REPORTS

OF

CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK,

WITH

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

REPORTER:
WALTER H. TRUEMAN, LL.B.,
BARRISTER-AT-LAW.

VOLUME II.

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1904.

JUDGES

OF THE

SUPREME COURT OF NEW BRUNSWICK

DURING THESE REPORTS.

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

Judge of the Supreme Court in Equity:
THE HONOURABLE FREDERIC E. BARKER.

Attorneys-General:
THE HONOURABLE ALBERT S. WHITE.†
" " HENRY R. EMMERSON.‡
" " WILLIAM PUGSLEY.§

Solicitor-General:
THE HONOURABLE HARRISON A. MCKEOWN.¶

* Mr. Justice Gregory was appointed October 13, 1900, in the place of Mr. Justice Van Wart, resigned.

† Hon. A. S. White was appointed Attorney-General October 29, 1897, and resigned January 18, 1900.

‡ Hon. H. R. Emmerson was appointed Attorney-General January 18, 1900, and resigned August 31, 1900.

§ Hon. Wm. Pugsley was appointed Attorney-General August 31, 1900.

¶ Hon. H. A. McKeown was appointed Solicitor-General March 26, 1903, and resigned February 8, 1904.

A TABLE OF THE NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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TABLE OF CASES CITED

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CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK.

TRITES v. HUMPHREYS.

1899.

September 19.

Practice — Injunction Suit — Affidavit — Act 53 Vict. c. 4, ss. 23, 24 — Administration Suit — Joinder of Administrator — Appointment by Court of person to represent deceased debtor's estate — Act 53 Vict. c. 4, s. 89 — Jurisdiction of Probate Court to appoint Administrator where no personal assets — Fraudulent Conveyance — Stat. 13 Eliz. c. 5. — Plaintiff not a Judgment creditor — Pleading — Delay by creditor — Statute of Limitations — Allegation of subsisting debt — Demurrer for want of parties — Act 53 Vict. c. 4, s. 54 — Costs in Demurrer.

Under Act 53 Vict. c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit. It is only where an injunction is sought before the hearing that the bill must be supported by affidavit.

In a suit by simple contract creditors of an intestate to set aside as fraudulent under the Stat. 13 Eliz. c. 5, a conveyance by him of real estate, and for the administration by the Court of his estate, an administrator of the intestate's estate appointed by the Probate Court is a necessary party to the suit, though there are no personal assets of the intestate.

The failure to make the administrator a party to such a suit is not a ground of demurrer, but may be taken advantage of under Act 53 Vict. c. 4, s. 54.

In such a suit it is not necessary for the plaintiff to allege that he has obtained, or is in course of obtaining, a judgment upon his debt.

The Court will not, in such a suit, appoint a person under Act 53 Vict. c. 4, s 89, to represent the estate of the intestate, instead of requiring the administrator of the intestate's estate to be made a party to the suit.

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The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but of no personal, estate.

Delay cannot be set up against a creditor seeking to set aside a conveyance of lands as fraudulent under the Stat. 13 Eliz. c. 5, where the creditor's debt is not barred under the Statute of Limitations at the commencement of the suit.

In a suit, commenced in 1899, by a creditor to set aside as fraudulent under the Stat. 13 Eliz. c. 5, a conveyance of land, the bill stated the debt arose upon two promissory notes, dated respectively in March and April, 1885, payable with interest three and twelve months after date, that the notes "were renewed and carried along from time to time by new or renewal or other notes, but have never been paid, but with interest thereon are still due to the plaintiff:"

Held, that the allegations were too vague, general and uncertain to show a valid and subsisting debt, not barred by the Statute of Limitations, at the time of the commencement of the suit, and that the bill was therefore demurrable.

Where some of several grounds of demurrer were overruled, costs were not allowed to either side.

Demurrer to bill. The facts fully appear in the judgment of the Court.

Argument was heard August 15, 16, 1899.

A. S. White, A.-G., and *L. Allison*, Q.C., in support of the demurrer:—

The bill seeks an injunction to prevent the alienation of the land in question pending the hearing of the suit. It should therefore be supported by affidavit as required by Act 53 Vict. c. 4, s. 23. The omission is a ground of demurrer: *Shepherd* v. *Jones* (1). It appears, by the bill, that an administrator of the estate of the deceased debtor has not been appointed. In an administration suit the rule is imperative that the legal personal representative of the deceased debtor must be brought before the Court: *Lowry* v. *Fulton* (2); *Dowdeswell* v. *Dowdeswell* (3); *Cary* v. *Hills* (4); *Rowsell* v. *Morris* (5); *Penny* v. *Watts* (6). The Act 53 Vict. c. 4, s. 54, forbidding demurrer for want of parties, does not apply where the party is not in existence. Section 89 of Act 53 Vict. c. 4, permitting the Court

(1) 3 DeG., F. & J. 56.
(2) 9 Sim. 104.
(3) 9 Ch. D. 294.
(4) L. R. 15 Eq. 79.
(5) L. R. 17 Eq. 20.
(6) 2 Ph. 149.

to appoint a person to represent a deceased's estate is held not to apply to an administration suit: *James* v. *Aston* (1), where the absence of a general legal personal representative was made a ground of demurrer. The plaintiff is disentitled to relief by lapse of time amounting to laches, and acquiescence. The conveyances sought to be set aside as fraudulent are dated of 1878. The plaintiff's debt was then in existence. By renewing the debt from time to time, and forbearing to impeach the conveyances until now, the plaintiff must be regarded as having acquiesced in the conveyances. The bill should affirmatively shew that the plaintiff's debt was enforceable in an action at law at the time of the commencement of the suit. The bill alleges that the debt was embraced in two promissory notes, dated March and April, 1885, payable respectively three and twelve months after date, and that they "were renewed and carried along from time to time by new or renewal or other notes, but have never been paid, but with interest thereon are still due to the plaintiff." If renewal notes have been given, it is suggestive that they are not fixed upon as evidence of the plaintiff's debt instead of the original notes. The allegation of the subsistence of the debt should be explicit, and should be supported by a statement of the facts. Where it appears by the bill that the plaintiff's cause of action is barred or extinguished by the *Statute of Limitations*, it is demurrable: *Hoare* v. *Peck* (2); *Fyson* v. *Pole* (3); *Noyes* v. *Crawley* (4); *Prance* v. *Sympson* (5); *Dawkins* v. *Lord Penryhn* (6). The conveyances having been made in 1878, plaintiff's right to relief is extinguished by c. 84, C. S. N. B., s. 21. The bill does not disclose any reason for making defendants parties to the suit. The land is shewn to have been conveyed by the debtor to a third person, and by him to the debtor's wife. But it is not shewn that the title continued in her, or that it did not subsequently become vested in an innocent purchaser. If conveyances are set aside, then land is to be

(1) 2 Jur. N. S. 224.
(2) 6 Sim. 51.
(3) 3 Y. & C. Ex. 266.
(4) 10 Ch. D. 31.
(5) Kay, 678.
(6) 4 App. Cas. 51.

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distributed among creditors. It is a rule of pleading that the bill must shew why parties are joined in the suit: *Wiggins* v. *Floyd* (1); *MacRae* v. *MacDonald* (2). Facts should be stated in support of the allegation that the conveyances were made fraudulently, and for the purpose of hindering and defeating the recovery of the plaintiff's debt. It is not shewn that at the time the transfers were made the debtor was in insolvent circumstances. It is merely stated that after the transfers were made the grantor had not sufficient to pay his debts. That may mean a considerable period of time.

[Barker, J.: — It is alleged that the grantor made the transfer with intent to defeat, hinder and delay his creditors. For the purposes of this demurrer it must therefore be assumed that the debtor was insolvent at the time the transfer was made.]

The remaining ground of the demurrer is that the plaintiff has not obtained a judgment at law upon his debt, or alleged that he is in course of obtaining one. See *Reese River Silver Mining Co.* v. *Atwell* (3). This is necessary under a system of jurisprudence in which equitable and legal remedies are not assimilated, and cannot be concurrently administered. The plaintiff is precluded from establishing in this Court that a debt is due to him. The decisions in Ontario and England permitting a creditor to maintain a bill to set aside a deed as being void against him, without having first recovered a judgment at law, proceed upon the fusion of equity and law effected by the Judicature Act of those countries, and enabling a legal question to be dealt with by the Court of Chancery. See *McCall* v. *McDonald* (4).

M.G. Teed, Q.C., contra:—

The absence of an affidavit in support of the bill is not a ground of demurrer, but is a formal defect to be taken

(1) 1 Han. 229.
(2) N. B. Eq. Cas. 531.
(3) L. R. 7 Eq. 350.
(4) 13 Can. S. C. R. 247, 255.

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advantage of, if thought necessary, under s. 54 of Act 53 Vict. c. 4. In *Crossman* v. *Hanington* (1), an answer neither signed nor sworn to was removed from the files of the Court on motion. A demurrer lies for a defect in substance appearing upon the face of a pleading. The bill does not disclose that the affidavit is wanting, and the Act does not require that the affidavit shall be attached to the bill. Section 24 of Act 53 Vict. c. 4 will bear the construction that the affidavit is not to be filed with the bill, but is to be used in support of an application for an injunction when required before the hearing of the suit. It may be that an injunction will not be applied for, or will not be applied for until the hearing, when it can be granted without affidavit. The general proposition that in an administration suit the legal personal representative of the deceased debtor should be a party to the suit cannot be disputed. But it is subject to this qualification, that there must be personal estate to be administered. Here the bill states that there is no personalty, and that the suit is for the setting aside of the conveyances of real estate, and its administration by the Court. There being no personal estate the Probate Court will not appoint an administrator. The plaintiff cannot compel one of the next of kin of the intestate to take out letters of administration, and if the plaintiff were appointed administrator he would be unable to attack the conveyances in question. Real estate is not assets in the hands of an administrator: *Doe d. Hare* v. *McCall* (2). The objection that there is no legal personal representative of the deceased debtor made a party to the suit is not a ground of demurrer: s. 54 of Act 53 Vict. c. 4. Delay by plaintiff in instituting proceedings to set conveyances aside is only material if the plaintiff's debt is barred by the *Statute of Limitations*. Delay will be considered a ground in equity for refusing equitable relief. Here we are asking relief, pursuant to Stat. 13 Eliz. c. 5, and are therefore enforcing a legal right. Assuming that the defence of laches may be set up, it is not a ground of demurrer but of answer: *Mitford* Eq. Pl. 307;

(1) 26 N. B. 588.

(2) Chip. MS. 90.

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Three Towns Banking Co. v. *Maddever* (1). The objection that our right to relief is extinguished by s. 21 of c. 84, C. S. N. B., on the ground that transfers were given over 20 years previously to the commencement of suit, proceeds upon a misconception of the nature of the suit. Plaintiff does not seek to have title to land vested in him, but to have conveyances set aside. He never had a right of entry, and under c. 84, C. S. N. B., time only runs from the time a right of entry accrued. Plaintiff's debt is shewn by the bill to be subsisting in 1898. The notes are stated to have been renewed up to the time of the debtor's death in that year. To be demurrable the bill must, with conclusive certainty, shew that the debt is barred: *Deloraine* v. *Browne* (2); *Foster* v. *Hodgson* (3); *Hoare* v. *Peck* (4). The interest of the defendants in subject matter of suit is clearly apparent. If conveyances are set aside, the title is vested in the defendants as heirs of the debtor. Upon a sale of the land any excess remaining after satisfaction of the creditors' claims would belong to the defendants. It is not necessary that the plaintiff should be a judgment creditor of the grantor, or that he should allege that he is in the way of getting a judgment. Statute 13 Eliz. c. 5 enacts that conveyances are void as against creditors. There being no legal personal representative no action at law could be brought. *Reese River Silver Mining Co.* v. *Atwell* (5), and *Clarkson* v. *McMaster* (6) are wholly opposed to the defendants' contention. Where a demurrer is put in on more than one ground, and fails in part, no costs will be given: *Benson* v. *Hadfield* (7); *Allan* v. *Houlden* (8).

White, A.-G., in reply:—

The plaintiff could have taken out letters of administration without disentitling himself from bringing this suit. He would in this suit have represented the other

(1) 27 Ch. D. 523.
(2) 3 Bro. C. C. 633.
(3) 19 Ves. 180.
(4) 6 Sim. 51.
(5) L. R. 7 Eq. 350
(6) 25 Can. S. C. R. 100.
(7) 5 Beav. 546, 554.
(8) 6 Beav. 148, 150.

creditors, and would act in the character of a creditor. Real estate is available as an asset for the payment of creditors in the absence of personalty, and letters of administration will be granted to enable the real estate to be sold under license.

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1899. September 19. BARKER, J.:—

This is a demurrer by four of the defendants to the plaintiff's bill, and the questions which arise are somewhat novel and important. The bill is filed by the plaintiff on behalf of himself and the other unsatisfied creditors of one Alfred Humphreys, deceased, for the purpose, not only of setting aside as fraudulent against creditors a certain conveyance from him to one John Humphreys, dated January 7, 1878, and a conveyance of the same date from John Humphreys to Abigail Humphreys, wife of Alfred Humphreys, but also to have the estate of Alfred Humphreys — both real and personal — administered in this Court. Abigail Humphreys died intestate in the year 1887, and in 1890 Alfred Humphreys married again. He died in April, 1898, intestate, leaving him surviving his widow and several children, the issue of the first marriage. The bill alleges that he left no assets or property—real or personal—other than his interest in or title to the lands mentioned in these conveyances, and that no letters of administration had been granted or taken out to his estate or effects. The bill also alleges that Alfred Humphreys always continued in the occupation, possession and management of the land in question, which is situate in the County of Queens. The defendants are the heirs at law of Alfred Humphreys and his widow; and this demurrer has been filed by four of the heirs. The bill prays (1), that an injunction be granted restraining the defendants from selling or transferring the land in question; (2), that the two deeds may be declared fraudulent and void as against the plaintiff and other creditors of Alfred Humphreys and be set aside, and that the land and premises comprised therein may be treated and made available as assets of said Alfred

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Humphreys for the payment of his debts, and that they be sold for that purpose, and (3) "that the property, assets and estate, of which said Alfred Humphreys died possessed or entitled, both real and personal, including said lands and premises as mentioned and comprised in said two deeds may be administered herein by and under the direction of this Honorable Court."

The first ground of demurrer is that although this is an injunction cause the bill is neither sworn to nor supported by any affidavit stating the truth of the facts alleged therein. I am not altogether satisfied that this, strictly speaking, is an injunction cause. It is true that an injunction restraining an alienation of the property so as to preserve its present status until the final decree is made, is asked for, but that is merely in aid of the principal relief sought, and not in any way a part of it. The whole object of the suit is attained without an injunction, by a decree setting aside the conveyances as fraudulent, in which case the land would remain the property of Alfred Humphreys, liable to be sold for the payment of his debts. If, however, this be treated as as injunction cause, I do not think this ground of demurrer can be sustained. There are no doubt cases where bills have been held bad on demurrer for want of an affidavit, where in order to give them validity, or to shew them within the Court's jurisdiction, they required to be sworn to, or to have an affidavit of verification annexed to them, or to be accompanied by one: *Daniell* Ch. Pr. (4th Am. ed.) 392, 587. In these cases the verification by the oath or affidavit seems to have been an essential part of the bill itself. In 1854, when the practice of this Court was put in a statutory form by Act 17 Vict. c. 18, it was distinctly required that all bills should be sworn to: section 4. By section 5, it was provided that in injunction causes, if the application, that is the application for injunction before hearing, was to be supported by any proof other than the sworn bill, the same should be done by a short affidavit verifying the facts. Under this section, therefore, the application for injunction before hearing might be made either on the sworn bill alone, or on the

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sworn bill supported by additional affidavits. The bill, if sworn to, was complete and open to no objection, but when it came to be used on an application for an injunction before hearing, it might be supported by affidavits. The practice, as to swearing to bills, was altered in 1863 by Act 26 Vict. c. 16, and when the statutes were consolidated in 1876, it was provided that the bill need not be sworn to except in injunction causes, but that it should be signed by the plaintiff, his solicitor or agent. See s. 22, c. 49, C. S. N. B. By section 23 it was provided that in injunction causes the bill should be sworn to by the plaintiff or his agent, and that if the application for injunction was to be supported by any proof, other than the sworn bill, it should be done by affidavit verifying the facts. It will be seen by s. 24 of c. 49, C. S. N. B., that an application for an injunction before hearing could be made on the sworn bill alone, though it might be supported by affidavits verifying or corroborating the facts mentioned in the bill. The bill if sworn to was complete as a bill — and it might be used alone or supported by further proof, to support a motion for an injunction. Coming down to the present practice as regulated by Act 53 Vict. c. 4, it is no longer necessary to have bills sworn to in any case — that practice even as to injunction bills was abolished by that Act; and it was provided by s. 23 that in injunction causes the bill shall be supported by affidavit stating the truth of the facts contained therein, or in any of the separate allegations thereof; and that facts in confirmation of the bill may be stated by affidavit. It is true that there is nothing here said about an application for an injunction, as is said in the corresponding sections of the two previous Acts, but if we read them together it is, I think, fair to infer that the Legislature required the bill to be supported only on the occasion mentioned in the other Acts — that is, when it was to be used on an application for injunction before hearing. It could no longer be used alone on such a motion, for as it was not sworn to, it had not the force of an affidavit. It was therefore provided by s. 24 that an injunction before hearing could only be granted on the production of the

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bill before filing, or a sworn or certified copy after filing with affidavits — not affidavits, if any, as is provided by the other sections. The Legislature was by this Act abolishing the practice of filing a sworn bill in injunction causes, and thus assimilating the practice to that established as to other kinds of bills. I cannot think it intended to abolish a well known and comparatively simple practice, and substitute for it a more complex one in order to accomplish practically the same end. The reasonable construction to place upon the Act is that a sworn bill in injunction causes is no longer necessary, but if you require an injunction before hearing, the application must be made on the bill, and affidavits supporting it. As a bill, it is not, in my opinion, open to objection, either on demurrer or for want of form, because it is not supported by affidavit. This ground of demurrer fails.*

The second ground of demurrer is that the bill prays for relief not disclosed in the summons, but the Attorney-General abandoned this ground, and I think properly so.

The third ground is that it appears by the bill that there is not, and never has been, any legal personal representative of Alfred Humphreys, and without such a representative being a party to this suit it cannot be maintained. Two answers are made to this objection — first, that want of parties is no longer a ground of demurrer; and second, that the personal representative of Alfred Humphreys is not a necessary party to this bill. It was contended that the objection was more than merely one for want of parties, because there was no administrator, and therefore no person who could, by name, be ordered to be made a party. That, however, is altogether unnecessary. The objection is one for want of parties, and is therefore no ground of demurrer. See Act 53 Vict. c. 4, s. 54. In many, if not in all the cases to which I shall have occasion to refer later on, in which the objection arose, it came up expressly on a demurrer for want of parties. Many of them were cases where no representative had been appointed, but the order was that the cause stand over to enable the personal representative

* See *Glasier* v. *MacPherson*, 34 N. B. 206. — Rep.

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to be made a party. The substantial point argued goes beyond this technical one, and as it will likely come up at a later stage of the case, I may as well decide it now, that it with other points in the case can go up on appeal if the parties desire it. It was argued, though not very strongly, that this suit had for its sole object, or at all events its main object, the setting aside of these conveyances in question — or, it was said that for the purpose of disposing of this demurrer the bill could be so treated, and in that case the personal representative was not a necessary party. The main argument, however, was that as the bill alleged that Humphreys died without leaving any personal estate — an allegation admitted by the demurrer to be true — there was nothing for an administrator to do, and there was therefore no jurisdiction in the Probate Court to appoint one, and for that reason the practice requiring the personal representative of the person whose estate is being administered to be a party to the administration suit, could have no application to a case like this. As to the first point I entertain no doubt that this is in point of form, and in point of fact, an administration suit. The plaintiff, who is a simple contract creditor of Humphreys, without any lien on the property, claims that the land in question must be made available for the payment of him and the other creditors, and he seeks a declaration setting aside these conveyances as being fraudulent against the creditors. If that were the only relief asked for, as perhaps it might be if the debtor were alive, it is obvious that some other proceeding must be taken, either in this Court, or in the Probate Court, to realize by sale of the real estate the money necessary to pay the debts. This Court, however, deals with the whole matter in one suit; and having set the conveyances aside, and thus made the real estate available for the payment of the creditors, proceeds to give complete effect to that order by a sale of the land and payment of the creditors, that being the ultimate object to be accomplished — all of which of necessity involves an administration of the estate. In *Clarkson* v. *McMaster* (1), at

(1) 25 Can. S. C. R. 96.

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page 101, this practice of Courts of Equity is referred to in the following passage:—"And that an instrument fraudulent under the Statute (13 Eliz.) was void against all creditors, was also demonstrated by the well established practice of Courts of Equity in administering assets, which was not to require a judgment at law, but to treat deeds fraudulent under the Statute as void against all creditors, and to deal with the property purported to be conveyed by such instruments as assets for the payment of simple contract as well as other creditors."

Taylor v. *Coenen* (1), a case similar to this; *Adames* v. *Hallett* (2); *Skarf* v. *Soulby* (3), and other cases may be cited as instances of administration suits, in which the bills are similar in character and object to the one in this case. This being therefore an administration suit, is it necessary that there should be a personal representative present as a party to the suit? The authorities on this point are uniformly against the plaintiff's contention. In *Tyler* v. *Bell* (4) the bill prayed for an account of the assets of an intestate, who died in India, possessed by the personal representative there; and it was held not sufficient in order to avoid a demurrer for want of parties, that the personal representative constituted in India, who was out of the jurisdiction, was made a party, and process prayed against her when within the jurisdiction; although the bill alleged that the Indian Court was the proper Court for granting administration, and that the administratrix constituted by it was the sole legal personal representative. It was also held that a personal representative of the intestate constituted in England was a necessary party, although it did not appear that the intestate at the time of her death had any assets in England. At page 109 of the report the Lord Chancellor is thus reported: "That an estate cannot be administered in the absence of a personal representative, and that such personal representative must obtain his right to represent the estate from the ecclesiastical Court in this country, has, I believe, never before been

(1) 1 Ch. D. 636.
(2) L. R. 6 Eq. 468.
(3) 1 MacN. & G. 364.
(4) 2 M. & C. 89.

doubted. The cases of *Tourton* v. *Flower* (1); *Atkins* v. *Smith* (2); *Swift* v. *Swift* (3); *Attorney-General* v. *Cockerill* (4); *Lowe* v. *Farlie* (5), and *Logan* v. *Fairlie* (6), all proceed upon this, that the Courts in this country, for the security of property, will not administer the property of a person deceased in the absence of a person authorized to represent the estate; and that they look only to the judgment of the ecclesiastical courts in this country in granting probate or letters of administration to ascertain who are so authorized; and it is immaterial what ecclesiastical court in this country has granted probate or letters of administration to ascertain who are so authorized; and it is immaterial what ecclesiastical court in this country has granted probate or letters of administration, provided the state of the property was such as to give it jurisdiction." I have referred to a great number of cases in which this point has arisen, and I have not been able to find one, and certainly none was cited, where the rule as above laid down has been departed from. The nearest case of the kind is *Dey* v. *Dey* (7), decided in 1851. In that case there was an administrator *ad litem*; and the bill alleged, as in this case, that there were no personal assets, and it sought to have the real estate applied in satisfaction of the debts. The Chancellor, after alluding to the then unsettled point as to the sufficiency of an administration *ad litem* for the purpose, says:—"The parties entitled to the real estate of the intestate, did not appear at the hearing. Now the account and application of the personal estate, in suits of this kind, is directed for the protection of those entitled to the real assets, and had they appeared and insisted upon the objection it would have been proper to have ordered the case to stand over, for the purpose of enabling the plaintiff to obtain a general administration. But the bill has been taken *pro confesso* against the parties entitled to the real estate; and as it negatives the existence of any

(1) 3 P. Wms. 369.
(2) 2 Atk. 63.
(3) 1 B. & B. 326.
(4) 1 Price, 165, at p. 179.
(5) 2 Madd. 101.
(6) 2 Sim. & S. 284.
(7) 2 Gr. 149.

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outstanding personal estate, a decree directing the application of the real assets of the intestate, can work no injustice, and for this purpose the record is properly constituted." *Hughes* v. *Hughes* (1) may be referred to as shewing how closely the rule is adhered to in Ontario in later years. *James* v. *Aston* (2) may be referred to as an authority, not only in favor of the contention that the personal representative is a necessary party to an administration suit, but also to shew that this is an administration suit, and that administration *ad litem* is not sufficient. See also *Davis* v. *Chanter* (3); *Fordham* v. *Rolfe* (4); *Latch* v. *Latch* (5); *Rowsell* v. *Morris* (6); *Dowdeswell* v. *Dowdeswell* (7).

Neither will this Court appoint someone to represent the intestate in such cases under s. 89 of Act 53 Vict. c. 4: *Maclean* v. *Dawson* (8); *Moore* v. *Morris* (9); *Silver* v. *Stein* (10); *Groves* v. *Lane* (11); *Bruiton* v. *Birch* (12).

It is said, however, that in the absence of chattels there are no assets to come into the hands of an administrator, and in such a case there is no jurisdiction in the Probate Court to grant letters. I do not agree in this view. As is well known an intestate's chattels originally belonged to the Crown as *parens patriæ*. This prerogative right, for a time exercised through Ministers of Justice, was later on handed over to the clergy, under the idea that as spiritual men they were better able to use the chattels for pious uses. The ordinary, therefore, simply became the King's almoner, as Blackstone says, "within his diocese to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the time had denominated pious." The clergy of that time did not reckon the payment of debts as one of the pious uses to which an intestate's estate might with propriety be devoted; and accordingly the Statute of Westminister, 13 Ed. 1, c. 19,

(1) 6 A. R. 373.
(2) 2 Jur. N. S.224.
(3) 2 Ph. 544.
(4) 1 Tam. 1.
(5) L. R. 10 Ch. 464.
(6) L. R. 17 Eq. 20.
(7) 9 Ch. D. 294.
(8) 27 Beav. 21.
(9) L. R. 13 Eq. 139.
(10) 1 Drew. 295.
(11) 16 Jur. 1061.
(12) 22 L. J. Ch. 911.

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was passed, compelling the ordinary to pay the debts so far as the personal property extended. The ordinary still pocketed the surplus, and consequently the Statute 31 Ed. 3, c. 11 was passed compelling the ordinary to depute the nearest of the intestate's friends to administer his affairs. They were known as "administrators," and are, as Blackstone says, "only the officers of the ordinary appointed by him in pursuance of this statute, which singles out the next and most lawful friend of the intestate." Of course the Bishops exercised their jurisdiction — speaking generally — within their own dioceses, and the value as well as the location of the chattels or *bona notabilia*, as they were called, determined the particular jurisdiction in each case. The legislation on this subject in this Province has undergone some changes, but the main features of the Probate jurisdiction differ little from what they were in the early history of the Province. Section 1 of 3 Vict. c. 61; s. 1 of c. 136, R. S. N. B., and s. 1 of c. 52, C. S. N. B., in the same words provide that the Probate Court shall have power to take the probate of wills and grant administration *in the manner hitherto in use*. But as there was a separate Court for each county, it became necessary in order to prevent a conflict of jurisdiction to fix the power and authority of each Court. It was therefore provided by sections 21 and 22 of 3 Vict. c. 61, and by the revised reversion of these sections in s. 7 of c. 136, R S. N. B., and s. 8 of c. 52, C. S. N. B., that where the deceased person was an inhabitant of a County at the time of his death, the Probate Court of that County had jurisdiction, but if at the time of his death he was not an inhabitant of the Province, then the Probate Court of the County *in which he left assets*, had the jurisdiction. I should think the Probate Court of Queens, in which County the intestate lived at the time of his death, and for many years before, had jurisdiction to grant letters of administration to his estate. Wills of realty are constantly admitted to probate quite irrespective of the existence of chattels: *In re Jordan* (1); *In re Tomlinson* (3); *Brownrigg* v. *Pike* (3); *In re Hornbuckle* (4). And

(1) L. R. 1 P. & D. 555.
(2) 6 P. D. 209.
(3) 7 P. D. 61.
(4) 15 P. D. 149.

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our Statute expressly requires all wills without distinction to be presented for proof on pain of severe penalties. It cannot, I think, be said that an intestate who dies leaving real estate, but no personal, leaves no assets. Neither do I concur in the view that in such a case if the intestate dies indebted, there is no estate to be administered, and therefore no jurisdiction, or at least no reason, for appointing an administrator. It is well known that while there never seems to have existed any doubt that the effect of the Imperial Statute, 5 Geo. 2, c. 7, was to render the real estate of a colonial debtor within the colony liable to and chargeable with his debts to British subjects, and to make such estate assets for the satisfaction of such debts, there were differences of opinion as to whether the statute had any reference to the estates of deceased persons, or if so, whether without some additional legislation on the part of the colony the remedy could very well be made effectual. In Upper Canada, after some conflict of judicial opinion, the question seems to have been determined and settled in *Gardiner* v. *Gardiner* (1), decided in 1847, where it was held that by virtue of that statute the real estate of a deceased debtor was assets in the administrator's hands for the payment of debts, and that it could be reached on a judgment against the personal representative. To a plea of *plene administravit* it was competent under that decision to reply lands. *Sickles* v. *Asselstine* (2); *Ruggles* v. *Beikie* (3), and many other cases may be cited as instances of such a replication being held good. In *Thomson* v. *Grant* (4) the Master of the Rolls held that lands in the colonies were by virtue of this statute converted into personal assets for payment of debts, and as such were possessed by the executor. Coming to decisions in our own Province we find that in *Doe d. Hare* v. *McCall* (5) it was held that neither under the Imperial Statute, already referred to, nor under our Provincial Statute 26 Geo. 3, c. 12, could the real estate of a deceased testator be taken in execution on a judgment

(1) 2 U. C. (O. S.) 554.
(2) 10 U. C. Q. B. 203.
(3) 3 U. C. (O. S.) 347.
(4) 1 Russ. 540.
(5) Chip. MS. 90.

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against his executor for a debt due by the testator, and that the only remedy in such a case was to procure a license to sell the real estate in the manner pointed out by Act 26 Geo. 3, c. 11. The real estate of an intestate it was held descended to the heir at law, subject to be divested by a sale under a license procured under the last mentioned Act, which required as a necessary condition of its validity that there should exist debts to be paid for which the personal estate was insufficient. I am of course bound by the decision of our own Courts, but in either view of the Imperial Act it is obvious that its provisions as well as those of our Provincial Acts are entirely nugatory, if the plaintiff's contention can prevail that there can be no letters of administration where there is no personal estate. Under the Imperial Act, as viewed in Ontario, a judgment against the personal representative is necessary in order to realize out of the real estate, but you cannot obtain a judgment against a personal rspresentative without first appointing one. And under our Provincial Act 26 Geo. 3, c. 11, which provides the sole remedy, or at least did so until a comparatively recent date, you could not proceed to obtain a license for a sale without having a personal representative, for it is to such representative alone that such license issues, and he is alone authorized to sell, whether the license issues on his own application or that of a creditor. I do not say that real estate is assets in the hands of an administrator to be administered in the same sense that chattels are—that would perhaps be at variance with the opinion of the Court in *Crawford* v. *Willox* (1)—but I do say that in the case of an intestate dying indebted, and leaving real estate, but no personal property, there is ample authority in the Probate Court of the county of which the deceased was an inhabitant, or if a a non-resident of the Province, then in the Probate Court of the County within which real estate is, to appoint a person to administer his estate, an administrator whose duty it will be to ascertain the amount of the indebtedness,

(1) 1 All. 634.

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and to pay it with such assets as the law has made available for that purpose. Involved in this is his duty to take the means provided by the Act to enable him to sell the real estate, and thus provide the means for the payment of creditors which the law has in such a case expressly made liable for that purpose. In *In re Fox* (1) much the same argument was addressed to the Court as has been addressed to me, though on a somewhat different point. In that case the late Mr. Justice *Palmer* seems to have entertained no doubt that Probate could be granted in this Province where the testator died abroad, leaving only real estate in the Province, and he added that the contrary was a startling proposition, as in such a case creditors would be without remedy. See also *People's Bank* v. *Morrow* (2). It may be said that there was always a remedy in Equity, and that on a bill filed this Court would administer the real estate as well as the personal, but that is not so. The simple contract debts of an intestate were never a charge upon real estate or in any way payable out of it in England, until the Act 3 and 4 Wm. 4, c. 104 made them so, and gave the Court of Equity power so to administer the estate. But the Court of Equity in this Province never had any power in an administration suit to sell the real estate of an intestate to pay his debts until it was so authorized by the Act 26 Vict. c. 16. So that from 1786, when the Act 26 Geo. 3, c. 11 was passed, down to 1863, when the Act 26 Vict. c. 16 was passed, the only remedy for creditors against real estate in such cases, was by a license procured under the first Act and its amendments. The effect of the Act of 1863, and of s. 103 of Act 53 Vict. c. 4, which contains the existing provisions on this subject, is simply to authorize this Court in an administration suit to order the sale of the real estate without using the machinery of the Probate Court for the purpose. See *People's Bank* v. *Morrow* (3). Neither in this Court nor in the Probate Court can the order for a sale of the real estate be made, until it has first judicially been determined that the

(1) 20 N. B. 391. (2) N. B. Eq. Cas. 257.

(3) N. B. Eq. Cas. 257, 262.

personal estate is insufficient for payment of the debts — a question which in my view can only be determined in the presence of some person duly authorized to administer the estate, who has access to the intestate's books and papers and control over them, whose duty it is to ascertain what the debts are, what the personal estate amounts to, and what is the deficiency to be made up from the real estate. As to this ground of demurrer I think, and so hold, that this is an administration suit, that it is defective for want of parties, and that the personal representative of the person whose estate is being administered must be made a party. At the same time, I think the objection is not a ground of demurrer.

