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NOVA SCOTIA.

SUPREME COURT.

TOWNSHEND, C.J. SEPTEMBER 25TH, 1909.

CHAMBERS.

BLIGH v. WARREN.

Practice—Striking out Defence—Libel Action—"Conciliatory Plea"—Embarrassing Matter.

Motion to strike out as embarrassing, &c., the first and part of the fourth paragraphs of the defence.

The action was for libel contained in a letter alleged to have been written by the defendant to the Attorney-General of Nova Scotia asking for the plaintiff's removal from the office of Justice of the Peace on the ground that he was found guilty of stealing moneys. The defence set up a denial of the writing or publication of the letter, qualified and absolute privilege; that the words in the letter did not bear a defamatory meaning, and (1) that "The defendant resides at Berwick in the county of Kings and holds the rank of commander in the Royal Navy of Great Britain and Ireland," and (4) in part that "The defendant was for a number of years attached to and a member of the Royal Navy of Great Britain and Ireland, and was honourably retired therefrom with the rank of commander, and from his association with and subjection to the strict discipline of the said Navy is possessed of unbending convictions and extreme views in all matters pertaining to the prompt discharge by all civil, naval, military and judicial servants of the Crown of their duties

to the public, and is a vigorous thinker and an uncompromising and energetic writer in all discussions and communications relating thereto, and the said words were written and published, if at all, in good faith and without malice and in the public interest, and were not intended to seriously or at all charge the plaintiff with the crime of theft as contemplated by law or with any crime, but were only intended by the defendant to call in good faith and without malice and in the public interest to the attention of the said Attorney-General the said conduct of the plaintiff in not making a return of and under the said convictions, and which said conduct of the plaintiff the defendant in good faith believed had a tendency to reflect upon the judicial office and to bring the administration of justice into disrepute and contempt and to call for the dismissal of the plaintiff from his said offices of Justice of the Peace and Stipendiary Magistrate as aforesaid."

The above quoted paragraphs were now moved against as stated. The defence further alleged in the plea of privilege that the plaintiff had been sued in a qui tam action under section 1134 of the Criminal Code for retaining pecuniary penalties, and the penalty therein mentioned recovered against him.

August the 24th, 1909. W. E. Roscoe, K.C., for the motion referred to Order 19, r. 27; Order 21, r. 4; Order 25, r. 4; Order 34, r. 30; Order 36, r. 37; Annual Pr. 1909, p. 251; Holmested & Langton's Jud. Act, 2nd. ed., 455; King's Law of Defamation, 355, 358, 416, 570, 611; Nichol's N.Y. Pr. 963; Black v. Woodworth, per Drysdale, J., April 5th, 1909; Odgers on L. & S. 3rd ed., pp. 113, 115, 677; McDonald v. Sydney Post, 39 N. S. R. 85, 86.

John J. Power, K.C., contra, cited Odgers' L. & S. (Blk. ed.), pp. 57, 499; Bullen & Leake, 6th ed., 832; Thompson v. Bernard, 1 Camp. 48; Cyc., vol. 25, p. 465; Bush v. Prosser, 11 N. Y. 347, N. Y. Civil Code, sec. 165; Beatty v. Intelligencer, 22 Ont. A. R. 97; Vansycle v. Parish, 1 O. L. R. 13; Order 19, r. 4; Order 34, r. 30; King's Law of Defamation 358, 405; Millington v. Loring, 6 Q. B. D. 190; Whitney v. Moignard, 24 Q. B. D. 630; Cunningham & Mattinson 77; R. S. N. S., 1900, cap. 10, sec. 3 (6); Shea v. O'Connor, 26 N. S. R. 205; Power v. Pringle, 31 N. S. R. 78; Wason v. Walter, L. R. 4 Q. B. 73.

Roscoe, K.C., in reply cited Odgers' L. & S. 3rd ed., 307.

TOWNSHEND, C.J.:—This is an application to strike out as embarrassing certain portions of the defence pleaded. It is an action for libel.

The first paragraph sets out that the defendant holds the rank of commander of the Royal Navy of Great Britain and Ireland. That fact is immaterial to the defence as the rank of an individual cannot of itself affect his liability for uttering a libel unless shewn and pleaded to be in connection with his duties as such. The case referred to by Mr. Power, Wason v. Walter, L. R. 4 Q. B. 73, is not in point here. There, defendant in justifying the publication of the alleged libel was compelled to shew that as proprietor of a newspaper in which it was published, the libel was a fair and accurate report of the proceedings in the House of Lords. It was therefore a necessary allegation in his defence, but entirely irrelevant here, and must be struck out.

That portion of the 4th paragraph of the defence following the denial that the words were not written or published or understood, nor bear the meaning alleged by plaintiff, is also attacked as embarrassing and irregular. The defendant in his third defence has set forth in detail the facts and circumstances under which he wrote the alleged libellous letter to the Attorney-General. Under the defence he will be enabled to prove everything which may constitute a defence on the ground of privilege. He contends that the portion of the 4th paragraph objected to is what is termed a conciliatory plea, or, at any rate, may stand as matters in mitigation of damages.

I do not know that I quite appreciate what is meant by a conciliatory plea in bar in libel or slander. A libel must be met either by a plea of denial or justification on the ground of privilege, or that it was true. I presume "conciliatory" refers to matters in mitigation of damages, and if so the authorities all agree such matters must be so pleaded, or the plaintiff may treat the defence as pleaded in bar. Some of the matters alleged in the 4th paragraph go in mitigation of damages, and if defendant wishes to avail himself of these, he must give the notice required by the rules as stated in the Annual Practice, 1909, at p. 251. On the other hand a defendant is strictly not entitled to plead in his defence matters which may tend to mitigate the damages: Wood v. Durham, 21 Q. B. D. 501; Wood v. Cox, 4 Times Rep. 550. In actions of defamation if the defendant

has not pleaded a justification he may state certain facts in mitigation of damages in a special notice which must be served seven days at least before the trial: Order 36, r. 37; Vide Starkie on L. & S., 5th ed., 348.

Without discussing at greater length the cases cited or commented on in counsel's briefs I have come to the conclusion that the portion of 4th paragraph of the defence complained of must be struck out as irregular and embarrassing.

As I cannot think the matter complained of very seriously embarrasses the plaintiff in his pleading, although no doubt improper, the order as to costs will be that the costs of this application be plaintiff's costs in the cause.

NOVA SCOTIA.

PROBATE COURT FOR ANNAPOLIS COUNTY.

SEPTEMBER 11TH, 1909.

IN RE ELLIOTT.

Construction of Will—Life Estate—Gift Over of Residue "as Left Unused" by Life Tenant.

