Blake*). Thirdly, "Language, however suggestive of legislative intention, "used in debate, even in legislative halls, on the "subject of a bill, which afterwards becomes a law, "cannot be referred to in Court in aid of the construction of that law." (*Regina* v. *Whittaker*, 2 C. & K., 640.) Fourthly, "The intention of the legislature, however "probable, can only be gathered from words used that "are consistent with it." In *Regina* v. *St. Leonard's*, 14 Ad. & Ell., N.S., 343, Lord *Campbell* says: "But whatever the intention of the legislature was, we must "judge of it from the words employed." In *Woodward* v. *Watts*, 2 Ell. & Bl., 458, *Erle* J. says: "I take "it to be clear that, in construing a statute, we must "give effect to all the words, unless that leads to "manifest absurdity or inconvenience." In *Abley* v. *Dale*, 11 C. B., 391, *Jervis* C. J. says: "We assume "the functions of legislators, when we depart from "the obvious meaning of the precise words used, "merely because we see, or fancy we see, an absurdity or manifest injustice, from adhering to the "literal meaning." If I, in the discharge of my present duty of simply construing this statute, were to adopt this mental process, viz.: first, assume that the innovation on the common law, which has been contended for, would be beneficial; and, secondly, strive to make the language used effect that object, I should feel, in accordance with the sentiment of the learned *Chief Justice* just referred to, convicted of usurping functions that do not belong to me, and of perverting those that I am bound to exercise. It may be that,

1865.

LANE v. DORSAY.

as has been intimated, the legislature intended to modify the common law; but we must see clear evidence of such intention in the language used. It may be urged, "that it is not probable that the legis-"lature merely intended to declare a common law "rule;" still, it is not unusual for the legislature to do this, and if the language, in its obvious import, conveys a mere declaration of that rule, it must be so construed. And why? Because, though we may conjecture, we cannot, in such a case, know that they intended anything else. *Evans* v. *Elliott*, 5 Ad. & Ell., 142, was an action for taking and impounding, and a tender, after the taking and before the impounding, was pleaded and demurred to, because the lawfulness of the original taking was not disputed by the plea. Lord *Denman* held the plea good, and said, "Every "unlawful detention is a new taking." That case decided, as clearly as if the Court had used the very terms of section 171 (though the decision involved the recognition of an ancient principle of the action), "that replevin will lie for an unlawful detention, "although the original taking was lawful." It by no means professed to decide (and if it had so decided, the decision would have been overruled by *Mennie* v. *Blake*), that replevin would lie for an unlawful detention of a chattel, irrespective of a mode by which the defendant became possessed of it. It decided that the action could be sustained for the detention, after the tender of the rent due, because the detention was then unlawful, admitting, nevertheless, that the original taking of the chattel by the defendant under distress warrant for the rent when due, was lawful. Such, undeniably, may have been "the original "taking" meant in section 171. Thus, then, it is demonstrable, that the words in question may mean the mere declaration of a common law principle.

In my opinion, the words in question, namely, "the original taking," plainly import a taking *in invitum*. No other meaning would, I am persuaded,

be thought of, save for the purpose of supporting an argument at the bar. The words, and all the words of section 171, are completely satisfied by the following case, which may (for any thing we can predicate to the contrary) have been in the legislative mind, namely, "*A's* horse is taken by distress warrant for "rent due, all the proceedings being regular." Here is "an original taking," *in invitum*, and yet "a lawful "taking." "Before the statutable day of sale, *A* "tenders the rent and all costs, and yet the constable "detains the horse." The detention is "an unlawful "detention," and replevin lies, both at common law "and by virtue of section 171." I am arguing now without reference to the form in Appendix A. Presently I shall show how utterly inconclusive the argument that has been based on that form is. Admitting, as of course I admit, that in many connections in our language, "take" imports mere reception of a thing, irrespective of force or fraud used to obtain possession of it; I ask, if, nevertheless, it has not a technical meaning in the connection in which the participle of that verb is used in this section? When in the plea, "*non cepit*," older than the time of *Fitz Herbert*, the defendant, in replevin, by way of answer to the old count for property taken by distress, which was taken from him *by force*, says "he did not take," he incontrovertibly says in effect, "he did not *forcibly* take." When in trespass it is alleged, "that the defendant 'took' and carried away "the plaintiff's goods," a forcible taking and *in invitum* is at once suggested. The language in an indictment for larceny, and in that for robbery is, "did steal, "*take*, and carry away;" whilst, in contrast with these, the language in an indictment for receiving stolen goods is, "did receive and have." In larceny two kinds of taking are recognized, namely, a taking by actual force, and a taking where the goods have been obtained from the owner by fraud, and in pursuance of a previous intent to steal them. See

1865.

LANE v. DORSAY.

Rex. v. *Stock.*, 1 R. & M., C. C. R., 87. These are the two kinds of taking, one or the other of which is essential to constitute a legal right to replevin in the party who has been the subject of such taking, unless the legislature has declared in language, the force of which cannot be resisted, that taking of another kind will suffice. When *Selwyn* wrote in the passage which I have above quoted from his work, "replevin "is not maintainable unless in a case in which there "has been first 'a taking' out of the possession of "the owner," he did not consider it necessary to add, as a qualification of the word, "tortiously" or "*in* "*invitum*," though it is certain he meant a taking so qualified. He felt that a natural, and not a non-natural construction would be put on the simple language that he used; and he knew that lawyers would, of course, understand the word "taking" in its received, technical sense.

Why, then, are we to distort the word into a non-natural or untechnical sense? Can we do so consistently with our legitimate functions? It is not possible to construe the clause as it is interpreted by those who oppose my view of its meaning, without doing violence to grammatical rules and to the plain force of language. The words are not, "replevin may be brought for an unlawful detention, "where there has been an original taking," but, "replevin may be brought for an unlawful detention, "*although*"—(an emphatic and significant word)—"although the original taking may have been lawful." Now, the effect of this is, if there be any force in words, to raise, in every case of an action of replevin brought under this clause, a necessity for a preliminary inquiry, "whether the original taking was lawful or not?" And if the case be one in which such an enquiry cannot arise, it follows that the case was not in the mind of the legislature. Let us apply this test. If, as I suppose, the words merely declare a common law rule, they are, and every one of them is,

most intelligible and apposite. In every conceivable case of replevin at common law, whether brought for a distress strictly, as in cases of poor rates, or for rent, or damage feasant, with which the reports abound, or for a mere coercive taking, as in *George* v. *Chambers*, 11 M. & W., 149, and *Allen* v. *Sharp*, 2 Exch., 352, the preliminary question did arise, and it was this: "Was the authority under which the chattel was "taken real or pretended?" In most striking and significant contrast with this, in the case before us, and every case where the taking is under a contract, no such question can possibly arise. Such cases, therefore, are not within the statute. Judges in construing a statute are bound, if possible, to give effect to every word; but effect is not given to the words, "although" and "may" in this sentence, on the construction contended for by the plaintiff. Let us, now, consider what language would probably have been adopted, if the legislature really intended to modify the common law rule, and extend the remedy by replevin. Let us see how this has been done, where unmistakably designed. *Morris*, in his Treatise (p. 37), expresses the *American* doctrine in language which, if it had been used by our legislature, would have excluded argument. He says: "Replevin "lies for all goods and chattels unlawfully taken, *or* "detained, and may be brought whenever one person "claims personal property in the possession of ano- "ther; and this, whether the claimant has ever had "possession or not, and whether his property in the "goods be absolute or special, provided he has the "right to the possession." Had the language of our statute been, "Replevin may be brought for an un- "lawful detention, irrespectively of the manner in "which possession of the goods may have been "acquired by the defendant," there could, of course, have been no contention about the meaning of the words.

In this connection an argument *ex absurdo*, and a

1865.

LANE v. DORSAY.

conclusive one, as I conceive, is suggested against the asserted intention of the legislature to change the common law doctrine of replevin. It is conceded by those who oppose my view of the question, that it is only changed in cases where there has been a *taking*, in some sense, of the chattel. Thus, then, it is clear, that a very large and most important class of cases, which practically demanded, at the hands of the legislature, a remedy by replevin, are left, as at common law, without that remedy. Could the legislature, on a rational hypothesis, have contemplated a change, and stopped short where they did, instead of enacting in its fullest extent the *Massachusetts* doctrine? Let a practical case illustrate this: *A* has been divested—he knows not how—of the possession of an article of great real, or imaginary value,—of a value, it may be, which no sum that a jury would give could, in his estimation, measure; it may be a rare gem, or a diamond ring, associated with the memory of a departed friend,—it may be an animal of peculiar qualities, making it of real intrinsic worth. This, capable of being clearly identified as the property of *A*, is found in the hands of *B*, who refuses to give it up, denying *A's* title, and asserting, it may be truly, that he picked up the gem in the street, or that the animal strayed into his premises. *A* reasonably apprehends that, before the time when he can obtain a judgment against *B*, establishing his right to the article, it will be abstracted and placed beyond his reach forever. In such cases, *A*, *ex concesso*, cannot adopt replevin, because unprepared to prove an "original taking" by *B*.

Now, I ask, if it is possible, without imputing absurdity to the legislature, to conclude that they contemplated making the remedy by replevin more effective than it is by common law, and did not make it extend to the class of cases which I have supposed,—a class of cases in which *B* wrongfully withholds from *A* the possession of a chattel, to which *A* is entitled?

I ask, whether it is not much more reasonable to conclude,—adverting to the only qualification which they have assigned, namely, "a taking," that they merely intended to declare to minds ignorant of a common law principle, as recognized by a particular decision, what that common law principle was?

Again, the question is suggested, why did the legislature make "a taking" at all a necessary ingredient in their supposed extended remedy by replevin? We understand why "a taking" *in initium* was a necessary condition of the action at common law, namely, because the ancient form of the writ necessarily supposed the chattel, under the writ, to be re-delivered, restored, on pledges, by the officer of the law to the plaintiff from whom the possession had been taken originally by force or fraud. I am, however, utterly at a loss to conceive the *rationale* of a legislative rule, which makes it a condition of using the writ of replevin that the defendant had once received from the plaintiff, possession of the chattel in question! In fact, such a sole condition is simply absurd.

The legislature of *Massachusetts*, in which State it has always been held (see *Morris*, 39), that, at common law, replevin was the proper remedy for goods detained, without reference to the mode by which the possession of the defendant had been obtained, has distinctly confirmed that doctrine.

New York, which, in opposition to *Massachusetts*, long held the *English* doctrine, at length, in 1846, in an elaborate statute (Title XII., p. 612, 2 S. R. S.), which statute contains seventy-six sections, declared (section 1), "Whenever any goods or chattels shall "have been wrongfully distrained, *or* otherwise "wrongfully taken, *or* shall be wrongfully detained, "an action of replevin may be brought for the recovery thereof, &c." In section 7, carrying out the distinction, a form of writ is given in the alternative, viz., in the "*cepit*" and in the "*detinet;*" thus:—

1865.

LANE v. DORSAY.

"Whereas, *A B* complains that *C D* has taken, and "does unjustly detain" [or, "does unjustly detain," as the case may be], "one horse," &c.; "therefore, "we command you," &c. Section 36 is so explicit as to prevent possibility of misconception. It runs thus: "Where the original taking of the goods is not "complained of, but the action is founded on the "wrongful detention of such goods, the declaration "shall be conformed to the writ, and shall allege with "requisite certainty of time, place, and value, that "the defendant *received*"—(mark this)—"the property "described in the writ from the plaintiff, or from "some other person" (naming him), "to be delivered "to the plaintiff when thereunto requested, and that "the defendant, although requested, has not delivered "the same to the plaintiff, but refuses so to do, and "detains, &c. And when the action is founded "upon the wrongful taking and detention of the "property, but such property, for any reason, shall "not have been replevied and delivered to the plain-"tiff, the declaration shall not only allege such "wrongful taking, but shall also allege that the "defendant continues to detain such property."

In *Massachusetts* the principles and practice in replevin are still regulated by the first decisions of their Courts (which opposed the *English* rules that *New York* had adopted), and by their statutable provisions. *New York* has since made fundamental changes by its Code of Procedure.

In replevin for cattle distrained damage feasant, it is imperative on the plaintiff, in his declaration in replevin, "to state accurately the place where the "cattle were taken." That allegation has always been held to be, and still is, in *England* and in this Province, material and traversable. In *Walton* v. *Kersop et al.*, 2 Wilson, 354, *Wilmot* C. J. says: "At "this day it is very clear that the vill and place where "the cattle were taken "(damage feasant)," must be

"laid in the declaration; and if there is no place, the "defendant may demur." With this accords *Bullythorpe* v. *Turner*, Willes, 476. Such is the law of *England* at this hour. (See *Roscoe* by *Smirke*, p. 454, 6th edition.)

In the *United States*, *Morris* (p. 74), states the rule thus: "If the goods were taken as a distress, the "place in that case being material and traversable, "and a new assignment not being allowed in replevin, "(1 *Saund.*, 347), the plaintiff must state the place of "taking within the town or county, accurately in the "declaration. If taken in a dwelling house in a "city, the street and number of the house should be "stated." This rule of law—of the common law—colonists brought with them to *Nova Scotia*, and it is there the rule still. A necessity for this accuracy flows from the reason of the thing, for *Selwyn* says (*Nisi Prius*, 1212): "The defendant may state in his "avowry that the *locus in quo* was his soil and freehold, "and that he took the plaintiff's cattle because they "were doing damage there; and this is the usual "form." That our legislature, in passing chapter 134, did not altogether lose sight of the peculiar principles of the common law which mark cases of replevin for goods taken for "rent in arrear," and "damage "feasant," as distinguishing them from other cases (*e. g.*, those of *George* v. *Chambers*, and *Allen* v. *Sharp*) is clear, for section 172, which requires a preliminary affidavit in general, excepts the two particular cases of replevin to which I have just referred; again, section 174 provides that defendant may retain possession in all cases, on giving security, except those two particular cases.

Having then, as I think, shown that the words of the section, regarded *per se*, will not bear the construction which the plaintiff's counsel seeks to put upon them, I proceed to consider them in connection with the form of the writ of replevin which is prescribed in Appendix A., No. 2, and by means of which

1865.

LANE v. DORSAY.

the legislature, in section one of chapter 134, requires the action of replevin to be commenced. It must be borne in mind, that that is all that is required, and that, according to the prudent provisions of sec. 4, a special declaration may be prepared where necessary. But for this, as I have already shown, very serious inconveniences would practically result from a necessity imposed of adhering in all cases in the declaration in replevin to the mere language of the writ. In that case, for instance, a practical wrong would be done to a defendant, against whose goods a replevin was sued out, where those goods had been distrained for rent in arrear, or for damage feasant, seeing that he would not, as the common law requires, be apprized with particularity of the place where the distress was taken. The formula prefixed runs thus: "We command you forthwith, upon security being "given according to law, to cause to be replevied to "*A B* his cattle (or goods), namely, which *C D* un- "justly detains as is said; and that you summon the "said *C D* to appear, &c., at the suit of the said *A B*, "who says that the said *C D* is unjustly detaining the "said cattle (or goods)."

This differs from the *English* precedents, in that it omits the word "took" which they contain, and it is contended for the plaintiff that this shows an intention to institute the fundamental change asserted in the principles of replevin at common law. If it does so, a great change is thus effected by a very inartificial agency of means. The general mode of accomplishing such an end is by explicit language in the body of a statute. The argument, if it prove anything, proves too much. If it can be argued successfully that the studied omission of the word "took" shows that the legislature intended the foundation of replevin to be "a detention," it can be argued, with equal force, that the omission of the word "took" shows that the legislature intended that the action of replevin should not rest on "a taking," and thus a class, and

the more important class, of cases that demand the exigency of such a writ would be excluded from its operation. *New York* and *Massachusetts* both saw this, and guarded against the absurd consequence, the first by a general form of writ in "the *cepit*" and "the "*detinet;*" the second by separate writs in "the *cepit*," and in "the *detinet*." But "this contention" for its necessary support demands, "that a precedent thus "framed was adopted for the first time in the Pro- "vince, when this statute was passed."

The fact, however, is otherwise. Such a form was introduced into our statute book, at a time and under circumstances that precluded all idea of an innovation upon the common law in relation to replevin. Our legislature, as far back as 1784, when legislating on the subject of "damage feasant," and in order to provide a remedy by replevin in cases of trespasses by cattle, where the damage was under three pounds, provided that the Justices of the Peace should grant a replevin in the form following: "You are hereby "commanded to replevy to *A B* his ———, which "*C C* unjustly, as is alleged, detains under pretence "of having committed a trespass not exceeding the "sum of three pounds; and also to summon the said "*C C* to be before me the ——— day of ———, at "——— o'clock, there to answer such things as shall "be objected against him." The specially expressed case for which this last mentioned precedent was framed, necessarily supposed and included a taking by force, *in invitum*, as an element of it. When, therefore, the word "took," which was found by the framers of the Act of 1784, in *English* books of practical forms, was omitted in the formula thus prescribed, it must have been on the common law principle that was then as recognised and notorious as now, viz., "that in replevin every detention was a "new taking;" and it was, therefore, thought that the allegation "took" was in effect as truly made in the precedent as if it had been expressed. That we

1865.

LANE v. DORSAY.

must so construe the language of our form in Appendix A, I have no doubt, and to it, so construed, I can perceive no objection. If so construed, the argument from the omitted word falls to the ground. Whether this form was taken from the old statute, or from one of the two forms given in the *New York* statute, I know not; but I cannot forbear remarking that, in any view of the argument founded on the omission of the word "took," it strikes my mind as so inconclusive, that a Court of justice cannot act upon it, in construing a statute that affects the rights of suitors.

The words in the form, "unjustly detains," and "is unjustly detaining," must be construed as involving an allegation that defendant *took*. On what principle, indeed, can damages be awarded in respect of a taking, if a taking be not held to be alleged as a ground for awarding them? Suppose replevin brought for a distress taken for rent in arrear. Defendant avows the taking for rent in arrear, which is answered by showing "that none was in arrear." Is plaintiff to get no damage for the taking, because his complaint is in form for a mere detention? If he can get none, he has sustained a wrong for which the legislature has provided no remedy. If he gets it (under sec. 175) then a taking must be held to have been substantially and impliedly alleged in the phrase "unjustly detains" occurring in his writ.

Morris says (p. 87): "Though *non cepit* denies the "taking only, the unlawful detention may also be "inquired into under it." How is this to be understood, except on the principle that a taking is impliedly included in the allegation of a detention? I have carefully examined the prescribed forms of bonds, but their language does not furnish, nor, indeed, was it contended that it does furnish, any inference that elucidates the question before us. In *England*, looking to the principles decided in *George* v. *Chambers*, *Allen* v. *Sharp*, and *Mennie* v. *Blake*, it is not going too far to say, that replevin is now limited

to cases of goods distrained, strictly speaking, and to cases of goods forcibly taken, *in invitum*, under a pretended, but non-existing authority in law.

Thus, then, stands the argument: The words in question may be merely declaratory of the common law, or they may have been used to change it. Those who maintain, as I do, the first part of the alternative, establish, on the clearest principles of statutable construction, their contention by showing a doubt as to the legislative intention. They, however, who hold the second part of it, must show on the face of the statute some evidence of an intention of the legislature in accordance with their view of the meaning. In my humble judgment, nothing has been urged which has the least tendency to remove the doubt on the words, the existence of which none are bold enough to deny, and to indicate an intention to innovate on the common law. All which I have heard urged as affording evidence of such intention may be resolved into one or the other of the two following arguments: First, it has been insisted "that the mere act of legislating in the subject matter is a fair ground for such "an inference, inasmuch as an intention merely to "declare the law cannot be supposed." To this it appears to me a conclusive objection, "that to support "the argument it is necessary to show, as it has not "and cannot be shown, that the legislature *never* does "merely declare the common law."

I, who am required to expound this clause, find the language, in one view of it, at least, speaking the common law as decided in *Evans* v. *Elliott*. How, then, can I, without the slightest ground furnished by the statute, pronounce that the legislature, in using that language, did not simply design to inform, not merely the profession, but the public generally, what the law in that respect was? Secondly, it is urged in effect, "that an interpretation of the words "which would effect the asserted intention, would "establish a convenient, practical rule of law." This

1865.

LANE v. DORSAY.

seems to me met fully by two answers: first, the change which is contended for stops far short of furnishing a convenient and practical rule,—secondly, such a consideration, as is thus submitted, cannot be entertained by those whose functions are confined to expounding the law.

This action has been, as I have already said, in my opinion, misconceived, and I think the rule should be made absolute. Rule absolute.

Attorney for plaintiff, *J. A. Dennison.*

Attorney for defendant, *Savary.*

July 20.

BENNETT *versus* MURRAY.

Plaintiff and defendant entered into an agreement, by which defendant contracted to finish a certain vessel belonging to the plaintiff. Before the completion of the contract the vessel was burned, and a difference having arisen as to the amount defendant had earned under the contract, plaintiff and defendant entered into arbitration bonds, in which, after reciting the agreement, and that the vessel, before her completion, had been consumed by fire, the subject of the submission was stated as follows: "In consequence of which, differences have arisen between the said *J. B.* (the plaintiff,) and the said *A. M.* (the defendant,) *as to their accounts, and the amount the said A. M. is entitled to receive under said agreement.*" Two of the three arbitrators made an award, in which, after stating that they had investigated the matters submitted for their consideration, they awarded "That the said *J. B.* (the plaintiff,) do pay to the said *A. M.* (the defendant,) the sum of £195, under his agreement and the matters submitted to us."

Plaintiff had, previous to the submission, paid defendant £184, on account of the work under the contract, and subsequent to the award he paid him a further sum of £5, and took a receipt from him therefor, which was expressed to be "in full of all dues and demands to date," notwithstanding which the defendant had set up the amount of the award as a set-off to a separate demand of the plaintiff.

Held (*Young* C. J. and *DesBarres* J. dissenting,)—1. That parol evidence was inadmissible to show that the only matter submitted to and considered by the arbitrators was the value of the defendant's work on the vessel under the agreement, and that the award was only as to the amount at which the work was so valued, without making any deduction for plaintiff's payments.—2. That the receipt, though found by the jury to have been prepared by the plaintiff in good faith, and signed by the defendant with a knowledge of its contents, and on all the circumstances, was no bar to the defendant's claim on the award.

ASSUMPSIT for money paid, board and lodging, &c. Plea (among others) that the plaintiff was indebted to defendant in an amount greater than the plaintiff's claim for work and labor done by the defendant for the plaintiff, and upon an account stated, and *upon an award made on a submission of certain matters of difference between the plaintiff and defendant.* Replication to this plea. 1. That the reference was only of

1865.

BENNETT v. MURRAY.

the work done at a ship of the plaintiff, under an agreement dated 19th *March*, 1856, that during the performance of the contract the ship was destroyed by fire, and that the reference was only as to the value of the defendant's labor on the ship, that the arbitrators took this alone into consideration, that the award refers solely to this, and that the amount awarded was fully paid to the defendant on settlement of accounts. 2. General denial.

At the trial before his Lordship the *Chief Justice*, at *Digby*, in *September* last, the jury found for the plaintiff.

A rule *nisi* having been obtained for a new trial, it was argued in *Michælmas* Term last, by *James* for plaintiff, and *Savary* and the *Solicitor General* for defendant.

All the material facts sufficiently appear in the judgments.

The Court now gave judgment.

YOUNG C. J. In *March*, 1856, the defendant, a master carpenter, agreed with the plaintiff, the owner of a ship then on the stocks at *St. Mary's Bay*, to finish the hull in a good and workmanlike manner, for four hundred and twenty pounds. The defendant proceeded with the work accordingly; but before it was completed, the ship was burnt down. He had previously received money and goods from the plaintiff to the value of one hundred and eighty-four pounds on account of the work, which were entered in a book kept by the defendant, and produced at the trial. The only dispute as to this credit was about the delivery of one barrel of flour; but a more material difference arose as to the value of the work done under the contract before the burning of the ship. This they referred verbally to two persons of the name of *Brooks*, one of whom estimated the value of the work at three hundred and ten pounds, and the other at two hundred and ninety pounds. The defendant would not assent to the lower valuation, and

1865.

BENNETT v. MURRAY.

the plaintiff was dissatisfied with both, contending that he had paid enough. A submission was then entered into by bonds mutually executed, reciting that, in consequence of the burning of the vessel, differences had arisen between the parties as to their accounts, and the amount the defendant was entitled to receive under the agreement. The arbitrators having met and disagreed after hearing the parties, they appointed an umpire, who concurred with one of the arbitrators in an award, that the plaintiff should pay to the defendant the sum of one hundred and ninety-five pounds, under his agreement, and the matters submitted to them. If this sum was intended as a balance beyond the one hundred and eighty-four pounds, it was in excess of the largest estimate by the *Brooks*, while it was as much below it, if the award was intended to represent the value of the work. That it was understood in this latter sense by both parties, at the time it was made, appears from the evidence of Mr. *Walsh*, one of the defendant's witnesses, who drew the award. He said: "The plaintiff was satisfied with the award; the defendant "was not,—he thought he should have more." It is easy to understand why the plaintiff was satisfied. Adding to the one hundred and eighty-four pounds a sum previously owing to him by the defendant, as appeared by his evidence and account book at the trial, the credits to which he was entitled somewhat exceeded the amount awarded, and relieved him of further liability. But if the sum awarded was to be paid by the plaintiff, independent of the credits, the defendant was getting more than he ever asked or expected, and being dissatisfied with the award, it is plain that he viewed it only as an adjudication of the one side of the account to be reduced or extinguished by the set-off, and not as the settlement of a balance which he was to receive.

The plaintiff's claim was for money paid for the defendant, and board and lodging subsequently to

the award. This was admitted at the trial, and the whole question turned upon the construction and meaning of the submission and the award consequent thereon. The case was tried before me, and I decided on receiving the evidence of the parties and arbitrators, subject to exception. The defendant testified that "he could not tell how the arbitrators made "up the balance; they went out into a room, and "made up their award, and he considered the "amount of the award as due him." The plaintiff, on the other hand, declared that he wished the arbitrators to go into the whole account, but that they declined this, and determined nothing more than the value of the work; and this was confirmed by one of the arbitrators, who was examined at the trial, and said: "What we settled was the amount "defendant should get for his work. We saw no "papers at all belonging to either party. We con-"curred in the award, as the value of the work, and "made no deduction for payments or accounts. We "did not consider them at all." The plaintiff also produced a receipt for five pounds, given him by the defendant several months after the award, and expressed to be in full of all dues and demands to the date thereof. This receipt was impugned by the defendant, and, in charging the jury, I submitted to them three questions as follows, all of which they answered in the affirmative:

Did the arbitrators inquire only into the value of *Murray's* work upon the vessel under the agreement, without taking into account *Bennett's* payments?

Did the two arbitrators who signed the award determine only the value of *Murray's* work upon the vessel under the agreement, without taking into account *Bennett's* payments?

Was *Murray's* receipt in full prepared by *Bennett* in good faith, and signed by *Murray*, with a knowledge of its contents, and of all the circumstances?

It would seem from the views entertained by the

1865.

BENNETT v. MURRAY.

jury, and expressed by their verdict, and it was my own impression at the trial, that the equities of the case were with the plaintiff, and the question now is, whether the law will justify us in sustaining the verdict.

The receipt having been signed by the defendant, with a knowledge of its contents, and of all the circumstances, and being in full of all demands, comes within the *nisi prius* decisions in *Bristow* v. *Eastman*, 1 Esp., 172, and *Abner* v. *George*, 1 Camp., 392. Both of these cases were in assumpsit; and, in the former Lord *Kenyon* said that a receipt in full of all demands, when given with complete knowledge of all the circumstances, was a conclusive bar, and the party giving it should not be allowed to rip up the transaction which had been so closed and concluded. In the latter case, that of *Abner* v. *George*, Lord *Ellenborough* said: "There can be no doubt that a receipt "in full, where the person that gave it was under no "misapprehension, and can complain of no fraud or "imposition, is binding upon him." Now, it may be said that these decisions were only at *nisi prius*, and are subject to some modification. Courts would not now-a-days hold a receipt in full a conclusive bar, and that expression of Lord *Kenyon* is perhaps too strong.

In *Taylor on Evidence*, sec. 786, note 5, the case of *Abner* v. *George* is said to have been virtually overruled; and in *Phillips on Evidence*, p. 388, note 2, the writer distinguishes between the legal effect of such receipts as operating on the minds of a jury, and their amounting to an estoppel. But the rule, as it is modified, still remains, that admissions in writing, while they are left at large and do not amount to an estoppel, are to be weighed with other evidence, and determined by the jury. Now, in the case in hand, this has been done. The jury have found, with the facts fully submitted to them, that the receipt in full was prepared in good faith, and signed by the defen-

dant, with a knowledge of its contents, and of all the circumstances.

It rests upon a different principle from the cases cited at the argument, where a smaller sum is pleaded in satisfaction of a larger one. The plaintiff does not pretend that he paid the five pounds in satisfaction of the one hundred and ninety-five pounds; he says it was given by him and received by the defendant as an adjustment of all claims and demands, as a full settlement of their transactions up to the date when it was signed; and if so, it seems to be a conclusive answer. 1 *Stark. on Evid.*, 704.

If the parol evidence, however, at the trial was improperly received, as it no doubt largely influenced the jury, it would be wrong to uphold the verdict. Nor would any judge without due inquiry set aside or weaken the wholesome rule which excludes parol evidence, when its object is to vary a written instrument. In the recent case of *Pym* v. *Campbell*, 36 L. & Eq. Rep. 91, Lord *Campbell* goes back to the case of *Meres* v. *Ansell*, 3 Wils., 275, as one of the earliest establishing the rule. It was there held that no parol evidence is admissible to disannul and substantially to vary a written agreement. Some nice distinctions, however, have been engrafted upon this rule, examples of which are to be found in *Wake* v. *Harrop*, 4 L. T. R., 555, and *Lindley* v. *Lacey*, 11 L. T. R. 273.

There seems also to be a more liberal, or, as it may be thought, a looser interpretation of the rule in the case of submissions and awards, than of other written instruments. Two cases were cited by Mr. *James* from 4 T. R., 146,—*Golightly* v. *Jellicoe*, and *Ravee* v. *Farmer*,—which go a long way.

First of all, however, it is to be noted that the submission and award here are not altogether free of ambiguity. They may be read either way. If the award had comprehended all the accounts, and settled the true balance, I think there is enough to uphold it; and yet it may have been drawn and signed by the arbitrators,

1865.

BENNETT v. MURRAY.

with a view only to the amount payable under the contract. This was the only amount in difference; there was no difference as to the credits, except indeed as to one item, and that of little value. Now, in the case of *Golightly* v *Jellicoe*, where all matters in difference were referred, and the plaintiff pleaded that certain subsisting matters were not before the arbitrator, Lord *Mansfield* said, the only question is, whether a submission of all matters *in difference* is a submission of matters *not in difference*—and gave judgment for the plaintiff. And in *Ravee* v. *Farmer*, where the submission included all matters in difference between the parties, and the plaintiff replied to an award pleaded that the subject matter of the action was not included in the reference, one of the arbitrators was called to prove that this matter had never been laid before them by the parties, and that they had not taken it into consideration in forming their award. The case is very analogous to the present, and, upon the same ground which was urged at the trial here, Lord *Kenyon* rejected the witness, and the plaintiff was non-suited. But the Court, upon application, set aside the non-suit; and upon the cause going down to trial again before Lord *Kenyon*, the witness was admitted, and the plaintiff obtained the verdict. On a second motion to set aside this verdict, *Buller* J. said: "There is no color for the motion. The plaintiff "may undoubtedly show that this matter was not in "difference between him and the defendant at the "time of the submisssion, nor referred by them to "the arbitrators,"—that is, the plaintiff may show this by the evidence of the arbitrator, notwithstanding the submission and subsisting claim.

These cases are cited without disapproval in the various text books,—2 *Stark on Evidence*, 86; *Sharswood's Starkie*, m. p. 335, and others. They are affirmed also by *Lawrence* J., in 6 T. R., 610, and the two cases relied on by the defendant are not inconsistent with them. In *Smith* v. *Johnson*, 15 East., 213, there was

a reference of all manner of actions and causes of action, and an award of a sum of money in full of all accounts, claims, and demands whatsoever, and a direction that the plaintiff should accept the same in full accordingly, and that thereupon all differences and disputes subsisting between the parties should finally cease and determine. Under these circumstances, a claim of set-off by the defendant was rejected, because the deduction claimed was a matter in difference at the time, and within the scope of the reference; and Lord *Ellenborough* so held, without deciding against the authority of *Golightly* v. *Jellicoe*. In *Dunn* v. *Murray*, 9 B. & C. 780, the subject matter of the action, and of a former reference, were within the scope of the reference, and the Court held that if it was meant to be insisted on, it was the duty of the plaintiff to have then brought it forward. See also the case of *Upton* v. *Upton*, 1 Dowl. Rep., 400.

That no objection could be raised to the examination of the arbitrator with his own consent appears from *Taylor on Evidence*, 775, and the case of *Martin* v. *Thornton*, 4 Esp., 180. There the defendant's counsel called the arbitrator to prove that the reference before him was a reference of all matters in difference. This was objected to by the plaintiff, whose counsel contended that parol evidence was not admissible, as the award should speak for itself; but it was ruled by Lord *Alvanley* to be admissible and sufficient.

I think, also, that the parol evidence in this case was admissible; and, if so, there can be no question that the jury had ample ground for their verdict, and that the rule for a new trial should be discharged.

JOHNSTON E. J. The parties in this case entered into arbitration bonds, in which, after reciting the agreement for finishing the vessel, and that before her completion she had been consumed by fire, the subject of the submission is stated in these words: "In consequence of which, differences have arisen

1865.

BENNETT v. MURRAY.

"between the said *John Bennett* and *Angus Murray* as "to their accounts, and the amount the said *Angus* "*Murray* is entitled to receive under said agreement."

Two out of three arbitrators signed the award, which set out that having been chosen to investigate the matters in dispute between the parties, and having investigated the matters submitted for their consideration, and having examined the witnesses, and heard what each of the parties had to advance, they awarded that the said *John Bennett* should pay to the said *Angus Murray* the sum of one hundred and ninety-five pounds, under his agreement, and the matters submitted to them.

Evidence was received, under objection of the defendant's counsel, to show that the award was confined to one side of the account. The plaintiff swore that he wished the arbitrators to go into the whole accounts, his as well as defendant's, but they declined, and that the evidence was confined to the work on the ship; and one of the arbitrators stated that what they settled was the amount the defendant should get for his work, and they made no deduction for payments or accounts, which, he said, were not considered at all.

The learned *Chief Justice*, who tried the cause, put it to the jury to say whether the arbitrators inquired into and determined only the value of defendant's work, without taking into account the plaintiff's payments, and the jury found the affirmative.

The plaintiff also gave in evidence a receipt signed by defendant, dated some months after the award, for five pounds in full of all dues and demands to its date.

The *Chief Justice* put it to the jury whether this receipt was prepared by *Bennett* in good faith, and was signed by *Murray* with knowledge of its contents, and of all the circumstances, and this the jury also found in the affirmative.

The defendant's counsel have objected that it was

not competent to receive evidence to circumscribe the submission and award; and that the receipt did not in law operate to release the debt; and plaintiff's counsel cited cases to show that the evidence offered to limit the submission and award was rightly submitted to the jury. It is sufficient to consider two from 4 *Term Reports*, 146, and note; *Ravee* v. *Farmer*, and *Golightly* v. *Jellicoe*, in the note to that case. In the latter of these was a plea of reference of all matter in difference, and replication that the matters in the declaration were not before the arbitrators was held good on demurrer; Lord *Mansfield* saying, "The "only question is, whether a submission of all matters "*in difference* is a submission of matters *not in differ*- "*ence*." And in *Ravee* v. *Farmer*, where the submission was of all matters in difference, *Buller* J. said: "The plaintiff may undoubtedly show that this matter "was not in difference between him and the defend- "ant, at the time of the submission, nor referred by "them to the arbitrators."

The nature of these decisions, and the extent of their application, are explained in *Smith* v. *Johnson*, 15 East, 213. Attachment was moved for non-payment of a sum awarded, the defendant claimed deduction of a sum, which it was sworn was not submitted to the arbitrators, nor made the subject of claim before them, and which did not form any part of their award. The defendant's counsel relied on *Ravee* v. *Farmer*, and *Golightly* v. *Jellicoe*, as ruling that the award did not affect a matter of difference then subsisting, but not taken into consideration by the arbitrator, and *not included in the matters referred*. [Lord *Ellenborough* observed that the latter words formed a distinction very important in that case.]

In giving judgment, Lord *Ellenborough* said: "Here "is a reference of all matters in difference, and the "matter claimed to be deducted was a matter in "difference at the time, and within the scope of "the reference. * * Without deciding against

1865.

BENNETT v. MURRAY.

"*Golightly* v. *Jellicoe*, I think that when all matters in "difference are referred, the party as to every matter "included within the subject of such reference ought "to come forward with the whole of his case."

Dunn v. *Murray*, 9 B. & C., 780, was decided on the authority of *Smith* v. *Johnson*, Lord *Tenterden* repeating what Lord *Ellenborough* had there said, added: "So "here, the present claim was within the scope of the "former reference; it was the duty of the plaintiff to "bring it before the arbitrators if he meant to insist "upon it as a matter in difference, and he cannot "now make it the subject matter of a fresh action."

Without inquiring how far the cases of *Ravee* v. *Farmer* and *Golightly* v. *Jellicoe* may have been shaken by the later decisions, it is enough for the present purpose to observe that their application is limited to cases not included in the matters referred, and that by them it was held that matters subsisting, but not in difference, were not included in the submission of all matters in difference.

The inquiry, therefore, is not whether the arbitrators considered the matters, or whether the award embraced them, it is whether they were included in the subjects referred; and it is needless to say that a matter plainly included in the words of submission under bonds of arbitration cannot be excluded by parol.

Unfortunately for the plaintiff, he cannot be permitted to show that his account against the defendant was not a matter in difference, and hence not included in the matters referred, because the submission under his hand and seal recites that differences had arisen between these parties as to their accounts, *and* the amount *Murray* was entitled to receive under the agreement; thus including everything on both sides, and the plaintiff in his evidence concludes the argument, for he says he wished the arbitrators to consider his account as well as the defendant's; and they refused. Further, the arbitrators have concluded themselves

from limiting the award, as one of them attempted to do at the trial, for they awarded the plaintiff to *pay* the defendant one hundred and ninety-five pounds "under his agreement, *and* the matters submitted;" a decision inconsistent with the explanation offered, which recognizes no payment, and no matters except the agreement.

If it were quite certain that the defendant was entitled to no more under his agreement than the one hundred and ninety-five pounds, then the decision, which, I think, the Court is bound to adopt by the rules of law, will entail great hardship on the plaintiff. In such case we must be satisfied with the vindication of Lord *Tenterden*, in *Johnston* v. *Duport*, 2 B. & Ad., 929, where an award was upheld according to its legal import, although there could be no doubt the arbitrators had made it with a different intent, and it produced great hardship. His Lordship said: "I should "be very sorry to find that in any cause the general "rules and principles of law had worked injustice in "the particular instance. But in the infirmity of all "human jurisprudence such evils must occasionally "happen; and the evil is of less magnitude than the "total absence of general judicial rules, or a depar-"ture from them to meet the supposed hardship of a "particular case.

I am, however, by no means clear, that much, if any injustice is really done by giving to this award its legal significance. At the first reference attempted, the matter was left to the decision of two competent men—ship carpenters—who adopted, I think, a fairer principle than the later arbitrators, for those considered the value of the work remaining unexecuted when the ship was burnt. One of them set it at one hundred and ten pounds, and the other at one hundred and thirty pounds. Taking the medium, one hundred and twenty pounds, and deducting forty-five pounds for the spars, leaves seventy-five pounds to be taken from four hundred and twenty pounds, the

1865.

BENNETT v. MURRAY.

agreed price of the whole work, which gives the defendant a credit of three hundred and forty-five pounds, the plaintiff's account of one hundred and eighty-four pounds would reduce this to one hundred and sixty-one pounds, or within thirty-four pounds of the award; and if the defendant should be allowed a credit of thirty-one pounds said to have been struck out of plaintiff's book, the sum due the defendant would be one hundred and ninety-two pounds, or within three pounds of the award.

Be this as it may, the constitutional duty of the Court in this case is to determine the legal force of the submission and award, and not to ascertain equities in this instance excluded from their consideration by rules and principles, which it is their duty to uphold; and in my opinion the award conclusively settled the claims of both parties, and the evidence offered to give it a different meaning was not admissible.

As regards the receipt, I am quite satisfied that a receipt for five pounds in full of all demands, is not a release of one hundred and ninety-five pounds due on an award under submission by bond. The authorities cited at the argument abundantly prove this, and *Down* v. *Hatchers, et al.*, 10 Ad. & Ell., 121, goes much farther.

As evidence inferentially showing that the defendant did not himself consider the debt of one hundred and ninety-five pounds as due to him, or as evidence of the payment of five pounds as a final balance of that sum, the receipt was, I think, equally unavailing; because the debt being established on legal evidence, could not be abrogated by any inferences, and because there was no pretence of payment of the one hundred and ninety-five pounds, the plaintiff instead repudiating his liability.

Being of opinion that evidence legally inadmissible was received, under which the defendant was excluded from an offset of one hundred and ninety-five

pounds, to which he was entitled, and which would have brought the balance in his favor, I think the verdict should be set aside, and a new trial had.

DODD J.* I think we are bound by the case of *Smith* v. *Johnson*, 15 East, 213, in which the Court refused to allow a set-off of a matter that was within the scope of a previous reference between the parties, the object of which was to make a final settlement of all matters of account between them. In the case before us the submission is large enough to embrace all matters of account between plaintiff and defendant when entered into, indeed it is so in express terms, and the award of the arbitrators is to the same effect. Taking this view then of the case, I think the evidence at the trial, which was received for the purpose of showing that the plaintiff's account against the defendant was not considered by the arbitrators, was improperly admitted; and, in that case, the receipt in full for five pounds, for a debt of one hundred and ninety-five pounds clearly established, will not assist the plaintiff to retain his verdict. It was not pretended at the argument, that the receipt was given for the award, but for a distinct and separate claim, the plaintiff at the trial contending that his account against the defendant, not considered by the arbitrators, was sufficiently large to satisfy the amount awarded the defendant. The five pounds, then, is no answer to the defendant's claim, beyond a set-off to that amount. I am, therefore, of opinion that the rule for a new trial should be made absolute, with costs.

DESBARRES J. The award pleaded by the defendant in this case, as a set off to the plaintiff's claim, was produced in evidence at the trial; and, as it did not appear from the award itself that the submission was confined to the valuation of the work performed

* *Bliss* J., not having been present at the argument, gave no opinion.

1865.

BENNETT v. MURRAY.

by the defendant at plaintiff's ship, as the plaintiff asserted it to be, the learned *Chief Justice*, who tried the cause, allowed one of the arbitrators to be examined on that point, who proved that the only subject matter submitted to and considered by the arbitrators was the value of the work performed by the defendant on the plaintiff's ship, and that the amount at which the work was so valued, was awarded to the defendant, *without making any deduction for plaintiff's payments to the defendant.* It was proved on the part of the plaintiff, that he had made payments to the defendant before the submission to arbitration to the amount of two hundred pounds, for the work done by the defendant on the plaintiff's ship, for which no credit had been given by the arbitrators; and it was also proved that the plaintiff paid to the defendant the sum of five pounds after the award was made, for which the defendant gave plaintiff a receipt, stating it to be in full of all demands; thus showing that the sum of one hundred and ninety-five pounds awarded to the defendant was not justly due, and ought not to be set off as against the plaintiff's claim in the present action.

The evidence given by the arbitrator having been received by the learned *Chief Justice*, subject to objection, a rule *nisi* was granted to set the verdict aside, upon the ground urged by the defendant's counsel that it was inadmissible, and the sole question to be disposed of is, whether this evidence was or was not properly received—a point upon which I think the case of *Ravee* v. *Farmer*, 4 T. R., 146, is conclusive. [The learned Judge here stated the substance of this case.]

I do not think the case of *Ellis* v. *Saltau*, referred to in the note to *Johnson* v. *Durant*, 4 C. & P., 327, and pressed upon our attention by the defendant's counsel at the argument, has any important bearing on the present case. That was an action on an award, and the defendant called the arbitrator to prove the ground on which he had made his award, in order to

show that he had exceeded the limits of the submission. *Mansfield* C. J. told the witness that he need not be examined unless he chose it, and he declined to be examined, to which ruling, it appears, no objection was made, on a motion afterwards made for a new trial. Now, the arbitrator in the present case was not called to prove that he had exceeded the limits of the submission, or acted wrongfully in the matter submitted, but merely to show that the subject matter of the present suit was not before him and the other arbitrator, and that the only matter referred was the valuation of the defendant's work on the plaintiff's ship. He gave his testimony willingly when called, and it was received as the evidence of the arbitrator in *Ellis* v. *Saltau* would have been, if he had been equally willing to submit to an examination.

This case, then, does not in the slightest degree affect the cases of *Ravee* v. *Farmer* and *Golightly* v. *Jellicoe*, which show that the evidence of the arbitrator in the case before us was rightly received; and, therefore, I think the rule for setting aside the verdict, which, according to my judgment, is fully sustained by the proof, ought to be discharged.

WILKINS J. The only issue material for consideration is that raised on plaintiff's replication to the tenth plea of set-off "for work and labor, account "stated, and on an award made on a submission of "certain matters in difference between plaintiff and "defendant."

The replication is, in substance, "that the reference "was only of the work done at a ship of the plaintiff "under an agreement; that during the performance "of the contract the ship was burnt, and that the "reference," (not the inquiry of the arbitrators) "was "to the value of defendant's labor on the ship; that "the award refers solely to this, and that it was paid."

1865.
BENNETT v. MURRAY.

The language of the replication to the tenth plea is, "and that the award mentioned in the said "tenth plea is not, as is alleged by the defendant, "that the plaintiff should pay to the defendant the "sum of one hundred and ninety-five pounds; but "that the submission and award only have reference "to the value of the labor performed by the defend-"ant on said vessel as aforesaid."

The issue raised no question for the jury, but a pure question of construction of the condition of the bond of submission, which was entirely for the judge.

The first and second questions, therefore, submitted to the jury by the learned *Chief Justice* were not raised by the pleadings. The only question raised was, "as to what was referred to," (not at all as to what was inquired into by) "the arbitrators."

The legal question really raised presents no difficulty. The allegation in the replication "that the "reference was only of the value of the work done "by the plaintiff at the ship," is refuted by the submission, which, *per se*, shows incontestably, that the reference was not confined to that matter, but extended to it, and to "their" (the parties') "accounts," that is, their mutual accounts. We cannot construe the phrase "their accounts" to mean "the defend-"ant's accounts alone." The language of the parties in question occurring in the condition of the bond of submission is, "Whereas said vessel" (which was to be built by defendant under an agreement with the plaintiff) "was consumed by fire before her comple-"tion, in consequence of which differences have "arisen between the said *J. B.* and the said *A. M.* as "to their accounts, and the amount the said *Angus* "*Murray* is" (*i. e.* at time of submission) "entitled to "receive under said agreement." These last mentioned words can only be construed thus: "As to "their mutual accounts, and as to the amount (if any) "the said *Angus Murray* is entitled to receive under

"said agreement." The report gives us the benefit of the plaintiff's own construction of the submission as to what was referred. He says: "I wished the "arbitrators to go into the whole accounts, mine as "well as defendant's," and, as is significant, after he had just before said, "the only matter in dispute left "to *Dakin* and *Mulberry* was the value of the work "done on the vessel." And this, by the way, shows how dangerous it would be to break away in construction from the plain language that exists here as respects both submission and award. The question is, "are the submission and award to be explained by "the written instruments, perfectly plain on their "faces, or by the oral testimony of the parties and "witnesses?". The evidence afforded by the former is absolutely at variance with that given by the latter. The plaintiff and the arbitrator say, "the value of "the work done by defendant on the vessel was alone "submitted, and is alone referred to in the award." The submission, on the contrary, is "of *their* ac- "counts," and the language of the award is, not "the value of defendant's work at the vessel is one "hundred and ninety-five pounds;" but "we award "that *Bennett* do *pay* to *Murray* the sum of one hun- "dred and ninety-five pounds his agreement, and the "matters submitted to us."