The 4th and 7th grounds can be considered together. The 4th ground is that the plaintiff's remedy (if any) is barred by his delay, laches and acquiescence, and by lapse of time; and the 7th ground is that the bill does not shew, with sufficient clearness and certainty, that he is a judgment creditor, or otherwise entitled to maintain this suit, and that it does not shew such a case as entitles the plaintiff to any relief or discovery. The allegations in the bill bearing upon this point of the case are these. In section 3 it is alleged that Alfred Humphreys, when the deeds in question were made in 1878, was indebted to the plaintiff and one Hiram Humphreys, since deceased (who were then doing business together as co-partners under the name of Humphreys & Trites), in the sum of $1,071.94 for principal, and $190 for interest on a promissory note made by Alfred Humphreys, in favor of Humphreys & Trites. In section 13 it is alleged as follows: "That the said indebtedness from the said Alfred Humphreys to the said plaintiff, and said Hiram Humphreys, mentioned and alleged in the third paragraph of this bill, has never been paid or settled; and on the first day of April, A. D. 1885, on a settlement then made and had between the said Alfred Humphreys and said firm of Humphreys & Trites, there were found to be due, owing and unpaid to the said firm of Humphreys & Trites, in respect to and on account of the said indebtedness so alleged in the third paragraph of this bill, the sum of eight

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hundred and ninety-nine dollars and seventy-seven cents, for which amount the said Alfred Humphreys had or then made and delivered to said Humphreys & Trites his two certain promissory notes in their favor, namely, one promissory note for $300, dated on or about the 19th day of March, A. D. 1885, and payable three months after the date thereof; and one promissory note for $599.77, dated the 1st day of April, A. D. 1885, and payable twelve months after the date thereof with interest. That said two last mentioned notes have been renewed and carried along from time to time by new, or renewal and other notes, made by the said Alfred Humphreys in favor of the said Humphreys & Trites, up to about the time of the death of the said Alfred Humphreys, but have never been paid, but with interest thereon are still due, owing and unpaid to the said plaintiff as surviving partner of said firm of Humphreys & Trites, and amount to in all the sum of $1,700."

It is necessary, in determining this point, to bear in mind the distinction between the *Statute of Limitations*, which operates as a bar to the enforcement of legal remedies, and that delay or laches or acquiescence which disentitles a party to relief in seeking the enforcement of merely equitable rights. The plaintiff's right to a decree depends, among other things, upon his being a creditor of Humphreys for a debt enforceable at law. The right of a creditor to set aside a deed, under 13 Eliz. c. 5, is a legal, and not an equitable right, and a settlement is liable to be impeached under the statute until the legal right of the creditor is barred by the *Statute of Limitations* — that is, his right to recover the debt. In *Three Towns Banking Co.* v. *Maddever* (1) the plaintiffs filed a bill to set aside a conveyance, under the same statute, ten years after the death of the grantor, though they had always known the facts, and did not in any way satisfactorily account for the delay. North, J., says: "Where parties have been merely non-active, I do not see any reason why they should not take proceedings at any time *while the debt is a subsisting debt.* The time might have arrived when

(1) 27 Ch. D. 523.

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the *Statute of Limitations* would be a bar, and, of course, when the debt was gone, no proceedings could be taken in respect of it; but when you have the plaintiffs merely abstaining from enforcing as against the defendant a right which it was admitted they had at one time, and the defendant is simply left in possession of the property, with knowledge of all the circumstances, I do not see what he has to complain of." Baggallay, L. J., says: "It was urged for the defendant that, assuming the deed to have been one which ought originally to have been set aside, it ought not to be set aside now after such delay. The bank appear from the first to have known a good deal about the facts, and if the case had been one where the plaintiffs were coming to set aside, on equitable grounds, a deed which was good at law, I should have thought that the defence was good. But the plaintiffs had a legal right, and I do not see how that right can be lost by mere delay to enforce it, unless the delay is such as to cause a statutory bar. Cases have been cited where Courts of Equity have refused to interfere on the ground of delay, but they have been cases where relief was sought merely on equitable grounds; here the plaintiffs have a legal right." Cotton, L.J., says: "The plaintiffs in this case say, 'we are creditors whose debt is not barred, and we seek payment out of property conveyed away by the debtor by a deed which the Statute 13 Eliz. c. 5 makes void as against us.' The defendant relies on the delay of the creditor; but I am of opinion that this defence is not effectual. The cases referred to do not apply; they were cases where one of the parties to the deed sought to set it aside on equitable grounds. Here the action is not by one of the parties to the deed, but by creditors who come to enforce a legal demand. An action of that nature stands on quite a different footing from an action to set aside a deed on equitable grounds. I am of opinion that in the case of a legal right we cannot refuse relief to the plaintiff on the mere ground of delay, unless there has been such delay as to create a statutory bar." Lindley, L. J., says: "No equity arises from mere delay to enforce a legal demand, and, unless there are other

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circumstances to create an equity, the only question is whether the legal demand has been barred or not." See also *Struthers* v. *Glennie* (1).

The plaintiff's right therefore is a purely legal one, and based upon the fact that he is a creditor of a debt not barred by the *Statute of Limitations* before the commencement of the suit, for a debt so barred cannot be proved or allowed before the Master if objected to: *Alston* v. *Trollope* (2); *Berrington* v. *Evans* (3).

It was contended by the Attorney-General that s. 21 of c. 84, C. S. N. B., relating to limitations as to real actions applied to this case. I do not agree in this view. This is in no sense an action in which the plaintiff claims the land. He simply seeks a declaration that as to him and his co-creditors the conveyances in question are void; the effect of which is simply to put the title to the land conveyed by them in Humphreys, the debtor, as though the deeds had never been made, so that they can be made available for the payment of the debts. The section in question only applies to cases where an equitable title to the land is set up, which if it had been a legal title, would have been within the statute. See *Faulds* v. *Harper* (4). The bill here alleges that the conveyances in questions were purely voluntary, and that Humphreys remained in possession up to the time of his death. A different state of facts may be set up by the answer, but there is nothing alleged in the bill which in my opinion creates any equity in these defendants to which the doctrine of laches or acquiescence, as applied in this Court, can have any reference. Even if it were so, the authorities seem to determine that it is a question rather of fact to be determined on the hearing, than one of law to be raised on demurrer. In *Daniell* Ch. Pr. (5), it is thus laid down: "Where there is no positive limitation of time, the question whether the Court will interfere or not, depends upon whether, from the facts of the case, the Court will infer acquiescence or confirmation

(1) 14 O. R. 726.
(2) L. R. 2 Eq. 205.
(3) 1 Y & C. (Ex.) 434.
(4) 11 Can. S. C. R. 639, 650.
(5) 4th Am. ed. 560.

or a release. Such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer."

It was admitted on the argument that if it clearly appeared by the bill that the plaintiff's debt was barred by the *Statute of Limitations* the defence could be raised by demurrer, and the weight of authority seems in favor of that view, though a distinction has been drawn between cases where the limitation had reference to the title to lands, and where it referred simply to the recovery of personal debts: *Dawkins* v. *Lord Penrhyn* (1). It therefore follows that as this plaintiff can only succeed on the ground that he is a creditor for a debt not barred by the statute, that fact must appear with certainty in the bill; otherwise it is open to demurrer. So far as the allegations in section 13 of the bill are intelligible (and that is the only section bearing on this point of the case), it appears that on the original debt of 1878 there was due on the 19th March, 1885, the sum of $899.77, for which two notes were then given, one for $300, dated on or about March 19th, 1885, payable in 3 months; and the other for $599.77, dated April 1st, 1885, payable in twelve months with interest. And it is alleged in the same section that there is still due on the said notes the sum of $1,700, including interest. It is obvious that these notes were barred by the statute many years before this suit was commenced, and many years before Humphrey's death, unless the remedy has, by payment or otherwise, been kept alive. In *Noyes* v. *Crawley* (2) it appeared that on the termination in 1861 of a partnership between the plaintiff and defendant, there was an admitted balance of £787 due to the plaintiff from the defendant, for which he had at that time a complete remedy at law. In 1878 the plaintiff commenced proceedings for an account of the partnership transactions, and in his bill he alleged the above facts; and also that nothing had been paid on account of this ascertained balance. The bill was demurred to on the ground that the remedy was barred by the *Statute of Limitations*. Malins, V.-C., says: "Now, the £787 being due in 1861, in

(1) 4 App. Cas. 51.

(2) 10 Ch. D. 31.

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order to take the case out of the *Statute of Limitations*, the plaintiff is bound to allege and would have been bound to prove at the hearing of the cause, if it had gone to a hearing, either a subsequent promise to pay, and in writing, or part payment or something to take it out of the *Statute of Limitations*. There is no allegation of that." See also *Prance* v. *Sympson* (1).

Tho only allegation in the bill relied on as showing that the debt was not barred, is that these notes, that is the two notes given in 1885, "were renewed and carried along, from time to time, by new or renewal or other notes, made by Alfred Humphreys in favor of Humphreys & Trites, up to about the time of Alfred Humphrey's death." And section 14 of the bill alleges that "Hiram Humphreys died in October, 1896, leaving the plaintiff sole surviving partner of the firm of Humphreys & Trites, and the holder of said promissory notes so made by said Alfred Humphreys as aforesaid." Of what notes is the plaintiff the holder? If the notes made in 1885 are referred to, then it would seem that they must be within the limitation fixed by the statute, but if other notes given in renewal of those, and therefore in substitution of them, what are the particulars of them? It is contended that the allegations in section 13 are altogether too vague, uncertain and general, and in this view I concur. It is a well-settled rule of pleading that the plaintiff must allege positively, and with precision, whatever is essential to his rights and is within his knowledge: *Mitford* on Pleading (2); *Daniell* Ch. Pr. (3); *Townsend* v. *Westacott* (4); *Gregson* v. *Hindley* (5).

The particulars of the plaintiff's claim are entirely within his knowledge. What is to be understood by the allegation that these notes were "carried on"? An expression so vague and uncertain can scarcely be an appropriate one for a Bill in Equity. If the notes, upon which the plaintiff bases his claim, are the original notes, given in 1885, it should be so stated; and if these notes have

(1) Kay, 678.
(2) P.136.
(3) 4th Am. ed. 360.
(4) 2 Beav. 340.
(5) 10 Jur. 383.

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been renewed, and the renewals are the notes claimed upon then it is clearly incumbent upon the plaintiff to state, with precision and certainty, the particulars of the notes. The allegation in the bill as to the plaintiff's claim, is, in my opinion, altogether too loose, vague and uncertain, and not at all up to the rule by which a substantial allegation like this is governed — a rule which certainly ought not to be relaxed where the claim is made after the lapse of so many years, and after the death of the debtor. In *Munday* v. *Knight* (1) the Vice-Chancellor says: "Where there is a charge of fraud, and the defendant demurs, he admits the charge to be true, and the demurrer must be overruled; but, if the allegation is so vague that it is impossible to make out what the pleader means to represent, the Court must treat such general charge as too indefinite and uncertain to be regarded." If the notes upon which the plaintiff claims are those made in 1885, then the *Statute of Limitations* is a bar, as there is no allegation of payment on account, or written acknowledgment to preserve the remedy. If, on the other hand, his claim is based on other notes, as from the language seems to be the case, then the allegation in reference to them is too vague, uncertain and not sufficiently definite to require the defendants to answer it. In either case the bill is demurrable. In this connection it may be pointed out that while in an administration suit after decree the statute may be used at the instance of any one interested to defeat the claim of any creditor, the rule does not apply to the plaintiff's own claim as in reference to it the statute must be set up as a defence in the suit itself: *Ex parte Dewdney* (2); *Briggs* v. *Wilson* (3); *Fuller* v. *Redman* (4).

There remains but one question mentioned in the 7th ground of demurrer, that is that no judgment has been obtained by the plaintiff, nor is there any allegation that he is in course of obtaining one: *Reese River Silver Mining Co.* v. *Atwell* (5). This, however, is not necessary in an administration suit. In *Hunt* on Fraudulent Conveyances (6)

(1) 3 Hare, 497.
(2) 15 Ves. 479, 498.
(3) 5 DeG., M. & G. 12.
(4) 26 Beav. 614.
(5) L. R. 7 Eq. 350.
(6) P. 231.

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it is said: "After the death of the debtor there would seem to be no necessity for the creditor to prove that he has established his claim in some action, as the Court of Chancery has full power of administering the deceased's estate, and ordering payment of the debt."

The fifth ground of demurrer is that it does not appear by the bill in whom is vested the legal estate in the lands mentioned, or that these defendants have or claim any interest in the subject matter of this suit. I do not think there is anything in this objection. The bill alleges that Alfred Humphreys originally owned these lands — that he made a voluntary conveyance of them, with the fraudulent intention of defeating and delaying his creditors, to his wife — that these defendants are the children of Alfred Humphreys and his wife Abigail, and that they both died intestate, the husband continuing in possession up to the time of his death. This, I think, shews a sufficient interest in these defendants to entitle them to be made defendants. Neither do I think there is anything in the sixth ground of demurrer — that the bill does not shew that the defendants have been guilty of fraud, or that the plaintiff or any creditor of Alfred Humphreys has been delayed or defrauded by the conveyances. I think the allegations are sufficient. The bill alleges the indebtedness to the plaintiff and others at the time the conveyances were made, and that the property which Humphreys had after parting with the land in question, was insufficient to pay his debts — in other words by conveying away this property he made himself insolvent. It also alleges that the conveyances were made voluntarily without consideration, and with the fraudulent intent mentioned in the Statute 13 Eliz. The demurrer admits all this to be true. The legal effect of that is that as against the creditors the conveyances are void. In *Scarf* v. *Soulby* (1) the Vice-Chancellor says: "It appears from what Lord Hardwicke says in *Lord Townshend* v. *Windham* that it is quite enough to prove that he was indebted at the time. Lord Hardwicke

(1) 16 Sim. 344.

says: 'I know no case on the 13th Eliz., where a man indebted at the time, makes a mere voluntary conveyance to a child without consideration and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors.'" See also *Shears* v. *Rogers* (1); *Richardson* v. *Smallwood* (2).

I do not consider it necessary to discuss the objections made to the conveyances in question — as to their form, or the sufficiency of their acknowledgments and registry. If the suit had for its sole, or even its principal, object, the mere setting aside of these conveyances, it might be said possibly that as the alleged defects appear on the face of the instruments themselves, no suit is necessary to have them declared void, because they convey no interest. This part of the relief in this case is merely an incident to the principal object of the bill — that is the administration of Alfred Humphrey's estate, of which it is claimed these lands form a part, for the payment of debts. As this involves a sale of these lands as belonging to Alfred Humphreys at the time of his death, it is desirable, for the benefit of all parties, that the sale should be freed from any question or clog as to the title.

The result is that I must allow the demurrer on the ground I have stated, but the plaintiff must have leave to amend his bill as to the statement of his claim on or before the 1st November next. As to adding parties he must do as he is advised, as I can make no order as to that at present. As some of the grounds of demurrer have been sustained, and some not, there will be no costs of demurrer to either side, and I so order. See *Benson* v. *Hadfield* (3).

If, however, the plaintiff does not amend his bill, pursuant to leave, the demurrer will be allowed with costs.

(1) 3 B. & Ad. 362. (2) Jac. 552. (3) 5 Beav. 546.

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October 17.

ATTORNEY-GENERAL v. MILLER.

Pilotage Commission — Appointment of pilots — Avoiding office — Remedy — Injunction — Quo Warranto.

The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the Pilotage Commissioners. An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the Commissioners, on the grounds (1) that their appointments were not made by bye-law confirmed by the Governor-General in Council, and published in the Gazette as required by "The Pilotage Act," c. 80, s. 15 (d), R. S. C.; (2) that under that Act the Commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the Commissioners, or by the Commissioners acting together as a body. A pilot appointed under the Act is appointed during good behaviour for a term not less than two years.

Held, that the office of pilot being a public and substantive independent office, and its source being immediately, if not mediately, from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colorably and not in good faith, the remedy, if any, was not by injunction, but by information in the nature of a *quo warranto*.

The facts fully appear in the judgment of the Court.

Argument was heard September 15, 1899.

W. Pugsley, Q.C., and *L. J. Tweedie*, Q.C., for the plaintiffs:—

The authority of the Pilotage Commissioners to license pilots is derived from "The Pilotage Act," c. 80, R. S. C., and must be strictly pursued. Before a pilot can be licensed the Commissioners are required to pass a bye-law for the purpose, and obtain its confirmation by the Governor in Council: s. 15 (d). If a pilot can be licensed without a bye-law he must pass an examination in accordance with regulations made by the Commissioners, under s. 15, (a) and (b). The form of license provided in the Act shews that an examination should be held. A standard of

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qualification was fixed by the regulations of 1894. These are not superseded by the regulations of 1899, if the latter do not provide a standard of qualification as required by the Act. As the licenses complained of were granted out of hand by the commissioners, they are illegal. No examination was held to determine the fitness and competency of the pilots, and they were not appointed at a regularly called meeting of the Commissioners, or by the Commissioners when acting together as a body. A public body can only exercise its powers at formally convened meetings: *Brice* on *Ultra Vires* (1).

L. A. Currey, Q.C., and *R. A. Lawlor*, Q.C., for the defendants:—

Section 15 of "The Pilotage Act" cannot mean that a pilot cannot be licensed except by bye-law confirmed by the Governor in Council. The section enables the Commissioners to pass bye-laws, *inter alia*, to license pilots. When this is done, and confirmation by the Governor in Council is obtained, they are clothed with authority to grant licenses. The Commissioners could act without notice of meeting to each of them if they were substantially in daily intercourse upon their duties, and each was aware of what was being done so that an act could properly be said to be the act of all, or a majority. By s. 7, ss. 42, of c. 1, R. S. C., when any act or thing is required to be done by more than two persons, a majority of them may do it.

The suit should be by information by the Attorney-General, as the interests alleged to be injuriously affected belong to the general public: *Merritt* v. *Chesley* (2); *Rogers* v. *Trustees of School District No. 2 of Bathurst* (3).

The plaintiffs have misconceived their remedy, if any. The Court of Equity has no jurisdiction to restrain the appointment of a public officer, or to determine the title to a public office: *Attorney-General* v. *Clarendon* (4); *Beach*

(1) 2nd ed. 38, 233.
(2) N. B. Eq. Cas. 324.
(3) 1 N. B. Eq. 236.
(4) 17 Ves. 491.

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on Injunctions (1); *Mechem* on Public Officers (2). Nor will an injunction lie to prevent a public officer from acting: *Mechem* on Public Officers (3). The proper remedy is by information in the nature of a *quo warranto*.

Pugsley, Q.C., in reply:—

Public officers will be restrained from acting where they are not lawfully appointed: *Beach* on Injunctions (4); *Mechem* on Public Officers (5); *Board of Liquidation* v. *McComb* (6).

1899. October 17. BARKER, J.:—

This is a bill and information filed by the Attorney-General of the Province *ex relatione* Robert J. Walls, and Robert J. Walls against John C. Miller, Allan Ritchie, Ernest Hutchinson, William B. Snowball and Edward Sinclair, Pilotage Commissioners for the District of Miramichi, and Christopher McLean, George Nowlan, Hugh McLean and Michael J. Jimmo. The prayer of the bill is that an injunction be granted restraining the Pilotage Commissioners from appointing and licensing as pilots, persons not shown to be duly qualified and competent to perform the duties of pilots in the district, under the provisions of the second regulation, passed May 11, 1894, or until other regulations, prescribing the necessary examination and conditions for the licensing of pilots, should be passed; and that the defendants Nowlan, Jimmo and the two McLeans be restrained by injunction from acting as licensed pilots, under the licenses granted to them by the Commissioners; and that a decree be made declaring that a regulation approved of by the Governor-General in Council on May 20, 1899, is void and of no effect, as beyond the powers of the Pilotage Commissioners.

It is very much to be regretted that the negotiations which seem to have been going on for some time for a settlement of the matters in dispute between these parties,

(1) S. 55.
(2) S. 994.
(3) S. 345.
(4) S. 54.
(5) S. 990.
(6) 92 U. S. 531.

and which have been made a ground for this litigation, should not have resulted in some satisfactory arrangement; for there is nothing to suggest — in fact, the character and position of both Commissioners and pilots preclude any such idea — that any of the parties has been influenced in any way by improper motives, or had in view any action which was likely prejudicially to affect any public interest. I also regret that the judgment I am about to deliver will leave the substantial matters in dispute still undecided, but that is a result which, if my view is correct, I am unable to avoid.

There is in reality little or no difference between the parties as to the main facts of the case as they are in proof before me. In 1882 certain rules and regulations were made, under "The Pilotage Act" of Canada, by the then Pilotage authority, for the District of Miramichi, for the government of pilots. All previous rules and regulations were thereby repealed, and the new ones were substituted in their place. These continued in force until May, 1894, after the present Commissioners had been appointed, when a new set of regulations was made in lieu of the old ones. These were confirmed by the Governor-General in Council, as required by the Act, and remained unaltered until April last. On the 7th of that month the Commissioners passed certain regulations, the general effect of which was to reduce the pilotage dues of the port. By the regulations of 1882 it was provided that after the apprentices indentured previous to the 1st of February of that year, had received their licenses, no more apprentices should be licensed as pilots until the number of pilots had been reduced to thirty. Though there is no similar clause in the regulations of 1894, the evidence shows that there was an understanding between the Commissioners and the pilots that no new appointments should be made until the number was reduced to 20; and in fact until these four defendants were appointed no appointments had been made since 1882. The general substitution of steamships for sailing vessels and other well-known causes had rendered a large number of pilots altogether unnecessary for the

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business of the port, and of course the smaller the number the larger would be the sum each pilot would annually receive as his share of the earnings. The evidence shows that 20 pilots who held license in April last, or perhaps even a less number, were quite able to do all the business of the district. The regulations which were made in May last, and which have given rise to all this trouble, were made without any consultation with the pilots or any reference to them in any way. They seem to have been altogether unsatisfactory to the pilots, or at all events to the most of them — so much so that after some negotiations which had gone on with a view to some arrangement had failed, they determined to resign unless the regulations in question were either repealed or modified to suit their views, and so notified the Commissioners. No arrangement was reached, and accordingly a few days later — that is on the 23rd of May last — the 20 pilots resigned in a body, leaving the whole district without a licensed pilot. At this time three or four large steamers and two vessels were loaded and ready for sea, and their draught of water was such that unless they went out on the tides as they then were, they could not go out until the next high tides, ten or twelve days later. Anticipating this action of the pilots, the Commissioners, on the 19th of May, passed the following regulation: "That notwithstanding any of the existing provisions in the rules and regulations for the pilotage district of Miramichi, the pilotage authority of said district may, in their discretion, grant to such person or persons as they may find competent, a license or licenses as pilots for the said district." This regulation was approved by the Governor-General in Council on the 20th of May last, and published in the Gazette of the 27th; and under it the four defendants, Nowlan, Jimmo and the two McLeans were appointed pilots and given licenses. They immediately commenced to act — they took the steamers and vessels then in port to sea, and have since that time been discharging the duties, and doing the work of licensed pilots of the district under their appointment by the Commissioners, except for the short period during which they

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were restrained by the *interim* injunction granted on the 9th June last.

The grounds relied on by the Attorney-General for sustaining the bill are as follows: (1). That the only authority the Commissioners have to appoint or license a pilot is derived from "The Pilotage Act," c. 80, s. 15, R. S. C., and that the effect of sub-section (d) of that section is to require all appointments to be made by a bye-law confirmed by the Governor-General in Council, and published in the Gazette, which admittedly was not done in this case. (2). That if the appointment can be made otherwise than by bye-law, then "The Pilotage Act" requires that there shall be a standard of qualification fixed so that any person coming up to that standard shall be entitled to license, and that the regulations of 1894 fixed the standard. That if the effect of the regulations of May, 1899, was to do away with that standard, it was *ultra vires* as being in violation of the statute; and if that was not its effect, then the examinations and other qualifications, required by the 1894 regulations, were entirely ignored in the appointment of these defendants. (3). That there was no examination of these pilots, or any other means used to ascertain their competency; that they were not appointed at any regularly called meeting of the Commissioners, or by the Commissioners when acting together as a body. (4). That Sinclair, one of the Commissioners, was not notified of these meetings, and there was no evidence of his resignation.

The objections relate solely to the personal status of these four pilots. The point is not that they are doing something which the nature of their office does not enable them to do; but their right to discharge the duties of the office to which they have been appointed, and of which they are now in possession, is challenged on the ground that they are not rightly in office, by reason of their appointment having been made in an irregular or illegal manner.

It is not necessary, in the view I take of this case, to discuss the evidence bearing upon the points raised on

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behalf of the Attorney-General, further than to say that there is nothing in it to suggest, neither did Counsel suggest, that in making the appointments in question the Commissioners were acting colorably in any way or otherwise than in the *bonâ fide* belief that they were legitimately exercising a power conferred upon them by "The Pilotage Act," and the regulations made under it. As I think the remedy, if any, is not by injunction, but by an application for an information in the nature of a *quo warranto*, it is unnecessary for me to discuss the points raised by Mr. Pugsley on behalf of the Attorney-General.

It was determined by the House of Lords in *Darley* v. *The Queen* (1), that an information in the nature of a *quo warranto* was the proper remedy for the usurpation of an office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others. The scope of this remedy seems by that case to have been somewhat enlarged, and since the law has been thus settled it has been acted upon in the greatest variety of cases, in many of which the office, though of a public nature, was of a very subordinate character. In *The Queen* v. *Guardians of St. Martins* (2), the office of clerk to the guardians had been created by certain commissioners under the authority of an Act of Parliament, and his duties defined. The clerk having resigned, a meeting of guardians was held, and one Griffiths was elected in his place, and his election was approved by the Poor Law Commissioners. Some of the guardians objected that a certain resolution under which the election was regulated had been irregularly passed; that Griffiths was not qualified for the office, and that the vote was not taken according to law; and on these grounds the election was impeached and a mandamus was applied for to compel the guardians to proceed to a new election. It was held that as the office was full, mandamus would not lie, but that the proper course was by information in

(1) 12 Cl. & F. 520. (2) 17 Q. B. 149.

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the nature of a *quo warranto*, and that the office was a public one held under a statute. Lord Campbell said the tenure of the office was during good behaviour, and as to its public nature he added: "Whether the district for which it is exercised be a parish or a hundred or several parishes in a union, appears to me to form no ground of distinction, if it be an office in which the public have an interest." Patteson, J., says: "But the question here is not whether the body for which the officer acts is public; it is whether his duties are of a public nature; and, as the exercise of them materially affects a great body of persons, I think they are so." Erle, J., says: "Three tests of the applicability of a *quo warranto* are given in *Darley* v. *The Queen*—the source of the office, the tenure and the duties." In *Reg.* v. *Mayor of Chester* (1), the application was for a mandamus, but Lord Campbell held that as the office was full, the right to it must be tried by *quo warranto*; and Coleridge, J., said: "Wherever a person is *bona fide* elected by persons having a general authority, and they proceeded *bonâ fide* in a matter which admits of question, their election is not colorable, although there may be a mistake in the time or mode of their proceedings." In *Frost* v. *Mayor of Chester* (2) Lord Campbell says: "When an election takes place upon the assumption of a construction of the Act which we may possibly not adopt, but which is arguable, that is a real election. This, therefore, is not to be tried by mandamus, but by impeachment of the title on a *quo warranto*." Wightman, J., says: "For the present question, we may assume that the office is not full *de jure*, but only *de facto*; and for the purpose of the present argument, we may assume that the election has been holden in a way not warranted by law, and is therefore bad, and such as could not be supported on *quo warranto*. But the office is not the less full *de facto*; and the party elected has been admitted. I think, therefore, that a plenarty is shown which is decisive in favor of Mr. Welsby's clients, and that the question can be tried only

(1) 2 Jur. N. S. 114.

(2) 5 E. & B. 531.

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by *quo warranto*." *Askew* v. *Manning* (1), and *Ex parte Cameron* (2) are authorities to the same effect.

Argument is scarcely necessary to show that the office of pilot comes within the class of offices referred to in the cases I have mentioned. Pilots were formerly among the public officers appointed by the Sessions. That the office is a public and independent substantive office seems fully recognized in *Ex parte Langen* (3), though in that case the application failed because, as then made in St. John, the appointment was during pleasure. The source of the office is clearly mediately or immediately from the Crown, its tenure is not during pleasure and its duties are certainly of a public and independent character. The licenses granted to these four pilots were not produced, but the evidence shows that the order was to appoint them for the balance of the year. As I read "The Pilotage Act" the appointment is during good behaviour, with a power, under section 34, to appoint for a term not less than two years, subject to renewals for a similar term. The licenses are in all cases subject to cancellation for cause or on an age limit. See sections 30, 32, 73, 74 and 75. If the appointment was only for a year, the same principle would apply so long as the officer could not be removed during the year, except for cause: *Reg.* v. *Hampton* (4). I entertain no doubt whatever that this office is one to which the principle laid down in the cases I have selected from numerous ones, which are reported, applies; and the only other question is whether the appointment was made colorably. As I have already pointed out, no such question was suggested on the argument, nor is there any such allegation in the bill. Whatever may be said as to the construction of the Act as requiring all appointments to be by bye-law, it cannot be said to be so entirely free from doubt as to make an appointment not by bye-law colorable. The contention may eventually prove to be correct, but that point will come up in the *quo warranto* proceedings.

While the remedy of *quo warranto* exists is it the

(1) 38 U. C. Q. B. 345.
(2) 1 Han. 306.
(3) 3 All. 135.
(4) 6 B. & S. 923.

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only remedy, and must it be resorted to to the exclusion of the equitable remedy of injunction? I think so. I have not been able to find any case, decided before the Judicature Act was passed, where any such jurisdiction was exercised by this Court. In *High* on Injunctions, s. 1312, it is thus laid down: "No principle of the law of injunctions, and perhaps no doctrine of Equity jurisprudence, is more definitely fixed, or more clearly established, than that Courts of Equity will not interfere by injunction to determine questions concerning the appointment of public officers, or their title to office, such questions being of a purely legal nature, and cognizable only by Courts of law. A Court of Equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections; but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto*. Thus, Equity will not interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum." The same author, in his work on extraordinary remedies, s. 619, says: "Where, however, the right to an office or franchise is the sole point in controversy, the specific legal remedy afforded by proceedings in *quo warranto* is held to oust all equitable jurisdiction of the case. Thus, the legality of the election of trustees of an incorporated association, and their consequent right to exercise the functions pertaining to their office, and to conduct the affairs of the corporation, will not be determined by bill in chancery, such a case being regarded as appropriately falling within the jurisdiction of the common law courts by proceedings in *quo warranto*. And since this remedy is applicable the moment an office is usurped, an injunction will not lie to prevent the usurpation, even though the respondent has not yet entered upon the office, or assumed to exercise its functions. In such a case the party aggrieved should wait until an actual

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usurpation has occurred, and then seek his remedy in *quo warranto*." In *Short* on Informations, 122, the principle is thus laid down: "Wherever the office is full *de facto* the proper method of proceeding is by *quo warranto* to oust the occupant, if he is not in possession *de jure*. And the office is full *de facto*, though the election to it was illegal, provided it was a real and not merely a colorable election. If, on the other hand, the election was merely colorable, so as to be no election at all, it does not confer even a *de facto* possession; and the remedy of the person ousted by it is not *quo warranto*, but mandamus."

In *People* v. *Draper* (1) this principle is laid down as that adopted by the United States Courts. The same practice prevails in Ontario, or at all events did before the Judicature Act was adopted there. In *Chaplin* v. *Public School Board of Woodstock* (2) it was alleged that three of the trustees had vacated their seats, by having entered into certain prohibited contracts; and that notwithstanding this they continued to sit and vote, and had voted in favor of certain resolutions which were passed, whereby the principal of the school was dismissed, and the defendant G. appointed in his place; and it was also alleged that but for the votes of these three defendant trustees the result would have been different. The plaintiff asked for much the same relief as the Attorney-General in this case. He prayed that the seats of the three trustees might be declared vacant, and that the votes given by them should be declared void, and the resolution which had been rejected should be declared to have been carried and binding on the defendants; and also that an injunction should issue restraining the defendant trustees from further acting as members of the board. The case came up on demurrer, and so the truth of these allegations was admitted. Notwithstanding this, it was held that as the seats were full, the Court would not interfere by injunction to restrain the occupants from acting, and that the only remedy was to try the right in a *quo warranto* proceeding.

(1) 24 Barb. 265. (2) 16 O. R. 728.

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In *Aslatt* v. *Corporation of Southampton* (1), the plaintiff moved for an injunction to restrain the defendants from avoiding or declaring void the office of alderman of the borough of Southampton, then held by the plaintiff, or appointing or electing a successor to him as such alderman, or taking any steps for that purpose, or in any way interfering with the plaintiff in the exercise of his rights and privileges as alderman. It was contended there that plaintiff had vacated his office by executing a creditors' deed of composition, and acting upon that notion the defendants were proceeding to fill the vacancy. It was argued, on the part of the defendants, that this Court never interfered by injunction where the question involved was merely one of personal status, and that the only remedy in such cases was by information in the nature of *quo warranto*. Lord Jessel, after deciding that the office had not been vacated, proceeds thus: "That being so, a further question is raised as to whether I ought to interfere by injunction. It is said, and I believe with perfect truth that no such injunction was ever heard of formerly; and there was a very good reason for it, namely, that the Courts of Common Law, which exercised jurisdiction over cases of this kind had no power to grant an injunction, because the Act enabling them to do so was not passed until a very recent date, and therefore you could not have an injunction so far as the Common Law was concerned; nor was it the habit of the Court of Chancery to grant an injunction in aid of a legal right where the man was in possession of an office. The mere fact that some proceeding was being taken to test his right to continue in the office was never considered a ground for interfering by injunction. There was a reason for that. The old Court of Chancery did not interfere by injunction where there was a legal right in question — but only a legal right — being tried or put in a course for trial; and this led to a positive denial of justice." Lord Jessel then goes on to show that by a section in the Judicature Act that procedure had been altered, and in that particular case he granted the injunction. His construction

(1) 16 Ch. D. 143.