Testator's will provided as follows: "I give, devise and bequeath all my real and personal estate whatsoever and wheresoever unto my affectionate wife Bertha A., for her own use during the term of her natural life and from and after her decease I give, devise and bequeath the residue of my said estate as left unused by my said wife unto my children living at my decease and to the issue of any children who may die before me in equal shares so that my said children shall have the same shares as the issue of any deceased child shall have." Testator authorised his wife to sell and convey his real estate, and he appointed his son and a son-in-law executors and trustees of the will. He died leaving no real estate.

F. L. Milner, for the children, contended that the widow took a life interest only, and that the words "left unused by my said wife" meant that if she had not drawn the income up to the time of her death, such income being "left unused" went into the residue; and that if the testator had intended to give the widow the right to any of the corpus he should have used proper words for that purpose. He relied on Constable v. Bull, 22 L. J., Ch. 182.

A. L. Davidson, for the widow, contended that the widow was entitled to have the whole estate transferred to her, and that only so much thereof as might not be used by her would go to the children.

OWEN, JUDGE OF PROBATE, now (September 11th, 1909), delivered judgment.

Testator has devised and bequeathed his property as follows (setting out the will). Mr. Milner, on behalf of the children, claims that under the will the widow has only a right to the interest during her life accruing from the corpus of the estate and that the corpus goes in entirety to the children. Mr. Davidson claims that the widow is entitled to the whole estate, corpus as well as interest, and that only such portion as may be unused by her during her life goes to the children.

The words "left unused" in paragraph 1 of the will are synonymous with the words "whatever remains of" in Constable v. Bull, cited in Bibbens v. Potter, 10 Ch. D. 733, and with the words "what shall be left" in Surman v. Surman, 5 Madd. 123, cited in Jarman on Wills, 4th English edition, page 364.

Paragraph 2 of the will gives the widow power to sell and convey testator's real estate, but it does not state for what particular object or purpose. The power of sale does not increase or affect her interest in the estate. She is entitled only to the use of or interest or income accruing therefrom. The corpus goes in entirety to the testator's children. And I so decree.

NEW BRUNSWICK.

BARKER, C.J. JULY 13TH, 1909.

SUPREME COURT IN EQUITY.

EARLE v. HARRISON ET AL.

Mortgagee in Possession — Referee's Report—Exceptions — Accounting—Interest—Rents.

S. B. Bustin and E. T. C. Knowles, for the plaintiff.

Daniel Mullin, K.C., John A. Barry, C. F. Inches, for defendants.

BARKER, C.J.:—The plaintiff has excepted to the Referee's report as to the amount due on the mortgage. The plaintiff took possession under his mortgage on the 29th August, 1902. The mortgage was given to secure the payment of $450 and interest at the rate of 7%. The Referee has found that when the plaintiff took possession there was due on the mortgage $587.20, and about this sum there is no dispute. He has also found that the plaintid since he went into possession has expended in the payment of taxes, ground rents, necessary repairs and improvements up to March 4th, 1909, the sum of $976.14, and about this there is no dispute. He has also reported that the interest chargeable under the mortgage from August 29th, 1902, to March 4th, 1909, is $243.51. He also finds that the plaintiff received from rents during the same period the sum of $1,-239.99, leaving a balance due on the mortgage of $560.76 on March 4th, 1909. There seems to be an error, as the balance should be $566.86. From the balance of $560.76 the Referee has deducted the sum of $138.97 for rents which the plaintiff is chargeable as having been lost by his default. This leaves the sum of $421.79 as the true balance found by the Referee to be due on the mortgage on the 4th March, 1909. The third exception refers to the item of $243.51 which the plaintiff alleges was made up on a wrong principle. He claims that it should be $267.17. I do not think either sum is correct. The principle upon which the account of a mortgagee in possession should be made up is stated by Jessel, M.R., in Union Bank of London v. Ingram, 16 Ch. D. 53. He says: "In taking the account you take all the mortgagee's receipts, &c. . . . for all the rents and receipts go in reduction of the principal and interest" (see page 56). See also Bright v. Campbell, 41 Ch. D. 388.

The Referee made up the account by crediting rents as they came in on the mortgage as payments. The difference is not very great. The plaintiff's amount is wrong. He has charged 7% on the balance of $587.20, which of itself is partly made up of interest. By the endorsement on the summons which issued March 11th, 1902, there was due for interest $12.50 and the interest from March 11th, 1902, to August 29th, 1902, is $14.74. These two items, amounting to $27.24, should be deducted from the $587.20 and interest charged on the difference, or $559.96 from August, 29th, 1902, to March 4th, 1909—six years and one hundred and

eighty-seven days—which amounts to $255.26. That will be the sum instead of $243.51 as stated by the Referee and $267.17 as claimed by the plaintiff.

I think the Referee was quite right in dissallowing the claim for commission for collecting the rents. There does not seem to be anything in the evidence to warrant any such charge. The Referee was equally wrong as to the $138.97 which he charged to the plaintiff as a loss on rents not collected. As to this item the Referee says in his report: "I find that the mortgagee in possession should have collected at least eighty per cent. of the rental of the said mortgaged premises. During the period of possession of the same is the sum of $138.97 more than he did collect and therefore charge the plaintiff with the said sum of $138.97 which I deduct from the balance of $560.76, &c." Before a mortgage in possession can be made liable for rents which he has failed to collect there must be evidence to shew that it has been due to his default in some way. I never heard of any such rule as the Referee has acted upon—there is no evidence of any such rule and of course no such rule could well exist.

The account will be stated thus:—

There was due on the mortgage on August 29th, 1902, when the plaintiff took possession.....	$	587 20
Taxes, ground rents, improvements up to March 4th, 1909		976 14
Interest on the mortgage from August 29th, 1902, to March 4th, 1909,..... ...		255 26
	$	1,818 60
Cr.		
By rents, &c.		1,239 99
March 4th, 1909, Balance due.	$	578.61

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J. SEPTEMBER 21ST, 1909.

SMITH ET AL., TRUSTEES, ETC., OF ROBERTSON v. ROBERTSON, ET AL.

Will — Construction — Administration of Trusts—Heirs at Law—Statutory Next of Kin—General Scheme of Will.

Bowyer S. Smith, for the plaintiffs.

M. G. Teed, K.C., and W. A. Ewing, K.C., for defendants.

BARKER, C.J.:—When this case was before me in February last there was a declaration made (1) that in order to make the payment to the executors of the will of L. J. Almon of the one-third share of the property comprised in schedule "A" appointed to him, the plaintiffs have power to sell and dispose of it as they may deem necessary, and (2) that the unappointed two-third shares of Mary Allan Almon in the same property should be divided now into five equal shares, one share to each of the surviving children of the testator and one share to the heirs of David D. Robertson.