This is altogether unlike the case of a reference in general terms of all matters in difference, from the very nature of which it often becomes indispensable to ascertain by oral testimony, extrinsic to the writings, what in reality was not submitted to the arbitrator. It would be a dangerous precedent to permit an arbitrator in the box to contradict a written submission, and a written award in terms so explicit as these.

Plaintiff's account, therefore, against defendant, as connected with the particular contract, was within the submission. If, then, the arbitrators refused to consider that account, the award would be for that reason invalid; but under these pleadings it must be taken

1865.

BENNETT v. MURRAY.

to be a good award, and must speak for itself. The sum of one hundred and ninety-five pounds being, then, as found by the arbitrators, the net balance on mutual accounts due the defendant, it is clear, notwithstanding the finding of the jury, that defendant having accepted five pounds in satisfaction of it, accepted it under mistake, or through fraud, and his debt in point of law remains unsatisfied. For these reasons, I think, the rule should be made absolute.

Rule absolute.

Attorney for plaintiff, *Wade.*

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

July 21.

LORDLY, ADMINISTRATOR OF MAJOR, *versus* BECKWITH.

A separate debt due by one member of a firm in his individual capacity cannot be set off, either at law or in equity, against a joint debt due to the firm, unless by agreement with *all* the members thereof.

ASSUMPSIT on a promissory note. Plea, equitable set-off.

The cause came before the Court on a special case, which was argued in *Michælmas* Term last, by *W. A. D. Morse* and the *Solicitor General* for plaintiff, and *McCully*, Q. C., and *J. W. Johnston, Junior*, for defendant.

The pleadings, and the statement of facts in the case, appear sufficiently in the judgments.

The Court now gave judgment.

YOUNG C. J. In *October*, 1863, *Beckwith*, the defendant, and *Major*, the intestate, of whom the plaintiff is administrator, agreed to dissolve the partnership which had existed between them; *Beckwith* purchasing *Major's* interest therein for a sum, which he paid partly in cash, and for the remainder gave notes of hand; the last of which is still unpaid. By one of the clauses in the deed of dissolution, "each of the

"said parties agrees to account with the other for, "and to pay him the proceeds of any co-partnership "goods he may have sold, and the amount of any "co-partnership debts or monies he may have re- "ceived, or have discharged, or given receipts for, "or offset against his own personal debt, but "which proceeds, debts, or monies, he may h "omitted up to the date hereof, to pay into "co-partnership, and to enter in its books." It is not alleged that any such omission was made, but on the death of *Major* an equitable set-off is claimed as against the remaining note in the hands of his administrator, upon the ground that *Beckwith* is entitled to credit for certain sums which sundry debtors to the firm refuse to pay to *Beckwith*, the surviving partner, because, as they allege, *Major* was indebted to them in his private capacity, and these debtors claim under agreement with *Major* to offset these debts due by *Major* in his private capacity to them, with the demands against them of the firm of *Beckwith & Major*. It is stated in the special case on which the argument was had, that among the parties so refusing on the above grounds is the administrator himself, and our opinion was asked upon the following question: "Whether, by law, and under the "agreement and pleas pleaded, plaintiff ought not "to deduct from the said note, in the declaration men- "tioned, the amounts due by the intestate, *Major*, in "his lifetime, in his individual capacity, to those "parties who are indebted to the late partnership "firm, and who refuse to pay their said partnership "debts, unless amounts due them by said *Major*, in "his individual capacity, be first paid or credited."

To understand this matter, which has rather a complicated air, let us put an individual case. *A B* owes the late firm of *Beckwith & Major* one hundred pounds. *Beckwith*, as surviving partner, and having also an equitable right under the agreement, demands payment. *A B* says, I am willing to pay you one-half,

IMAGE EVALUATION TEST TARGET (MT-3)

6″

1865.

LORDLY v. BECKWITH.

but as to the other half, *Major*, in his lifetime, owed me that amount in his private capacity, and agreed with me to offset the amount he so owed me against the one hundred pounds I owe to the firm. I will pay you, therefore, only fifty pounds of the one hundred pounds.

The strength of *A B's* position here is the agreement with *Major*, and the first question is, will it avail him? A joint agreement by *Beckwith & Major* would have been a very different thing. In *England* questions of this kind have arisen almost altogether in bankruptcy, and the case of *Kinnerley* v. *Hossack*, 2 Taunt., 170, where the plaintiffs sued as assignees, is cited in *Collyer on Partnership*, 447, in proof of the position, that although joint demands cannot ordinarily be set off against separate demands, or *vice versa*, yet, where there is an express agreement between the partners and a person dealing with a firm, that the debts severally due from the members of the firm to that person shall be set off against any demands which the firm jointly have on him, such agreement will be binding. Now, here there was an agreement of both parties with the debtor. But I can find no case either at law or in equity, making the agreement of one partner binding upon both, and it is contrary to first principles that it should be so. The cases cited at the argument, and which I shall presently advert to, have a totally different application, and I hold it too clear to be denied, that the alleged agreement of *Major*, without the acquiescence of *Beckwith*, was in the eye of the law a fraud upon *Beckwith*, and offers no defence whatever, either legal or equitable, to the debtors of the firm, as against the demands of the surviving partner.

I can easily understand the reluctance of *Beckwith* to be involved in such controversies. *Major*, quite independently of the agreement—for this matter is really beyond the agreement—had no right to deal

with the debtors of the firm as they now allege, and *Beckwith* wishes to escape out of these complications. The misfortune is that other parties are concerned. If the estate of *Major* were solvent, the question, I presume, would not have come here. Mr. *Lordly* himself would have paid his debt to the firm in full, and been paid his own debt also in full out of *Major's* estate. It is because it will not pay in full, that he seeks to be made whole by means of this restriction. His interest as an individual, and as an administrator, are at variance. As an individual, it is his interest to fail in this suit, and the effect would be that a part of *Major's* creditors would be paid in full, and the dividend of the other creditors proportionably reduced.

Beckwith seeks the protection of what his counsel called an equitable set-off to escape the obligation of suing parties, who ought to pay without suit, because they have no defence. We may search the books in vain for any case like this. Here there is no agreement for stoppage, as it is called, "where equity," as the *Master of the Rolls* said, in *Jeffs* v. *Wood*, 2 P.Wms., 129, "will take hold of a very slight thing to do both "parties right." There is no equitable set-off here in the sense understood by the Courts of Equity, and which prevailed long before the Statute; and it is laid down that the rules as to set-off, as administered at law and in equity, are the same, unless under very special circumstances. The modern rule appears to be, that, where there are cross demands of a purely legal nature, no jurisdiction is practically exercised in equity. *Haynes' Outlines in Equity*, 157. "Courts of Equity," says *Story* in his *Equity Jurisprudence*, section 1437, "following the law, will "not allow a set-off of a joint debt against a separate "debt, or, conversely, of a separate debt against "a joint debt, or, to state the proposition more "generally, they will not allow a set-off of debts "accruing in different rights. But special circum-

1865.

LORDLY v. BECKWITH.

"stances may occur, creating an equity, which will "justify such an interposition." I should judge from an inspection of the cases cited by *Story*, *Collyer*, and *Lindley*, that the tendency of the Courts is rather to restrict than to extend such interpositions. The case in 3 Ves., 248, is overruled by *Ex parte Twogood*, 11 Ves., 517. The case *Ex parte Stephens*, 11 Ves., 24, so much insisted on at the argument, proceeded mainly on the ground of fraud, which alone, as the *Lord Chancellor* admits in 19 *Ves.*, 467, would have justified his decision. This case, as well as *Ex parte Hanson*, 12 Ves., 346, are reviewed by the *Master of the Rolls*, in *Addis* v. *Knight*, 2 Mer., 117. "These "cases," said he, "only establish that, under certain "circumstances, there may be a set-off in equity "where there can be none at law. But it is quite "clear that, as at law, a joint cannot be set off against "a separate demand, the same rule" (and the converse rule, of course) "prevails in equity, and must "continue to prevail so long as the present system, in "regard to joint and separate estates, subsists." It was accordingly held in *Addis* v. *Knight*, that a debtor, by bond to the separate estate of a deceased partner, could not be permitted in equity to set off his bond debt, in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission of bankrupt. In other words, the plaintiff, having borrowed a sum of money from one of the partners, for which he gave his bond, was obliged to pay the whole amount to the estate of that partner, although he had much larger claims on the partnership, for which he could obtain only a dividend. This was a harder case than the present; for the plaintiff dealt with the firm in the confidence that he could set off at any time to the amount of his bond. The debtors to the firm, who are the real parties here, may have had a like confidence, but there was no legal foundation for it. As in *Addis* v. *Knight*, they must be

content with the dividend that *Major's* estate may yield to them in common with the other creditors, and must pay their debts to the firm. The defendant, therefore, is not entitled to the equitable set-off he has claimed, and our judgment on this special case must, as I think, be in favor of the plaintiff.

DODD J*. The question raised by the pleadings in this cause, and included in the case, is, whether the plaintiff ought not to deduct from the note sued upon the amount due by the intestate in his lifetime, in his individual capacity, to the parties who are indebted to the late partnership firm of *Beckwith & Major*, and who refuse to pay their partnership debts, unless the amount due by the intestate in his individual capacity, be first paid or credited to them.

In the Courts of law it is too clear to admit of doubt, that if this was an action brought by *Beckwith* against either of the persons indebted to the firm of *Beckwith & Major*, they would not be allowed to set off in such action a debt due by *Major* in his individual capacity; but if the law in that respect differs in equity, then, as there is an equitable plea in this case setting forth the above facts, the defendant would be entitled to the benefit of it. No action has been brought by *Beckwith* against the persons so indebted to the copartnership, and the mere refusal to pay their legal debts, unless allowed to set off their claims against the estate of *Major*, does not prove anything: the mere assertion of a legal right can be only decided in the legal tribunals of the country; and the case, in my opinion, would have come more correctly before us in such an action. By our Practice Act, sec. 112, wherever there are mutual debts *in the same right*, one debt may be set off against the other, although

* *Johnston* E. J. and *Bliss* J. gave no opinion, the former having been concerned in the cause when at the Bar, and the latter not having been present at the argument.

1865.

LORDLY v. BECKWITH.

such debts may be deemed in law to be of a different nature. Before the passing of the Imperial Act, 2 *George* 2, chap. 22, sec. 13, where there were cross demands unconnected with each other, a defendant could not, in a Court of law, defeat the action by establishing that the plaintiff was indebted to him even in a larger sum than that sought to be recovered, and relief could only be obtained in Courts of Equity. *Burrows*, 820, 1230.

1 *Chitty on Pleading*, 598, referring to the statutes of set-off, says: "The statutes require, first, that the "debt sued for, and that sought to be set-off, should "be mutual debts, and due to each of the parties "respectively in the *same right* or *character*, so that a "joint debt cannot, by virtue of the statutes, and in the "absence of an express agreement to that effect, be "set off against a separate demand, nor a separate "debt against a joint one; nor can there be any set-off "at law or in equity if one of the debts be due to the "party in his *private* right, and the other be claimable "by his opponent in *autre droit*;" and he refers to *Gale* v. *Luttrell*, 1 Young & Jervis, 180, as an authority, also *Davies* v. *Wilkinson*, 4 Bing., 573, 1 M. & P., 502.

The cases cited by Mr. *McCully* and Mr. *Johnston* do not appear to me to have any strong bearing upon the case. They are principally cases in bankruptcy, which are governed by the statutes regulating bankruptcy. It is true that, in some of the earlier cases, where the *Lord Chancellor* sitting in bankruptcy gave the same relief he would administer in equity, he permitted in some particular cases set-off, that would not have been permitted in the Courts of law; but I can find no case where it has been permitted in equity to set-off a separate debt against a joint one, nor a joint debt against a separate one, unless by agreement, or there has been fraud in the transaction, or some extreme circumstances very remote from those in the present case.

In *ex parte Christie*, 10 Vesey, 105, it was decided that part owners of a ship cannot set-off their proportions of a debt to the bankrupt on that account against the debts due by the bankrupt to them severally. The *Lord Chancellor*, in dismissing the petition, said unless it could be made out that part owners of a ship are not partners, it was nothing more than a set-off of a separate debt against a joint debt. In *ex parte Twogood*, 11 Vesey, 517, a separate commission of bankruptcy, relief, in the nature of set-off against a separate debtor of the bankrupt, indebted to the partnership to a greater amount, was refused. And in *ex parte Ockenden*, 1 Atkins, *m. p.*, 237, the *Lord Chancellor*, referring to the clause in the Act of 5 *Geo.* 2, relating to mutual credit, said that he did not know that a Court of equity had gone further than the Courts of law in the cases of set-off.

I have referred to those old cases to show how the law stood at that time, and I will now refer to a late case, in which the old cases are reviewed, showing that the law is still the same as it formerly was.

In *Freeman* v. *Lomas*, 5 L. & Eq. R., 120, which was a case of set-off, Sir *George Turner*, V. C., after deducing the rule from the *Roman* law, proceeds with his judgment, and states how it has been dealt with in the Courts in *England*. "Upon examining the authorities," he says, (p. 125), "I believe it will be found that, except "upon special circumstances, Courts of Equity have "never allowed cross demands, existing in different "rights, to be set the one against the other. The cases "on that point cited on the part of the plaintiff, to "which may be added *Chapman* v. *Derby*, 2 Vern. 117, "are distinct authorities against a right, in an ordinary "case, to apply one of such demands in satisfaction "of the other. But it is not to be denied, on the "other hand, that an agreement, express or implied, "may confer such a right, and that slight circumstances "may be sufficient to warrant the Court in presuming "such an agreement." In this case, it appears to me,

1865.

LORDLY, v. BECKWITH.

we have not any circumstances to take it out of the ordinary rule referred to by the *Vice Chancellor*.

I think we may presume that the estate of *Major* is insolvent, or we would not have the present case before us; and if we decide in favor of the set-off, we may be giving an unfair preference to those parties who now seek to relieve themselves from their liability to the firm of *Beckwith & Major*, to the extent of their claim against the estate of *Major*.

I am of opinion that neither at law or in equity can the defendant's plea of set-off be supported; and therefore the plaintiff is entitled to his judgment upon the note.

DESBARRES and WILKINS JJ. concurred.

Judgment for plaintiff.

Attorney for plaintiff, *W. A. D. Morse*.

Attorney for defendant, *J. W. Johnston, Jr.*

July 29.

HUTCHINSON *versus* WITHAM ET AL.

The granting of an order of sale of mortgaged premises after foreclosure, where the interest of the mortgagor is only *contingent*, is discretionary with the Court of Equity; and that Court having refused an order of sale in such a case, where the mortgagor made default, the Court dismissed the appeal therefrom, *Wilkins J.* dissenting.

APPEAL from an order of the Court of Equity, dated 28th *November*, 1864, refusing an order of sale on foreclosure of mortgage.

It appeared from the pleadings and the affidavits filed in the cause, that *George Witham*, one of the defendants, mortgaged to the plaintiff certain lands, of a portion of which he was seized in fee, and in the remainder of which he had only a *contingent* interest under the will of his father. The testator, who died in 1835, devised the last-mentioned lands to certain trustees, and the survivor of them and the heirs of the survivor, on trust to lease the same during the life of his wife, and from the rents thereof to pay her during her life one hundred pounds per annum, and

to keep the said property insured and in good repair, the balance of rents, as they from time to time accumulated, to be divided among his children, "in the "same way and manner and subject to the same mat- "ters and things as the several bequests were before "made to them in the division of his personal pro- "perty." The testator also directed that on the death of his wife, in case she should live until after his youngest surviving child should attain the age of twenty-one years, or in case she should die during the minority of his said youngest surviving child, then upon such child attaining the age of twenty-one years, the said trustees or the survivor of them, or the heirs of the survivor, should within three months after the happening of either of the before mentioned circumstances, cause the whole of testator's lands to be sold, and execute to the purchaser or purchasers a deed or deeds thereof; and should cause the proceeds of the sale to be equally divided and paid to such of his children as might be living at the time of such sale, and in case all his said children should be then dead, then that the said trustees, &c., should cause the said proceeds to be equally divided among the lawful representatives of his said children. The widow of the testator, it appeared, was still living.

The summons for the foreclosure was duly served on *Charles D. Witham*, the survivor of the trustees, and on the other defendant, the mortgagor. The latter made default, and the former (now deceased) appeared and pleaded in substance that he was surviving trustee under the will of his father, setting forth the trusts precisely as stated in the plaintiff's writ, and concluding as an inference therefrom that the mortgagor never was entitled to any part of the lands so devised by the testator.

On the 3rd September, 1861, (which was previous to the recent establishment of the Court of Equity as a distinct tribunal presided over by a separate Judge), three of the Judges (*Young* C. J., *Bliss* and *Wilkins*

1865. HUTCHINSON v. WITHAM et al.

JJ.), after hearing counsel on both sides, and after argument, granted an order of foreclosure of *George Witham's* interest in the whole of the mortgaged lands, but of *sale* only as regards those lands which he owned in fee. This order also provided that, as regards the lands to which the said *George Witham* claimed to be entitled under the will of his father, and the costs of the said *Charles D. Witham*, the same should be subject to the further order of the Court.

Under this order a sale of the absolute estate of the defendant, *George Witham*, was had, the proceeds of which amounted to one hundred and fifty-three pounds seventeen shillings, and left a balance due plaintiff on his mortgage of three hundred and twenty-four pounds three shillings.

In order to realize this balance and the interest, the plaintiff applied to the Judge in Equity for authority to sell the remaining property, and also *George Witham's* title and interest therein, but the learned Judge by an order declined to grant the authority asked for.

This last order was the one appealed from, and the appeal was argued in *Michælmas* Term last by *McCully* Q. C., for plaintiff,—no one appearing on the other side.

The Court now gave judgment.

YOUNG C. J. The Judge in Equity considers it doubtful whether the order of foreclosure as regards the lands in which the defendant, *George Witham*, has only a contingent interest, can be sustained. To none of the three Judges who granted the order did any such difficulty occur, and for the purpose of my own judgment I shall consider the order of foreclosure as good. I think, however, that the Court of Equity has power to control the sale, and to suspend or delay it. The interest of the mortgagor, in the property of which an order of sale is now asked, is merely a contingent interest, and, if sold now, it would

probably realize a very small sum. If the sale is delayed until the death of the tenant for life, and the mortgagor survives her, his interest in the property would probably be worth some hundreds of pounds. I think, therefore, that there is sound reason in not allowing the property to be sold at the present moment, and that the Court of Equity had a perfect right to withhold the order of sale. 4 *Kent's Com.*, 9th edit., 220–1; 2 *Daniell's Practice*, 903, 909, 921, 922, 924, 929; *Sugden on Vendors and Purchasers*, 72.

JOHNSTON E. J. I cannot help thinking that the order of foreclosure, as regards the lands in which the defendant, *George Witham*, had a contingent interest, has been inadvertently made, that part of the order being inconsistent with what follows, that that question should be reserved for further consideration. The legality of the order has been disputed, and that dispute has not yet been decided. In construing the mortgage we must look at the will, under which the mortgagor derives his interest in that portion of the mortgaged property, of which a sale is now sought. The will is not fully set out in the mortgage. One clause of the will is set out in the writ, but that clause is not perfect in itself, and even if it were so, there are other clauses in the will which might affect it. The clause set out says that the property shall be sold and distributed in the same manner as in a preceding clause, and what that preceding clause is the Court has not been informed. No witness to the will has been examined, and the will itself has not been proved. The recent enactments in England show how completely the sale of mortgaged lands is considered under the control of the Courts of Equity. I think that the soundest discretion in this case was to withhold the order.

BLISS J., not having been present at the argument, gave no opinion.

1865.

HUTCHINSON v. WITHAM et al.

DODD and DESBARRES JJ. concurred with the *Chief Justice*.

WILKINS J., after stating the facts of the case, proceeded as follows:

It is understood that the appealed order was made *pro forma*, with a view to an appeal. The particular grounds, therefore, on which the learned Judge made the order in question do not appear; but it was understood to be contended adversely to the plaintiff, that equitable principles demanded the gratuitous interposition of this Court to protect, by refusing a decree of sale, certain interests in the estate of the late *John Witham*, that might be, and as was contended, would be, prejudiced by the effect of such decree. It was urged, moreover, that the widow of the late *John Witham* still lives, and that, first, no benefit could accrue to a purchaser at a sale, if ordered, inasmuch as by the provisions of the will the realty cannot be sold *whilst she lives;* secondly, that, as at her death the whole of that real estate will be converted into personalty, any interest now existing in it must then become personalty also; thirdly, that at that event, in case the widow shall happen to survive *George Witham*, and leave one or more children of the testator her surviving, there will then exist, by terms of the will, no interest whatever in the heirs or assignees, or in the personal representatives of *George Witham* in the real estate of his late father, when then by a sale converted into money; and fourthly, that the interest in question purporting to be conveyed by the mortgage being in terms "the "one eighth part or share of and in those estates to "which he, the said *George Witham*, is entitled under "and by virtue of the last will and testament of the "said *John Witham*," that interest was and is either a nullity, or if it exist, it was at the execution of the mortgage, and now is an interest in the *personalty* of the late *John Witham*.

On behalf of the plaintiff it was argued, and as I think unanswerably, that, first, no opposing equity has been suggested to the Court; secondly, that none exists; and thirdly, that as it is admitted on the pleadings that *George Witham*, in order to secure a debt due by him to the plaintiff, did convey to him whatever interest he at the execution of the mortgage had, to the extent of one-eighth part, in the estates of his father, and has ever since failed to satisfy that debt, *George Witham* is, and ought to be, subject to an equitable estoppel from denying the plaintiff's right, asked for in the usual form, to a sale of that interest, whatever its value or its nature may be.

The following considerations appear to me decisive in favor of the plaintiff's claim.

The contract between the parties must be regarded by us as a mere security for money lent, and we recognize on behalf of the defendant every conceivable equitable right or privilege in the *corpus* of the security, which is consistent with the mere equity in the plaintiff to have the whole of that *corpus* available for the payment of principal, interest, and costs. But I know of no rule of equity, and no practice in Courts of Equity, which gives a mortgagor any right or privilege which extends beyond this, or which beyond this limits the right of the mortgagee. The defendant, *George Witham*, has been distinctly notified that the plaintiff sought a foreclosure and sale of all the interests (whatever they may be) in the estates of his late father which that defendant pledged to the plaintiff as a security for a debt, and which it was alleged he had not paid at the commencement of the suit. *George Witham* has made no defence, and judgment has been entered against him, and a portion of the mortgaged property has been actually sold. He, therefore, has admitted the truth of every allegation in the plaintiff's writ. *He* has not asked this Court to interpose on his behalf. *Charles D. Witham*, the

1865.

HUTCHINSON v. WITHAM.

other defendant, brought into Court as a trustee under the will in which *George Witham* has acknowledged himself to be interested as a *cestui que trust*, has appeared indeed, and pleaded, but has urged no equity on behalf of himself or the *cestuis que trust*, except what may be thought to arise out of his mere relation to the will and to the estate that he represented.

If, then, real or supposed equities on behalf of the defendants, or either of them, or of any person or persons who are or may be interested in the subject matter in question, are so interposed as to prevent this plaintiff from making the mortgaged premises to their utmost extent presently available as a security for the mortgage debt, (and they will be so interposed if the order appealed from be confirmed), then, undeniably, that consequence will result, not from an appeal made by the defendants, or either of them, or any persons whom they represent, but from the mere unsolicited interposition of this Court. That a spontaneous interposition is without precedent, I will not undertake to say, but I will venture to affirm that it is unprecedented in *English* Courts, and the Courts of this colony, where the equities that induce it are not so manifestly and prominently brought to the notice of the Court that their existence cannot form the subject of controversy. Do such exist in this case? If a sale were to take place to-morrow, and the interests in question were to bring the most insignificant sum, no prejudice to the person who other than this mortgagor may prove to be interested, at a future trustee sale after Mrs. *Witham's* death, can by possibility arise, for the purchaser's title, under this last, will be paramount to that of a purchaser under the foreclosure sale. But it is said *George Witham* may be prejudiced, because it is not to be assumed that any person will be found who, in view of his present interest, and of future contingencies affecting it, will be prepared to bid any sum at all proportioned to what the intrinsic value of that interest may even-

tually prove to be. To this the following answers are, I think, conclusively suggested: First, *George Witham*, when he executed the mortgage, consented that such sale should take place in case he should fail (as he did fail) to pay his debt at the appointed time to the mortgagee; secondly, he was notified that an authority for such sale would be demanded in the Court before which he was summoned to appear, and being so notified has urged no reason why it should not be given; thirdly, it cannot, and under the circumstances it ought not to be, assumed, that at a present sale a considerab' um would not be offered for the interest in question; fourthly, that if an imagined equity *may* exist on behalf of defendant, inducing a postponement of a sale because it *may* be that if an order therefor be withheld until Mrs. *Witham's* death, the interest will then produce a larger sum than it would now, for the benefit of the *mortgagor*, so on the other hand, *may* and ought a counter equity, on behalf of the *mortgagee*, to be recognized, to the effect that such a postponement not only leaves, in the meanwhile, the creditor's debt unpaid, to his prejudice, but that circumstances over which this Court have no control, and cannot foresee, may exist at the time of the trustee sale, that will make a sale of the interest *less* productive then, than a sale *now* may possibly be.

There are two important rules of equity law involved in this question which I should have been glad to have heard argued; but as they were not at all referred to, I have felt it necessary to examine them for myself. They are novel in practical application in this province. I allude to the doctrine of "equitable conversion," and of "election," as incident thereto. "The doctrine of equitable conversion "is embodied in the maxim that 'what ought to be "'done is considered in equity as done,' and its "meaning is, that whenever the holder of property is "subject to an equity in respect of it, the Court will,

1865.

HUTCHINSON v. WITHAM.

"as between the parties to the equity, treat the subject matter as if the equity had been worked out, "and as if impressed with the character which it "would then have borne." (*Adams' Equity*, page 135.) This is the general principle, but the following incidents of it are important in reference to a decision of the particular question before us. "The conversion "will operate for these purposes only which fall "within the scope of the trust, and it is limited to "the purpose of the donor, &c." (*Adams' Equity*, page 138.) "Where land is to be converted into "money, or money into land, the '*notional conversion*' "will subsist, only, until some *cestui que trust*, who is "competent to elect, intimates his intention to take "the property in its original character. The Court "will not compel a conversion against the will of the "absolute owner; for should the conversion be made, "he would immediately reconvert it, and equity will "do nothing in vain." (*Lewin on Trusts and Trustees*, page 623.) "A remainder-man may elect, so as to "bind the rights of his heir, and personal represen-"tative, *inter se;* notwithstanding the subsistence of "the prior estate. But the remainder-man can, of "course, only elect subject to the right of the owner "of the prior estate to call for the actual conversion "in accordance with the instrument of trust." (*Ibid*, page 625.)

"It is not the declaration" (of the donor) "but "the duty to convert, which creates the equitable "change." (*Adams' Equity*, page 136.)

Story, with that clearness which marks all his definitions of legal rules, thus expresses the equitable rule under consideration. He says, in his *Equity Jurisprudence*, sec. 793. "Upon the ground of inten-"tion also, if it can be collected from any present or "subsequent acts of the parties, that it is their inten-"tion, notwithstanding any will, or deed, or other "instrument, that the property shall retain its present "character, either in whole or in part, Courts of

"Equity will act upon the intention. Thus, for "instance, if money is directed by a will or other "instrument to be laid out in land, or land is directed "to be turned into money, the party entitled to the "beneficial interest may, in either case, if he elects "so to do, prevent any conversion of the property "from its present state, and hold it as it is. * * It "is this election, however, and not the mere right to "make it, which changes the character of the estate."

Now, applying these principles to the particular case, we shall find that they are decisive to establish the following positions:—First. Looking to the point of time when the defendant, *George Witham*, executed the mortgage in question, at which time the estates of *John Witham* were vested in the trustees under his will, who were directed, at the happening of certain events, to make an actual conversion by sale, and to dispose of the proceeds in the manner declared by the testator for the benefit of certain persons indicated, amongst whom it is indisputable that *George Witham*, the defendant, *might* then be included, and whom, indeed, in one way of reading the will, he alone might then represent at that point of time, the defendant was *beneficially* interested in respect of his reversion contingent on his surviving the happening of the events referred to. Nay, it is undeniable that, if he should be the *only* surviving child of his father living at the happening of those events, and if the testator intended that *one only child*, if so surviving, should take *all* the proceeds, he *alone* would be then beneficially interested in the estates of his father, either in their original or then converted state. It is clear, therefore, that at the point of time referred to, he had such an interest in those estates, or the money representing them, *that he could legally convey it.* I shall have occasion to notice cases that will establish this, which, indeed, no equity lawyer would controvert. The act done by this defendant at that point of time, viz., *the execution of the mortgage*, not only, in

1865.
HUTCHINSON v. WITHAM.

effect, transferred to this plaintiff the whole beneficial interest of the defendant, (whatever it was), but it also manifested, unmistakably, the *election* of the defendant to treat *as realty* his interest in the estates of his late father, then vested in the trustees of the latter under his will.

My view of this case renders it necessary for me to refer to the original mortgage, which is the foundation of the action. That instrument began by reciting the will, by which *George Witham* became entitled to one-eighth share of certain estates alleged to be in the will more particularly described. After this recital, the mortgagor grants to the plaintiff and his heirs, &c., all the certain one-eighth part or share of and in those estates, to which he, the said *George*, was so entitled under and by virtue of the said will, *Habendum et tenendum* the premises described, to the said *William Hutchinson*, (the mortgagee), his heirs, &c.. The mortgage contains an express covenant of the said *George Witham*, his heirs, &c., with the said *William Hutchinson*, that the premises are free from all former incumbrances,—and that the said *William Hutchinson*, his *heirs* and assigns, in default of payment by the mortgagor, shall have peaceable enjoyment of the mortgaged premises, without interruption of any person whatever. And further, that he, the said *George Witham*, will execute all further documents for assuring the premises to the said *William Hutchinson* and his heirs.

Here, then, are a grant and covenants, in respect of real estate, by one asserting himself to be the owner of it, which bind the heirs of the person who executed the instrument in question, and operate expressly for the benefit of the mortgagee and *his heirs*.

George Witham, then, thus treated his contingent beneficial interest *as real estate*, and so declared his *election* that it should remain such, and should not be converted on the happening of the events specified in the will. We shall see this clearly, as the inevitable

consequence of acknowledged principles, if we suppose the mortgage paid off—the widow of *John Witham* dying after the youngest child attained his majority—and the possible event realized of *George Witham* being one of the children, or the only child of his father then living. In this "condition of circumstances," if *George Witham* invoked Equity, prayed that there should be no sale, but that the trustees should be ordered to convey the realty to him as alone interested, (if he were alone interested,) or otherwise, to him and his co-survivors concurring in the prayer, the prayer would be granted as a matter of course. This state of things and the equitable consequences of it show also, the fallaciousness of a contention "that what *John Witham* gave "contingently and beneficially to this defendant is "but a mere interest in the proceeds of a future sale "of the realty." In the "condition of circumstances" adverted to, *the very corpus of the realty* would become the absolute property of *George Witham*.

It is not necessary to enquire whether, *at law*, such a contingent interest as *George Witham* had under his father's will, at the execution of the mortgage, was assignable. It is sufficient that it has long been, and now is, a settled principle, *in equity*, that such could be assigned. *Lewin* says, expressly, (page 10), on the authority of cases which he cites, "the equity of a "*cestui que trust, though a bare contingency or possi-* "*bility*, is assignable." And again (p. 450), "it may "be laid down as a general rule, that an equitable interest may be assigned, *though it be a mere possibility*, and that either with or without the intervention of a trustee." A leading case—*Crabtree* v. *Bramble*, 3 Atk. 680, on the point of election, is not in principle to be distinguished from that which is now before us.

(The learned judge, after stating that case fully, and noticing the arguments of Counsel in it that were adopted by the Court, proceeded as follows :—)

1865.

HUTCHINSON v. WITHAM.

Lord *Hardwicke's* judgment concedes: First, That where an estate is directed to be sold, and the proceeds of sale to be disposed of in such a way as that a particular person will, or *may*, at time of sale, have an interest therein, an election may be exercised by that person, and exercised, whilst the estate is in trustees, and during the continuance of a life estate, which must terminate before there can be an actual conversion. Secondly, That *that* election may be evidenced by any act that (to use Lord *Hardwicke's* words) "*amounts to an approbation that the subject matter shall continue in its then existing state.*" Thirdly, Where evidence of such election appears, the Court will not act against the intention *merely because the original trust was to turn the land into money.* The words which I have underscored are those of the Attorney General, arguing for the defendant, *Bramble*, and they were approved by the Chancellor. Mr. *Noel's* argument for the defendant in that case, which was also sanctioned by Lord *Hardwicke*, was, and it is very pertinent to the case before us:—"This Court does not," he said, "*absolutely* consider money to be laid out in land, *as land*, or land turned into money, as money, unless it is consistent with the purposes for which the land was intended to be sold, or, on the other hand, for which the money is to be invested in land." Now, the application of this to the particular case will be apparent, if it be asked—What, referring to *John Witham's* will, are the purposes for which he directed his land to be sold? The answer is—For the benefit of his children, and of *George Witham*—one of them. He signified, unmistakably, his approbation of his interest in his father's real estate continuing to be real estate, by treating it as such, and conveying to *Hutchinson* and his heirs, his (*Witham's*) interest in it in the form and character of real estate. In *Harcourt* v. *Seymour*, 2 Sim. N. S. 45, there is a perfect recognition and adoption by the Vice Chancellor of the principles of Lord *Hardwicke's* deci-

sion. This will appear fully by reference to the case. The commencing words of the Vice Chancellor's judgment are as follows:—"I take the law upon this case to be perfectly clear. When, by a settlement, land has been agreed to be converted into money, or money into land, a character is imposed upon it, until somebody entitled to take it in either form chooses to elect that, instead of its being converted into money, or into land, it shall remain in the form in which it is actually found. There can be no doubt that that is the law, and the only question in each particular case is—Whether there have been acts sufficient to enable the Court to say that the party has so elected." Even if I were constrained to regard the property in question *as personalty*, I should not feel myself obliged to refuse to this appellant a judicial order of foreclosure and sale of it *as such*. This I say after an examination of the authorities. They will be found sufficiently explained and elucidated in *Kent's Commentaries*, (vol. 2, m. p. 532—vol. 4, m. p. 138, 139.) The result would appear to be, that in cases of pledges strictly speaking, or of mortgage of chattels, a Court of Chancery *may* make a judicial order of foreclosure, though, in many instances, and especially in those of mere pawns by way of security for a debt, the creditor may, on giving proper notice, sell, of his own authority, without the interposition and sanction of a Court. —(See *Tucker* v. *Wilson*, 1 P. Wms. 261; and *Kemp* v. *Westbrook*, 1 Ves., 278.)

It follows, from the views which I have expressed, that, in my judgment, there should be an order of foreclosure or sale.

Appeal dismissed.

Attorney for plaintiff, *H. Blanchard, Q. C.*

Attorney for the defendant, Charles D. Witham, *W. Sutherland*, Q. C.

July 29.

In Re T. J. WALLACE.

A letter written by a Barrister to a Judge, charging the Judge and the whole Court with partiality, in cases in which he was a party, is a contempt of Court, for which the Court may, of its own motion, suspend him from practice.

YOUNG C. J., on the first day of Term, stated that in *January* last he had received a very extraordinary letter from Mr. *T. J. Wallace*, a barrister of this Court. At the next Chambers sitting thereafter, he (*Chief Justice*) had stated publicly that the whole Court would deal with the letter, which they had accordingly done, and had decided that it was a high contempt of this Court, and would be dealt with as such.

The learned *Chief Justice* then handed the following rule to *J. W. Nutting*, Esquire, the Prothonotary of the Court, and requested him to read and file it, which was accordingly done.

"Halifax SS. In the Supreme Court, 1865.

In re Thomas J. Wallace.

On reading a letter addressed in vacation by *Thomas J. Wallace*, Esquire, an attorney and barrister of this Court, to the Honorable the *Chief Justice*, dated the 26th *January* last, and proved by the affidavit of *James W. Nutting*, Esquire, to be of the handwriting of said *Thomas J. Wallace*, and said letter containing scandalous matter, and being a contempt of this Court: It is ordered that said *Thomas J. Wallace* have until *Saturday*, the 22nd instant, to show cause why he should not be suspended from practice as such attorney and barrister, until he shall make a suitable apology in writing, to be read in open Court, for such his contempt.

By the Court, 18th *July*, 1865.

J. W. Nutting, *Proth'y.*"

1865.

In re WALLACE.

The following letter and affidavit, being the letter and affidavit referred to in the above rule, were also filed at the same time:

"HALIFAX, *26th January*, 1865.

The Honorable the *Chief Justice*:

SIR,—I shall feel obliged by your filing the judgment given in Court in my case with Mr. *Sutherland* without any additions. I say without any additions, because in the case of *Dunphy* v. *Wallace* I had much reason to complain of the decision there filed, as very material additions were made to it, and much said with a view, as I and others thought, of meeting me at *England*. I must, I think, decline sending to *England* the decision given on my petition for an appeal, in consequence of a statement made therein, to the effect that other modes were pointed out by which the matter might have been removed, but I remember only one way mentioned, that by *certiorari*, and this certainly is not modes. Now, as regards one's position after the removal of a cause by *certiorari*, I think I can safely say that no practitioner at our bar understands it. In the case of the *City of Halifax* v. *Wallace*, according to the decision of the Court, I would not have been allowed to try the cause only for the defects in the affidavits produced on the part of the city. Remembering this case, I was a good deal surprised to hear the Court say that had the cause with Mr. *Sutherland* been removed by *certiorari*, it would have been sent to a jury, leaving the impression on my mind that the party so removing a cause has a right, as a matter of course, to a trial, the very reverse of what was decided in the case of the *City of Halifax* v. *Wallace*. It is true, in that case I good-naturedly remarked that the decision would likely be different when it fell to my lot to be on the other side, and I venture to say had my case with Mr. *Sutherland* been removed in the first instance by *certiorari* (a course, however, which never occurred to the Hon.

1865.

In re WALLACE.

Mr. *Johnston*, then my counsel), I would have been met with a thousand objections, resulting in my defeat, as on the appeal.

"I may be wrong, but I can't help thinking that I am not fairly dealt with by the Court or Judges, and that the well-beaten track is often departed from for some bye-way to defeat me. Even in that little case of *Wallace* v. *Connolly*, the case was not decided upon the affidavits, but a person was spoken to out of doors, and the case decided upon what he said, not under oath, while the rule is, that a Judge can't use even knowledge within his own mind, much less obtain it from others, but must decide upon the affidavits. Better tell me at once to bring no affidavit into Court, for if Mr. *Smith* or any such person shall even state to me that there is a different impression of the facts on his mind, you must fail as a matter of course. I could also recall cases where the decision was, I believe, largely influenced, if not wholly based upon information received privately from the wife of one of the parties by the Judge. Is this justice? I think a Judge in *England* would be a little startled to hear that a Judge in *Nova Scotia* listened to, much less decided upon, information obtained in this way.

"I was on more than one occasion almost tempted to bring these things to the notice of the Legislature, but I overlooked them, as I trust you will overlook anything in this, should there be anything in it not strictly within allowable limits.

Your very obdt. servant,

T. J. WALLACE."

"HALIFAX S. S.

I, *J. W. Nutting*, of *Halifax*, in the county of *Halifax*, Prothonotary of Her Majesty's Supreme Court of Judicature, make oath and say that I am well acquainted with the handwriting of *T. J. Wallace*, one of the Barristers of said Court, and that I verily believe the paper writing or letter hereto annexed,

and the signature 'T. J. *Wallace*' thereto subscribed, to be of the proper handwriting of the said *T. J. Wallace*. 1865. In re WALLACE

J. W. NUTTING."

Sworn before me this Eighteenth day of *July*, A. D. 1865.

W. YOUNG.

The affidavit of the service of the rule was now (July 22nd) read.

Wallace, in person, then showed cause. He was surprised to be called on to show cause against a rule opened in this way. He had to answer merely an affidavit of service. The letter complained of had not been read, and there was no affidavit that it had ever reached the *Chief Justice*. The rule should have been moved by a barrister, and not by the Court. In re—Gent. 3 *Nev. & M.*, 566; 1 *Harr. Dig.*, 517. He was called on to answer a charge, and not a single case had been cited to show that he should be struck off the roll. The letter could not be considered in Court, as it had not been read.

The course pursued by the Court in moving the rule is prejudging the case. 8 *Moore's Privy Council Cases*, 157. The letter, he thought, could not be considered a contempt. Had he been called on by the Court to explain, and had refused to do so, then he might not have had reason to complain of the course pursued. Even if the letter were a contempt, a barrister could not be suspended or struck off the roll for writing it. There should first have been a rule *nisi* for an attachment. 3 *Dowl.*, 39, *Id. p.* 320. If a party can justify what he has said, or can explain it, or can show that he did it without any intention to insult, it is not a contempt. Some opportunity should have been afforded in this case to show this, and there should have been an affidavit, stating that he was guilty of contempt. The Court will not exercise summary jurisdiction over attornies, unless in cases of

1865.

In re WALLACE.

palpable fraud. 2 *Scott*, 131. An attorney may be struck off the roll for gross misconduct or mal-practice, but not merely for writing a letter, or for an act for which he may atone by a mere apology. Cites 2 *Chit. Arch. Q. B. Practice*, (10th ed.,) 1648; 3 *Moore's P. C. C.*, 414; 7 *do.*, 174; 1 *Harr. Dig.*, 516.

(*Wallace* then read an affidavit of his own, stating that the letter was not written by him with a view to insult the *Chief Justice*, or to treat him or the Court contemptuously; that he felt aggrieved at the time in consequence of certain decisions given in matters in which he was concerned, and that he did not think it wrong, whilst requesting the *Chief Justice* to file his judgment in one of said cases, to complain of what he (*Wallace*) believed to be real grievances; that as this was done by a letter guarded, as he thought, by appropriate terms of apology, he thought it could not be construed to be offensive; that when he found it was so considered by the *Chief Justice*, he stated to him that he was surprised he should construe it to be an insult; that he did not intend it as such to him or the Court; that he regretted it very much, and hoped it would go no further, and offered, as he (*Wallace*) thought, an ample apology; that he admitted that the statements referring to the Court in said letter were much broader than he intended, and he certainly did not mean them to apply to the Court when fully constituted, and that he, therefore, for this oversight or slip of pen, fully and freely apologized.

The affidavit goes on to refer to several cases, in which Mr. *Wallace* alleges that the *Chief Justice* treated him unfairly, and concludes with the following paragraph:—

"And I further say that thus finding the *Chief* "*Justice* so hostile to me, and fearing I might get into "trouble with him or the Court, I concluded not to "do any Chamber business before him, except what "I could not avoid; that if I have drawn erroneous "conclusions regarding the *Chief Justice* on these

"occasions, I regret it much, and if convinced of it "would gladly apologize to him for all.")

1865.

In re WALLACE.

C. A. V.

YOUNG C. J. now (July 29) delivered the judgment of the Court,—the other five Judges being present.

The judgment I am about to pronounce is to be taken as the judgment of the whole Court, and having been submitted to my brother Judges, and met their approval, it is to be received as the unanimous expression of our opinions.

The Judge of Probate at *Halifax* having passed an order on the 16th *January*, 1863, declaring that the said *Thomas J. Wallace* had been guilty of a contempt committed by him in the face of that Court, and suspending him from practice therein as advocate or proctor, Mr. *Wallace* appealed from that order to the Supreme Court, and the appeal was heard before us in *December* last, when we decided, for the reasons assigned in a written judgment now on file, that the appeal, having been taken under the Provincial Statute and not by *certiorari*, could not be entertained; that Mr. *Wallace* had mistaken his course, and that the contempt, therefore, was not judicially before us.

In *January* last, having taken charge of the business for that month, Mr. *Wallace* moved me at Chambers to allow an appeal from the above decision to Her Majesty in her Privy Council. As a matter of this kind, whoever the mover might be, affected more or less the privileges of the Bar, I thought it advisable to consult such of my brethren as were in town—all the Judges, in fact, being here except Mr. Justice *Dodd*, then in *Cape Breton*, and they concurred with me in thinking, as the main question of a contempt had not been considered, and as the case on that account was not ripe for an appeal, that the appeal ought not to be allowed. The reasons for that decision were expounded in the written judgment already

1865.

In re WALLACE.

referred to, which was filed on the 24th *January*, in Mr. *Wallace's* presence, the instant it was delivered.

On the 26th of the same month Mr. *Wallace* thought fit to send to me the letter which has led to these proceedings. In that letter he not only impugns in very offensive terms my decision of the 24th *January*, which appeared on the face of it to have been concurred in by the other Judges, but he assails also the judgment of the whole Court on his appeal in *December* from the Court of Probate. He then makes a general charge against the Judges in language too insulting to be repeated, and winds up with a criticism in the same style on some of the minor matters which I had decided at Chambers.

A letter of this character, from a practitioner to a Judge of an *English* court, is an outrage which probably was never perpetrated before, and which it was impossible to pass over in silence. Neither was it a fit matter to be dealt with by any one Judge, and therefore I contented myself with stating, in the presence of Mr. *Wallace* and of the Bar, at the next Chamber day, that I had received a letter of this extraordinary kind, and that on the first day of the ensuing *Trinity* Term Mr. *Wallace* would be called upon to answer it.

While the utmost boldness and liberty of speech and action are fully and freely conceded to every member of the Bar as belonging to his position, and as essential to the rights of his clients, no less than to his own, and none on this Bench would attempt or desire to restrain them; on the other hand, a gentlemanly conduct, and a decorous and respectful treatment of the Judges of the land, in all intercourse between them and the Bar, must necessarily be observed by the latter. If the Judges can be insulted by language or letters addressed to them, and such a contempt of their persons and authority committed with impunity, their weight and influence would be

1865.

In re WALLACE.

lost, and failing to vindicate the dignity of their office thus outraged, they would forfeit, and deserve to forfeit, the public respect and confidence so necessary to their character and the due administration of justice.

It was this feeling, and the necessity thus imposed on us by the letter of Mr. *Wallace*, rather than any personal consideration, which has compelled us to take steps against him. On the 18th instant his letter was accordingly verified and filed, and we passed a rule *nisi* as follows:

[The rule *nisi* will be found above.]

By the terms of this rule the offence of which he was guilty, and the consequences to which it would subject him, were stated, and the mode by which he might atone for the one and avoid the other.