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of that particular section was not concurred in by the Court of Appeal in *North London Railway Co.* v. *Great Northern Railway Co.* (1), though in that case it was not denied that before the Judicature Act was passed no injunction would have been granted. As we have no such provision as that contained in the Judicature Act, under which the above case was decided, it is an express authority for saying that no injunction will be granted in such a case.

It is not quite apparent what interest the plaintiff Walls has in this suit, which would entitle him to file a bill. He testifies that he is Harbor Master and Pilot Master. What the office of Pilot Master is, or what are the duties attached to it, I do not know. There is no such office mentioned either in the Act or regulations. By section 13 of the rules, passed in 1882, it was provided that the pilots should each year appoint one of their number whose duty it should be to arrange the turns in which the pilots should do duty, and to attend to some other minor matters, and that he should receive for his services a share of the net proceeds earned by the pilots, which by section 20 were to be divided equally among the licensed pilots at the end of each year. I presume Walls is the man selected for this duty, and as such, is called Pilot Master. He cannot be a licensed pilot himself and Harbor Master also, for that is prohibited by section 43 of the Act. The regulations of 1894, however, repealed all the regulations of 1882, and in the latter rules there is nothing similar to rule 13 of the earlier ones. Section 10 seems to contemplate the appointment of some person to determine the order in which the pilots shall act, but there is no provision authorizing the pilots to select him, as Walls says was done in his case in 1894; nor is there any provision whatever made for his pay, as was made in the 1882 rules. So far as I can see, from the evidence, he is at most a mere servant of the Commissioners, with no more interest in the subject matter of this suit than any one of the general public. No right in property is in any way involved in this suit. The net earnings of the pilots are divided among them at the end

(1) 11 Q. B. D. 30.

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of each year. Though the Act provides for the establishment of a pilotage fund for the relief of superannuated or infirm licensed pilots and their families, and expressly authorizes the pilotage authority to make bye-laws for its maintenance, by assessments upon the pilots and otherwise, it does not appear that any such fund exists. There is no regulation in any way relating to such a fund, excepting section 17, which provides that all pecuniary penalties collected for breach of any bye-law shall form a fund to be disposed of as the Governor in Council may direct. There is nothing in this bill, or in the evidence, to suggest that in commencing this suit any other object was in view than a determination of the personal status of these four pilots, and whether they could legally hold the offices to which they had been appointed, in which question was involved the right of the Commissioners to appoint. As that is the sole question involved, it cannot, in my opinion, be raised in this suit, but must be determined in the usual way, by an information in the nature of a *quo warranto*.

The bill must be dismissed with costs, to be paid by the relator.

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June 6.

Fraudulent conveyance — Statute 13 Eliz., c. 5.— Conveyance for valuable consideration — Judgment creditor — Action in tort —Cause of action arising subsequently to date of conveyance.

In 1893 the defendant and his son entered into a parol agreement that the defendant should convey his farm to the son, and that the son should labor upon the farm and support his parents. The farm was not conveyed to the son until October 2, 1895. On September 24, and on October 10, 1895, the defendant spoke words alleged to be defamatory of the plaintiff. Before the date of the conveyance the plaintiff warned the defendant of her intention to bring an action against him for slander. An action was brought for the words spoken on both occasions, and the plaintiff obtained a verdict for $123, which on motion for new trial was reduced to $63, being the amount of damages awarded by the verdict in respect to the defamatory words uttered on October 10. At the date of the conveyance the defendant was not in debt. In a suit to set the conveyance aside as fraudulent and void against the plaintiff under the Statute 13 Eliz., c. 5:

Held, that the conveyance was not within the Statute.

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

Argument was heard April 25, 1899.

C. E. Duffy, for the plaintiffs.

G. F. Gregory, Q.C., for the defendants.

1899. June 6. BARKER, J.:—

The plaintiffs, Joseph H. Gorman and Letitia, his wife, file this bill against Charles Urquhart and Margaret, his wife, and their son William S. Urquhart, to set aside a certain conveyance dated and registered October 2nd, 1895, whereby for an expressed consideration of $500 the defendant Charles Urquhart conveyed to their said son a farm in the County of York, with the stock and farming utensils then on it. The plaintiffs are judgment creditors of the defendant Charles Urquhart, on a judgment signed on the 3rd June, 1898, for $258.60, of which $63 are for damages. This judgment was obtained in an action brought

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to recover damages for defamatory words alleged to have been uttered by the defendant Charles Urquhart about the female plaintiff. The action was commenced on November 15th, 1895. The declaration contained five counts, to which the defendant pleaded not guilty. At the trial the jury found the second, third and fifth issues in favor of the defendant, and the other two in favor of the plaintiffs, assessing the damages at $123. The words, in reference to which the plaintiffs recovered, were uttered on two separate occasions — one was on the 24th September, 1895, and the other at a school meeting held on the 10th of October following. A new trial was moved for, and the Court being of the opinion that the plaintiffs could not recover in reference to what took place on the 24th September, ordered a new trial, unless the plaintiffs consented to reduce the verdict to $63, as the damages recoverable in reference to what took place at the school meeting on the 10th October. To this the plaintiffs assented, and entered their judgment accordingly. It also appeared by the evidence that the verdict for the plaintiffs in reference to the words spoken at the school meeting was given by only five jurors. It will be seen, therefore, that the plaintiffs' judgment is based solely on a claim for damages which arose after the deed in question had been made and registered, and which could not have been in the anticipation of anyone at that time. There is no pretence for saying that Urquhart, at the time he made this deed, was indebted in any way. There is no such allegation in the bill, and the evidence is clear and uncontradicted that at that time he owned the farm and stock, worth from $1,000 to $1,200, free of any encumbrance; that he did not owe anyone, and that he had $100 in cash on hand. Urquhart was not engaged in any trading business of any kind outside of that incident to his farming operations. When he made the conveyance in question, therefore, he had no creditor to defraud or defeat, and, with the exception of the plaintiffs' claim for damages — to which I shall refer later on — he had no expectation of becoming indebted to anyone, and he was not engaged in any business which would, in its ordinary course, involve

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him in debt. Under these circumstances it is important to see precisely the grounds for relief upon which the plaintiffs rely. In their bill, after setting out the recovery of their judgment in an action for defamation of character, they, in the 11th section, allege that the defamatory words were spoken in the months of September and October, 1895, and, that the female plaintiff, about whom the words were uttered, had threatened to bring an action against Urquhart for the said words, which threat had been communicated and made known to him before October 2nd, 1895, when the deed in question was given. So far as this allegation has reference to words uttered in September, upon which the plaintiffs failed in their action, the evidence is by no means clear; and so far as the other libel of October 10th is concerned, it can have no possible reference to it; and as I have already pointed out, it is upon that cause of action alone that the judgment was recovered. In the 13th section of the bill the plaintiffs allege that on October 2nd, 1895, and after Urquhart had spoken the defamatory words sued for in the action at law, and after he had become aware that the plaintiffs intended to proceed, and in anticipation of that action he made this conveyance. The bill also contains a general allegation that the deed was made without consideration; that on its execution there was no change of possession or management of the farm, and that the consideration mentioned in the deed was far below the value of the property. And in the 16th section the bill alleges as follows: "And the plaintiffs allege and charge that there was no consideration for the said conveyance, and that the same was made in anticipation of the said action with a view of protecting the said real estate and personal property mentioned in the said conveyance, from seizure, at the suit of the plaintiffs, under the execution obtained by them in the said action at law, and the same is void in Equity, and should be declared void in law by reason of same having been given without consideration, and with the fraudulent intent of defrauding the plaintiffs of the said judgment and

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execution, and with a view of escaping the pecuniary consequences of the said suit at that time contemplated and known to the said Charles Urquhart."

The prayer of the bill is that the conveyance be set aside and declared void, and that the property be declared to be the property of Charles Urquhart. As a matter of pleading it is by no means clear to me what the grounds are upon which the plaintiffs rely. They do not allege any fraud or fraudulent intent in William S. Urquhart, or that the conveyance was made with intent to defraud, defeat or delay creditors, and therefore void under the Statute of Elizabeth; neither are there facts alleged amounting to fraud in fact. The case, however, was argued as though it were governed by the Statute of 13 Elizabeth, and as such I shall treat it. The defendants set up in their answer, and have established by evidence which is practically not contradicted, the following facts, in order to shew the *bona fides* of the transaction. Charles Urquhart has a family of eleven children, of whom the defendant William S. — or Sylvester, as he is called — is, I think, the fifth. The children, as they arrived at an age sufficient for the purpose, seem to have worked as best they could for their support — the sons working in the woods in the winter time, stream driving in the spring, and assisting on the farm in the summer. In the fall of 1892 Sylvester went to Aroostook where he got employment at digging potatoes for a time. He afterwards went into the woods where he was working all winter, and in the spring of 1893 he returned home under the following circumstances. At that time he was just of age, having reached his twenty-first birthday on the previous Christmas. His father at the time was troubled with rheumatism and other ailments, which unfitted him for the heavier description of farm work, and under these circumstances he and his wife were desirous that Sylvester should remain at home and take charge of the farm. Accordingly Mrs. Urquhart, by her husband's directions, wrote two letters to Sylvester while he was at Aroostook — to only one of which he replied. These letters were not produced, as they had been lost or

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mislaid, but it appears that they contained proposals to him to return home, and an intimation that if he would do so, and remain home and work the farm and give his parents support, they would give him the farm. Sylvester says — and there is nothing to discredit his testimony — that before coming home, in the spring of 1893, he had an offer of remunerative employment on a farm in Maine, which remained open to him until he should go home in accordance with his father's wish and see if any arrangement should be made for his remaining. He accordingly went home, and it was there verbally agreed between him and his father that if he would remain at home and take the brunt of the work off of him, and support him and the mother during their lives on the farm, and take care of and educate three younger children then at home, the father and mother would give him a deed of the place and what was on it. It was also understood as a part of the arrangement that the father and mother were to assist at the work as they could and felt able; and that if the father later on wished to get a house for himself at Gibson or some place near Fredericton where he could live, Sylvester would help him to the extent of $400 or $500. Sylvester agreed to these terms; he abandoned his chance of employment in Maine, remained at home, went to work and has remained there at work ever since, working it is true sometimes in the woods in the winter time, when farm work is light, and returning to the farm work in the spring. He is not married, and he, together with his father and mother and three others of the family, has lived on the premises ever since. It is true that no conveyance was made until October, 1895, some two and a half years afterwards, but the arrangement that Sylvester was to get one was not kept secret. The family knew of it — Charles Urquhart told it to Mrs. McLean in 1894, and Melvin Urquhart, an elder brother living in Lewiston, knew of it in 1894, and at Sylvester's request spoke to his mother in July, 1895 about the delay in executing the deed and giving it to Sylvester as had been agreed upon. Sylvester had himself on one or two occasions during the period spoken to his mother about

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the deed. It is also true that there was no apparent change in the possession of the premises, and that the management of the farm went on much the same after the agreement and after the deed was given as before. This is, however, quite consistent with the arrangement which was made. I am asked to reject all this evidence as a mere fraudulent concoction made up to support this conveyance, but before I can conclude that all these witnesses have deliberately perjured themselves — for that is what it means — I should require much more than the few comparatively unimportant circumstances which have been suggested as suspicious. The arrangement itself is by no means an unusual one with persons in the position and circumstances of these defendants; and it would be rather an unlikely thing that Sylvester at his age, with the chance of good employment in Maine, should return home and remain as he did without some agreement of a substantial character, such as is said to have been in fact made. In addition to this the evidence is practically uncontradicted, and it seems to me altogether improbable that when this suit could have been avoided by the payment of this $259 due the plaintiffs, all these parties should have conspired together to concoct this defence and then swear to it, simply to escape payment of the difference between the amount of this judgment and the costs, which under most favorable circumstances these defendants will be out of pocket as a result of this litigation. It is a question of fact to be determined in every particular case whether the conveyance in question was made with the fraudulent intention mentioned in the Act. In *Thompson* v. *Webster* (1), the Lord Chancellor, in laying down a rule in such cases, says: "The Court has to decide in each particular case, whether, under all the circumstances, we can come to the conclusion that the intention of the settlor in making the settlement was to delay, hinder, or defraud his creditors." And in the same case, when before Kindersley, V. C., as reported in 5 Jur. N. S. 698, that learned Judge says: "Some of the judges had

(1) 7 Jur. N. S. 531.

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held that to bring the case within the statute it was sufficient that the deed was made without adequate consideration; others that the party making it must be indebted to the extent of insolvency; but it was clear that the mere fact of a settlement being voluntary or without valuable consideration was not sufficient ground *per se*. If two men, one worth £500, the other £100,000, made a voluntary settlement, a different rule would be applicable in the different cases; nor could it be necessary for the purpose of bringing the case within the Act, that the settlor should be insolvent, for he might hinder or delay his creditors, although there was just enough to pay his debts; and the Court or the jury has to decide in each particular case by its circumstances, but not being able to fathom a person's mind we must judge by his acts connected with the surrounding circumstances."

It is obvious that in determining this question of fact very different considerations must prevail in a case like the present from those which govern in that class of cases of which the plaintiffs' counsel cited several at the hearing, where traders or others in embarrassed circumstances, or in a state of insolvency, make conveyances of their property under circumstances which lead to the conclusion that they were in fact made with the fraudulent intention mentioned in the statute. In *Holmes* v. *Penney* (1), Wood, V. C., says: "With respect to voluntary settlements the result of the authorities is, that the mere fact of a settlement being voluntary is not enough to render it void against creditors; but there must be unpaid debts, which were existing at the time of making the settlement, and the settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement, were creditors of the settlor. The mere fact of a man's making a voluntary settlement and thereby parting with a large portion of his property has never been held to make such a settlement

(1) 3 K. & J. 90.

fraudulent as against subsequent creditors." In the present case the party charged with the fraudulent intent had no creditors when he made the conveyance; he owed nothing, and the only claim which these plaintiffs then had, as it eventually turned out, amounted to nothing, and they altogether failed in sustaining it. The plaintiffs are therefore in the position of subsequent creditors, and are driven to what seems to me the altogether untenable position that as such they can sustain this bill. *Ex parte Mercer* (1), cited by Mr. Gregory, is in its important features so similar to this present case that it might almost be considered as decisive of it. That was a case of a voluntary settlement while this is not, and in that case the settlement was made after the action had been commenced, while this one was made before the cause of action recovered on existed at all. The present case is therefore weaker than that, and in that case the Courts before which it came were all unanimous in upholding the settlement. If the conveyance by Urquhart had been a purely voluntary gift I should have thought it perfectly good under the circumstances in evidence. It was, however, made for a valuable consideration, and under circumstances showing its entire *bona fides*, and in my opinion the plaintiffs have altogether failed in sustaining their bill.

Mr. Duffy attached much importance to the fact that the consideration mentioned in this conveyance was not correct, and that there was what he termed a "secret trust" in favour of the grantor and for his benefit, alluding, I presume, to the arrangement by which Sylvester was to pay his father the $400 if he concluded to move elsewhere. The plaintiffs are entitled to the full benefit of these two facts so far as they bear upon the question of fraud, but in themselves they afford no ground for impeaching this deed. The real consideration can always be shown in cases of this kind: *Pott* v. *Todhunter* (2); *Bayspoole* v. *Collins* (3); *Gale* v. *Williamson* (4).

(1) 17 Q. B. D. 290.
(2) 2 Coll. 76.
(3) L. R. 6 Ch. 238.
(4) 8 M & W. 405.

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In this last case the consideration expressed in the conveyance was natural love and affection, but the real consideration was the obligation of the grantee to support the father (the grantor) and his family. The Court held that it formed a valuable consideration for the conveyance; that the conveyance was not void under the Statute of Elizabeth, and that as between third parties evidence of the real consideration could be given not to contradict the deed but to disprove fraud. Rolfe, B., says: "But the question in each question is whether the deed is fraudulent or not; and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction; not to contradict the consideration stated in the deed, but to take it out of the operation of the statute."

The plaintiffs' counsel also contended that Charles Urquhart, by virtue of the agreement as to the $400, had an interest in the property to that extent, and that I should declare the plaintiffs' judgment in some way a lien on this interest. There are several answers to that claim. In the first place it is based on the idea that the conveyance in question is good, and that Charles Urquhart has this interest under it as a part of the purchase money so to speak. The plaintiffs' bill is framed and the cause was tried hostilely to this deed — the prayer is that it should be set aside as fraudulent. No amendment was asked for, and although relief may and oftentimes is given of a different character from the specific relief asked for, *Vernon* v. *Oliver* (1), does not, I think, extend to a case of this kind where the bill is framed as this is and remains without amendment. In *Allen* v. *Spring* (2), the Master of the Rolls says: "A person cannot file a bill to set aside a deed and then by amendment turn it into a bill to execute the trusts of the same deed." See also *Shields* v. *Barrow* (3). In addition to this the $400 was not to be paid until Charles Urquhart chose to go away — in the meantime he is getting his maintenance where he is, and he may choose

(1) 13 Can. S. C. R. 136. (2) 22 Beav. 615.
(3) 17 How. 130.

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to remain there. Another answer to this claim of the plaintiff is this. If Charles Urquhart, under the arrangement which formed the consideration for the conveyance in question, has any beneficial interest in the land capable of being seized and taken in execution, the plaintiffs do not require the aid of this Court in any way for they have a judgment and can proceed on that. See s. 10, c. 47, C. S. N. B.

The bill must be dismissed with costs.

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August 15.

Practice — Married Woman — Suit relating to separate estate — Parties — Joinder of husband as co-plaintiff — Next friend — Suit in wife's name — The Married Women's Property Act, 58 Vict. c. 24.

Husband and wife should not be joined as co-plaintiffs in a suit relating to the wife's separate property. The suit should be in the name of the wife's next friend, or, since The Married Women's Property Act, 58 Vict. c. 24, it may be in the wife's name.

Motion to dissolve an *ex parte* injunction order. The facts are fully stated in the judgment of the Court.

Argument was heard June 6, 1899.

C. E. Duffy, for the plaintiffs.

F. St. John Bliss, for the defendant.

1899. August 15. BARKER, J. :—

In this case a motion was made to dissolve an *ex parte* injunction order granted on the 14th of April last, by which the defendant was restrained from interfering with the plaintiffs in replacing an aqueduct laid from a spring on the defendant's land, to the use of which the plaintiffs claim

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to be entitled; and from hindering the plaintiffs from relaying it and using and enjoying it when relaid. The bill alleges that in May, 1883, and for some years before, one John T. Clark was the owner in fee of a certain farm in the Parish of Queensbury, in the County of York, and on the 19th of that month he and his wife made a conveyance of the lower half of this farm to one George Miller, which conveyance contained a reservation in these words: "And said Clark hereby reserves the right to himself, his heirs, administrators and assigns, the right of way to convey water, by aqueduct or otherwise, from one of the springs back of the highway road, on the lower half of said farm to the upper half of said farm." There were three springs of water back of the highway road on the lower half of the farm, but none at all on the upper half. On the 11th December, 1888, Miller and wife conveyed the lower half of the farm to the defendant by a description identical with that in the conveyance from Clark to him, omitting the reservation clause, or any reference to it. On the 19th May, 1883, Clark and wife conveyed the upper half of the farm to one Hiram U. Clark, and in the conveyance is the following clause: "And the said John T. Clark and Henrietta, his wife, hereby give, grant and convey right of way to convey water from the lower half of said farm to the upper half of said farm to the said Hiram U. Clark, his heirs, administrators and assigns forever." On the 20th September, 1887, Hiram U. Clark and wife made a conveyance of the upper half to one George Albert Lounsbury and John D. Lounsbury, which conveyance contained the following clause: "Together with all right of way to convey water from the lower half of said farm to the upper half of said farm, granted and conveyed to the said Hiram U. Clark, his heirs, administrators and assigns, by the late John T. Clark and Henrietta, his wife, by the said deed herebeinfore referred to." On the 29th April, 1890, George A. Lounsbury conveyed his interest in the lot to John D. Lounsbury, his co-tenant, and on the 25th May, 1896, John D. Lounsbury and wife conveyed the upper half of the lot to Sarah Cronkhite and Peter F. Cronkhite, her husband,

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who on the 31st December, 1897, conveyed it to the female plaintiff Sarah E. Cronkhite, both of which last deeds contain clauses conveying the water privilege in terms substantially the same as those in the earlier conveyance. The bill goes on to allege that in October, 1897, and before the female plaintiff had acquired her title, but after an agreement for a purchase of the land had been made, the plaintiff George A. Cronkhite, as husband, occupied and enjoyed the right of way to one of the springs on the lower half of the lot known as the front spring, and conveyed water therefrom for the use of his stock and household; and that he and the defendant entered into an arrangement to lay an aqueduct from the said spring to the house of the plaintiffs, with a branch aqueduct to the defendant's house, the expense of which was to be equally divided between them; that some dispute arose after the pipe had been purchased, but that eventually the aqueduct was laid, as the plaintiffs allege, at their expense, the defendant having the right to tap the pipe and convey water through the branch pipe to his own house. It is admitted that the pipes were laid substantially as the plaintiffs allege, though the parties do not quite agree as to the terms upon which the work was done. It is not necessary, I think, for the purpose of the motion, to discuss this part of the case, for it can be more satisfactorily disposed of at the hearing when the parties can give their evidence subject to cross-examination. Though not very clearly stated, it does, I think, appear by the plaintiffs' bill, and by an affidavit of the plaintiff George A. Cronkhite, used in this motion, that in laying the aqueduct in question and using the water, the plaintiffs professed to be acting on the right reserved in the conveyances which I have mentioned, and not on the parol agreement, whatever it may have been between the parties, except so far as that agreement specified and designated this front spring as the spring on the lower half which was to be used by the owner of the upper half. This being so, it was objected that as the property in question is owned by the wife as her separate property, and the right in question is one appurtenant to the land, she must either

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bring her suit by her next friend, or, if she chooses, in her own name alone. The practice is settled by *Archdeacon* v. *Howe* (1), and many other cases, that before the right of bringing an action in her own name was secured to a wife by The Married Women's Property Act, she must bring it by her next friend, and that in a suit such as this a bill filed by husband and wife would be demurrable, in which case the injunction order must be dissolved. Since the passing of that Act I think a married woman may maintain the action in her own name. See *Stevens* v. *Thompson* (2). The plaintiffs' bill will therefore, I think, require amending at all events in a matter of form so that the substantial cause of dispute may be properly alleged. The costs of motion are reserved.*

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October 17.

Statute of Frauds — Crown land lumber license — Interest in land — Parol agreement — Purchase money — Resulting trust.

An agreement under which a Crown land lumber license was bid in at public sale at the up-set price by the defendant, in whose name the license was issued, for the plaintiff, who had paid to the defendant the up-set price previous to the sale, does not relate to an interest in land within the *Statute of Frauds*, and if it does, as the purchase money for the license was paid by the plaintiff, and a trust thereby resulted in his favor by construction of law, it can be established by parol evidence under the *Statute of Frauds*, c. 76, C. S. N. B., s. 9.

The facts fully appear in the judgment of the Court.

Argument was heard September 29, 1899.

A. A. Stockton, Q.C., and *W. A. Mott*, for the plaintiff:—

The agreement is not illegal as being an agreement to

(1) 28 N. B. 555. (2) 38 Ch. D. 317.

* See *Alward* v. *Killam*, and notes, N. B. Eq. Cas. 309—Rep.

stifle competition at a public sale: *Irving* v. *McWilliams* (1); *Laughlan* v. *Prescott* (2). It may be contended that a license to cut lumber on Crown land does not convey an interest in land, but is personal property, and that the plaintiff therefore will be left to his common law remedy: *Laughlan* v. *Prescott* (2). It is not the doctrine of the Court of Equity that specific performance of an agreement will not be decreed where the subject of the suit is personalty. See *McManus* v. *Cooke* (3) where Kay, J., expressed the view that specific performance would be decreed of a parol agreement for an easement, though no interest in land was intended to be acquired. In *Laughlan* v. *Prescott* (2), the Court did not refuse relief on the ground of want of jurisdiction, and in *Irving* v. *McWilliams* (1), relief was granted. The plaintiff is entitled to have the title of his property vested in him, and not to be compelled to rely upon the defendant's solvency. We ask the Court to declare the defendant to be a trustee for the plaintiff of the license to the lots of land in question.

L. A. Currey, Q.C., and *J. Montgomery*, for the defendant:—

The plaintiff has not discharged the burden of proof resting upon him of conclusively satisfying the Court of the existence of the alleged agreement: *Calhoun* v. *Brewster* (4). There is no act of part performance to take the case out of the operation of the *Statute of Frauds* as relating to an agreement for an interest in lands. The payment of the purchase money for the license is not an act of part performance: *Browne*, Statute of Frauds (5).

1899. October 17. BARKER, J.:—

The plaintiff in this case seeks a declaration that the defendant holds the license of two blocks of Crown land, known as blocks 27 and 28 in range 12, on the Main Forks of the Upsalquitch river, in trust for him. It appears

(1) 1 N. B. Eq. 217.
(2) 1 N. B. Eq. 406.
(3) 35 Ch. D. 681.
(4) 1 N. B. Eq. 529.
(5) P. 533.

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that in the early part of October, 1897, the plaintiff, in the name of George Moffatt, applied for a license of block 26 in ranges 10 and 11, on Pope Logan brook, a tributary of the Upsalquitch river. These lands were advertised to be sold on the 20th October, 1897 — the up-set price being $8 per square mile, or $24 in all — each block containing 1½ square miles. Previous to this the plaintiff, in the name of George Moffatt, had applied for and brought to sale a license of blocks 27 and 28 in ranges 10 and 11, and licenses for these four blocks had issued to the plaintiff. The defendant says that he refrained from bidding on the four blocks under the impression that Moffatt, between whom and himself there existed some understanding as to lumber lands in that part of the Province, was purchasing them for himself. The defendant seems to have been somewhat annoyed when he found out that the plaintiff was the real purchaser. The plaintiff having heard of the defendant's dissatisfaction sought an interview with him. They met on the 18th of October—two days before the day fixed for the sale of block 26 in ranges 10 and 11 — at a place called Dansonville, some six or seven miles from Metapedia station. At this time the plaintiff, according to the requirement of the Crown land regulations, had on deposit with the Receiver-General the sum of $24, the up-set price of the blocks, and he had instructed his agent at Fredericton to bid in this license for him. The parties do not altogether agree as to what took place at Dansonville. The plaintiff says that in the conversation which took place there, he agreed to abandon all claim to the lands to be sold on the 20th of October, and for which he had applied, and, by telegraph, to instruct Mr. Winslow, his agent at Fredericton, to bid them in for the defendant; and he also says that it was further agreed that the defendant should in his name apply for blocks 27 and 28 in range 12, and bid them in for the plaintiff. The plaintiff says all this conversation took place at Dansonville. The defendant, however, says that there were two separate conversations, one at Dansonville about the first mentioned lots, and the other later on in the same day, and when the two were driving down

together to Metapedia, in which the arrangement was made as to the lands now in dispute — that is blocks 27 and 28 in range 12. He says that it was arranged at Dansonville, not only that the plaintiff was to abandon all claim to block 26 in range 10 and 11, and instruct his agent to bid them in for him (the defendant), but that he (the defendant), was to have the right to all the lumber on blocks 27 and 28 in range 12, which would drive into Pope Logan brook. He also says that a man by the name of Andrews, who was with them at the time, was called to witness this agreement. Andrews was produced as a witness, but all he was able to remember was that some arrangement was made by which all lumber that would haul into the stream on which the plaintiff lumbered he was to have; and all that would haul into the stream on which the defendant lumbered he was to have, and neither was to interfere with the other. He did not remember the names of the streams; he heard nothing about the telegram or the lots then advertised for sale being bid in for the defendant. He knew nothing of the lots in dispute, and of course could not do so if the defendant's version of what took place is correct, for according to him nothing had been said at this time about these lots at all. So far therefore as Andrew's evidence goes it is not of much importance in this case, for it has no material bearing upon the question now in dispute. In reference to the lands in dispute the defendant admits there was some arrangement about them, but says that the agreement was that whatever lumber there might be on them, which would haul into the little Grass Widow brook, the plaintiff could have, but nothing more. This is not a case of specific performance of contract. The question is whether, under the facts as established by the evidence, there is a resulting trust as to these lots in favor of the plaintiff; and the material question of fact to be determined is whether the purchase money was paid by the plaintiff, and whether he was the real purchaser and the defendant merely the nominal one. The onus is, I think, on the plaintiff to establish these facts in his favor with reasonable certainty. Having done

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that the law raises the trust in his favor. I think the plaintiff has established these facts by evidence which, though contradicted in some particulars, is so entirely corroborated by the defendant's own acts as to leave no substantial doubt that the plaintiff's version of the arrangement, as to the lots in question, is the correct one. It is agreed that the telegram, as to the lots to be sold on the 20th of October, was sent to Winslow as agreed upon, and that these lots were bid in at the up-set price — $24 — in the defendant's name, and that the license issued to him. The parties also agree that on the 18th of October, the day on which the transaction took place, the defendant offered to return to the plaintiff the $24 which he had deposited as the up-set price of the lots to be sold on the 20th of October, as the plaintiff had then abandoned all claim to them, and the money would therefore belong to the plaintiff. It is admitted that the money was not returned, but the parties differ as to the reason. The plaintiff says when the money was offered to him he refused it, telling the defendant he was to take that money to pay for blocks 27 and 28 in range 12 — the lots now in dispute — and which according to the plaintiff's version the defendant had then arranged to apply for and bid in for him. This seems to me a most natural thing to do, if the facts are as the plaintiff says. The defendant states that he offered to return the money but the plaintiff refused it, saying there was plenty of time and they could settle about it afterwards. The defendant retained the money until the following August — some ten months or more — during which time nothing was said about it by either party, and it was not until the defendant had become annoyed at something having no reference to this matter at all that he offered to repay the money. I conclude that the defendant did retain the money for the purpose stated by the plaintiff at the time — that is, to pay for the license of blocks 27 and 28 in range 12; and that he did use the money for that purpose. Any other conclusion seems to me most unreasonable; and there is really no other explanation of the defendant's action in retaining the money for so long a

period, or of the plaintiff permitting him to do so. The evidence shews that the defendant did immediately afterwards apply for certain blocks, including the two in question; that they were purchased by him on the 3rd of November, 1897, at the up-set price, and that the license therefor issued to him, which was renewed in August, 1898, and again in August, 1899. Nothing more seems to have taken place between the parties until the 1st day of August, 1898, when the renewal license fee of $4 per mile became payable—that is $12 for the two blocks. On that day the plaintiff paid the defendant $12, saying to him, "Here is $12 for the renewal of those two blocks of land that you bought for me." The defendant took the money, saying, "I should have had it yesterday." One James Harquail was present when the money was paid, and in that particular corroborates the plaintiff's evidence. Harquail also swears that immediately after the payment the defendant said to him: "I will treat; I got $12 from McGregor for a renewal license of some land." The defendant admits that this $12 was paid him, and that he understood at the time it was the renewal fee on the license for these lands in dispute. The plaintiff further swears—and he is not contradicted in this particular—that in a conversation with the defendant some eight or ten days later he asked the defendant to transfer these blocks to him, to which the defendant replied, "the ground is yours, but I cannot transfer it to-day." Nothing more was done until the 20th of August, a few days later, when the defendant in a letter of that date enclosed the plaintiff a cheque for $37.93, made up of the two sums of $24 and $12, and $1.93 for interest. In this letter the defendant writes: "Inclosed find check for $37.93, amount paid by you for ground, which, under the circumstances, I decline to accept." It seems clear by this that this money was paid by the plaintiff to the defendant for ground, and as this was the only transaction of the kind between the parties, the ground referred to must necessarily be these blocks of land in dispute—in fact there is really no pretence that anything else was intended. The cheque was

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returned, and the $12, renewal fee for 1899, was tendered to the plaintiff but refused. The license was however renewed in the defendant's name, and he now holds these lots under it. I have no hesitation in finding upon this evidence that the license of the two blocks 27 and 28 in range 12, was in reality purchased by the plaintiff and paid for with his money, and that the renewal for 1898 was also paid for by the plaintiff. As a result the defendant immediately on the purchase held the blocks for the plaintiff, in whose favour a resulting trust arose by operation of law. Some point was made by the defendant that the agreement was an attempt to stifle public competition, and therefore void as being contrary to public policy. There is nothing whatever in this. The plaintiff and defendant were not competitors for these lots. As I find the facts the plaintiff wanted to get a license of them, and the defendant was willing that he should have them — in fact agreed to apply for them and bring them to sale in his own name. That this either prevented competition, or even had a tendency to do so, is the merest conjecture. The only point in the defence which seems to require much consideration was as to the *Statute of Frauds*, but this, I think, must also be decided adversely to the defendant. It is true there was no writing between the parties, but there are two answers to this ground of defence. In the first place these Crown land licenses have never been held as creating an interest in land: *Laughlan* v. *Prescott* (1), and if they did, the Statute has no application to trusts arising by operation of law: c. 76, C. S. N. B., s. 9. So long ago as the year 1788 it was held, in reference to that provision of the Statute, that "the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money": *Dyer* v. *Dyer* (2).

(1) 1 N. B. Eq. 406.