In accordance with this declaration the plaintiffs have sold the property included in Schedule "A." that is, Mrs. Almon's property, and the fund is ready for distribution under the will. This property was by the terms of the will vested in the plaintiffs, the present trustees, upon trust on Mrs. Almon's death to convey one-third of it to such person or persons and upon such trusts as she might appoint. The remaining two-thirds were in the case of a daughter dying leaving children surviving, to be held by the trustees for the benefit of the children as particularly directed in the will. In case a daughter died leaving no issue surviving the will provided as follows: "And in the event of my daughter dying, leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and one-third before mentioned (if no disposition of the same shall me made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brothers and

their respective heirs in equal proportions per stirpes and not per capita." Mrs. Almon executed her power of appointment as to one-third of the property in favour of her husband who survived her. She died without ever having had any children, leaving four sisters and the widow of her deceased brother David D. Robertson and their five children surviving. The question as to which the trustees now ask for directions is as to the meaning to be given to the word "heirs" in the clause I have quoted. On the part of the widow of David D. Robertson it is claimed that the word must be read as meaning the statutory next of kin, so that so much of the one-fifth share of the fund as consisted of personal estate would be divisible under the Statute of Distributions, in which case the widow would be entitled to one-third. On the part of the children of David D. Robertson it is claimed that the word must be read in its primary sense as "heirs at law," in which case the whole fund would go to them to the exclusion of the widow. No doubt there are many cases to be found where Judges, in order to carry out what from the provisions in the will, they concluded was the testator's intention, have given to the word "heirs" and other similar expressions having a well understood technical meaning, an altogether different interpretation similar to that proposed here, and in order to carry into effect this intention, they have incorporated into the will provisions of the Statute of Distributions, as must be done in the present case in order to include the widow as a participant in this fund. After an examination of many of these cases I have come to the conclusion that they are not applicable to the present and that the widow's claim cannot be sustained. It is not disputed that this must be the result unless the word "heirs" was used by the testator in some other than its primary and ordinary meaning. In Keay v. Boulton, 25 Ch. D. 212, cited by Mr. Teed as a representative case of the class to which I have referred, Pearson, J., says: "The next question is, what is the meaning of the word "heirs," the gift including both real and personal property? Is the word "heirs" used in the sense of persona designata, indicating the person who would have been the heir-at-law of real estate of a child who had died intestate, or is it to be read in a qualified sense, so as to give the real estate to those persons who would in the event of the intestacy of the deceased children have taken their real estate and the personal estate to their next of kin accord-

ing to the Statute of Distributions? I think this case is to be decided by authority, and by authority only. No doubt the word "heir" has a technical meaning, i.e., the heir-at-law of real estate, and if there is nothing in the will to show a contrary intention the heir-at-law must take the property as persona designata." It is therefore necessary in order to sustain the widow's claim that we should find something in the will clearly indicating an intention on the testator's part in using the word "heirs" not to mean the heirs-at-law but a different class of persons altogether.

The scheme of this will, stated shortly, is this: Eliminating the provisions made for his widow, the testator for the benefit of his five daughters, divided up certain real and personal property into five parts, one for each daughter. Each part was estimated to be worth $50,000 and they were mentioned and described in five separate schedules distinguished respectively by the letters A, B, C, D, and E, the property comprised in Schedule A having been allotted to Mrs. Almon and representing the fund now ready for distribution. On the death of a daughter the property comprised in her schedule was to be disposed of by the trustees in the manner already mentioned. These properties as they are described in the schedules, consisted principally of real estate—that in Schedule D seems to have been entirely so—but the others consist of both real and personal. The trustees had power to vary investments and with the consent of the daughter to sell her real estate and invest the proceeds of such sale, as well as moneys received by way of insurance against loss by fire, in mortgage and other securities. So that it is wholly unlikely that the nature of these scheduled properties would remain to-day as they were at the testator's death over thirty years ago. I cannot think that the testator had any intention in providing for the final distribution of his estate—for the residuary estate is subject to the same trusts—that the question as to who should take it under his will should depend in any way upon the nature of the property as it might happen to be at the date of distribution. He treated real and personal property as one fund and not separately. His intention clearly was that the whole fund should go to the one class irrespective of its nature. It was one-third of the whole property over which the daughter had a power of appointment and in transferring that to the appointee the trustees were under no obligation to divide it one-third of the personal and one-third

of the real. Both were treated as one fund. By the language of the will it is in the case which has happened, the two unappointed thirds of the lands, tenements, hereditaments and premises apportioned to her in such schedule which the trustees are to divide equally between the sisters and brother and their respective heirs in equal proportions per stirpes and not per capita. The evidence of intention is quite as strong as in the case of Gwynne v. Muddock, 14 Ves. 488, in which the M. R. says: "I have not found any case directly applicable; but there is no doubt, the heir-at-law properly, 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. Where two descriptions of property are given together in one mass, then the difficulty arises, who is meant; for both the next of kin and the heir cannot take, unless this construction can be made reddendo singula singulis, that the next of kin shall take the personal estate, and the heir-at-law the real estate. But in this case the testator could not mean that, for he blends all the real and personal estate together; and after the death of Ann Williams directs that his nighest heir-at-law shall enjoy the same. As both are to be enjoyed together, it is absolutely necessary for the Court to say who shall enjoy both. It would be contrary to the intention to divide them, and it would be contrary to the words to give the whole to the next of kin. Therefore the Court has no alternative but to adhere to the words of the will; and permit the person, who answers the description of heir-at-law, to enjoy the whole." See De Beauvoir v. De Beauvoir, 3 H. of L. C. 524 at page 550; Smith v. Butcher, 10 Ch. D. 113; In the goods of Dixon, 4 Prob. D. 81.

It is scarcely necessary to point out that the wife is not next of kin to her husband, nor the husband to the wife: Watt v. Watt, 3 Vesey 244; Chomondeley v. Ashburton, 6 Bea. 86, Kilner v. Leech, 10 Bea. 362. What she takes under the Statute of Distribution she takes as widow. She takes an arbitrary proportion and the remainder goes among the next of kin as specially provided. In its primary sense the phrase "next of kin" does not include either husband or wife: Garrick v. Lord Camden, 14 Vesey 372; In re Fitzgerald, 58 L. J. Ch. 662; Milne v. Gilbart, 2 DeG. M. and G., 720, affirmed on appeal 5 DeG. M. & G. 510. It is therefore necessary in order to include the widow as one of those