To any well regulated mind, the opportunity so afforded for consideration and apology would have been all that was required. If, through ignorance or want of judgment, or the absence of proper feeling, in a moment of irritation, from infirmity of temper, or any other cause short of a deliberate intention to insult, such a letter had been hastily penned, time and reflection would have enabled the delinquent to see his error, and to make such reparation for it as was in his power.

Let us see what course Mr. *Wallace* has pursued.

On the 22nd instant he appeared in person to shew cause, and was heard patiently and at length upon several objections to our proceeding. He urged, among other things, that the Court had no authority to move in this matter except at the instance of a barrister; that there was no evidence of the letter having come into my possession, or how it had gone out of the possession of the writer; that the letter could not be construed into a contempt; that if it were a contempt it would not vindicate a suspension; and on these and other grounds of a technical kind, he insisted that he ought not be called upon.

1865.

In re WALLACE.

But Mr. *Wallace* entirely misapprehended his position. This was not a contempt for the non-payment of money, or for disobeying some order of the Court, in the progress of a suit, but a contempt levelled at the Court itself, and which the Court has the authority and the right to adjudicate upon of its own motion without invoking the aid of any barrister, and upon the production of the obnoxious letter by the judge to whom it was addressed. In Mr. *Charlton's* case, reported in 2 *Mylne & Craig*, 316, Lord *Cottenham*, then Lord Chancellor, pursued the course we have adopted here. Letters having been addressed by Mr. *Charlton*, a barrister and member of parliament, to one of the Masters of the Court of Chancery, and to the Lord Chancellor, of a highly objectionable kind, and reflecting upon the proceedings of the Master in an enquiry then before him, His Lordship, after directing copies to be served upon the parties concerned (here there are no parties to be served), took notice thereof in open Court, and after declaring that the letter to the Master contained scandalous matter, and that the conduct of Mr. *Charlton*, in writing the two letters, was a contempt of the Court of Chancery, passed an order that he should show cause on a certain day why he should not be committed to the prison of the *Fleet* for his said contempt. Mr. *Charlton* having failed to show cause, the Chancellor, after remarking that every written letter or publication which has for its object to divert the course of justice, is a contempt of the Court, and that every insult offered to a Judge in the exercise of the duties of his office, is a contempt, concluded by ordering Mr. *Charlton's* committal. This was effected at a subsequent day, and the House of Commons having refused to interfere, and Mr. *Charlton* having made a suitable submission, and expressed his contrition for the offence he had committed, he was discharged, after having been in prison for three weeks.

1865.

In re WALLACE

It will be seen, therefore, that we have guided ourselves by a precedent of high authority, while our right to substitute a suspension from practice for imprisonment is too clear to be disputed.

It is proper, also, to add that we have looked into the cases in the Privy Council, cited from 3 and 7 *Moore*, as well as several others to be found in 1 *Knapp*, 1 and 8 *Moore*, and 5 *Law Times Reports, N. S.*

In addition to the technical and other grounds we have thus disposed of, in place of the apology which, as I have said, this Court might reasonably have expected, and which any judicious adviser would certainly have recommended, Mr. *Wallace* produced an affidavit made by himself, which aggravates his offence and is an accumulation of fresh insults. Had we thought fit, we would have been justified in refusing to receive this affidavit, or in interrupting him while reading it. As we had already pronounced his letter to be a contempt, it was not competent for him to attempt a justification, and he could show cause only by denying, if he could, or if possible explaining away or extenuating his offence. But we preferred affording him a full hearing; and as no letter or affidavit of his could touch the reputation of this Bench or of any member of it, we allowed him to go on without interfering.

This affidavit is the more inexcusable, because in the nature of things it could not be answered. Parts of it are founded upon hearsay, which is not evidence, and in the most trifling matters is not admissible in this Court. Parts of it rest upon the mere assertion of Mr. *Wallace*, at variance with all our impressions and recollection, but in which he must pass of course uncontradicted, and much of it relates to recent transactions, in the knowledge of one or other of the members of the Bar or of the officers of the Court, and which are represented in a manner quite inconsistent with the facts and with the papers on file. We content ourselves with these general observations, for

1865.

In re WALLACE.

it is obvious that to descend into details, and stoop to a vindication of this Court, would be a complete surrender of its independence and its dignity. If Judges forget their duty—if they lay themselves open to imputation, and are amenable to censure, adequate remedies are provided by the law and constitution of the country. A single Judge at every step is subject to control. Every charge he delivers to a jury—every order he signs at Chambers—every taxation of costs—every judicial action, and every refusal to act, may be appealed from, to his brethren; and, for the higher breaches of duty by one Judge or by all the Judges, there are the means of constitutional redress. But this is the first time that Judges have been assailed in their own Court by a practitioner, when invited to atone for a contempt, putting upon the file an affidavit, which, in every paragraph, is a new offence. It is evident that no Court, having a just regard to its position, could permit such an affidavit to remain among its records, and therefore we direct this affidavit to be taken off the file.

In conclusion, we have only to repeat that we would willingly have been excused from moving in this matter. We have not been actuated by personal resentment, nor by any apprehension that Mr. *Wallace's* actions or censure in any shape could possibly excite. We have looked only to what was required for the due administration of the law; and while there has never been any difference of opinion or doubt among ourselves as to what was necessary and proper to be done, we have taken care that ample time should be afforded to the party to reflect upon his position, and avert the consequences he has drawn down upon himself.

We have no alternative now but the performance of an imperative duty in directing the following rule to be filed:—

1865.

In re WALLACE.

"HALIFAX SS. In the Supreme Court, 1865.

In re Thomas J. Wallace.

On reading a letter addressed in vacation by *Thomas J. Wallace*, Esq., an attorney and barrister of this Court, to the Honorable the *Chief Justice*, dated 26th *January* last, and proved by the affidavit of *James W. Nutting*, Esq., the Prothonotary, to be in the handwriting of said *Thomas J. Wallace*, and now admitted by him to have been addressed and sent to the *Chief Justice*, and said letter containing scandalous matter, and being a contempt of this Court, and on reading the rule *nisi* passed on the 18th inst., and said *Thomas J. Wallace* having been heard thereon on the 22d inst., and having failed in shewing cause against said rule, or in making a suitable apology in writing for such his contempt as required therein, it is ordered that the said *Thomas J. Wallace* be suspended from practice as an Attorney and Barrister of this Court.

By the Court, 29th *July*, 1865.

J. W. NUTTING,
Prothonotary."

Wallace then moved for an appeal to Her Majesty, in her Privy Council.

The appeal was granted on the 2nd *August*, when

YOUNG, C. J. delivered the following judgment of the Court on the application therefor:—

Mr. *Wallace* having moved in person for leave to appeal to Her Majesty in her Privy Council from the rule made on the 29th ult., suspending him from practice as an Attorney and Barrister of this Court for a contempt thereof, we have referred to the Order of Her Majesty in Council of the 20th *March*, 1863, making provision for appeals to Her Majesty in Council from this Court, and from the terms in which that Order is drawn, as well as from the cases decided in the Privy Council, and the practice thereof as laid down by Mr. *MacPherson*, in his treatise, we are of

1865.

In re WALLACE.

opinion that the Order in Council does not extend to such cases, and that it is incumbent on Mr. *Wallace* to apply to Her Majesty, in the first instance, to admit his appeal. But inasmuch as Mr. *Wallace* has applied to us for such leave, complaining of the injury and delay to which our refusal would subject him, we have decided on giving him such leave so far as we have power and authority so to do, not requiring from him any security for costs, but leaving him to act as he may be advised therein, or as Her Majesty may see fit to order. We direct, therefore, that the following rule shall be filed:—

"HALIFAX SS. In the Supreme Court, 1865.

In re Thomas J. Wallace.

On motion of the said *Thomas J. Wallace* in person,—It is ordered that the said *Thomas J. Wallace* have leave to appeal from the rule made by this Court on Saturday last, the Twenty-ninth ult., suspending him from practice as an Attorney and Barrister of this Court, to Her Majesty the Queen in her Privy Council.

By the Court, 2nd *August*, 1865.

J. W. NUTTING,
Prothonotary."

On the 7th *August* the papers were transmitted by the Prothonotary to the Privy Council, with a letter stating that the Judges, having had no personal feeling or interest in the matter, and having acted therein solely from a sense of public duty, they did not intend to appear by Counsel on the appeal. The appeal was accordingly argued, and the decision of the Supreme Court was reversed by Her Majesty in Council, on the 10th *November*, 1866, on the report of the Lords of the Judicial Committee of the Privy Council, of *November* 2nd, 1866, and the order directed to be discharged in respect of the punishment imposed not being appropriate to the offence committed. The Lords of the Judicial Committee state as the ground of their judgment that, though "the letter was a letter of a most reprehensible kind, and was a contempt of Court, which it was hardly possible for the Court to omit taking cognizance of," yet as "it was an offence committed by an individual in his capacity of suitor, in respect of his supposed rights as a suitor, and of an imagined injury done to him as a suitor, and had no connection whatever with his professional character, or anything done by him as an advocate or an attorney, and to offences of that kind there has been attached by law and long practice a definite kind of punishment, viz., fine and imprisonment; that there was no necessity for the Judges to go further than to award to the offence the customary punishment for contempt of Court; that there was nothing which rendered it expedient for the public interest, or right for the Court, to interfere with the *status* of the individual as a practitioner of the Court."

The Judicial Committee conclude their judgment as follows:

"We do not approve of the order (the order of the Supreme Court suspending Mr. *Wallace*); at the same time we desire it to be understood, that we entirely concur with the Judges of the Court below in the estimate which they have formed of the gross impropriety of the conduct of the appellant. But we are still of opinion that his conduct did not require, and did not authorize, a departure from the ordinary mode and standard of punishment, and upon that ground, and that ground only, we shall advise Her Majesty to discharge the order, in respect of it having substituted a penalty and mode of punishment, which was not the appropriate and fitting punishment for the case in question."

1865.
In re WALLACE.

TUPPER *versus* LIVINGSTON.

July 29.

W. A. D. MORSE moved, on the first day of Term, for a rule for publication or constructive service of a Writ of Revivor, under *Revised Statutes*, chap. 134, sec. 135, the object of the writ being stated to be to enable plaintiff to sell defendant's real estate. The affidavit of *William M. Fullerton* stated "That defendant left the Province some twelve years since, and has never returned, and his present place of residence is unknown, and he is still without this Province."

On this, and the Sheriff's return to the Writ of Revivor, that defendant could not be found, the motion was made.

The Court will not order publication or constructive services of a writ of revivor, where the defendant has been absent from the Province for upwards of seven years, and it does not appear that he has been heard of in the mean time.

THE COURT intimated that "sufficient cause" had not been shown, as from the lapse of time there was a presumption of the death of defendant, and that the plaintiff should rather obtain administration to his estate.

Rule refused.

July 22.*

MORTON *versus* CAMPBELL.

Where a rule is entered for argument by the party who obtained it within the first four days of the Term in which it is returnable, and no affidavits are filed by him within the time, the rule will, on motion of the opposite party, be discharged with costs.

M'CULLY Q. C., moved on the first day of term, (*Tuesday*), to discharge a rule *nisi*, granted at *Liverpool*, to set aside an award, on his own affidavit, that the rule had not been entered for argument by the defendant, who had obtained it.

THE COURT intimated that as the entry and papers might have been delayed by inevitable accident, and cause might be shown within the first four days of the present term, the rule being so made returnable, the motion should be postponed until *Saturday*.

McCully, Q. C., now (*July* 22d) renewed the motion, and no cause being shown, and no affidavits accounting for the delay having been filed by the defendant,

THE COURT discharged the rule, with costs.

Rule accordingly.

* The report of this case has been accidentally placed out of its order in point of time.

Aug. 3.

LAKE *versus* LAWSON.

Every pleading must be an answer to the whole of what is adversely alleged, and professed to be answered thereby; and this principle is not affected by payment into Court under a particular plea, *Johnston* E. J. *dubitante*.

ASSUMPSIT for the freight of six hundred and twelve barrels of flour.

Plea 3. That the cargo having become damaged during the voyage, from the improper stowage and insufficient dunnage, the plaintiff agreed with the defendant that if the defendant would sell the damaged part of the cargo, the plaintiff would make good to him any loss arising therefrom, and that the same should be deducted from the freight; and the defendant thereupon sold the same, the loss on which

amounted to $44.18, and the defendant was always ready, and willing, and offered to pay the plaintiff the sum of $78.22, being the amount of freight claimed, less the said sum of $44.18.

Demurrer thereto. Because the third plea neither admits nor denies the plaintiff's cause of action, as set out in his writ, nor confesses nor avoids it; because it sets out a new and independent contract alleged to have been made by plaintiff with defendant after the date of the contract set out in plaintiff's writ, and upon which he seeks to recover, and endeavours to set off the latter contract against the former; because defendant tenders no sufficient or proper issue in his said third plea; because if the facts were as set out therein, it might be the subject of a cross action, but cannot and ought not to be set up in bar of plaintiff's right of action upon the contract set forth in his writ; because the plea invites issues which, if taken by plaintiff, would be a departure from his writ; because if plaintiff did enter into the contract set forth in defendant's plea, and defendant had fulfilled his portion of it and plaintiff had not, the damages sustained by defendant are undefined and unliquidated, and could only be ascertained by a Court and jury in a separate action; because the plea, while alleging a tender, is not properly pleaded as a plea of tender; because it is inartificial, double, and insufficient.

Plea 5. That the plaintiff, by a bill of lading under his hand, agreed to deliver in good order, certain barrels of flour to the defendant; that on the arrival of the plaintiff's vessel, some of the barrels of flour were found damaged, and the plaintiff agreed with the defendant that if he would take the whole and sell the damaged barrels, he would pay him the difference between the value of the damaged and the undamaged barrels, and any loss arising therefrom; and the defendant made such sale in accordance with such agreement, and the difference and loss on the

1865.

LAKE v. LAWSON.

flour amounted to $44.18, which amount the plaintiff refuses to pay the defendant; and the defendant also says that the plaintiff is indebted to him for work done and materials provided by the defendant for the plaintiff, at his request, and for money paid, laid out and expended by the defendant, to and for the plaintiff, at his request; and also for the discharge of a vessel moored and kept by the defendant in and about his wharf, dock and premises, for the plaintiff, at his request.

Demurrer thereto. Because the fifth plea neither denies the contracts set out in plaintiff's writ, nor confesses, nor avoids it; because the fifth plea sets out a new agreement with plaintiff after breach of that set out in plaintiff's writ, and avers performance on defendant's part, and a violation of its terms on plaintiff's part, which, if true, constitutes no proper or sufficient defence or plea to the present action; because if plaintiff were to take issue upon the making or fulfilment of the terms of the second agreement by himself or by defendant, it would be a departure; because if plaintiff entered into a second agreement with defendant as alleged, and did not keep it, it does not therefore follow that he should be deprived of the freight earned, as claimed by his writ and particulars; because a non-fulfilment of such second agreement on the part of the defendant is no sufficient or proper plea to the plaintiff's writ, and the contract therein set forth; because the defendant does not state in his fifth plea whether the bill of lading therein mentioned has any reference to the particular cargo of flour for which freight is claimed in plaintiff's writ; because it does not appear whether the flour was alleged to be damaged by any fault or misconduct of plaintiff; because no proper issue is tendered which the plaintiff can safely take; and because the plea is inartificial, double, and insufficient.

Joinder in demurrer.

1865.

LAKE v. LAWSON.

McCully, Q. C., for defendant. The third plea is bad. The money admitted to be due should have been paid in under a tender in this plea. The plea tenders several issues. The rule of pleading is plain and simple. A plea to an action on an agreement must either deny the agreement or confess and avoid it. [BLISS J.. Defendant admits the contract on which you sue, but sets up another, which, he says, does away with it.] That he cannot do. His remedy would be by cross action. Special pleading is said to be the essence of good logic. There is no law, practice, or precedent for pleading a new contract in extinction of another on which a right of action has accrued. If that could be done, the plaintiff might come in and plead another contract behind that again. There is a good deal of learning in the *United States* about *recoupement*, but that has never been introduced here. [BLISS J. Suppose an action were brought on an agreement to pay in a month, and the defendant pleaded a subsequent agreement that if the whole debt were paid at once the plaintiff would take so much less, and that he (defendant) paid the amount so agreed on. Would that not be a good plea?] I think not. One contract cannot be set off against another, even if arising out of the same transaction. Every plea must stand by itself, and be an answer to the whole declaration. That the defendant has always been ready to pay, is no answer to the declaration. He may have been ready to pay, and not now ready. The fifth plea is no answer.

Solicitor General contra. The plea of payment of money into Court must always be taken into consideration in our pleadings, because we have not the general issue. In this case a certain sum of money was paid into Court. [BLISS J. Was not your course very clear? Should you not have pleaded, as to so much the defendant says, &c.] It will be remembered that we are not now under the old rules of

1865.

LAKE v. LAWSON.

pleading, under which all sorts of ingenuity were practised by the profession, and admired by the Court. It is not now necessary that matters should be stated in pleading in any technical or formal language or manner, and immaterial statements may be omitted. *Revised Statutes, chap.* 134, *sec.* 54, 55. Where issue is joined on demurrer, the Court must give judgment according to the very right of the cause, without regarding any imperfection, omission, defect in, or lack of form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of form. *Id., sec.* 59. The plaintiff's replication to the plea of payment into Court is on the very demurrer book filed by him. Money may now be paid into Court at any stage of a cause. [JOHNSTON, E. J. When was the money paid in?] At the time the pleas were filed, and the payment appears on the demurrer book filed by plaintiff, [YOUNG C. J. Mr. McCully's argument is, that we have nothing before us but the writ and the third and fifth pleas, and that we cannot look at anything else.] Payment into Court is an exceptional plea. It always becomes a portion of the record, and the Court has a right, in a case of this kind, to look at the whole record. 9 *Ad. & El.*, 499*n*. [BLISS J. Suppose an action were brought for £100 freight, is it an answer to say, as to the sum of £50, you agreed to waive your claim for it; as to the other £50, I was always ready to pay it?] I meet the question in this way: as to the £50, the plea would undoubtedly be good; as to the other £50, defendant says to plaintiff, you know it was paid. I put it on the ground that the plea of payment is an exceptional one. [BLISS J. Then you say also, I presume, that, by denying the readiness to pay, the plaintiff would raise an immaterial issue.] An utterly immaterial issue. The plea of payment deranges all the issues. [YOUNG C. J. If the words "and has paid the same under another plea" had been added to the third plea, it would have been

sufficient.] What is the difference between tendering and offering? [BLISS J. I think there is a substantial difference.] They are, I think, substantially the same. The fifth plea is a plea of *set-off* all throughout, and what objection is there to it either in substance or form? [YOUNG C. J. The form of a plea of set-off is "indebted in a greater amount than the plaintiff's claim."] Yes, but can we not set off as to part? [YOUNG C. J. Yes, but it must be so pleaded. BLISS J. Can you profess to plead as to the whole, and set off as to part? The language of a plea must be taken most strongly against the party pleading it.] The plea of payment of money into Court must be considered with this fifth plea, and with it the fifth plea is good. I ask your lordships also to apply the statute which requires the Court to decide according to the very right of the cause. [BLISS J. The very right of the cause, according to the pleas before us.]

McCully, Q. C., in reply. This case must be argued as if there were only two pleas on the record,—the third and fifth. For the purpose of this argument, there is no plea of payment here. Every plea must be a separate answer to the previous pleading. It is one of the commonest principles of pleading, that one plea shall not be taken advantage of to aid another. The Court cannot look beyond the demurrer book. Neither uncertain nor unliquidated damages are matters of set-off. *Cowper's Rep.*, 56. Under the fifth plea the defendant might claim a balance. There is no claim for deduction in it, as in the third plea. [JOHNSTON, E. J. So much money has been paid into Court, and the pleas are an answer to the claim for the balance.] That statement is based on looking at the whole record. [JOHNSTON E. J. On the payment into Court.] Then your lordship is doing what the law does not allow you to do. You are, then, assuming that we have demurred to all the pleas. When the plaintiff joined in demurrer, he thereby alleged that the third

1865.

LAKE v. LAWSON.

and fifth pleas were good pleas. [JOHNSTON E. J. Good pleas to what?] To the whole declaration. [JOHNSTON E. J. No, but to the claim for the balance remaining after the payment into Court. BLISS J. The defendant might have pleaded as to so much, payment into Court, as to the residue, the agreement, and his pleas then would have been good. You said, Mr. *McCully*, that you were about to refer to the main point, that one contract cannot be set off against another.] My language was perhaps too large. I should perhaps have said merely that *torts* could not be set off against contracts.

C. A. V.

YOUNG C. J. now delivered the opinion of the majority of the Court.*

It is a fundamental principle in pleading that every pleading must be an answer to the whole of what is adversely alleged, and professed to be answered thereby,—in other words, whatever a plea assumes to answer, it must answer in full; if pleaded to the whole declaration, it must answer the whole; if pleaded to part, it must answer that part. *Stephen on Pleading*, (2nd edition), pp. 253, 4. Where by the commencement of his plea the defendant professes to answer the whole declaration, but, in fact, only gives a defective or partial answer, the plaintiff's course is not to sign judgment for the part defectively answered, but to demur to the whole plea. 1 *Saund.*, 28 n. 3; 1 *Salk.*, 179. The third plea in this case professes to answer the whole declaration, but really answers only a part, and is, therefore, clearly demurrable. It was stated in argument that one contract cannot be set off against another. We do not assent to that position. If there had been an agreement by plaintiff to accept a sum certain, we think it would have been an answer to his declaration. It can hardly be said that an allegation that

* DESBARRES J. was not present at the argument.

defendant was always ready and willing to pay is any answer.

Where the demurrer is to part only of the declaration on other pleadings, those parts only of the pleadings to which the demurrer relates are to be copied into the demurrer book. 1 *M. & R.* 662. It appears, however, from what is said by *Patteson* J. in a note to *Burroughs* v. *Hodgson*, 9 A. & E. 499, that if a plea demurred to contain a reference to something partly answered in another plea, such other plea may be inserted in the demurrer book. Had the third plea, therefore, ended with the words, "which sum "has been paid in under another plea," it would have been good. As it is, however, we think that the plea cannot be sustained, as we cannot look beyond the demurrer book.

It is impossible to sustain the fifth plea. It is a plea of set-off, but does not cover the whole of plaintiff's claim,—had it done so it would have been good. In *Thomas* v. *Heathorn*, 2 B. & C. 477, the demand in the declaration was for one thousand pounds, to which the defendant pleaded an acceptance of four hundred pounds in satisfaction thereof, and the plea was held bad. It is, therefore, clear that a plea which professes to answer the whole declaration, and answers only part, cannot be sustained.

Under these authorities, therefore, we hold that the pleas demurred to are bad. We also consider that the defects do not come under the definition of duplicity, argumentativeness, and uncertainty, but are substantial defects, and that the pleas, therefore, are bad in substance.

JOHNSTON E. J. I am unfortunate enough to differ from the rest of the Court, and I cannot say that my objections have been entirely removed. The view I take results from the nature and effect of payment into Court. It is objected that the pleas profess to answer the whole declaration, and answer only a part.

1865.

LAKE v. LAWSON.

The question arises, do they not answer the whole declaration? What is the declaration now? The effect of paying money into Court is to remove so much out of the action, and the pleas are then pleas to what remains. Suppose the pleas had run in this form: As regards twenty-five pounds of the said claim, the defendant brings money into Court; and as regards the remainder of the claim, he says that the plaintiff agreed to accept the said sum of twenty-five pounds in full of his claim. Would the pleas not have been good then, and are they not substantially in this form? I presume that my view must be erroneous, as all my brethren take a different view.

Judgment for plaintiff.

Attorney for plaintiff, *H. Blanchard*, Q. C.
Attorney for defendant, *Solicitor General.*

Aug. 3.

COULSON, ADMINISTRATOR OF GEORGE COULSON, DECEASED, *versus* SANGSTER ET AL.

Section 7 of the Mercantile Law Amendment Act of 1865 (28 Vic., ch. 10) has a retrospective operation as regards rights of action, but does not apply to actions commenced before its passage.

ASSUMPSIT for principal and interest due on a promissory note made by defendants on the 6th September, 1849, to George Coulson, deceased.

Plea 3. That the plaintiffs cause of action, if any, did not accrue within six years next before the date of the writ issued herein.

Replication. The plaintiff joins issue on the defendant's first, second, third, fourth, and fifth pleas; and for further replication to defendant's third plea, the plaintiff says that at the time when his cause of action accrued, the said *George Coulson* was out of this Her Majesty's Province of *Nova Scotia*, and did never after return to said Province.

Demurrer to replication to third plea. Because, if it were true, as set forth therein, that plaintiff was

out of the Province when his cause of action arose, yet that is no longer a disability which will protect a plaintiff after the lapse of six years from the time of action accrued.*

Joinder in demurrer.

McCully Q. C., for defendant. The point to be argued is in the third demurrer. Until the Act of last session, (28 *Vic., chap.* 10, *sec.* 7), the plaintiff's action would have been protected by the absence of the intestate, as alleged in the third plea. The action was brought before, but the replication has been filed since the passage of that Act. The question now arises, how far is this third plea a bar to the right of action? A statute takes effect from the day of its passage. 1 *Kent's Com.* (10th ed.), 510, 515. The Statute of Limitations affects not the contract, but the remedy only. 3 *Peters*, 280; *Higgins* v. *Scott*, 2 B. & Ad., 413. Where the will of the Legislature is clearly expressed, it must be upheld by the Court, regardless of consequences. The Statute of Limitations is now more favorably viewed by the Courts than formerly. *Angell on Limitations*, p. 21, sec. 12. It seems that the statute has a retrospective operation. *Towler* v. *Chatterton*, 3 M. & P., 619; S. C., 6 Bing., 258; *Amner et al* v. *Cattell*, 2 M. & P., 367; *Ansell* v. *Ansell*, 3 C. & P., 563.

Solicitor General, contra. The Act is prospective throughout. The *English* Act on which this is based was passed in 1856, and it came up for adjudication almost immediately after its passage. It was never contended in *England* that the Act generally was not prospective. It was, however, contended that one clause (the 14th) was retrospective, and Vice Chancellor *Kindersley* gave a decision to that effect. *Thompson* v. *Waithman*, 3 Drewry, 628. He seems to have

* There were other demurrers in the demurrer book, but, as the third was the only one relied on by the defendant's counsel in argument, it has been considered unnecessary to report the others.—REP.

1865.

COULSON v. SANGSTER et al.

disregarded Lord *Coke's* rule, "*Nova constitutio futuris formam imponere debet non preteritis*," and his decision has been overruled. The Court will not so construe the Act as to make it retrospective. *Jackson* v. *Woolley*, Ell. Bl. & Ell., 886; S. C., 8 Ell. & Bl., 784; which over-rules the judgment of the Queen's Bench in the same case, Ibid, 778.

Mc Cully Q. C., in reply. Whether the Act is retrospective or not, is a question of intention to be decided by the Court.

C. A. V.

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

The question for our decision is, whether section 7 of the Mercantile Law Amendment Act extends to actions existing at the time of its passage. The difficulty has been removed by a discovery of my brother *Wilkins*, who brought to our notice the case of *Cornill* v. *Hudson*, 8 Ell. & Bl., 429. In that case it was held that the tenth section of the *English* Act (which is similar to the seventh section of our Act) applied to cases where the cause of action had accrued before the Act came into operation, and no action had been commenced until after that, but did not apply to actions already commenced. The plaintiff in *Cornill* v. *Hudson* was a prisoner at the time of the passage of the Act, and the decision, therefore, was on the clause relative to imprisonment being no longer a disability, but imprisonment in this Act stands on the same footing as absence beyond the seas. It is to be understood, therefore, that this seventh section of our Act applies to all rights of action existing at the time it was passed, but has no operation on actions commenced before its passage.

Judgment for plaintiff.

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

* DESBARRES J. was not present at the argument.

1865.

BOWERS *versus* HUTCHINSON.

Aug. 3.

CASE for libel of the plaintiff in a certain newspaper called the "*Burning Bush*," and also for slander.

In an action for libel, the third count of the declaration alleged that the defendant falsely and maliciously printed and published of the plaintiff, in relation to his calling as a minister of the Gospel, the words following: "Notices." "All persons who have at any time paid Mr. *William Bowers*," (meaning the plaintiff,) "formerly of the Lutheran Church in *Nova Scotia*" (meaning that the plaintiff at the time of such publication was falsely pretending to be a Lutheran Minister in *Nova Scotia*) "any money for funeral services, will confer a great favor upon the public generally by handing in their names to the editor of this paper as early as they possibly can, and before the close of the first week in *October* next." Held, on demurrer, that the count as containing proper averments and innuendoes was good.

The third count of the declaration was demurred to,—the count and demurrer being as follows:

Third Count. And in a certain other number of the same newspaper, bearing date the 15th day of *September*, 1864, the defendant falsely and maliciously printed and published of the plaintiff, in relation to his calling as a minister of the Gospel, the words following:—

"NOTICES.

"All persons who have at any past time paid Mr. *William Bowers*," (meaning the plaintiff,) "formerly of the Lutheran Church, in *Nova Scotia*," (meaning that the plaintiff, at the time of such publication, was falsely pretending to be a Lutheran minister in *Nova Scotia*), "any money for funeral services, will confer a great favor upon the public generally by handing in their names to the editor of this paper as early as they possibly can, and before the close of the first week in *October* next."

Demurrer. That the said words in said count, alleged to have been printed and published by defendant, do not in law amount to a libel.

The fifth count was also demurred to, but as the defendant's counsel abandoned the demurrer thereto on the argument, it has been considered unnecessary to report this count. The Court intimated on the argument that the article set out in this count was libellous, from its being headed "Lamentable," and containing the words "sad state of morals," in alluding to the plaintiff.

Joinder in demurrer.

1865.

BOWERS v. HUTCHINSON.

Smith, Q. C., for defendant. It is for the Court to judge whether the alleged words were libellous or not. No innuendo can give words a meaning beyond what common sense would give them. The words charged in the third count are not *per se* libellous. The innuendo here gives the words charged a meannig which they do not bear. *Goldstein* v. *Foss et al.* 6 B. & C. 154. [YOUNG C. J. Was not that case decided before the Common Law Procedure Act?] The Common Law Procedure Act, from which our Act (*Revised Statutes, chap.* 134, *sec.* 102) is taken, has merely superseded the *colloquium*, but has not altered the law in other respects with regard to libel. You still cannot give words a meaning by an innuendo which they do not reasonably bear. [BLISS J. An expression, perfectly innocent *per se*, may be libellous]. Then it comes to this, that I may say of a man that he is an *honest* man, and an action for libel may be brought against me by alleging that I meant he was a *dishonest* man. [WILKINS J. If we can imagine a possible state of things occurring which would have rendered the words charged defamatory, it is enough to sustain the count.]

James, contra. The action is brought by a man averring himself to be a minister of the Gospel. The words charged, though innocent in themselves, were used in a defamatory sense. "Matter" in section 102 of the Practice Act, (*R. S., ch.* 134,) may mean pictures as well as words. It was not only necessary that we should allege that the words charged were false and malicious, but also that we should give them a meaning. Words innocent *per se* may be libellous. Suppose that the defendant had, previous to the publication of the libel alleged in the third count, verbally warned people against having their children baptized by plaintiff, stating that he was an impostor, &c., would not that render the words charged libellous? "Mr. *William Bowers*" may be offensive in itself.

It is not the usual way of speaking of a minister. [WILKINS J. Suppose the defendant had said, the day before the publication of the libel, "*Bowers* has committed such infamous crimes that he is no longer a minister," would not that give point to the words "formerly of the Lutheran Church in *Nova Scotia?*"] A man may make statements which are perfectly true, and perfectly innocent in themselves, and yet they may be proved to have been defamatory. Cites *Goldstein* v. *Foss et al*, 2 Car. & Payne, 252; S. C. (in the Exch. Chamber) 4 Bing., 489; *Roberts* v. *Patillo*, Jones' Rep., 367. (*Smith* Q. C. Although the *colloquium* is abolished by the Statute, it does not alter the rule of law that the innuendo shall not be more extensive than the words used. WILKINS J. There never was such a rule. YOUNG C. J. In the model count in *Bullen and Leake*, the words charged are, "He is a regular prover under bankruptcies"—innuendo "meaning that he was in the habit of proving fictitious debts." *Smith* Q. C. Is not the meaning quite consistent with the words used? In this case the alleged meaning does not follow at all from the words used.) It does not follow from the words charged in *Goldstein* v. *Foss et al.* that the meaning was that the plaintiff was a swindler and a sharper; but the declaration was held bad merely for want of an averment,—*Best* C. J. in delivering the judgment of the Court (4 *Bing.*, 492) stating that what was required was an allegation of fact that the words were used in the sense charged. The object of an innuendo is not to allege facts, but to explain the sense in which words are used, and it is required in the declaration. *Stockley* v. *Clement*, 4 Bing., 162. In *Gompertz* v. *Levy*, 9 Ad. & Ellis, 285, it was held that a count for libel could not be maintained without a statement of the facts and circumstances. *S. P. Wheeler* v. *Haynes*, Ibid., 286 note. Cites *Barrett* v. *Long*, 16 English Law & Equity R., 1; *Robinson* v. *Jermyn et al*, 1 Price, 14.

1865.

BOWERS v. HUTCHINSON.

Smith Q. C., in reply. Special damage must be alleged. If a judgment could be arrested after a verdict on this third count, then a demurrer to it is maintainable. The object of the innuendo is to state the true meaning of the words used. [WILKINS J. No,—not the meaning of the words used, but the sense in which they are used.] That is much the same thing. [WILKINS J. No,—it is a very different thing.] If the meaning given in the innuendo is not the natural result of the words used, the plaintiff must fail.

C. A. V.

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

Without the innuendo, the words charged in this third count would not be libellous. Under the old practice, the *colloquium* was, no doubt, indispensable. Section 102 of our Practice Act, however, is precisely similar to a corresponding clause in the Common Law Procedure Act of 1852, and under that clause it was held in *Hemmings* v. *Gasson*, El. Bl. & Ell., 346, (a case found by *Dodd* J.,) that the declaration need no longer state any *colloquium*, but, after setting out the words complained of, may put any construction upon them by innuendo that the pleader thinks fit,—and the question, whether the words were spoken with such meaning, is for the jury. The most innocent words, therefore, may be alleged to be libellous, but on the trial the jury must be convinced that they were used in the defamatory sense charged.

The relative functions of the Judge and jury, in determining the meaning ascribed to a libel by the innuendo, appears from *Blagg* v. *Sturt*, 10 Q. B., 899. In that case in the Exchequer Chamber on error from the Queen's Bench, *Wilde* C. J. said, (p. 908): "Undoubtedly it is the duty of the Judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo; but when the Judge is satisfied of that, it must be left to the jury to say whether the

publication has the meaning so ascribed to it." All the other Judges of the Exchequer Chamber concurred in this judgment.

1865.

BOWERS v. HUTCHINSON.

We, therefore, hold this third count to be good.

Judgment for plaintiff.

Attorney for plaintiff, *James*.

Attorney for defendant, *John Creighton*, Q. C.

THE QUEEN *versus* ROSS.

Aug. 3.

PERJURY. The indictment, referring to certain proceedings before two Justices of the Peace on a complaint of bastardy against a son of the defendant, charged the defendant, who was sworn as a witness on such proceedings, with having sworn "falsely, maliciously, and wickedly," as to the time when *Mary McLean* (the mother of the bastard child) left his (defendant's) house and service. The averment in the indictment, with regard to materiality, was as follows: "The said *Donald Ross* being so "sworn as aforesaid, it *then and there* became material "to enquire and ascertain at what time and when the "said *Mary McLean* quitted the house and service of "the said *Donald Ross*."

In an indictment for perjury, which charged the defendant with having sworn falsely on certain proceedings before Justices, wherein he was examined as a witness, the allegation of materiality averred that "the said *D. R.* (the Defendant) being so sworn as aforesaid, it *then and there* became material to enquire and ascertain &c." Held bad, as not sufficiently showing that the alleged perjury was committed at the said proceedings.

On the trial before JOHNSTON E. J. at *Sydney*, in *June* last, there was conflicting testimony as to the exact time when *Mary McLean* left the defendant's service, and one of the Justices, before whom the bastardy proceedings were taken, stated that he and the other Justice, before whom the proceedings were had, did not consider it material when she left defendant's service. The learned Judge instructed the jury that the defendant was entitled to an acquittal, on the ground of the immateriality of the matter in which the perjury was alleged to consist. The jury, however, found the defendant guilty, but the

1865.

THE QUEEN v. ROSS.

learned Judge, under the Act (*Revised Statutes, chap.* 171, *sec.* 99), postponed judgment, and reserved the question for the judgment of the full Court, whether the defendant was entitled to an acquittal.

On the first day of the Term, a rule *nisi* in arrest of judgment and for the discharge of the defendant was obtained, on the ground, among others, that the averment in the indictment—"it then and there became material," &c.—was insufficient.*

This rule now (*July* 31st) came on for argument.

W. A. Johnston, in support of the rule. The allegation "it *then and there* became material," &c., is insufficient, as not clearly pointing to the trial. The indictment must be good without the help of argument or inference. *Regina* v. *Bartholomew*, 1 C. & K., 366; *The King* v. *Nicholl*, 1 B. & Ad., 21; 2 *Russell on Crimes*, 639; *Regina* v. *Burraston*, 4 Jurist, 697, (1840;) *The King* v. *Dowlin*, 5 T. R., 311.

Solicitor General, contra. The case cited from 1 *Car. & Kir.* does not turn on the words "then and there." The words "then and there" in this indictment sufficiently point out the prosecution before the Justices, and, as the precedents and decisions will show, are all that are required. 3 *Arch. Crim. Practice & Pleading*, 601. *The King* v. *Dowlin*, cited on the other side, also shows this. [WILKINS J. Does not "then and there" often mean more than the previously mentioned time and the previously mentioned place,—does it not often mean that particular occasion?] "On the trial" is virtually charged in the indictment. [WILKINS J. There are three antecedents in this indictment—the time, the place, and the occasion.]

W. A. Johnston, in reply. I still rely on the case of *Regina* v. *Bartholomew*. I have cited two cases to the

* The rule was obtained on several grounds, but as the one mentioned above was the only one referred to in the decision of the Court, it is considered unnecessary to report the other grounds, or the argument thereon.—REP.

same effect—one decided in 1793, the other in 1844,—and the latter shows that the law on the point remains unaltered. The indictment does not say that previous to the judgment of the Justices it became material to enquire, &c. The oath, even if false, would not be perjury, unless made previous to their adjudication and in their presence. [BLISS J. Is not your objection just this "then and there" refer only to the time and place, but not to the occasion?]

C. A. V.

The Court now delivered judgment.

YOUNG C. J. The essential question for our decision in this case is, whether in the allegation of materiality in the indictment the averment, "it *then and there* became material, &c.," is sufficient without saying "upon the trial."

In the form of indictment given in 3 *Arch. Crim. Prac. and Pleading*, 601, the words given in the allegation of materiality are, "and then *upon the trial* of the said issue it became, &c." In the *King* v. *Aylett*, 1 T. R. 64, the words so given are, "on the hearing." In the *King* v. *Dowlin*, 5 T. R. 311, the words are, "at and upon the said trial." The authorities and best text books all show that the words "upon the trial," or some equivalent words, should be used. I think that the judgment must be arrested.

JOHNSTON E. J. concurred.

BLISS J. I think there is not a single authority which does not show that it is necessary that the words "upon the trial," or some equivalent words, should be used. *Starkie*, who is good authority, and *Chitty*, both show this. *Starkie's Crim. Pleading;* 2 *Chitty's Crim. Law*, 307, 352, 354, 355, *et seq.*

DESBARRES and WILKINS JJ. concurred.

Rule absolute.

Aug. 3.

BURROWES *versus* ISNOR.

Where a judgment has been duly recorded in the lifetime of a deceased party, and his estate has been declared insolvent by the Probate Court, an execution may, nevertheless, be issued on such judgment, on a proper suggestion of the facts on the record, against his executor or administrator, but can be extended only on the land bound by such judgment.

If any balance remain due to such judgment creditor, after a sale of the land under such execution, he is entitled to claim therefor out of the personal assets of the deceased, under the provisions of section 70 of the Probate Act. (*Rev. Statutes, chap.* 127.)

APPEAL from the decision of YOUNG C. J. at Chambers, discharging a rule *nisi* for reviving the judgment herein.

Solicitor General, for appellant, read the affidavit of *T. J. Wallace* on which the rule *nisi* was granted, from which it appeared that the defendant had died shortly after the entering of the judgment (under a warrant of Attorney) against him, that no part of the debt had been paid since the judgment was entered up, and that the judgment had been assigned to the said *T. J. Wallace* who now desired to have it revived so as to issue execution thereon. The *Solicitor General* also read the rule *nisi*, and the affidavit of *James Fraser*, one of the administrators of the estate of the defendant, in reply to the affidavit of *T. J. Wallace*. It appeared from *James Fraser's* affidavit that the estate of the defendant had been declared insolvent by a decree of the Probate Court; that there was some money in the hands of the *Sheriff* belonging to the estate, but that he (*Fraser*) considered that it belonged to the creditors, and should not be allowed to be levied upon under the present proceedings; that he was willing that the judgment should be revived so as to bind the real estate of the defendant, but that no execution should be issued to affect said personal property or funds. The *Solicitor General* contended that the real estate of the deceased should be sold under an execution on the judgment, and that it must be sold before the assignee of the judgment could claim a dividend in the personal assets.

Shannon, Q. C., contrà. The administrator *Fraser* considered that the object of the rule to revive the

judgment was to tax him with costs. He is willing that the real estate should respond the judgment. [*Solicitor General.* One object of reviving the judgment is to show that the debt which it represents is really due.] 2 *Chit. Arch. Q. B. Practice* (10*th ed.*) 1077. All that we ask is, that the personal estate shall not be affected at all by these proceedings. The costs are entirely in the discretion of the Court.

C. A. V.

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

We all think that the decree of insolvency is a sufficient answer to any attempt to levy an execution on the personal estate of the deceased. In England an execution is allowed against the *terre tenant.* We think that that law is wholly inapplicable here. In England, in such a case, there would be but one defendant, the heir-at-law; here, in most cases, there would be several defendants. We think an execution should issue against the administrator, but limited to the real estate only; and carefully guarding the rights of the other creditors in the personal estate. We have, therefore, decided to grant a rule (which my brother WILKINS will read) rescinding the order passed at Chambers by entering a suggestion, and establishing a precedent to be followed in all future cases where an execution is taken out against the real estate of a deceased party.

WILKINS J. Before reading the order I would remark that the Statute (*Rev. Stat., ch.* 127, *sec.* 70,) provides that judgments and mortgages registered in the life time of the deceased, may be recovered out of the land as far as the value of the land bound by them extends, leaving the judgment creditor or mortgagee, if there is any deficiency, to come in therefor *pari passu* with other creditors.

The learned Judge then read the following rule:

1865.

BURROWES v. ISNOR.

"On reading the order of His Honor the *Chief Justice*, made in this cause on the 25th of *April*, 1865, and the affidavit and rule *nisi* therein referred to; also the order of His Honor, made in this cause on the 2nd of *May* last, allowing an appeal from the order first above mentioned; and on hearing counsel on the said appeal, and it appearing that the said defendant is dead, and that administration of the goods and chattels, rights and credits, which were his at the time of his decease, who died intestate, has been duly granted according to law; and whereas the Court are of opinion that the order first above mentioned should be modified, it is ordered that the same be rescinded, and that leave be given to the said plaintiff to enter a suggestion, under the Statute, to the effect 'that it manifestly appears to this Court that he is entitled to execution of his judgment against the said defendant, and to issue execution thereon in manner hereinafter stated, that is to say, that execution shall issue on the said judgment against the administrators of the estate of the said deceased, in such manner as that the land of the intestate shall alone be held liable to satisfy the said judgment, and the execution to be issued thereon.'

"And it is further ordered, that the personal property and assets of the said intestate shall not be primarily held liable to respond the said judgment and execution, nor be otherwise held liable for the same, than according to the provisions of section 70 of chap. 127 of the third series of the *Revised Statutes*, in the possible event of the real estate of the said intestate proving insufficient to satisfy the said judgment and execution.

"It is further ordered, that the suggestion in this case shall be entered in the following form, viz.:— 'And now, on the 3rd day of *August*, 1865, it is suggested and manifestly appears to the Court, that the said *Thomas Burrowes* is now entitled to have execution of the judgment aforesaid against the ad-

ministrators of the goods and chattels, rights and credits, which were of *Nathaniel Isnor*, deceased, who died intestate, at the time of his death to be administered, but to be extended only on the real estate which was of the said deceased at the time of his death. Therefore it is considered that the said *Thomas Burrowes* ought to have execution of the said judgment against the said administrators in manner aforesaid.'

"And it is further ordered, that the said order of the said 25th of *April* be rescinded without costs, and that this present order be without costs."

Attorney for plaintiff, *Wallace*.

Attorney for defendant, *J. N. Ritchie*.

CITY OF HALIFAX *versus* McLEARN.

Aug. 3.

APPEAL from an order of *Bliss* J. at Chambers, declaring the house of the defendant a nuisance, within the meaning of the Act of 1861, chap. 45, and the Act of 1832, chap. 37.

It appeared from the affidavit of *B. D. G. Marshall*, city architect, dated 3rd *May*, 1864, on which the rule was granted, that the house complained of is situate at the north west corner of *Argyle* and *Prince* streets; that it was, in *December*, 1863, in a ruinous condition, old and dilapidated; that in the said month of *December* the said defendant commenced to tear down and remove the chimneys from the centre of the building where they then stood, and to commence repairing the same; that he was then warned by the city architect not to alter his house without the permission of the City Council, notwithstanding which he still continued to do so, and to such an extent as to make it nearly a new house. It also appeared that the defendant had added to the building

The application to a Judge under 25 *Vic., chap.* 27, *sec.* 11, now section 655 of the city charter (27 *Vic. ch.* 81) should be by information or complaint under oath, stating precisely and clearly the several grounds of complaint, and the proceedings thereunder should be similar to those under *Rev. Stat. chap.* 70, *sec.* 52. No writ of summons is required, and the information may be sworn to before a commissioner.

1865.

CITY OF HALIFAX v. McLEARN.

by raising the roof from a sloping roof to a flat roof, by which the attic had been considerably enlarged; that the chimneys had been removed from the centre of the building to the north end thereof, and were only one half brick in thickness at the back, and that a shed twenty-five feet long, four feet eight inches wide, and seven feet high, had been erected at the back of the building, where there was formerly an open space. Mr. *Marshall* also swears in this affidavit that the building stands within the limits where all buildings and outhouses to be erected in the city of *Halifax* are directed by the law to be constructed of brick or stone.

This affidavit was sworn before a commissioner of the Supreme Court, and headed "*The City of Halifax* vs. *William McLearn*," although it appeared that no writ of summons had been issued, and that the affidavit itself was the first proceeding in the Supreme Court.

On this affidavit a rule *nisi* was granted by *Bliss* J. at Chambers on the 3rd of *May*, 1864, which, it appeared, was duly served on defendant.

This rule was afterwards, after argument, made absolute by *Bliss* J., and the rule absolute is the rule or order appealed from.