(2) 2 Cox, 92

In *Wray* v. *Steele* (1), the Vice-Chancellor says: "The rule was clearly settled by the decision in Ventris in the 35th of Charles II., about six years after the *Statute of Frauds* passed, that where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him who paid the money; that case forming an exception to the *Statute of Frauds*; and so long has that decision been followed that no rule can be represented as more clear and incontrovertible."

In *Bartlett* v. *Pickersgill* (2), it appeared that the defendant had bought an estate for the plaintiff, but there was no written agreement, nor was any part of the purchase money paid by the plaintiff. It was held that a bill would not lie to compel a conveyance, the Court saying: "The Statute says no trust shall be of land unless there be a memorandum in writing, except such trusts as arise by operation of law. It is not like the case of money paid by one man, and a conveyance taken in the name of another. There the bill charges that the estate was bought with the plaintiff's money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the money were lent or not. If it were not lent, the plaintiff bought the land." The payment of the purchase money by the plaintiff is put forward in that case as an essential fact in order to create the trust, and thus obviate the necessity for some written memorandum, but it may be doubted whether the doctrine is now so restricted. See *Heard* v. *Pilley* (3).

In *Williams* v. *Jenkins* (4), Strong, V.-C., says: "It is well established that when the purchase money or any part of it is paid by the principal, parol evidence of agency is let in on the ground of resulting trust; and although I doubted at the time of the argument, I am now convinced that the agreement having been made by Palmer in consideration of this test to be made at the plaintiff's mill and at the plaintiff's expense, as was afterwards done, the case is not distinguishable from one in which the price is actually paid by the principal in money; so that there is

(1) 2 V. & B. 388.
(2) 4 East, 577, n.
(3) L. R. 4 Ch. 548.
(4) 18 Gr. 536.

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here in my opinion a resulting trust expressly excepted by the 8th section of the *Statute of Frauds*."

In *Sanderson* v. *McKercher* (1), the Court did not for a moment dispute that the trust arose as a result of the payment of the purchase money by the plaintiff, as held by the Ontario Court of Appeal (2), though they did overrule that Court upon the question of fact. See also *Wilde* v. *Wilde* (3); *Boyd* v. *McLean* (4); *Botsford* v. *Burr* (5); *Booth* v. *Turle* (6).

It was said that the defendant could not assign his interest in these blocks to the plaintiff as they were included in one license with other blocks, to which the plaintiff has no claim; and by the regulations of the Crown Land Office, the license would only be assigned in whole. I can see, however, no objection to the defendant assigning to the plaintiff all his interest in these two blocks acquired under the license. If the Crown Land Office will not recognize it, or act upon it, it will not be the defendant's fault.

The plaintiff is entitled to a decree with costs. The defendant must be declared a trustee for the plaintiff of these blocks, and of all interest acquired under the license, and he must be restrained from cutting on them or interfering with them, and he must be ordered to execute an assignment of them to him.

(1) 15 Can. S. C. R. 206.
(2) 13 A. R. 561.
(3) 20 Gr. 521.
(4) 1 John. Ch. 582.
(5) 2 John. Ch. 408.
(6) L. R. 16 Eq. 182.

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January 12.

Ship — Charterparty — Arrival of vessel at loading berth — Notice — Lay days — Demurrage — Delay in loading caused by failure of railway to forward cargo — "Customary Despatch" — Weather-working days — Refusal to sign Bills of Lading — Injunction.

By charterparty a vessel was to proceed to the port of St. John and load lumber; the vessel was to haul to loading berth as required by charterer; cargo was to be furnished at customary despatch; lay days were to commence from the time vessel was ready to receive cargo, and written notice was given to the charterer; bills of lading were to be signed as presented without prejudice to the charty party, and vessel was to have an absolute lien on cargo for demurrage. On arrival the vessel proceeded to the Ballast wharf when the master was notified by charterer that cargo would be furnished at the Government wharf. On August 28th the master mailed a notice to the charterer that vessel was at loading berth and would be ready to receive cargo on the 29th. When notice was sent vessel was not at loading berth. The cargo was brought to the berth by the Intercolonial Railway, but owing to pressure of traffic the railway was unable to commence forwarding cargo until a number of days after vessel was at berth, or to forward cargo thereafter on a number of days, and during which no loading took place. A claim for demurrage was made by the master, and he refused to sign bills of lading unless the claim was settled or notice thereof was inserted in bills of lading. An injunction having been obtained restraining the vessel from proceeding with the cargo to sea it was agreed that all questions in dispute between the shipowner and charterer should be determined in the injunction suit.

Held, (1) that lay days did not commence to run until delivery of cargo began, as the notice should not have been given until vessel was at loading berth ready to receive cargo;

(2) that under the evidence there is not in the lumber trade at the port of St. John a recognized custom to furnish cargo at a particular rate; that the words "customary despatch" meant that cargo should be furnished at the usual despatch of a charterer having a cargo ready for loading, and that this was at the rate of 35M. per weather-working day; any substantial work to count as half a day;

(3) that delay in furnishing cargo was to be borne by charterer;

(4) that master should have signed bills of lading, and that the injunction was properly granted.

The facts fully appear in the judgment of the Court.

Argument was heard November 27, and December 4, 1899.

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

The plaintiff's remedy on account of the master's refusal to sign bills of lading is by action for damages against the master, and not by suit for injunction to detain the vessel until the bills of lading are signed: *Leggett* on Bills of Lading, 17. It was the master's duty to insist that bills of lading should contain notice of the lien for demurrage, in order that they might not be assigned to an innocent purchaser.

[BARKER, J. :— The charterparty stipulates for a lien upon the cargo for demurrage, and that the lien shall not be prejudiced by the signing of the bills of lading as presented. The master's refusal to sign was a breach of the charterparty. *Rayner* v. *Rederiaktiebolaget Condor* (1), is directly in point.]

Lay days commenced to run from the time notice of the vessel's arrival and readiness to receive cargo was given by the master to the charterer. We, however, contend that the vessel was at loading berth when notice was received. It cannot be the meaning of the charterparty that before we could properly give notice we would have to wait until the charterers selected a berth and we had gone to it. That would put us at the mercy of the charterers. The reasonable construction of the contract is that lay days are to commence upon our giving notice to the charterers of the vessel's arrival, and of our readiness to proceed to any loading berth to be named by them. If the place of loading named be a port, the notice of the readiness of the vessel may be given though the vessel is not then in the particular part of the port in which the cargo is to be loaded: *Nelson* v. *Dahl* (2); *Pyman* v. *Dreyfus* (3); *Stanton* v. *Austin* (4).

The charterers have not loaded the vessel according to "customary despatch." They seek to excuse themselves from performance of this part of their contract by attributing the delay to the railway. The charterparty does not

(1) [1895] 2 Q. B. 289.
(2) 12 Ch. D. 568, 581.
(3) 24 Q. B. D. 152.
(4) L. R. 7 C. P. 651.

contain any exception to relieve the charterers of liability in event of their inability to load with "customary despatch." The duty of the charterers was to have the cargo ready at the place of loading, and to load with "customary despatch." The words do not refer to the facilities which the charterers may have for bringing the lumber to the loading berth. In *Kearon* v. *Pearson* (1), the defendants, by charterparty, engaged to load on board the plaintiff's ship a cargo of coals, "to be loaded with usual despatch." The defendants brought the coals in boats by canal, but before the cargo was completed the canal froze up, and the ship was subjected to a long detention. It was held that the expression "usual despatch" meant "usual despatch of persons who have a cargo ready for loading," and that the loss occasioned by the delay should be borne by the defendants. In *Adams* v. *Royal Mail Steam-Packet Co.* (2), the terms of a charterparty were that the vessel was to be loaded with coals by the charterers in the customary manner. It was held that this meant a loading according to the usage of the port, and within a reasonable time, without reference to unforeseen casualties beyond the control of the charterers. Even if the words "customary despatch" were given the wide meaning sought to be put upon them by the charterers it has not been shewn that the cargo could not have been loaded except by being brought over the railway. See also *Ashcroft* v. *Crow Orchard Colliery Co.* (3); *Wright* v. *New Zealand Shipping Co.* (4), and *Grant* v. *Coverdale* (5).

W. Pugsley, Q.C., and *A. P. Barnhill*, for the plaintiff:—

If the vessel has been detained in breach of the charterparty the shipowner's remedy is by action for damages, and not by lien. A right to demurrage at the port of loading is not given by the charterparty, and therefore there is no lien. Demurrage cannot exist unless the damages for

(1) 7 H. & N. 386.
(2) 5 C. B. N. S. 492.
(3) L. R. 9 Q. B. 540.
(4) L. R. 4 Ex. D. 165.
(5) 9 App. Cas. 470.

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delay can be calculated by exclusive reference to the charterparty. For this purpose lay days must be specified, or a definite rate of loading per day fixed. Here it is impossible to ascertain the amount of damages for which a lien could be claimed without an inquiry into extrinsic matters for the purpose of determining the meaning of "customary despatch." A charterer has a right to release the cargo of the lien by tendering to the shipowner the amount due as demurrage, and this he cannot do if the damages are not liquidated. See *Lockhart* v. *Falk* (1); *Clink* v. *Radford* (2); *Dunlop* v. *Balfour* (3); *Hansen* v. *Harold Brothers* (4); *Schofield* v. *Gibson* (5). As the shipowner was not entitled to a lien the master acted illegally in refusing to sign bills of lading, and we are entitled to costs of injunction suit. Moreover, if a lien did exist, we were entitled to have bills of lading signed. The lien could not thereby be lost: *Wegener* v. *Smith* (6). The remedy by injunction was open to us. The terms of the injunction order are not in restraint of the vessel proceeding to sea, but in restraint of the vessel proceeding to sea with the plaintiff's cargo. See *Peek* v. *Larsen* (7), where this course was followed. The remedy by action for damages against the master would be wholly inadequate.

The liability of the charterer in respect of loading was not initiated under the notice given by the master of the arrival of the vessel. When the notice was given the vessel was not at loading berth. Lay days under the charterparty are to commence from the time the vessel is ready to receive cargo at the loading berth designated by the charterer, and written notice thereof is given to the charterer. Where a ship is to load at a particular wharf notice that the ship is ready cannot be given until the ship is at the named place, though the ship is in port: *Nelson* v. *Dahl* (8); *Tharsis Sulpher and Copper Co.* v. *Morel*

(1) L. R. 10 Ex. 132.
(2) [1891] 1 Q. B. 625.
(3) [1892] 1 Q. B. 507.
(4) [1894] 1 Q. B. 612.
(5) 1 P. & B. 619.
(6) 15 C. B. 285.
(7) L. R. 12 Eq. 378.
(8) 12 Ch. D. 568, 581.

Brothers & Co. (1); *Murphy* v. *Coffin* (2); *Sanders* v. *Jenkins* (3).

Lay days only commenced on September 13th, when charterer commenced to deliver cargo. Construing "customary despatch" to mean 25 M. per weather-working day, or 20 M. per running day, the lay days had not run out when the cargo was loaded. If the rate is put higher we submit that the failure to deliver at a higher rate occurred through no fault of ours, but is to be ascribed to extraordinary causes external to ourselves, and for which we are not responsible. Under the charterparty the loading wharf was in the option of the charterer. This gave us liberty to select the railway wharf. The shipowner knew that a cargo loaded there is received over the railway, and that traffic might become congested, and delay ensue. This eventuality is incorporated in the contract, and the words "customary despatch" must be construed subject to it. In *Grant* v. *Coverdale* (4), the Earl of Selborne, L. C., says: "Where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as for instance that the goods should be brought down part of a river from the only place from which they can be brought, according to known mercantile usage, to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment." In *Wyllie* v. *Harrison* (5), the charterparty provided that the cargo was to be discharged "as fast as the steamer can deliver after having been berthed, as customary." It was the custom at the port of discharge that on notification by the consignees or charterers of the arrival of a vessel to one of the two railway companies whose lines ran along the quay, the company should provide trucks, into which the cargo was to be discharged by means of steam cranes provided by the harbour authorities. On the arrival of the

(1) [1891] 2 Q. B. 647.
(2) 12 Q. B. D. 87.
(3) [1897] 1 Q. B. 93.
(4) 9 App. Cas. 470, 477.
(5) 13 Court Sess. Cas., 4th Series, 92.

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vessel due notice was given to the railway company, by whose line the cargo was to be forwarded, but delay was occasioned through the failure of the railway company to supply trucks. It was held that the consignees were not liable to demurrage. "Customary despatch" is the same as "reasonable time." A party under obligation to perform a contract within a "reasonable time" is relieved from the consequences of delay not attributable to his own negligence, but arising from causes beyond his control: *Hick* v. *Raymond* (1). See also *Bulman* v. *Fenwick* (2); *Little* v. *Stevenson* (3), and *Hudson* v. *Ede* (4).

Stockton, Q.C., in reply.

1900. January 12. BARKER, J.:—

On the 3rd day of May last the plaintiff, who is an extensive shipper and manufacturer of lumber at St. John, entered into a charterparty with the defendant McLeod, owner of the bark *Bessie Markham*, then in Montevideo, by which the vessel was to proceed to the port of St. John, and there load a cargo of lumber for Buenos Ayres. The vessel arrived at St. John in ballast on the 23rd of August, and immediately hauled in to the Ballast, or Charlotte Street Extension, Wharf. She commenced loading on the 13th of September, and finished on the 18th of October. In the meantime a dispute had arisen between the parties as to a large claim for demurrage, which the plaintiff refused to recognize in any way. In consequence of this the master refused to sign bills of lading as presented by the charterer, or any bills of lading which did not in some way carry notice on their face that the ship had this claim for demurrage, and had a lien on the cargo for it. As the master was preparing to clear the vessel and proceed on his voyage, without signing bills of lading as presented by the shipper, he (the plaintiff), on the 23rd day of October, applied to Mr. Justice *McLeod* and obtained an *ex parte* injunction order restraining the vessel from going

(1) 62 L. J. Q. B. 98.
(2) [1894] 1 Q. B. 179.
(3) 65 L. J. P. C. 69.
(4) L. R. 3 Q. B. 412.

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to sea with the plaintiff's cargo. It was then agreed that the claim for demurrage, and all other questions involved in the suit, should without further formalities be left to this Court in the nature of an arbitration; and the plaintiff deposited with the Clerk $1,500, which I was to appropriate in carrying out such decision as I might arrive at. The vessel then went to sea, and the loss and inconvenience which would otherwise have arisen from her detention were avoided. Though in form this is a suit in which Cushing the shipper is plaintiff, and though for some of the purposes of the suit the plaintiff's right to file the bill and obtain the injunction will have to be discussed, the main and substantial question for determination is the claim for demurrage.

I have no doubt whatever that the vessel was unreasonably detained in obtaining her cargo, but whether the shipper is liable in consequence of it for demurrage is another question. By the charter the vessel, which was then at Montevideo, was to proceed in ballast and with all possible despatch direct to the port of loading to enter upon the charter. Then follows a provision in these words: "Vessel to haul once to loading berth as may be required by charterers or their agents, who have the privilege of moving her afterward by paying the additional towage. Cargo to be furnished at port of loading, customary despatch, and to be discharged at port of destination at the average rate of not less than thirty thousand superficial feet per running day, Sundays excepted. Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part or agent, and that for each and every day's detention by default of said party of the second part or agent, sixty dollars (U. S. gold) per day, day by day, shall be paid by the said party of the second part or agent, to the said party of the first part or agent."

Two important questions arise, (1) When did the lay days commence; and (2) when did they end? And this involves a consideration of the principle upon which

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they are to be computed, there being no fixed number mentioned in the charterparty.

The evidence shows that the cargo in question was a dry lumber cargo, which had been manufactured at Calhoun's mill, about a hundred miles from St. John, on the Intercolonial Railway, and that it had to come down by rail to the Government wharf, where it would be loaded from the cars to the ship. On the vessel's arrival the master was notified by Cushing that she was to proceed to her loading berth at the Government wharf where the cargo would be furnished to her. The distance from the Ballast wharf, where the vessel was lying, to her designated berth at the Government wharf is about 100 yards, and in order to shift from the one to the other the vessel had to be towed through the draw in the railway trestle. Notwithstanding the vessel had been required to go to the Government wharf, she actually did not proceed there until the evening of the 28th or the evening of the 29th of August — it is uncertain which. On one of these evenings the vessel was shifted to the berth assigned her at the Government wharf, and she continued there from that time until she finished loading. Although the weather during this whole period was exceptionally fine, no cargo was furnished until the 13th of September. On the 28th day of August the master of the ship sent the following written notice to the plaintiff:—"You will please take notice that the bark *Bessie Markham* is now in her loading berth at Government wharf and ready to receive cargo on the 29th inst. when lay days will count. Also please deliver cargo alongside in accordance with terms of charterparty, and I will sign bills of lading agreeably to your surveyor's account." In reference to this notice Captain Stewart says that he wrote it in Scammell's office on the 28th of August; that he expected to be busy shifting the ship, that is from the one wharf to the other, and he left the notice at Scammell's to be posted so that the plaintiff might receive it on the morning of the 29th. There is no evidence as to when the notice was actually mailed, but Cushing gives the following account of its receipt. He cannot give the date, but he

says that he received it at the Post Office in the morning with his other letters at 7 or 8 o'clock. That on the morning in question, on his way to the Post Office, he drove on the Government wharf past the Ballast wharf, and that he then saw the *Bessie Markham* lying at the Ballast wharf; that he drove directly from there to the Post Office, received his mail — this notice with other letters — and then drove to his own office, and then and there after reading the notice wrote this memorandum on the back of it: "Notice no good; vessel not at loading berth as stated." If Mr. Cushing is correct, and it is difficult to see how he can be otherwise, unless intentionally so, of which there is of course no suggestion, the *Bessie Markham* must have been still lying at the Ballast wharf when he received the notice, as undoubtedly she was when the notice was written and left by Captain Stewart at Scammell's office. The discrepancy in the evidence of the witnesses as to the date of the removal of the *Bessie Markham* from the one wharf to the other is difficult to explain satisfactorily. Mr. Cushing's evidence is strongly corroborated by Captain Clarke, master of the tug *Neptune* which towed the vessel from the Ballast wharf to the Government wharf; and from a charge for the work made by himself in his book he swears it was on the 29th. Vincent, who is the wharfinger of the Government wharf, and whose duty it is to keep an account of all vessels lying there when liable to pay side wharfage, as they are when not actually engaged in loading, speaks from entries in his books and finds that the first day the *Bessie Markham* is charged is the 30th, from which he says she was not there on the 29th, as she must have been if Captain Stewart is correct. On the other hand Captain Stewart swears the vessel was moved on the evening of the 28th, and there are entries in his log book to sustain him. Doherty, a pilot who was in her when she was moved, swears it was on the same time that the Norwegian vessel *Akershus* was towed away from the Government wharf to complete her cargo at Sand Point, and about two hours afterwards—the *Bessie Markham* going to the berth vacated by the *Akershus*. And Captain McKinney, master

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of the tug which towed the *Akershus* at this time, from an entry in his book for the service swears it was on the 28th. This claim for demurrage, it must be borne in mind, is based on an alleged default in the shipper not furnishing the cargo according to contract. The onus of proving that fact is upon the shipowner; and I think in order to entitle him to recover he ought to make it appear with reasonable certainty. In my view, however, it is unnecessary to determine whether the vessel was at her loading berth ready to receive cargo when Mr. Cushing received the notice or not, it being admitted that she was not there at the date of this notice, and when it was actually written and sent. Mr. Stockton contended before me that under a charter-party such as this, where the vessel was merely bound to proceed to a certain port to load, it was sufficient, in order to initiate the liability of the charterer, whatever it might be, to take his part as to loading, that the vessel should be placed at a usual place for loading in the port, ready to load, and notice given to the charterer. And my attention was called to the distinction between the mutual obligations of the shipowner and charterer under a charter such as this, and one where by the express terms of the charter the vessel was to proceed to a specified wharf or dock to load. *Nelson* v. *Dahl* (1), and many other cases were referred to as illustrating this distinction. I do not doubt that if on the arrival of this vessel at St. John the charterer had refused to name the particular wharf or berth where he required the vessel to go for the cargo, the shipowner might have placed his vessel at the disposition of the charterer in the way I have mentioned so as to render him liable, in the case of his continued refusal, for a breach of contract in some form or another. That, however, is not the case here; for on the ship's arrival the master received due notice of the berth to which she was to proceed for loading, and for any delay there may have been in getting her there the charterer does not seem to have been in default in anyway — at all events the claim for demurrage is in no way based on that. On the contrary no demurrage

(1) 12 Ch. D. 568.

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is claimed except for detention after the vessel had been taken to her designated berth, and the notice relied on as initiating the liability of the shipper to load has sole reference to her being at her berth and ready to load there. The sufficiency of the notice must be determined upon the facts of the particular case. It was contended on the part of the charterer that immediately upon his notifying the master of the berth or wharf to which he required the vessel to proceed for her cargo, it became as absolute a contract on the part of the shipowner to take her there as though such berth or wharf had been named in the charter-party as the place to which the vessel was to go. There are cases however where this would not in my opinion be the case, because there may be mutual obligations upon the shipowner and charterer to aid in getting the vessel to her berth in the one case which might not exist in the other. But in a case like the present, where the berth has been notified without delay, and where there is no impediment in the way of the ship getting there for which the charterer is in any way responsible, I think the contract should be construed as though the particular place had been inserted in it. In *Parker* v. *Winlow* (1), the vessel was to proceed to Plymouth, not higher up than Torpoint or New Passage, and discharge. She was ordered to a certain wharf for that purpose — to which the vessel at the then state of the tide could not get. She was detained in consequence and a claim for demurrage was made. Erle, J., says: "The plaintiff contracted that the ship should go to such place, within the limits, as should be named, provided it was a proper place. It now appears that in fact Brunswick wharf, which was named, was a proper place. The plaintiff therefore contracted to take the ship to that place, and the lay days did not commence till it got there." See also *Murphy* v. *Coffin* (2); *Tapscott* v. *Balfour* (3); *Tharsis Sulphur and Copper Co.* v. *Morel Brothers* (4). And in *Nelson* v. *Dahl*, already cited, James, L. J., says: "What is the difference in point of legal construction and effect

(1) 7 E. & B. 941.
(2) 12 Q. B. D. 87.
(3) L. R. 8 C. P. 46.
(4) [1891] 2 Q. B. 647.

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between such a charterparty, completed by subsequently naming the port and dock and a charterparty containing the names of both." Is this notice sufficient? Two things must concur to make it so. The vessel must have been at her loading berth, and she must have been ready to receive cargo. I do not think a notice can be given in advance that the vessel will be at her loading berth and ready to receive cargo on some future day. The notice which is to be given is of an existing fact — that the vessel is at her berth and is there ready to receive her cargo; and until that is the fact, and the notice of it given, the lay days do not commence. They did not, I think, commence in this case until the 13th of September, when the cargo began to be delivered, and they must be computed from that date. The next question is at what date, under a proper construction of this charter, ought the charterer to have completed delivery of the cargo for loading, he being under an obligation to furnish it at "customary despatch." Involved in this is a question of law as to the meaning of that expression, and a question of fact under the evidence as to the rate of such loading required to satisfy such meaning. It was attempted to prove that the words "customary despatch" had a well-defined and generally understood meaning among shippers, shipowners and others engaged in the lumber trade at St. John, and that the rights and liabilities of the parties must be determined subject to that meaning, as they must be taken to have contracted with that in view. And it was said that by such recognized custom, if a cargo such as the one in question were furnished at the rate of 20M. per running day, or its alleged equivalent of 25M. per weather-working day, the vessel was getting "customary despatch." The evidence, I think, altogether failed in establishing the contention, and we are therefore left to give a construction and meaning to the words according to their legal import. In *Kearon* v. *Pearson* (1), the jury were instructed that the expression "usual despatch" meant that the vessel should be loaded with the usual despatch of persons who

(1) 7 H. & N. 386.

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have a cargo ready at Liverpool (here it would be St. John) for loading. At what rate then is the charterer to furnish the cargo in order to fulfil his contract? In other words, what is the usual and customary rate at which, under ordinary circumstances, cargoes of this description are delivered to the ship for loading at this port? I can only decide that question of fact upon the evidence which has been given before me, and I find that rate to be 35M. per weather-working day, any substantial work to count as half a day, as determined by the present Lord Chief Justice in *Branckelow Steamship Co.* v. *Lamport* (1). The evidence shows many instances where cargoes have been furnished at double this rate; and according to Vincent's evidence in this case out of the 32 working days from 13th September to 19th October inclusive, there was actually nothing done on fourteen of them for want of cargo; so that in fact the whole cargo of 718M. was loaded in 18 days, or at the rate of say 40M. per day; and there were days upon which a much greater quantity was delivered. On this basis the vessel should have been loaded on the 11th October, which would leave her eight days on demurrage, at $60 a day, or $480. It was argued on the part of the charterer that any delay in furnishing the cargo was due to the failure of the Intercolonial Railway to furnish the necessary transport from Calhoun's mill to the Government wharf, a distance of about a hundred miles; and that for this delay he was not responsible, having done all in his power to expedite the delivery. The argument was that as this railway is the usual, if not the only, means of getting a cargo of lumber to the Government wharf for shipment, and as the vessel was obliged to go there for her cargo, under the option which the charterer had of ordering her there, any loss by reason of delay caused by the Railway authorities in getting the cargo there must fall on the ship. I do not at all agree with this proposition. Delay in getting a cargo to a wharf where it is to be shipped is one thing — delay in loading it when it is there is quite

(1) [1897] 1 Q. B. 571.

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a different thing. In *Kearon* v. *Pearson* (1), just referred to, the Court held that "usual despatch" was the usual despatch of a person having a cargo at the place of loading ready for loading. In that case the cargo of coal was being brought from a colliery at Wigan down a canal in flats, when the canal was frozen by a sudden frost and traffic was interrupted so that a serious delay in the loading took place. The Court held that the charterer must bear the loss as his contract was absolute. Wilde, B., says: "The stipulation that the vessel shall 'be loaded with usual despatch' does not relate to the facilities which the charterers may have in their trade of getting the coal alongside the vessel, but to the putting it on board." So in *Ashcroft* v. *Crow Orchard Colliery Co.* (2), the same rule was applied where the words in the charter were, "to be loaded with the 'usual despatch' of the port"—a mere expansion of the phrase "customary despatch." See also *Adams* v. *Royal Mail Steam-Packet Co.* (3).

A further claim for demurrage is made by the shipowner for detention by reason of the charterer not presenting proper bills of lading to the master; and damages are also claimed against the plaintiff on his undertaking given on obtaining the *ex parte* injunction. The first of these two claims arises out of a dispute between the owner and charterer as to the form of the bills of lading as I have already pointed out. On the 21st of October the master gave the charterer a further notice of his claim for demurrage, the vessel having been prevented, as he claimed, from clearing within the forty-eight hours which, according to Captain Stewart, is the time usually allowed for that purpose. On that day or the day before—the evidence is not very clear which—the charterer's agent presented bills of lading to the master for signature at the Custom House, but the master refused to sign them unless the demurrage claim was first settled. It is true that he did not have possession of the bills to read them, but his refusal to sign was absolute unless the demurrage claim was first settled. The

(1) 7 H. & N. 387. (2) L. R. 9 Q. B. 540.
(3) 5 C. B. N. S. 492.

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master claimed that, under the charter, the ship had a lien on the cargo for the demurrage at the port of loading. The shipper, on the contrary, claimed that no such lien existed, but if it did, he was entitled to have bills signed as presented. The charterparty provided that bills of lading were to be signed as presented without prejudice to the charterparty; and that the vessel was to have an absolute lien upon the cargo for all freight, dead freight and demurrage; charterer's responsibility to cease when vessel was loaded and bills of lading signed. The bills of lading which the charterer presented to the master for signature, and which he refused to sign, are in the usual form, and provide for the cargo to be delivered "unto order or assigns, paying freight on said lumber with all other conditions as per charterparty, dated at St. John, N. B., May 3rd, 1899." There were some minor objections to the bills of lading, but they were unimportant — the demurrage claim caused all the difficulty. In my opinion the master was wrong in refusing to sign the bills as presented. It is not necessary, for the purposes of this case, to determine whether the lien-clause in the charterparty covered a detention in loading as well as in discharging the cargo; for if it did the lien would not, I think, be lost by signing bills of lading such as were presented to the master for signature, they being subject to the conditions of the charterparty which created the lien, and which expressly provided that such bills of lading should be without prejudice to the charter. It is settled, I think, by authority that such bills of lading are to be read as though the conditions of the charterparty were incorporated in them.

In *Porteus* v. *Watney* (1), Brett, L. J., says: "I take the decision in *Gray* v. *Carr* (2) to have been that those words ("on paying freight for the same goods, and all other conditions, as per charterparty") in a bill of lading are to be treated as words of reference to the charterparty; and that they therefore introduce into the bill of lading every condition that is in the charterparty by way of reference; so that they bring into the bill of lading every condition

(1) 3 Q. B. D. 534. (2) L. R. 6 Q. B. 522.

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of the charterparty in its terms, and make every one of those conditions part of the bill of lading as if they had been originally written into it." Cotton, L. J., says: "The words of the bill of lading are 'paying freight for the same goods and all other conditions as per charterparty.' There is an express provision in the charterparty that the shipowner shall have an absolute lien on the cargo for all freight, dead freight, and demurrage. It is impossible not to import that into the contract entered into by the bill of lading." See also *Gray* v. *Carr* (1); *Gullischen* v. *Stewart Brothers* (2); *Jones* v. *Hough* (3).

In *Rayner* v. *Rederiaktiebolaget Condor* (4), the same question arose under circumstances about identical with those here. The vessel there was chartered to load a cargo of coal at Grimsby and to proceed to Cronstadt and deliver it there. The charterparty contained a provision that the captain should sign charterer's bills of lading as presented without qualification, except by adding weight unknown, within 24 hours after being loaded; or pay £10 for every day's delay as and for liquidated damages until the ship should be totally lost, or the cargo delivered. The captain refused to sign the bills which were presented. A dispute, precisely as in this case, had arisen as to the date of the vessel's readiness to load, and as to the amount of the demurrage payable by the plaintiff. And the captain insisted in inserting in the bills of lading the following words: "Together with demurrage, protests and consular expenses as per margin, £204, to be paid at the port of discharge before breaking bulk"; and he signed bills of lading under protest in this modified form and sent them to the charterer—substantially the course which Captain Stewart intended or claimed the right to adopt. When the vessel arrived at Cronstadt the master refused to deliver the cargo until the £204 were paid. This action was brought not only to recover the amount back, but also the £10 per day for the delay by the captain in not signing bills of lading as presented. It was held that the charterer was entitled

(1) L. R. 6 Q. B. 522.
(2) 13 Q. B. D. 317.
(3) 5 Ex. D. 115.
(4) [1895] 2 Q. B. 289.

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to recover back so much of the demurrage claim as had been improperly paid, and that the captain was liable for refusal to sign bills of lading as presented for such damage as had been sustained; and that the master was wrong in insisting upon adding the words he did.

I have therefore no doubt that Captain Stewart was wrong in refusing to sign bills of lading until the demurrage claim was settled; and I think he was also wrong in refusing to sign the bills of lading presented to him, and in endeavoring to force upon the charterer bills containing stipulations to which he was in no way bound to submit. Any delay therefore occasioned by the dispute over the bills of lading arose out of the shipowner's wrongful or unwarranted action, and is in no way the fault of the charterer. As to the question of damages, for which it is claimed the charterer is liable under his undertaking on obtaining this injunction in this case, I do not think there is anything in it. If I thought there were any damages sustained by the defendant by reason of the injunction order, which in my judgment the plaintiff ought to pay, I do not see upon what basis I could ascertain them, because no evidence whatever has been given to show what they are. This claim has nothing to do with demurrage — it arises altogether outside of the charter; and in order to recover any damage there must be evidence to show what it is; that is if the Court was wrong in granting the injunction, because it is only in that case the plaintiff can be liable for any damage at all. When this matter first came before me I had great doubt as to whether this Court had the right to interfere by injunction. In *Peek* v. *Larsen* (1), a case similar in principle though not altogether identical in its circumstances, an injunction was granted restraining the defendants from sailing with the cargo, precisely the same as the order granted by my brother *McLeod*. No question was raised as to the right to proceed in that form. There may be cases such as *Jones* v. *Hough* (2), where the act of the master in sailing with the cargo without signing any bills of lading at all would

(1) L. R. 12 Eq. 378. (2) 5 Ex. D. 115.

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not amount to a conversion of the property, but in a case where the charterer is by law entitled not only to have bills of lading, but bills of a particular description, he is not bound to permit the master in violation of his own contract, under which he has got possession of the cargo, and upon which he claims a lien for a large sum of money, to proceed to his port of destination with the cargo without first giving the owner of the cargo such evidence of ownership and control as is supplied by proper bills of lading; and that if the master persists in his determination to sail, either without signing bills at all, or after signing bills which are not in accordance with the contract of the charter, the master of the ship should be restrained from carrying the cargo to sea. I think Mr. Justice *McLeod* was right in granting the injunction order.

As to the question of costs I think each party should have the costs so far as he has succeeded. I shall direct the Clerk to allow to the plaintiff the costs of the bill, and obtaining and serving the injunction order; and to the defendant the remaining costs. And from the fund in Court the Clerk will pay to the defendant or his solicitor, the sum of $480 and his taxed costs; and pay the balance to the plaintiff or his solicitor.

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March 30.

Interrogatories — Answer — Ambiguity — Knowledge, information and belief — Document in public office.

An answer to an interrogatory must be in plain and positive language, and clear in meaning, so that it may be safely put in evidence.

It is not sufficient for the plaintiff, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.

Where a plaintiff was properly interrogated as to the existence of a document in a public office it was held that he was not bound to seek knowledge as to the fact, but that if he had such knowledge, or information or belief upon the subject, he should answer fully as to his knowledge, information and belief.