entitled to the personal property that the word "heirs" shall be read as including all persons who, in the case of an intestacy, would be entitled under the Statute of Distributions. In other words I must hold as a matter of construction, that when this testator directed his trustees, in the events which have happened, to divide the one-fifth of this property share and share alike among the heirs of his deceased son David D. Robertson, he only intended so far as it was personal property that they should have two-thirds of it and the remaining one-third go to one who was not next of kin or of kin to him at all. Is such a departure from the ordinary and primary meaning of the testator's language admissible? For after all it is as Kindersley, V.C., says in Low v. Smith, 2 Jur. N. S., 344: "A mere application of what is the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was executed, such word must receive its ordinary and primary meaning, unless the Court is satisfied that the testator intended to use it in a secondary and less proper sense." There is not in this whole will any mention of the Statute of Distributions or any reference to it in any way. Roper in his work on legacies at page 121 says: "It may be considered settled that a testator is to be understood to mean by the expression "next of kin," when he does not refer to the statute or to a distribution of the property as if he had died intestate, those persons only who should be nearest of kin to him, to the exclusion of others who might happen to be within the degree limited by the statute." And he treats the conflict of opinions on this point as definitely settled by Elmsley v. Young, 2 M. & K. 780, as to which he says: "After a full discussion of the conflicting authorities the Lord Commissioner decided that the words 'next of kin' when used simpliciter, are to be construed strictly as meaning the next of kin in degree according to the civil law of computation and not the persons entitled according to the Statute of Distributions; it is to be observed that the above is the case of a deed and not of a will. But this decision has been followed in the case of a will in Cooper v. Denison, 13 Sim. 290." The cases are fully discussed in Elmsley v. Young, 2 M. & K. 780, and in summing up the different arguments Lord Commissioner Bosanquet says: "The two grounds, then, upon which the decision of Mr. Buller proceeds, are first, that the words 'next of kin' have since the statute, acquired a particular meaning; and sec-

ondly, that the case of Thomas v. Hole was a decision in point to govern that case. Now how, and when, and to what extent did the words 'next of kin' acquire any particular meaning distinct from their known legal meaning? That before the statute the meaning of those words was clear and intelligible, and that there was no difficulty in applying them, as they had been applied on former occasions and according to the language of Lord Coke, to the next in blood, there can be no doubt. How, then, did they acquire a different meaning; and how can that meaning be applied to an instrument which does not profess to relate to the Statute of Distributions—which does not profess to relate to an intestacy—but which, on the contrary, professes to point out the particular persons who are to take the property, and which, as it appears to me, indicates an anxiety not to leave any part of the settlor's property undisposed of? Do the words 'next of kin' imply that a distribution is to be made according to the directions of the statute, or are they to be construed 'next of kin' as described in the statute? That they do not imply a distribution according to the provisions of the statute is, I think, clear from this circumstance, that they do not extend to the wife; for it is not argued that they extend to the wife."

In the present case the testator has used the word heirs, but if he had used the term "next of kin" the case from which I have just quoted is an authority for saying that the widow would not have been included as there is no reference direct or indirect to the Statute of Distributions, and the words, therefore, have their ordinary meaning. Halton v. Foster, 3 Ch. App. 505 and Withy v. Mangles, 10 C. & F. 215 are to the same effect.

There is one other provision of the will which is opposed to the construction proposed on the part of the widow. The will directs that this property (real and personal) shall be equally divided by the trustees between the surviving sisters and brother and (not or) their respective heirs in equal proportions per stirpes and not per capita. It is clear that whoever is entitled as heirs to take the property are to take it in equal proportions. How can that apply to a widow who, if entitled at all, is entitled under the statutes to one-third of the whole. The words "in equal proportions per stirpes and not per capita," which are not apt words to use in reference to a widow's interest in her husband's personal property where he dies intestate, must be struck

out altogether in order to give the proposed meaning to the word "heirs." That would be making a new will, and as it seems to me rejecting a plain meaning used in order to do so. I think the widow is not entitled to participate in the fund.

The costs of all parties will be paid out of the general residuary estate. Trustees' bill to be taxed as between solicitor and client.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY.

BARKER, C.J. SEPTEMBER 21ST, 1909.

CLARK v. CLARK ET AL., EXECUTORS.

Will—Residuary Clause—Construction—Gift—Inter Vivos—Declaration of Trust—Testamentary Gift—Wills Act.

A. O. Earle, K.C., and James A. Belyea, K.C., for the plaintiff.

Daniel Mullin, K.C., John A. Barry, J. McMillan Trueman, for defendants.

BARKER, C.J.:—The question upon which the direction of the Court is asked arises under a clause in the will of the Reverend John A. Clark, who died April 15th, 1907, leaving him surviving a widow and three children, two daughters and a son. Hannah Gertrude Clark, one of the daughters, died on the 14th of November, 1908, before these proceedings were instituted, and we are therefore without her evidence. Mr. Clark's will, which is dated March 13th, 1906, contains the following residuary clause: "All the rest and residue of my estate, real and personal, excepting only such personal property as may be found in my private cash box, or in my box in the vaults of the Bank of New Brunswick, St. John, and which I had already given to my daughter Hannah Gertrude, to meet the immediate personal necessities of herself and her sister Jean, I give in trust to my executors to apply all net increase to the support and mainten-

ance of my children and their step-mother as long as she remains my widow." There follow various provisions as to the ultimate disposal of the property about which no question is raised at present. The dispute arises as to what property, if any, is included within the exception and which the daughter Hannah Gertrude took by gift from her father during his life time. The claim put forward by the plaintiff Jean Spurr Clark, who is the sister of Hannah Gertrude Clark and the devisee of substantially all her property under her will, is that all the property found in the private cash box and the bank vault box at the time of John A. Clark's death had been given to Hannah Gertrude Clark by their father before his death and was excepted from his testamentary disposal by the clause I have mentioned. If this claim can be sustained, the gift would comprise property valued at about $30,000, more than half of the whole estate left by the testator. Claims like the present are included in one of three different classes. The first is that of gifts inter vivos, which this is said to have been, and the second is by transfer of the property by way of trust or a valid declaration of trust.

In Richards v. Delbridge, 18 Eq. 11, Jessel, M.R., said: "A man may transfer his property without valuable consideration, in one of two ways—he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or in trust, as the case may be; or the legal owner of the property may, by one or other of these modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." In that case it appeared that Delbridge, who was the owner of a mill and machinery and a stock in trade connected with the mill business, made and signed the following memorandum, endorsed upon the lease of the mill pro-

perty: "7th March, 1873. This deed and all thereto belonging I give to Edward Bernetto Richards from this time forth, with all the stock-in-trade." Soon after making this memorandum Delbridge delivered the lease on behalf of Richards, who was then an infant, to his (Richards') mother, and she retained possession of it. The bill was filed for a declaration that by the memorandum Delbridge created himself a trustee of the property for Richards. A demurrer to the bill for want of equity was sustained. It was clear there that a voluntary gift was intended, but the donor had not executed any transfer of the legal estate, he had not done all that he might to perfect the gift and as a volunteer the donee had no equities which he could ask the Court to enforce by way of completing the gift.