McCully, Q. C., for defendant. The affidavit on which the rule *nisi* was granted, being made while there was no suit pending, is a proceeding which the law does not justify, and is therefore extrajudicial. [BLISS J. You mean to say that the proceedings should have been by summons in the first instance. That was the only point taken before me.] The affidavit itself is not sufficient to support the order. The Judge had no power to make the order. An Englishman's house is his castle, and the power given by this statute will not be extended further than is absolutely necessary. This Act carefully distinguishes between erection and repairing of houses. The act

1865.

CITY OF HALIFAX v. McLEARN.

complained of here is *repairing*, not erecting, and is sworn to be such. The statute never contemplated the destruction of a house which is being repaired. This proceeding has been taken as if these two Acts were one. Under which Act has a Judge the power to declare a man's house a nuisance? The Act of 1862 does not give him the power, and the powers of the Judge are confined to the Act of 1862 by section 12 of that Act. The Act of 1861 is the only one which authorizes a pulling down. The Act of 1862 does not declare what buildings shall be deemed nuisances. There must be a summons under section 11. There are only two modes in which the offending party may be proceeded against under this Act—by being brought before a criminal tribunal, or by summons. There is a great difference between a rule *nisi* and a summons. Our law provides that all personal actions shall be commenced by writ of summons. The commissioner had no power to take the affidavit in this case. *Rev. Stat., chap.* 123, *sec.* 20.

Sutherland, Q. C., contrà. [YOUNG C. J. refers to *Rev. Stat., ch.* 1, *sec.* 6.] The objection to the affidavit, on the ground of its having been sworn before a commissioner, should have been taken below. The application to a Judge was made, and the affidavit sworn, in *May*, 1864; the appeal was taken in *July*, 1864; and it is now too late to take this objection. Under the *Revised Statutes, chap.* 134, *sec.* 175, the commissioner takes affidavits where there is no cause pending. That section does not state before whom the affidavit is to be taken, and yet a commissioner always acts. Was the affidavit in this case necessary at all? It is contended that this proceeding should be commenced by summons. The rule *nisi* is in fact a summons. [WILKINS J. The Act provides that proceedings shall be taken before a Judge at Chambers. There is a recognized and established mode of proceeding at Chambers, namely, by rule *nisi*.] It is

1865.

CITY OF HALIFAX v. McLEARN.

unnecessary to labor the point that a rule *nisi* and a Judge's summons are the same thing. It is only necessary, then, to meet the argument that a writ should be issued. There is nothing in the Act to show that a writ is required. [WILKINS J. Why could not a full investigation be had before a Judge at Chambers?] There are two modes in which the offending party may be proceeded against, either by pulling down his house as a nuisance, or by prosecuting him for a fine or penalty. Section 655 of the present law, (Act of 1864, chap. 81,) like the Act of 1862, shows that the investigation must be before a Judge. Why may not the matter be tried as well by affidavits as by a *viva voce* examination? [YOUNG C. J. I do not think a Judge has power to settle the matter on affidavits. I think there must be an investigation, with opportunity of cross examination.] The defendant has made his house really a new one, by pulling it down piece by piece, and replacing what was pulled down with new materials. (A discussion arose here as to whether the building was within the limits of the district described in section 2 of the Act of 1861, as that within which no wooden building should be erected. It appears that one of the boundaries in that section is the west side of *Argyle* street, leaving the portion of the city west of that boundary outside the district. The defendant's building faced on the west side of the street, and extended back westwardly some forty feet. *Sutherland*, Q. C., at first contended that the building was within the district, but the Court being against him, he finally abandoned this position.) Under the 8th, 9th, 10th, and 17th sections of the Act of 1861, the shed is a nuisance, to be pulled down under the 18th section. The 16th section provides that no building within certain limits shall be enlarged or added to without the permission of the city council. The 18th section of the Act of 1861 is similar to the 11th section of the Act of 1862, only that the latter requires that a Judge shall

declare the building a nuisance before it is pulled down. Every violation of the Act of 1862 is a nuisance. The chimneys in this case are a nuisance. (Act of 1861, section 4.) Adding ten feet to a building is an erection.

McCully, Q. C., in reply. The whole question is the point raised by the rule *nisi*, and the argument should not be allowed to go beyond it. The Statutes of 1861 and 1862, under which these proceedings were commenced, have been repealed without reservation of this matter. Are not all proceedings under those Acts, then, abrogated? If a statute makes an act an offence, and before the offence is adjudicated upon the statute is repealed, both the offence and the remedy are gone. *Revised Statutes, chap.* 1, *sec.* 6, does not apply. No Judge had any power to take a step in this matter before the investigation was had. The city did not apply for an investigation, but for a pulling down. The Act of 1862 does not allow a Judge to do anything under the Act of 1861. The Acts are so inconsistent that they cannot be carried out. The 654th and 655th sections of the city charter (Act of 1864, ch. 81), are quite inconsistent. The affidavit is defective as to the shed. It does not state the time within which it was erected. It might consistently with the affidavit have been erected five years ago. A penal statute must be construed strictly. (*Sutherland*, Q. C., cites as to costs 2 *Chitty's Arch. Q. B. Prac.* (10th ed.,) 1546.)

C. A. V.

The Court now delivered judgment.

YOUNG C. J. Both the Acts of 1861 and 1862, as well as the Act of 1864, are confused and inconsistent. All the Acts must, if possible, be construed together. The question is, what is meant by the words "upon investigation of the facts, and conviction of the

1865.

CITY OF HALIFAX v. McLEARN.

owners or builders, before a Judge of the Supreme Court," in the 11th section of the Act of 1862. I am surprised that whoever prepared this Act did not prescribe the same mode of enquiry as is laid down by *Revised Statutes, chap.* 70, *sec.* 52, with regard to appeals to a Judge relative to railway damages. The affidavit was, I think, rightly sworn before a commissioner of this Court, as it is a proceeding in the Supreme Court. We pronounce no judgment as to whether the act complained of was a nuisance or not, as we have not the facts fully before us. Mr. Justice *Bliss* has drawn an order expressing our opinions.

BLISS J. When this matter was before me at Chambers, the objection was that a Judge could not proceed as I had done. I considered that the proceeding was not at all erroneous. A rule *nisi* to show cause is in effect a summons. The appeal must be dismissed, but under all the circumstances without costs, the Act being one of considerable difficulty, the practice thereunder entirely new, and the complaint of the city not sufficiently definite. The information does not allege the facts in the precise manner it should. We have, therefore, made the following order: "It is ordered that the appeal from the order of Mr. Justice *Bliss* in this cause be dismissed without costs, and that the said cause be remitted to the said or some other Judge, to be heard and proceeded with; and it is further ordered, that the plaintiff do amend his proceedings before the Judge by a more correct complaint or information, stating precisely and clearly the several grounds of complaint against the said defendant, upon which he seeks to obtain the order or judgment of the Judge." The mode of proceeding should be like that adopted where an appeal is made to a Judge in regard to railway damages. The main object of enquiry in this case is gone, it having been discovered on the

argument that the building is not within the brick district. The charge of repairing without leave of the city council is outstanding, but I think it never was intended that a building should be pulled down on that ground. The main question being disposed of, I think the matter might be settled without an investigation, which is an expensive matter. It is a nice question whether an appeal can be had from the decision of a Judge who has investigated all the facts.

Appeal dismissed without costs.

OVERSEERS OF THE POOR FOR GREENFIELD *versus* OVERSEERS OF THE POOR FOR GOSHEN.

Aug. 3.

No appeal lies directly to the Supreme Court from an order of justices for the removal of paupers.

Even in a regular appeal new evidence cannot be taken in this Court.

Construction of *Revised Statutes, chap.* 89, *sec.* 14.

APPEAL from the warrant of two justices ordering the removal of paupers.

It appeared that in *February*, 1860, two justices of the peace for the County of *Guysborough* had issued a warrant for removing *Rachel Taylor*, *Matthew Taylor*, and *Henry Taylor*, from the poor district of *Greenfield* to the poor district of *Goshen*. At the next Sessions for the district of *St. Mary's*, (within which district both the districts of *Greenfield* and *Goshen* were situate,) which was held in *October*, 1860, nothing appeared to have been done in the matter, but it was brought before the Sessions of *October*, 1861, who, as shown by their records, "dismissed the case without decision, as not being legally before them." An appeal was then brought before the Supreme Court at *Guysborough*, and a trial had before *DesBarres* J. in *June*, 1863, who gave judgment for the plaintiffs, confirming the order of the justices.

1865.

OVERSEERS OF THE POOR FOR GREENFIELD. v. OVERSEERS OF THE POOR FOR GOSHEN.

A rule *nisi* having been granted to set aside this judgment, it was argued during the present term by *W. A. Johnston*, for the defendants (the appellants), and by the *Solicitor General*, for the plaintiffs.

The argument turned almost wholly on the regularity of the appeal. The defendants' counsel contended that the order of the Sessions was in fact a judgment, and that the words "without decision," should be rejected as surplusage, and that consequently the appeal to the Supreme Court was regular, as being substantially from the order of the Sessions. He also contended that if there had been any irregularity in the appeal, that irregularity had been waived by the plaintiffs' counsel in going on with the trial before *DesBarres* J. The plaintiffs' counsel contended that as no decision had been given by the Sessions, the appeal was entirely irregular, and could not be entertained by the Court—that there was no waiver of the irregularity, as plaintiffs' counsel below, before going into the trial, had moved to quash the proceedings.

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

This Court has the right of revision as regards the decision of the Sessions in a case of this kind, but no appeal lies directly from the decision of the two justices to the Supreme Court. *Revised Statutes, chap.* 89, *sec.* 14. This appeal is, therefore, *coram non judice.* Both parties are in fault—the one in bringing the case to a trial before the Judge, and the other in defending it there. We set aside the whole proceedings, and remit the parties to their original rights. The question of costs is reserved.

BLISS J. If even the appeal had come regularly before this Court, the duty of the Court is not to try the case, but merely to say whether on the evidence

given before the two justices, their decision was correct. We have no power to take new evidence. Rule accordingly.*

1865.

OVERSEERS OF THE POOR FOR GREENFIELD. v. OVERSEERS OF THE POOR FOR GOSHEN.

MALONE *versus* DUGGAN.

Aug. 3.

An affidavit to set aside a regular judgment by default must, in general, be made by the defendant himself, and not by his attorney. The deponent in such a case must swear to a personal knowledge of the facts, and not merely to his belief.

MOTTON had obtained a rule *nisi*, returnable during the present Term, to set aside a regular judgment by default.

The affidavit on which the rule was granted was made by himself, he being the attorney of defendant; and he alleged therein, among other things, that the writ was placed in his hands by the defendant some days after it was served, when he (defendant) informed him that the date of service was the 24th *June;* that he delayed putting in the defence until the 8th *July*, when he learned that a default had been marked, and a judgment entered, the sheriff having returned the writ as served on the 23rd *June*.

The affidavit, after some positive averments as to the facts of the case, proceeded thus:—"I am familiar with the facts of the defence herein, and I verily believe," &c., stating several things under this caption, among others "that the claim set up by the plaintiff is false, and without any foundation, * * that the defendant has a good defence upon the merits, and that this application is not made for the purpose of delay, but to obtain justice herein; that great injustice will be done herein unless the judgment is taken off and the execution stayed, and the defendant allowed to appear and plead."

* The Court subsequently granted the costs of the rule to the plaintiffs, the Solicitor General representing that the plaintiffs' counsel below, before the trial, had moved to quash the proceedings on the ground of irregularity.—REP.

1865.

MALONE v. DUGGAN.

J. W. Johnston, Jr., now (*July* 22) shewed cause. The affidavit is insufficient. It is made by the attorney, who could have no personal knowledge of the facts, and not by the defendant. When the affidavit is made by the attorney, he should say "as I am informed and verily believe." 2 *Chit. Arch. Q. B. Prac.*, (10th ed.) 946. This affidavit says merely "I verily believe," and is therefore informal. The affidavit merely states that defendant has, in deponent's belief, "a good defence upon the merits." It should have gone further and said "upon the merits in the cause." 1 *D. & L.*, 768; 3 *Dowl.*, 218. "If parties are not held in these affidavits to the ordinary forms, a discussion will arise on every affidavit brought before the Court." Per *Tindal* C. J., 6 *M. & G.* 751. "As I am instructed and advised and believe," is not sufficient in an affidavit by the attorney. 2 *C. M. & R.*, 315. Nor will "believes he has a good defence to the action," answer in an affidavit by the attorney, 1 *Dowl.*, 398. An affidavit by a clerk who has the conduct and management of a cause, stating that "he is apprised and believes that the defendant has good grounds of defence upon the merits," will not do. 6 *M. & G.*, 750. A joint affidavit from the defendant and his attorney, that they are "advised and believe" that the defendant has a good defence upon the merits, is insufficient. 2 *C. M. & R.*, 315. The attorney here swears that he is familiar with the facts of the case. He either had no reliable information, or he has made an affidavit which should not be made. [YOUNG C. J. No affidavit can be received in reply on the merits. That has been settled in this Court by three decisions.] I am not going to show that the defendant has no merits, but to show my merits. [YOUNG C. J. here referred to the decision in *Chapman* v. *Black*, in this Court (MS., T. T., 1862), as shewing that the plaintiff could not produce any affidavit on the merits, but stated that he might answer that portion

of the affidavit accounting for the non-appearance, and that the fact that no affidavit could be received in reply on the merits, required an unexceptionable affidavit from the defendant.]

Motton, contrà. The affidavit was drawn hurriedly. It is not based merely on information. I have sworn that I am familiar with the facts of the case. If there were, even, gross negligence on the part of the attorney, would your lordships turn the defendant out of Court, if there really was a defence upon the merits?

J. W. Johnston, Jr., in reply. An affidavit in a case of this kind cannot be amended. 5 *Dowl.*, 588.

C. A. V.

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

An affidavit to set aside a regular judgment by default must state expressly that the defendant has a good defence to the action on the merits thereof. 3 *Dowl.*, 652. An affidavit omitting the words "to the action," has been held bad. *Ib.*, 218. Where the affidavit is made by the defendant himself, the words "as he is advised and believes," are added, (5 *Dowl.*, 566); where by the attorney or managing clerk of the attorney, the form is "as he is informed and verily believes," or "as he is instructed and verily believes." 3 *Dowl.*, 427; 2 *C. M. & R.*, 315. "As he is apprised and believes," in an affidavit by a clerk having the conduct of the defendant's case, has been held bad. 6 *M. & G.*, 750. By the Imperial Act of 1852 (which is similar to our *Revised Statutes*, 2nd series, *chap.* 134, *sec.* 26), the affidavit in a case of this kind is required to "disclose a defence on the merits." Under this Act two Judges (*Martin* B. dissenting) held that a common affidavit of merits was sufficient. 33 *Law & Eq. Rep.*, 420. Our Legis-

1865.

MALONE v. DUGGAN.

lature have now gone further, and added to the former Act the words, "with the particular grounds thereof." *Rev. Stat.*, 3rd series, *chap.* 134, *sec.* 26. We consider that under our present Act "verily believes" alone in an affidavit of this kind is not sufficient, that the deponent must have personal knowledge of the facts. Mr. *Motton* has said that he drew this affidavit hurriedly. An affidavit of this character should not be so drawn, as it requires great care. We consider the affidavit in this case insufficient. We do not decide that such an affidavit cannot be made in any case by the attorney or his clerk, but that whenever the client is present some good reason should be shown why he is passed by. We consider that the non-appearance is sufficiently accounted for, but we all think that the affidavit is defective on the ground that the attorney does not state that he has any *personal knowledge* of the facts, and that he swears simply to his belief. "I verily believe that the defendant has a good defence upon the merits," is clearly bad on the cases cited. The affidavit is also defective in not showing why *Shiels*, who appears to be the real defendant, was not called on to join in it.

Rule discharged with costs.

Attorney for plaintiff, *Motton.*

Attorney for defendant, *Payzant.*

THE QUEEN *versus* CUDIHEY.

Aug. 8.

Judgment will be entered on a recognizance against both principal and sureties, where the principal has not appeared in accordance with the condition of such recognizance; and where a rule *nisi* for such judgment has been served on the sureties, and the principal has left the Province, and they have failed to show cause.

The Queen v. *Thompson*, 2 Thoms. Rep., 9, affirmed.

ARCHIBALD, Q. C., moved on the first day of Term to make absolute a rule *nisi*, returnable on that day, for estreating a recognizance.

It appeared that the defendant had been charged with setting fire to a barn at the *Acadian Mines*, in *Colchester* county, and that the magistrate, before whom the preliminary examination was had, had remanded him for trial to the Supreme Court. He had afterwards been admitted to bail, himself in a hundred dollars, and two sureties in eighty dollars each. The grand jury found a true bill against him, but before the time appointed for the trial he absconded. Defendant was called on his recognizance in open Court on the first day of the Term at which the trial should have been had, and also on a subsequent day of the same Term, but did not appear or answer; and the sureties were also called in like manner on the recognizance to appear and bring in the defendant, but did not appear or reply, and failed to bring him in. *Archibald*, Q. C., read an affidavit of *George Spencer*, who swore to the service of the rule *nisi* upon the two sureties, and also that before the Term of the Court at which the defendant should have been tried, and at the time of making the affidavit, the defendant was absent from the Province.

C. A. V.

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

We affirm the practice established in the case of the *Queen* v. *Thompson*, 2 Thompson's Reports, 9, where the Crown was allowed to enter up judgment

1865.

THE QUEEN v. CUDIHEY.

on the recognizance, on an affidavit of the service of the rule *nisi* therefor on the bail, and their failing to show cause. Some difficulty arose formerly from some old decisions, which required that the defendant should be called every day during the Term or Sittings appointed for the trial. We do not think that necessary, and therefore make this

Rule absolute.*

* The following is a copy of the rule absolute granted in this case:—

Colchester SS. In the Supreme Court at *Truro*, 1865.

Cause { THE QUEEN, Plaintiff. *versus* JOHN CUDIHEY, Defendant.

Upon reading the recognizance in this cause, and the affidavits of *David B. Fletcher* and *William McKim*, thereto annexed;

And upon reading the rule *nisi* passed in this cause at *Truro*, on the 16th day of *June* last past, and the affidavit of service thereof upon *James Cudihey* and *Alexander J. Steele*, the bail for the said defendant;

It is ordered that the said recognizance be estreated, and that the plaintiff have execution against the said defendant for the sum of one hundred dollars, and against *Alexander J. Steele*, one of the bail, for eighty dollars, and against *James Cudihey*, another of the bail, for eighty dollars, being severally the penalties in which the defendant and the said bail are severally bound in such recognizance.

Dated at *Halifax*, this 3rd day of *August*, 1865.

By the Court.

J. W. NUTTING,
Prothonotary.

On motion of Mr. *Archibald*, for the plaintiff.

LADDS *versus* ELLIOTT ET AL.

Aug. 3.

Where the defendant in replevin justifies the taking as a distress for rent, the alleged tenancy must be clearly proved, precisely as laid in his avowry.

REPLEVIN for plaintiff's goods, to wit, two round tables, &c., distrained for rent on the plaintiff's premises.

Plea (among others), avowing the taking of the said goods, and justifying the same because the plaintiff for a long time, to wit, for the space of one year next before and ending on the first day of *May*, A. D., 1864, and from thence until and at the said time, held and enjoyed the said dwelling house, with the appurtenances, as tenant thereof to the said defendants, by virtue of a certain demise thereof to her, the said plaintiff, theretofore made at and under a certain yearly rent of £25, payable quarterly on the first days of *August*, *November*, *February*, and *May*, in every year by even and equal portions, and because the sum of £6 5s. of the rent aforesaid for the space of three months ending on the first day of *August*, A. D., 1864, was due and in arrear from the said plaintiff to the said defendant.

The following written notice was served on a tenant on the 1st *February*, 1864:—"*Dartmouth, Feb.* 1, 1864. Mrs. *L.* will please take notice that the rent of the house she now occupies will be twenty-five pounds per annum, commencing *May* 1, '64. Respectfully, *P. F.*" The tenant had previously paid a rent of £20 a year for the house. At the time the tenant was served with this notice, she said that she would not pay that rent; that she would give up the house. The landlord subsequently told her that if she would not keep the house it was let, to which she replied that she certainly would not keep it.

Replications. 1. That she "did not hold and enjoy the said dwelling house, with the appurtenances as tenant thereof to the said defendants, by virtue of a certain demise thereof, as alleged." 2. That "she held and enjoyed one half of the said dwelling house with the appurtenances, from the first day of *May*, A. D., 1864, as yearly tenant, the rent of the one half of the said dwelling house being payable quarterly, at the rate of £12 10s. per annum, the said tenancy of one half of the said dwelling house with the appurtenances, from the said first day of *May*, A. D., 1864, to the first day of *August*, A. D., 1865, was duly determined by notice to quit, given by the said defendants to the said plaintiff, on the first day of *August*, A. D., 1865, whereof the said plaintiff had notice, and the said plaintiff did not, on the first day of *August*, A. D., 1865, or at any time afterwards, hold and enjoy the said half of the said dwelling house with the appurtenances as tenant thereof to the said defendants, by virtue of the said demise thereof, as alleged."

Held, that the notice was not, even under all these circumstances, a notice to quit.

The fact of the tenant remaining in the house after receiving such notice, does not prove a tenancy at the increased rent, although she stated while she so remained, and admitted by one her pleas and at the trial, that she actually occupied half the house, under an alleged agreement to pay half the increased rent, which agreement, however, the jury found not to be proved.

1865.

LADDS v. ELLIOTT et al.

purtenances, having been verbally entered into and agreed upon on or about the 18th day of *April*, A. D., 1864, by and between the said plaintiff and the said defendants by their agent, one *Patrick Fuller*, duly authorized by the defendants to let said dwelling house, with the appurtenances or any part thereof." 3. That "she tendered £3 2s. 6d., the first quarter's rent of said half of the dwelling house, as soon as due, to the said *Patrick Fuller*, and to the said defendants, who refused to accept the same; and that no rent was in arrear, or due to the defendants, as in their avowry mentioned and set forth, at the time therein alleged."

There was also a plea by the plaintiff of payment of money into Court, under which the £3 2s. 6d. mentioned in the replication was paid in.

At the trial before *Bliss* J. at *Halifax*, in *May*, 1865, it appeared that the plaintiff on the 1st *February*, 1864, and for some years previous, was a yearly tenant of the defendants, at £20 per annum, of the dwelling house for the rent of which her goods were distrained—the year terminating on the 1st *May* in each year. It also appeared from the evidence on both sides, that on the 1st *February*, 1864, *Patrick Fuller*, the agent of the defendants, served the following notice on the plaintiff:—"*Dartmouth, February* 1, 1864. Mrs. *Ladds* will please take notice that the rent of the house she now occupies will be twenty-five pounds per annum, commencing *May* 1, 1864. Respectfully, *P. Fuller*"; and that the plaintiff, when the notice was served by *Fuller* on her, on 1st *February*, 1864, said that she would not pay that rent (£25), that she already paid as much as she could afford. *Fuller* testified that she also said on this occasion that she would not keep the house, that she would give it up. He also stated that about the end of *April* he had told her that if she would not keep the house, it was let: to which she replied that she certainly would not keep it. The plaintiff and her daughter

testified that *Fuller* had, on the 18th *April*, 1864, let the upper flat of the house to the plaintiff for £12 10s., but this was denied by him. It also appeared that proceedings had been commenced by the defendants against the plaintiff for over-holding, *Fuller* having made an affidavit and a complaint, and applied to a magistrate on the 10th *June* for a warrant for over-holding, which was obtained, but on which nothing was done. It appeared from the evidence of *Joseph Weeks* that he had written a letter to plaintiff on the 6th *May*, stating that he had hired the whole house, and signing himself as tenant of *Ferguson*. He admitted that he was not the tenant of *Ferguson*, and said that he had taken this course as a stratagem to get the plaintiff out.

The learned judge stated at the close of the trial that in his opinion the avowry could not be supported, as the plaintiff, who was a tenant at £20, when the notice was served on her by *Fuller*, not only did not assent to the payment of increased rent, but expressly and repeatedly declared that she would not pay it, and that even assuming that there was no new agreement, that the plaintiff should hold the half of the house at the rent of £12 10s., her continuing to hold after the notice that the rent would be raised could not raise an implied agreement to hold at that rent in the face of her declaration that she would not pay it, as she could not be taken to promise to do what she said that she would not do. The learned judge also said that it was then a mere case of over-holding, for which the law had provided a remedy, and that to that the resort in the first instance was had. It appeared to him that the affidavit made by *Fuller*, and the warrant against the plaintiff, which the landlords sanctioned, repudiated any new holding by plaintiff, and that they could not, after this proceeding, claim a right to distrain under a new contract to hold at £25, which they had themselves thus repudiated. He also doubted whether defendants could be considered as plaintiff's

1865.

LADDS v. ELLIOTT et al.

landlords after *May* 1864, after having let the house to *Weeks*, and after having allowed him to treat with the plaintiff as her landlord, and to threaten her with proceedings, as he had done by his letter of 6th *May*.

The learned judge, however, at the request of the *Solicitor General*, the defendant's counsel, left it to the jury to say whether there had been any such agreement as the plaintiff asserted, that she should hold half the house at the rent of £12 10s.

This was put to the jury with the understanding of both parties, that if the jury negatived such an agreement, the defendants should be entitled to judgment, provided the Court should decide the first point in their favor; and that if the Court should decide the first point otherwise, judgment should be for plaintiff.

The jury found that there was no agreement for half the house for £12 10s.

A rule was then taken out providing that the case should be argued before the full Court on the points reserved at the trial, and that upon such argument being had, the Court should have liberty to enter judgment for plaintiff or defendant.

This rule now came on for argument.

S. H. Gray, for plaintiff. The tenancy set out in the avowry must be clearly and precisely proved as laid. The variance here is fatal. 2 *Greenleaf on Evidence*, secs. 564, 5; *Clarke* v. *Davies*, 7 Taunt., 72; *Brown* v. *Sayce*, 4 Taunt., 320, *Dunk* v. *Hunter*, 5 B. & Ald., 322; *Woodfall's Landlord and Tenant*, p. 799; *Johnstone* v. *Hudlestone*, 4 B. & C., 93[illegible] The evidence adduced to prove a tenancy at £[illegible], did not prove it, but proved an overholding. The notice received by the plaintiff was not a notice to quit, but simply a notice that the rent would be raised. The notice given to *Fuller* by the plaintiff was a notice that she would quit. It was a verbal notice, but a verbal notice is sufficient if it is explicit enough.

The tenancy set out by the plaintiff in her replication being found by the jury not to exist, she is now in the same position as if it had not been pleaded.

Solicitor General, contrà. The plaintiff in her replication alleges that she held half the dwelling house at a rent of £12 10s., and she has paid in under a plea of payment £3 2s. 6d., for the quarter's rent of that half. The tenancy, therefore, is not denied at all, nor is the *rate* of rent for which the defendants have avowed the taking. *Fuller's* telling the plaintiff on the 1st *February* that her rent would be raised, or that she must leave, was a notice to quit. [COURT. No, that was not sufficient.] Assuming the tenancy to terminate on the 1st *May*, the defendants could then either proceed against her adversely, or waive the tort and treat her as a tenant. [WILKINS J. Could they do that after having attempted to get her out?] She did not pretend to say after the notice that she would remain in holding adversely, but that she would remain in holding half the house at half the rent. All the facts show a confirmation on her part of the £25 contract. Defendants treated her as a tenant, and she has recognized the tenancy herself in the most unequivocal manner by tendering rent. She cannot deny that she remained in as *tenant*, the only question is what was the rate of rent. [WILKINS J. Could she not elect to hold either as tenant or adversely?] I say that she has elected. [DODD J. You consider, then, that the notice to quit has been done away with.] Yes; she said in her testimony, "*Fuller* said £25 is to be the rent, and that is to be paid between *Joe* and you, (by *Joe* he meant Mr. *Weeks*,) but the upper flat will go for something less." This is a recognition on her part of the £25 contract. It was not that each was to rent half the house, but that they were to regulate between themselves what she should pay. She supposed that she could get the upper flat for something less than

1865.

LADDS v. ELLIOTT et al.

half the £25, but she did, in fact, occupy the whole. There was no agreement in point of fact as to the upper flat. She had the power to reduce her rent by taking in *Weeks* or somebody else as tenant. She says further, "I left on the 1st *May*, 1865." This proves her use and occupation of the house. [WILKINS J. Her alleged holding being negatived by the jury, she must be considered either as overholding, or as holding on the old rent of £20.] I contend that she took the whole house at the £25, thinking that she could make the arrangement with *Weeks*, by which she could occupy half for something less than £12 10s. Mrs. *Hudson*, one of plaintiff's witnesses, says "Mrs. *Ladds* had told me that *Fuller* let her half the house. *Fuller* said *Joe* and she were to fix the rent between them." This proves her tenancy at the £25. [BLISS J. It only shows a division of the whole rent between them, each to be tenant of *Fuller*.] *Fuller* proves that she or her daughter said "perhaps it is a small family, we could accommodate them." This shows that she considered herself as occupying the whole house. [BLISS J. If you get rid of her testimony by *Fuller's* you fall into another difficulty. *Fuller* said that *Weeks* was the tenant, and *Weeks* went and demanded possession.] After all she remained in, and the question is simply what ought she to pay.

THE COURT. There must be judgment for the plaintiff on the first replication to the avowry, the new contract alleged in the avowry not being proved

Judgment for plaintiff.

Attorney for plaintiff, *S. H. Gray*.

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

HUNT *versus* HARLOW.

Aug. 5.

SMITH, Q. C., on the first day of Term, had obtained a rule *nisi*, which he now moved to make absolute, to set aside a capias, and discharge the defendant from custody, &c., on the ground that he was not about to leave the Province at the time of his arrest.

In the affidavit on which the rule *nisi* was granted, the defendant said, "I was not about to leave the Province at the time of the said arrest, nor had I, nor have I now, the slightest idea of doing so, having business engagements and property to attend to."

J. W. Johnston, Jr., now shewed cause. It is not sufficient for a defendant to swear merely that he is not going to leave the Province. *Walker* v. *Lumb*, 9 Dowl. 134, per *Patteson* J. [YOUNG C. J. The practice in *England* is different from ours. The case cited does not apply to our practice.] (Reads affidavit of plaintiff.) [YOUNG C. J. There is not a single fact stated in that affidavit from which it can be positively inferred that the defendant was about to leave the Province.]

Rule absolute.

Where the defendant, in the affidavit on which a rule to set aside a capias is granted, swears positively that he was not about to leave the Province at the time of his arrest, and had not nor has any intention of doing so, the affidavit in reply must state *facts* from which it can clearly be inferred that it was his intention to leave, or the rule will be made absolute.

Attorney for plaintiff, *C. Morse.*
Attorney for defendant,

Aug. 7. CHIPMAN *versus* RITCHIE.

In an action on a promissory note by the indorsee against the maker, the declaration should allege that the note was indorsed before it became due.

Where the defendant in such an action relies on an agreement with the payee as a defence, the plea should allege that the note was indorsed after it became due.

A general plea of no consideration or no value, not stating the particular facts which show the want of consideration, is good in this Province.

Pleas which are only demurrable cannot be set aside as false, olous, and vexatious under *Rev. Stat., ch.* 134, *sec.* 71.

An application to set aside pleas under this section should be made promptly.

In applications of this kind the falsity of the pleas is always the main enquiry.

WEATHERBE had obtained a rule *nisi*, returnable during the present Term, to set aside the pleas in this case as false, frivolous, and vexatious.

The action was assumpsit on a promissory note, brought by the indorsee against the maker. The declaration which alleged the making of the note, but did not state that it had been indorsed to the plaintiff before it became due, also contained the common counts.

Pleas. 1. That the defendant "has not received any value for the said note." 2. Denial of the common counts. 3. "For an equitable defence, that one *Edward Everett*, at the date of the said promissory note, was indebted to him in a large sum of money, to wit, the sum of $1000, and that the said *Edward Everett*, in payment of the said sum, indorsed to the defendant a certain promissory note then held by him as indorsee, bearing date the 8th day of *May*, A. D., 1864, payable four months after date, and made by one *John Flint*, of *Yarmouth*, to *J. & D. Horton*, of the same place, for the sum of $1271.66, and payable on the 8th day of *September*, A. D., 1864; that the said promissory note declared upon in the plaintiff's writ was made to the said *Edward Everett*, for the excess of the amount of the said note, made by the said *John Flint*, and so indorsed by said *Everett* to the defendant above the amount due from the said *Everett* to the defendant. And the defendant alleges that at the time of the making of the promissory note de-

clared upon in the plaintiff's writ, it was stipulated and agreed between the said *Everett* and the defendant, that the said *Everett* should hold the said note in his hands, and not demand the amount thereof until the defendant could collect the whole amount of the said note from *Flint*, at which time said note should be sent to the office of *George Henderson*, Esq., in *Digby*, for payment; and defendant further alleges that he has used due diligence to collect the amount of said note from said *Flint* and the indorsee thereof, and that up to the commencement of this suit he had failed to do so, and the defendant therefore prays that the plaintiff's suit may be dismissed with costs."

The affidavits on which the rule *nisi* was granted were made by *Everett*, the person referred to in the third plea, and *Gavazza*. *Everett* states in his affidavit that the note sued on was given to him by the defendant for a valuable consideration, being the balance due him upon a promissory note drawn by *John Flint* and others in his (*Everett's*) favor, the amount of which note he says he verily believes has been received by the defendant. He further states that the note sued on was taken by him without any condition, and that no stipulation or agreement as alleged in the plea of defendant was made between him and the defendant in any way touching the manner of payment of the same. He also states that he indorsed the note to *Gavazza* for a full and valuable consideration, and as a payment in cash. *Everett* also swears to having received a letter from the defendant, dated 6th *February*, 1865, a copy of which letter he annexes to his affidavit. In this letter defendant states that he has just received the amount of *Flint's* note, and that he is prepared to pay the note to *Everett* to him at *Henderson's* store in *Digby*, on any day appointed, on the note being produced, and a receipt being given that he (defendant) will not be called on for it again. He further states that the note was intended and agreed to be a *bona fide* negotiable note,

1865.

CHIPMAN v. RITCHIE.

and as such was drawn payable to him (*Everett*) or order, and signed by the defendant without any conditions or stipulations as set forth in the pleas. *Gavazza* swears that the note was indorsed to him by *Everett* for a full and valuable consideration; that he received it as a payment in cash; that it was indorsed to him (*Gavazza*) before it became due, and that he transferred it to the plaintiff before it became due, who took it as a payment in cash. He also states that he had no notice of any condition being in any way connected with the note, and that he received full value for it from the plaintiff.

Counter affidavits were made by the defendant and his attorney, and were read at the argument. The defendant swears to the agreement with *Everett* set out in his third plea, which he states very *fully*, and also says that he caused all indorsees to be notified of the non-payment of the *Flint* note, as soon as he was aware that the note sued on was a negotiable note. He also says that the note was drawn up by *Henderson*, as he (defendant) supposed at the time, without the words "or order" being inserted in it; that he did not read it before signing, but that he positively swears that it was not intended or expected by him to be a negotiable note. He also swears that at the time the action was commenced a larger amount than the amount of the note sued on was uncollected on the *Flint* note; that he received the balance due on the *Flint* note on the 6th *February*, 1865, and at once notified *Everett* that he had obtained said balance, and was prepared to pay the amount of the note sued on, to which he never received any reply from *Everett*.

The rule now came on for argument.

Weatherbe, in support of the rule. It is unnecessary to read the affidavits on which the rule was granted, as the pleas on their face are bad in law. [BLISS J. We cannot take notice now that the pleas

are bad in law.] The first plea is bad on account of its general nature. It should state affirmatively such facts as show a want of consideration. *Stoughton* v. *Earl of Kilmorey*, 2 C. M. & R., 72; S. C. 3 Dowl., 705; *Lacey* v. *Forrester*, 2 C. M. & R., 59, 60; S. C. 3 Dowl., 668. [BLISS J. We do not set aside pleas as false, and vexatious, because they are informally pleaded.] Under the third plea no parol evidence can be given to qualify or vary the note. No parol evidence is admissible under these pleas at all. *Chitty & Hulme on Bills* (10th Am. ed.), 142. [BLISS J. Your objections apply only to legal pleas. The third plea is an equitable plea.] The third plea is no answer to a *bona fide* holder for value to whom the note has been indorsed before it became due. The defendant is not in a position to deny that the note was indorsed to the plaintiff before it became due, and we have sworn to it. 3 *Camp.*, 194. If fraud were intended to be set up as a defence, it should have been specially pleaded. *Act of* 1861, *ch.* 1, *sec.* 12. The defendant has set up no equity agaainst this indorsee. The pleas are utterly frivolous.

W. A. Johnston, contrà. It is a novel principle that where a party is brought into Court to answer an application to set aside his pleas as false, frivolous, and vexatious, that he should be told that he has to answer a demurrer. The principle of a demurrer to pleas is that the pleas are true in fact but bad in law. The principle on which an application of this kind is based is that they are false in fact. No case can be found in which pleas simply demurrable have been set aside on an application of this kind. It is said that the third plea is utterly frivolous on its face. If so there is another mode of dealing with it. If it really is so utterly frivolous the plaintiff may sign judgment as for want of a plea. 1 *Ch. Ar. Q. B. Prac.*, 270. The cases cited on the other side do not apply, because they are based on the General Rules in *Eng-*

1865.

CHIPMAN v. RITCHIE.

land of 4 *Will.* IV., which are not in force here. *French* v. *Archer*, 3 Dowl., 130; *Easton* v. *Pratchett*, Ibid. 472. [WILKINS J. We cannot pronounce pleas to be false, frivolous, and vexatious, if there is any question as to whether they are demurrable or not.] (Reads affidavits of defendant and his attorney.) Is there not a limited time for making applications of this kind? The writ in this case was issued in *November* last, and the pleas filed in *December*, and this application was not made until the first day of *July*, instant. Equitable defences of this kind may be pleaded in actions like the present. 1 *Chit. Arch. Q. B. Prac.*, 232, note (*n.*)

Weatherbe, in reply.

C. A. V.

The Court now delivered judgment.

YOUNG C. J. The declaration in this case does not state that the note was indorsed by *Everett* before it became due. Such a statement, which ought strictly to be in the declaration, is generally so inserted in *England* in such actions as this. The third plea is also clearly defective and bad, because it does not allege that the note was indorsed after it became due, so that the circumstances alleged in that plea, even if true, are no answer to the action of the present plaintiff, who is an indorsee. As regards the first plea, the general allegation of "no value" or "no consideration" is still good here, without stating the particular facts which show a want of consideration. It appears from *Easton* v. *Pratchett*, 2 C. M. & R., 542; S. C. 4 Dowl., 549, 3 Dowl., 472; that this pleading of the special matter was introduced in *England* by the new rules, and these new rules are not in force here. The plea of no consideration, however, is no answer to a *bona fide* holder of a bill or note, who has received the bill before it became due, and given value for it. *Chitty on Bills* (9th ed.), 69.

The clause of our Statute, on which this application to set aside the pleas is made, does not exist in any *English* Act. The *English* Courts, however, act on a principle much like it, though not of such binding force as if enacted by the Legislature. "The Court will set aside a plea which is clearly bad and an abuse of its authority, the object being to perplex and delay the plaintiff. In this case the plea is a mockery of the Court, and an insult to its proceedings, and whenever the Court sees that its process is abused, it is authorized to interfere." 8 *Dowl.* 76; S. C. 6 *Bing. N. C.* 153. "Where a plea is false and sham, and calculated to embarrass the plaintiff, the Court will set it aside upon an affidavit of its being a false and sham plea." 4 *Exch.*, 490.. Where a plea, then, is obviously a sham plea, the Court would have no difficulty in setting it aside independently of the Statute; but where it is only demurrable, it would be carrying the summary authority of the Court too far to set it aside without giving the party an opportunity to amend. It appears that the pleas in this case were filed in *December*, 1864, and that both parties were ready for trial at *Annapolis* in *June* last. The plaintiff, then, has lain by for several months before he made the application to set the pleas aside. We think that in an application of this kind the plaintiff should move promptly, and that in the present instance his application is made too late. It is a general rule that irregularities cannot be taken advantage of after any considerable lapse of time, and especially after a step taken.

JOHNSTON E. J. concurred.

BLISS J. Our practice in cases of this kind differs from the *English* practice. Where a plaintiff undertakes to swear that the statements in the pleas are false, frivolous, and vexatious, the defendant is called on to answer the plaintiff's affidavit, and if it is conclusively shown that the pleas are false, they are set

1865.

CHIPMAN v. RITCHIE.

aside. In this case the plaintiff joined issue on the pleas. The pleas on the affidavits which have been filed must be taken, as far as this application is concerned, not to be false. They are, however, no answer in law. The third plea sets up a defence which would be good against the payee, but is not good against the indorsee. The plaintiff makes this application after he had himself admitted the pleas to be good in law by joining issue on them. He has failed in showing them to be false, and it is too late for him to demur. On both grounds, therefore, he has failed, and he ought not to be entitled to costs because he has failed. It would be monstrous to give the defendant costs when his pleas are bad. It would be giving a premium on bad pleading.

*DESBARRES and WILKINS JJ. concurred.

Rule discharged without costs.

Attorney of plaintiff, *J. C. Troop.*

Attorney of defendant, *Chesley.*

DODD J. had left town, it being near the close of the Term.

COWLING *versus* LECAIN.

Aug. 7.

A verdict will not be set aside on the ground of an irregularity in the drawing of the jury, where the attorney of the complaining party had the means of knowledge of the irregularity at the trial, and made no objection then; and it was not shown that the verdict was otherwise improper, or that any injustice was done thereby, or that the officer who drew the jury was influenced by corrupt or improper motives.

The granting of new trials on account of such irregularities is entirely in the discretion of the Court.

Practice as to costs on rules made absolute.

CHESLEY had obtained a rule *nisi*, returnable during the present Term, to set aside the verdict in this cause, and for a new trial, on the ground of an irregularity in the drawing of the jury.

It appeared from the report of *Wilkins* J., who tried the cause at *Annapolis* in *June* last, that the action was brought by an attorney for his taxed costs in certain suits conducted by him for the defendant. The defence was gross ignorance in conducting them. The learned Judge did not consider that the defence was substantiated by the evidence, and the verdict, which passed for the plaintiff, met his entire approval. It further appeared from the affidavit of *Chesley*, the attorney of the defendant, that the acting Prothonotary, instead of drawing the jury from the jury-box, as required by *Revised Statutes*, *chap.* 136, *sec.* 55, had merely called the jurors from the panel consecutively as their names stood thereon. *Chesley* swore that neither he nor the defendant were aware of this irregularity until after the verdict had been rendered by the jury and recorded. It also appeared that the defendant's attorney did not challenge any of the jurors, and it was not alleged that the verdict was otherwise improper than on the ground of this irregularity, nor that any injustice had been done thereby; and no corrupt or improper motives were attributed to the officer therefor. *Chesley's* affidavit was based mainly on information received from the acting Prothonotary, and his affidavit was sworn before the same officer, who was not a commissioner, and the jurat did not contain the words "in open Court."

The rule now (*August* 5) came on for argument.

1865.

COWLING v. LECAIN.

W. A. Johnston, in support of the rule. The trial here may be considered as a nullity, the course prescribed by the statute not having been followed. 3 *Chit. Gen. Prac.*, 68, 73, 75. When the prescribed mode of proceeding is not observed, the Court must treat the irregularity as fatal. (Cites 4 *Chit. Gen. Prac.*, 69; *Tidd's Practice* (*7th ed.*) 928; 6 *Nev. & Man.*, 711; 4 *T. R.* 473; 4 *Eng. Law. & Eq. Rep.*, 244; *Willes' Rep.*, 484; 4 *M. & S.*, 467.) [WILKINS J. All the jurors who went into the box in the present case were duly qualified.] In some of the cases I have cited the jurors were duly qualified but not properly chosen. [WILKINS J. We must look at the spirit and policy of the law.] (Cites *Hague* v. *Hall*, 5 M. & G., 693; *Haldane* v. *Beauclerk*, 6 D. & L., 642; *The King* v. *Tremearne*, 5 B. & C., 254.) [BLISS J. There is a great distinction between the two cases, where the act is that of the party and where it is that of the officer. Is it not fair to look at the Statute simply as directory to the officer? In *Haldane* v. *Beauclerk* the fault was that of the party.] I have seen no such distinction in any of the text books or cases. The words of the Statute are positive, that a jury drawn as required by section 55 of the Jury Act, "shall be the jury for the trial of the cause." [WILKINS J. An officer, by the course which has been taken here, might make himself obnoxious to the censure of the Court, or liable for damages; but I do not see that it should affect the verdict, or the opposite party.]

Weatherbe, contrà. Several of the cases cited have no bearing or reference to one like the present. In all of them there was neglect in the opposite party. The cases show that the objection must be taken as early as possible, and before verdict. The granting of a new trial on the ground complained of here is discretionary with the Court. The verdict is not complained of, and it is not shown that any injustice has been done, or that the officer has acted corruptly.

There is, beside, no legal evidence that the jury was not properly drawn. *Chesley's* affidavit is based on information. Why did not *Chesley* ask *Morse*, the acting Prothonotary, to make the affidavit? Have I not a right to assume that *Morse* would not make the affidavit? (Reads affidavit of *George R. Grassie*, the Prothonotary, in which he swears that if any irregularity occurred in the drawing of the Jury, it arose entirely from inadvertence, and the inexperience of the acting Prothonotary.) The neglect of the defendant in not taking this objection earlier is a waiver of the irregularity. The affidavit of *Chesley* is sworn to before the acting Prothonotary, and the jurat does not state that it was sworn "in open Court." (Cites 2 *Chit. Arch. Q. B. Practice*, 1553; 8 *B. & C.*, 417; 5 *B. & C.*, 254; *Doe d. Ashburnham* v. *Michael*, 16 Q. B., 620; 4 *B. & Ald.*, 430; *Lessee of Seaman* v. *Campbell*, James' Rep., 94; *Kington* v. *Groom*, 11 M. & W., 826.)

W. A. Johnston, in reply. In 4 *B. & Ald.*, 430, there was no violation of the Statute. (Cites *Dovey* v. *Hobson*, 6 Taunt. 460.) I contend that 11 *M. & W.* 826, is not law; it is not sustained by other cases. It is equally competent for a Prothonotary to pick and choose the jurors from the panel as to read them off in consecutive order. It need not appear that a verdict was corrupt. The objection here was made at the earliest possible moment. This is all that the law requires: that the party should make the objection as soon as possible after the irregularity comes to his knowledge. [WILKINS J. It might have come to the knowledge of the Attorney in this case earlier by his using a little common vigilance.] (Cites *Fairman* v. *Ives*, 1 Chit. Rep., 85.) None of the authorities say that in an affidavit sworn before a Prothonotary the jurat must say that it was sworn in open Court. Every officer is presumed to act properly and within the scope of his authority. If the affidavit had been sworn before *Grassie*, the Prothonotary, it would have

1865.

COWLING v. LECAIN.

been presumed that it was done in open Court. The same presumption applies to the acting Prothonotary. *Quoad* this he had the same authority and rights as *Grassie*. A rule must be discharged without costs that does not ask for costs. [BLISS J. That is not our rule. Our rule is that costs should follow unless otherwise ordered.] Costs are not given to a party where he succeeds on a mere technical objection. *Joll* v. *Lord Curzon*, 5 C. B., 205. This is the case in which your Lordships objected to allowing me to amend the rule *nisi* by inserting the words "with costs."