The bill in this suit is filed for the foreclosure of a mortgage dated April 14, 1883, executed by Nelson Jonah and wife in favor of Mary E. Blakney to secure the sum of $500. Mary E. Blakney married Newton Jonah, and they assigned the mortgage to one William Scott for the expressed consideration of $500, by assignment dated September 1, 1888, and he assigned the mortgage to the plaintiff by assignment dated November 2, 1889, and for an expressed consideration of $500. Mary E. Blakney is a daughter of the said William Scott and a sister of the plaintiff. The defendant by his answer claims that the sum for which the mortgage was given was Mary E. Blakney's separate property, and was advanced to be employed as capital by one George H. Jonah, a son of the mortgagor and brother of the Newton Jonah who subsequently married Mary E. Blakney, to enable him to carry on a general store; that the money was used for that purpose, and that before the assignment of the mortgage the mortgage debt was paid in full to the mortgagee by goods from the store and by cash. The defendant also alleges that on August 14, 1886, the mortgagee gave a discharge in writing properly executed, acknowledged and registered to one Henry N. Jonah, and that by Henry N. Jonah is meant

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the mortgagor. At this time the mortgagee was married to Newton Jonah, but by what is alleged in the answer to be error or inadvertence, the discharge was not executed by him. The further defence is set up that the defendant purchased the property in November, 1890, for $1600; that he believed it was unincumbered, and that the assignment to William Scott and by him to the plaintiff was without any consideration, and at least without valuable consideration, and that both William Scott and the plaintiff had knowledge before the assignments to them that the mortgagee had been paid. Interrogatories were delivered by the defendant for the examination of the plaintiff. By the third interrogatory the plaintiff was required to set forth with full particulars and detail what consideration or value was paid or given by him for the assignment to him of the mortgage, and whether or not the same was paid or given by him in cash or in goods, or in some other and what manner, and when and where and to whom, and whether by the plaintiff personally or by or through the means or agency of some other and what person or persons. To this interrogatory the plaintiff answered that the consideration was an advance by his father, the said William Scott, to him on account of his (the plaintiff's) share in his father's estate to the extent of the amount he might receive from the mortgage.

The defendant's fifth interrogatory was as follows:—

"Is it not true that all the consideration and value given and advanced by said Mary E. Blakney on the execution to her of said mortgage, were at the time the same were so given and advanced by her, the sole and separate property of said Mary E. Blakney individually or how otherwise? State how and in what manner and from whom respectively said Mary E. Blakney acquired or got such consideration given or advanced by her for the execution to her of said mortgage. Set forth your utmost information, knowledge and belief respecting all matters inquired after by this interrogatory." Plaintiff answered that he had no positive knowledge of the matters inquired after in the fifth interrogatory, but that his information

and belief were that the money advanced by said Mary E. Blakney for the execution to her of the mortgage was her sole and separate property, and that he did not know from whom she acquired said money.

By the defendant's seventh interrogatory the plaintiff was asked if it were not true that the consideration or some or what part thereof, advanced by said Mary E. Blakney upon the security of the mortgage, was put into the said business and store of said George H. Jonah as part of the capital thereof. Of the matter inquired of by this interrogatory the plaintiff replied that he had no positive knowledge.

Defendant's eighth interrogatory was as follows:—

"Is it not true that on the 14th day of August, A. D. 1888, or at some other and what date the said mortgagee signed, sealed and delivered a document or paper writing in the following or some other and what words and figures, that is to say, 'Albert County. The debt secured by the mortgage dated the fourteenth day of April, A. D. 1883, No. 11182, folio 373, libro 2, Records of Deeds, has been paid to me by Henry N. Jonah, and in consideration thereof I do hereby discharge the said mortgage and release the mortgaged premises to said Henry N. Jonah and his heirs. Dated August 14th, 1886. In Witness Whereof I set my hand and affix my seal. (Sgd) Mary E. Jonah. [L.S.]' Did not said mortgagee at some and what time and in the presence of some and what person or persons sign a document or paper writing in the words and figures or to the purport and effect above set out, or how otherwise respectively? Did not said mortgagee at some and what time and in the presence of some and what person or persons, seal, or acknowledge that she sealed, a document or paper writing in the words and figures or to the purport and effect above set out, or how otherwise respectively? Is it not true that said mortgagee on said 14th day of August, A. D. 1886, or at some other and what date did sign, seal and deliver in the presence of Wilfred B. Jonah, a brother of said Newton Jonah, or in the presence of some other and what person or persons, a document or paper

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writing of or to the purport or effect aforesaid, or to some other and what purport or effect, professing to release and discharge said mortgage, or in some other and what way relating to the release and discharge of said mortgage, or how otherwise respectively? Is it not a fact that said mortgagee did actually on said 14th day of August, 1886, or at some other and what date sign a document or paper writing of or to the purport or effect that the debt due on or secured by said mortgage had been paid to her, and that she released and discharged said mortgage, or to some and what other purport and effect or how otherwise respectively? Is it not true that said mortgagee did on said 14th day of August, A. D. 1886, or at some other and what time, personally appear at Elgin, or at some other and what place in the County of Albert, before William J. McKenzie, or some other and what Justice of the Peace in and for said County of Albert, and acknowledge that she signed a document or paper writing of or to the purport or effect aforesaid, or of or to some other and what purport or effect professing to release and discharge said mortgage, or in some other and what way relating to the release and discharge of said mortgage or how otherwise respectively? Is it not true that a certificate or acknowledgment of the payment to said mortgagee of the debt secured by said mortgage and of the release and discharge by her of said mortgage signed, sealed and delivered by said mortgagee, or purporting to be so signed, sealed and delivered by said mortgagee, or by some other and what person or persons in the presence of said Wilfred B. Jonah, or some other and what person or persons, and in the words and figures above mentioned, or in some other and what words and figures and purporting to have been so signed, sealed and delivered, and also purporting to have been acknowledged as aforesaid, or in some other and what way before such Justice of the Peace, or some other and what Justice of the Peace was registered in the office of the Registrar of Deeds in and for said County of Albert, on or about October 12th, A. D. 1886, by No. 12732, in libro X, folio 206, or in some and what other registry on some and what other date, by some

other and what number, and in some other and what book and page. Set forth your utmost information, knowledge and belief respecting all matters inquired after by this interrogatory."

Defendant's answer to this interrogatory was as follows:—

"My utmost knowledge, information and belief is that the said mortgagee did not sign, seal and deliver a document or paper writing on the said 14th day of August, A. D. 1886, or at any other time as set forth in defendant's eighth interrogatory, but as towhether any paper writing or document was on said day signed by said mortgagee, the contents thereof will appear by the records of the registry office of Albert County, to which I crave leave to refer for the fact and certainty of the contents thereof; and I further say that no such paper is or ever has been in my possession, and I have no knowledge of the existence of such, or that any such paper was ever signed by the said mortgagee at any time in presence of any person, or acknowledged before the said William J. McKenzie as a Justice of the Peace for Albert County or otherwise, or before any other officer or person, nor have I any knowledge of the registration of any such paper, writing or document on the day, in the County record book, on the page or by the number as set forth in said interrogatory."

By defendant's ninth interrogatory the plaintiff was asked his full knowledge, information and belief as to when and from whom, before the commencement of the suit, he learned or had any and what information or belief that the document or paper writing mentioned in the preceding interrogatory, or any such or other document or paper writing purporting to be a statement by the mortgagee of the payment to her of the debt secured by said mortgage, and of the discharge by her of said mortgage had been executed by said mortgagee. Defendant answered that before the commencement of the suit he did not learn or hear from any person whomsoever, nor did he have any information or belief that said document or paper writing had ever been executed by the

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mortgagee, and that the first information he had in regard thereto was in the defendant's answer. Defendant filed exceptions.

Argument was heard February 20, 1900.

A. S. White, Q.C., and *Leonard Allison*, Q.C., in support of exceptions:—

The answer to the third interrogatory is insufficient, because of its misleading and evasive nature. It does not disclose that the plaintiff's father had any estate, or what the plaintiff's share in it would be. It is material that all the particulars connected with the assignment should appear, that it may be determined whether it was made in good faith, in view of our defence being that the mortgage debt was discharged previous to its assignment to the father by the mortgagee. The answer to the fifth interrogatory does not state the plaintiff's information and belief, but merely denies having knowledge as to whom Mary E. Blakney acquired her separate property from. We are entitled to the plaintiff's information and belief: *Laughlan* v. *Prescott* (1).

The seventh interrogatory is wholly ignored by the plaintiff in respect of that part of it which inquires if the consideration for the mortgage was not put into the business of George H. Jonah. The answer is evasive and tricky, in that it is limited to a denial of the agreement as alleged in the interrogatory. A verbal or unsubstantial inaccuracy may have occurred in transcribing the agreement, and it may be that the defendant is concealing his knowledge in reliance upon that or some species of mental artifice or reservation. We are entitled to an answer upon the substance of the agreement. The same attitude of mind is observed by the plaintiff in his answer to the eighth interrogatory. If the document therein referred to has been misquoted, or if even the seal has been omitted, the plaintiff might be blameless in his own mind in denying that there was such a document. Interrogatories and

(1) 1 N. B. Eq. 342.

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answers are not an exercise in verbal subtleties. If they were such they would give rise to intolerable conditions, for the interrogatories would have to be loaded down with refinements to anticipate every conceivable sophism in the mind of an opponent. The answer also fails to give the defendant the benefit of plaintiff's information and belief. The answer to the ninth interrogatory is open to the like criticisms.

G. H. V. Belyea, contra :—

The answer to the third interrogatory is substantially sufficient, and its meaning is intelligible to a reasonable mind. The consideration for the assignment is disclosed by the relationship of the parties. When substantial information is given by the answer the Court will not require minute and vexatious discovery: *Wiley* v. *Waite* (1); *Reade* v. *Woodrooffe* (2). I cannot understand the state of mind that can criticise the answer to the fifth interrogatory. The plaintiff's knowledge, information and belief are given. If the seventh interrogatory is not answered with respect to the purpose for which the money was borrowed, and the disposition that was made of it, I submit that as the information is not material the exception should not be allowed: *Bally* v. *Kenrick* (3). The answer to the eighth interrogatory is wholly misconceived by the defendant if he seriously regards the plaintiff as sheltering himself behind a trick of words. The Court will not say that a solicitor has framed an answer in deceit if it does not irresistibly support that inference. The defendant is not entitled to information from the plaintiff as to whether or not the document referred to in the interrogatory is registered. The fact is a matter of public record, and defendant can inform himself upon it. In such a case the Court will not compel an answer to be put in: *Hendricks* v. *Hallett* (4); *Glengall* v. *Fraser* (5). The ninth interrogatory is substantially answered.

(1) 1 N. B. Eq. 150
(2) 24 Beav. 421.
(3) 13 Price, 291.
(4) 1 Han. 185.
(5) 2 Hare, 104.

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White, Q.C., in reply.

1900. March 20. BARKER, J.:—

The first exception has reference to the answer to the third interrogatory, and it is objected that the plaintiff has not by his answer thereto set forth to his utmost knowledge, information and belief what consideration or value was paid or given by the plaintiff for the assignment to him of the bond and mortgage, and when and where and to whom respectively such consideration or value was so paid and given, and whether or not such consideration or value was so paid or given by the plaintiff personally or by or through the means or agency of some other person, and if so who? The answer is as follows: "I say that the consideration between the said William Scott and myself for the assignment to me of said bond and mortgage was an advance by my father the said William Scott to me on account of my share in his estate, to the extent of the amount I might receive from the said bond and mortgage, I being the son of the said William Scott." This sentence is not very neatly worded, nor is its meaning altogether clear. Notwithstanding this I was at first disposed to think it was substantially an answer to the interrogatory. In *Reade* v. *Woodrooffe* (1), the Master of the Rolls says: "When I see that the substantial information is given, though not strictly and technically, I have always discouraged exceptions; but where information is refused, it is the duty of the Court to enforce it." It must, however, be remembered that this interrogatory relates to a fact peculiarly within the plaintiff's knowledge, and in reference to which he cannot refuse to answer both fully and precisely. The defendant is entitled to such admissions as the plaintiff may be in a position to make in terms sufficiently plain and positive to obviate the necessity for proof; and if they are not so, but are couched in language capable of more than one meaning, or in language whose meaning is not altogether clear, it would be unsafe to put it in evidence

(1) 24 Beav. 421.

as an admission, and therefore it is open to exception as not being a sufficient answer. In this answer it is said that the consideration for the assignment of the mortgage from the father to the son was an advance by the father to the son on account of his ultimate share in his father's estate. What I presume was really meant was this—that there was no valuable consideration for the assignment at all, but that the father gave the mortgage to the son and whatever he was able to collect on it was to be considered as an advance on account of his share in his father's estate. It is so simple a matter to tell the exact facts that one wonders in a case like this that it has not been done. I think this exception must be allowed.

Second Exception. — By the fifth interrogatory the plaintiff is required to state how, in what manner and from whom Mary E. Blakney acquired or got the money advanced by her on the bond and mortgage. In his answer the plaintiff admits that this money was Mary E. Blakney's separate property, but says that he does not know from whom she acquired it. It is not very apparent what relevancy to the matters in dispute this inquiry has, but as the plaintiff has undertaken to answer it he must do so fully, and as he has only answered as to his knowledge and not as to his information and belief his answer is defective, and this exception must also be allowed.

Third Exception. — I think this exception must be allowed. The plaintiff is specially interrogated as to whether the $500 originally loaned to Jonah was not borrowed to be put into the business to be employed as part of the capital for carrying it on. The plaintiff has not answered this at all.

The fourth, fifth and sixth exceptions refer to the answer to the eighth interrogatory, and they must, I think, all be allowed. I do not wish to be understood as saying that this plaintiff is under any obligation to make a search at the registry office to get information as to this alleged discharge, which is said to be there recorded — but if he has actually done so and in that way acquired a knowledge of the fact, he is as much bound to answer as to that

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knowledge as he would be in reference to anything else. Or if he has acquired information as to it from other sources upon which he has formed a belief, he is bound to answer fully as to such information and belief. This is a material part of the defence, and the answer of the plaintiff in reference to it is by no means satisfactory. He says in the first place that his utmost knowledge, information and belief are that the said mortgagee did not sign, seal and deliver a document or paper writing on the 14th day of August, 1886, or at any other time as set forth in defendant's eighth interrogatory. This, to some consciences, would be accurate if some slight verbal error had been made in setting out the instrument; but he goes on in the same sentence as follows: "but as to whether any paper writing or document was on said day signed by said mortgagee, and the contents thereof will appear by the records of the registry office of Albert County, to which I crave leave for the fact and certainty of the contents thereof to refer." If it were necessary to draw any inference from this I should say the plaintiff had at all events full information that there was in fact on record, as the defendant alleges, a paper such as that set out or substantially so, though perhaps only signed by the mortgagee without being sealed. The plaintiff in his answer goes on to say that he has no knowledge of the existence of any such paper or of its having been signed, or acknowledged or registered. It is strange that he should crave leave to refer to a document on record, if he was not well assured by information which he believed that the paper was there and what were its contents. He does not pretend to deny this information, and I think the defendant is entitled to have the full benefit of the plaintiff's information and belief as to the fact, if he has no actual knowledge. It is true that the plaintiff says that he had no knowledge, information or belief as to any such document before this action was commenced, but it is also true that he says the first he heard of it was from the defendant's answer. When he answered these interrogatories he had at all events such information on the subject as the defendant's answer

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would give him, and it is not unreasonable to suppose that with that information the plaintiff would take some steps to ascertain whether the statement was true or not. At all events the defendant is entitled to have the plaintiff's oath either that he has no information or belief on the subject, or if he has, what it is.

Seventh Exception. — By the interrogatory to which this exception relates the plaintiff is asked first as to his knowledge, information and belief as to a certain specified paper set forth at length in the question, and where he got such information; and second, as to his knowledge, information and belief as to any such document or writing purporting or professing on its face to be a statement by the mortgagee of the payment to her of the debt secured by said mortgage, and of the release and discharge by her of this mortgage, or in some other and what way relating to such payment and release. As to this latter part of this interrogatory the plaintiff has not answered at all.

The exceptions must all be allowed with costs. The plaintiff will have 30 days from the date of settling the minutes of the order to put in an amended answer.

In re STACKHOUSE, A DRUNKARD.

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April 27.

Drunkard — Allowance to family — Payments out of principal — Act 53 Vict. c. 4, s. 276.

Where the estate of a drunkard did not yield sufficient income to maintain him and to partly maintain his family, the Court, under Act 53 Vict. c. 4, s. 276, ordered a yearly sum to be paid out of principal by the drunkard's Committee to the family for their support.

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

Argument was heard April 24, 1900.

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W. Watson Allen, Q.C., for the wife and children of the drunkard:—

The income from the estate is wholly insufficient to support the drunkard and his family, and the principal must be drawn upon. The estate may therefore with propriety, and with no diminution of advantage to the drunkard, be divided into three equal portions, one to be set apart for the drunkard, and the other two to be vested in the wife and children respectively. Section 276 of Act 53 Vict. c. 4 confides the disposition of the estate to the discretion of the Court.

J. B. M. Baxter, for the Committee:—

The allowance for the support of the drunkard should be calculated upon the basis of his present necessities, and with a regard to the probable duration of his life. The Committee is not unopposed to the request of the petitioner if the Court considers that it has power under the Act to make an order for the immediate division of the estate. There must be considerable doubt of the existence of such a power. The drunkard may reform, and may recover a capacity to manage his affairs. In that event the Committee should be in a position to restore the estate to him. It is not certain that he cannot make a valid will. The Court might very well hesitate to deprive him of that right by an immediate disposition of two-thirds of his property.

1900. April 27. BARKER, J.:—

In July, 1897, a declaratory order was made against Robert T. Stackhouse as an habitual drunkard under the provision of Act 53 Vict. c. 4, and a few days later E. G. Hickson was appointed Committee of his estate under section 264. The order was made on the application of the wife, and it still remains in force, no motion ever having been made to have it annulled or superseded. Stackhouse was entitled to a share of his father's estate which was to be

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distributed on his mother's death, which took place a few months ago. The amount is $3,814.02, and it has been paid to Hickson as Committee of Stackhouse's estate, and is now on deposit at 3 per cent. interest in the Bank of New Brunswick in Hickson's name as such Committee. In 1892 Mrs. Stackhouse and the children then living with her finding it impossible to remain with Stackhouse on account of his habits, removed to Boston, and since that time she, with such assistance as some of her children were able to give to her, has supported herself by taking boarders and in other ways; Stackhouse having during that period substantially contributed nothing to her support. The wife now applies, under section 276 of the above Act, for an allowance for the support and maintenance of herself and family from the fund, and in order to save the expense of a separate application, the Committee, by consent, applies for an order as to the disposal of the fund and an allowance for the support of the habitual drunkard himself. It appears that there are now six children living, three sons, and three daughters of the respective ages of 21, 16 and 14. The eldest son is married, but the remainder of the family have been living together in Boston, the two sons boarding with their mother, the eldest daughter assisting her mother in carrying on the house, and the two younger daughters being at school. Stackhouse is 55 years of age, somewhat impaired in health, without any trade or occupation, and altogether without means of support, except from the fund now in his Committee's hands. The evidence does not warrant much hope of his reformation; and with his present habits, any money in his possession is simply squandered in the most reckless way.

I have had the parties examined orally before me so that I might be fully informed as to the facts, and be the better enabled to make an order which might, in my judgment at least, be proper in view of the necessities of the parties and the provision of the Act under which these proceedings are taken. The Committee — Mr. Hickson — asked for a yearly allowance not exceeding $200; and Mr. Allen's proposition on behalf of Mrs. Stackhouse was that

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the fund be now divided in three parts — one to go to Stackhouse, one to his wife, and the other among the children. As this is, I believe, the first time any such question has arisen under this Act, I was desirous of giving the matter some consideration so that my conclusions might afford some guide for future applications of a similar character. These provisions in reference to "habitual drunkards," by which this Court is vested with power to act, have, I think, as their primary object the preservation of the drunkard's property. It is not enough to give the Court power to interfere that the man should be an habitual drunkard — but he must be possessed of or entitled to property which by reason of his habits he is unable to manage, and which he squanders; or else he must by reason of his habits be transacting his business prejudicially to the interests of his family. So far as the control and management of his property are concerned he is treated, so long as the declaratory order and proceedings founded thereon are in force, in almost identically the same way as a lunatic found so by inquisition whose property is in the hands of a Committee. See section 276. In *Ex parte Whitbread* (1), Lord Eldon says: "The Court in making the allowance has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court looking at what it is likely the lunatic himself would do if he were in a capacity to act, will make some provision out of the estate for those persons." In *In re Blair* (2), Lord Cottenham said "that he entertained great doubts with respect to the power of the Great Seal to grant, and with respect to the propriety of granting allowances to relations of lunatics for whom the lunatic was not legally bound to provide." Lord Jessel in *In re Evans* (3) says: "I concur with Lord Cottenham in thinking that the practice of giving away a lunatic's property ought to be narrowed rather

(1) 2 Mer. 99. (2) 1 M. & C. 300. (3) 21 Ch. D. 297.

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than extended. It is not the province of the Court to give general charity at the expense of a lunatic's estate." I am very clearly of opinion that Mr. Allen's suggestion of a division of the fund ought not to be entertained. No such thing, I am satisfied, was ever intended by the Act, and it is altogether opposed to the principle by which lunatics' estates are regulated. If it be true that in dealing with a lunatic's estate you should, as Lord Eldon says, always look to the probability of his recovery, there are stronger reasons for doing so in the case of an habitual drunkard. The object of the Act was not to take the drunkard's property away from him, except in order to prevent it from being squandered and dissipated by himself. This Court must take care that he and his family, for whom he is under obligation to provide, get such support and maintenance from it as is necessary, but anything not so required must go back to the drunkard himself in case he obtains a dissolution of the order. Section 276 expressly authorizes an appropriation to be made from the moneys in the Committee's hands for the support and maintenance of the drunkard and his family; and the only questions are whether it is necessary to make any such appropriation, and if so, how much? The fund is not very large, but if it were much larger I should think the allowance for the drunkard's support should not be so generous that he would feel there was no longer any necessity for self-exertion, and no incentive to reform the habits which had led him and his family into such uncomfortable straits. Considering all the circumstances, I shall order that the Committee be authorized, until further order, to appropriate from the funds in his hands, for the support and maintenance of the drunkard yearly, a sum not exceeding $200; and that he pay to the wife for the support of herself and three daughters, for the next two years, the sum of $200 a year, payable in advance, and thereafter the sum of $100 a year, payable in advance, until further order. The costs of the appointment of Committee and this application will be taxed, and be paid by the Committee out of the fund.

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May 9.

In re HARRIET LIGHT, A LUNATIC.

Lunatic — Death of Committee — Interim Committee of person and estate of lunatic — Ex parte appointment.

On the death of the Committee of the person and estate of a lunatic the Court appointed on an *ex parte* application an interim Committee.

This was an application for the appointment of a new Committee of the person and estate of Harriet Light, a lunatic, so found, in the room of the deceased Committee, and for the appointment of an interim Committee of her person and estate.

The deceased Committee of the person of the lunatic were James R. Ruel and his wife Sophia M. Ruel, and the deceased Committee of the estate of the lunatic was the said James R. Ruel. Both Committees were appointed in 1882. Sophia M. Ruel died May 20, 1894, and thereafter until the time of his death, March 8, 1900, James R. Ruel acted as sole Committee of the person of the lunatic. The estate of the lunatic yields a gross income of $1,895, and consists of real estate under lease, situate in the City of Saint John, and of bonds of the par value of $9,500. The petitioner is a son of the deceased Committee, and resides at the City of Saint John. Another nephew and a niece, both of age, of the lunatic reside at the City of Saint John. The lunatic is kept at a private ward in the Provincial Lunatic Asylum at a cost to her estate of $195 per quarter, payable quarterly, and has been accustomed to receive from her late Committees liberal and suitable allowances out of her estate of clothing and comforts. A scheme of allowance for the maintenance of the lunatic was not settled in the order and commission appointing the late Committees, and the Committee of the estate of the lunatic had never passed his accounts in Court, but had filed annually an account of his receipts and disbursements. The petitioner prayed that an inquiry might be had as to the nature and amount of

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the property and yearly income of the lunatic, and what portion of the income should be applied for the maintenance of the lunatic, and that he might be appointed Committee of the person and estate of the lunatic, and that pending such inquiry and appointment he might be appointed interim Committee of the person and estate of the lunatic.

The application was heard May 9, 1900.

A. G. Blair, Jr., in support of the application :—

It is a matter of some urgency that an interim Committee be appointed. The reference will very likely occupy considerable time, and in the meantime the petitioner or some suitable person should be appointed to manage the estate, collect the rents and income of the estate, and defray the maintenance of the lunatic. In *In re Pountain* (1) the Court appointed on an *ex parte* application an interim receiver of the estate of a supposed lunatic, pending an application for an inquisition.

BARKER, J. :— I order that the petitioner be appointed interim Committee of the person and estate of the lunatic in the place of the deceased Committee, and that he collect the rents and income of the estate of the lunatic and make all reasonable and necessary disbursements for the maintenance of the lunatic, and that a reference be had to report who is the most fit and proper person or persons to be appointed Committee of the person and estate of the lunatic, and to report who are the heirs at law and next of kin of the lunatic, and the yearly income, and the nature, value and quantity of the estate of the lunatic, and what portion of the yearly income should be applied for the maintenance of the lunatic.

(1) 37 Ch. D. 609.

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May 1.

BLACK v. MOORE.

Fraudulent conveyance — Statute 13 Eliz., c. 5 — Foreign assignment of personal property in New Brunswick — "Mobilia sequuntur personam" — Conflict of Laws — Onus of proof — Garnishee — Equitable execution.

A share in the annual income of an estate in Ireland payable under a will through the hands of the executor living in New Brunswick to the beneficiary living and domiciled in Massachusetts was assigned by the beneficiary by assignment executed in Massachusetts to trustee in trust, first, to maintain the assignor and his family, and, secondly, to pay his creditors a limited sum. In a suit in this Province to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under the Statute 13 Eliz., c. 5:

Held, (1) that the validity of the assignment should not be determined by the *lex domicilii* of the assignor, but by the law of New Brunswick;

(2) that assuming the validity of the assignment should be determined by the law of Massachusetts the onus of proving that the assignment was invalid by that law was upon the defendant, and that in the absence of such proof it must be assumed that the law of Massachusetts was the same as that of New Brunswick;

(3) that as the money coming into the hands of the executor was liable to attachment under Act 45 Vict., c. 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within the Statute 13 Eliz., c. 5.

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

Argument was heard March 6, 1900.

F. St. John Bliss, for the plaintiff:—

The assignment is charged with a primary trust in favor of the assignor so onerous as to exclude any possibility of benefit to creditors. After reciting that the assignor is indebted to several persons and that it is his desire to pay them, it is made a condition of the assignment that the assignor and his family are to be assured "a good and decent living." Then the assignment undertakes to fix a limit upon the amount that shall be paid to creditors regardless of the extent of the assignor's property. It is

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only to force an open door to argue that such an assignment is a fraudulent device contrary to the Statute of Elizabeth. We desire to have the assignment set aside that we may garnishee the income in the hands of the executor coming to the debtor. The Act 45 Vict., c. 17, s. 21, provides that a legacy payable by an executor to a judgment debtor may be attached.

G. W. Allen, Q.C., for the defendants:—

The validity of the assignment since it relates to personal property must be determined by the law of Massachusetts where the parties to it are domiciled, and if by that law the assignment is valid, it must be valid here. There is no proof that the Statute 13 Eliz., c. 5, has been adopted in Massachusetts, or that by the law of that State the assignment is void. The onus of furnishing this proof is upon the plaintiff. The Statute 13 Eliz., c. 5, has no application since the debtor assigned property not subject to seizure under execution, and its assignment could not defraud, hinder or delay the plaintiff: *Sims* v. *Thomas* (1). There it was held that a bond for securing an annuity is not "goods and chattels" within the Statute 13 Eliz., c. 5, and consequently an assignment of it could not be fraudulent as against creditors.

Bliss, in reply:—

Sims v. *Thomas* (1) was decided prior to the Judgments Act, 1 & 2 Vict., c. 110 (Imp.), by which almost every description of property may be taken in execution. Similar legislation has been enacted in this Province by chapter 47, C. S. There can be no question that the remedy by attachment under Act 45 Vict., c. 17, s. 21, is open to the plaintiff in the event of the assignment being set aside.

1900. May 1. BARKER, J.:—

The points in this case which are somewhat novel arise upon the following facts. One Cherry Moore died at

(1) 12 A. & E. 536.

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Fredericton in October, 1893, having first made a will dated May 18, 1888, executed at Fredericton, by which she devised all her property of every kind upon certain trusts to her executors, her sons, John Moore and the defendant Edward Moore. John Moore having died before the testatrix, probate of the will was granted by the Probate Court of York County to the defendant Edward Moore, who has since acted as sole executor and trustee under the will. The estate left by the testatrix consisted among other things of a large number of shares in a linen company in Belfast, the value of which varied somewhat from time to time, but the whole estate as stated by the executor Edward Moore in his answer was about a million dollars. The executor had power under the will to postpone so long as he thought desirable the division of the estate, but when divided, the defendant Thomas E. Moore, who was a grandson of the testatrix, was entitled to one-fifteenth share, and until the corpus of the estate was divided the net income thereof was to be distributed by the executor and trustee among the persons entitled to the corpus and in the same proportions. Under the will therefore the defendant Thomas E. Moore was entitled on the division of the estate to one-fifteenth part, and in the meantime to one-fifteenth of the net annual income. The way in which the business has been managed is this. It is under the control and management of an agent resident in Belfast acting under power of attorney from Edward Moore, and every six months this agent remits the net dividends to Edward Moore who resides at Fredericton by a bill of exchange on London which Moore sells to the Bank of British North America at Fredericton, and the proceeds he distributes by cheques on the Fredericton branch to the several persons entitled. The dividends thus distributed amounted according to Edward Moore's answer, in 1895 to $16,005.42; in 1896 to $32,462.06; in 1897 to $24,345.39; and in 1898 to $25,818.93, and in the first half of 1899 to $11,414.40. In 1894 the plaintiff, who is a solicitor residing and practising at Fredericton, was employed by the defendant Thomas E. Moore and three of the

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other devisees to go to Ireland where all the estate was situated to ascertain its nature, extent and value, and for his services he was to be paid by the parties in a proportion agreed upon. Thomas E. Moore's share amounted to $175.83, which he never paid. In 1898 the plaintiff commenced an action in this Province for the recovery of this sum, and on August 15th of that year he recovered a judgment in the Supreme Court against him for $245.63, upon which he issued a writ of *Fi. Fa.*, which was returned *nulla bona*, and upon which nothing has been paid. At the time the will was made and from that time forward the defendants Thomas Moore and Thomas E. Moore were resident and domiciled in the State of Massachusetts, and the defendant Edward Moore has always resided in this Province. On April 26th, 1895, the defendant Thomas E. Moore made and executed to his uncle the defendant Thomas Moore, a certain assignment which so far as it is material to the case is as follows:—"Know all men by these presents that I Thomas Moore of Dracut, County of Middlesex, and Commonwealth of Massachusetts, in consideration of four thousand five hundred and seventy dollars to me paid by Thomas Moore of Littleton, in the said County, the receipt whereof I do hereby acknowledge, do hereby assign and transfer unto the said Thomas Moore all my rights, title and interest, claims and demands of whatsoever kind and nature in property, either real or personal, which I now have and which at any time I may have as beneficiary in a will of Robert Moore (intended to be Cherry Moore) late of Belfast, Ireland, deceased, a copy of which is hereto annexed to wit. The condition of this transfer is that, whereas I the said Thomas Moore the grantor and assignor being heavily indebted towards several persons in said Lowell and also to divers other persons outside of Lowell by reasons of money borrowed, goods purchased and other duties or obligations for which I am personally responsible out of my income which is altogether inadequate and insufficient, and being desirous to liquidate the same by satisfying all my creditors equally and impartially, but while doing so, to assure to

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my wife, children and myself a good and decent living. And whereas I the said Thomas Moore being out of employment and seeing no prospects of finding any as yet that would suit my inclination, relying exclusively on the income that has been given to me until now for my subsistence and the money I derive from horse trading, which is my occupation and has always been. And whereas the said Thomas Moore of Littleton, who is my uncle, has undertaken to assist me financially. I the said Thomas Moore of said Dracut, releasing all my rights, title and interest in the above-named property, have agreed with the said Thomas Moore, my uncle, as follows:—

"1. That the said Thomas Moore of Littleton is to take possession of all my property, either real or personal, and in return he is to pay my debts after satisfying the debts owed him by me, but he is not to pay more than two thousand dollars in all.

"2. I will engage myself in the business of trading horses as heretofore, and whatever money I will derive from any exchange I am to divide with the said Thomas Moore of said Littleton, who shall keep the ownership of any horse I may possess temporarily or momentarily for the purpose of trading. He shall be responsible for any mistake on my part while in that trade.

"3. This division of profits will last until all my debts are paid and after that I am to be sole; said debt it is understood arises from a loan of money made to me by said Thomas Moore of Littleton, and secured by several notes aggregating to twenty five hundred dollars. The said notes are as follows: January 1, 1894, $500; March, 2, 1894, $500; June 2, 1894, $500; September 16, 1894, $800; January 3, 1895, $700, and April 26, 1895, $800." The instrument then goes on to mention, and apparently to confirm, a bill of sale between the same parties of some horses and other property for the consideration of $350.

During the period which elapsed between the execution of this assignment and commencement of this suit, the defendant Edward Moore has paid Thomas E. Moore's share of the income of the estate to his assignee, Thomas Moore.