In Milroy v. Lord, 4 DeG. F. & J. 264, it appeared that a transfer was made by one Medley to one Lord of fifty shares of the capital stock of the Bank of Louisiana, then standing in his name in the books of the bank to be held by him upon trusts for the benefit of his niece. This deed of assignment was executed by both Medley and Lord under their seals. By the constitution of the bank shares were transferable in the books of the company, the certificates of stock being surrendered at the time of transfer. No such transfer was ever made. Stuart, V.C., held that these shares were bound by the trusts declared in the deed of assignment, but he was overruled on appeal. Lord Justice Knight Bruce, speaking of the bank shares, says: "They stood in Mr. Medley's name before and at the time of his execution of that instrument (the deed of assignment) and continued so to stand until his death. He was during the whole time, and when he died, the legal proprietor of them, and unless so far, if at all, as the beneficial title was affected by that instrument, the absolute proprietor of them beneficially likewise. He might, however, have affected the legal title. It was in his power to make a transfer of the shares so as to confer the legal proprietorship on another person or other persons. But as I have said, no such thing was done." In the same case Lord Justice Turner says: "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the

property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

In Heartley v. Nicholson, 19 Eq. 233, the same principle is laid down by Bacon, V.C., and applied to an intended transfer of shares in a colliery company. He is thus reported: "That no perfect transfer was at any time made by the testator appears to be perfectly clear; but it is not less clear to me that the testator intended to give, and on the 11th February believed that he had given, the shares in question to the plaintiff, his daughter. It is, however, established as unquestionable law that this Court cannot by its authority render that gift perfect which the donor had left imperfect, and it will not and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection." As to the donor constituting himself a trustee the V.-C. says: "It is not necessary that the declaration of a trust should be in terms explicit. But what I take the law to require is, that the donor should have evinced by acts which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it, if any, as he retained was held by him in trust for the donee." In the same case the Vice-Chancellor expresses his approval of the distinction be-

tween a present gift and a creation of a trust for the donee's benefit as laid down by Jessel, M.R., in the following passage in Richards v. Delbridge, 18 Eq. 11: "The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise." See also Warriner v. Rogers, 16 Eq. 340. These cases must, I think, be taken as stating the true principle governing the question under discussion, though they are at variance with two previous decisions, Richardson v. Richardson, 3 Eq. 686, and Morgan v. Malleson, 10 Eq. 475.

It is much to be regretted that the rights of those interested in so large a sum of money must necessarily be determined upon evidence so meagre and uncertain as that which remains available since the death of Hannah Gertrude Clark. The only witness who knows anything about the questions involved and the only witness who has been examined is the defendant J. Sutton Clark, who is the surviving executor of John A. Clark (Hannah Gertrude Clark having been the other) and also one of the executors of Hannah Gertrude Clark. Sutton Clark says that in consequence of a letter received from his uncle—the testator—he came to St. John to see him. They talked some business matters over and the testator brought forward—to use the witness' own expression—some securities which he said he had given to his daughter and told him to take them to the Bank of New Brunswick and put them in a vault box there. I do not know that the daughter's name was even mentioned, but it was taken for granted at the hearing that Hannah Gertrude was the one referred to. It was not stated what the securities were or what their value was. They were enclosed in an envelope, I think, at Sutton Clark's suggestion, given to him, and in pursuance of the testator's directions, he went to the Bank of New Brunswick, took out a safety box lease in the names of John A. Clark and Hannah G. Clark, either to have access, and deposited the envelope with its contents, as given to him, in the box and gave the keys (there were two) to the testator. He never saw either the box or the keys or the securities afterwards until after the testator's death, when as executor he was taking

charge of the estate. He did not state the date of this interview, but it took place immediately before the safety box was procured. The lease is dated April 11, 1905, and the securities must have been deposited at or about that date, which would be eleven months before the will was made and two years before the testator's death. When the executors took charge of the estate they found two boxes as mentioned in the will—one, the bank vault box just referred to and a private cash box at the testator's residence, the keys of both being then in the possession of Hannah Gertrude Clark, but under what circumstances or at what time or for what purpose she became possessed of them there is absolutely no evidence whatever. The private cash box was then opened and found to contain the following:—

A pass book from the Bank of New Brunswick Savings Bank account, in John A. Clark's name, for $810.69.

A pass book from the Dominion Savings Bank account, in John A. Clark's name, for $1,527.93.

A dividend warrant on the shares of the British Bank on certificate for ten shares, in the name of John A. Clark, Hannah Gertrude Clark and Jean Spurr Clark, for $73.

Certificate in the name of John A. Clark from the British Columbia Permanent Loan and Savings Company for $3,692, and some miscellaneous articles of no value. I may as well without going farther dispose of the claims to the property in this box. There does not seem to me any evidence of any kind to suggest that, with the exception of the dividend warrant for $73, it was not all estate property belonging to the testator when he died. The dividend warrant carries on its face the evidence of ownership and the money will go accordingly. The property was found in what the testator in his will calls " my private cash box " at his own home; and there is nothing to indicate that Hannah Clark had any interest in it except as to the bank dividend. It is true she had the key of the box, but she was executrix and as such entitled to it. If she had not been, I should not have attached any significance to the mere fact of her having possession of the key. Some one must under such circumstances take possession of the key for the safety of the property. Of itself it is no evidence of ownership either of the box or its contents.

The contents of the bank vault box were as follows:—

An envelope tied up and addressed "Revd. John A. Clark and Hannah Gertrude Clark," containing the following:—

4 N. S. Steel & Coal Co. debentures for $1000 each, payable to bearer, 6%	$4,000 00
2 Town of Sydney debentures for $1,000 each, payable to bearer, 4%.	2,000 00
10 shares British Columbia Loan, &c., Co., for $100 each, payable to John A. Clark	1,000 00
4 Town of North Sydney Debentures for $500 each, bearing interest at 4½, payable to bearer	2,000 00
2 shares in the British Columbia Permanent Loan, &c., Co., for $200 each, payable to John A. Clark ...	400 00
1 debenture of the British Columbia Permanent Loan, &c., Co. for $1,000, payable to John A. Clark..	1,000 00
2 Centenary Church debentures for $500 each, payable to bearer	1,000 00
	$11,400 00