C. A. V.

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

The judgment in *Lessee of Seaman* v. *Campbell*, James' Reports, 94, is decisive of this case, and it is confirmed by two or three quite recent decisions. HALLIBURTON C. J. in that case said, "After looking into all the cases which have been cited, I find it to be quite clear that the objection taken is one upon which the Court is to exercise its discretion." That case is nearly analogous to the present, and it clearly shews that the granting of a new trial on the ground of the irregularity complained of here is entirely discretionary with the Court. The case of *Pryme* v. *Titchmarsh*, 10 M. & W., 605, shows that it is immaterial whether the complaining party had knowledge or not of the irregularity at the time it occurred. (See language of *Parke* B. in that case, *Ibid* p. 607.) There is not the slightest pretence that the verdict here is otherwise improper than on account of the irregularity complained of, or that the officer was influenced by any corrupt or improper motives. We, therefore, discharge with costs the rule for a new trial.

Rule discharged.

Attorney for plaintiff, *Cowling* in person.

Attorney for defendant, *Chesley*.

* DODD J. had left town, it being near the close of the Term, before the argument of this case.

ZINK *versus* ZINK.

Aug. 7.

A cause had been set down for trial by a special jury, at the instance of the plaintiff's attorney; but the *venire* not having been issued in time, ten only of the special jury attended. The plaintiff offered to try the cause with nine of the jurors who so attended, or with the common jury; but the defendant refused to consent, and the cause was continued.

Held, That the defendant was not, under these circumstances, entitled to the costs of the day.

J. W. JOHNSTON, Jr., on a former day (*July* 31), had moved for a rule to compel the plaintiff to pay the costs of the day for not proceeding to trial pursuant to notice.

It appeared that a special jury had been ordered in the cause, at the instance of the plaintiff's Attorney, but that the *venire* not having issued in time, ten only of the special jurors attended. The plaintiff offered to go to trial with nine of the jurors who so attended, or with the common jury, but the defendant would not consent, and the cause was, therefore, continued.

J. W. Johnston, Jr., contended that it was not the fault of the defendant that the trial had not been had, and that, therefore, he was entitled to his costs of the day. (Cites *Cook* v. *Smith*, 1 Dowl. N. S., 861; *Blow* v. *Wyatt*, 7 Dowl., 86; *Jones* v. *Williams*, 8 M. & W., 359; *Brown* v. *Wallace*, James' Rep., 264.)

C. A. V.

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

In *Mullings* v. ———, 5 Taunt., 88, the Court held that a plaintiff who had entered four causes for trial as to tithes, but found on the trial of the first that he was in bad odour with the jury, could withdraw the others without subjecting himself either to judgment as in case of nonsuit, or to the defendant's cost of the day on the rule for such judgment being discharged. In *Sleeman et al.* v. *The Governor and Company of the Copper Miners of England*, 5 D. & L., 451, a replication to one of the pleas, and the award of *venire* were omitted in the *nisi prius* record by the

1865.

ZINK v. ZINK.

Clerk of the plaintiff's Attorney, which omission the Judge had power to amend with the consent of the parties. The defendants having refused their consent, the Court refused to grant them the costs of the day, although the defendant's counsel offered to consent, if the Judge could give him an assurance that the whole proceedings would not be a nullity after the amendment, which the Judge could not give. *Erle J.* delivering the judgment of the Court in that case said, "the defendants improperly caused the waste by refusing their consent to amend." This case modifies *Cook* v. *Smith*, 1 Dowl., N. S., 861. In *Pope* v. *Fleming*, 5 Exch., 249, the Court refused to grant the defendant his costs of the day, where the plaintiff had offered to try the cause out of its turn, or to let it go to the bottom of the list, to which the defendant had refused to consent. On the authority of these cases, and the authorities showing clearly that allowing the costs of the day to a party is always in the discretion of the Court, and looking at the circumstances of this case, we think that the costs ought not to be allowed.

Rule refused.

Attorney for plaintiff, *DesBrisay*.
Attorney for defendant, *Creighton*, Q. C.

THE NOVA SCOTIA LAND AND GOLD CRUSHING AND AMALGAMATING COMPANY (LIMITED) *versus* ARCHIBALD BOLLONG. *Aug. 7.*

IDEM *versus* NEAL BOLLONG.

Where two suits are brought for the same cause of action by the same plaintiffs against different defendants, but the pleas are the same, and the witnesses the same in both suits, and notice of trial is given in both for the same time, the witnesses are entitled to fees only in one of the suits.

M'CULLY Q. C. on the first day of Term had asked that the witnesses in these cases, who were the same persons in both, should receive fees for travelling and attendance in both suits.

It appeared that both suits were actions of trespass, that the lots set out in both writs were the same, and the pleas the same in both suits. The plaintiffs had given notice of trial for the same day in both suits, and when the cases were called did not appear, and rules were obtained against them by the defendants' Attorney for costs of the day. The plaintiffs objected to the defendants' having subpœnaed the witnesses in *both* suits, and contended that their fees should be paid only in one case. There was no affidavit of the actual payment of any fees to the witnesses.

C. A. V.

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

In these cases the ordinary rules were granted to the defendants for payment of their costs of the day by the plaintiffs. The question for our consideration is, whether the witnesses being the same persons in both cases, they are entitled to fees for travelling and attendance in both. From the case of *Bettley* v. *McLeod*, 5 Dowl., 481, it appears that it is unnecessary to pay or tender his expenses to a witness, if they have been already paid by the opposite party who has subpœnaed him, and that he cannot receive his travelling fees

1865.

THE NOVA SCOTIA LAND AND GOLD CRUSHING AND AMALGAMATING COMPANY (LIMITED) v. ARCHIBALD BOLLONG.

IDEM v. NEAL BOLLONG.

from both parties. It also appears from the case of *Edmonds* v. *Pearson*, 3 C. & P., 113, that a witness may be subpœnaed, without a tender of payment of his expenses, if he has been already subpœnaed by the other side, and brought to the place of trial. We think, therefore, that where there are the same witnesses in similar suits, and notice of trial for the same day is given in both, they are only entitled to fees in *one* suit, unless it is made to appear that their fees have actually been paid to them in both suits; and if paid twice, the Court would enquire why they were so paid. We are, therefore, of opinion that the fees of the witnesses can be allowed in only one of these suits.

Application refused.

Attorney for plaintiff, *Richey*.

Attorney for defendant, *Blanchard*, Q. C

Aug. 7.

GIBSON *versus* KILEY.

An affidavit to set aside pleas as false, frivolous, or vexatious, must, in general, be made by the plaintiff himself, and must state *facts* showing that the pleas are so.

An affidavit made by plaintiff's counsel containing a mere general statement that the pleas are false, frivolous, and vexatious, as he has been informed by the plaintiff and verily believes, though uncontradicted by any affidavit on the part of the defendant, is not sufficient.

M'CULLY Q. C. had obtained a rule *nisi* to set aside the pleas in this case as false, frivolous, and vexatious.

The rule had been granted on an affidavit of his own, in which he stated that "the pleas pleaded in the said cause were false, frivolous, and vexatious, as he had been informed by the plaintiff, and verily believed," without stating any facts or circumstances which showed them to be so. This affidavit having been lost, a subsequent affidavit was made by *McCully* Q. C. in which he simply repeated the statement in his former affidavit, and the rule was thereupon enlarged until the last day of the present Term.

1865.

GIBSON v. KILEY.

It appeared that *McCully* Q. C. was the partner of the plaintiff's attorney. The action was assumpsit on a promissory note. The pleas were: 1. Denying the making of the note. 2. Note not made within six years before the suit. 3. Action did not accrue within six years before the suit.

The rule now came on for argument. No affidavits were produced in reply.

McCully, Q. C., in support of rule. [YOUNG C. J. If a simple allegation on the part of the attorney that a plea is false, frivolous, and vexatious, is sufficient to obtain a rule to set aside pleas, then the defendant must come in and swear to every plea.] He must do so to protect himself. [YOUNG C. J. Do you think that reasonable?] Yes. [JOHNSTON E. J. You swear to an *inference*, you do not swear to a *fact*. BLISS J. You have never said that the defendant did make the note.] Yes, I have stated so in the declaration. [JOHNSTON E. J. How do you know that the defendant did make the note? You have no affidavit from the plaintiff. BLISS J. The original practice certainly was that *facts* were stated in these affidavits, and not a mere bald statement that the pleas were false. You should have sworn that the note was made by the defendant. WILKINS J. There is no express allegation that the defendant made the note, and by his first plea he denies the making of it.] One of the pleas must, at all events, be set aside. [BLISS J. I think that to be "frivolous," within the meaning of this act, (*Revised Statutes*, 3rd series, chap. 134, sec. 71,) a plea must be "false."] I do not think that is sound English criticism. [YOUNG C. J. It is rather novel to me that an application to set aside pleas should be made on the affidavit of the attorney. It might be done in cases where the attorney has had personal communication with the defendant; then he swears to facts within his personal knowledge.] In the former series of the *Revised Statutes* the words "frivolous or vexa-

1865.

GIBSON v. KILEY.

tious" alone were used. "False" was introduced in the third series for the first time. The words now are "false, frivolous or vexatious," and I think it is a rule that where three adjectives are used in this way, with the word "or," the "or" applies to them all.

W. A. Johnston, contrà. The affidavit is so general in its character that there is nothing for defendant to answer. The second plea is true in point of fact, even from plaintiff's own shewing. Suppose that the note is produced at the trial, and it then appears from its face that it was made payable *five* months, instead of *nine* months as alleged, after date. [*McCully*, Q. C. Then it would be a different note from that declared on.] That is just what we have said, that it is not our note. The test of an affidavit is that perjury is capable of being assigned on it, if false. Perjury could not be assigned here on the attorney's affidavit.

YOUNG C. J. We all think that this rule must be discharged. We consider that *facts* showing the pleas to be false, frivolous, and vexatious should be stated in the affidavit on which such a rule is granted. We also consider it a wholesome rule that, without in all cases excluding the attorney or managing attorney of the plaintiff, or his authorized agent, the affidavit must be made by the plaintiff himself, unless some sufficient cause is shown why he should not make it. It is impossible to establish an inflexible rule; no rule can be established without some exceptions. But, on this general principle, and as this affidavit is a departure from the general practice, the rule must be discharged.

Rule discharged with costs.

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

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

RISSER ET AL. *versus* HART ET AL.

July 29, and *Aug.* 7.

Where a verdict is found against the charge of the Judge, and the uncontradicted evidence of the only witness examined at the trial, for a larger amount than the evidence warrants, the Court will either order a new trial, or, if the plaintiff consents, reduce the damages to the sum warranted by the evidence. The Court have power so to reduce the damages with the consent of the plaintiff alone, and against the will of the defendant. The question of costs in such cases will depend on the particular circumstances.

ASSUMPSIT. The declaration stated that defendants were indebted to plaintiffs for freight of certain goods from *Montreal to Halifax*, and the particulars were for freight of 388 barrels per schooner *Express*, from *Montreal* to *Halifax*, at 60 cents per barrel, $232.80.

Pleas. 1. Never indebted as alleged. 2. Charter of the whole vessel from *Halifax* to *Montreal* and back at 40 cents per barrel each way, payment for the freight to *Montreal* at that rate and acceptance thereof by plaintiffs, reception at *Montreal* on freight to *Halifax* on account of defendants of 706½ barrels, 218 of which were for *G. J. Mitchell & Company*, 100 barrels for *Pugh*, and the balance for defendants, payment by *Mitchells* and *Pugh* to plaintiffs of freight for the said 318½ barrels, at 60 cents per barrel, amounting to $191.10, leaving a balance of $91.50 due plaintiffs, which defendants had before action brought tendered, but plaintiffs had wholly refused, and which defendants now brought into Court. 3. Payment, except as regards the said sum of $91.50, which defendants have always been ready and willing to pay, and now bring into Court. Replication. Sum paid into Court not sufficient.

At the trial before *Wilkins* J. at *Halifax* in *May*, 1864, one of the plaintiffs, who was the only witness examined at the trial, admitted on cross-examination that he had contracted with the defendants, to take a full freight for them from *Halifax* to *Montreal* and back at 40 cents per barrel, and that he had received payment at *Montreal* for the up cargo at that rate.

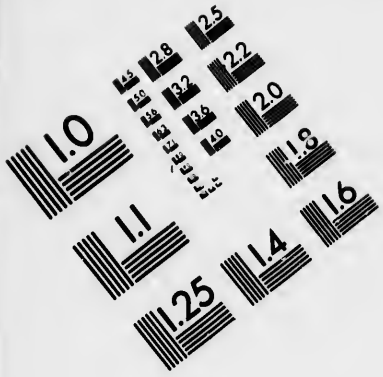
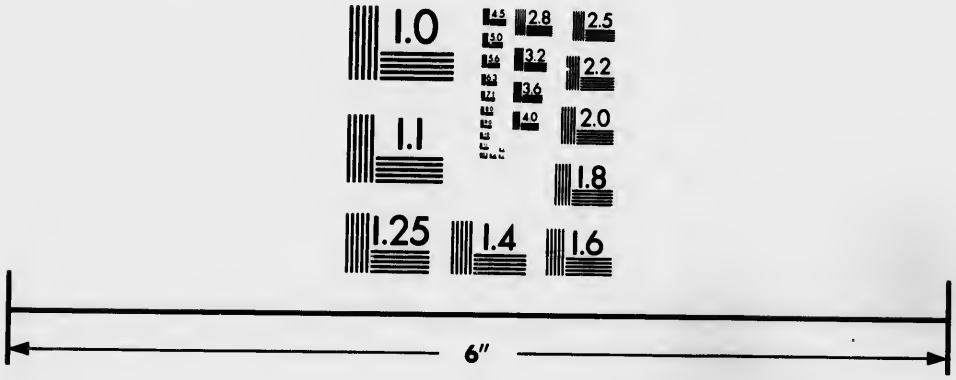
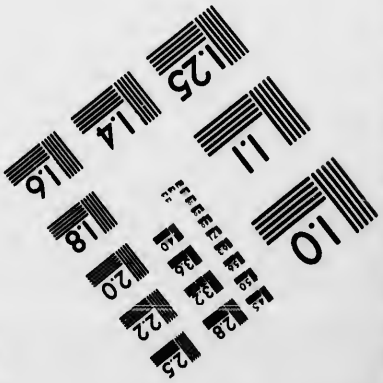


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
2.5
3.2
2.2
3.6
2.0
1.8
1.1
1.0

1865.

RISSER et al. v. HART et al.

He, however, stated that he had not received a full cargo by 110 barrels on that voyage. He also admitted that he was offered a full cargo on defendants' account by their agent at *Montreal*, which he declined. He also stated that he had received freight at the rate of 60 cents per barrel from *Pugh* for 100 barrels, and from *Mitchell & Co.* for 225 barrels, and 25 cents per firkin for 10 firkins.

The learned Judge intimated that the plaintiffs should submit to a non-suit, and that the objection of non-performance by defendants of their express contract was not open to the plaintiffs in this action and under the pleadings. The plaintiffs, however, declined to become non-suit, and the cause went to the jury, who found for the plaintiffs for the entire amount of their claim.

A rule *nisi* having been granted for a new trial, it was argued in *Michælmas* Term last by the *Solicitor General* for plaintiffs, and *Blanchard* Q. C. for defendants.

YOUNG C. J. now (*July* 29) delivered the judgment of the Court. After stating the facts of the case his Lordship said:

It is impossible for the plaintiffs to retain their verdict for the full amount for which it has been given, as the defendants paid into Court $91.50. There is also this further difficulty, that the defendants pleaded, and the plaintiff who was examined on the trial admitted the existence of a contract, by which plaintiffs were to have the use of the vessel to and from *Montreal* at 40 cents per barrel.

As the vessel would hold only 120 puncheons or 480 barrels, her whole freight at this rate if completely filled would only amount to $192. Defendants, however, supplied 370 barrels only on the trip to *Montreal*, and, therefore, plaintiffs are entitled to recover $44 for the short freight. The plaintiff has, however, to con-

tend with this difficulty, that he has inserted no count in his declaration for breach of contract.

As it is impossible, under the pleadings, to sustain the verdict as it stands, we will grant a new trial, unless the plaintiffs consent to the reduction of the verdict to $44. In that event we will give the plaintiffs the costs of the action, reserving the costs of the argument.

Judgment accordingly.

E. H. Harrington, for plaintiffs, stated that he consented to the proposed reduction of the verdict.

McCully, Q. C., for defendants, objected.

THE COURT then intimated that they would hear Counsel on the point of practice on the last day of the Term.

McCully, Q. C., now (*August* 7) argued that the Court had not the power to reduce the damages with the consent of the plaintiffs alone, that there must be the consent of both parties. (Cites *Dennison* v. *Dill*, Cochran's Reports, 34; *Leeson* v. *Smith*, 4 N. & M., 306.)

Solicitor General, contrà, cited *Mayne on Damages*, 344; 10 *Bing.*, 25. [YOUNG C. J. refers to 1 *C. B.*, 607. BLISS J. refers to *Mulhall et al.* v. *Barss*, 2 Thomson, 46.]

THE COURT held (*Wilkins* J. diss.) that under the special circumstances they had the power to reduce the damages with the consent of the plaintiffs alone, and without the consent of the defendants, and made the following rule: "It is ordered that the damages given by the jury in this case be reduced with the consent of the plaintiffs from £58 4s. to £11, and that

1865. RISSER et al. v. HART et al. the plaintiffs have judgment therefor with their costs, but that the defendants have the costs of the argument, to be deducted therefrom."

Rule accordingly.

Attorney for plaintiffs, *E. H. Harrington.*

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

[NOTE.—Three other cases, *Starratt* v. *Romkey*, *Dodson* v. *Mooney*, and *Mason* v. *Jacobs*, were argued and decided during the present Term. As the decisions, however, in the first two were merely an affirmance of the well-established principle that the Court will not set aside a verdict as against evidence, unless there is an almost overwhelming preponderance of evidence against it, and the judgment in the last case depended wholly on the construction of an Act (25 *Vic.*, chap. 1,) long since repealed, it has been considered unnecessary to report them.—REP.]

END OF TRINITY TERM.

IN THE

1861.

SUPREME COURT OF NOVA SCOTIA,

TRINITY TERM,

XXV. VICTORIA.

LAWSON ET AL. *versus* SALTER ET AL. *July 30.*

[The following is the dissentient opinion of DODD J. in this case, (*ante*, p. 79,) which has been found since the publication of the first part of this volume, and may be conveniently inserted here:]

DODD J. This cause was tried without a jury by consent before Mr. Justice *Bliss*, when judgment was given for the plaintiffs, with leave to move on the part of the defendants to set it aside. The case may be shortly stated. The defendants being indebted to Messrs. *Allison & Co.* gave two promissory notes for the amount due, payable at a day after date. These notes were indorsed by *Allison & Co.* to the *Halifax Banking Company*, and before the notes became due the drawers and payees had become insolvent, the former, by arrangement with their creditors, paying eight shillings and nine pence in the pound, and the latter ten shillings. The plaintiffs became the assignees of *Allison & Co.*, and in that character appear in this action. The notes were unpaid when due, of which the defendants had notice, and subsequently by arrangement with the bank gave new

1861.

LAWSON et al. v. SALTER et al.

notes in the terms of their assignment at the rate of eight shillings and nine pence in the pound, the bank consenting to take the new notes in discharge of the old ones. The bank did not sign the defendants composition deed, but their cashier gave them a receipt for one hundred and twenty-two pounds ten shillings, being the composition as agreed upon between them.

The receipt is significant in its terms, and taken in connection with the evidence of the cashier extremely important in giving to their agreement the legal construction to which in my view of the case it is entitled. The receipt is thus concluded: "the notes being retained for the purpose of receiving a dividend from the estate of Messrs. *Allison & Co.*" Mr. *Hill*, the cashier, when, in his evidence, referring to this subject, says: "Mr. *Twining*, one of the defendants, said the bank was fully entitled to receive the whole amount of the notes, and with that consideration he left them with him (the cashier) for the purpose of recovering from *Allison & Co.* the difference from their assets." Subsequently *Allison & Co.* paid the bank ten shillings in the pound upon the whole face of the notes, when they were handed over to them. No notice was given to *Allison & Co.* of the payment by the defendants to the bank, nor of their agreement with the bank, neither were there any endorsements on the notes showing the amounts paid upon them, and it may be fairly presumed from the evidence that *Allison & Co.* were in ignorance of all that took place between the bank and the defendants subsequent to the time of their retiring the notes from the bank. The suit is defended at the instance of the bank. Whatever the law may be, under the facts of this case I cannot help thinking that the equities are strongly with *Allison & Co.*

The defendants contend that they are discharged by their agreement with the bank, and there is no doubt that if there was not anything here to take the

case out of the ordinary cases that occur where the holder of a bill compromises with the acceptor and discharges him, they would be so.

The facts and circumstances of each case vary the general principles contended for by the counsel for the defendants, and the cases cited by them at the argument were decided upon a state of facts differing materially from those under consideration. It is true that the bank and the defendants entered into an agreement by which the latter were to be discharged from future liability as the drawers of the notes, upon their paying eight shillings and nine pence in the pound, but no notice of this agreement was given to *Allison & Co.*, and the acts and conduct of the parties in the transaction would lead *Allison & Co.* naturally to believe that no such agreement existed. Unfortunately for the defendants, when they made their agreement with the bank, they included in it the right of the bank to retain the notes for the purpose of looking to *Allison & Co.* for the balance then due upon them. This they could not do without continuing their liability over to *Allison & Co.*, and any attempt to fix *Allison & Co.* by such an agreement, and discharge themselves, would be held fraudulent and void. It was their duty to take up their notes when they say they were discharged, if they did not intend to continue their liability to *Allison & Co.*

Every person is supposed to know the law and the legal effect of an agreement that he enters into, (*per Bayley*, J., in *Lewis* v. *Jones*, 4 B. & C., 512,) and, therefore, the defendants were bound to know that if by their acts they made *Allison & Co.* liable to the bank, they could not discharge themselves from liability to their own payees of the notes. The difficulties in which they are now involved might easily have been avoided, had they contented themselves by paying to the bank what the bank was prepared to receive, and then to have taken up their notes. In that matter the

1861.

LAWSON et al. v. SALTER et al.

transaction would have been properly closed. The mere circumstance of a bill or note not being given up will afford a presumption against a party who alleges he has paid it. *Brembridge* v. *Osborne*, 1 Stark. R., 374. The drawer and indorsers have a right to insist on the production of the bill, and to have it delivered up on payment by them. *Powell* v. *Roach*, (Sittings at *Westminster* before Lord *Ellenborough*, 1806,) 6 Esp., 76. *Chitty on Bills*, p. 425, says it is not prudent to pay the bill or note to a party who is not the holder, nor without his first producing or delivering up the instrument, for otherwise the party paying may be liable to pay over again to another party who may really be the holder.

Here *Allison & Co.* exercised the prudence recommended in the foregoing authorities. They first examined the notes in the bank, saw there were not any indorsements upon them, then compromised with the bank, paid the dividend agreed upon, and took up the notes. They were then in a situation, it appears to me, to claim from the defendants the amount of the notes. We must not forget that *Allison & Co.* acted throughout in ignorance of the agreement between the defendants and the bank, and if this was simply a case between two innocent parties, the rule has always been that the least innocent of the two must suffer. Here, in the application of this rule, it is clear that *Allison & Co.* are entitled to the benefit of it. Giving time or releasing by a creditor to his principal debtor will in general discharge the surety, and the rule is equally applicable to bills of exchange and promissory notes, but it must be done without any such condition as that entered into between the bank and the defendants in this case of allowing the bank to retain the notes for the purpose of looking to *Allison & Co.* for their amount. The acceptor of a bill of exchange is considered as the principal debtor, and all the other parties to the bill are considered as sureties. *Philpot* v. *Briant*, 4 Bing., 717, 720. The

maker of a promissory note, after the note is in circulation by indorsement, stands in the same situation as the acceptor of a bill. Here, then, the defendants may be considered the principal debtors, *Allison & Co.* sureties, and the bank the creditor. Now I will refer to some of the leading cases to shew that the agreement between the defendants and the bank does not come within the general principle contended for. In *Sohier* v. *Loring*, 6 Cush., 537, *Metcalf* J. said: "It is settled in *England* that a discharge or giving time by a creditor to his principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal debtor that the surety shall not be discharged, and this rule of law is applicable to parties to bills of exchange and promissory notes who are liable only on the failure of prior parties, though they are not technically sureties of these parties." 1 *Stephen's N. P.*, 936; *Montague on Composition*, 36; *Chitty on Bills* (10*th American ed.*), 420. The same doctrine was advanced by Messrs. *Hamilton* and *Ricker* in argument, and was recognized by the Supreme Court of *New York* in *Stewart* v. *Eden*, 2 *Caines'*, 121, very soon after it had been laid down by Lord *Eldon* in *ex parte Gifford*, 6 Ves., 805. In this last case Lord *Eldon* said that sureties would not be discharged by a discharge of the principal, if *there was any reserve* of a remedy against the surety, and that Lord *Thurlow* had so admitted in a previous case not reported. He afterwards laid down this principle more authoritatively in *Boultbee* v. *Stubbs*, 18 Vesey, 20, and *ex parte Carstairs*, 1 Buck, 560. In *ex parte Glendinning*, 1 Buck, 517, he said, if a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditors. In *Nichols* v. *Norris*, 3 B. & Ad., 41, the Court of *King's Bench* decided that a composition made with the indorser of the note

1861. LAWSON et al. v. SALTER et al.

given for his accommodation did not discharge the maker. It was said by the Court that such composition deeds were very common, and that the special proviso (a reservation of the remedy against the other parties) took the case out of the common rule as to the discharge of sureties by giving time to the principal. *Story on Promissory Notes*, sec. 423, *note*.

In the work last referred to (sec. 416) *Story* says: "The fact that there is a valid consideration passing between the maker and holder, as, for example, a collateral security given by the maker to the holder, will not affect the rights of the latter against the indorsers, unless accompanied with some stipulation to give time to the maker; for the holder is at full liberty to take any such security, and indeed it is for the benefit of the indorsers that he should do so." *Pring* v. *Clarkson*, 1 B. & C., 14; *Twopenny* v. *Young*, 3 B. & C., 208. It is also material to state that, as the ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers, upon a valid consideration, is held to be a discharge of the indorser, is solely this, that the holder thereby impliedly stipulates not to pursue the indorsers or to seek satisfaction from them in the intermediate period; it can, therefore, never apply to any case where a contrary stipulation exists between the parties. *Story on Bills*, sec. 425; *Philpot* v. *Briant*, 4 Bing., 717. Hence if the agreement for delay expressly saves and reserves the rights of the holder to the intermediate time against the indorsers, it will not discharge the latter, for the very ground of objection is removed, that it varies their rights and subjects them to the disadvantage of having their own rights postponed against the maker, if they should take up the note. 3 *B. & Ad.*, 41; 3 *B. & C.*, 208; 1 *B. & C.*, 14; 2 *B. & Ald.*, 210; *Story on Bills*, sec. 426; 2 *Starkie's Rep.*, 178; *Stewart* v. *Eden*, 2 Caines' R., 121; *Wood* v. *Jefferson County Bank*, 9 Cowen, 190; *Suckley* v. *Furse*, 15 Johns., R., 338.

I have extracted the whole of the section from *Story* with the authorities he refers to in support of his position, considering it peculiarly applicable to the case under consideration, and conclusive in favor of the right of the plaintiffs to recover in the action. The bank not only with the consent of the defendants, but with their advice and directions, reserved their rights against *Allison & Co.*, and retained the notes after their compromise with the defendants for the express purpose of enforcing those rights, and did subsequently receive from *Allison & Co.* a dividend upon the whole face of the notes, thus bringing the present case perfectly within the exception to the general rule that the indorsers of a promissory note are discharged by the holder releasing or giving time to the maker. It is very difficult to reconcile the acts of the defendants with their present disclaimer of being liable upon their notes. The receipt given to them by the bank is something more than an ordinary receipt for money, it embodies the terms upon which the compromise is made between those parties, it is not only a receipt for eight shillings and nine pence in the pound upon the amount of the notes, but it goes further, and, in express terms, states the notes are to be retained by the bank for the purpose of receiving a dividend upon them from the estate of *Allison & Co.* It is also difficult to reconcile Mr. *Hill's* evidence with the receipt which he signed as the agent of the bank. In his evidence he says the notes were left in the bank by the defendants of their own accord, that had they been required by the defendants they would have been delivered to them, and yet the receipt upon its face is directly opposed to this evidence. If the receipt is to be taken as conclusive upon the parties to it, and as containing the agreement upon which the compromise took place between them, then it is only a receipt for so much money on account of the notes, reserving the rights of the holders of the notes against their indorsers. This construction of the

1861.

LAWSON et al. v. SALTER et al.

receipt is in perfect consistency with the acts and conduct of the bank and the defendants, and would not have the effect of discharging the indorsers as it was manifestly for their benefit in having their liability diminished by the holders receiving a part payment from the drawers. But the argument of counsel for defendants is that, although their composition deed was not signed by the bank, still the bank was bound by it, and as it contained a release the defendants thereby became absolutely discharged from further liability upon the notes. Such, no doubt, would have been the case had the conduct of the defendants and the bank squared with the deed; but throughout the transaction their conduct was the reverse, tending in each particular to deceive and mislead *Allison & Co.* in the first place by allowing the notes to remain with the bank after the receipt of the dividend, and without having it indorsed as it should have been, and, secondly, by the bank, when *Allison & Co.* inquired of them if any indorsements were on the note, answering that enquiry with a full knowledge that eight shillings and nine pence in the pound had been received from the defendants, and that there were no indorsements upon them but their own. The previous conduct of the defendants in allowing the notes to remain with the bank, and in not seeing that they were indorsed with the amount they had paid upon them enabled the bank to pass upon *Allison & Co.* the deception which they did, and yet they now come before this Court as innocent parties asking for a favorable construction of the law in their favor.

It was admitted at the argument that the bank had not signed the composition deed of the defendants, and there is no evidence showing that they had ever seen it, or were fully aware of its covenants and conditions; and taking the evidence altogether I have arrived at the conclusion that the agreement between the defendants and the bank, if not independent of the deed, must be taken in connection with it in the same

manner as if the receipt given by the bank to the defendants had formed a separate clause in the deed, and in this manner we reconcile in a great measure the testimony in the cause, and we are enabled to arrive at a just and equitable conclusion, which may be sustained by the principles of law and the authorities to be found in the books in support of them. If this were a question between the bank and the defendants, the former attempting to recover from the latter the difference between eight shillings and ninepence in the pound and the full amount of the notes, the argument that such an attempt would be a fraud upon the general creditors of the defendants that had signed their composition deed, might probably be well sustained; but, in my opinion, that case has no analogy with the present action; and in this case if the defendants are liable and have to pay the plaintiffs' demand, as this suit is defended at the instance of the bank, there is not anything to prevent their recovering over from the bank the amount of the plaintiffs' judgment, leaving the composition deed entered into by the general creditors to be carried out with undiminished funds. In a note to *Lewis* v. *Jones*, 4 B. & C., 516, it is said that there is a class of cases in which it has been held that a person joining other creditors in compounding with a debtor, or signing a bankrupt's certificate, cannot lawfully stipulate for any benefit to himself beyond that which the other creditors receive, whether that benefit be given by the debtor himself, or any third person for his relief, but that all those decisions related to new securities given as a consideration for signing the composition-deed or certificate, and proceed on the ground that the advantage gained by the particular creditor was a fraud upon the others, but that they do not appear applicable to securities existing before the negotiation for a composition; and reference is made to *Thomas* v. *Courtnay*, 1 B. & Ald., 1, in support of this position.

1861.

LAWSON et al. v. SALTER et al.

There is no evidence here that the creditors of the defendants knew anything of the agreement between the bank and the defendants, and there is not anything in the deed of composition that would give them that information, neither is there any evidence to show that the creditors were induced to sign the deed from any representations that the bank was to be bound by it, and therefore the agreement between the bank and the defendants, as I read it, is no more a fraud upon the creditors than if the bank had declined entering into any agreement with the defendants, but held them liable for the whole amount of the notes. There was not anything that could compel the bank to become parties to the deed, or they might become parties to it upon any conditions or stipulations which they and the defendants agreed upon, provided they acted in good faith, and did not make use of their agreement to deceive and mislead the general creditors. Here, then, we have an agreement according to the evidence that the bank consented to take from the defendants eight shillings and nine pence in the pound, the same sum that the other creditors had consented to take under the composition deed, and in addition to which, according to the receipt given by the cashier of the bank with whom the agreement was made, the bank was to retain the notes for the purpose of looking to *Allison & Co.* for the difference between the eight shillings and nine pence and the full amount of the notes, and this not only with the consent of the defendants but at their particular request, they saying at the time that *Allison & Co.* were liable for the difference. I admit that the cashier of the bank says that had the defendants requested that the notes should be given up he would have complied with the request, considering that under the agreement they were entitled to them; but looking to the whole evidence I cannot but come to the conclusion that the cashier was mistaken upon this point, rather trusting to the receipt which he at the time

gave, as expressing the correct intention of the parties, than to his memory after a period of a year or two.

In my view of the case, as I have already intimated, I think the deed and the receipt should be taken together, that is, that the receipt may be considered as engrafted upon the deed, and forming part of it, for all the purposes of carrying out the true agreement between the parties to it, and without any fraud being committed upon the general creditors; and then we have the case of a party entering into a composition deed and still reserving his rights against sureties, as in some of the cases I have already referred to, and in the later case of *Kearsley* v. *Cole*, 16 M. & W., 128. In that case the plaintiff, a shareholder in a banking company, became a surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition deed, to which the plaintiff and the banking company were parties, whereby he assigned his property to trustees for the benefit of his creditors; and this deed contained a stipulation for a reserve of remedies against sureties for the defendant. The plaintiff having been compelled to pay the debt to the banking company, it was held that he was entitled to recover back the amount, in an action for money paid, from the defendant. In that case, *Parke* B. says: "It appears that the plaintiff and defendant both executed the deed, and the plaintiff solicited different creditors to become parties to it; consequently it must be assumed that he consented to the reserve of remedies; and the question is, what is the effect of a discharge with the reserve of remedies *consented to by the surety?*" "We do not mean," he continues, "to intimate any doubt as to the effect of a reserve of remedies *without such consent*, and the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with, or giving time to a debtor by a binding instrument; and the reserve of remedies has that effect upon this principle: first, that it rebuts the

1861. LAWSON et al. v. SALTER et al.

implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety, is, impliedly, a consent that the surety shall have recourse against him. This is the effect of what Lord *Eldon* says in *ex parte Gifford* and *Boultbee* v. *Stubbs*, as to the reserve of remedies; and the general proposition, that, with that recourse, the composition, or giving time, does not discharge the surety, is supported by those and the following cases: *ex parte Glendinning*, 1 Buck, 517; *Nichols* v. *Norris*, 3 B. & Ad., 41; *Smith* v. *Winter*, 4 M. & W., 454, and others."

I might here be content without referring to another case, conceiving as I do that the case under consideration is governed by *Kearsley* v. *Cole*, in both cases there being a reserve of remedies under the composition against the surety. But the case of *Mallet* v. *Thompson*, 5 Esp., 178, not cited at the argument, is so illustrative of the principle I am contending for, that I am induced to refer to it. It was an action by the plaintiff as indorsee of *Twigg*, who was the payee of a promissory note made by the defendant payable to *Twigg's* order. *Erskine*, for the defendant, stated his defence to be: that *Thompson*, the defendant, had only lent his name to accommodate *Twigg* by drawing the note in favor of *Twigg* without any consideration whatever from him, but merely to accommodate him, that it was known to the plaintiff at the time that the fact was so, and he took the note with full knowledge that the defendant had no value for it; that when it became due, *Twigg* had become insolvent, and assigned his effects by deed to trustees for the benefit of his creditors; that the plaintiff

executed the deed of assignment of *Twigg's* effects. The deed contained a covenant whereby the plaintiff covenanted, in consideration of a composition on his debt, not to sue or otherwise molest *Twigg* on account of the debt for ninety-nine years, and that he afterwards received a dividend on *Twigg's* estate. Notwithstanding this, and after receiving the composition from *Twigg*, the plaintiff brought the action against *Thompson* as maker of the note. *Erskine* contended that to allow the plaintiff to support the present action would be to allow him to defeat his own covenant, by his own act; for if the plaintiff was allowed to recover against *Thompson*, *Thompson* would have a right of action over against *Twigg* after he had paid the money, the note having been made on *Twigg's* account; the consequence would, therefore, be that *Twigg* would be molested for the debt contrary to the plaintiff's covenant with him. Lord *Ellenborough*, in this case, said: "*Twigg* may be molested, but not by the plaintiff. Taking the statement as made by the defendant's counsel to be proved, the deed stands unbroken, for the plaintiff, (as he covenanted,) does not sue or molest *Twigg*, which is all that he has covenanted to do. It is true that the plaintiff recovering on the defendant in this case, he may have his action over against *Twigg*, but it will be for money paid to his use at the defendant's suit. The payment creates a new debt, but the old debt is satisfied as between *Twigg* and the plaintiff. A deed cannot be carried farther than the plain import of it between the parties." So the plaintiff had a verdict. In that case it must be remembered that *Twigg* was the principal debtor, and the defendant the surety, reversing the general rule that the maker of a note is the principal, because there it was an accommodation note given without value within the knowledge of the plaintiff at the time the note was made; and yet upon giving time to the principal by the composition deed, it was still held that the plaintiff could maintain his action against *Thompson*, the surety, and that *Thompson*,

1861.

LAWSON et al. v. SALTER et al.

1861.

LAWSON et al. v. SALTER et al.

notwithstanding the covenant in the deed by which the plaintiff had undertaken not to sue or molest *Twigg* for ninety-nine years, might still have his action against him for money paid to his use.

I have given to this case the best consideration I could, and very much regret I cannot arrive at the same conclusion at which the majority of the Court have arrived. In my opinion, the plaintiffs are entitled to retain the judgment, and for eight shillings and nine-pence in the pound upon the whole amount of the notes. More than that they cannot recover, *Allison & Co.* having signed the defendants' deed of composition by which they agreed to take that sum.

IN THE

1863.

SUPREME COURT OF NOVA SCOTIA,

TRINITY TERM,

XXVII. VICTORIA.

IN RE ESTATE OF JOHN SIMPSON.

July 21.

[The following dissentient opinion of BLISS J. in this case, handed to the Reporter by his Lordship since the publication of the first part of this volume, may conveniently be inserted here:]

BLISS J., after stating the facts of the case, said:— It is clear, nor was this disputed at the argument, that under the will of his father *James Simpson*, *John Simpson*, his son, took an estate in tail male in the property in question, the only question being whether the statute (*Revised Statutes*, chap. 112,) applied to this estate tail, which was created so long before the statute was passed, and what effect, under the language of the statute, the remainder which was limited over on the estate tail would have on its operation in this case.

With respect to the estate tail, though it existed prior to the passing of the statute, coming within its operation, I have not from the first entertained any doubt. The general rule certainly is, that any statute must be taken to be prospective in its operation, unless it is clearly expressed, or can as clearly be

1863.

In Re Estate of Simpson.

gathered from it, that it was intended to have a wider range and not merely a future application.

This statute, it appears to me, most clearly intended to abolish not only such estates tail as should be thereafter created, but those also which then actually existed.

1. In the first place the language of the Act itself shows this. There is no expression to restrict its meaning, nor anything to give it a future application, as referring to what was afterwards to take place; but the words are as general and comprehensive as words can be, and of a present and immediate signification: "All estates tail *are* abolished," and when the future tense is employed, as it is immediately after, "and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple," it is because now it refers to that which must necessarily be future, *i. e.*, the adjudication thereon. And this change of tense is not without much signification in seeking for the meaning of the legislature from the language it has employed. Indeed, it would be impossible, I think, to exclude existing estates tail from the operation of the statute, without a manifest violation of the plain import of the words, and their necessary and grammatical construction.

2. In the next place, the statute, in putting an end to estates tail, superseded altogether the old methods of barring such estates. In addition to the original mode of effecting this purpose by fine and recovery, we had another course provided by the Statute of 55 *George* 3 (1815), but this Act being no longer necessary was, simultaneously with the Act abolishing estates tail, repealed by the repealing Act of the *Revised Statutes*. So that if the Act (*R. S.*, chap. 112,) did not equally apply to estates tail then existing, the tenants under such would be placed in a much worse position than they were before, inasmuch as they would no longer have this easier statutable method of barring the entail which had now been repealed. So that this

statute, (*R. S.*, chap. 112,) which was obviously intended for the general benefit of tenants in tail, would, in effect, become more prejudicial to them than those then in existence; an inconsistency which we cannot for a moment attribute to the legislature, and which will be avoided by construing the Act, as I think the words only can be construed, to include the then existing estates tail.

3. In the last place, too, I would remark that the objection to giving statutes their retrospective effect does not apply to the present statute. It is a highly beneficial one to tenants in tail, relieving them of the burthensome and somewhat dilatory process, by which the estate tail could have been at any time converted into an estate in fee, doing the same thing for the tenant in tail by this simple, statutable declaration, which he could before have done for himself. Why should not such a remedial and beneficial measure receive the largest construction, and be applicable to then existing tenants in tail also? The Statute of 55 *George* 3, which I have already mentioned, was equally retrospective in its operation, and enabled all then existing tenants in tail to bar their entail by the method then given; and any other process still more simple, which the legislature might have devised, would scarcely have been considered objectionable on the ground of its retrospective effect.

Now this statute (*R. S.*, chap. 112,) may be considered more as an enactment of this kind, converting the estate tail into a fee for the tenant without any process on his part to effect it. I think, therefore, that when the legislature used the words *de præsenti*, "all estates tail *are* abolished," they meant to include the existing as well as future estates tail.

The only real difficulty is as to the construction of the Act itself. It declares that "all estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple." The object and effect of this are plain

1863.

In Re Estate of Simpson.

enough, for they are clearly expressed, and if nothing more had been intended it should have stopped here; but the Act goes on to say: "and if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." There is here evidently something more intended than had been provided for by the first part of the clause. The fee tail was to become a fee simple, and, if no valid remainder were limited thereon, it was to be a fee simple absolute. By a "valid remainder," I can only understand what the words plainly import — a good and legal remainder; and when the Act said it should be a fee simple absolute if there were no valid, *i. e.*, good and legal remainder limited thereon, it was equivalent to saying that it should only be a fee simple absolute in such case; or, in other words, if there were such a remainder limited on the estate tail it should not be a fee simple absolute. If then it was to be adjudged a fee simple, but not a fee simple absolute, when there was such a remainder, it follows, I think, inevitably and of necessity, that in such a case it must be a fee simple conditional, for it could be nothing else. And this is just what such an estate was held to be at Common Law before the Statute *de donis conditionalibus;* for estates tail, so called, owe their origin altogether to that statute; and what was a fee simple conditional before that, now became by it a fee tail. So that if fee tails were abolished, they would naturally become fee simple conditional estates, and if not fee simple absolute they must be conditional. The condition on which they held was that the tenant should have heirs of his body. If he died without heirs, then the estate reverted to the donor. It was, however, very early settled by what has certainly been considered a subtle construction, that if the condition was once fulfilled by the tenant having such issue, then the fee which depended on it being discharged of its condition

became thereby changed from a conditional to an absolute fee simple, at least for certain purposes, that of the right to alienate being one, though if he did not exercise this right, but died still seised of the land, it would revert on failure of heirs to the donor as before.

And this is the nature and character of the estate which our statute, when it abolished estates tail, has, I conceive, by the language it has used, substituted for such estates tail where there was a valid remainder limited thereon. It is true, that, properly and legally speaking, a remainder cannot be limited on a fee; and that holds equally with respect to a fee simple conditional, as to a fee simple absolute. But the remainder which the statute here speaks of is one that was limited on the estate while it was an estate tail; and, when the statute converted that into an estate in fee, it must have intended to leave the remainder, which was limited on it and its rights, untouched, and just as they had existed while the fee tail continued; and, therefore, it is, that it has made such a clearly marked distinction in the conversion of estates tail where there was, and where there was not, a remainder.

The whole effect and meaning of the Act will then, in my view of it, amount to this: Every estate tail is abolished and converted into an estate in fee simple, and if no valid, *i. e.*, good and legal remainder be limited on the estate tail, it will then be a fee simple absolute; but if there be such a remainder, it shall be a fee simple conditional, subject, as it was before, to the effect and operation of such remainder. This appears to me to be the only sensible meaning which the statute will bear, viewed in all its integrity, and giving force and effect to every clause and expression in it, as the true sound rule of construction requires.

Let us then see what the effect of this construction will be.

If there be no remainder limited on the estate tail, it becomes at once a fee simple absolute by the terms

1863.

In Re Estate of Simpson.

of the statute; the statutable conversion is complete, for, there being no remainder and no rights to protect, (those of the reversion being wholly disregarded by the statute in both contingencies,) there is no reason why it should not immediately become a fee simple in the largest sense of the word.

But if there be a remainder, then the estate becomes a fee simple conditional, and if the first taker have no issue then the condition fails, and it will still go *per formam doni* to the remainder-man, as it would have gone if the estate had continued to be an estate tail. On the other hand, if the tenant have issue, then the condition on which the estate was given being fulfilled, he may at once alienate and purchase back the land to himself absolutely; but, if he fail to do this, it will then descend, as the donor has declared it should, to the heirs of the donee, and will continue to be so held by them until alienation, and, if not alienated before the ultimate failure of the particular heirs, the remainder will take effect.

It is true that the first taker after issue born, or any other tenant who succeeds him in the estate, may, at any time, destroy the remainder by simple alienation; but so it could have been done, if the estate had remained an estate tail, either by a common recovery, or by the means provided by the *Fairbanks* Act, (55 *George* 3, chap. 14,) before its repeal. The present Act has only in this case rendered those more expensive steps unnecessary, giving to the holder of the estate the means of doing the same thing, if he so wishes it, by his own simple act, that of alienation by deed, and of thus putting an end to the succession both of the heirs and remainder-man. Nor do I know that a more reasonable or better course could be well adopted, than would result from the statute according to what I think its proper and legitimate construction.

This Act of ours is borrowed verbatim, as far as it goes, from the *Revised Statutes* of the State of *New*

York, but the section which is borrowed from it is there followed immediately by this other: "Where a remainder in fee shall be limited upon any estate which would be adjudged a fee tail according to the law of the State as it previously existed, such remainder shall be valid as a contingent limitation on a fee, and shall vest in possession on the death of the first taker without issue living at the time of such death."

If I understand this clause, it means that notwithstanding the estate tail has been converted into a fee, if the first taker has no issue living at the time of his death, so that the tenancy in tail, if it had been left undisturbed by the statute, would have run out of itself and expired, and so let in the remainder, the remainder shall still take effect as it would have done if the statute had not passed. This does, in effect, convert the estate tail into an estate in fee simple conditional, so as to let in the remainder upon failure of issue of the first tenant in tail. But whether it is considered to be limited by this clause to the case of the *first* taker dying without issue, as it seems to me to be, I am unable to say. We, however, either through accident or design have not borrowed this second section of their Act, and the construction of our own must be made without any reference to it, and ours, as I have already said, appears to me to let in the remainder at any time until barred by alienation by the holder of the estate.

Now, to apply the statute, as I have thus interpreted it, to the case before us: Here there was an estate tail devised to *John Simpson*, with remainder, on failure of such issue, to the daughters; and, on failure of such issue again, to the next entitled to the said estate. There is, then, a good and legal, and, therefore, a valid remainder. *John Simpson*, the devisee, the first tenant in tail, became, by force of the Statute, (*R. S.*, chap. 112) the tenant in fee simple conditional, and having had issue could

1861.