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This amounted as Edward Moore states in his answer to $8,117.10. In March, 1899, the plaintiff in order to enforce his judgment took proceedings under Act 45 Vict., c. 17, to attach the funds of Thomas E. Moore in Edward Moore's hands, but for reasons which will appear later on the proceedings failed and the attaching order was set aside. The defendant then filed this bill by which he alleges that the assignment from Thomas E. Moore to Thomas Moore is void as against creditors under the Statute of Elizabeth, as having been made with intent to hinder and delay creditors, and he seeks to have it set aside as to himself and other creditors who may come in and contribute to the cost of the suit, and he asks for a receiver, and for an order that the amount of his judgment be paid by the defendant Edward Moore out of Thomas E. Moore's portion of the estate being or coming into his hands.

The first question to be determined is whether the assignment is void under the Statute. The instrument is not very scientifically drawn, and the meaning of some portions of it is somewhat obscure. It however seems impossible to read its provisions without being forced to the conclusion that the assignor's principal intention in making it was to secure support for himself and family, and to place his income from this estate if possible beyond the reach of creditors who might otherwise interfere with his enjoyment of it. While he seems to have been willing that his creditors in addition to his uncle should be paid to the extent of $2,000 at some period that desire seems to have been altogether secondary to the more important object of securing a support for himself and family, and as a necessary part of that arrangement to place it beyond the reach of his creditors. What his indebtedness was at the time does not appear beyond what one may gather from the assignment itself. No evidence was given on the point at the hearing, and though Thomas Moore claims in his answer a very large indebtedness to him, he has offered no proof of it, and he is altogether unable to give any account whatever of the appropriation of the monies which he has received under the assignment, and which as I have already

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mentioned amount to upwards of $8000. Apart altogether from any question as to the great difference between the value of Thomas E. Moore's interest in the property transferred and the amount of his indebtedness placed at the highest figure named, I think there appears on the face of the instrument itself a clear expression of his intention to assure for himself, wife and children out of the property transferred what he calls "a good and decent living." If without the assignment the creditors could not have interfered with the owner's appropriation of his property, then the assignment was not necessary for that purpose. If on the contrary they could have done so, and it is clear that they might, then it seems obvious that the assignment was made to head off the creditors, so that his main object of securing a benefit for himself and family might be accomplished. This in my opinion is ample to render the transfer void as against the plaintiff. Mr. Allen did not contend very strongly against this view, but he raised two other questions upon which as he claimed the plaintiff must fail in this action. His contention was that as this assignment was made in a foreign country by and between persons domiciled there its validity must be determined by the *lex domicilii*, and that as personal property follows the person, if the assignment was good in Massachusetts where it was made, it must necessarily be held good here as to the personal property coming into the hands of Edward Moore for the use and benefit of the assignor. And he contended therefore that it was incumbent upon the plaintiff to shew that the contract was void by the law of Massachusetts.

While it is quite true that the general rule is as stated by Mr. Allen, it has many exceptions. In *Green* v. *Van Buskirk* (1), Mr. Justice Davis in delivering the opinion of the Supreme Court of the United States says: "The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and the theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be

(1) 7 Wall. 139.

located. But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined.'" In the same case it is said that there is no absolute right to have such transfer respected; it is only a principle of comity that it is ever allowed, and that the principle always yields when the laws and policy of the State where the property is prescribe a different rule of transfer from that of the State where the owners live.

In *Guillander* v. *Howell* (1), a citizen of New York owning personal property in New Jersey, made an assignment of it with preferences to creditors which was valid in New York but void in New Jersey. Certain creditors in New Jersey seized the property there, under their foreign attachment law, and sold it, and the Court of Appeals recognized the validity of the attachment proceeding and disregarded the sale in New York.

In *River Stave Co.* v. *Sill* (2), the facts were these. A company incorporated in Michigan, while in insolvent circumstances, gave a mortgage upon chattels in Ontario to a Michigan creditor to secure previous cash advances made by the company under a verbal promise by two of the directors to give security. The effect of this mortgage was to delay and prejudice other creditors and to give the defendant a preference over them. By an Act of the Ontario Legislature then in force, 48 Vict., c. 26, an assignment of that nature was void, and the contention was made there as it is made here that the law of the domicile must prevail. Armour, J., in delivering the judgment of the Court, says: "It remains to consider the contention of the defendant's counsel that as the mortgagors and mortgagees were both domiciled in Michigan, and the mortgage was valid according to the laws of that State, the mortgage could not be affected by our laws, although the property mortgaged was within our territory and jurisdiction." The law as to this contention is well and tersely stated in *Clark*

(1) 35 N. Y. 657. (2) 12 O. R. 557.

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v. *Torbell* (1), by Foster, J., and adopting that case the Court in Ontario held that the law of Ontario prevailed and the mortgage was held bad. The same rule was acted on in *Marthison* v. *Patterson* (2). The Courts in Massachusetts have held to the same view. See *May* v. *Wannemacker* (3); *Zipsey* v. *Thompson* (4); *Fall River Iron Works Co.* v. *Croade* (5); *Ingraham* v. *Geyer* (6). See also *In re Maudslay* (7).

The provisions of the Statute of Elizabeth as to transfers made with intent to defeat, hinder and delay creditors have been substantially adopted by every English-speaking country as a part of its jurisprudence; and it can scarcely be said to be in accordance with either the law or the policy of this Province that an assignment such as the one under discussion should be held good as against creditors, when if made here it would be held void as against creditors. I should myself be prepared to hold the transfer void as against creditors so far as it relates to personal property within the Province, even assuming that it is perfectly good as against creditors by the law of Massachusetts. I do not however concur in the suggestion of the defendants' Counsel that the onus is upon the plaintiff of shewing whether or not it is good by the law of Massachusetts. The question is not one between the parties to the instrument, but between the assignor and his creditors as to their rights and remedies here against money or property of the debtor here for the recovery of their judgment debts. If the law of the owner's domicile be important or in any way affects the question, those who rely upon that fact are, I think, bound to prove it in some way. And in the absence of such proof it must be assumed that the foreign law is the same as our own, and the point must be determined on that hypothesis. In *Smith* v. *Gould* (8), Lord Campbell says: "It is said indeed that we ought, in the absence of evidence, to presume the law to be as contended for by the

(1) 58 N. H. 88.
(2) 20 O. R. 125; 720.
(3) 111 Mass. 202.
(4) 1 Gray, 243.
(5) 15 Pick. 11.
(6) 13 Mass. 146.
(7) [1900] 1 Ch. 602.
(8) 6 Jur. 543.

appellant, the law of England upon this subject being an exception to the law of all other commercial nations. But we apprehend that where reliance is placed by any party upon a difference between the law of England and the law of a foreign State upon such a subject, he is bound by witnesses or books of authority to shew that there is such a difference." See also *Re O'Brien* (1); *Toponce* v. *Martin* (2); *Langdon* v. *Robertson* (3); *Graham* v. *Canandaizua Lodge* (4); *Re Central Bank* (5).

The other ground relied on by the defendants is that this money, which comes into the hands of the defendant Edward Moore for Thomas E. Moore, is not capable of seizure under execution, and therefore it can be no fraud upon a creditor to transfer it as he is losing nothing which he could make available for the payment of his judgment; and *Sims* v. *Thomas* (6) was cited as an authority for that position. Money, however, is capable of seizure on an execution, and debts due or owing to a judgment debtor can be attached in garnishee proceedings at the instance of his creditor, and made available for the payment of the creditor's judgment. In this respect the law both in England and here has been altered since *Sims* v. *Thomas* was decided, and in my opinion an assignment of money, debts or any other property, which by execution or otherwise can be made available for the payment of a judgment debt, can be set aside at the instance of the judgment creditor, if it was made with the intent mentioned in the Statute. There can be no doubt I think that in this case the instant that money representing the income of this estate came into the hands of Edward Moore, as trustee for distribution among the beneficiaries, Thomas E. Moore, as one of them, could proceed for the recovery of his share as a legal or equitable debt due him and, except for the assignment to Thomas Moore, could enforce payment. That being so, this plaintiff could have intervened and attached the debt for the purpose of paying his judgment.

(1) 3 O. R. 326.
(2) 38 U. C. Q. B. 429.
(3) 13 O. R. 497.
(4) 24 O. R. 255.
(5) 21 O. R. 519.
(6) 12 A. & E. 536.

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The plaintiff's garnishee proceeding failed on two grounds — first, it was not clearly shown that at the time Edward Moore had any money in his hands belonging to Thomas E. Moore; and second, if he had, the assignment stood in the way, which though void as against creditors, was good as between the parties themselves, and there was no procedure in the garnishee action to try the validity of the assignment and the rights of the various parties. The assignment therefore does withdraw from the reach of the creditor money or debts, which but for that he could reach by ordinary legal process, and in that way it delays, hinders and defeats the creditor, and forms ample reason for the interference of this Court. In *French* v. *French* (1) it appeared that a trader in insolvent circumstances agreed to sell his stock and business in consideration of a money payment, and that the purchaser should, during the joint lives of himself and wife, pay him, the trader, an annuity equal to one-quarter of the profits; and a contingent annuity to the wife, if she survived her husband, equal to one-sixth of the profits. It was held that a creditor could impeach that part of the transaction relating to the annuity as void under the Statute of Elizabeth. The Lord Chancellor says: "I must assume that at the date of the agreement the debtor was not in a condition to pay his creditors in full, and if that were so, any settlement which he could have made, the effect of which would be to prevent his creditors from getting the benefit of what, but for the settlement, they might have got, would, I think, be a transaction clearly within the Statute." Again he says: "I consider the annuity so payable to the widow just in the same light as if it was taken and applied to his own purposes, and abstracted from his creditors; and in my opinion it amounts to a voluntary settlement in favor of his wife. It formed clearly a portion of the consideration which instead of keeping himself for the benefit of his creditors, he chose to keep for the benefit of his wife. The law is clear that such a transaction is fraudulent as against creditors, that is to say, it is an attempt to abstract from

(1) 6 DeG., M. & G. 95.

creditors what they are entitled to look to for payment of their debts." In the case just cited the bill had been filed for the administration of the settlor's estate, but the decision does not proceed upon any distinction which may be suggested between that case and the present one. See *Neale* v. *Day* (1). In *Banack* v. *McCulloch* (2), Wood, V.-C., held that since the passing of Act 1 and 2 Vict., c. 110, permitting money or bank notes to be taken in execution, a person largely indebted could not pass over to a child money or bank notes for the purpose of making a purchase; and if he did his creditors might follow the money into the land or stock, or whatever had been purchased therewith; and any voluntary gift of it would be void against them under the Statute of Elizabeth. In such cases it has been the established practice of this Court at the instance of a judgment creditor to grant aid by way of equitable execution; and, when necessary, to appoint a receiver as is asked for in this case. Numerous cases are to be found since *Neate* v. *Duke of Marlborough* (3) was decided, where equitable executions have been granted in order to make the debtor's equitable interest in land available for the payment of the judgment debt, and the same remedy is applied in other cases. In *Webb* v. *Stenton* (4), the facts were very similar to those of the present case. The judgment debtor was entitled during his life to one-sixteenth share of the income arising from a certain trust fund under a will, the amount being payable half-yearly. The question was whether this fund was attachable as a debt due the debtor. There was at the time no trust money in the trustee's hands, and on that ground it was held that there was no debt to attach. Cave, J., says: "A more simple course is for the plaintiff to apply for the appointment of a receiver, which would give him all he seeks to obtain by the present order." Fry, L. J., said that he thought the power of the judgment creditor to obtain a receiver under the practice of the Chancery Division was adequate to meet all that might be required, and would

(1) 4 Jur. N. S. 1225.
(2) 3 K. & J. 110.
(3) 3 M. & C. 407.
(4) 11 Q. B. D. 518.

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prevent any denial of justice; and Lindley, L. J., agreed in this view.

In *Vyse* v. *Brown* (1), the defendant Brown had in his hands, as executor of an estate, a legacy of £500, payable to Wise, who assigned it to Brown to invest and hold the income for the benefit of Wise's wife. The plaintiff, who was a judgment creditor, attached the money as a debt due from Brown to Wise, alleging that the assignment of the fund to Brown was a voluntary settlement and void as against the judgment creditor. Williams, J., says: "It was argued that the settlement must be treated as void and of no effect, and that consequently Brown stood in the position of an executor holding in hand a legacy due to the judgment debtor. There is, however, a fallacy in this argument; for even supposing that the plaintiff had taken the proper steps to set aside the settlement as void, and had succeeded in doing so, even then Brown could never have been placed in the position of being obliged to pay over the money to Wise: the settlement would still be valid and subsisting between the parties; and although in such a suit Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor, that could never be by reason of his becoming indebted to the judgment debtor; the forms of decrees in such cases invariably exclude the settlor from all interest, and direct that any surplus of the fund shall follow the trusts of the settlement." So in *Fuggle* v. *Bland and Wife* (2), the plaintiff, who was a judgment creditor of the two defendants, obtained a receiver of the wife's income from property held in trust for her under her father's will. In *Westhead* v. *Riley* (3), a receiver was appointed of a sum taxed to the defendant as costs and payable to him out of a fund in Court. Chitty, J., says: "As there is no way of getting this fund except by the appointment of a receiver, which operates as equitable execution, I shall therefore appoint a receiver as asked, but shall make no declaration of charge." The judge there thought the case

(1) 13 Q. B. D. 199. (2) 11 Q. B. D. 711. (3) 25 Ch. D. 413.

within the principles laid down in *Anglo-Italian Bank* v. *Davies* (1); and under the authority of the same case in *Bryant* v. *Bull* (2), the plaintiff, who had a judgment for some costs, obtained the appointment of a receiver of dividends arising from stocks held in trust for the benefit of the debtor. Bacon, V.-C., says: "The contention amounts to this — that this lady, being a debtor under a judgment of the Court for the payment of costs, is to retain her interest in this fund, and leave the applicant unpaid. But that is what the law does not permit." See also *Stuart* v. *Grough* (3).

It is true that in some of the cases I have cited the application for the receiver was made under provisions of the Judicature Act, which are not in force here, and which authorized the appointment under a procedure which we have not in use. The principle, however, upon which the Court acted in making the appointment, as well as the object to be gained in making it, remains the same so far as cases like the present are concerned. In *Anglo-Italian Bank* v. *Davies*, Lord Jessel says that he thinks sec. 25, sub-sec. 8, of the Judicature Act enlarged the powers formerly possessed by Courts of Equity of granting injunction or receivers, but as Lord Justice James says in *Day* v. *Brownrigg* (4), "it does not in the least alter the principle on which the Court should act." See also *Gaskin* v. *Balls* (5), per Thesiger, L. J.

In this present case it is, I think, quite competent for this Court, having decided that the assignment in question is void as against the plaintiff and other creditors, to appoint a receiver of the moneys assigned, and to direct payment of the creditors who become parties to this suit out of the fund. As it appears that the defendant Edward Moore has in his hands sufficient money to pay the plaintiff his judgment and the costs of this suit; and there are no other creditors interested in the suit, I shall order the defendant Edward Moore to pay the plaintiff the amount

(1) 9 Ch. D. 275.
(2) 10 Ch. D. 153.
(3) 15 A. R. 299.
(4) 10 Ch. D. 307.
(5) 13 Ch. D. 329.

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due on his judgment and the costs of this suit, to be taxed, out of moneys in his hands going to Thomas E. Moore, under the will of Cherry Moore; and that any balance of such moneys be paid and held subject to the assignment to Thomas Moore by Thomas E. Moore, it being declared void only as against creditors. There will be a decree accordingly.

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June 13.

LAWTON SAW CO., LIMITED v. MACHUM.

Partnership—Agreement—Construction—Losses—Contribution inter se.

By an agreement between plaintiffs and defendant it was provided that the defendant, who was carrying on the business of manufacturing wire fencing, should furnish machines, in which he had patent rights, for the purpose of carrying on the business of manufacturing and selling wire fencing; that he should devote his time and energy in furthering the interests of the business; that the machines and patent rights therein should be security for money advanced by the plaintiffs; that the plaintiffs should advance to the defendant $500, purchase wire needed for manufacturing, and pay wages, etc., in consideration of a commission of five per cent. on all purchases and advances; that the plaintiffs should furnish space on their premises for the business at a yearly rent; that the defendant should receive a weekly salary; that the plaintiffs should attend to the office work of the business, for which they should be paid a weekly sum; that the net profits of the business should be divided; that the business should be conducted under a company name, and that the agreement should continue for one year, when plaintiffs could purchase a half interest in the business and patent rights of the defendant or continue the business for a further term. The business resulted in a loss.

Held, that the parties were partners *inter se*, and should share equally in the losses of the business.

The facts fully appear in the judgment of the Court.

Argument was heard May 18, 1900.

J. D. Hazen, Q.C., for the plaintiffs:—

The agreement contains all the necessary elements to

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constitute a partnership. Under it each party contributed to the capital of the undertaking, the plaintiffs' share consisting of money chiefly, and the defendant's share consisting of the wire fence machines, in which he had patent rights, and his skill and labor in carrying on the business. Provision is made that the net profits of the business are to be divided between the parties. The fact that the defendant in addition was paid a sum per week by the plaintiffs does not diminish the effect of the provision to share the profits, or establish that he was merely an employee. Provision was also made that the plaintiffs were to be paid a certain sum per week. If the relationship between the parties was that of employer and employee it is strange that the employer should stipulate for an amount to be paid to him. Each party was to share in the management of the business, and a firm name was adopted. *Dame* v. *Kempster* (1) is a case very like the present. There an agreement entered into between three persons to carry on the business of manufacturing roller skates under a company name, recited that two of them should assign to the third all interest in a patent; that the third was to buy materials and sell the products, control the finances, and furnish the capital; that each was to receive compensation for his services; that the net profits, after deducting expenses, including such compensation, should be divided equally between them, and that neither should sell or assign his interest in the business without the consent of the others. They were held to be partners on the grounds that the parties had a community of interest in the property or stock engaged in the business, and a community of interest in the profits. See also *Green* v. *Beesley* (2); *Brett* v. *Beckwith* (3). While an agreement to share profits does not, since the case of *Cox* v. *Hickman* (4), necessarily constitute a partnership, it is strong *prima facie* evidence of partnership. And the conclusion that a partnership was intended would be irresistible if supported by other circumstances, such as exist here. See *Pooley* v. *Driver* (5), where Jessel, M. R.,

(1) 146 Mass. 454, cited 19 Rul. Cas. 322.
(2) 2 Bing. N. C. 108.
(3) 3 Jur. N. S. 31.
(4) 8 H. L. C. 268.
(5) 5 Ch. D. 458, 470.

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says: "I think it may be taken as established by the authorities, that, in the absence of something in the contract to show a contrary intention, the right to share profits, as profits, constitutes, according to English law, a partnership. I cannot find, as far as I can see, a single authority which conflicts with that proposition."

A. I. Trueman, Q.C., and *E. R. Chapman*, for the defendant:—

Division of profits and losses is not an exhaustive or even a sufficient test of the existence of a partnership. While it furnishes a strong test of partnership, yet whether that relation actually exists or not, must depend on the real intention and contract of the parties. There can be an agreement to share profits without an agreement to share losses. It is clear from a fair reading of the agreement that a partnership was not in the contemplation of the parties, or that the parties were to share in the loss of the plaintiffs' capital. The transaction on the part of the plaintiffs was a speculative one, not unaccompanied by practical considerations, involving a risk by them of the capital they should advance, but with no intention that its loss should be proportionately borne by the defendant. The venture was provisional in its nature; it was limited to one year, and its substantial purpose was to test defendant's machines, and whether the business could be carried on profitably, so that at the end of the year the plaintiffs could determine whether they would purchase a half interest in the machines, and in the business previously carried on by the defendant. The agreement to share profits has no significance for the purpose of creating a partnership. It was merely a mode of estimating the *quantum* of profits, if any, each should receive, but it did not embrace the result that the defendant should share in the loss of plaintiffs' contributions to the business. A depreciation in the value of defendant's machines would take place from their use during the year, but the plaintiffs would not expect to be charged with a portion of the loss. The provision that

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the defendant is to be paid a weekly salary by the plaintiffs, regardless of the state of the business, is inconsistent with the theory that there was a partnership. The case closely resembles *Walker* v. *Hirsch* (1).

Hazen, Q.C., in reply.

1900. June 19. BARKER, J.:—

On September 21, 1895, the plaintiffs and defendant entered into an agreement for the purpose of manufacturing and selling woven wire fence, at St. John. The situation of the parties at the time, was this—The plaintiffs were carrying on their regular business on premises situate in the City of St. John, and the defendant had certain patent rights in what was known as Kitselman's wire fence machines, and he was skilled in the use of these machines and in the manufacture of wire fence. Under these circumstances they entered into the agreement in question, which, omitting the formal parts, is as follows: "The said Albert J. Machum for and in consideration of money advances made by the said Lawton Saw Co., Limited, and mentioned herein, agrees to furnish, set up and put in good working order four (4) Kitselman's wire fence machines with roller attachments for the purpose of manufacturing and carrying on the woven wire fence business, in the building occupied by the said Lawton Saw Co., Limited, and also agrees to devote his time and energies to making sales, putting up fencing and doing all in his power to further the interests of the said business. The said Albert J. Machum further agrees to place as security against money advanced, all machinery, and his rights, secured under patent 28585, from the Kitselman Wire Fence Machine Co., of St. Thomas, Ont. The said Lawton Saw Co., Limited, on their part agree to advance the said party of the first part the sum of $500, and also to import wire for fence making purposes, in consideration of a commission of 5 per cent. on all importations, and on all moneys advanced, and shall advance all moneys required to pay wages, travelling expenses, etc., in

(1) 27 Ch. D. 461.

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connection with the said woven wire business, and shall furnish space for manufacturing in their building, at a rental of one hundred dollars per annum. In consideration of the above, it is mutually agreed between the said Albert J. Machum and the Lawton Saw Co., Limited, that the said Albert J. Machum shall receive a salary of fifteen dollars per week for his services, and one-half of the net profits of the said business. It is further mutually agreed that the Lawton Saw Co., Limited, shall keep all books, do all office work in connection with the said business, including the financial management of the same, in consideration for which they shall receive the sum of $12.50 per week, and one-half of the net profits of the business. The business shall be conducted under the name of 'The Wire Fence Manufacturing Company.' This agreement shall continue in force for one year from the date hereof, at the expiration of which term the Lawton Saw Co., Limited, shall have the privilege of purchasing a full half interest in the said business and rights held by Albert J. Machum under patent 28585 of the Dominion of Canada, at a cost of $2000, or continuing this agreement a further term."

The business was carried on under this agreement until October 1, 1897, when the parties entered into a new agreement similar in its terms to the other, the only difference being that the salaries of $15 and $12.50 were reduced to $11 and $4 respectively; and the plaintiffs' option of purchasing the patent right was omitted. The last agreement was for one year, and at the end of that time,—30th September, 1898—the business was wound up. It is alleged, and so far as I know it is not disputed, that the result of the three years' business was a loss of $2,800, all of which the plaintiffs have paid. The plaintiffs file this bill for the usual account, and for a decree that the defendant contribute one-half of the loss. The plaintiffs contend that by the agreement the parties made themselves partners *inter se*, sharing losses as well as profits, while on the other hand the defendant's contention is that the business was the plaintiffs' business, in which he was merely employed

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as a servant at a salary of $15 a week, and half of the net profits in addition.

The question is simply this, are the plaintiffs entitled to the relief they seek either by express or implied contract, or as a result which the law fixes as an incident to the relation between the parties as created by the agreement. As Cotton, L. J., in *Walker* v. *Hirsch* (1) puts it; "Therefore what we really have to consider is this, what on the contract between the parties are the rights which that contract has *inter se* given to one as against the other." And in determining that question the whole contract must be considered, and not isolated parts of it. There is in this agreement a provision by which these parties are to share equally in the profits. That is, however, not a determining factor, and perhaps not even *prima facie* evidence of a partnership, though it affords such evidence of the intention of the parties, as if uncontrolled by other parts of the contract, may be accepted as evidence that a partnership was intended to be created. See *Badeley* v. *Consolidated Bank* (2).

It is clear by this agreement both parties agree to do certain things for the establishment and maintenance of a business to be carried on under a name selected for the purpose—not the plaintiffs' name, nor the defendant's—but what seems to me to be a firm name. The defendant on his part agrees to furnish the four machines, and give all his time and energy to the business. The plaintiffs on their part agree, first, to make an advance of $500 to the defendant, for which he pledges his machines as security, and also to advance the money necessary to carry on the business, and to import all the wire necessary for the business; and for those latter advances, which are for the business, the plaintiffs have no security, because they are their capital put into the business against the defendant's skill and knowledge of the business, and the use of his machines to be used in carrying it on. On the assumption that this business was to be that of the plaintiffs, and that the defendant was to be merely their salaried servant, it seems to be an odd provision that the plaintiffs should covenant to advance

(1) 27 Ch. D. 468. (2) 38 Ch. D. 238.

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the money necessary for their own business and pay their own clerks and servants. Who would do it in such a case but themselves? From the standpoint of a partnership, it is a usual and reasonable provision. And if this new business was merely an expansion of the plaintiffs' own business it seems unusual, in the case of a corporation particularly, that a new name should be selected, under which it was to be carried on. Who were the Wire Fence Manufacturing Company? Surely the parties to the agreement. Who owned the wire when purchased for the business, or the stock when manufactured for sale? It surely could not be the plaintiffs — but the business — that is to say — the Wire Fence Manufacturing Company — which was the business name of the plaintiffs and defendant. When the stock was sold the purchase money belonged to the business — if it produced a profit the business got the benefit of it, and if there was a loss the business was charged with it. It seems to me that the scheme of their agreement is altogether unlike what one would look for if the plaintiffs were simply embarking on a new business venture, and were employing the defendant as their servant, for whose work and for the use of whose machines they were to pay as a salary one-half the net profits, and a fixed sum per week. The agreement points, I think, to an entirely different state of facts. In fact there is nothing in them to displace any inference of the creation of a partnership, which may be drawn from the fact that there was to be a participation in the profits. This being so, what follows? In *Collins* v. *Jackson* (1), the Master of the Rolls says: "In the absence of any evidence, the presumption is that the partners were equally entitled to profits and equally liable to bear the losses." And in *In re Albion Life Assurance Society* (2), Jessel, M. R., says: "It is said, as a general proposition of law, that in ordinary mercantile partnerships where there is a community of profits in a definite proportion, the fair inference is that the losses are to be shared in the same proportion. I entirely assent to that proposition, although it seems that no positive authority can be adduced in sup-

(1) 31 Beav. 645.

(1) 16 Ch. D. 83.

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port of it." And in such a case where capital has been put in by partners in unequal proportions and it has been lost, the loss falls upon the partners in the same ratio as that in which the profits are shared, and not in the proportions in which the capital was contributed. In this case the defendant has put in his capital as he agreed — that is his skill and knowledge, his services and the use of his machines. He has been paid his weekly allowance for his services as agreed, and has his machines. The plaintiffs on the other hand have put in the money required as they agreed—they have received their weekly allowance for doing the business, but have lost a portion of their capital; and this loss must be divided equally — just as the profits would have been shared had there been any.

There must be an account taken of the business on the terms of the parties being partners on equal shares, and there will be a reference for that purpose. All other questions will be reserved until after the referee has reported.

1900.

August 21.

In re DEAN ARBITRATION.

Arbitrators' Fees — Attendances — Adjournments — Review by Judge.

Where each of three arbitrators charged $5 for each of a number of attendances at meetings which were adjourned without any business being despatched, owing to causes for which the arbitrators were not responsible, a review Judge held the charge not to be unreasonable.

Where arbitrators each charged $10 for each of their sittings at which evidence was taken, or the matter of the arbitration was proceeded with, a review Judge refused to reduce the charge.

Review before Mr. Justice *Barker*, as a Judge of the Supreme Court, of arbitrators' fees, under Act 61 Vict., c. 52. The facts are fully stated in the judgment of the learned Judge.

Argument was heard August 9, 1900.

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

W. Pugsley, Q. C., *contra*.

1900. August 21. BARKER, J.:—

This is an application on behalf of the City of St. John to review the charges made by the arbitrators for fees in the case of William J. Dean, who made a claim for compensation under Act 61 Vict., c. 52. The arbitrators were sworn in on the 14th of November, 1898, and their award was made on the 6th of January, 1900. The award was for $2,500, and was signed by all the arbitrators. The arbitrators' fees as charged, amount to $795, or $265 to each arbitrator, and this application is made to me under section 8 of the above Act, to reduce this amount, on the ground of its being unreasonably large.

I was rather urged by the Recorder, who complained of the great expense to the city of this and other arbitrations under the Act in question, that some scale should be

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laid down by which arbitrators' fees should be determined on a *per horam* basis for the time necessarily occupied. While it is true that the time necessarily occupied is an important element in determining the amount of compensation, it is by no means the only element. And though it may be true that a *per horam* or *per diem* allowance is as simple and convenient a method of estimating arbitrators' fees as any other which can be suggested, unless very considerable latitude were allowed to those vested with authority to settle the question, many cases would arise where the rigid application of any such rule would work unjustly. I must adhere to what I said in *In re Sutton and Jewett Arbitration* (1), and let each individual case be determined on its merits. In that case I pointed out the difficulties in the way of settling these questions without any legislative scale of fees: and although two sessions of the legislature have been held since that decision was given, the city does not seem to have sought any legislation to remedy the evil. I can only exercise the best judgment in this particular case which I can form on the material before me.

The principal item objected to is a charge of $5 to each arbitrator in cases of what are called "adjournments," that is, where the arbitrators met to go on with the work but nothing was done. There are sixteen of these charges, amounting in all to $240. The evidence however shows that in all the cases where the charge is made, the arbitrators were there ready to proceed, and the adjournments took place at the instance of Counsel, and to suit their convenience, or for causes for which the arbitrators were in no way responsible. One or two such adjournments took place at the instance of the Recorder, when his official duties required his presence elsewhere. On other occasions the delay seems to have been attributable to the claimants, who were unable to go on in consequence of the absence of witnesses, or for other reasons. I intimated to Mr. Skinner at the outset that I thought for business men, such as these arbitrators are, a charge of $5 under such circumstances was not unreasonable; and as a similar case might

(1) 1 N. B. Eq. 568.

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arise again, I consulted the Chief Justice and Mr. Justice *McLeod*, and they authorized me to say that they concur in my view. The remainder of the bill is made up of a charge of $5 for attending to be sworn in, and eighteen sittings, when evidence was given, or the matter was proceeded with in some way, and for which a fee of $10 for each session is charged. So far as one can gather from perusing a copy of the stenographer's notes of evidence—and that is really all I have to guide me—the sessions took place generally in the afternoon commencing at 2.30, but occasionally in the evening at 7.30 or 8 o'clock, but how long they continued I am unable to tell, as the record does not show. The stenographer's return contains 294 pages of type-writing, but that does not include any report of the various arguments and discussions which in such cases constantly take place, and which consume much time. I do not feel called upon in these cases to review the charges of arbitrators with the same particularity which a taxing-master with a fee table before him would exercise. It is only in cases where it is made to appear that some substantial overcharge has been made that I should feel warranted in interfering, and substituting my judgment for that of the arbitrators, where they have acted *bona fide*. While I am not able from the evidence before me to say that the fees charged in this case are unreasonable, in view of those allowed in the Sutton and Jewett case, I cannot help thinking that these proceedings occupied more time than was really necessary. I am aware that however anxious arbitrators may be to expedite proceedings pending before them, they sometimes find difficulties in the way which they are unable to overcome. That may be a weakness peculiar to the tribunal itself, but at all events arbitrators ought not to suffer a pecuniary loss for delays in no way attributable to them.

The application will be refused.

In re WIGGINS' ESTATE.

1900.
August 21.

Trustees—Commission—Personal Estate—Income—Investments.

No fixed rule can be laid down as to the commission trustees will be allowed by the Court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate.

Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of 5 per cent. on income, a commission on the estate was refused, but a commission of 1 per cent. was allowed on investments made by them.

Application by trustees for commission. The facts are fully stated in the judgment of the Court.

Argument was heard August 9, 1900.

A. O. Earle, Q.C., for the trustees :—

The trustees consider that they should be allowed a commission of five per cent. on the whole trust estate. They have had the care of the estate for upwards of seven years, and as it consists of a large number of investments it has imposed considerably upon their time. By Act 53 Vict., c. 4, s. 210, the Court may allow to trustees such commission as shall seem reasonable. In the Probate Court the practice is to allow executors five per cent. commission on all personal property received by them. See *Wright* v. *Berton* (1).

G. C. Coster, for Mrs. Ada B. Wiggins :—

As the trust deed contains a provision for remunerating the trustees they cannot very well ask for an additional allowance, except possibly a small commission on re-investments made by them. See *In re Eaton's Estate* (2).

1900. August 21. BARKER, J.:—

This is an application by trustees for compensation.

(1) 32 N. B. 708.

(2) 1 N. B. Eq. 527.

1900.