The above securities were in the envelope. In addition to these there was also in the box a promissory note dated June 1st, 1905, for $1,000, made by Roderick McDonald of Halifax, N.S., in favour of John A. Clark, and endorsed by him to Hannah Gertrude Clark. A pass book with the Canada Permanent Mortgage Co., for $3,270.89 in the name of John A. Clark and Hannah Gertrude Clark, payable to the survivor of them. Also a bond and mortgage for $8,000 from Annie E. Earle, wife of Wm. E. Earle, to Hannah Gertrude Clark. A life insurance policy on Earle's life for $1,000, payable to his wife, and by her assigned to Hannah Gertrude Clark, issued by the Ontario Mutual Insurance Co. Another life policy in the same Co. for $1,000 on Earle's life, payable to his wife, and by her endorsed to Hannah Gertrude Clark. Some fire insurance policies in different companies upon Earle's property made payable by him to Hannah Gertrude Clark for $6,000; several fire insuarnce policies on the King Square property owned by the testator and which is valued at about $15,000. All

of these books and securities, including those in the envelope, were found in the bank vault box which the testator in his will describes as "my box in the vault of the Bank of New Brunswick," and they together with what was in the private cash box, comprise substantially all the personal property included in the testator's residuary estate. Great reliance is placed on the evidence of Sutton Clark as to the so-called declarations of the testator in reference to the securities placed in the envelope and deposited in the bank box. I am asked to infer that when the testator said "I have given these securities," &c., it should be inferred that a complete gift had been made, and that where delivery was necessary for that purpose it should be inferred that a delivery had actually taken place. I do not feel at liberty to act upon the assumption that a gift completed by a delivery had actually been made, in view of the manner in which the testator dealt with the property for the two succeeding years of his life, and in view of other circumstances to which I shall presently refer. During these two years the testator had the custody of the box and the control of everything in it. During that time he seems to have deposited in it the McDonald note, the Earle papers, the pass book in the Canada Permanent Mortgage Co. and the insurance policies on the King Square property, for none of these seem to have been put in the box originally. It is impossible for the plaintiff or any one else to select any one security found in the envelope on the testator's death, and identify it as having been in the envelope originally deposited in the box. I am asked to infer that the contents of the envelope when originally deposited in the box were the same as when they were examined two years later after the testator had died. I am speaking of the debentures transferable by delivery. As to these I think there is really no evidence of any gift, and that so far as inferences may fairly be drawn from the facts and circumstances, there never was any delivery. As to these the plaintiff's claim must fail. The ten shares in the British Columbia loan Company and the two shares in the British Columbia Permanent Loan Company are in the name of John A. Clark as the legal owner, and were so when he died. The debenture in the same company is made payable on its face to John A. Clark. As to these, even if the testator intended to make a gift, there never was any assignment which was necessary in order to complete it. As to the remainder of the property

there is first the McDonald note for $1,000 in favor of the testator and endorsed specially to his daughter Hannah. It is evident that this note was not among the papers deposited in the box by Sutton Clark, because it is dated June 1st, 1905, some seven weeks after the box lease was taken out. The only evidence of a gift is the indorsement. If a delivery of the note had also taken place it would have been complete. There is nothing to show nor anything from which one could infer that the daughter ever saw this note or heard of it until after her father's death. The money on deposit with the Canada Permanent Mortgage Company stands in a somewhat different position. That was a deposit made by the testator in the joint names of himself and his daughter "payable to the survivor." In re Paul Daley, 37 N. B. 483, was cited to shew that money so deposited did not necessarily go to the survivor. In that case the money was not deposited so as to go to the survivor, but simply in the joint names of Daley and his daughter with power to either to withdraw. And the Judge there thought that there was evidence to rebut any presumption of a gift. In the present case the testator when he deposited the money did so under a contract with the company that they would pay it to his daughter if she survived him. There could therefore be no doubt that it was the testator's intention that his daughter, if she survived him, should have the money, and he did all that was necessary in order to carry out that intention. I think she is entitled to the money: Fowkes v. Pascoe, 10 Ch. App. 343.

The Earle mortgage was evidently an investment for the benefit of the testator's daughter. She is the mortgagee and as such has the legal title and is entitled to the money secured by it. The insurances on this property as well as the life insurance policy assigned were a part of the mortgage transaction and stand in the same position as the mortgage.

Of the property found in the boxes I think the daughter Hannah Gertrude was entitled to retain as her property given to her by her father during his life the following: Her share in the bank dividend warrant for—

$73, which I assume to be one-third, say...	24 44
Canada Permanent Mortgage Company pass book, ...	3,270 89
Earle mortgage.	8,000 00
	$11,295.33

The remainder of the property will go to the executors of John A. Clark as part of his residuary estate. In arriving at this result it will be seen that only those moneys and securities which had actually been assigned to the daughter and of which she had the legal title have been allotted to her, and it may be thought that Sutton Clark's evidence, uncontradicted as it was, has been entirely ignored. That is not so, but on examination of it, it really had not much bearing on the important points involved. It certainly so far as it went to prove a gift, made out no stronger a case than that presented in Morgan v. Malleson, 10 Eq. 475, in reference to which Bacon, V.-C., in expressing his disapproval of that decision, said: "I am strongly inclined to believe that there must be some imperfection in the report of it, because what staggers me most is to find that the decision, as it stands, would seem to establish that if a man writes a letter to say, "I have given" a bank note, or an Indian bond, or anything else, "to A. B.," and no more, and retains the bank note or bond and the memorandum in his own possession, that letter has a valid operation as between himself and A. B. If that were all that appeared in the case I should certainly consider such a letter to be a mere nullity." (See Warriner v. Rogers, 16 Eq. 340, at page 349.)

A strong argument against the claim put forward as to all this property may be found in the scheme of the will itself. The testator seems to have derived his property from two sources, a part from his father and the remainder from some other source; it was said from his first wife. His interest in his father's estate which was unsettled at the time of his death has since been settled at about $10,000. The testator gave his interest in that estate to be divided equally between his three children, after the payment of two legacies of $250 each. He gave all his personal and household effects of every description to his daughter Hannah Gertrude, "to be used for the furnishing and the maintenance of a home over which she is to have control and which is to be a home of her sister Jean as long as she remains unmarried, and also of her step-mother, my present wife, so long as she remains my widow." The residue of that part of the estate is disposed of by the clause I have before mentioned and it directs the executors to apply the net income to the support and maintenance of the children and their step-mother so long as she remains his widow.

This fund is divisible after the year 1911, as follows: Two-ninths to Hannah, two-ninths to Jean, two-ninths in trust for the son and the income of the remaining three-ninths to the step-mother during widowhood. It is obvious if Hannah Gertrude took by way of gift all the personal property, the remainder would have been altogether inadequate for the maintenance of the children and step-mother and the provision for the latter, on a division of the fund, and which is the only provision the testator seems to have made for his wife, would be, one would say, out of proportion to the value of the estate.