In Re Estate of SIMPSON.

immediately after have alienated the estate, and by taking it back have become tenant in fee simple absolute. But, not having done so, the estate under the fee conditional descended in due course to his eldest son, the heir in tail, *John Simpson*, the present claimant. The other children of *John Simpson* deceased, the first taker, who would have been co-heirs with the eldest son if the estate tail had been converted into a fee simple absolute,—as it now is have no right or share therein. It follows, according to this view of the case, that the order or decree of the learned Judge of Probate in favor of those children cannot be supported, and the appellant, *John Simpson*, is, therefore, in my opinion, entitled to our judgment.

The majority of the Court, however, take, I believe, a different view; and, as I understand, consider the latter part of the statute as repugnant to that which went before, and, therefore, reject it as inoperative and void. I have not felt myself at liberty so to regard it, but conceiving, as I have endeavored to explain, that the last part of the statute may receive an apt and reasonable meaning, quite consistent with the whole object of the statute, and in no respect repugnant to the former part of it, I have thought myself bound to expound it in this way, so that effect may thus be given to every part and expression of it.

IN THE

SUPREME COURT OF NOVA SCOTIA, 1865.

IN EQUITY.

TRINITY VACATION,

XXIX. VICTORIA.

FOSTER *versus* FOWLER, ET AL.

Sept. 11.

A Court of Equity will not, in favor of a judgment creditor who has obtained an assignment under the Insolvent Debtors' Act of a father's property, treat as fraudulent and void under the Imperial Acts of 13 *Eliz.*, ch. 5, and 27 *Eliz.*, ch. 4, deeds made by the father to his son of all his property, where such deeds were made in consideration of valuable past services, and bound the son to the payment of certain sums to the father's other children and his grand-children, and the jury found that the deeds were not executed with intent to defraud the creditor; although at the time the deeds were made the judgment creditor had obtained a verdict against the father, which verdict, however, the father believed, and was advised by counsel, would not be sustained, and did not in fact ripen into a judgment until a year after the execution of the deeds.

Conveyances made under such circumstances are not mere voluntary conveyances within the meaning of the Acts referred to.

A voluntary conveyance by one not indebted at the time, not in embarrassed circumstances, and not made with a fraudulent intent, cannot be impeached in Equity by a subsequent creditor.

The existence of a single debt will not *per se* invalidate even a voluntary conveyance, at the instance of a prior, or of a subsequent creditor.

This was an action on the Equity side of the Court combining the ordinary count in ejectment, with other counts setting out certain alleged facts under which it was claimed that certain deeds made by one of the defendants, *Gilbert Fowler*, to the other defendant, *Wallace G. Fowler*, should be set aside as fraudulent, and that both defendants should be ordered to pay the amount of the judgment held by the plaintiff against the defendant, *Gilbert Fowler*, &c.

At the trial before *DesBarres* J., at *Annapolis*, in *June*, 1864, the jury rendered a verdict for the defendants, in which they found that the deeds were made in good faith, and for a valuable consideration, and not for the purpose of defrauding the plaintiff.

1865.

FOSTER v. FOWLER et al.

A rule *nisi* for a new trial was taken out under the Statute, and the cause was heard before the *Judge in Equity*, and *Bliss* and *Wilkins* J.J. as associate Judges, in *March* last, *McCully* Q. C. arguing on behalf of the plaintiff, and *Ritchie* Q. C. and *S. L. Morse*, for the defendants.

The pleadings and the facts are sufficiently set out in the judgments.

WILKINS J. now delivered the judgment of the Court.

This cause was argued before the *Judge in Equity*, having associated with him *Mr. Justice Bliss* and *Mr. Justice Wilkins*. The action was commenced at *Annapolis*, on the 11th *August*, 1862, by a writ of summons, the first count of which demanded, in the ordinary form of ejectment, possession of the real estate hereinafter described. The second count stated, in substance, a judgment obtained, on the 12th *January*, 1861, by the plaintiff against the defendant, *Gilbert Fowler*, for $472.37, debt and costs, of which a certificate was registered, at *Annapolis*, on the 24th *January* of that year. The plaintiff further alleged that the cause which resulted in that judgment was tried, a second time, in *June*, 1859, when a second verdict was given for the plaintiff, and that that verdict was sustained by the Supreme Court at *Halifax;* that, in the interval between the delivery of the verdict and the entering of the judgment, the defendant, *Gilbert Fowler*, executed to the other defendant, *Wallace G. Fowler*, his son, certain deeds whereby there was conveyed all *Gilbert Fowler's* farm and real estate and also his personal property. The deeds show that the subject of their operation was the homestead farm and personalty, which would appear to comprise *all* the stock, farming utensils, and household property of *Gilbert Fowler*. The deed, transferring these, was recorded at *Annapolis* on the 28th *June*, 1864. There was also executed an

assignment to the son by the father of a certain mortgage.

The second count further stated the arrest of *Gilbert Fowler*, under an execution issued on the 23rd *January*, 1861, on the above judgment, and his final discharge, under the Insolvent Acts, by a Court of Appeal, who, at the expiration of nine months, for which period he had been remanded for fraud in respect of the transfer of his property, made an order for his discharge on his making an assignment to the plaintiff of all his interest in the real estate and personal property described in the deeds. It is further set forth in the second count that *Gilbert Fowler*, in compliance with that order, executed such assignment, which bears date the 4th *January*, 1862. After recitals, the plaintiff alleged "that the deeds were made fraudulently pending the determination of the suit between him and *Gilbert Fowler*, to put the property of the latter beyond the reach of any judgment that the former might obtain against him, and that these two defendants in executing the deeds fraudulently conspired to deprive the plaintiff of his rights." He concluded by praying an account of the amount due on his judgment, and a decree that in respect thereof the property conveyed should be taken to be held in trust by *Wallace Fowler*, for payment of the judgment, that the two defendants might be ordered to pay the same, and that, in default thereof, the property assigned should be directed to be sold for payment of it with interest and costs; or, in the event of a trust not being found to exist, that the estate, real and personal, conveyed, should be held to be still the property of the defendant, *Gilbert Fowler*, and that, as liable to respond the judgment, it should be decreed to be sold.

The defendants' pleas, in substance, maintain the good faith of the transactions involved in the deeds, insisting on their legal operation according to what appears on the faces of them. Defendants, moreover,

1865.

FOSTER v. FOWLER et al.

set forth that, at the time of the execution of the conveyances, they were advised, and believed, that the verdict above referred to (which was in an action for a *tort*) would be set aside; and, further, that *Gilbert Fowler*, being advanced in years, in pursuance of a design long before entertained, executed the deeds for the purpose of carrying out an agreement previously entered into between his son, the other defendant, and himself, viz., as to the real estate that it should compensate *Wallace Fowler* for his labours on, and improvements of, the farm, and as to the personalty transferred, that it should be made available to pay the sums in respect of which trusts were declared, and covenants made, as thereinafter explained. The deeds may be shortly stated thus, viz.: first, an assignment by *Gilbert Fowler* to *Wallace Fowler*, dated the 21st *November*, 1859, of a mortgage executed to the former by one *Calvin Phinney*, on which a balance (to what amount does not appear, though it was certainly small,) was due at the time of the assignment; secondly, a deed bearing even date with that assignment. The parties to this last, who are named in the body of the deed, are *Gilbert Fowler*, of the first part, *Wallace G. Fowler*, (one of these defendants,) of the second part, *Eliza J. Longley* (wife of *Charles Longley*), *Nancy Chesley* (wife of *George E. Chesley*), daughters of the said *Gilbert Fowler*, and *William R. Gibbon*, *George G. Gibbon*, and *Ella Gibbon*, sons and daughter of *William H. Gibbon*, and grand children of the said *Gilbert Fowler*, of the third part. The deed, however, is actually executed by *Gilbert Fowler* and *Wallace G. Fowler* alone. After reciting the desire of *Gilbert Fowler* to convey his real and personal estate to his son above named, ("who had," it was said, "for a number of years before and since attaining his majority, assiduously aided and largely contributed in acquiring the farm and personal property thereinafter conveyed,") by such conveyance and under such charges by way of provision for his other

children and grand children, parties thereto, as might be just and equitable, — the said *Gilbert Fowler*, "in consideration of the services of the said *Wallace G. Fowler*, and in consideration of the several sums charged upon the lands thereinafter described, and the covenants thereinafter contained, on behalf of the said *Wallace G. Fowler*, his heirs, &c., to be performed to and with the said parties of the third part, severally and respectively, and their several and respective heirs, &c., and also for the further consideration of the sum of five shillings to the said *Gilbert Fowler* by the said *Wallace G. Fowler* paid," conveys to the said *Wallace G. Fowler*, his heirs and assigns, the homestead farm, (particularly described,) with a proviso that the same was subject to payment of the following sums to be paid by the said *Wallace G. Fowler;* and the said real estate is made chargeable with the payment thereof, viz., £50 to *E. J. Longley*, £75 to *Nancy Chesley*, £25 to *William R. Gibbon*, £25 to *George G. Gibbon*, £25 to *Ella Gibbon*, which sums respectively are to be paid as thereinafter covenanted. The indenture then proceeds to state that the said *Gilbert Fowler*, "for the consideration of the said services, charges, and covenants," conveys to the said *Wallace G. Fowler*, his executors, &c., "the two yoke of oxen, four cows, eight young cattle, the brood mare, and twenty-two sheep; and, also, all the hay, grain, and corn in the barn and buildings on the premises; also the farming utensils on the farm and premises, and the household furniture and implements in the house and about the premises thereby conveyed, and all other goods and chattels contained in the schedule thereunto annexed in and about the same." Then follows a covenant for good title by the said *Gilbert Fowler*. This is followed by a covenant of *Wallace G. Fowler*, his heirs, &c., with each of the parties to the deed, of the third part, and with his or her heirs, &c., for payment of the several charges above mentioned at the following times and manner,

1865.

FOSTER v. FOWLER et al.

that is to say, to *E. J. Longley*, one half in one year, and the residue in two years after the death of *Gilbert Fowler;* to *Nancy Chesley*, in the proportions and at the periods last mentioned; to *William R. Gibbon*, to *George G. Gibbon*, and to *Ella Gibbon*, when they shall, respectively, attain the age of twenty-one years.

It is thus, in effect, conceded by the pleadings that, *at the time of the execution of the conveyances in question*, the plaintiff was not actually a creditor of the defendant, *Gilbert Fowler*, and it is not alleged that that defendant was then indebted or likely to be indebted to any other person. The deeds are sought to be invalidated by this plaintiff on two grounds: first, that they are void as respects the real estate conveyed under the Statute 27 *Eliz.*, chap. 4, as against him, being, as he contends, a "subsequent *purchaser*," within the meaning of that statute; secondly, that they are void under the Statute 13 *Eliz.*, chap. 5, in respect of the lands and personalty, against this plaintiff, as a "subsequent *creditor*," within the meaning of the last mentioned statute. Very different considerations will, of course, govern the subject of our inquiry according as the plaintiff is viewed in the one, or in the other of these characters. As, however, we do not consider the deeds in question, under all the circumstances in which this case is now presented to us, as mere voluntary conveyances, it becomes unnecessary for us to decide whether this plaintiff, whose only title to the lands in question is founded on a deed which was neither the result of a contract, nor embodied a contract of bargain and sale between him and the defendant *Gilbert Fowler*, but which was the result of a compulsory order under a statute, and made by the exigency of law, must necessarily be regarded as "a subsequent *purchaser*" within the intent of the 27th of *Elizabeth*. The operation of that statute is, confessedly, harsh, and has been deplored by great *English* lawyers, whilst the Supreme Court of the *United States*, and that of the State of *Massachusetts*, have

repudiated the *English* decisions, and adopted a different principle. (See *Story's Eq. Jur.*, sec. 427, *et seq.*; also, sec. 1503 *b.*; also, sec. 426, *note.*) Nothing less, therefore, than the obligation of an express *English* authority running on all fours with the particular case before us would, under any circumstances, be deemed sufficient to make us regard this plaintiff as "a subsequent purchaser" under the 27th of *Elizabeth*, in respect of the coerced assignment made by the defendant *Gilbert Fowler*, viewed in connection with the deeds which the plaintiff now seeks to impeach as fraudulent and void. An important question, however, remains, viz., "How are these deeds affected by the operation of the 13th *Elizabeth?*" In ordinary cases the office of an Equity Judge, when invoked by a creditor to carry out that statute, is exercised in weighing all the circumstances which surround the deed sought to be invalidated, or are connected with it, and in inferring fraud, or good faith, as the result of his inquiries. The statute only operates where there appears "*the end, purpose or intent to delay, hinder, or defraud creditors,*" and the fact of indebtedness of the settlor, to a greater or less extent, is treated like any other fact, as a means of proving that the case comes within the provisions of the statute. Where the settlor is insolvent, or in embarrassed or failing circumstances, consciously, at the time of the execution of the voluntary deed in question, the inference of the fraudulent intent will be raised almost of course; and, perhaps, as an inference of *law*. Such is the settled doctrine of cases, ancient and modern. (See *Richardson* v. *Smallwood*, Jac. 556; *Townshend* v. *Westacott*, 2 Beavan, 343; *Scarf* v. *Soulby*, 1 H. & T., 428, and the preceding cases therein noticed; *Reade* v. *Livingston*, 3 Johns., Ch. R., 481; *Sexton* v. *Wheaton*, 8 Wh., 229, and the cases which it reviews; see also *Gale* v. *Williamson*, 8 M. & W., 405; *Caldwell* v. *Kinsman*, James' Rep., 398.)

In order, however, to rebut the presumption of

1865.

FOSTER v. FOWLER et al.

fraud, it is, to use the language of *Rolfe* B., in *Gale* v. *Williamson*, (8 M. & W., 411,) "competent to the party against whom fraud is sought to be established, to give in evidence the circumstances of the transaction, in order, if he can, to take it out of the operation of the statute." The following distinction, stated by the *Master of the Rolls* in *Richardson* v. *Smallwood*, (Jacob's Rep., 557,) is important: "No doubt," that learned judge said, "if the party be not indebted at the time, the *onus* of proving the fraud is thrown on the other side, for he may fairly intend to give away his property, but still it *may* be fraudulent as contemplating future debts." In such a case, therefore, the *onus* of proving not merely legal fraud, but fraud in fact, would be on him who would invalidate the deed. Sir *Thomas Plumer* remarked, in the same case, (*Ibid*, p. 556,) "I do not recollect any instance of validity being given to a settlement where the party was largely indebted at the time, and subsequent creditors have applied for relief. All the cases say that the deed will stand if the party be not indebted, and if it be not fraudulent."

In ordinary cases, as has been remarked, the Judge is bound to institute the inquiries referred to in the light of these settled rules of equity law; in this case, however, he is relieved from that necessity, for they have been made by a jury, and we have the result of them reported by the learned judge who conducted the trial of the issues. The substantial issue raised was, "whether the deeds in question were executed with intent to delay, hinder, or defraud this plaintiff, who, at the time of the trial, was a creditor of *Gilbert Fowler?*" That issue was thus submitted by the learned judge. He said, "if they (the jury) thought there was any collusion between old *Fowler* and his son, and that no agreement had ever been made between them, and there was in fact no debt due by him to his son, and he had executed the deed with the view of divesting himself of his property, and

thereby to preclude the plaintiff from recovering any damages and costs that might be awarded against him in the pending suit, and in that way to defraud the plaintiff of his legal remedy against him, they would find a verdict for the plaintiff; but if, on the other hand, they thought the conveyance had been made in good faith and in fulfilment of the agreement testified to have been made between the father and the son, and as a compensation for the services of the son, they would find a verdict for the defendants." The verdict is, "We find that *Gilbert Fowler* had a right to convey, and did convey, his homestead farm to his son, *Wallace G. Fowler*, in good faith and in fulfilment of the agreement made between the father and the son, and as a remuneration for the services of the son, and all the personal property. We also find that the assignment of the *Calvin Phinney* mortgage by *Gilbert Fowler* to *Wallace G. Fowler* was made in good faith, and not for the purpose of defrauding the plaintiff of his debt and costs." Now, if we turn our attention to the facts of this case, as reported, on which the defendants rested their answer to the plaintiff's writ, and which the verdict of the jury has established, and view these in the light of equitable principles, we are precluded from considering that the deeds in question are within the operation of the Statute of 13 *Eliz.*

The case presents the following facts, which were in proof at the trial, and which we must regard as now incontrovertible, because adopted as true by the jury:—*Gilbert Fowler*, advanced in years, not indebted to any body, contemplating indeed the possibility of his becoming the judgment debtor of this plaintiff, but advised by his counsel that he was not likely to become such, and, himself persuaded that he would not stand in that relation,—unequal to the further management of his farm, and therefore determined to relinquish it,—urged by his son to perform an agreement which, many years before, the father had

1865.

FOSTER v. FOWLER et al.

made with him to give him, by way of compensation, a title to his estate on which, for upwards of twenty-five years, the son had worked laboriously and greatly to the improvement of it,—not intending, to use his own expression, "to cheat any body," executed these conveyances in good faith, and having at an anterior period, when he could not have contemplated his present indebtedness, applied to his solicitor to prepare these very conveyances in effectuation of the previous agreement with his son. And, here, adverting to the able and learned decree of the late *Master of the Rolls*, in *Caldwell* v. *Kinsman*, to which our attention was very properly directed at the argument, which judgment is suggestive in many respects to the case before us, we are forcibly struck by the consideration, that that very hypothetical case put by the learned Judge, as not existing, but which, if it had existed, would, in his opinion, have established the *bona fides* of the conveyances in question before him, has actually been found by the jury to mark the case now under our consideration. These are the words of the learned Judge: "If, instead of the case actually before me, *Nathaniel Kinsman* had shown that the original understanding between himself and his father was, that the farm should, on his death, descend to him (*Nathaniel Kinsman*); that, seeing a probability that he would be prevented from being thus remunerated for his labor, he had called on his father to pay or secure to him a reasonable compensation therefor, by a deed or mortgage of his farm; and this had been complied with by the father; or, if *Nathaniel Kinsman* had, as he alleges, remained with him under the express agreement stated in his answer, and to secure himself against the proceedings of other creditors, (all being done in good faith,) secured himself in like manner, this Court could have afforded no relief to the complainants." Examining the deeds, we find, indeed, seemingly, *all* the property real and personal transferred to the son; and whilst we consider, on the

one hand, that such *universality of transfer* is often justly viewed as a badge of fraud, so, on the other, reflecting that the son's services (to say nothing of his disbursements) extended over a period of twenty-five years, that the value of the whole property conveyed does not much, if at all, exceed £800 or £900, that the son's covenants bind him to pay to the children and grand-children £200, and that he, doubtless, recognizes a moral obligation (to say nothing of a legal one) to support his parent during life, we can easily understand why the jury did not infer fraud from *that* circumstance in the case before us.

We can the more easily enter into the minds of the jury when they negatived fraud in respect of the transfer by *Gilbert Fowler* to his son of all his stock, and farming implements, &c., if we consider that these last, no longer required by the former, were indispensable to the latter, to enable him to cultivate the farm, the management of which the father was obliged to relinquish, but to the successful management of which he looked as a part of the means provided for enabling the son to pay the charges imposed on the real estate in favor of the children and grand-children. If it were necessary to inquire into the question of moral fraud as regards *Wallace*, we should perceive that there is no ground for imputing it. Of course he had a right to obtain security for the debt that his father owed him, and as the father made it a condition of giving it, that the son should take the property subject to the charges, the son, obviously, had the alternative of consenting to the condition, or of not obtaining the security. (See *Heap* v. *Tonge*, 7 Eng. Law. & Eq. Rep. 194.) It may be observed that the consideration named in the principal conveyance, which is, as expressed, one and indivisible, is, in reality, two-fold and distributable. As respects that portion of the real value of the land and the personalty, whatever it may be, which represents the measure of the son's claim, the consideration is the

1865.

FOSTER v. FOWLER et al.

provision for compensating the son *pro tanto*, whilst as regards £200 of that value, the consideration is the son's personal covenants for the benefit of the children and grand-children. It is clear that those who are named in the body of the last mentioned conveyance as parties thereto of the third part, but who have not executed, can execute at any time, and can, without executing, enforce performance of *Wallace Fowler's* covenants made for their benefit respectively, and, of course, he is, in the eye of Equity, a trustee for the objects of the charges. (See *Petrie* v. *Bury*, 3 B. & C., 353.) As regards that portion of the conveyance which is in its nature *voluntary*, viz., that which contains provisions for the *children* and *grand-children*, nothing can be more clear, in view of the decisions in *English* and *American* Courts, than that such a conveyance, if made, as this was, by a man not indebted at the time, not in embarrassed circumstances, and not made with a fraudulent intent (as we must take this not to have been made) cannot be impeached in Equity by a *subsequent* creditor. In passing, we may remark that in a note to 2 *Kent.*, 592, we find it has been held, in the case of *Buchanan* v. *Clark*, in the Supreme Court of *Vermont*, "that one may make a voluntary conveyance of his property, in trust for *his support*, valid against *subsequent* creditors." (On this point, see also *Gale* v. *Williamson*, *ubi supra.*)

In *Bennett* v. *The Bedford Bank*, 11 Mass., 421, it was decided "that a voluntary conveyance to a son of the grantor for the consideration of love and good will, the grantor not being in embarrassed circumstances at the time, will be good against future creditors." In *Reade* v. *Livingston*, 3 Johns. Ch. R., 495, Chancellor *Kent* thus refers, approvingly, to the language of Lord *Hardwicke:* first, in *Townshend* v. *Windham*, (2 Vesey, 1,) where Lord *Hardwicke* said—"A voluntary conveyance, without any badge of fraud, and by a person not indebted at the time, would be good, though he afterwards became indebted;"

and, again, to the language of his Lordship in *Walker* v. *Burrows*, (1 Atk., 93,) where he says, "if the party was not indebted at the time, or immediately after the execution of the deed," (in the case before us an interval of upwards of a twelvemonth elapsed between the execution and the *single* indebtedness,) "the provision for the wife and children would not be affected by subsequent debts." In construing the phrases, "*indebted at the time*," or "*indebted immediately after the execution of the deed*," or "*contemplating future indebtedness*," when, in relation to this question, either of them occurs in the decree of an Equity Judge, we are not to understand *one single debt*. The existence of such will not, *per se*, suffice to invalidate a conveyance at the instance of a prior, or of a subsequent creditor. On this point, *Scarf* v. *Soulby*, 1 H. & T., 428, is decisive. And we may remark that, inasmuch as even if this plaintiff's judgment had been entered up at the date of the conveyance, it would have been *the one only debt due by Fowler*, the conveyance, on the authority of the case last referred to, could not have been impeached. In that case the Court below had set aside a voluntary settlement on the ground of the mere existence of a debt at the time of its execution, but the *Lord Chancellor* reversed the decree, using this language, "To set aside a voluntary settlement at the suit of creditors it is not necessary to shew the actual insolvency of the settlor at the date of the settlement, *but the mere existence of a debt* at that time will not be sufficient *per se* to render it void." Again, he said, (p. 428,) "the word *indebted*, as used by Lord *Hardwicke* in Lord *Townshend* v. *Windham*, in *Russell* v. *Hammond*, and *Walker* v. *Burrows*, must be considered as meaning that the party owed *some debts*." In that case the *Lord Chancellor* reviewed *Townsend* v. *Westacott* and *Richardson* v. *Smallwood*, and expressed his approval of the principles involved in them. These will be found entirely to support the views expressed in this opinion of the case before us. But we must

1865.

FOSTER v. FOWLER et al.

not close our investigation of the present subject of enquiry without noticing the case of *Sexton* v. *Wheaton et ux.*, 8 Wheaton, 229, which reports a luminous and exhaustive judgment of Chief Justice *Marshall*. It is expressly to the point which relates to the *voluntary* part of the conveyance in question, inasmuch as it decided "that a voluntary settlement in favor of a wife made by a party, not indebted at the time, and not actually fraudulent, cannot be impeached under the Act of 13th *Elizabeth*." The learned *Chief Justice* observed, (p. 242,) that "it would seem to be a consequence of that absolute power which a man has over his own property that he may make any disposition of it which does not interfere with the *existing* rights of others, and such disposition, if it be fair, and real, will be valid." "The limitations," he added, "on this power, are those only which are prescribed by law." He further observed, "in construing the Statute of 13th *Elizabeth*, the Courts have considered every conveyance not made on consideration deemed valuable in law as void as against *previous* creditors." This, it may be observed, if meant to apply to *English* Courts, would now, perhaps, require some qualification. (See *Gale* v. *Williamson*, 8 M. & W., 405, and *Scarf* v. *Soulby*, 1 H. & T., 428, both of which are above noticed.) The learned *Chief Justice* resumed, "With respect to *subsequent* creditors the application of this Statute appears to have admitted of some doubt." On that point he proceeded to consider *Shaw* v. *Standish*, 2 Vernon, 326, and all the leading subsequent *English* cases down to, and inclusive of, *Townshend* v. *Wyndham*, 2 Vesey, 1, and then said, "a review of all the decisions of Lord *Hardwicke* will show his opinion to have been that a voluntary conveyance to a child by a man not indebted at the time, *if a real and bona fide conveyance*, not made with a fraudulent intent, is good against *subsequent* creditors." He also reviewed the decisions made since the time of Lord *Hardwicke*, in *England*, up to his own day,

and then continued thus, "From these cases it appears that the construction of this Statute is completely settled in *England*. A voluntary settlement in favor of a wife, or children, is not to be impeached by subsequent creditors on the ground of its being voluntary." Finally, the learned *Chief Justice* went on to do that which has been done in this case by the jury. To adopt his own words, he inquired, "*whether there were any badges of fraud attending the transaction in question which could vitiate it.*" Any person who will refer to the report of this case will be struck with the similarity, in the subjects of inquiry which the learned Judge prosecuted in it, to those which attend the case now under our consideration. The conclusion, also, at which the learned Judge arrived was the same with that to which the jury at *Annapolis* came at the trial of the issues there. It could not have been, and it was not pretended, that at the time of the execution of these conveyances, *Gilbert Fowler* was actually indebted to any body; and we are precluded from adopting the position taken at the hearing, "that he, when he executed the deeds, contemplated even that one isolated condition of indebtedness which now exists." It is negatived by the verdict of the jury, and there was evidence sufficient, if believed, to support the verdict in that respect. The jury believed, and we must conclude, that, when *Gilbert Fowler's* counsel and himself testified, the first that he advised, and the second that he thought, "the verdict in question would not be sustained by the Supreme Court," such was their opinion at the time of the execution of the conveyances. The jury also believed, and we must believe, *Gilbert Fowler* in his assertions,—first, as to the particular motives assigned by him for making the transfers; secondly, "that he owed no debts at the time in question"; thirdly, "that he had then no intention of cheating anybody, but that his sole object was to settle his affairs, and give up the farm, which," he adds, "he could not have retained

1865.

FOSTER v. FOWLER et al.

if *Wallace* had left him, and he had been obliged to hire labor." We have not been unmindful of, nor, under other circumstances than those now presented, should we have failed to feel the force of an argument urged by the plaintiff's counsel, viz., "that the plaintiff's judgment might be regarded as but the consummation of an incipient debt that existed when he obtained his verdict in the original action." Had the verdict in the cause now before us been other than what it is, or had there been found no sufficient evidence to support it, or had the rule of Equity law been that the mere existence of *one* debt would suffice, *per se*, to invalidate a voluntary conveyance under the Statute in question, we should have felt it our duty fully to consider the point thus presented to us; but, in view of the verdict in the present cause, of the evidence, and of the law, as we find all these,—an inquiry into it is, obviously, unnecessary. On the whole, this Court are of opinion that the rule must be discharged, and that there must be judgment for the defendants.

BLISS J. made a few observations expressing his concurrence in the judgment just delivered, which, he said, embodied his views.

THE JUDGE IN EQUITY (*Johnston* E. J.) remarked that he had not prepared any written observations, the elaborate and extended review of the case and the authorities, by Mr. Justice *Wilkins*, had made this unnecessary, and it was the less needed because his opinion rested mainly, perhaps he might say entirely, upon the finding of the jury.

What his judgment might have been, had he been required to exercise the functions of the jury, he was not prepared to say, for he would not conceal that the facts were calculated to raise suspicion, and that at the argument he had been much impressed with the considerations that had been urged on the part of the plaintiff.

But in examining the authorities, and he had done so very carefully, he found himself met in every aspect of the case by the verdict. The 27th *Elizabeth* could not apply, if the deed impeached was made in good faith and for valuable consideration; and as little could the 13th *Elizabeth* affect a deed of that character when the party stood no otherwise indebted than did the elder *Fowler* at the time of the deed, and when the jury had given credit to his testimony that he was not influenced by any intention to defeat the plaintiff's claim.

The argument derived from the transfer of the personal property, which the plaintiff's counsel had strongly urged, seemed at the time entitled to, and he had given it, great consideration. But, as had been already observed by Mr. Justice *Bl ss*, there was almost a necessity for the disposition of the personal property when *Gilbert Fowler* parted with the real estate, and this gave a reasonableness to that part of the transaction which at first sight might seem suspicious; and the cases went to establish the position that a valuable consideration would be extended to objects not immediately within its scope, so as to prevent the operation of the statutes.

In the leading case of *Doe d. Otley* v. *Manning*, 9 East, 69, where Lord *Ellenborough* on a review of the cases gave an extended operation to the statutes of *Elizabeth*, yet there his Lordship spoke of benefits "that might fall under the denomination of a valuable consideration, though perhaps other persons derived a benefit from the settlement who were not the principal objects of it."

In *Doe d. Watson* v. *Routledge*, Cowp. 713, *Aston* J. says, "A great deal has been said upon the construction of the Statute 27 *Eliz.*, chap. 4, whether there should be a *full* as well as a *bona fide* consideration. It has been said that a *bona fide* consideration only is not sufficient, but it is; and the consideration need not be full."

1865.

FOSTER v. FOWLER et al.

In *Pulvertoft* v. *Pulvertoft*, 18 Vesey, 92, the *Lord Chancellor* held that parties not within the consideration directly, yet fall within the range of the consideration, and therefore the statute did not apply to them; and he assigns as a reason, that the settlor may make such an extension a condition, and the party entitled may be compelled to accept the settlement so extended.

The case of *Heap* v. *Tonge*, 7 Eng. Law & Eq. Rep., 194, (1851,) cited by Mr. Justice *Wilkins*, recognizes *Pulvertoft* v. *Pulvertoft*, and is very strongly in point in its circumstances. There the consideration was alone between two parties *J. H.* and *B. C.*, but their agreement embraced other persons in its benefits; and *Turner* V. C. said, (p. 195,) "*J. H.* and *B. C.*, respectively purchase each other's interest for the benefit of the other objects of the deed," and he, therefore, held the deed valid against subsequent purchasers under *J. H.* and *B. C.*, although the deed was altogether voluntary and without consideration as regarded the objects benefitted.

Sutton v. *Chetwynd et al.*, 3 Merivale, 249, in limiting this doctrine as not applying to mere strangers, confirms its application to children.

Then as to new trial, the learned Judge left the case very fully to the jury, and, in some respects, perhaps, more favorably for the plaintiff than the plaintiff was entitled to.

In *Hutton* v. *Cruttwell*, 1 Ellis & Bl. 20, Lord *Campbell* said, "the jury found that the deed was not fraudulent, nor executed in contemplation of bankruptcy. The verdict ought to stand, unless the Judge was bound to rule at the trial that the execution of the deed was necessarily, in point of law, an act of bankruptcy."

Strong as may have been the impression made by the arguments of the plaintiff's counsel, it does not seem possible in this case to go that length.

The plaintiff chose his tribunal, and the Court can-

not say that the jury had not a right to believe the defendant and his witnesses, and believing them, that they were not authorized to draw the conclusion that they have done.

1865.

FOSTER v. FOWLER et al.

It follows that the rule for a new trial must be discharged, and that judgment on the hearing must be for the defendants.

Rule discharged, and
Judgment for defendants.

Attorney for plaintiff, *J. C. Troop.*
Attorney for defendants, *S. L. Morse.*

CHAMBERS DECISIONS.

No Chambers Decisions of any permanent importance were delivered between *June* and *December*, 1865.

IN THE

1861.

VICE ADMIRALTY COURT.

AT HALIFAX.

THE WORSHIPFUL ALEXANDER STEWART, C. B.,

PRESIDING JUDGE.

Feb. 27.

THE "CORDELIA" AND THE "OSPREY."

A brigantine was beating up the channel leading to *Halifax* harbor between daylight and sunrise, showing no lights, and it being very dark. A steamer was coming out of the harbor at full speed, not blowing her whistle, nor ringing her bell. A collision occurred resulting in damages to both vessels, for which damages actions were brought on behalf of each vessel against the other.

Held, that the brigantine was in the wrong, in exhibiting no lights; and that the steamer was also in fault in going at full speed, and that, therefore, neither vessel was entitled to recover damages or costs from the other.

Construction of Merchants' Shipping Act, section 298.

These were actions for damages arising out of a collision between these two vessels, and were promoted by the owner of each vessel against the owner of the other.

The argument at the hearing was conducted by *Ritchie* Q. C. and *William Twining* for the owner of the *Cordelia*, and *Johnston* Q. C., Advocate General, for the owner of the *Osprey*.

The pleadings and the facts are sufficiently set out in the judgment.

STEWART J. now delivered judgment as follows.

In preparing this judgment I have, to avoid circumlocution and repetitions, used the names of the vessels instead of the names of the parties.

These causes have arisen out of a collision which occurred between the brigantine *Cordelia*, and the steamer *Osprey*. No appearance under protest was preferred, nor was any objection offered to the admissibility of the pleadings; the evidence was taken in the case of the *Osprey*, and by consent read, at the

hearing in both causes which came on together, and were ably argued on the 11th, 12th, and 14th of this month. Questions of great importance to the owners and masters of vessels entering and departing from the harbor of *Halifax*, and, indeed, to the public generally, and principles, the application of which is familiar in *England*, but infrequent in *British North America*, having arisen, I have deemed it my duty to go more at large into the law which governs them, than I should have otherwise thought it necessary to do.

In collision cases the Judicial Committee and the High Court of Admiralty in *England*, call naval officers to their aid, and here, by the kindness of the Admiral on this station, this Court has had the like assistance. On this occasion I am not so fortunate, and the absence of all Her Majesty's ships prevents me from hoping for it until their return to this port in *June*. From the decrees of this Court, however, an appeal lies to the Judicial Committee; if they are erroneous they will be corrected. I refer to the right of appeal, because the law, as I shall now declare it, must govern those who enter and leave the harbor by the channel in which this collision occurred, until it is adjudged erroneous by a superior tribunal. The collision occurred before sunrise (at about half-past five or a little later) on the morning of the 16th *November* last, at a place described in one of the preliminary Acts as "close to the west side of *McNab's Island*, not quite abreast of, and about a quarter of a mile from the northern point of *McNab's Cove* and about three-quarters of a mile inside and northwardly of the *Beach Light*." This place is within the main channel leading into *Halifax* harbor, and is about a mile and a half from *George's Island* at its entrance. This channel is the thoroughfare into and out of the harbor. It is at all hours of the day and night traversed by vessels, small and large, decked and undecked, by fishing and other crafts, by pleasure and other boats.

1861.

The CORDELIA and The OSPREY.

From *George's Island* to the white buoy on the east, and *McNab's Island* on the west of it, it is rather more than half a mile wide; at the white buoy is the narrowest part of it, and the place of collision is on the eastern side of it, at a small distance below the narrowest part of the channel. The white buoy is placed at the end or extremity of *Point Pleasant Shoal*, and from this buoy and the opposite shore of *McNab's Island* the channel widens to about a mile and a quarter, and at this width it continues to its termination, which may be described as being at *Meagher's Beach*, on the eastern side, (from which a shoal extends, and on which there is a light house,) and *Purcell's Cove* on the western side. From *George's Island* to the place of collision is about one and a half mile, and thence to *Meagher's Beach* it is about the same distance. The wind was a whole sail breeze from the north-north-west, the water was smooth, and the *Osprey* was going down this channel at seven knots, (as much speed as she could then command, her greatest speed under steam being eight,) and the *Cordelia*, which was beating into port, was, just before the *Osprey* was sighted, on the port tack, close hauled, going through the water at about six knots, as the pilot testifies, a mile or more less, as the master says, and standing to the eastward. The *Cordelia* had carried two lights on her starboard and port sides until the previous starboard tack, during which they were, by the master's orders, taken down and put away, he being under the impression that he was not bound to keep them up after daylight, and, moreover, that it was sufficiently light to do without them. The *Osprey* objects (for I am considering the *Cordelia's* claim for damages first) that the *Cordelia* cannot recover, because she had not the Admiralty lights exhibited, it being before sunrise, and that had they been exhibited the collision would not have taken place. This objection is apparent on the *Cordelia's* libel, but, as I have said, no objection was taken to

the admissibility of the pleadings, and it was not my duty to interfere in the course which the parties thought it best for their interests to pursue.

The regulations by which vessels are bound to exhibit lights of the description specified therein, were made by the Lords of the Admiralty on the 24th *February*, 1858, under the Merchants' Shipping Act, 1854. And by them it is ordered that "all sea-going sailing vessels when under way shall, between sunset and sunrise, exhibit a green light on the star-board side, and a red light on the port side of the vessel." And the 298th section of that statute enacts, "that if in any case of collision it appears to the Court, before which the case is tried, that such collision was occasioned by the non-observance of any rule for the exhibition of such lights, the owner of the ship, by which such rule has been infringed, shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it be shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

The learned advocate for the *Cordelia*, upon the authority of a class of cases, of which that of *Davies* v. *Mann*, 10 M. & W., 546, is a prominent one, submitted that though this were neglect on the part of the *Cordelia*, she might still recover against the *Osprey*, if the Court were satisfied on the whole case that the collision was mainly the fault of the *Osprey*. And, he further contended, that the rule of the Admiralty was, that where both vessels were in fault the damages are divided, and proceeded to show that the *Osprey* was much more to blame than the *Cordelia*, whose only fault was the master's misapprehension of the law. *Ignorantia juris non excusat*, but neither the owners nor the masters of vessels belonging to this Province have any right to urge that they were ignorant of those regulations. So soon as I received them they were at my request published by the Pro-

1861.

The CORDELIA and The OSPREY.

vincial Government, now more than two years since. And I take this occasion to impress upon all parties concerned in navigation, as they regard not merely the safety of their property, but in consideration of the imminent peril to which they expose life, the necessity of paying implicit attention to the requirements of these regulations, and of the Merchants' Shipping Act, 1854. In this connection I may mention that the impression on the mind of some of the witnesses that a sailing vessel is never bound to alter her course for a steamer is erroneous, as may be seen by reference to the 196th section of the Merchants' Shipping Act, which I shall presently read at large. As regards dividing the damages where both vessels are at fault, Dr. *Lushington* did adhere to the rule of the Admiralty in a case, wherein the vessel suing for damages had by not porting her helm in time violated this section, but upon appeal to the Judicial Committee this decision was reversed. *Swabey's Rep.*, 60. In the course of his remarks, the Right Hon. *P. Leigh*, who pronounced the judgment, said: "To say that the statute does not apply because the damage was not occasioned solely by the *James*, would be to render the statute quite inoperative. The intention of the Legislature was to enforce certain general fixed rules by additional penalties besides those already existing, and the penalty is, that if a vessel violate them she cannot recover, whatever she might have otherwise recovered in the Court of Admiralty from the other vessel when also in fault." The same doctrine was upheld by eight Judges in the Exchequer Chamber, in *Whittel* v. *Crawford*, 37 Eng. Law. & Eq. Rep., 466, and again in 1859, in the *Calla*, in the High Court of Admiralty, *Swabey*, 465. In this case Dr. *L.* said, "that the *Calla*, not having carried her colored lights fixed in the ordinary manner required by the Admiralty regulation, was bound to make out a sufficient justification; that if no circumstances were proved sufficient to justify the non-observance of the rule,

and that the collision was in any degree occasioned by the lights not being exhibited, the *Calla* was to blame for the collision." And afterwards, in the same year, in the *Livingstone*, Swabey, 519, Dr. *L.* said, "the *Livingstone* was guilty *prima facie* of violating the regulations in not carrying the colored lights *fixed*. If this has in any degree contributed to the collision she is barred from recovery." I shall refer hereafter to the facts in testimony, which make me fully believe, that at the time of the collision it was very dark. And in this conviction I cannot persuade myself that if the *Cordelia* had on her "port side a red light so constructed as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and to shew an uniform and unbroken light over an arc of the horizon of two points of the compass, from right a-head to ten points abaft the beam," it must have been seen by the *Osprey* coming down the channel. And the law is, that however light it might have been at the time, this furnishes no excuse for the non-exhibition of the lights. This was decided in the case of the *City of London*, Swabey, 247, in which it was proved that the moon was exceedingly bright, and the night very light. That a light was thought essential in this case is evident from the hurried exhibition of one on board of the *Cordelia*, immediately before the collision. Moreover none of the *Cordelia's* witnesses proved that the collision must have happened even if the Admiralty lights had been exhibited. Nor is there any allegation in the libel setting forth that view of the case. To apply, then, Dr. *L's* observations to this case, the *Cordelia* was bound to make out a sufficient justification for violating these regulations. She has failed to do so, and this is so decisive against her claim for damages that I am relieved from the necessity of considering what was further urged in support of it.

Turning now to the *Osprey's* demand for damages, the *Cordelia*, in answer to it, alleges that the *Osprey*, in

1861.

The CORDELIA and The OSPREY.

starboarding her helm instead of porting it, had herself violated that section of the Merchants' Shipping Act, the 196th, to which I have just called the attention of masters of sailing vessels. It is as follows, "whenever any ship, whether a steamer or a sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, the helms of both vessels shall be put to port so as to pass on the port side of each other, and this rule shall be obeyed by all steamships and all sailing ships whether on the port or starboard tack, and whether close hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and as regards sailing ships on the starboard tack close hauled, to the keeping such ships under command by putting her helm to starboard." The *Osprey's* answer to this is, that it was not only the proper, but the only course; that she was compelled, immediately after, to put her helm to port, so as to render the collision as little injurious as possible by separating the vessels, and that, had she not done so, she would have gone ashore on *McNab's Island*. I think the weight of evidence, independently of the consideration that the *onus probandi* is on the *Cordelia*, is very much in favor of that view. The captain and chief officer of the *Osprey* swear that had the helm been put to port before the collision, the *Osprey* would have run into and probably sunk the *Cordelia*, and the *Osprey* insists that it was because the *Cordelia* did not starboard her helm and so bring her up into the wind the collision took place; and further, the pilot of the *Cordelia*, against whose ability, integrity, and conduct throughout no objection has been urged, a witness produced by the *Cordelia*, swears that if the helm had

been put to port the *Osprey* would have probably sunk the *Cordelia*; that to starboard the *Osprey's* helm was the right step to take, and that she did starboard her helm.

The *Cordelia* alleges, secondly, that the *Osprey* violated the 297th section of this Act, which enacts, "that every steamship, when navigating a narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steamship." None of the *Cordelia's* witnesses establish this allegation; the pilot of the *Cordelia* does not; while the captain and chief officer of the *Osprey* swear that she was kept as near the starboard side of the channel, as at night was safe and practicable. Now, I do not concur with the counsel for the *Cordelia*, that because there was sufficient water near the white buoy, the *Osprey* was bound to keep as close to it as possible at night. The shoal against which it warns mariners was in dangerous proximity to it, and the morning was so dark, that, to say the least of it, the white buoy could not be easily seen. The statute only requires steamers to keep on the starboard side of the mid-channel when it is safe and practicable, and it was lawful for the steamer to navigate this channel at night as well as in the day. To have done as the learned advocate contends the *Osprey* should have done, would have been unnecessarily to imperil the safety of the ship and those on board of her. By my direction the captain of the *Osprey* has marked on the map, exhibited at the hearing, the course he pursued from *George's Island* to the point at which he had arrived when the *Cordelia* was first descried; the point itself, and also the place of collision. It will be seen that the *Osprey*, having just passed the white buoy and cleared the *Point Pleasant Shoal*, was turning her course westward so as to avoid the shoals off *Meagher's Beach*, which agrees with the proper course, as testified to by Capt. *Hunter*, who commands the steamer

1861.

The CORDELIA and The OSPREY.

Merlin. He says, "at night I keep to the port side to avoid *Point Pleasant Shoals* until I get down to the north point of *McNab's Island*, when I alter my course so as to get *Meagher's Beach* light on my port bow." This the *Osprey* did, and she had just arrived at that north point when she saw the *Cordelia*. The *Cordelia* by the fifth article of the responsive plea, lastly, insists that the collision was occasioned by the rapid rate at which the *Osprey* steamed down the channel.

Two arguments urged by Mr. *Ritchie*, and the *Advocate General*, I will here dispose of. Mr. *Ritchie* contends that it was the duty of the *Osprey* to have gone at half speed, and that had she done so the collision could not have occurred, as she could not have arrived at the place of collision, *i. e.*, when it took place. But this was not the proximate cause of it, and, if a valid argument, it would have applied as forcibly if the collision had occurred ten miles further toward the sea. Then the *Advocate General* contended that as the *Persia's* rate of steaming, *e. g.*, is at her full speed sixteen knots an hour, and she could, as he assumed she could, have legitimately gone at her half-speed, therefore the *Osprey's* speed of seven knots was not excessive. But it is not with reference to the mere number of knots that a steamer is proceeding that the rate may or may not be lawful; it is with reference to the more efficient and prompt control which can be exercised on a steamer at full and at a lower rate of speed respectively. I will now advert to the circumstances in proof which compel me to believe that the morning of the 16th *November* last was before, at, and after the collision, as dark as described by the *Osprey's* witnesses, namely, so dark that one man's features could not be distinguished from another. (His Lordship here referred at some length to the various affidavits in which the circumstances were stated from which he drew this conclusion.)

The *Cordelia's* objection to the *Osprey* recovering, in consequence of the rapid rate at which she was steaming, calls upon the Court to decide whether, having reference to the darkness of the morning and the locality in which she was steaming, that rate was unlawful, and whether the *Osprey* did in fact use such extra precautions to give warning of her advent, as, having due regard to the safety of the lives and property of others, she ought to have given; and if she did not, whether she must not thereby be held to have contributed to the collision. I do not think the Local Private Act referred to by Mr. *Ritchie* is applicable to this inquiry. It is true the *Osprey* in passing *George's Island* at the rate of seven knots an hour committed a breach of that Act. But it is confined to the harbor, it does not apply outside, and it has provided specific penalties for any breach of it. Its origin was in the circumstance that some of the members of the Legislature, observing the injurious effect of the swell produced by the rapid course of the steamers upon the small vessels lying at the wharves, caused it to be passed.

As I have intimated at the commencement of my observations, I shall go more at large into the law applicable to this branch of the case than an *English* Judge would probably do, and I will commence with some extracts from the remarks of Dr. *Lushington*, on that most unfortunate case, the *Europa*, 2 Eng. Law & Eq. Rep., 559. "Every man," says that able, experienced, and most learned jurist, "has a right to pursue his lawful avocation in a lawful manner. The test, whether the manner of pursuing a lawful avocation is lawful or not, is this, *the probability of injury to others;* and that, of course, depends on circumstances. It is quite manifest that injury or mischief to others, whether it be to life, limb, or property would be probable or not, not simply according to the act done, for instance, the sailing at the rate of twelve and a half knots an hour, *but according to the*

1861.