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By an assignment bearing date November 8th., 1893, George C. Wiggins conveyed certain property consisting of stocks and mortgages to George E. Fairweather and Edmund G. Kaye, upon trust to pay the annual income, after deducting a commission of 5 per cent. to themselves, to himself during his life, and after his decease, to hold the fund for such person or persons as he might by his will appoint, and in default of such appointment, upon trust for Margaret T. O'Brien. The trustees were authorized to vary the investments, with Wiggins' assent, and they were authorized to reimburse themselves out of the trust funds all expenses incurred in the execution of the trust. Wiggins having died, the trust fund is now being handed over to the donee, Mrs. Ada B. Wiggins, and in doing so, the trustees claim by way of compensation a commission of 5 per cent. on the fund for their services, having already received from the annual income the 5 per cent. commission on it provided for by the trust deed. The fund practically remains the same as it originally was, except a sum of $5,113, which was paid off and re-invested. This particular case presents no difficulty, and is a simple one, but before announcing my opinion, I desired to place on record what personally I know was the course adopted by my predecessor in a similar case, more especially as I myself acted upon it in *In re Eaton's Estate* (1), though the case to which I refer was not there mentioned by me. The late Mr. Justice *Palmer* on an application similar to this, made in the estate of Wiggins in 1884, allowed trustees compensation, by way of a commission of 5 per cent. on income, and 1 per cent. on investments running over a period of, I think, six years and upwards. I was counsel for the applicant in that case, and though there is no report of it, I think the case came before the court on appeal, and I know the decision of Mr. Justice *Palmer* was sustained. It is of course impossible to lay down any hard and fast rule by which every case is to be governed, and there may be cases where the compensation may be more properly fixed by allowing an arbitrary sum than a commission. And as the amount is allowed as a

(1) 1 N. B. Eq. 527.

compensation to the trustees for the management of the estate, the trouble in doing so must always be an element in determining the sum to be allowed, and cases may arise where compensation may be given, though there have been no funds re-invested. See *Dixon* v. *Homer* (1); *Re Berkley's Trusts* (2); *Stinson* v. *Stinson* (3); *Re Prittie Trusts* (4).

In most cases the fixing of the compensation by way of a commission will be found a simple and convenient method to adopt, and so long as trustees are removed from the temptation of making short-time investments for the sake of earning a commission by re-investing, such a rule will, I think, in most cases work satisfactorily. In this case the trustees have already received their commission on the income, and I think if they are allowed 1 per cent. on the $5,113 reinvested by them, they will be sufficiently compensated. I allow them that sum, to be divided equally between them.

(1) 2 Met. 240.
(2) 8 P. R. 193.
(3) 8 P. R. 560.
(4) 13 P. R. 19.

1900.
August 31.

BROWN v. SUMNER.

Practice — Security for costs — Form of security — Bond — Recognizance — Act 53 Vict., c. 4, s. 286.

Quaere, whether security for costs of suit may be by recognizance under s. 286 of Act 53 Vict., c. 4, instead of by bond.

Security for costs of suit was ordered to be by recognizance. Security not being given it was ordered that the bill should stand dismissed unless security for costs was put in within a limited time. Before the expiration of the time security was put in by bond in the usual form. Upon an application to set the bond aside and for its removal from the files of the Court on the ground that the security should be by recognizance:

Held, that in view of the second order security was properly put in by bond.

Motion to set aside bond for security for costs, and for its removal from the files of the Court. The grounds are fully stated in the judgment of the Court.

Argument was heard August 28, 1900.

D. I. Welch, in support of motion.

W. B. Chandler, Q.C., *contra*.

1900. August 31. BARKER, J.:—

On July 31, 1899, Mr. Justice *Hanington* made an order for the plaintiff to give security for costs in this suit, and, as a part of the order, directed that the security be by recognizance in the sum of $500 to the Clerk in the usual form, to be entered into before a Judge of the Supreme Court and to his satisfaction. The order also stayed the proceedings until the security was given, and directed the costs of the application to be costs in the cause to the defendants in any event. The security not having been given, an application was made to this Court for an order that the plaintiff's bill stand dismissed, unless security should be given within a limited time, and, accordingly, on

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the 20th of February last, this Court made an order that the bill should stand dismissed, with costs, unless the plaintiff gave security for costs on or before the 1st day of May, then next. Before the expiration of this time, the plaintiff gave security in the sum of $500 by bond, in the usual form, which bond is now on file in this Court. This bond was approved of by the Clerk, and no question is raised as to the sufficiency of the sureties, nor was any objection raised to the form of the security, though the defendants' solicitor had notice of the application to the Clerk for his approval of the security. This present application is made for an order setting this security aside, and directing the removal of the bond from the files of the Court, on the sole ground that it is not in accordance with the order of Mr. Justice *Hanington*, as it is a security by bond instead of by recognizance.

It has long been the settled practice of this Court so far as I am familiar with it, to give security for costs by bond precisely as has been done in this case. Special leave is sometimes given to deposit the money with the Clerk in lieu of the bond, but that is for the convenience of the plaintiff, as either security is deemed ample for the protection of the defendants. See *Daniell* Ch. Pr. (1). This practice was recognized by this court in *Walsh* v. *McManus* (2), and in *Stewart* v. *Harris* (3), and I am disposed to think that it was not the intention of the legislature to alter a practice so well established, by section 286 of the Equity Act, 53 Vict., c. 4, under which this original order for security seems to have been made, though its terms are certainly comprehensive. It would seem to me intended for the case of guardians, and cases of a similar character, where by the practice of the Court security was given by recognizance. It is however unnecessary to determine this point for I think whether the order is good or bad, that this present application must fail. The second order which was obtained, and taken out by the defendants, does not direct that the bill shall stand dismissed unless the security

(1) 4th Am. ed. 33, 36. (2) N. B. Eq. Cas. 86.
(3) N. B. Eq. Cas. 143.

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be given as directed by the first order, though it is based on the fact that the plaintiff was in default under the first order. It simply ordered that the bill shall stand dismissed, unless the plaintiff "give security for costs before the first of May;" the meaning of which is that he give security in the usual manner by bond. The substantial question is, have the defendants the security for which they first applied—that is security for their costs? I think they have; for I am altogether unable to see what answer the parties to this bond can possibly have to any proceeding for its enforcement, and it is admitted that the bond is correct in point of form, that the amount is correct, that the sureties are sufficient, and that it was made and filed within the time limited by the order.

This application must be dismissed, and the costs will be costs in the cause to the plaintiff.

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December 18.

Power of Attorney—Authority to receive surplus proceeds of mortgage sale—Death of grantor before sale—Revocation—Equitable assignment.

Pending a suit for the foreclosure of a mortgage and sale of the mortgaged premises the mortgagor executed and delivered a writing in favor of a creditor authorizing him to collect, recover and receive, and apply on account of his debt, any surplus from the sale, and declaring that the power might be exercised in the name of the grantor's heirs, executors and administrators, and should not be revoked by his death. The sale resulted in a surplus. Before the sale the mortgagor died.

Held, that the writing was not an equitable assignment, but a power of attorney revocable by the grantor's death.

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

Argument was heard November 20, 1900.

A. A. Wilson, Q.C., in support of the application:—

The writing under which Magee claims the surplus proceeds of the mortgage sale cannot be put higher than a power of attorney revocable by the grantor's death. The executor and trustee was entitled to sell the equity of redemption or to redeem the mortgage. In either event the surplus would not have come into existence, and the power of attorney would be inoperative. That the property was taken to sale after the mortgagor's death and the sale resulted in a surplus cannot avail to divest the executor's title. The surplus retained its quality as realty and passed to the executor in that character. The rule is that where a mortgage of freehold estate is sold in the lifetime of the mortgagor, the surplus money arising from the sale is personalty; but if the estate be unsold at the death of the mortgagor, the equity of redemption devolves upon his heir or devisee, and that if a sale subsequently takes place,

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the heir or devisee (in this case the executor) will be entitled to the surplus produce as real estate. Thus, in *Bourne* v. *Bourne* (1), real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to the mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee should enter into possession of the premises, and, at his discretion, sell the same, and pay over the surplus (after payment of the debt, interest and costs) to the mortgagor, his heirs, executors, administrators or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised the estate for a life interest, with remainder over in tail. It was held that there was no conversion, and that the surplus passed by the devise as real estate. See also *Wright* v. *Rose* (2); *Clarke* v. *Franklin* (3); *Jones* v. *Jones* (4), and *Re Cooper's Trusts* (5). The assignment is also void as against other creditors of the deceased as a fraudulent preference within the Act 58 Vict., c. 6.

W. B. Chandler, Q.C., *contra*:—

The power of attorney amounts to an equitable assignment; in order to constitute which it is sufficient that it be payable out of a certain fund, though not in existence at the time the assignment is given. See *Lambe* v. *Orton* (6); *In re Thornton* (7); *Burn* v. *Carvalho* (8).

It is submitted that the surplus of the mortgage sale must be dealt with in the form in which it is found. Where a sale of realty takes place by the order of a Court or by a trustee all the consequences of a conversion follow, unless there is an equity in favor of the heir (here the executor) to reconvert the personalty into real estate. Thus in administration suits the surplus from a sale of real

(1) 2 Hare, 35.
(2) 2 S. & S. 323.
(3) 4 K. & J. 260.
(4) 4 K. & J. 361.
(5) 4 DeG., M. & G. 768.
(6) 1 Dr. & S. 125.
(7) 13 L. T. 516.
(8) 4 M. & C. 690.

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estate is treated as personalty. In *Steed* v. *Preece* (1) a suit was brought by trustees for administration of a trust, and for partition. The Court being of opinion that a sale would be for the benefit of the infant defendant, and the adult defendant consenting, a sale was ordered. The purchase-money was paid into Court, and the infant's share carried to his separate account. The infant subsequently died without having attained twenty-one. It was held that the fund belonged to the infant's legal representative, and was not to be treated as realty. Jessel, M.R., in the course of his judgment refers adversely to the case of *Cooke* v. *Dealey* (2), in which it was decided that where real estate was sold in an administration suit to which the devisee was party, and there remained in Court a surplus after payment of the debts, the surplus in the character of real estate passed to the heir of the devisee. He says: "The judgment in *Cooke* v. *Dealey* is based on a general principle assumed to have been laid down in *Ackroyd* v. *Smithson* (3), viz., that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd* v. *Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the Court or a trustee sell more than is necessary there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale." See also *Flanagan* v. *Flanagan* (4); *In re Wharton* (5); *Mordaunt* v. *Benwell* (6); and *Hyett* v. *Mekin* (7). No equity exists here in favor of the executor for treating the surplus as real estate. He stands in the place of the testator, and best represents him by

(1) L. R. 18 Eq. 192.
(2) 22 Beav. 196.
(3) 1 Bro. C. C. 503.
(4) 1 Bro. C. C. 500.
(5) 18 Jur. 209.
(6) 19 Ch. D. 302.
(7) 25 Ch. D. 735.

1900. giving effect to our equities to have the assignment carried out.

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Wilson, Q.C., in reply.

1900. December 18. BARKER, J.:—

This is an application by David I. Welch, as executor and trustee under the last will and testament of the deceased defendant, for an order for the payment to him of the sum of $346.17, being a fund paid into Court in this cause. Under the decree in this cause for the foreclosure of a mortgage and sale of the premises, the mortgaged lands were sold, and the mortgage money and costs paid; and the fund in question is the surplus proceeds of this sale. The decree was made on June 19, 1900. The sale by the referee took place on September 12, last. About ten days before the sale the defendant died, leaving a will dated July 17, 1891, by which, after devising some small specific legacies, immaterial for the determination of this case, he gave all his real estate and all the remainder of his personal estate to his executor, the present applicant, upon certain trusts. The will was duly proved, and letters testamentary granted to the executor, who states in his petition for this money that, so far as he has been able to ascertain, it forms the entire assets of the estate. He also states in his petition that the defendant was insolvent at the time of his death and also on the 24th of July, 1900, the date of the power of attorney under which this application is opposed, and that the estate will not pay, in addition to funeral and testamentary expenses, fifty cents on the dollar of the liabilities.

The application is resisted by one John S. Magee under a power of attorney to him from the defendant, bearing date July 24, 1900, about a week before the defendant's death, and is as follows:—

"Know all men by these presents, that I, William Gilfillan, of Moncton, in the County of Westmorland, and Province of New Brunswick, gentleman, do hereby constitute and appoint John S. Magee, of Moncton, in the

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County of Westmorland, and Province aforesaid, grocer, my true and lawful attorney, irrevocable, for me and in my name, place, and stead, to take whatever steps may be deemed necessary or advisable for collecting, recovering and receiving from the Supreme Court in Equity for the Province of New Brunswick any surplus which may be realised upon the sale of certain lands and premises in the city of Moncton owned by me, under and by virtue of a decree made in the Supreme Court in Equity on the nineteenth day of June, A. D. 1900, in a suit now pending in said Court between Etta Chapman, plaintiff, and myself, the said William Gilfillan, defendant. And I do hereby authorize and empower the said John S. Magee, in my name and as my attorney, to petition said Court for the payment to him out of said Court of any surplus which may have been paid into Court to the credit of said cause as the surplus proceeds of the sale of the said lands and premises under the said decree, the sale of the said lands and premises having been advertized to take place on Monday, the twelfth day of September, A. D. 1900, at three o'clock in the afternoon, at or near the city market building, in the city of Moncton. I do also hereby authorize, empower and direct the said John S. Magee to apply the net proceeds of any moneys which he may receive or which may be paid to him out of said Court from and out of any surplus proceeds of the sale of the said lands and premises under the said decree, after payment of the expenses of procuring payment of the same out of Court, in payment so far as such surplus proceeds shall extend of any amount which may be due and owing by me, my executors or administrators, to the said John S. Magee at the time of the receipt by him of such moneys; any surplus of the said moneys remaining in the hands of the said John S. Magee after payment of the said amount due to him as aforesaid to be paid by him to me or to my executors, administrators or assigns, as the case may be. I do hereby declare that the powers herein contained may be exercised in the name and on the behalf of my heirs, executors and administrators, and shall not be revoked by

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my death. I, the said William Gilfillan, do hereby agree and covenant for myself, my heirs, executors and administrators to allow, ratify and confirm whatsoever my said attorney or his substitute or substitutes shall lawfully do or cause to be done in the premises by virtue of these presents."

The mortgage contained a power of sale, and provided that, in case of its exercise, the surplus (if any) should be payable to the mortgagor as a part of his personal estate.

Notice of this application having been given to Magee, the matter was heard on the affidavits produced by the applicant. There is nothing before me to show that the defendant at the time of his death was indebted to Magee, or, if so, what the amount of such indebtedness is or how it was incurred, but the matter was argued on the assumption that there was an indebtedness of some kind.

On the part of the applicant it was contended that the power of attorney did not assign any interest in the land, nor in any fund; that, if it did, it was revoked by the defendant's death, when by operation of law, the equity of redemption in the land devolved upon the applicant as trustee under the will, thus empowering him to redeem the mortgage, stop the sale, and thus prevent any fund ever being realised. He also contended that the surplus funds in case of sale retained their character as land, and that, if the power of attorney operated as an equitable assignment of the fund, it was void as an assignment in consequence of the insolvency of the defendant at the time. Whether the decree for sale or the sale itself operated as an equitable conversion of the land or not is a question which I think does not arise here. That might be a question between the heir-at-law or a devisee of the real estate and those interested in the personal estate. But in this case the right to this fund, so far as I at present feel called upon to decide the matter, depends upon the right of Magee, for, if he cannot get the fund, it makes no difference to him whether there is a conversion or not, except so far as his position may be stronger if the proceeds of the sale are to be regarded as personal property. The main questions are,

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then, Does the power of attorney assign anything? and, if it does, has it been revoked? I think the case is settled by *Lepard* v. *Vernon* (1). In that case one Vernon, being indebted to his bankers to the amount of £8,000, executed a power of attorney to them enabling them to procure and receive from the board of ordnance, with whom he had a contract for the erection of some buildings, "all such sum and sums of money as now are, or which may hereafter from time to time become, due and payable to him." This was accompanied by a verbal declaration that the power was given to enable the bankers to apply the money in payment of the debt due them. The Master of the Rolls held that it was a mere common power, not accompanying any assignment of the debt, nor making part of any security given to the bankers. He says: "There is, indeed, parol evidence that Vernon had declared it was to enable them to apply the money to the debt due to them. But that is not enough to operate as an appropriation of the money or to prevent it from becoming part of the testator's assets. In the case of *Mitchell* v. *Eades* (2) the power was made irrevocable; yet it was not allowed to be effectual against the general creditors after the death of the debtor." The Master of the Rolls was here dealing with a mere money fund, in reference to which there was no difficulty in the way of creating a trust by parol. In the present case the power of attorney seems to me nothing more than an ordinary power to apply for and receive this fund if it ever came into existence as the fund of the defendant, and on receiving it to appropriate it in a certain way. But it never was a fund of this defendant. On his death the land from which the fund was eventually to arise became the property of some one else, and when the time came for the application to be made the fund belonged, not to the defendant or his attorney, but to some person under the will. I regard the power as only a mandate revocable by the defendant's death, conferring no interest in the fund, which was not then in existence, but which in any case was not in terms assigned in any way, and

(1) 2 V. & B. 51. (2) Pre. Ch. 125.

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which I think should be paid over to the executor as part of the defendant's estate to be administered. I do not desire to preclude Magee from filing a bill to establish his claim upon the fund, and I think he should have leave to do so if he wishes. If, however, he chooses to give Welch a written undertaking not to take further proceedings, but to come in as an ordinary creditor of the estate, he may do so, in which case both parties will have their costs of this application out of the fund; otherwise the applicant alone will have his costs. The fund will be paid to the applicant.

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December 18.

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Practice — Pleading — Demurrer and answer to whole bill — Amendment — Costs — Act 53 Vict., c. 4, s. 47 — Setting demurrer down for argument — Waiver of objection to demurrer — Act 53 Vict., c. 4, s. 41. — Demurrer ore tenus.

A defendant may not answer and demur respectively to the whole bill, for thereby the demurrer is overruled, notwithstanding section 47 of Act 53 Vict., c. 4. Consequently where a demurrer professed to be to a part, and the answer professed to be to the residue, of a bill, but the demurrer was extended to the whole prayer of the bill, it was held that unless the answer were withdrawn, for which purpose leave of Court was given, the demurrer should be overruled with costs, but that if the answer were withdrawn, the demurrer being successful on the merits should be allowed with costs.

In an answer and demurrer the defendant ought to specify distinctly what part of the bill it is intended to cover by the demurrer.

The objection that an answer and demurrer are respectively to the whole bill, is not waived by the plaintiff setting the demurrer down for argument under section 41 of Act 53 Vict., c. 4.

A defendant cannot demur *ore tenus* where there is no demurrer on the record, as where the demurrer on the record is overruled by the answer.

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

Argument was heard November 23, 1900.

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W. B. Wallace, Q.C., for the plaintiff:—

The demurrer and answer extend to the whole bill. This is a course in pleading which has never been allowed. By demurring the defendant invites the judgment of the Court that he should not answer. Therefore, if he answers as well as demurs, the function of the demurrer is at an end, and the demurrer must be withdrawn by amendment or be overruled. It is only where a demurrer is to a distinct part of a bill and an answer relates to another distinct part that the demurrer and answer can co-exist. See *Lowndes* v. *Garnett and Moseley Gold Mining Co.* (1); *Dormer* v. *Fortescue* (2); *Jones* v. *Earl of Strafford* (3); *Robinson* v. *Thompson* (4); *Crouch* v. *Hickin* (5); *Dawson* v. *Sadler* (6); *Chetwynd* v. *Lindon* (7). Section 47 of Act 53 Vict., c. 4, does not alter the rule of pleading in this respect. The section enacts that "no demurrer or plea shall be held bad and overruled upon argument because such demurrer or plea does not cover so much of the bill as it might by law have extended to, or because the answer of the defendant may extend to some part of the same matter that may be covered by such demurrer or plea." These words are not radical enough to include the present case. The circumstance that a limitation is set to the scope of the section is wholly favorable to the view that where the whole of the bill is answered the defendant will not be permitted at the same time to demur. The section is taken from rule 9 of Order XIV. of the English Chancery Orders, construing which it would seem the Court held that it did not apply to an answer and demurrer to the whole bill. In *Emmott* v. *Mitchell* (8) Shadwell, V.-C., says: "Suppose the answer extends to the whole of the pleas or demurrer, and not merely to some part of the same, would that be good?" Where a defendant, after the time allowed for demurring alone, filed a pleading, which was a demurrer, and also an answer, to the whole

(1) 2 J. & H. 282.
(2) 2 Atk. 282.
(3) 3 P. Wms. 79.
(4) 2 V. & B. 118.
(5) 1 Keen, 385.
(6) 1 S. & S. 537.
(7) 2 Ves. Sr. 451.
(8) 9 Jur. 170.

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bill, it was held that, notwithstanding the rule, the answer overruled the demurrer: *Skey* v. *Garlike* (1). See also *Ellice* v. *Goodson* (2). If it is contended that the defendant's pleading may be amended by withdrawing the answer and leaving the demurrer, it is submitted that the course is not open since the demurrer was not put in within twenty days after service of the bill, as required by section 37 of Act 53 Vict., c. 4. The defendant Quinton was served with the bill on August 8th, 1900, and the answer and demurrer were not served until September 4th following. The defendant Anderson was served with the bill on September 22nd, and the demurrer and answer were not served until October 30th following.

W. Pugsley, A.-G., and *A. P. Barnhill*, for the defendants: —

If the objection taken to the defendants' pleading has any merit, it has been waived by the plaintiff's act setting the demurrer down for argument. It was thereby admitted that the demurrer was properly laid. It is also not now open to the plaintiff to say that the demurrer was not served in time. He should have applied to have the demurrer taken off the files of the Court. While the objection finds support in the older authorities, it is too technical and reactionary to be favorably considered by this Court. Section 47 of Act 53 Vict., c. 4, is directed against ingenious refinements upon the delimitation of the frontiers of pleadings with exactness, and might very properly be construed to include a case like the present. No substantial reason can be suggested why the defendants may not answer and demur to the whole bill. If the demurrer is bad, it is open to us to demur *ore tenus*. See *Crouch* v. *Hickin* (3); *Henderson* v. *Cook* (4). In the former case a demurrer was put in to the whole bill, and a plea to part. On the demurrer being overruled on the ground that it was applicable to the whole of the bill, and consequently to that part of it which was covered by the

(1) 1 DeG. & S. 396.
(2) 3 M. & C. 653.
(3) 1 Keen, 385.
(4) 4 Drew. 306.

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plea, the defendant demurred *ore tenus*, and the demurrer was allowed. This we would be ordinarily entitled to do on paying the costs of the demurrer on the record. See *Attorney-General* v. *Brown* (1); *Durdant* v. *Redman* (2); *Robinson* v. *Smith* (3). We now demur to the bill, *ore tenus*, on the grounds that the bill does not shew a concluded agreement for the sale and purchase of the land, and that the agreement is shewn not to have been in writing. The merits of the demurrer are wholly with the defendants. The correspondence, out of which it is sought to spell an agreement within the *Statute of Frauds*, passed between the plaintiff and Scott, and the bill does not shew that Scott was Mrs. Anderson's agent to sell the land. The letter from Mrs. Anderson to the plaintiff states nothing further than that Scott will look over the land and will see the plaintiff. The letters between the plaintiff and Scott do not disclose a concluded and binding agreement for the sale and purchase of the land. We can discard the letter of August 28, 1899, from Scott to the plaintiff as not being an offer, though mistakenly conceived by the plaintiff to be one in his letter of September 2. On September 11 the plaintiff makes an offer in writing to Scott, and Scott in his written reply does not accept it, but says that he has referred the offer to Mrs. Anderson. If there was an acceptance of the offer later by Scott, it is of no avail to the plaintiff, since it is not in writing. See *Pearce* v. *Watts* (4); *Appleby* v. *Johnson* (5); *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs* (6); *Harvey* v. *Facey* (7); *Hussey* v. *Horne-Payne* (8).

Wallace, Q.C., in reply :—

Demurrer, *ore tenus*, cannot be pleaded on the same grounds as the demurrer on the record. It is submitted that there was a concluded agreement within the *Statute of Frauds*. To determine this the Court will have recourse

(1) 1 Swan. 288.
(2) 1 Vern. 78.
(3) 3 Paige, 231.
(4) L. R. 20 Eq. 492.
(5) L. R. 9 C. P. 158.
(6) 44 Ch. D. 615.
(7) [1893] A. C. 552.
(8) 4 App. Cas. 311.

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to the whole of the correspondence, including that portion of it anterior to the formation of the agreement. See *Hussey* v. *Horne-Payne* (1); *Long* v. *Millar* (2). There was an acceptance of plaintiff's offer by Scott's letter of September 18. It was not the less such because he said he was communicating the offer to Mrs. Anderson. If the letter reserved a final assent until after Scott heard from Mrs. Anderson, it provided that the assent would be by parol. A parol assent was therefore sufficient. In *London Guarantie Co.* v. *Fearnley* (3) Lord Watson says: "It appears to me that when that which is left indeterminate in a contract, whether it be time, or place, or *quantum*, becomes fixed and ascertained in the manner stipulated by the contracting parties, it must be treated just as if it had been an original term of the contract." See also *Milnes* v. *Gery* (4).

1900. December 18. BARKER, J.:—

This bill was filed for the specific performance of a contract for the sale of some land in the Parish of Lancaster, alleged to have been made by the defendant, Elizabeth T. Anderson, through one W. J. Scott as her agent. It appears that Elizabeth T. Anderson was the owner in fee of the lot in question, and in 1899, when the alleged contract was made, she and her husband, William A. Anderson, who is joined in this suit as a defendant, were residing in British Columbia. The other defendant, William A. Quinton, who is made a party on the ground that he had notice of the plaintiff's purchase, bought the property from Mrs. Anderson, through her agent, Scott, and under his purchase has gone into possession. The contract in question arises principally out of correspondence between the plaintiff and Scott, which is set out at length in the bill. The plaintiff by his bill prays for the specific performance of the agreement in question; also that the agreement made with the defendant Quinton should be set aside, and that the defendant be restrained from transferring the

(1) 4 App. Cas. 311.
(2) 4 C. P. D. 450.
(3) 5 App. Cas. 911, 920.
(4) 14 Ves. 400.

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property, and the Registrar of Deeds be restrained from registering any such transfer, and that the defendants be restrained from cutting wood off the land or committing waste thereon. To this bill the defendants—that is, Anderson and wife by themselves, and Quinton by himself —put in demurrers and answers. The demurrers were set down for hearing, and, before going into the merits, the plaintiff's Counsel objected that, as the demurrers and answers were to the whole bill, the demurrers were thereby overruled. For convenience sake, as the parties were all prepared, the demurrers were argued on their merits. The practice is, I think, well settled that where there is a demurrer to the whole bill and also an answer to the whole bill the demurrer is thereby overruled. *Story*, Eq. Pl. 442, and many cases, some of which were cited on the hearing, establish this as the practice. It was, however, contended that this was not a demurrer to the whole bill, but in this I cannot concur. In *Devonsher* v. *Newenham* (1) Lord Redesdale lays down the rule, "that where a defendant demurs to part and answers to part of a bill, the Court is not to be put to the trouble of looking into the bill or answer to see what is covered by the demurrer, but it ought to be expressed in clear and precise terms what it is the party refuses to answer; and I cannot agree that it is a proper way of demurring to say that the defendant answers to such a particular fact and demurs to all the rest of a bill. The defendant ought to demur to a particular part of a bill, specifying it precisely." These demurrers are I think in form and substance demurrers to the whole bill. It is true they commence in the usual way by professing to be a demurrer to part and an answer to the residue, but the demurrers are "to so much of the plaintiff's bill as prays that the defendant may be decreed," etc.; then follows the whole prayer of the bill set out verbatim. The answers also cover the whole bill, and the rule to which I have referred must therefore apply, unless for some of the reasons advanced by the defendants it should be held otherwise. The first reason suggested is, that as

(1) 2 Sch. & Lef. 199.

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the plaintiff had applied for and obtained an order setting the demurrers down for argument, he had waived the objection now made, but it is clear this is not so, for by section 41 of the Equity Act, 53 Vict., c. 4, the plaintiff is obliged on a demurrer being filed to obtain an order setting it down for argument, otherwise the demurrer is held sufficient. It was also contended that, if the demurrers were held bad on the ground I have mentioned, the defendants could on the argument demur *ore tenus*, on the same grounds. That particular form of demurrer is nothing more than assigning orally at the hearing of the demurrer grounds of demurrer in addition to those assigned upon the record, and these, if valid, will support the demurrer, though the causes of demurrer stated in the demurrer itself may be held bad: *Daniell*, Ch. Pr. (4th ed.), 589. A defendant cannot demur *ore tenus*, unless there is a demurrer on the record. Here the demurrer is bad for the reason I have mentioned, not but that the grounds of demurrer may be good, but by reason of a technical rule of pleading which no demurrer *ore tenus* would reach or in any way affect. Neither am I able to agree with the Attorney-General in thinking the difficulty is cured by section 47 of the above Act. Under the English Chancery order, of which this section is a copy, it has been held that it does not apply to cases where the demurrer and answer are to the whole bill: *Emmott* v. *Mitchell* (1); *Lowndes* v. *Garnett and Moseley Gold Mining Co.* (2); *Skey* v. *Garlike* (3).

The plaintiff is of course entitled to the benefit of his objections, though they arise out of a practice not in harmony with modern ideas and of very little practical utility. At the same time I feel I should be disregarding my duty to these litigants if I failed in applying such remedies as this Court possesses, by way of amendment or otherwise, as will without injury to any one of them secure a decision of their differences with the least possible expense and delay. Such a course is in accordance with modern practice and in no way at variance with the rule laid down in *Baker* v. *Mellish* (4).

(1) 9 Jur. 170.
(2) 2 J. & H. 282.
(3) 1 DeG. & S. 396.
(4) 11 Ves. 72.

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How does this demurrer stand on its merits? The plaintiff claims specific performance by the defendants, Anderson and wife, of an alleged contract made by Mrs. Anderson through Scott, as her authorized agent, with the plaintiff for the sale to him of a certain piece of land. The agreement relied on is contained in certain letters which passed between the plaintiff and Scott, and which are set out in the bill. Three questions arise. First, as to Scott's authority to bind Anderson; second, as to whether or not there was a completed agreement; and third, whether the agreement is in writing so as to satisfy the *Statute of Frauds*. There is no question here of part performance so as to render evidence of the verbal contract admissible.

I quite agree with Mr. Wallace in thinking that when a contract is entered into by means of correspondence you must look to all the letters and all that took place between the parties: *Jervis* v. *Berridge* (1); *Hussey* v. *Horne-Payne* (2); *Rossiter* v. *Miller* (3).

I shall not discuss the question as to Scott's authority, for in my view the bill does not shew that there was any completed contract signed by Mrs. Anderson or her agent, the party sought to be bound. The first letter of any importance is Scott's letter to the plaintiff of August 28, 1899, in which he stated to him that he had an offer of $300 for the land, and adds, "If you think you could afford to give more for the land than I was offered, you, of course, can have the land." In his reply of September 2, the plaintiff treats this as an offer to sell to him for $300, and accepts it. In this he was clearly wrong, for the letter will bear no such construction. It was evident from it that Scott had two purchasers to deal with and that he was trying to get the largest price he could. On the 11th of September the plaintiff wrote to Scott, and, after recapitulating what had taken place and again asserting that Scott had offered to sell at $300, says, "If you wanted more than $300, you should have fixed your figure so as to give me a chance to see what I could do. Without

(1) L. R. 8 Ch. 351. (2) 4 App. Cas. 311. (3) 3 App. Cas. 1124.

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prejudice, however, let me say I will give $325 and pay expenses of transfer, etc. Please let me know what you intend doing." To this letter Scott replied on the 18th of September. He pointed out to the plaintiff his mistake in thinking he had been offered the land for $300, and said he had written his sister (Mrs. Anderson) of the offers he had had, and said, "As soon as I hear from her I will be down, and, of course, as you were the first man to speak for the land, I shall give you the refusal. But I think you are mistaken when you said I offered you the land for this price. I had no authority to sell at any price, but I think it will not be many days till I hear from my sister, and when I do I will be down and have it fixed up." It is clear from this letter that, whatever authority Scott had to sell, he had no intention of exercising it until he had received specific instructions from his sister as to the offers made. The plaintiff's offer to purchase for $325 was an entirely new offer, and it is a contract to sell at that price which the plaintiff seeks to enforce. In reference to that offer, the plaintiff asks Scott to let him know what he intended doing, and in Scott's last letter he tells him; but the letter contains nothing amounting in any way to an acceptance of the offer, and the whole matter remained open until after Mrs. Anderson had been heard from. The correspondence between the plaintiff and Scott ended with Scott's letter of the 18th of September, up to which time there was no completed contract between them, either verbal or written. What next took place the plaintiff alleges in section 7 of his bill to have been as follows: "That afterwards, and on the 23rd day of September, 1899, the said W. J. Scott came to my house, and, after we had breakfast together, I said to him that I was surprised to hear that he was dickering with Mr. Quinton, as I had offered to give $325 on the strength of his letter; that I considered it the full commercial value for the property; that we could go over it if he wished and see if I was not correct, or leave it to Mr. John Gilbraith, who knew the property, but he said that was not necessary, or words to that effect.

I then told him I considered the matter closed, and proposed we should go to Mr. W. B. Wallace's office and have the matter settled up, as the papers and money were in his vault, to which Mr. Scott said 'all right,' and I thereupon harnessed my horse to my waggon, and we started together towards the city of Saint John." It is contended that the expression "all right" amounted to, and was intended to be, an acceptance on the part of Scott of the plaintiff's offer to purchase for $325. I should think it quite doubtful whether the language fairly, much less necessarily, bears that meaning, but, if it does, there is no writing of any kind to satisfy the *Statute of Frauds*. The written negotiations ended before the matter was agreed upon, and the Statute seems to me to be a complete answer to the plaintiff's action. Apart from the technical objection, which I have already discussed, I think the demurrers should be allowed, and, as they go to the whole bill, the suit would be at an end.

Under the circumstances I shall give the defendants leave to withdraw their answers on or before the 10th of January next, leaving the demurrers as if they were demurrers alone, with leave in that case to make any amendments in their form (if any) as Counsel may advise. If such leave is acted upon, and notice of such withdrawal and the amendments (if any) are filed with the Clerk and served on the plaintiff's solicitor within the above time, then the demurrers will be allowed with costs and costs of suit; otherwise they will be overruled with costs.