I have mentioned two of the three classes of cases in which questions of this kind arise. The third is where there is a gift, but not to take effect until the donor's death and which is therefore testamentary in its character. I think it not unlikely that the testator may have had some such idea in his mind. In his will he excepts such of the personal property in the boxes, not "which I have already given," but which I had already given, that is, as I read the words, as he had before his death given. The immediate personal necessities of the two daughters for the relief of which the gifts were made, could not very well refer to necessities during the testator's life, because he would relieve these himself. The marking of the envelope with the names of the testator and daughter sustains the notion that she was to have an interest, but it equally sustains the notion that he had not parted with his. And strongest of all is the fact that up to his death he retained the possession and control of all these securities, treated them as his own and collected the interest and dividends for his own use. This is entirely opposed to the idea of a present gift, except where the gift had been in fact completed and became irrevocable as in the case of the assigned securities I have mentioned and which answer the description of the property excepted. If any such gift as I have described were intended as to the other securities or any of them, it would be testamentary in its character and of no validity by reason of the formalities of the Wills Act requisite in such cases having been disregarded: Warrainer v. Rogers, 16 Eq. 340.

There will be a declaration such as I have mentioned and the costs of all parties will be paid out of the residuary estate of the testator, the executor's costs to be allowed as between solicitor and client.

PRINCE EDWARD ISLAND.

SUPREME COURT OF JUDICATURE.

IN CHAMBERS. OCTOBER 16TH, 1909.

IN RE FIRST ELECTORAL DISTRICT OF QUEENS, PROVINCIAL ELECTION.

MOLYNEAUX v. CROSBY.

Petition—Copy—Service—An Election Stated as Holden on "Eighth" when Polling Day on "Seventh."

J. A. Mathieson, K.C., and A. A. McDonald, for petitioner.

F. L. Haszard, K.C., and J. J. Johnston, K.C., for respondent.

FITZGERALD, J.:—This is a rule to shew cause why the petition presented in this matter should not be set aside, and removed from the files of the Court.

Shortly the grounds are:—

1st. That a true copy of the petition was not served on respondent; it appearing that in the heading of the copy served, the date of the holding of the election is omitted.

2nd. That in the petition the election is described as holden on the eighth day of July, A.D. 1909," whereas as a fact polling day was on the seventh day of July, 1909. It appeared that a petition regular in form was duly presented, and notice of presentation duly served on the respondent, together with a paper purporting to be a copy of the petition.

In this copy the title or heading reads: "Election of an assemblyman for the Legislative Assembly—for the first Electoral District of Queens County, holden on the

The date of the holding being thus left blank.

In the body of the petition clause 2 reads as follows:—I quote it in full as I have afterwards to refer to it.

"2. And your petitioner states that the election was holden on the eighth day of July, A.D. 1909, when John H. Myers, of Hampton in Queens county, farmer, and Cyrus W. Crosby, of Bonshaw in Queens county, farmer, hereinafter called the respondent, were candidates for assemblyman, and

George Coombs, High Sheriff of said county, returning officer for the said first electoral district of Queens county has returned the respondent Cyrus W. Crosby as being duly elected as assemblyman for the said first electoral district."

This objection appears to me to be a purely formal one—the clerical omission in the heading of a date which is fully set out in the body of the copy of the petition served. It is a harmless error in the title, which in itself is unimportant, and upon which nothing in the body of the petition is dependent by reference.

Rule 51 of the rules in election petitions declares that: "No proceedings under The Controverted Elections Act shall be defeated by any formal objection," and sections 22 and 26 of the statute give me in this matter the full powers of a Judge of the Supreme Court of the province.

It appears to me to be my plain duty to give effect to such powers and grant leave to amend the copy served, now before me.

It is doubtful if this objection could be sustained on another ground, which as it was raised before me I refer to.

Section 16 of the Provincial Act of 52 Vic. cap. 3, regulating the manner of service of an election petition, is no longer in force. Under it "notice of the presentation of a petition accompanied with a copy of the petition" had to be served on respondent. But sec. 6 of 1 Edward VII., cap. 5, repealed that section, and in the new section enacted in lieu thereof the words "accompanied with a copy of the petition" are omitted.

It was suggested that Rule 13 still requires service of a copy of the petition. I rather doubt that. The "service of an election petition" there referred to, will be read as that required by the statute, not another and a different one.

Section 7 of Edward VII. (following sec. 6), enacts that "six days clear after the petition has been served on respondent as aforesaid the petition shall be deemed at issue."

No rule of Court would, I think, be interpreted as requiring other modes of service, and thus coming in direct conflict with the statute.

The second ground in the Rule appears to me to be such of the same nature as the first.

It is true that polling day was on the seventh day of July. But the petitioner states in his petition that the election was holden on the 8th day of July, does he necessarily mean that that day was polling day?

Our Rules follow the English Rules of 1866—and the form there given of an election petition.

The English practitioner, according to the forms given in Hardcastle, appeared to be in some doubt as to what to put after the words "holden on."

One added "on the 3rd day of February, 1872, being the day of nomination, the 6th day of February, 1872, being the day of polling, and the 8th day of February, the day of the declaration of the poll."

Another added only a single date, probably the polling day. Really the election is holden from the day the sheriff is ordered to open his Court "for the commencement of such election" until the day he makes declaration and return —as required by law—of the name of the candidate duly elected as assemblyman. In this election the writ now before me orders the sheriff to open his Court for such commencement on Wednesday the 30th day of June, 1909 (nomination day); and the 20th day of the July following was declaration day. The election was being holden between these two dates.

I suggested to counsel, supposing that the petition had read, "holden between the 30th day of June and the 20th day of July," would such a use of the form be objectionable? It was not contended it would. Nor was it contended that if any of the ear-marked days, viz., nomination day, polling day, or declaration day had been used, that that would not have been a sufficient designation.

In this petition is set forth one of the days during which the election was being held, together with the full particulars of such election, viz., the electoral district in which it was held; the nature of the election, that for an assemblyman for that district; the names, residences and addresses of the candidates seeking election; the name of the returning officer thereat, and his return that the respondent had been duly elected as assemblyman for such district.

All these facts appear in section 2 of the petition before referred to by me.

The crux of this matter is, does the petitioner in this petition describe the election and return which he seeks to have declared null and void, with that particularity which repels the possibility of the respondent being misled thereby?

The petition appears to me to disclose with the fullest particularity such election and return; the candidates running; the electoral district to be represented; the legislature

and the office to be filled therein; the result of the election, and the return of the respondent, with a date stated during which the election was by law being holden.

Nothing but the date given could possibly mislead, but that date though inapt, is not strictly inaccurate, and with the other particulars points with full certainty to the election and return of the respondent by these proceedings sought to be invalidated.

I see no need for any amendment.

The petitioner taking an order to amend the title by adding the date omitted, I dismiss this Rule.

The costs to be costs in the cause to the respondent in any event, and over and above any other costs which he may ultimately become entitled to.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 5. OCTOBER 1ST, 1909.

MATTHEWS v. SMITH.