The CORDELIA and The OSPREY.

time at which it was done, and the locality where the occurrence took place. There might be cases of such careless and reckless navigation, that, if death ensued, the parties guilty thereof might be convicted of manslaughter." Again, in the case of the *Pepperell*, a sailing vessel, reported in *Swabey*, 12, in condemning her in damages, he says, "The ground on which my judgment will be founded is this: the *Pepperell* was going six and a half knots an hour, stating at the same time that the night was so dark that she could only see vessels at the distance of one hundred to two hundred yards off. She ought to have known that she was crossing a fishing ground, and indeed she did know it, for she states that shortly before the accident she saw many lights. From that circumstance alone, that she was going through the water at that rate, at that season of the year, the Court will pronounce for the damage." In the case of the *Europa*, he further says, "In the *Iron Duke*, and other cases, the principle is laid down that no man may navigate a vessel with probable risk to others. The great principle is the chance of injury to life, but it applies as much to the destruction of *property* as it does to the destruction of *life*." He cites from *Russell on Crimes*, p.657, as follows, "*A.* was driving a cart with four horses in the highway where people did not usually pass, and the horses, being upon a trot, threw down a woman who was going the same way with a burthen on her head, and killed her, held only to be a misadventure, but if it had been in a street where people usually pass it had been manslaughter." In that case the collision occurred seven hundred miles from land on the *Atlantic Ocean*, and it had been alleged by the ship, the unfortunate *Charles Bartlett*, that the locality was where ships bound east and west continually passed, and with reference to this Dr. *L.* says, "that case from *Russell*, and its principle, would be applicable, supposing the collision had been in a locality where there would have *been a likelihood of meeting vessels*, as there

would have been of meeting people in a crowded street; then it is an illegal act." Then as to the proper look out, he says, "I have no hesitation in saying that, under the circumstances, the reasonable look out must *be the most ample that could be adopted.*" And the result of this case was, that "although no rate of sailing by steamers or other vessels can be said absolutely to be dangerous, but whether any given rate is dangerous or not, must depend on the circumstances of each individual case, as the state of the weather, locality, and other similar facts; yet that the rate of twelve and a half knots an hour, the full speed of the *Europa*, in a dense fog, in the locality where the occurrence took place, though seven hundred miles from land, must be attended with more risk than a slower pace; but that assuming it might be accomplished with reasonable security, and without probable risk to other vessels, such a rate of going could not be maintained with such security, *except by taking every possible precaution against collision.*" It was held that the ordinary look out which she had was not sufficient, and she was condemned in all damages and costs. From this judgment the *Europa* did not appeal.

1861.
The CORDELIA and The OSPREY.

Then, again, is the case of the *Iron Duke*, 2 W. Rob., 377, which was this, "a steam vessel, proceeding at the rate of between eleven and twelve knots an hour, in a track where many vessels were passing up and down, condemned in the damage." This is the marginal note. In the course of his judgment, (p. 384,) Dr. L. says, "the steamer admits she was going at full speed, and that the night was so dark that she never saw the *Parama* until that vessel was actually upon her. Can it be said that in going at such speed, upon such a night, the steamer was justified—I apprehend not," and he condemned the steamer in damages. From the judgment an appeal was preferred, and the judgment was confirmed.

Then in the case of the *Rose*, 2 W. Rob. 1, Dr. *Lushington* said, "It is not denied that the vessel

1861.

The CORDELIA and The OSPREY.

proceeded against was coming down the *Bristol Channel*, at the time of the collision, at the rate of between ten and eleven knots an hour, that there was a considerable haze on the water, and that no vessel could be discerned at a greater distance than a quarter of a mile. Now if the steamer, coming down the channel at this rate, had run down the *Regina*, without either of the parties seeing each other, I should have taken upon myself the responsibility of saying that the *Rose* would have been responsible for the damage, and I will state the reason. It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the property and lives of other persons are thereby endangered. I well remember a case which occurred before Lord *Ellenborough*, in which this principle was applied, though not in a collision at sea. The driver of one of the mail coaches was indicted at the *Old Bailey* for manslaughter, he having run over and killed a man. It was urged in his defence that, by contract with the Post Office, he was compelled to go at the rate of nine miles an hour. Lord *Ellenborough*, adverting to that defence in his summing up, observed that no contract with any public office, and no consideration of public convenience, could justify the endangering of the lives of His Majesty's subjects. The man was convicted of manslaughter and punished."

In the case of the *Vivid*, Swabey, 88, it is ruled that "it is no excuse for a vessel steaming at the rate of twelve knots, on a dark night, through a fairway where vessels are accustomed to anchor, that she was under contract to carry Government mails at the rate of thirteen knots."

The case of the *Despatch*, Swabey, 138, was one where the steamer proceeded against was 294 tons burthen, had engines of 120 horse-power, and the collision had occurred at the entrance of the *Mersey*. She was proceeding at the rate of nine knots an hour,

and approached the schooner with which she collided without any alteration in her course, until within the distance of about three times her own length, &c. The marginal note of the case is this: "A steamer going ten knots an hour, on a dark night, in a narrow channel, held liable for collision thereby occasioned." Dr. *Lushington*, in addressing the Trinity Masters, said, "The schooner had no lights exhibited. The question is, whether the *Despatch*, being a steamer, on a night admitted to be dark, was justified in coming up the *Horse Channel* at the rate of ten knots an hour." Quoting from one of the witnesses, he says, "The way of the *Despatch*, when going at full speed, could not be stopped entirely before she had run two miles, without reversing, or one mile, the engines being reversed."

1861. The CORDELIA and The OSPREY.

And in the case of the *Perth*, 3 Hagg., 414, an action promoted on behalf of the *Ariel*, which had been run into at seven o'clock at night, the night dark and the weather hazy, the steamer pleaded that "she *took every precaution*, had two strong lights and thirty-two men, *that the large bell was rung about half-past six, and thence every half minute*, that a good look out was ordered, and the helmsman to be careful." Yet Sir *John Nicholl* says: "Respecting steamers generally, they are a species of vessel of vast power, liable to inflict great injury, and particularly dangerous to coasters." And, again, "This steamer was going through the fog at the rate of twelve miles an hour, in a course where coasters are numerous, and yet she did not abate her speed." The Trinity Masters replied, "We are of opinion that, considering the fog and other circumstances, the steamer ought to have reduced her speed one half, such a precaution was due to the safety of the upward bound vessels."

The *Osprey* alleges that the *Cordelia* did not keep a good look out. I do not find in the testimony any sufficient proof of this. (The learned Judge here stated the circumstances in proof from which he drew this conclusion.)

1861.

The CORDELIA and The OSPREY.

The sudden appearance of the *Osprey*, and the all but instantaneous collision which followed, lead me to think that when they first descried each other, these vessels were nearer together than a quarter of a mile, (and, as is said in many cases, nothing is more difficult than to judge of distances when such emergencies occur,) and if, as has been suggested, the master of the *Cordelia*, appalled at the imminent peril impending, and agitated and alarmed, had for the moment lost his presence of mind, and so ported the *Cordelia's* helm, and then, when his presence of mind returned, sought by starboarding to correct his error, had the rapid speed of the *Osprey* no part in producing that agitation and alarm? She was proceeding at her then utmost speed; true that at that rate she answered her helm more quickly than if she had been going at half speed, but she could at the latter rate have been stopped in less time than she could at the former rate. When a steamer is entering a harbor (in a fog, or in a very dark night,) for her own safety, as well as that of other vessels, she slows her engines, her progress is just perceptible, and it can be arrested in an instant. Her bell is rung, her whistle sounded, and more than ordinary vigilance is observed. And her precaution would be the like if she were among ice, having regard only to her own protection. Have not others a right to have the same protection extended to them which steamers deem indispensable for their own safety? If such, or the like precautions, had been adopted by the *Osprey*, I cannot but think this collision had been avoided, just as I think that it would not have happened if the *Cordelia* had carried the lights prescribed by the Admiralty Regulations. Nor do I regard it as an unreasonable restriction upon steamers, that if they will traverse that short narrow channel in a morning so dark, as that one man could not discern the features of another, at their highest rate of propulsion, they should at least ring their bell, sound their whistle, and give every other signal of

1861.

The CORDELIA and The OSPREY.

their approach possible, in order that others may traverse it with safety and security for their lives and property, as well as themselves. But even with all these precautions, I cannot regard steamers steaming on so dark a morning in this channel at full speed as lawful. If life should ever be lost in consequence, it will not be my province to determine the character of the homicide, but what a judge and jury might deem it to be, is well worth the consideration of Captain *Gulliford* and Captain *Hunter*, both of whom have told us that they habitually proceed at night down this channel at full speed.

Let us recur to what *English* Judges have held to be an unlawful rate of steaming, in the cases from which I have so largely cited. The *Pepperell* was only proceeding at six and a half knots an hour; from that circumstance alone, Dr. *L.* condemned that vessel in damages. It was such a rate of speed, in such a locality, as the *law would not tolerate.*

The *Despatch* ran into a schooner shewing no lights. It is to be observed that it was not the steamer seeking for damages from the schooner, as the *Osprey* here is from the *Cordelia.* The steamer was endeavoring to escape the payment of damages. Indeed all the cases I have cited, (and there are many more in the books,) are those of steamers defending themselves. But the *Despatch* was condemned to recompense the schooner in damages, because she was not justified in going ten knots an hour in a narrow channel. Then look again at the case of the *Perth.* This vessel pleaded that she had *kept her bell ringing every half minute,* but the Judge said the night was dark, the steamer was going in a place where coasters are numerous, and that she ought to have abated her speed. That eminent Judge was thus carrying out the principle he had announced in the *Europa,* viz., that no man shall navigate a vessel with *probable* risk to others. A steamer cannot lawfully go at full speed in a channel wherein there is a likelihood of meeting vessels. If

1861.

The CORDELIA and The OSPREY.

a steamer do go at full speed, even ringing the bell every half minute as the *Perth* did, will not protect that steamer. But the *Osprey*, as I have intimated, did nothing extraordinary. She did not ring her bell, nor slow her engine, and she went at full speed. And was there no likelihood of meeting vessels? Every one knows that this channel is being constantly traversed, (probably in no period of the year more so than in the month of *November*,) when vessels, boats, &c., are bringing their produce to market, and taking hence their supplies for the winter. There was then, at the rate and in the place where the *Osprey* was steaming, probable danger to life and property.

I was much displeased with the captain of the *Osprey's* manner of answering me on this point. I transcribe from the Registry minutes my questions and his replies. I asked him, "Do you consider it safe to go at seven miles an hour in a narrow channel like this, having reference to life and property?" To which he replied, "Provided the vessels show lights, I do!" "Might you not (again I asked him) run down boats, which are not bound to carry lights?" and his answer was, "I would not, either at seven knots or at half-speed." Is this credible? It is not one whit more credible than his first hesitating assertion, that at full speed the *Osprey* could be stopped in three minutes, which he declined to affirm by his signature, and then extended the time to five minutes. This was the time stated by Captain *Hunter*, and no doubt the proper time, as he gave his testimony properly and frankly.

For all these reasons I can give damages neither to the *Cordelia* nor to the *Osprey*, and must leave them to pay their own costs.

Judgment accordingly.

Proctor for the *Cordelia*, *W. Twining*.
Proctor for the *Osprey*, *J. W. Johnston, Jr.*

THE "ALMA."

Oct. 21.

In awarding salvage the actual salvors, and not the owners of the salving vessel, receive the largest amount.*

It is the rule of the Admiralty, as it is of all other Courts, that a party can only recover *secundum allegata et probata.*

Giving advice to a master as to locality, even to a foreign vessel, is not a salvage service.

Salvors must not sleep on their lien on the property saved.

Where salvors, who have a claim for a moderate reward, set up an inflamed and exaggerated statement of their services, their claim will be wholly dismissed, and themselves condemned in costs.

This was a claim for salvage promoted by the owner of a fishing boat, the alleged salvage service having been performed by two of his servants, while on a fishing expedition for him in the boat.

The cause was argued, on the 10th and 11th inst., by *Ritchie* Q. C. and *Sawers* for the promovent, and *Johnston* Q. C. and *J. W. K. Johnston* for the impugnants.

The pleadings and the facts are sufficiently set out in the judgment.

STEWART J. now delivered judgment as follows.

The barque *Alma*, bound for this port, struck on the *Sisters Rocks*, near *Sambro* lighthouse, on the west side of the entrance, about three o'clock on the morning of the 5th *July* last, from which she was by the swell of the sea thrown into deep water shortly afterwards. Sail was immediately made on her, and she was grounded on *Ketch Harbor Bar*, about one and a half mile distant from where she struck the rocks. By the time she reached the bar she had taken in much water. After some ineffectual attempts to repair her, she was sold for the benefit of all concerned, in *Halifax*, on the 22nd of the same month. On the 5th *August* she was arrested at the suit of *Peter Fleming*, in an action of salvage, in which he claims £75 sterling, and Messrs. *Young* and *Hart* have intervened for the owners, who are *British* merchants, carrying on business in *Liverpool*, in *England*.

The promovent's act on petition is apparently framed on the principle that because he was the owner of the boat, in which his men (the persons who performed the alleged salvage) were, he became, *ipso*

* This rule is now largely modified. See *post*, page 790 n. — REP.

1862.
The ALMA.

facto, solely entitled to the compensation to be awarded for such service; and much of the argument of his counsel was predicated on that idea. But this idea is erroneous. The actual salvors (whether servants or others) are those to whom the Court awards the largest part of the amount given; and, formerly, (as was said by Sir *Christopher Robinson*, in 1831, in the case of the *Jane*, 2 Haggard's Admiralty Reports, 343,) "as to the owners, who are principal parties in these proceedings, the general principle of law is, that the claim of owners generally is *very slight*, unless from the circumstances of the case their property becomes exposed to danger, or they incur some real loss or inconvenience;" and similar language may be found in many decisions.* Thus Dr. *Lushington*, (in 1860,) in the case of the *Enchantress*, 1 Vern. Lushington, 96, says, "In later times the introduction of steam power has effected a considerable change in the nature of the Court, and no doubt reasonably, for a steamer is now most frequently the principal salvor. It is equitable in such cases that the owners, on whom the chief risk and all the expense falls, should be rewarded in a much higher proportion than owners were formerly, and the Court has acted accordingly. But the Court will not lose sight of its ancient principle of adequately and liberally rewarding the personal services of the men engaged." "The exception," says *Marvin*, (a recent *American* author on Wreck and Salvage,) in his book, p. 243, "is in favor of the owners of steam vessels. Even an apprentice is entitled, as a salvor, to a share of the salvage for his own use (*Ibid.* 240); and the master or owner of the salving vessel has no authority in law to settle or receive the shares of the crew." (*Ibid.* 241.) "The general principle of the High Court of Admiralty is that the master and crew

* This doctrine has been somewhat modified, and the claims of the owners more freely recognized by subsequent decisions. See *Williams & Bruce's Admiralty Practice*, 138; 1 *Conkling's United States Admiralty*, (2d ed. 364.) — REP.

are in strict language to be considered as the only salvors." (*Ibid.* 243.)

In this cause the promovent has not conjoined his servants. He has extracted the warrant, prepared his act in his own name, and prayed damages for himself only. I have thought it well to state the law is this respect *in limine*, inasmuch as it has an important bearing on the testimony in this cause.

Mr. *Johnston* urged that however meritorious the promovent's claim may be, (and even though it be proved satisfactorily,) he cannot recover if it be not accurately set forth in his pleadings. I accede to this proposition. In the case of the *Ann*, 1 Vern. Lushington, 56, (1860,) before the Judicial Committee on appeal from Dr. *Lushington's* judgment, Lord *Chelmsford* says: "It is a rule, and a most important rule to be observed in all Courts, that a party complaining of an injury and suing for redress must recover only *secundum allegata et probata*. There is no hardship or injustice in adhering strictly to this rule against the complainant, for he knows the nature of the wrong for which he seeks a remedy, and can easily state it with precision and accuracy. But great inconvenience would follow to the opposite party unless this strictness was required, because he might be constantly exposed to the disadvantage of having prepared himself to meet one state of facts, and of finding himself suddenly and unexpectedly confronted by another totally different. The great object of all Courts, where trials of facts take place, ought to be to bring the parties to a distinct agreement as to what is in contest between them, and this object would be entirely frustrated if it were competent to a party to place his right to redress on one ground, and then to abandon it at the trial for another, although the latter ground would originally have given him a right to recover against the other party. Their Lordships have, in a recent case before them, held that parties are bound by the statements which they

1862.
The ALMA.

make in their pleadings in the Court of Admiralty. In the case of the *Teela Carmen* and the *North American*, the Court below had found that both parties were to blame, and had given sentence accordingly. Their Lordships were strongly inclined to think that the *North American* was alone in fault, but upon a different state of facts than that which had been alleged on behalf of the *Teela Carmen*, and they therefore affirmed the sentence, being of opinion that it would not be consistent with the safe administration of justice to alter the judgment upon grounds quite inconsistent with the case made by the appellant, both in his allegations, and in his evidence, and at the bar. The present case will furnish an additional example of the necessity of correctness and accuracy of statement of pleadings in the Court of Admiralty. The appellants were, in the judgment of their Lordships, entitled upon the true facts of the case to succeed against the respondents; but they have, unfortunately, undertaken to prove that the injury resulted from an entirely different state of facts; they have, of course, wholly failed in doing so; and then the rigid but wholesome rule steps in and compels their Lordships to declare, not that the judgment *ought* to be affirmed upon the ground on which it was pronounced, but that it *must* be affirmed because the case *which has been set up by the appellants has not been proved by the evidence.*"

My extracts from authorities have been copious on this subject, because I am aware that the law of the former has long been held in more high esteem in this Province, than it is and has ever been in England. The rules and practice of the Admiralty Courts are few there and easily understood, and it requires but slight attention on the part of the practitioner to conform to them. Sitting here as a Judge of an Imperial Tribunal, I am bound to see that they are strictly adhered to; and twelve years ago in the cause of the *Star*, in a case which I see *Marvin* has referred

to, I upheld the principle that a party can only recover here *secundum allegata*. The promovent, in his act on petition, sets forth, "that about midnight, between the fourth and fifth days of *July* last, *Henry Bayers* and *Alex. McNeil*, two of his servants, proceeded in his boat from *Ketch Harbor* to fish for him, that as they approached the *Sisters Rocks*, between two and three o'clock, A. M., they saw a large barque thereon, and, as they approached, the master hailed them to come on board; that just as they went on board she was carried by the sea over the rocks into deep water; that the said *Henry Bayers* then sounded the pumps, and found that there was fifteen feet of water in the hold, and that she was settling fast; that at this time *William Graham*, a pilot from the eastward of *Halifax* harbor, was on deck, very much excited, and professing to be unacquainted with that part of the shore; that he and the master requested him to take charge of her; that after she was driven on the rocks, she lay head to wind, with the sails down and flapping about, and that the pilot proposed to anchor her, but that he protested against this and told him it would sink her in a few minutes, but that he thought he could run her into *Ketch Harbor*, where the vessel and rigging would be saved; that the master and pilot acquiesced in this, and requested him to do what he thought best, and he accordingly directed her course to *Ketch Harbor* bar, which he knew was the only safe place where she could reach; that when she reached the bar she was in a sinking state, and just before she struck she seemed to be going down forward; and that he remained in charge of her until the next day, when the master returned from *Halifax;* and that had it not been for the timely assistance and exertions of the said servants she would have gone down in deep water, and the vessel and cargo have been lost, and in all probability some if not all of the crew and passengers would have perished."

Now, as here set forth, this is a case of great merit,

1862.

The ALMA.

for although, as intimated by Dr. *Lushington*, in the case of the *Little Joe*, 1 Vern. Lush., 89, (1860,) "giving advice to a master as to a locality, even to a foreign vessel, is not a salvage service," yet in this case the master and pilot placed the vessel in charge of *Bayers*, and by his skill and knowledge alone she was saved, as well as the lives of some if not all on board of her.

The impugnants, *Young* and *Hart*, (who have intervened for the owners,) deny generally the case thus set up, and by the twentieth article of their responsive plea they specially deny all the promovent's allegations. To prove his case, the promovent has produced nine witnesses, whose testimony I shall examine and compare with that adduced by the impugnant's witnesses, (eight in number,) commencing with the affidavits of *Henry Bayers* and *Alexander McNeil*. In the case of the *Martha*, Swabey's Rep., 490, Dr. *Lushington* says: "In causes of salvage the Court is well accustomed to meet with statements and evidence which cannot be reconciled. Such contradictions arise sometimes on matters of fact, but more generally on matters which, to a great degree, may be questions of opinion, as the degree of danger, or probability of total loss. In such cases the Court arrives at the best conclusion it can. Without absolutely discrediting the evidence on either side, it makes deductions, remembering that interest, partizanship, and similar considerations, often lead to exaggerations; yet it may be not to wilful falsehood and perjury. But on the present occasion all attempts to reconcile the evidence are obviously vain; facts of a most striking description are unequivocally alleged, and as distinctly denied. Either the statements must be wilfully false, or the denial."

These remarks are, I am sorry to say, entirely applicable to this cause also, and I have in consequence found the investigation of it not only a difficult, but a disagreeable duty. For I must say, as

regard *Bayers* and *McNeil* on the one part, and *Brodie* (the master), *Graham* (the pilot), and *Keefe* on the other, that it is impossible they can all be laboring under misapprehension or mistake.

(His Lordship then read and commented at great length on the evidence, making a careful and elaborate analysis thereof, after which he stated his deductions therefrom, as follows.)

The conclusion at which I have arrived, (and I have not reached it without great reluctance,) is, that *Bayers* and *McNeil*, instead of doing what they had promised the captain to do, and what, when he delivered the women and children into their care, he had a right to expect they would do, by keeping their boat alongside, exposed them to the very peril from which he had endeavored to preserve them; that, availing himself of the darkness, *Bayers* sought to set up a claim as a salvor of the vessel by assuming to act as having charge of her, giving orders and doing other things which tended to show to bystanders he was what he affected to be; and that he left her when he saw that to remain longer would not advance his object, an object which would have been in all probability effected but for the unadvised act of the Marshal in personally serving the warrant of arrest on the captain, which compelled him, as he thought, to remain here and defend this suit.

It is the duty of Courts of Admiralty (it has always during the seventeen years that I have sat here been to me a pleasing duty) to decree a liberal reward to meritorious salvors. But it is still more emphatically their duty to lay a heavy hand on such as seek to turn the misfortunes of those, whose lives and property are imperilled by the manifold dangers of the sea, to a dishonest purpose. This Court requires good faith and a considerate regard for the rights and interests of others in those who invoke its aid. A salvor obtains by salvage service a lien upon the property saved. He must not sleep upon that lien. He

1862.

The ALMA.

must not allow others to be misled by his conduct, and, thereby, their fair endeavors to deal with that property frustrated, or controversies caused by it. Has *Peter Fleming* pursued such a course? Not at all. He says he sent *Bayers* to the captain, who treated him with insult. Why did he not instantly go to him and openly assert his right? The captain was an unfriended stranger then, but *Fleming* was at home. When, again, (as he tells us,) *Young* and *Hart* abused him, why did he not instantly employ an attorney and enforce his right, or, at the least, follow up his demand on them by a more formal one, accompanied by a witness. He, by his servants, had, as he thought, saved property worth many hundred pounds, and had probably saved life also. In a case to which I have heretofore referred, (*The Towan*, 2 W. Rob., 259,) Dr. *Lushington* says, (p. 270,) "I pronounce judgment against the salvors, with costs, in the hope that the example will prevent the reiteration of similar experiments in future. It is necessary," that very eminent jurist continues, "to watch with suspicion transactions of this description, and to protect owners and underwriters from an attempt at extortion;" adding that "where salvors who have a claim for a moderate reward, set up an inflamed and exaggerated statement of their services, he would dismiss it, and condemn them in the costs." That is what has been done in this case, and would, were the pleadings in a condition to enable me so to do, indispose me to give the promovent anything. But it is not in my power, under his act on petition, to do otherwise than to pronounce against him and condemn him in costs.

Judgment accordingly.

Proctor for Promovent, *Sawers*.

Proctor for Impugnants, *J. W. Johnston, Jr.*

THE QUEEN *vs.* THE CHESAPEAKE AND CARGO.

Jan. 13.
Feb. 10 & 15.

It is competent for a Judge of a Court of Admiralty to indicate, *ex officio*, to the parties, any view which may seem to have an important bearing on their rights.

The right of a captor to a prize may, by his subsequent misconduct in regard to the captured vessel, be wholly lost, and the vessel thereby forfeited to the Crown *jure coronæ*.

Alleged belligerents who have violated Her Majesty's proclamation of neutrality, grossly, wilfully, and stealthily violated her territory, resisting with force her officers seeking to execute the process of her magistrates, are guilty of such misconduct as renders any prize taken by them, even if it were lawfully taken, subject to forfeiture to the Crown.

The Court will entertain no plea on behalf of persons so acting.

It is the ordinary practice of the Court of Admiralty to direct property taken by pirates to be returned to the owners without delay, and, except where there is a strong necessity requiring it, without requiring bail for latent claims, taking care to protect the rights of the salvors, and the droits of Admiralty.

The act of a belligerent in bringing an *uncondemned* prize into a neutral port, to avoid recapture, is an offence so grave against the neutral state, that it *ipso facto* subjects the prize to forfeiture.

This cause came before the Court under rather peculiar circumstances. It appeared that the *Chesapeake* was a steamer plying between *New York* and *Portland* in the *United States of America*; that shortly before her leaving *New York* for *Portland* on the 5th *December*, 1863, several persons had taken passage in her as passengers, who afterwards had, on the high seas, taken forcible possession of her, brought her to the *Province of Nova Scotia*, and landed portions of her cargo, and sold the same, in several ports of the Province. These persons claimed to be officers and men in the employment of the so-called *Confederate States of America*, and to be duly authorized by the Government of these States to capture the *Chesapeake*. The vessel was afterwards taken possession of in *British* waters by the *United States* gunboat *Ella and Annie*, (the original captors having left her and fled to the shore on the approach of the *Ella and Annie*), and brought into the port of *Halifax*, where the commander of the *United States* war steamer *Dacotah* delivered her up to the *British* authorities. The Administrator of the Provincial Government directed the vessel and cargo to be brought into the Court of Admiralty for adjudication.

The following Counsel appeared on behalf of the various parties interested:—the Advocate General

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

(*Johnston* Q. C.) for the Crown; *J. W. Johnston, Jr.*, *J. W. K. Johnston* and *Wylde*, Advocates and Proctors, for owners of portions of the cargo; *Shannon* Q. C. Advocate, and *W. A. D. Morse*, Proctor, for the owners of the vessel and of the remainder of the cargo.

All the material facts of the case sufficiently appear in the decisions given, as stated below, in its various stages.

STEWART J. now (Jan. 13) after stating that his observations on a former day had been misapprehended, and that he had, therefore, reduced those observations to writing, said:

Now, in the first place, I have to remark, that it is in this Court open to the Judge in any stage of the proceedings, especially where the rights of the Crown are or may be involved in it, to indicate to the parties the proper course to be pursued, and, upon the facts before him, if they cannot be gainsaid, (and those on which I have formed my opinion cannot be gainsaid), to call their attention to the view of the law applicable thereto, which has occurred to him. It is his duty, therefore, sometimes to interfere, *ex officio*, as did the most eminent of my predecessors, Sir *Alexander Croke*, in the case of the *Herkimer*, Stewart's Admiralty Rep., 128, in which he said (p. 157), "It is quite in accordance with the constitution of the Court of Admiralty for the Judge to indicate, *ex officio*, to the parties, any view which may seem to have an important bearing on their rights," adding (p. 158), "such proceedings must necessarily be governed by the discretion of the Court."

Now, the facts set forth in the affidavit on which I granted the warrant are, that the *Chesapeake* and cargo were forcibly taken on the high seas from those who were conducting her from *New York* in the *United States of America*, to her port of destination, *Portland*, (she being a steamer carrying passengers, and a cargo

owned by several shippers, some *British* and some citizens of the *United States*,) by a number of persons who had gone on board as passengers at *New York*; that one of her crew was then slain by them; that those persons brought her into several of the ports of this Province, giving her a false name; that they landed and sold a considerable part of her cargo; that they entered and remained in *Sambro Harbor*, within a short distance from this port, and on the approach of a ship of war of the *United States*, left the vessel and fled to the shore, and, while there, with firearms forcibly resisted process issued against them by lawful authorities here—signifying that on any attempt being made to arrest them they would use them; and, finally, that they are all now fugitives from justice. Unexplained, these circumstances certainly constitute a piratical taking, and such as required me to grant a warrant to arrest the vessel and cargo. Vague assertions and rumors to the effect that this taking of life and this capture were the acts of duly authorized belligerents furnish no reply to such a case. Indeed, Mr. *Ritchie* suggested it as possible, and addressed me as *amicus curiæ* only. With reference to the principles he propounded, they lie on the very surface of international law; and, if those persons are really entitled to the character asserted for them, we have a right to expect that they should be prompt to vindicate that character before a *British* tribunal such as Her Majesty's Supreme Court, on whom they might, I am sure, rely for protection, if the law entitled them to protection.

Now the jurisdiction of the Court of Vice-Admiralty over cases of piracy is exclusive, for the Crown has *jure coronæ* as droits of Admiralty the absolute right to goods belonging to pirates, and also to those found in their possession, if not claimed by their owners and proof made of their title. Until such claim is established, they must remain in the custody of this Court. At the end of a year, they are, if no claim

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

is preferred, condemned to the Crown as droits of Admiralty. Moreover, this Court is bound to see that salvors are properly rewarded. In the present case no such claim is preferred, or, if preferred, it would not be listened to for a moment.

It is not for me to deal with the gross outrage on the liberty of our fellow subjects, and the contemptuous and coarse violation of Her Majesty's proclamation and her territorial rights, perpetrated by officers of the navy of the *United States*. We may rest assured that these are safe in the hands of Earl *Russell*, a statesman who has ever been foremost in vindicating the rights of his countrymen in every part of the world. I do not doubt that his Lordship will promptly demand that ample reparation be made by the Government of the *United States*, and I confidently anticipate that that Government will as promptly disavow and apologize for the conduct of their officers, and make full reparation to the sufferers. I think, too, we have all reason to be gratified that our gracious Sovereign has been so fitly represented in the recent emergency by her representative, General *Doyle*. With the courtesy natural to him, and the spirit and decision which his high office and duty as a soldier taught him, his prompt measures to obtain the release of our fellow subjects, so ignominiously treated, cannot but secure to him the gratitude of every *Nova Scotian*.

From the first I thought it probable that the case would come before me, and, therefore, I, as carefully as I could, considered the principles which, if it should, must govern my proceedings. I knew indeed, that though His Honor the Administrator of the Government might, as representative of the Queen, possibly direct the vessel and cargo to be delivered at once to their respective owners, yet, for him to do this, without waiting for the instructions of Her Majesty's Government, I also knew would be assuming a very grave responsibility. Besides, this

case is *primæ impressionis*, and, in many of its aspects, full of difficulties. *Prima facie*, the facts before His Honor, and, of course, submitted to his legal adviser, the Advocate General, exhibited an undoubted case of piracy. But it was well to pause before presenting it to this Court as such, in order that all the circumstances should be fully ascertained. Moreover, the nature of the cargo shipped by *British* owners as well as citizens of the *United States*, rendered it extremely difficult for the Local Government to aid His Honor, since they had no authority to administer an oath to the claimants, and no machinery to effectively ascertain their respective rights. What the Government could do, they did promptly and well, and by their vigilance and activity much of the goods clandestinely landed from the *Chesapeake* has been saved for the owners.

Looking, then, at the circumstances of this case, I, (in the exercise of the discretion of which I have already spoken), thought it well, with a view to preventing further delay and saving the heavy expense attendant on this litigation, to suggest at the outset to the parties the course which the incontrovertible facts of the case have led me to adopt, viz., that the owners of the vessel and cargo should conjoin their claims, instead of presenting separate claims, and thereby render unnecessary the unlading the cargo, and enable the vessel at once to resume her original voyage. I had previously directed the Marshal not to take the rigging from or otherwise dismantle the vessel, but to wait on His Honor the Administrator of the Government, the authorities at the Dockyard, and the Provincial Government, and ask them to permit the vessel and cargo, and that part of the cargo the possession of which had been obtained by the officers of the Provincial Government, to remain as at present until some further order should be made therein by this Court, and this was immediately conceded. I granted the decree of

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

unlivery for which the Advocate General moved, to be used at his discretion, and directed the respective claimants to confer with each other, and to submit their proofs to him preparatory to their moving for the restoration of their property. On this occasion Mr. *Wylde*, the Proctor of one of them, signified his client's desire that his portion of the property should be delivered here. Appearances on behalf of the vessel and parts of the cargo have been filed; (I take it for granted that the proctors have filed their proxies, duly authenticated,) but no appearance has been given for the alleged captors.

In the course of his address, Mr. *Ritchie* suggested that but for fear of his being delivered upon the demand of the Government of the *United States*, under the Extradition Treaty, the principal person engaged in the capture would appear openly and make a claim. Captures lawfully made by a belligerent, may, by subsequent misconduct of the captors, in respect to such captures, so divest themselves of their vested right as to take from them the aid of the Court of Admiralty. Now the consideration of such a claim as Mr. *Ritchie* suggests, though but an incident of the cause over which, in virtue of its constitution and power, it has and exercises original jurisdiction, calls on me to proceed upon the common law of the Admiralty and the enlarged principles of international law which guide this Court, in contra-distinction to those circumscribed technicalities and rules which obtain in other Courts. Yet, even in the Courts of Common Law and Equity, we have the maxims that "a man must come into Court with clean hands;" "that he who seeks equity must do equity;" and the like. A mere reference to the Admiralty Reports will show that such subsequent misconduct has the effect I have mentioned. More than sixty years ago, Sir *Alexander Croke* decided, not on a statutable provision, but on the common law of the Admiralty, in the case of *La Reine des Anges*

Stewart's Admiralty Reports, 11, that the right of the captor to a prize which had vested in him, was, by his subsequent conduct, in respect to the captured vessel, wholly divested, and he condemned her as forfeited to the Crown *jure coronæ*.

Now the course of proceedings in this Court in this case, as prescribed under Acts of the Imperial Parliament, will be this: The Proctor General, on behalf of the Crown, will file a libel, setting forth therein as piratical acts all the circumstances I have detailed; and, if any claim be put in either on behalf of the person to whom Mr. *Ritchie* referred, or of the *Confederate States*—assuming that the latter have such a corporate character as to give them a right as a nation to a *locus standi* in this Court, (as to which I will say nothing more at present), and assuming further that the *Chesapeake* was lawfully captured, then those circumstances must be all admitted by the plea of such a claimant.

Now by clause third of section twelve of our Rules, it is prescribed to the Judge as his duty "to reject *immediately* all pleas which, if assumed to be true, "will not justify him in pronouncing a decree for the "party pleading such plea," for in this Court both parties are actors. The effect of my decreeing such a plea to be valid would be to deliver the vessel and property to the claimant. But am I sitting as the Judge of a Court of Admiralty, and representing Her Majesty in it, to sustain the plea of men who have violated her proclamation of neutrality,—offered an affront to her dignity; of men who, claiming to be belligerents and not seeking the privileges which the courtesy of neutral powers extends to belligerent vessels, but who have grossly and wilfully and stealthily violated her territory, and sold goods therein;—who have with revolvers and lawless force violently resisted on the same territory the officers seeking to execute the process of her magistrates; and who are at this moment fugitives. If, indeed,

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

these people had entered this port claiming the privileges usually accorded to belligerent vessels by neutral States, then the principles referred to might *perhaps* have been invoked on their behalf before a tribunal authorized to consider them. But this Court of Vice-Admiralty has no such authority, except, as I have said, as incidental to the jurisdiction which it rightly exercises in cases of piracy. Among the principles I have referred to is that one by which neutral property, not being contraband, found by belligerent captors on board of a prize, is restored to the neutral owners. But unless the view of the course I propose to pursue be correct, I have no authority to decree a delivery of that claimed in this case by *British* owners; still less, if possible, to order the vessel to be restored to her owners.

I trust that a judicial career of now nearly eighteen years has enabled the Bar to believe that I am capable of altering my opinion, when Counsel show that it is erroneous. I confess, as at present advised, I should feel it my duty to reject such a plea, and had the facts been capable of being controverted or materially modified on which my opinion is founded, I should have studiously refrained from expressing it at this early stage of the cause. But the rights of *British* owners are concerned, large expenses are being daily incurred, and I am desirous, as I have said, to diminish them, and to expedite these proceedings. The conduct pursued by the persons who seized the *Chesapeake*, after the seizure—though it were a lawful seizure—has, as I think, by international law, rendered their prize subject to forfeiture to Her Majesty to be dealt with as to her may seem fit.

At the close of the proceedings his Lordship informed the Advocate General that under the facts before him, unless they were altered by evidence, he would treat the case as one of piracy throughout.

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

His Lordship now (*February* 10th) granted the motions for Writs of Restitution of such parts of the cargo of the *Chesapeake* as were claimed, and their claims allowed on *Friday* the 5th of *February*; and, in doing so, remarked:—

What I have said and done in this cause has been greatly misunderstood and misrepresented, and it is of much importance that this should, as far as possible, be prevented from again occurring. I have, therefore, thought it well to reduce to writing what I have to say in decreeing these writs as prayed. It has been thought, for example, that my proceedings will be in effect deciding in favor of the demands made by the Government of the *United States* upon the Governments of this and the adjoining Province of *New Brunswick*, for the delivery, under the Extradition Treaty, of the captors of the *Chesapeake* as pirates. But with questions or rights under that Treaty, this Court has no concern,—no authority to interfere directly or indirectly. And the view I have taken of the case before me can and could in no wise affect that demand, even if it were invested with full authority to adjudicate upon it. I grant these writs, and I am prepared to decree the same writs in order to the restoration of the vessel and the remainder of the cargo to their original owners, upon due proof of their title to them and payment of the costs and expenses which have been incurred. Those which have now been preferred I will examine and pronounce thereon on *Saturday* next. It will be recollected that at the commencement of these proceedings, I stated that in my view, assuming the captors of this vessel to be lawfully authorized belligerents, they had forfeited their rights; that I could not, therefore, entertain a plea on their behalf, and that the proper course to be pursued was to restore the vessel and cargo to their original owners. Subsequent research and reflection, and circumstances which have since occurred, have confirmed this view, and also enable me to state

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

that in my early announcement of it I rightly exercised the discretion which is constitutionally reposed in a Judge of a Court of Admiralty. Still, if these opinions be erroneous, they can be readily corrected. This Court (though it administers its functions in *Halifax*) is an Imperial Tribunal, acting by the authority of Acts of the Imperial Parliament, and guided by international and maritime as well as municipal law; and from its decrees an appeal lies to the highest appellate tribunal but one in the Empire. If, therefore, these captors have the rights which it has been suggested at the Bar belong to them, the Confederate Government and its agents can have no difficulty in effectively vindicating them. The announcement of those views was received with but scant deference. They, especially the intimation that the *Chesapeake* and her cargo should be forthwith restored to their owners, were promptly denounced as inconsistent with that common sense, the application of which, it was said, to legal problems, was all that was required for their solution. This reception of them troubled me but little, as I felt that no personal disrespect could be intended; but the conduct of a portion of the press in these Colonies has given me great concern. Free and fearless criticism of the proceedings of Courts of Justice, such (and such only) as one sees in the great leading organs of public opinion in *England*, is an essential corrective of these proceedings. But the circumstances of this case, it is well known, have excited the most angry feelings throughout the *United States*, and the epithets and aspersions, and the unworthy motives and conduct imputed to this Court, and to myself, as Judge of it, are as unpatriotic as they are *un-English*, for they can have no other tendency than to exasperate these feelings, and justify alike the Confederates and the Federals in treating with contempt any decree which it may pronounce.

Motions were then made by the several Counsel in

reference to the vessel and cargo, after which His Lordship stated that on *Monday* next he would give judgment which would be in the nature of a final decree in the case. The Court then adjourned till *Monday* next at 11 o'clock.

His Lordship now (*February 15th*) delivered final judgment as follows:—

On the 6th *January* last the Advocate General exhibited affidavits of himself made before the Registrar, and copies of three affidavits made before the Mayor of this city, by *James Johnson*, *George Ames*, and *Mary V. Burgoyne*, and also the affidavits of *William Henry*, *Alexander Henry*, *John E. Holt*, and *Patrick Conners*, sworn before the Registrar (copies of all which affidavits are attached to this judgment). Upon these affidavits he moved for a warrant to arrest the steamer *Chesapeake* and cargo, as having been piratically taken on the high seas from her lawful owners, which I granted. It was issued on the same day, made returnable on the 12th, executed on the 7th, and returned and filed in the Registry on the 9th of *January*. On this last day he moved for a commission of unlivery which I granted, informing him that he might cause the cargo to be unladen or not as in his discretion he should think fit.

On the 18th he placed it in the hands of the Marshall, who, on the 29th, returned it executed (with inventory attached to it) unto the Registrar.

No appearance on behalf of the captors of the *Chesapeake* having been filed on the return day of the warrant of arrest, they were, on the petition of the Procurator General, in the usual manner pronounced in default.

Claims by *British* owners for parts of the cargo have been allowed, viz., to *Ross & Co.*, of Quebec, for 109 hogsheads of sugar; to *Belony & Lamotte*, for 10 hogsheads of tobacco and a box of tinfoil; to *Charles Sampson* for 1 cask of augers, and to *James McInlay*

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

for 5 rolls of sole leather, and H. M. Advocate General having consented thereto I decreed Writs of Restitution.

On the 10th *February* Mr. *Morse*, on behalf of the owners of the vessel, moved for the admission of their claim that the vessel be restored to them, and that the remainder of the cargo (which is unclaimed and which is owned in part by *British* subjects and in part by *American* citizens) should be delivered to them in order that they might carry the same to the original port of destination, *Portland*, in the *United States*, and there deliver it to those who were entitled to receive it. The Advocate General has examined this claim, and consented that a Writ of Restitution thereof be granted without bail, to answer prospective, or (what are in this Court designated) latent claims. And upon this claim I am now giving judgment. But it is obvious that thus granting this claim and the restoration prayed for will terminate this case. These claimants are citizens of the *United States of America*, the vessel is an *American* steamer, and, I may mention that, as an additional ground for the delivery of the unclaimed cargo to them, they allege that they have a lien thereon for freight. It is the ordinary practice of this Court to direct property taken by pirates to be returned to the owners without delay, and, except where there is a strong necessity for requiring it, without bail for latent claims, taking care to protect the rights of the salvors and the droits of Admiralty. At this period it is incumbent on me to state that I adhere to the opinion I expressed on the 9th, and repeated on the 12th of *January*. I do not at all controvert the legal principles suggested at the Bar as worthy of my consideration, but I do not perceive their applicability to the circumstances of the present case. But whether I be in error or not, whoever or whatever they are who seized the vessel, and whatever in their own or in their Counsel's estimation their rights may be, they have not thought fit to vindicate them before

this Court. They have, as I have just noticed, suffered judgment by default.

I have been much embarrassed in dealing with this case. To grant this application will be entirely within the rules applicable to it, for, on the facts sworn to, the taking was undoubtedly a piratical taking. But in its origin, in its position before the Court, in the mode of the recapture, in short, in all the concomitant circumstances, the case is very peculiar. I was, therefore, in the absence of decided cases, obliged to recur to, and rely on for my guidance, those principles which lie at the basis of all law. And I do not think I shall be acting unbecomingly in referring for a few moments to those principles.

The right of self-defence is one of the fundamental attributes of an independent State, and the principles, which regulate its conduct towards other States, have their foundation in a higher philosophy than that which underlies the municipal or positive law. The latter implies a ruler to prescribe, and a subject to obey. An independent State recognizes no superior, acknowledges no authority paramount to its own. Underneath international law lies the *ultima ratio Regum*. Every independent State determines for itself, as exigencies arise, what shall be the penalty for infractions of the law which it prescribes. The Sovereign, whose territorial rights are violated by the subjects or citizens of a friendly State, is not bound to appeal for reparation to (what might be) the tardy justice to be conceded by that State. If those subjects or citizens are within its territory, it will inflict on them its own penalty, in its own mode. An independent State is not circumscribed by the limits which are essential to the administration of municipal law, since by it the agents of the community protect from the aggression of the wrong-doer the individuals of which it is composed. Then, if one of the Queen's subjects had violated the municipal law as flagrantly as the captors of the *Chesapeake* have outraged the

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

international law, and such violation would have (as it unquestionably would) justly subjected the offending vessel to forfeiture, shall those who have violated the higher law be subjected to a less penalty? Assuredly not.

Then, as to the right disposal of the forfeited vessel. It were derogatory to the Royal dignity to add the proceeds of property which had belonged to the citizens of a friendly nation to the privy purse of the Queen, and it would as little become the honor of the *British* nation to make profit out of their misfortune.

What more appropriate mode of dealing with this vessel and cargo, then, than to restore them to their original owners;—not as a favor to them, but as an act of justice to the offended dignity of the Crown; not as recognizing any right of the Government of the *United States* to require such restoration, but as a fit punishment of the offenders, and a warning to others? The law which the Queen and the Parliament have prescribed to enforce the observance of her neutrality is to be found in Her Majesty's Proclamation, and in the Statute under the authority of which it was issued. Is the offence which I have suggested against the municipal law, or can any offence be more serious than that by which the *British* nation might be drawn into the sad contest, which has desolated and is still desolating one of the fairest portions of the earth.

By the affidavits on which I granted the Warrant, it is certain that the *Chesapeake*, if a prize at all, is *an uncondemned prize*. For a belligerent to bring an uncondemned prize into a neutral port, to avoid recapture, is an offence so grave against the neutral State, that it *ipso facto* subjects that prize to forfeiture. For a neutral State to afford such protection would be an act justly offensive to the other belligerent State.

The *Chesapeake* was brought not into one port only, but into several of the ports of this Province;—not

openly, but covertly; not in her proper name, but in a false name. Still farther, they, who thus invaded the Queen's territory surreptitiously, landed and sold therein a considerable portion of her cargo, making no distinction between those parts of it which were owned by the subjects of Her Majesty and those belonging to the citizens of the *United States;* and, instead of vindicating the rights which it was asserted for them at the Bar they possessed, they, (after landing on the shores of this Province, and thus being under the protection of *British* law), have long since fled from and are still fugitives from it.

These are the facts, on which I deemed it right to recommend at once that the vessel should not be unladen or removed from the custody of the Provincial Government, in order that she might be restored intact to her owners. I then thought—I still think that it would not consist with the dignity of Her Majesty—though the capture had been a lawful one, to hold valid a plea on behalf of these persons. The facts I have just mentioned must have been admitted, for they are in their nature incontrovertible.

This Court has no prize jurisdiction, no authority to adjudicate between the *United States* and the *Confederate States*, or the citizens of either of these States. Yet, if a claim to the vessel and cargo could have been sustained, all further jurisdiction on my part over them must have ceased, and they must have been further disposed of by competent authority, and it would have, in that case, been my duty to have examined into the question of prize. As the case at present stands, I am rightfully exercising jurisdiction, for the facts disclosed by the affidavits as to the actual taking of the vessel from the master and crew beyond all doubt constitute a piratical taking. The effect of upholding the plea of these captors might possibly be, that notwithstanding their gross misconduct the vessel and cargo might be left to them.