Practice—Re-opening Judgment — Grounds—N. S. County Court Act, sec. 86 — Refusal to Re-open — Extension of Time to Appeal from Original Order for Judgment — Costs.

Fitzpatrick and McKay, for plaintiff.

R. H. Graham, for defendant.

PATTERSON, Co. C.J.:—This is an application under section 86 of the County Court Act to re-open a judgment and vacate the order made upon it.

The action is one upon an implied contract. The plaintiff having kept, with his knowledge and consent, the infant child of defendant for a long period, now asks to be paid for such keep. If the matter ended there, the implied contract was established, but the only witness plaintiff called—his wife, who, according to the evidence is the real plaintiff,—swears that the child was not kept under such circumstances,

or under any circumstances that would imply a contract, but under a special arrangement whereby at her request the child was left with her to keep and provide for during her life time, the defendant promising to allow the child to remain with her for that time. She further testifies that at the time there never was any word or thought of payment, and that she would not now ask payment if defendant would leave the child with her. Of course this arrangement could not be enforced, but it seemed to me that it was sufficient to shew there was no implied contract; and at the conclusion of the plaintiff's case, I gave judgment dismissing his action, and signed an order for judgment to that effect. I am now asked to re-open that judgment and vacate that order.

I was not, at the trial, nor am I now asked for any amendment to plaintiff's statement of claim. The action still stands as one on an implied contract, and nothing more or less, and plaintiff must succeed on an implied contract or not at all. A number of grounds are mentioned in the notice of motion, but all were abandoned at the argument but one, namely, that the agreement or arrangement under which plaintiff kept the child being unenforceable at law would not destroy or do away with the implied contract that plaintiff sought to set up. Two questions arise: 1st, Does the section relied on (section 86 of the County Court Act) give me authority to do what is asked? 2nd, If it does, have proper grounds been shewn to warrant me in using that authority?

1st. It is perfectly clear, altogether apart from the section, that if a judgment is given or an order signed under a mistake or misapprehension, as in Smith v. Horton, 26 N. S. R. p. 41, or in Re Australia Steamship Co., 3 Ch. D. 661. In this latter case the order had not been signed (see in Re St. Nazaire Co., 12 Ch. D. 91), and it is trite law to say that until an order is signed a Judge can re-consider his decision. See the N. Cape Breton Election case, 6 E. L. R. p. 532. A Judge can rescind or vacate any order he has made, but when a Judge has deliberately, with all the facts before him, and as a result of the best consideration he could give the matter, given judgment, and upon that judgment has signed an order, I do not think that apart from this section he could rescind his judgment and vacate his order; and I am bound to say that I do not think this section gives or was intended to give him such power. I think it was only

intended to give him power to rescind all or any decisions or orders made prior to the final order for judgment. I am quite aware that sub-section 4 is strongly against this view, but almost identical language was in the old section (1889, c. 9, s. 46), and Mr. Justice Graham and the late Mr. Justice Ritchie in Smith v. Horton, supra, have both adopted it, and expressed their opinion that the statute gave a Judge no such power as to rescind an order for judgment. I would be quite content to shelter myself behind these eminent authorities if it were necessary and refuse this application for want of authority to make the order asked for. But it is not necessary, for I am strongly of the opinion that even if I had such authority, no proper reason has been shewn for exercising it. And this brings me to the discussion of the second question.

Let it not be forgotten that plaintiff claims upon an implied contract, and that only. An implied contract, as I understand it, is—to be brief—a contract arising from conduct. In this case the implied contract would have arisen if defendant's child, with his knowledge, had been supported by plaintiff, and nothing whatever said, but that is not what happened at all. How it can be contended there is implied contract when the conduct of the parties shews there was an express agreement (Mr. Fitzpatrick, the solicitor of the plaintiff, quarrels with the use of the word "agreement," to describe the arrangement entered into between the plaintiff and defendant, but I notice the reports use the word in describing similar arrangements), I cannot understand. Though the agreement is invalid and could not be enforced, it surely shews that the conduct of the parties was such that no contract by implication could arise. As Bramwell, B., says in Roberts v. Smith, 4 H. & N. 322, "All implication is at an end, because we have the real facts." In Selway v. Fogg, 5 M. & W. 83, the plaintiff sought to recover upon an indebitatus assumpsit for the value of the work actually done; to-day we would say upon an implied contract. Defendant set up a special contract to do the work at a specified sum, a contract though which was avoided by fraud. By a very strong Court it was unanimously held that the plaintiff could only recover according to the terms of the special contract. Lord Abinger said: "A party cannot be bound by an implied contract when he has made a specific contract which is avoided by fraud. A

person is not at liberty to say, 'I have made two contracts, and if one of them is avoided by its fraud, then I will set up the other.'" And Parke, B., added: "If the plaintiff chooses to treat the defendant as a party who has contracted with him, he must be bound by the only contract made between them."

Counsel for the plaintiff attempted to distinguish Selway v. Fogg from the present case by saying there was a special contract in Selway v. Fogg, though it was avoided by fraud, but here there was no special contract at all. On the facts I do not see any valid distinction, but even assuming that there was no contract or agreement here because such agreement as there was was unenforceable, there was at least conduct, such conduct as prevents plaintiff setting up an implied contract. In Harrison v. James, 7 H. & N. 804, the defendant, being desirous of apprenticing his son to the plaintiff, it was verbally agreed between them that the son should go on trial for a month, and if the parties were satisfied, he should be bound apprentice for four years, the defendant to pay a premium by instalments. The son went on trial, and remained above sixteen months, when the defendant removed him. No deed of apprenticeship was executed, or any part of the premium paid. It was held that the plaintiff could not recover for the son's board and lodging during any part of the time he remained with him.

Nor are the text-books less positive than the cases. Chitty, 14th ed., p. 43, says: "With regard to all the above cases, however, this principle must be kept in view, namely, that promises in law exist only where there is no express promise between the parties. Expressum facit cessare tacitum. A party, therefore, cannot be bound by an implied contract when he has made an express contract as to the same subject matter, even though the latter be avoided by fraud. He may, it is true, repudiate the contract entirely on this ground, but if he sues the other party in contract at all, it must be on the express contract." And the American editor of Addison lays down the same doctrine, citing abundant American authorities for it.

Taking this view, I see no reason for exercising the power of opening up the judgment entered herein and vacating the order, assuming I have such power. The application is therefore dismissed with costs.

As I said at the trial, such sympathy as a Judge is permitted to have is with the plaintiff. I should have liked to

have been able to decide this matter differently, and would be glad if an appeal court would say I was wrong. So far as this application is concerned it would seem (Snyder v. Arrenburg, 27 N. S. R. 247), that it is in my discretion whether it is granted or refused, and there is no appeal, but if I have the power and am asked to do so, I will extend the time for appeal from the order for judgment.