1864.

THE QUEEN v. THE CHESAPEAKE AND CARGO.

For as his Honor the Administrator of the Provincial Government had directed the vessel and cargo to be brought into this Court for adjudication, he could hardly then have resumed possession for any purpose. Impressed, then, by these strong convictions, as such a condition is dispensed with by the Advocate General, I will not myself volunteer to impose (as a condition precedent to the restoration of the property) that their owners shall give bail to answer prospective claims, for, if I am rightly informed, the amount to be required would be at the least eighty thousand dollars, and to insist on such bail might be equivalent to a refusal to restore the property.

Unlading the vessel, and the incident expenses, have rendered their ratable adjustment a matter of great difficulty,—a difficulty, to be sure, which might be overcome by my decreeing a particular appraisement and valuation of the vessel and cargo to be made by the Marshal, and a subsequent reference to the Registrar and merchants. After a careful consideration, however, of this part of the case, I think it not unjust to order that the costs and expenses, (except only the costs of these claimants whose property is to be delivered to them here, which, as well as those of the Advocate General appertaining thereto, they are to pay), be paid by the owners of the vessel, leaving to them to adjust and seek repayment thereof from the shippers, insurers, and other persons chargeable therewith. If this were an ordinary case of recapture from pirates, the prescribed salvage would have been one-eighth of the value of the property, and this, on the value of the vessel alone, (which, I am informed, is more than sixty thousand dollars), would have been seven thousand dollars, and the owners of both vessel and cargo have been fortunate that they were not destroyed at sea, and so wholly lost to them. It is unnecessary to recur to the circumstances of the recapture. It suffices to remark that the taking was not an ordinary piratical capture.

It is even *possible* not to have been a case of piracy at all. This Court would stultify itself, were it to affect ignorance of what is patent to everybody, namely, that those who wrested the *Chesapeake* from the master and crew, are at the present moment in the adjoining Province of New Brunswick asserting that they made the capture as citizens of, and parties duly authorized by, the Government of the *Confederate States;* and that they have produced documents and proofs thereof before Magistrates there, duly invested with the right to determine the validity of their claim, so far, at least, as affects their alleged piratical character. I allow this claim, and will decree a Writ of Restitution, when moved, to be given to the claimants upon payment of the costs and expenses, as I have before specified.

The Registrar will estimate as accurately as he can the amount which will certainly cover the whole costs and expenses to be paid, as I have directed, by the vessel; and, upon that amount being paid into the Bank of *British North America*, the Bank of deposits of this Court, he will issue the Writ of Restitution to the owners of the vessel. And he will, by orders on the said Bank, pay to the several parties entitled to receive the same, such sums as he may have taxed and allowed; and the remainder, if any, he shall return to the said owners. In like manner he is to tax, and allow and cause to be paid by the claimants of that part of the cargo which has been, is, or is to be, delivered here, all their costs and the costs of the Advocate General appertaining to their claims.

Judgment accordingly.

Proctor for the Crown, *Advocate General.*

Proctors for owners of portions of cargo, *J. W. Johnston, Jr., J. W. K. Johnston, Wylde.*

Proctor for the vessel and owners of remainder of cargo, *W. A. D. Morse.*

1865.

IN THE

VICE ADMIRALTY COURT AT HALIFAX.

THE HONORABLE WILLIAM YOUNG,
PRESIDING JUDGE.

MEMORANDUM.

The Honorable *Alexander Stewart*, C.B., died on the 1st *January*, 1865, and was succeeded by the Honorable *William Young*, Chief Justice of the Supreme Court, who became, *ex officio*, Judge of this Court, under the authority of the Imperial Act, 26 *Vict.*, chap. 24.

Jan. 28.

THE "CITY OF PETERSBURG."

(CAUSES NOS. 216, 218, 219.)

Two out of three promovents shipped at *Bermuda*, on board the ship libelled, a blockade runner, for the round voyage from *Bermuda* to *Wilmington, North Carolina*, and thence to *Halifax, Nova Scotia*. The remaining promovent shipped at *Wilmington* in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents certain specified sums, in three equal instalments. The contract was absolute as to two of the instalments, and, as to the third, there was a condition that it was to be paid only if the claimants' conduct were satisfactory.

These were actions for seamen's wages, promoted by three seamen against this vessel.

The causes were tried together twice—once before the late Judge *Stewart*, who ordered a re-argument, and again before the present Judge of this Court—by

Held. 1. That this was not an ordinary engagement for seamen's wages, but a special contract.

2. That previous to the Admiralty Court Act of 1861, 24 *Vict.* ch. 10, the High Court of Admiralty had no jurisdiction over such contracts.

3. That this Act did not extend to the Vice Admiralty Courts, nor were the provisions respecting special contracts embraced in its tenth section extended to those Courts by the Act of 1863, 26 *Vict.*, ch. 24, sec. 10.

4. That, although the Commission formerly issued to the Vice Admiralty Judge empowered him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of *England*," yet this power, like some others assumed to be bestowed by the Commission, is frequently inoperative.

And that, therefore, this Court has no jurisdiction in cases like the present.

Held, also, that, although the respondents were bound to have objected to the jurisdiction *in limine*, by appearing under protest, still, that, where the Court is of opinion that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it.

Sutherland, Q. C., and *LeNoir*, for the promovents, and by *Ritchie*, Q. C., and *J. N. Ritchie* for the vessel.

The pleadings and the facts are fully set out in the judgment.

YOUNG J. now delivered judgment as follows.

The *City of Petersburg* is a blockade runner, plying between *Bermuda* and *Wilmington*, the voyage in question in these suits having terminated, (in consequence of the fever at the former of these places in the month of *September* last), at this port. Two of the plaintiffs, *Nichol* and *Bailey*, shipped, the one as chief cook, and the other as second steward, at *Bermuda*, for the round voyage, and were discharged by Capt. *Fuller*, the then master, for alleged incompetence, at *Wilmington;* but were brought here in the ship, in obedience to the laws of the *Confederate States*. The third libellant, *John Valley*, was shipped at *Wilmington*, as chief cook, in place of *Nichol*. The ship left *Bermuda* on the 8th of *August*, and arrived at *Wilmington* on the 13th,—was detained till the 29th at quarantine,—left *Wilmington* again on the 5th *September*, and arrived here on the 13th. Capt. *Fuller* returned in her, and refused to pay the balances claimed by the three plaintiffs. He appears to have left this for *England* along with Mr. *Campbell*, one of the owners, in the steamer of 29th *September*, a few days before these actions were brought. *Webb*, the chief steward of the ship, appears also to have left before they were brought,—so that the two principal witnesses for the defendants could not be examined.

The libels exhibited by the plaintiffs are in the ordinary form, but omit in the schedules, as required by the rule, a statement of the sums received on account and the balances claimed to be due; these balances, however, appear in the affidavits. In point of fact *Nichol* claims $120, *Bailey* $80, and *Valley* $120, with the difference of exchange and costs. The responsive allegations in the three suits are nearly the

1865.

THE CITY OF PETERSBURG.

same. The hiring alleged in *John Nichols'* libel, No. 216, was for hazardous services, and wages therefor said to have been promised in one sum of $180, payable, part on leaving *Bermuda*, and the remainder on arrival of the ship at the termination of the voyage there or at *Halifax;* while the responsive allegation pleads, in the first article, that the wages were payable in three sums each of sixty dollars—the first on leaving *Hamilton*, the second on the termination of the voyage at *Bermuda* or *Halifax*, and the third as an additional bounty, "provided the master was satisfied with the plaintiff's conduct during the voyage." The second article of the allegation sets forth the incompetency of the plaintiff and his discharge therefor. The third alleges that the master was not allowed to leave the plaintiff, being a *British* subject, at *Wilmington*, but was compelled to bring him to *Halifax* as a passenger. And the fourth claims the benefit of the 189th section of the Merchants' Shipping Act, 1854, the sum claimed by the plaintiff being under £50. There are no other pleadings in either case, and by agreement the evidence taken in the three suits was to be used in all or any of them as far as it might be applicable. The three were argued together before the late Judge *Stewart*, and a re-argument having been ordered by him, on account of the difficulties which the cases presented, they were again heard before me on the 20th and 21st instant.

The first object of enquiry is the nature of the contract. This is common to all the three cases, the plaintiffs' counsel contending that, with some variation in the mode of payment, it is the ordinary engagement for seamen's wages, to be considered and dealt with as such; and the defendants insisting that it is a special contract, and, as such, not within the jurisdiction of this Court. On this very material point, the pleadings, as we have seen, and the evidence are conflicting. There is some testimony as to the usage of the trade; several companies, as

1864.

THE CITY OF PETERSBURG.]

we know, being engaged in the hazardous enterprise of blockade-running, but *Dunbar* says that every company has its own prices and mode of payment; and *Wade* testifies that the wages in the *Old Dominion* and *City of Petersburg*, which were owned by the same company, were different from those in other ships. *Nichol* says that his wages were to be $180 in all, payable in gold, of which he received $60 in advance, "and the balance was to be paid on arrival if they made the clear trip." He denies that it was optional with the captain to deprive him of his wages; "such a thing," he says, "was not mentioned when I hired. I should not have gone." *Bailey* says in reference to this case, differing somewhat from *Nichol*, that at the hiring "three sixties were mentioned—one sixty when the pilot left, the remainder on the termination of the voyage. No condition," he adds, "was mentioned as to stopping any part of our wages or anything else." "The Captain said he would give *Nichol* three sixties —those were the words he used—he said nothing about cotton money." And again, he says, "Nothing was said about bounty or cotton money." As to his own hiring, *Bailey* says, "the captain agreed to give me $120 for the voyage, payable forty advance when the pilot left us (which he admits having received), and eighty on termination of voyage." *Nichol*, confirming him, again says, "Nothing was said about bounty or cotton bounty—nothing more was said between us and the captain."

No ship's articles were signed, on account, it is said, of the nature of the trade, and *Fuller* and *Webb* being absent, there is no other evidence of what actually passed at the hiring of these men. It is obvious, however, that something more either did pass or was understood between the parties. No such contract as is here represented was had with any other of the men either of the *Old Dominion* or the *City of Petersburg*. *Nichol* himself says, "that the custom of wages was well understood among the men,"—and

1865.

THE CITY OF PETERSBURG.

what that custom was is abundantly proved by the witnesses for the defence. Mr. *Hull*, formerly chief, now second, officer of the ship, says, "The rate in ships of the class of the *City of Petersburg* is $60 for the chief cook, when we leave port for the passage from *Hamilton* to *Wilmington*. If the man keeps on, when he comes back to any *British* port, $60 more,—he also gets cotton money at the owner's option,—some men get it and others do not." "By cotton money," he says, "I mean a present from the owners at their option if the men give satisfaction." "What the owners pay on leaving *Bermuda* is an advance; what they agree to pay leaving *Wilmington* is a bonus; cotton money is a present." Of his own pay, he says, "Capt. *Fuller* hired me. My wages, as second mate, were $75 for the passage in,—if I came out in the ship, $75 more,—and if I gave satisfaction, $75 more as cotton money. I gave satisfaction, and got it." *Alex. Cameron*, supercargo of the ship, and a partner in the adventure, says: "The men shipped at *Bermuda*, and were paid in advance there as by tariff; after running the blockade, and reaching a neutral port (that is, outside the Confederacy), with a cargo, they are paid bounty and cotton money; the cotton bounty is optional with the captain,—provided the conduct of these men deserves this cotton bounty, they get it, otherwise not." "Copies of the tariff," he adds, "were supplied to the chief officer and engineer."

Capt. *Page*, the master of the *Old Dominion*, also says, "that the cotton money was payable to the men, provided they gave satisfaction; that the bounty system is perfectly understood by the seamen, as well as by the party engaging, when they engage. *Thos. Purcell*, chief steward of the *Old Dominion*, produced a copy of the tariff common to both vessels, and which he read to the men of his department. The crew had one copy forward, and it was read by *Lowrick*, one of the witnesses for these plaintiffs, but

1864.

THE CITY OF PETERSBURG.

not examined upon this point. *Parcell* says, that Mr. *Campbell*, one of the recognized owners, called him aft, and read the tariff to him, and asked him if he was satisfied. He said he was; and that was the contract the witness entered into. The tariff, from which the copy marked A was made, distinguishes the monthly pay or advance from the two bounties payable on return, and at the foot says, "Cotton money will only be paid to those whose conduct has satisfied the captain, chief engineer, and mate."

Now, it must be conceded, I think, to the plaintiffs that the exact nature of this contract has not been unmistakably and clearly shown on the defence. The option of paying the cotton money depends, according to one witness, on the satisfaction of the owners,—according to another, on that of the master,—and according to the tariff, on the combined satisfaction of the master, engineer, and mate. *Hull* also says, "that it was optional with the captain to have discharged all the crew at *Wilmington*, and in that case they would have forfeited the rest of their wages." But while in this absence of ships' articles, (a want which may be very injurious in such suits to the owners, but is never allowed in this Court to operate against the seamen), a certain degree of obscurity rests upon this contract, it is impossible to view it, upon the whole evidence, as an ordinary contract for mariners' wages. It sprang, as I have already said, out of an exceptional and hazardous trade, new in all its circumstances and relations, which has not been attacked in this case as illegal, but which differs widely from the usual conditions, and can hardly be governed by the general rules entitling the seaman to his wages on performance of his contract of service.—(*Abbott on Shipping*, 658.)

In the case of the *Riby Grove*, 2 W. Rob., 61, Dr. *Lushington* observes "that unfortunately what is or is not a special contract, no one has attempted to define. None of the decided cases have defined specifically what is a special contract, and upon this

1865.

THE CITY OF PETERSBURG.

point," he says, "I am left entirely to my own judgment." But none of the decided cases resemble this. I shall say nothing of the old authorities in Prohibition cited in *Abbott*, and in the case of the *Sydney Cove*, 2 Dodson, 12. Of those in the Admiralty—the cases above mentioned of the *Sydney Cove* and the *Riby Grove*, both of them involving partnership transactions; the *Isabella*, 2 Ch. Rob., 241, where there was a claim for the value of a slave in addition to the wages; the *Mona*, 1 W. Rob., 141, where the promovent was to receive a gross sum for proceeding from *St. Helena* to *England* and his expenses back; these and other cases were not more distinguishable from the ordinary mariner's contract than the present, I think, must be held to be. In my view it cannot be considered otherwise than as a special contract, separable, it may be, into parts, as was done in the case of the *Tecumseh*, 3 W. Rob., 109, 144; but, as it is pleaded in the responsive allegations here, and appears in proof, essentially a special contract.

Now, there is no position better established in the Court of Admiralty than its want of jurisdiction in such a case, till the jurisdiction was conferred by the Act of 1861, the 24 *Vic.*, ch. 10.

In the *Mona*, decided in 1840, Dr. *Lushington* said: "Looking to the authorities that have been cited, their effect is plainly this, 'that where there is a special agreement differing from the ordinary mariner's contract, this Court has no power to adjudicate, and the cognizance of the question belongs to another jurisdiction.' Lord *Stowell* decided the *Sydney Cove* on that ground."

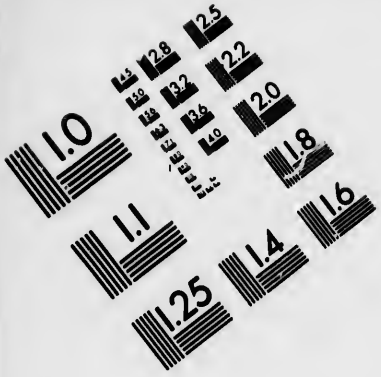
In the *Debrisca*, decided in 1848, he said:—"The right of the mariner to sue is denied, not only upon the ground that there has been an abandonment of the voyage, but that his engagement with the owners was in the nature of a special contract. This, I apprehend, as far as this Court is concerned, is a fatal objection. I cannot find any authority that would

authorize me to interfere; neither do I see in what way I could proceed to ascertain what is the amount of the indemnification, to which the mariner is entitled for a breach of the contract. The matter lies entirely and exclusively within the functions of a jury, whose functions I should usurp in adicating upon it."

The rule was recognized also in the *Irish* Court of Admiralty in the case of the *Enterprise*, 5 Law Times Rep. N. S., 29. And in the same volume, p. 210, and in *Lush.*, 285, is the case of the *Harriet*, where the Counsel submitted that any agreement by a mariner *dehors* the ship's articles, which are appointed by the Legislature, is a special agreement. And Dr. *Lushington* said: (p. 221) "However differently the Courts of Common Law may now be disposed to view the jurisdiction of this Court from what they did in former times, I am bound by the limitations imposed on my predecessors, and acted upon by them and by myself in former cases; and I cannot enforce any contract for seamen's wages different from the ordinary mariner's contract." His Lordship added, "I am happy to say that an Act is now passing through the legislature, which will remedy the defect in the jurisdiction of the Court, which, in the present case, has operated with such hardship on the plaintiff."

This Act I have already referred to, and section 10 runs thus:

"As to claims for wages and for disbursements by Master of a ship,—The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship: provided always, that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by



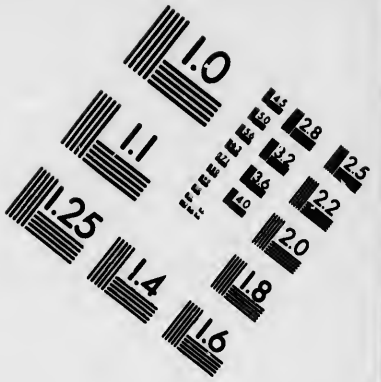
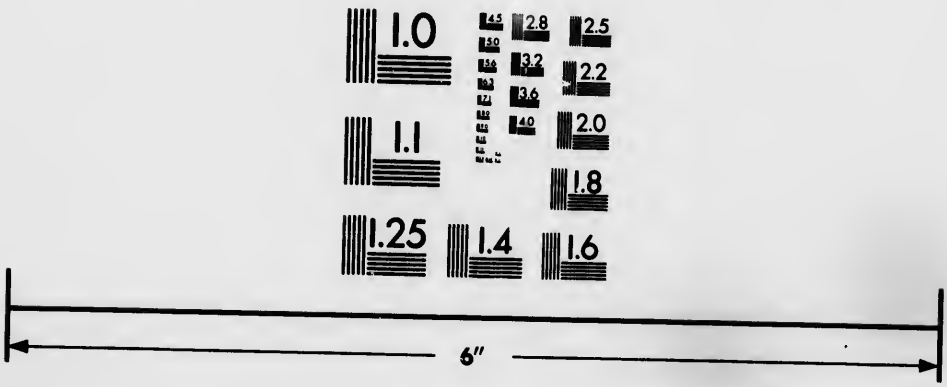
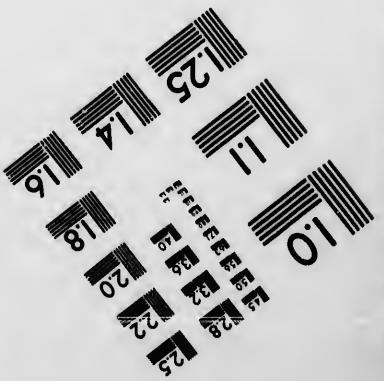


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1865.

THE CITY OF PETERSBURG.

him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court."

This section gives in express terms the jurisdiction that was formerly wanting,—it extends to a claim by a seaman of any ship for wages earned by him on board the ship, "whether the same be due under a special contract or otherwise," and the plaintiffs' Counsel contended at the hearing, that the Act of 1861, as it gave the power to the High Court of Admiralty, gave it also by construction, or *ex necessitate*, to the Courts of Vice Admiralty all over the Empire.

I confess I should have had great difficulty in assuming this jurisdiction, even had the Act of 1863, the 26 *Vict.*, ch. 24, not been passed. And, as it is, I think the question must turn entirely on the construction of the two Acts.

The Commission to my predecessor, it is true, dated in 1846, empowers him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of *England*, in our said Province of *Nova Scotia* or *Acadia* and maritime ports of the same and thereto adjacent whatsoever." The Commission of the Hon. *Henry Black*, the Judge of the Admiralty at *Quebec*, dated in 1838, is printed in the appendix to his Reports, published in 1858, and runs in nearly the same words. And in the case of the *Friends*, fol. 115, he quotes these words in the Commission, but accompanies them with remarks which, coming from so accomplished a jurist, are entitled to our respectful attention:

"The Judicial Commissions of the Admiralty are of very high antiquity, and were settled long before the statutory provisions and legal decisions, whereby the jurisdiction of the Admiralty, as it was originally exercised, was materially abridged. But 'it is universally known,' says Lord *Stowell*, 'that a great part of the powers given by the terms of that Commission, are totally inoperative, and that the active jurisdiction of the Admiralty stands in need of the support of con-

tinued exercise and usage (the *Apollo*, 1 Hagg., 312); and again in the case of the *Atlas*, he says, 'This Court, except upon the subject of prize, exercises an original jurisdiction, upon the grounds of authorized usage and established authority. The history of the laws of this country shows full well that such authorized usage and established authority are the only supports to which this Court can trust, except in respect to the subject to which I have alluded. (2 *Hagg.*, 55).'"

"In all cases of jurisdiction the Court is called upon to perform a delicate and important duty. As, on the one hand, it is the duty of the Judge to maintain unimpaired the jurisdiction wherewith the law has invested him; so, on the other, he must be cautious not to assume authority on matters beyond the pale of his jurisdiction. He can have no inclinations or bias either way. The power which he is to exercise is held by him in trust, and must be maintained in its integrity, neither enlarged nor abridged, within the precise limits which the law has defined. Sir *Thomas Strange* has expressed with peculiar felicity the duty of a Judge in this particular: 'It is said in many cases *boni judicis est ampliare jurisdictionem*. If for *jurisdictionem* he read (as was always read by Lord *Mansfield*) *justitiam*, it is a noble maxim. If an object and matter of jurisdiction exists, it is indeed the part of a Judge, so far as circumstances may admit, to administer an enlarged and amplified justice, embracing the interests of all parties and all the bearings of the case in any other sense of the maxim. It seems to me that the strength of every jurisdiction consists mainly in a temperate admeasurement of it by those in whom it is vested; and that, so far from it being the duty *boni judicis ampliare*, it becomes none more than Judges to set to others in power a different example, instead of, by overstrained constructions, and upon fanciful imaginations, to be outstepping the bounds set by their Commission. Neither are we to presume that justice will not be done, though this Court, sus-

1865.

THE CITY OF PETERSBURG.

taining the plea, should decline the office of rendering it."

It is true that, in the case of the *Friends*, he decided that the jurisdiction claimed by the plaintiff belonged neither to the High Court of Admiralty, nor to the Vice-Admiralty Court. But his remarks, as we have seen, bear on the general question of jurisdiction, and a marked distinction, if it did not previously exist, has been drawn by the recent Acts between the powers of the High Court of Admiralty and the Vice-Admiralty Courts.

The practice of the two is confessedly different,—that of the Vice-Admiralty Courts still depending on the Rules made in pursuance of the 2 & 3 *Will.*, 4, ch. 51, and that of the High Court of Admiralty having been greatly simplified and improved by the Rules of 1859, made in pursuance of the Acts of 1840 and 1854, many of which, I think, might be extended with great advantage to the practice of this Court. By the 65th of these Rules the modes of pleading theretofore used, as well in causes by act on petition as by plea and proof, which are still in force here, were abolished; and the 66th substituted one mode of pleading of a very simple and effective kind. The forms also are greatly abbreviated. The fees I have not compared,—but I have long thought that the fees in this Court might be largely reduced, with signal advantage to the community as well as to the Profession.

If the practice of the two Courts is so widely different, so also, as I think, is the extent of their authority, under the recent legislation. (See the cases in *Swabey's Rep.*, 475-488.)

This is a most interesting enquiry, and, while I regret that, in conducting it, we have lost the aids of the long experience and professional attainments of the late Judge, it has become my duty, and is essential indeed to a right determination of these suits, to trace it through all its bearings.

1865.

THE CITY OF PETERSBURG.

In the case of the *Australia*, Swabey, 488, the Privy Council said in the year 1859, "A Vice-Admiralty Court has no more than the ordinary Admiralty jurisdiction. That jurisdiction is the jurisdiction which was possessed by Courts of Admiralty antecedent to the passing of the Statute which enlarged it in 1840."

With this principle in view, let us look to the 6th section of the Act of 1861 in respect to damages to cargo imported. The first decisions upon this section were in the cases of the *Ironsides*, 1 Lush., 458, and the *St. Cloud*, 8 Law Times Rep. N. S., 55, in which latter case Dr. *Lushington* thus points out the necessity and advantage of this remedial clause:

"The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, the goods being the property of *British* merchants, was frequently a grievance—an injury without any practical remedy; for the owners of such vessels being resident abroad, no action could successfully be brought in a *British* tribunal, and to send the *British* merchant, who had sustained a loss, to commence a suit before a foreign tribunal, and probably in a distant country, could not be deemed a practical and effectual remedy. And this enactment, therefore, was intended to operate by enabling the party aggrieved to have recourse to the arrest of the ship bringing goods delivered short or damaged in cases where, from the absence of the defendant in foreign parts, the common law tribunals could not afford effectual redress."

The evil here described and remedied, and which remedy was extended somewhat further, by the decision in the *Norway*, 10 Law Times Rep. N. S., 40, exists equally, though in a modified degree, in the Colonies as in the *United Kingdom*. Why should not an *American* or a *Spanish* ship making short delivery of her goods, or delivering them in a damaged state at *Halifax* or *Quebec*, be subject to the same arrest at

1865.

THE CITY OF PETERSBURG.

the suit of the colonial consignee, as at the suit of the home consignee in *London* or *Liverpool?* I look, however, in vain, to the Act of 1863, although one of its objects is to extend the jurisdiction of the Vice Admiralty Courts, and in some particulars it does extend it, for any clause resembling the 6th in the Act of 1861; and where the Imperial Legislature has given these colonial Courts certain new powers and withheld others, it would be a bold assumption indeed to act upon the powers so withheld, as if they had been given by the very Act that withholds them. I have no doubt therefore, that the Act of 1861 does not extend, *per se*, to the Vice Admiralty Courts.

The question remains, whether the words, "claims for seamen's wages," in the 10th section of the Act of 1863, were intended to cover such claims, when due under a special contract. I confess I should be glad to find that they would; for there is little reason in withholding this power, when the next clause gives the new power to adjudicate upon a master's disbursements. It is strange, however, that the words, as to special contract, in the 10th section of the Act of 1861, are not repeated in the 10th section of the Act of 1863; and it is clear that the proviso in the latter section, not having been repealed, does not extend to us. I see that the Judge of the High Court of Admiralty has been extremely cautious in exercising jurisdiction under the 10th section of the Act of 1861. In the case of the *Chieftain*, 8 Law Times Rep., 120, the petitioner stated his case as follows.

He stated, amongst other things, "that a sum of money was due to the master for wages, that he had 'disbursed various sums, necessary expenses, for and on behalf of the *Chieftain*, and had also become liable in respect of necessaries ordered by him and supplied, and in respect of wages due and owing to the crew.'"

Dr. *Lushington* (after stating the facts of the case) said: "The simple question for the decision of the

Court is, whether or not it has jurisdiction to entertain these claims: the consequences either of allowing or of disregarding them, it is beyond the province of this Court to consider. It must be admitted that prior to the Admiralty Court Act, 1861, the Court would have had no such jurisdiction, and its powers must therefore be found, if at all, within the 10th section of that Act. [The Court then read the section alluded to.] I am opinion that there is a manifest distinction between the liability alleged by the plaintiff, and the meaning of the word 'disbursement,' and as the present claim does not come under the latter denomination it must be disallowed. The decision may perhaps result in a hardship to the master, though, if it were necessary to consider that question, it should be borne in mind that he has another remedy by personal action against the shipowner. I make no order as to costs."

In the case of the *Edwin*, 10 Law Times Rep. N. S., 658, the Judge confirmed the above case, adding that "with regard to the liability of a master beyond his disbursements—that is, the disbursements he had actually paid—however hard my decision may be, or with whatever severity it may operate on him, I have no jurisdiction to give a remedy."

In the case of the *Robert Pow*, 9 Law Times Rep. N. S., 237, the Judge exercised equal caution in interpreting the sixth section of the Act of 1840, and the seventh section of the Act of 1863, and in these decisions has set me an example which I will do well, I think, to follow. The inclination of my judgment leans strongly against the enlarged construction of the tenth section of the Act of 1863, and, consequently, against the power of this Court to award seamen's wages due upon a special contract.

It was contended, however, at the argument, that the defendants could not object to the jurisdiction either on this ground or under the £50 clause in the Act of 1854, because they had filed absolute appear-

1865.

THE CITY OF PETERSBURG.

ances, and the rule in the Admiralty Court requires, "that should a party appear under protest, either objecting to the jurisdiction of the Court, or on any other ground on which he means to contend that he is not liable to answer the action, his appearance must be entered as given under protest. Now, there is no doubt that an appearance under protest is a familiar practice in the Admiralty, as appears in *Coote's Admiralty Practice*, 93, 176, and by the cases, 1 *Dodson*, 234, 3 *Hagg.*, 364, 1 *W. Rob.*, 143, 2 *W. Rob.*, 224, 3 *W. Rob.*, 109, and many others. In a note to *Coote*, 93, a dictum of Dr. *Lushington* is quoted from the *Law Magazine*, "that the question of jurisdiction should always be raised in the first instance, and, if it were not, he was of opinion that it was not properly before the Court." So in the case of the *Blakeney*, Swabey, 429, the Judge held that all objections to the jurisdiction must be taken on the earliest occasion; and the defendant having appeared, and, after the release of the ship on bail, having obtained leave to make his appearance under protest, the protest was overruled, "for an absolute appearance once given cannot be recalled." On these authorities I should have been inclined to hold that the appearance of the defendants, not under protest, was a waiver of any objection under the £50 clause in the Act of 1854. But, as it struck me at the argument, it was a very different thing to expect the Court to assume a jurisdiction which it did not at all possess, merely because a defendant had neglected or did not choose to raise the objection in the proper form. This distinction, which appeared to me to rest on principle, is supported I find by the case of the *Bilbao*, 1 Lush., 152. It is there said, "that the Court has occasionally considered questions of jurisdiction at the hearing, but always with great reluctance, and only where there might be danger of the Court proceeding without any jurisdiction at all. The Court is necessarily obliged to be careful not to exceed its jurisdiction, but it will not admit, after

absolute appearance, objections of a purely technical kind." It will be seen, therefore, that where the Court is of opinion, as in the cases now before us, that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it, as seems to have been the case in *Swabey*, 67.

Of the merits of these cases, I have hitherto said nothing, though they figured largely at the argument. It is of little consequence, indeed, whether the merits are or are not with the plaintiffs, if I have no power to enforce them. I may say, however, that in my opinion, two of the parties at least ought to have been paid something more than they got. The claims made to the third sixty or third forty dollars, I look upon under the evidence as untenable. *Bailey* admits that he received his advance outside; and *Cameron* says that he received $40 at *Halifax*. If so, *Bailey* was entitled to nothing more. To *Nichol*, if I had the power, I would have assigned the whole or the greater part of his second sixty, and *Valley*, whose evidence that he was to receive three sixties at *Halifax* is improbable in itself, and is besides inconsistent with *Cameron's*, that a man leaving *Wilmington* gets only half,—wants $30 of that half. My decree, therefore, would have awarded very small sums, reducing the whole question very nearly to a question of costs. As the plaintiffs have given no security, and have left the Province, the defendants, in fact, must bear their own costs, and they will probably think themselves happy in escaping on those terms.

I have given more attention to these cases than their intrinsic importance perhaps deserved; but, this being the first time that I have sat in the Admiralty, I was desirous of informing my own mind, and communicating the results of my enquiries to the Profession, on the new and somewhat difficult questions that have grown out of this argument.

My decree is that the three suits be dismissed, re-

1865.

THE CITY OF PETERSBURG.

serving the question of costs for further consideration, should the defendants move me therein, which, as their Counsel now assure me, will not be done.

Judgment accordingly.

Proctor for the promovents, *LeNoir*.

Proctor for the vessel, *J. N. Ritchie*.

GENERAL RULES.

MICHAELMAS TERM, 1855.

Hereafter, in making up the Dockets for trial in all the Courts throughout the Province, the Prothonotary shall place on the Judge's list all such causes given in, as shall have been called on the list of the next preceding Term, and the trial of which shall have been deferred without the fault of the Plaintiff, and also all such causes given in, as for want of time were not called in the next preceding list, in the relative order in which they stood on said list.

3rd *December*, 1855,
By the Court,

J. W. NUTTING,
Proth'y.

MICHAELMAS TERM, 1856.

Counsel, when addressing the Court, will read from their briefs, and not from their books.

TRINITY TERM, 1859.

It is ordered, that the first *Tuesday* in each month shall be appointed for the trial of Summary and Appeal Causes under the Provincial Act of 22nd *Victoria*, before a Judge at Chambers, when there shall be a Judge in Town to attend to Chamber business, except during the months of *July*, *August*, and *September*, when the long Vacation takes place. Such causes will take precedence over all other Chamber business, and are to be given in for trial to the Prothonotary on the *Thursday* preceding.

In order to facilitate references made at arguments by Counsel to minutes or papers before the Court, it is ordered, that the Prothonotary in transcribing the Judge's notes, shall insert in each page of the transcript the words contained in the corresponding

page of the original, and shall number consecutively the pages of such transcript, and further that all copies used in argument shall be conformable in those respects to that transcript.

Ordered further, That all papers furnished to the Judges, and those used by Counsel, shall contain the same words on each particular page, and in the lines, and shall be numbered also consecutively on the pages and lines.

25th *July* 1859,

By the Court,

J. W. NUTTING,
Proth'y.

MAY SITTINGS, 1860.

It is ordered, That no person shall hereafter be received as an Articled Clerk by any Barrister of this Court, until he shall have undergone an examination at *Halifax* before one of the Judges, and two of the office-bearers of the Barristers' Society, as to his educational qualifications, such qualifications to comprehend a knowledge of Geography, and of the leading events of English History, of the three first books of Cæsar's Commentaries, or the two first books of the Æneid, or an adequate portion of any other Latin Classic Author, to be approved of by the examiners, and of the two first books of Euclid, the examination to be conducted orally, or by written questions to be answered in writing on the spot, or in both forms at the option of the examiners, and the applicant shall also produce a certificate of his moral character from such person as the examiners may approve, which certificate, along with a certificate of the applicant's having passed a satisfactory examination in the above branches, shall be filed with his Articles in the office of the Prothonotary at *Halifax*, pursuant to the Act of last session.

It is ordered, That notice of the intention to apply for being received shall be posted up by the applicant for at least one month previously in the Prothonotary's Office at *Halifax*.

30th *May*, 1860,

By the Court,

J. W. NUTTING,
Proth'y.

TRINITY TERM, 1863.

It is ordered, That, in all cases of appeal from the decision of a Judge at Chambers, the Appellant shall obtain an order for the appeal from a Judge, and shall insert therein or append thereto the

grounds of the appeal, and shall file the same together with security in the sum of ten pounds within the period of ten days, unless the Judge shall otherwise order, and further that he shall, on argument of the appeal, be confined to the grounds so taken.

3rd *August*, 1863,

By the Court,

J. W. NUTTING,
Proth'y.

TRINITY TERM, 1869.

It is ordered, That *John Young Payzant*, Esquire, be appointed Accountant General of the Supreme Court, which office is vacant by the death of *Charles Twining*, Esquire, the late Incumbent, to take charge of, receive, hold, and discharge all monies of suitors in this Court, which may be paid over to him under its rules and regulations, and subject to such directions respecting the same, as this Court can and may at any time make and give.

It is further ordered, That the said *John Y. Payzant* shall give good and sufficient security, by Recognizance, in the sum of One Thousand Pounds, to Our Sovereign Lady the Queen, for the due and faithful performance of the duties of the said office.

It is further ordered, That the said Accountant General shall receive for all such monies, as may be invested by him in the Bank, ten per cent. of the Bank interest, and on all sums which may be invested by him under the orders and directions of the Court on Mortgage, or other securities, five per cent. of the amount of the interest thereon—as a just and reasonable Brokerage and Commission.

And it is further ordered, That the said *John Y. Payzant* do file verified on oath with the Prothonotary at *Halifax* in the first week in *Michaelmas* Term in each year, to be then submitted to the Court, an account of his receipts and payments in said office during the year then preceding, and also a schedule of all investments remaining unpaid, which account shall be vouched before and audited by the Prothonotary.

12th *August*, 1869,

By the Court,

J. W. NUTTING,
Proth'y.

INSOLVENT ACT, 1869.

It is ordered, under and by virtue of the 32 & 33 *Vic.*, chap. 16, intituled "An Act respecting Insolvency," section 139, that, until further directions therein, the same costs, fees, and charges, shall or may be had, taken, or paid by and to Judges of Probate, Counsel, Attorneys, Solicitors, and Sheriffs, as are now payable to and taken by them in the Supreme Court and Courts of Probate in this Province, under and by virtue of the Acts in that behalf.

Halifax, 13th *September*, 1869.

W. YOUNG,
J. W. JOHNSTON,
W. F. DESBARRES.
L. M. WILKINS.

INSOLVENT ACT OF 1869.

It is ordered, That the Commissioners for taking affidavits in this Court, appointed by the Governor in Council under the authority of the *Revised Statutes* be, and they are hereby appointed, Commissioners within their respective Counties for taking affidavits to be sworn in proceedings in Insolvency pursuant to the said Act.

27th *December*, 1869.

By the Court,

J. W. NUTTING,
Proth'y.

MICHÆLMAS TERM, 1869.

On reading the docket of causes for argument in the Term that is now closing, and the large arrear of cases remaining uncalled, it is ordered:

First.—That all causes in the present or any future docket fit to be argued at Chambers shall be remitted there, with the consent of the parties or their Counsel in writing.

Second.—That in the absence of such consent it shall be competent for a Judge, at the instance of either party, to order that any cause fit to be argued at Chambers shall be remitted there, and be entered for argument on such notice to the opposite party as the Judge shall direct.

Third.—That on the argument of causes it shall be incumbent on each party to provide legible and compared copies of the minutes

of trial for the use of the Judges as heretofore, and also to provide copies, each of his own exhibits and affidavits, substituting, wherever it is practicable, for entire copies, such parts of the exhibits as are essential to the argument.

Fourth.—That on arguments the Rule or Case, Pleadings, Judge's Minutes, Affidavits, or other necessary papers, shall be first of all read by the respective parties without comments, and that each party or Counsel in addressing the Court or Judge shall be limited to one hour, the party who has obtained a Rule Nisi to open the grounds thereof briefly as heretofore.

Fifth.—That it shall be competent for the parties or their Counsel in any cause, in lieu of an oral argument, to submit to the Judges a state of facts mutually agreed on, or the evidence in the cause, with statements by the respective parties of the legal propositions on which they rely, and of the authorities and cases; and the decision thereon of the Judges by whom the same shall have been considered, or of the majority, reduced to writing and filed, shall have the same effect, and, on the judgment being entered, the same costs, in all respects, shall be taxed, as if the argument had been orally held, and judgment delivered under the 240th section of the Practice Act.

And, it being advisable that certain other changes should be introduced into the practice, it is further ordered as follows:

Sixth.—No person shall be admitted as an Attorney or Barrister, except in open Court during Term.

Seventh.—A student or candidate for admission as an Attorney or Barrister, if he fails in passing a satisfactory examination, shall not be allowed to present himself for further examination until after an interval of not less than six months, and a candidate shall in such case continue to serve with a practising Barrister, and produce a satisfactory certificate of his moral character.

Eighth.—Where an Affidavit is made before a Judge, a Prothonotary, or a Commissioner of this Court by a person who from his signature appears to be illiterate, the party taking the Affidavit shall state in the jurat that it was read or explained or words to that effect.

Ninth.—Every Writ of Summons shall be served within six months from the day it is issued.

Tenth.—A Judge may grant an order for further or better particulars stating dates, credits, &c., or for amending particulars upon affidavit, and without summons therefor.

Eleventh.—No person shall be allowed to plead and demur to the same pleading at the same time, except upon sufficient grounds supported by affidavit.

Twelfth.—The Sheriff shall, upon the receipt of every Writ, endorse thereon the time at which the same was received by him.

Thirteenth.—Where a party who has brought an action, or been served with process within the jurisdiction, resides out of the Province, notice of trial shall be served at least twenty days before the first day of the Term or the Sittings thereafter.

6th *January*, 1870,

By the Court,

J. W. NUTTING,
Proth'y.

EQUITY COURT RULES.

An Equity Court will be held on every *Monday* when business requires, (except in Vacation) at 11 o'clock, A.M., in the Chancery Room off the Prothonotary's Office.

All intended applications, motions, and, as far as practicable, the affidavits and documents in support of them, are required to be entered and filed on the preceding *Friday*.

4th *July*, 1864,

By order of the Court,

J. W. NUTTING,
Proth'y.

RULES RELATING TO APPEALS.

Rules made and pronounced by the Judge in Equity, for regulating proceedings in cases of Appeals from Decisions of the Judge in Equity and Associated Judges under the 125th Chapter of the Revised Statutes, Section 2:

1. The intention to appeal shall be signified by petition, succintly stating the grounds, addressed to the Judge in Equity, and accompanied by the certificate of Counsel (not being the Attorney in the case), that in his judgment there is reasonable cause of Appeal.

3. The petition shall be presented within Eight Days from the order or decree appealed from, within Ten Days thereafter if the Defendant reside in the county of *Halifax*, Fourteen Days if in any other county in *Nova Scotia* Proper, and Twenty Days if in

Cape Breton. The appellant shall cause to be entered, with the Prothonotary at *Halifax*, security in Forty Pounds to pay to the respondent such costs, as the Supreme Court may appoint in case the order or decree shall not be reversed. The security, if given in *Halifax*, shall be by recognizance; if elsewhere, by bond to Her Majesty with at least one good surety, who shall justify, but if the Judge shall so direct the security shall be by the deposit with the Prothonotary at *Halifax* of such sum of money as may be ordered, not exceeding Forty Pounds.

3. Stay of proceedings shall not be consequent upon appeals, unless the Judge in Equity, upon special application, shall so order, or unless in special cases the Supreme Court shall interpose to that effect. The application may be contained in the petition of appeal, and in any case shall be at the peril of costs in the discretion of the Judge, if unsuccessful.

4. The petition will be dismissed if the security be not perfected with the Prothonotary at *Halifax* at the time limited, unless upon application to the Judge in Equity the time shall be extended.

1st *February*, 1863.

By order of the Court.

J. W. NUTTING,
Proth'y.

COMMON LAW CHAMBERS RULES.

The business at Chambers having greatly accumulated, and requiring some further regulations, the Judges direct:—

That all causes to be moved on shall be entered with the Prothonotary in each week, between *Wednesday* and *Saturday* at 4 o'clock, unless a subsequent entry is permitted by the Judge on affidavit.

That the Prothonotary shall arrange the causes so entered according to the priority of the Bar, on the same principle as in Term, under the Practice Act, section 234.

That arguments likely to occupy a considerable time, and to in-

terfere with the proper business of the Chambers day, shall be remitted to the Court in Term.

That costs shall be taxed as heretofore, but on a subsequent day, when the Chambers day is taken up with motions.

Halifax, 26th *February*, 1869.

[The above, it is believed, comprise all the Rules of Court now (16th *April*, 1870,) in force, except such as are embodied in the Practice Act (*Revised Statutes*, third series, chap. 134), either *verbatim* or in substance.—REP.]

AN

INDEX

TO

THE PRINCIPAL MATTERS.

---

*This rule is now largely modified.—REP

SPECIAL CONTRACT for seamen's wages, what constitutes; cannot be enforced in Vice Admiralty Court.

Two out of three promovents shipped at *Bermuda* on board the ship libelled, a blockade runner, for the round voyage from *Bermuda* to *Wilmington*, *North Carolina*, and thence to *Halifax*, *Nova Scotia*. The remaining promovent shipped at *Wilmington* in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents certain specified sums, in three equal instalments. The contract was absolute as to two of the instalments, and as to the third, there was a condition that it was to be paid only if the claimants' conduct were satisfactory.

Held: 1. That this was not an ordinary engagement for seamen's wages, but a special contract.

2. That previous to the Admiralty Court Act of 1861, 24 *Vic.*, ch. 10, the High Court of Admiralty had no jurisdiction over such contracts.

3. That this Act did not extend to the Vice Admiralty Courts, nor were the provisions respecting special contracts, embraced in its tenth section, extended to those Courts by the Act of 1863, 26 *Vic.*, ch. 24, sec. 10.

4. That, although the Commission formerly issued to the Vice Admiralty Judge empowered him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of *England*," yet this power, like some others assumed to be bestowed by the Commission, is frequently inoperative, and that, therefore, this Court has no jurisdiction in cases like the present.

Held, also: That, although the respondents were bound to have objected to the jurisdiction *in limine*, by appearing under protest, still, that, where the Court is of opinion that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it.—*The City of Petersburg* 814

SPECIFIC PERFORMANCE.

T., by written contract, agreed to sell to *D.* a farm for £200, but subsequently refused to execute the deed. *D.* brought a suit for specific performance, to which *T.* pleaded several pleas, attacking the agreement on various grounds, but raising no distinct issue of circumvention or fraud, though by way of recital to his fifth plea he stated that he had been overreached, and that *D.* had by undue advantage endeavored to obtain his property for an inadequate consideration. The

WILL.

1. *M.*, by will made in 1819, devised certain lands in trust "*for the benefit of a Protestant Orthodox Minister, duly authorized,* as also for the building thereon, a house for the public worship of Almighty God, a parsonage house, a school house, and burying ground for the use of the inhabitants of the Western part of the township of *Cornwallis*, whenever there may be a sufficient number united in the promotion of the public worship of God in that quarter."
There was not in 1819, nor up to the time of *M.'s* death, any Presbyterian Church, or Protestant Church of any kind in *West Cornwallis*, but the members of the Presbyterian Church residing there communed with the Presbyterian Church in *East Cornwallis*, and *F.*, the Minister of the latter Church, occasionally officiated in *West Cornwallis*.
M. died in 1824, and from the year 1800 to the time of his death, was an elder of the Church of *F.*, who was a Minister of the Church of *Scotland*.
The plaintiff, who was a Minister of the Reformed Presbyterian Church, and the first Presbyterian Minister that was settled and had a congregation in *West Cornwallis*, claimed the benefit of the devise.
The trustees of *M.*, had declared the land to be held for the use of the Free Church of *Scotland*, now having a resident minister in *West Cornwallis*, and claiming the land as rightfully belonging to them.
It appeared that according to the principles of the Reformed Presbyterian Church, a member of that Church could not consistently hold a civic office under government, or be a magistrate.
No such principles were held either by the Established Church of *Scotland* or the Free Church of *Scotland*, and *M.* had been for many years previous to, and at the time of his decease, a magistrate and a Major in the Militia.
It further appeared that the plaintiff would not commune with members of the Church of *Scotland*.
Held: That, in order to ascertain the intentions of *M.*, the Court was bound to consider all the circumstances surrounding him at the time the will was made, and that, in view of these circumstances, and of other clauses in the will, the plaintiff was not entitled to the benefit of the devise.—*Sommerville* v. *Morton et al.* 50

2. A testator bequeathed a certain sum of money to his wife, which he stated he supposed to be one-third of the worth of his property, after the payment of his debts and necessary expenses. By subsequent