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December 18.

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Donatio mortis causâ — Savings bank deposit book — Trust — Remedy in Equity.

A deceased person in her last illness, and shortly before her death, handed to the defendant a government savings bank pass book in which was credited in the names of the defendant and the deceased a sum of money deposited in their names, and at the same time told the defendant to pay to the plaintiff $400 out of the bank, pay some debts owing by the deceased, and her funeral expenses; to which the defendant assented. The money on deposit belonged to the deceased, but could be withdrawn by the defendant on delivery up of the pass book, before or after the deceased's death:

Held, (1) that the pass book was a good subject of a *donatio mortis causâ*;

(2) that there was a valid *donatio mortis causâ* constituted by trust, and enforceable in equity, in favor of the plaintiff.

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

Argument was heard October 12, 1900.

W. B. Wallace, Q.C., and *G. H. V. Belyea*, for the plaintiff:—

To constitute a valid *donatio mortis causa* it is necessary, first, that the gift must have been made in contemplation of death; secondly, that the subject-matter of the gift must have been delivered to the donee; and thirdly, that the gift must have been made under circumstances shewing that the subject-matter of the gift was to revert to the donor in the event of his recovery: *Tate* v. *Hilbert* (1); *Cain* v. *Moon* (2). The delivery may be to a third person in trust for the donee: *Bunn* v. *Markham* (3); *Farquharson* v. *Cave* (4); and though not to go into effect with respect to the donee until the donor's death: *Duffield* v. *Elwes* (5); *Drury* v. *Smith* (6); *Sessions* v. *Moseley* (7); *Marshall* v. *Berry* (8). It will probably be argued for

(1) 2 Ves. 111.
(2) [1896] 2 Q. B. 283.
(3) 7 Taunt. 223.
(4) 2 Coll. 356, 357.
(5) 1 Bli. (N. S.) 497.
(6) 1 P. Wms. 404.
(7) 4 Cush. 87.
(8) 13 Allen (Mass.), 43.

the defendant that to give effect to the donation will be to evade the *Wills Act*, as the defendant was also directed to pay debts owing by the donor, and her funeral expenses, in addition to paying the plaintiff $400, and that the transaction falls nothing short of an attempted disposition of property by parol will. It is settled, however, by the authorities that a *donatio mortis causa* is good under such circumstances. The case of *Blount* v. *Burrow* (1) decides that a *donatio mortis causa* may be made, although the donee is to use the subject-matter of the donation to make particular payments, and to retain the residue for himself. In *Hills* v. *Hills* (2) a gift was held to be good as a *donatio mortis causa*, although coupled with a trust that the donee should provide the funeral of the donor. A difficulty may be suggested, in view of the case of *Ex parte Gerow* (3), whether a pass book may properly be the subject of a *donatio mortis causa*. In that case it was held that a bank deposit receipt, being only evidence of a debt, and not a document that could be transferred so as to make the bank liable to a third party, could not form the subject-matter of a *donatio mortis causa*. While it is not necessary that the soundness of this decision should be criticised, it is opposed to many English decisions, including *Amis* v. *Witt* (4); *Moore* v. *Moore* (5); *In re Dillon* (6). But the case is easily distinguishable. The money represented by the pass book was on deposit in the joint names of the deceased and the defendant. On the delivery of the book to the defendant the donor divested herself of control of the money, and the control of it vested at once in the defendant as trustee for the plaintiff. The delivery of the subject-matter of the gift was therefore complete in the lifetime of the donor. The delivery of the pass book of a bank does not resemble the delivery of the donor's cheque on a bank, in which case it is held that it is not a good *donatio mortis causa* if not presented before the donor's death.

(1) 4 Bro. C. C. 72.
(2) 8 M. & W. 401.
(3) 5 All. 512.
(4) 33 Beav. 619.
(5) L. R. 18 Eq. 474.
(6) 44 Ch. D. 76.

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See *Hewitt* v. *Kaye* (1); *Beak* v. *Beak* (2); *Rolls* v. *Pearce* (3). A cheque is an order, and, if the order is not acted upon in the lifetime of the donor, it is revoked by the donor's death. But, as pointed out by Lord Romilly, M.R., in the former case, the gift of a bond, or promissory note, or an I O U, is the gift of a chose in action, and the delivery of such an instrument confers upon the donee all the rights of the donor therein. That is the principle upon which *Amis* v. *Witt* (4) was decided, where the donor gave the donee a deposit note, by which bankers acknowledged that they held so much money of the donor, and it was held that the delivery of the deposit note was a good *donatio mortis causa*. In the recent case of *In re Dillon* (5) the Court of Appeal reviewed all the English decisions upon the question whether a deposit note is a good subject of a *donatio mortis causa*, and decided the question affirmatively. Cotton, L.J., in his judgment in that case says: "If we go on principle, why should not this document be a good subject of *donatio mortis causa*? The case of *Duffield* v. *Elwes* (6) shews that there may be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the donor are trustees of the donee for the purpose of giving effect to the gift. The case of *Moore* v. *Darton* (7) is very instructive as to the class of instruments which are subjects of *donatio mortis causa*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, beside acknowledging the receipt of the money, expressed the terms on which it was held, and shewed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causa* of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security

(1) L. R. 6 Eq. 198.
(2) L. R. 13 Eq. 489.
(3) 5 Ch. D. 730.
(4) 33 Beav. 619.
(5) 44 Ch. D. 76.
(6) 1 Bli. (N. S.) 497.
(7) 4 DeG. & S. 517.

in *Duffield* v. *Elwes*; but the House of Lords there laid it down that the executors were trustees for the donee and must do what was necessary to perfect the transfer." If necessary, the Court should refuse to follow *Ex parte Gerow* (1), but we submit it is quite distinguishable.

J. D. Hazen, Q.C., and *E. P. Raymond*, for the defendant: —

There was not an effective delivery by the deceased of the subject-matter of the gift to satisfy the requirements of delivery within the rule as to *donationes mortis causa*. The delivery to the defendant of the pass book was accompanied by a number of instructions, with which it would be necessary to comply before the transfer of the subject-matter of the gift to the plaintiff could take place. The defendant was constituted the agent of the donor, whereas the delivery, to be effective, should have been to the defendant as agent of the donee: *Farquharson* v. *Cave* (2). The gift to the plaintiff was not of the pass book, but of a portion of the money represented by it. The gift therefore amounts to an attempted testamentary disposition of the donor's property, and not to a *donatio mortis causa*. Again, the gift was not to take effect until the donor's death, whereas it is a condition of a valid *donatio mortis causa* that the gift shall take place presently. In *Powell* v. *Hellicar* (3) the deceased, immediately before her death, told A. to take the keys of a dressing case and box, containing a watch and trinkets, and immediately on her death to deliver the watch and trinkets to the plaintiff. It was held that it was not a valid *donatio mortis causa*. See also *Earle* v. *Botsford* (4); *Bunn* v. *Markham* (5); *Mitchell* v. *Smith* (6); *Basket* v. *Hassell* (7). Since the delivery is postponed until the donor's death the gift is a legacy, and transmissible only by will. If an instrument, for instance, is clearly testamentary, that is, an instrument not intended to take

(1) 5 All. 512.
(2) 2 Coll. 356.
(3) 26 Beav. 261.
(4) 23 N. B. 407.
(5) 7 Taunt. 223.
(6) 4 DeG., J. & S. 421.
(7) 107 U. S. 602.

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effect until after the death of the person executing it, and dependent upon his death for its vigour and effect, but is not duly executed as a will, it will not be given effect as a *donatio mortis causa*. See *White & Tudor's* L. C. (1). If any other rule was allowed than that the delivery must be *in praesenti* to constitute an effective *donatio mortis causa*, the distinction between such a form of gift and a bequest is gone, and the *Wills Act* is defeated. To allow the defendant to carry out the deceased's instructions would be to clothe him with the authority of an executor under a duly executed will. Such a palpable evasion of the *Wills Act* will not be permitted. In *Thompson* v. *Heffernan* (2) it was vainly sought to establish a *donatio mortis causa* under circumstances closely similar to those in the present case. The party setting up the gift claimed that the donor, in the presence of his housekeeper and the defendant, directed the housekeeper to hand to the defendant a sum of money, which, he said, was in a certain box; that he directed a legacy of £50 to be paid to the housekeeper, and a sum of £5 to another person, and told the defendant, after paying the funeral expenses, to keep the remainder for himself. The donee did not take away the money until the following day, when the donor was unconscious. In the course of his judgment Lord Chancellor Sugden makes use of the following pertinent remarks: "The transaction is more like a nuncupative will than a *donatio mortis causa*, which is permitted by law [if] accompanied by certain acts essential to its validity; one of which is that the subject of the gift should be actually handed over at the time. If a man on his deathbed call an intended legatee, and put a bag of money into his hands, such a gift is good. But here there appears to have been a general disposition of this man's property, in the nature of a will. He constitutes the defendant substantially his executor," etc. It cannot be said here that delivery was completed in the lifetime of the donor because the pass book was handed to the

(1) Vol. 1 (7th ed.), 403. (2) 4 Dr. & W. 285.

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defendant as an agent or trustee of the donee. The defendant was not to give the money to the donee until the donor's death. According to George E. F. Perry's evidence the direction with respect to the gift to the plaintiff was to pay it to her "after she (the donor) was gone." As the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but an attempted testamentary disposition. The transaction does not fall within the rule that a *donatio mortis causa* is valid, though coupled with a trust, for in such a case there must be an immediate delivery of the subject-matter of the gift.

1900. December 18. BARKER, J.:—

Mary C. Perry departed this life on the morning of June 17, 1899, intestate, leaving her surviving two children, the plaintiff and defendant, and some grandchildren, issue of a deceased daughter. At the time of her death, or rather at the time she made the donation which gives rise to this litigation, she had on deposit some $1,176 of her own money in the Government Savings Bank at St. John, the pass book for which she always had and then had, in her possession. She was also at the same time possessed of some promissory notes amounting to about $250, some bedding, and, it is said by the defendant, of some $200 in cash. Though the deceased died at the plaintiff's home, where she had gone on a visit, she generally lived with the defendant after the death of her husband. During the night immediately preceding her death, finding herself ill and, as she thought and as the event proved, in a dying condition, she sent for her son (the defendant) to come and see her; and while she was lying in bed and a few hours before her death, and when she realised that her end was not far away, she made, as is alleged, a gift of the Savings Bank book, a pocket book and a small trunk, with their contents, to the defendant. Several persons besides the plaintiff and defendant were present at the time, and there is really no substantial disagreement between all the witnesses as to what took place.

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The plaintiff's account is as follows: "After the defendant had entered the room where his mother was lying in bed he asked her how she was, and she said she was very poorly, and then after a very short time she said, 'Priscilla (that is, the plaintiff), you go to that chest (pointing to an old-fashioned chest in the room) and give me your father's little trunk and satchel,' and gave me the keys. I did as she told me, and she handed the trunk to George Perry (the defendant) and said, 'Here is the papers;' and then she opened the satchel and she took out a pocket book, and she says, 'Here is the pocket book.' Then she took out the bank book, and she said, 'Here is the bank book; I want you to pay her $400 out of the bank—it is Priscilla I mean;' and she says, 'George, now you will do it,' and he said, 'Yes, mother, I will if it is there;' and she said, 'It is there, and there is more there, too.' She said 'If I rally, I want you to give these things back to me,' and he said he would; and then she says, 'I want you to see to my burial.' He said, 'Is there any particular minister that you want to preach your funeral sermon?' and she said no, but to get Rev. David Paterson." The plaintiff says that she did not hear anything said about debts being paid; that the defendant retained possession of the articles delivered to him and never parted with them. She also says that soon afterwards all present except herself went to breakfast. She remained in the room with her mother, and while they were there alone her mother gave her another pocket book, which she took from under the pillow, saying, "This will be quite a help to you." In this pocket book, the plaintiff says, were several promissory notes, amounting in all to about $250, but nothing else of any value. Margaret Carpenter, a neighbor of the family, who was present, also testifies as to the delivery of the pass book, pocket book and trunk, and the deceased's direction as to the payment of the $400 to the plaintiff, but says that she heard nothing said as to funeral expenses, but did as to the payment of two small debts.

Bayard Thorne, who is the plaintiff's stepson, was also present. He says that he heard nothing about funeral

expenses, but there was something said about two small debts. He also says that when the deceased handed the defendant the bank pass book she said: "This is the bank book, and I want you to give her $400 out of it—Priscilla I mean;" and George said, "I will, mother, if it is there," and she said it was there. The defendant's account of what took place does not differ from that of the other witnesses as to the payment of the $400 to the plaintiff, but it is more particular as to other matters. He said that his mother handed him the trunk first, then the pocket book, and then the bank book, and that she said, "Give Priscilla $400." He said he would if it was there, and she replied it was there all right. His evidence then proceeds: "So she went on to say, 'I give you them notes and collect them and pay my doctors' bills;' and she said, 'I have a shop bill,' or she mentioned about Tommy Todd, and she said. 'You pay them.' Then she talked about the funeral expenses," and he says he was to pay them. On his cross-examination he admits that he understood that the plaintiff was to get the $400. He supposed it was to come out of the bank money. George E. F. Perry, the defendant's son, a young lad, was also present. He says the deceased spoke of notes, and, as to the money for the plaintiff, he said his grandmother said, "Give Priscilla $400 in the bank." And on cross-examination this question was asked him: "And you remember distinctly that she made this remark in regard to the bank book—that he was to give Priscilla $400 out of the bank?" To which he answered "Yes." In another part of his evidence he says that when his grandmother gave the defendant the bank book she said: "There is the bank book; you take and get $400 out of the bank and give to Priscilla."

The defendant says that the trunk which was handed to him contained nothing of value except a mortgage or some papers of that class belonging to his father's estate, and that the pocket book, in which he expected to find money and promissory notes, contained neither the one nor the other. In fact, it is this circumstance which has given rise to this dispute, as the defendant by his answer

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expresses his willingness to pay the plaintiff her $400 if she will hand over to him the promissory notes which she received from her mother shortly before her death, and which, he says, were intended to be given him, and therefore of right belong to him.

The plaintiff claims that as to the pass book and other articles there was a donation *mortis causa*, coupled with a trust as to the money in the Savings Bank in favor of her to the extent of $400; and this bill is filed to enforce that claim. The parties have chosen to administer their mother's estate without any formal letters of administration, and the case must be determined as a matter solely between the plaintiff and defendant. I think the plaintiff is entitled to a decree.

Three things must concur in order to establish a donation *mortis causa*. The gift must have been made in contemplation, though not necessarily in expectation, of death; there must have been a delivery of the subject-matter of the gift to the donee or some one for him, and it must have been made under such circumstances as shew that the thing is to revert to the donor in case of recovery: *Cain* v. *Moon* (1).

The evidence in this case leaves no doubt in my mind that all these three requirements have been satisfied in this case. As to the contemplation of death and the reversion of the subject-matter of the gift in case of recovery there can, I think, be no question. The only difficulty suggested is as to the pass book, and it is said that such a book is not the subject of a *donatio mortis causa* so as to pass the title to the money represented by it. It must be remembered that at the time this alleged gift was made, and for a long time previous, the money in question, although belonging exclusively to the deceased, was deposited, with the defendant's knowledge, in the joint names of himself and his mother, in which case either or the survivor could withdraw on the production of the pass book. When, therefore, the deceased delivered the pass book to the defendant she clothed him with full authority and power

(1) [1896] 2 Q. B. 283.

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to draw the whole fund from the bank and placed it entirely under his control. Even in cases where the money is deposited in the name of the donor such a delivery of the pass book has been held sufficient to render the gift good as a *donatio mortis causa*. See *Sheedy* v. *Roach* (1); *Tillinghast* v. *Wheaton* (2); *Hill* v. *Wheaton* (3).

How much stronger is the case where the money is on deposit in the name of the donee and he only needs possession of the pass book to complete his entire control over it. There is nothing whatever in all the evidence to suggest that it was not the intention of the deceased, or the understanding of every person present who heard what took place, that the control over this money in the bank, and the pocket book and small trunk, with their contents, was by the delivery to pass then and there to the defendant as a gift in contemplation and expectation of death. It is, however, contended on the part of the defendant that the request or direction to him to pay the funeral expenses of the deceased and her one or two trifling debts and this $400 to the plaintiff shews conclusively that the transaction was nothing more than an attempted testamentary act, and for that reason inoperative as a gift. *Blount* v. *Burrow* (4) and *Hills* v. *Hills* (5) are direct authorities against this proposition. In the latter case the deceased during her illness told her landlady that "she felt much worse and she wished her brother James to bury her; that she wished him to have all she had, and he would bury her comfortably." Soon afterwards the brother came to see the deceased, and she then, in the presence of the landlady, a few minutes before her death, put her pocket book into his hands, the pocket book containing at the time about £80 in cash and notes, everything apparently which she possessed. This was held to be a perfectly good *donatio mortis causa*, though the gift was for a special purpose and coupled with a trust. Parke, B., says in reference to the direction as to payment of funeral expenses: "It is not indeed properly a condition, because

(1) 124 Mass. 472.
(2) 8 R. I. 356.
(3) 68 Me. 634.
(4) 4 Bro. C. C. 72.
(5) 8 M. & W. 401.

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otherwise the property would not vest until performance of it, but a trust upon which the *donatio mortis causa* was made. And the authority to which I have already referred, of *Blount* v. *Burrow*, goes the length of deciding that it is no objection to the gift that it is made for a special purpose." Alderson, B., says: "The case of *Blount* v. *Burrow* decides that a *donatio mortis causa* may be made for a particular purpose; that the party may deliver the subject-matter of the gift so as to pass the property to the donee, in contemplation of death, although he is to use it for a particular purpose, or out of it to make particular payments, and to keep the residue for himself." Rolfe, B., says he cannot see how the annexation of a trust to the gift can make any difference, and adds: "If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference that with it he is to pay for a particular thing. If a man on his deathbed gives another £1,000, is it any addition to the evils attending this mode of bestowing property that he attaches a condition to it—as, for instance, that he stipulate that his brother shall receive an outfit to India? The case of *Blount* v. *Burrow* is expressly in point and disposes of the question."

That a parol declaration of trust in reference to personal property is good and can be enforced will not be disputed. See *Peckham* v. *Taylor* (1). And there is, in my opinion, no difference whatever in this respect between gifts *inter vivos* and those *mortis causa*, except so far as the annexing of a trust to the gift may furnish evidence that there was no valid donation at all, but only an attempted testamentary act. And in cases where the evidence clearly establishes an executed and complete delivery to the donee of the possession and title to the property, the fact that there is a trust annexed to the gift furnishes no evidence whatever to defeat the gift or to change its character. This ground of defence, I think, fails.

Another objection raised to the plaintiff's right to

(1) 31 Beav. 250.

succeed in this action was that her remedy, if any, was by action at law for money had and received, though it was conceded by Counsel that the remedy in this Court was concurrent. See *Scott* v. *Porcher* (1). This involves the question whether or not a trust was created. It is certainly so regarded in *Hills* v. *Hills*, already cited. In *Moore* v. *Darton* (2) the dispute arose in part as to the effect of a receipt in the following form: "Received the 22nd of October, 1843, of Miss Darton for the use of Anne Dye, one hundred pounds, to be paid to her at Miss Darton's decease, but the interest at 4 per cent. to be paid to Miss Darton." The Vice-Chancellor held that the document created an effectual trust *inter vivos* in favor of Ann Dye. Now, in this present case, the defendant took the pass book and the money represented by it, and he holds it to-day for this plaintiff so far as $400 are concerned. It was for that purpose that he assented to take the money; he actually got the money under that arrangement, and it is for that purpose that he now holds it, always subject to this—that the gift would be subject to the payment of debts, that being a condition which the law attaches to such donations. The defendant, I think, holds this $400 in a fiduciary character for the plaintiff—liable for a breach of trust if he does not pay it over. To discharge himself he may show that the fund has been disposed of in paying debts or in the discharge of any other claim superior and prior to that of the plaintiff. But, subject to that, he must discharge himself by payment, and until he has admitted a specific sum in his hands to be paid to the plaintiff, and thus rendered himself liable personally and individually, and not as trustee, no action at law would lie, but the matter is simply a trust.

In *Burdick* v. *Garrick* (3) Lord Justice Giffard says: "I do not hesitate to say that where the duty of persons is to receive property and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that prop-

(1) 3 Mer. 652. (2) 4 DeG. & S. 517. (3) L. R. 5 Ch. 243.

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erty to somebody entitled to it." In *Lyell* v. *Kennedy* (1) Lord Macnaghten, in reference to the above passage, says that it is a sound proposition, and adds: "I do not think it can make any difference what the nature of the property may be, whether it is a lump sum, or collected in the shape of rents accruing from time to time. I do not think it can make any difference whether the person in whose behalf the property is professedly received is, or is not, under disability, or unborn, or unascertained. Nor do I think it can make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken, and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow."

In this case we have it proved—in fact, it is not denied—that this defendant agreed to receive this fund, and in fact did receive this fund, and in fact now holds this fund for this plaintiff. No one else claims it. No one else has any right to claim it so far as the evidence goes. At all events, as between this defendant and this plaintiff, what right has the defendant to withhold this money? The only reason, as given by the defendant himself, is that the plaintiff has the promissory notes which, he claims, were intended for him. I am unable to see that this forms the slightest answer to the claim. As next of kin her right to the notes is at least as good as his, and, if her evidence is to be accepted, she has a superior title to his derived directly from her mother. Her right to the notes is in no way involved in this suit. It may be questioned in other proceedings, but I think it does not arise here. See *Roper* v. *Holland* (2); *Bond* v. *Nurse* (3); *Bartlett* v. *Dimond* (4); *Coutant* v. *Schuyler* (5); *Drury* v. *Smith* (6).

There must be a decree for the plaintiff for payment of the $400 and costs.

(1) 14 App. Cas. 437.
(2) 3 A. & E. 99.
(3) 10 Q. B. 244.
(4) 14 M. & W. 50.
(5) 1 Paige, 316.
(6) 1 P. Wms. 404.

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1900.
December 18.

Deed — Competing purchasers — Registry Act, 57 Vict., c. 20, ss. 29, 69 — Unregistered deed — Sale of part of lot of land — Subsequent registered mortgage of remainder of lot — Reference in description to previous conveyance — Subsequent deed of whole lot — Notice — Priorities.

A part of a lot of land was sold to the plaintiff by M. by deed, which the plaintiff neglected to register. Subsequently M. mortgaged by registered conveyance the remainder of the lot to S. The description in the mortgage of the land followed the original description of the whole lot, but "excepted the portion sold and conveyed by the said" M. to C. (the plaintiff). Subsequently M. sold and conveyed by registered deed for valuable consideration the whole lot of land to the defendant, who had notice of the mortgage, but not of its contents. By Act 57 Vict., c. 20, s. 29, an unregistered conveyance shall be fraudulent and void against a subsequent purchaser for valuable consideration whose conveyance is previously registered. By section 69 of the Act the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration.

Held, that by the Act the registration of the mortgage constituted actual notice of its contents to the defendant, whose title therefore should be postponed to the plaintiff's.

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

Argument was heard November 27, 1900.

L. J. Tweedie, Q.C., for the plaintiff: —

A registered conveyance will be postponed in equity to a prior unregistered conveyance where the second purchaser bought with notice of the earlier conveyance, notwithstanding the provision of the Registry Act, 57 Vict., c. 20, s. 29, by which it is expressly enacted that the unregistered conveyance shall be fraudulent and void against a subsequent purchaser for valuable consideration whose conveyance is previously registered. The policy of the Act is to protect subsequent purchasers against prior secret conveyances. If the prior conveyance is not secret, though unregistered, the intending purchaser cannot be

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prejudiced by it. If, having notice of a prior conveyance, he is able to obtain priority of title by priority of registration, the Act is turned to a mischievous and inequitable purpose. In the well known case of *Le Neve* v. *Le Neve* (1) the decision that a deed first in time, though unregistered, should be preferred in equity to a registered deed where the grantee thereof had notice of the former deed turned upon the construction of the Middlesex Registry Act, 7 Anne, c. 20, by which it was enacted "that a memorial of all deeds and conveyances whereby any honours, manors, lands, etc., in the county of Middlesex may be any way affected in law or equity may be registered in such manner as is after directed; and that every such deed or conveyance that shall be made and executed shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial is registered as by this Act is directed before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." Lord Hardwicke in his judgment says: "What appears to be the intention of the Act? Plainly to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but, if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced. The Act gives [the subsequent purchaser] the legal estate, but it does not say that he is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding. It would be a most mischievous thing if a person taking advantage of the legal form appointed by an Act of Parliament, might under that protect himself against a person who had a prior equity, of which he had notice." The principle of the decision in *Le Neve* v. *Le Neve*

(1) Amb. 436.

has been repeatedly followed by English and Irish courts. See *Ford* v. *White* (1), and *Agra Bank, Limited* v. *Barry* (2). The defendant Rogers before he purchased had notice of the plaintiff's conveyance. He bought subject to the registered mortgage from McLaughlin and wife to Sproul, which, though conveying the land according to the description in the deed from Loggie to McLaughlin, excepts that portion sold and conveyed by McLaughlin and wife to the plaintiff. It is not necessary to fix Rogers with notice of the plaintiff's title that it should be shewn that he had actual knowledge of the deed to the plaintiff. The Registry Act, 57 Vict., c. 20, s. 69, provides that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration." Under this section, therefore, Rogers had notice in law of the mortgage to Sproul, and of its contents. It is a principle in equity that, where a deed or other muniment forming part of the chain of title to land contains a reference to or recital of a deed relating to the same property, the purchaser will be charged with notice of the reference or recital: *Bisco* v. *Earl of Banbury* (3); *Coppin* v. *Fernyhough* (4); *Malpas* v. *Ackland* (5); *Farrow* v *Rees* (6); *Danby* v. *Coutts* (7); *Poole* v. *Adams* (8); *White* v. *Foster* (9); *Central Trust Co.* v. *Wabash Railway Co.* (10); *George* v. *Kent* (11). In these cases the instrument referring to other incumbrances came to the actual knowledge of the purchaser. Here, if the Sproul mortgage was not read by Rogers, the Registry Act imputes express notice of it and its contents to him. See *Trust and Loan Co.* v. *Shaw* (12); *M'Kay* v. *Bruce* (13); *Clark* v. *Bogart* (14). Rogers must also be affected with the knowledge of his solicitor, who was fully cognizant of all the facts.

(1) 16 Beav. 120.
(2) L. R. 7 H. L. 147.
(3) 1 Ch. Ca. 207.
(4) 2 Bro. C. C. 291.
(5) 3 Russ. 273.
(6) 4 Beav. 18.
(7) 29 Ch. D. 500.
(8) 33 L. J., Ch. 639.
(9) 102 Mass. 375.
(10) 29 Fed. Rep. 546.
(11) 7 Allen (Mass.), 16.
(12) 16 Gr. 446.
(13) 20 O. R. 718.
(14) 27 Gr. 455.

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connected with the title to the property: *Boursot* v. *Savage* (1); *Marjoribanks* v. *Hovenden* (2); *Hewitt* v. *Loosemore* (3); *Nixon* v. *Hamilton* (4). While the plaintiff may not be entitled to have the conveyance to Rogers rectified, he is entitled to a decree declaring that his deed has priority over the deed to Rogers, or declaring Rogers to be a trustee of the property, with directions to convey it to the plaintiff. See *Lee* v. *Clutton* (5); *Greaves* v. *Tofield* (6); *Potter* v. *Sanders* (7); *Dickenson* v. *Dodds* (8).

R. Murray, Q.C., for the defendant:—

The defendant Rogers had neither actual nor constructive knowledge of the conveyance to the plaintiff. A presumption of notice cannot be founded under the Registry Act. To do so would introduce the evils which the Act was framed to avoid. Unless the defendant had actual notice of the plaintiff's deed the priority the defendant has obtained by registering his deed will not be interfered with. The modern view of registration Acts is that a purchaser shall be free from the imputation of constructive notice: *Wyatt* v. *Barwell* (9); *Lee* v. *Clutton* (10); *New Ixion, Tyre and Cycle Co.* v. *Spilsbury* (11); *Ross* v. *Hunter* (12); *Pomroy* v. *Stevens* (13); *Lamb* v. *Pierce* (14). While it is submitted that the doctrine of constructive notice has no application to qualify or infringe upon the Registry Act, it is to be observed that it is a doctrine not favored by the Courts, and is only applicable where fraud or gross negligence is present. In *Ware* v. *Lord Egmont* (15) Lord Cranworth says: "I must not part with this case without expressing my entire concurrence in what has on many occasions of

(1) L. R. 2 Eq. 134.
(2) 1 Dru. 11.
(3) 9 Hare, 449.
(4) 2 Dr. & Wal. 364.
(5) 45 L. J., Ch. 43.
(6) 50 L. J., Ch. 118.
(7) 6 Hare, 1.
(8) 2 Ch. D. 463.
(9) 19 Ves. 435.
(10) 45 L. J., Ch. 43.
(11) [1898] 2 Ch. 484.
(12) 7 Can. S. C. R. 305.
(13) 11 Met. 244.
(14) 113 Mass. 72.
(15) 4 DeG., M. & G. 460, 473.

late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of Equity to extend this doctrine. When a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as to enable the Court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, where it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." See also *English and Scottish Mercantile Investment Co.* v. *Brunton* (1), and *Bailey* v. *Barnes* (2). It cannot be said to be gross or culpable negligence on the part of Rogers that he did not make a search of the registry, or did not acquaint himself with the contents of the Sproul mortgage. It would only be so if he wilfully abstained from doing so in order to avoid obtaining a knowledge of his vendor's title. There was no reason why Rogers should investigate the Sproul mortgage, since he was unaware that it contained any allusion to plaintiff's conveyance. The present case is concluded by the decision in *Miller* v. *Duggan* (3), where it was held that the assignee of a mortgage without notice was not affected by the unregistered equity of a mortgagor to have the mortgage reformed so as to exclude a portion of land not intended to be included in the mortgage.

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Tweedie, Q.C., in reply.

1900. December 18. BARKER, J.:—

By a deed dated November 1, 1893, and registered on November 6th in the same year, one William S. Loggie

(1) [1892] 2 Q. B. 708. (2) [1894] 1 Ch. 25.
(3) 23 N. S. R. 140; 21 Can. S. C. R. 33.

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conveyed to Elizabeth McLaughlin, one of the defendants, a farm of land in the County of Northumberland. In 1894 the plaintiff bought a piece of this land for the sum of $50, which he paid at the time, and on the 2nd of August of that year, in completion of this purchase, McLaughlin and wife executed a conveyance to the plaintiff. When McLaughlin purchased from Loggie he secured the purchase money by mortgage on the land and some other property. This mortgage is also dated November 1st, 1893, and was registered on November 6th. In 1896 McLaughlin was arranging to pay off the balance then due on his mortgage to Loggie, and for that purpose he borrowed $400 from one Sproul, and, to secure this sum, McLaughlin and wife on the 27th of May, 1896, executed a mortgage to Sproul on the two properties included in the mortgage to Loggie—that is, the property originally purchased from Loggie—and another which is not involved in this suit in any way. The first property—that is, the Loggie property—is described in the mortgage to Sproul precisely as in the original deed from Loggie to McLaughlin, but with this clause added, "(excepting that portion of the above described lands which was sold and conveyed by the said John McLaughlin and Elizabeth McLaughlin to one Fenton Carroll), the same"—that is, the whole lot—"being the lands and premises that were sold and conveyed to the said Elizabeth McLaughlin by William S. Loggie and wife by deed bearing date the first day of November, A. D. 1893, as by reference thereto will fully appear." This mortgage was duly registered on June 5, 1896. In 1897, the defendant Rogers purchased this lot—the whole lot, as he says—from McLaughlin for $700, and on the first day of October of that year McLaughlin and wife executed a conveyance of the whole lot to the defendant Rogers in completion of his purchase, and this conveyance was duly registered on the 25th of March, 1898. The plaintiff, who is an illiterate man, neglected registering his conveyance, being, as he said, ignorant of the fact that registry was in any way necessary to the completion of his title. He did, however, enter on the piece he had

purchased, and made some cutting on it, it being woodland. In the spring of 1898, after the plaintiff had heard of the conveyance to Rogers of the whole lot, he applied to him for a reconveyance to him (the plaintiff) of that portion of the lot purchased by him in 1894, and which had been conveyed to him; and he tendered Rogers a conveyance of that piece of the land for execution, but Rogers refused to execute it, claiming that he had bought and paid for the whole lot without knowing anything of the plaintiff's purchase. The plaintiff then filed this bill against Rogers and the McLaughlins, by which he claims relief on two grounds. First, he seeks to have the conveyance to Rogers rectified on the ground of mutual mistake, so that the piece of land purchased by him should be excluded from Rogers' conveyance; and second, he seeks to have his conveyance given a priority over the registered deed to Rogers on the ground that Rogers purchased with notice and knowledge of his rights.

As to the first ground for relief, I think the plaintiff's case entirely fails. The plaintiff's difficulty arises solely out of his neglect in registering his deed. Had he done that, any mistake made afterwards between McLaughlin and Rogers would not have affected him or his title. The plaintiff was in no way party to any mistake; he acquired his title, such as it is, before the alleged mistake was made. In addition to this, I think the evidence altogether fails in establishing any such mutual mistake as would sustain a bill to reform the conveyance to Rogers on that ground. The evidence relied on as shewing this mistake is also relied on as shewing notice to the defendant Rogers of the plaintiff's rights, and on that point I will refer to it more particularly later on. If the plaintiff is entitled to relief at all, it must be on the second ground. To succeed, however, on that ground there must be satisfactory proof that when Rogers purchased he had actual notice of the sale to the plaintiff; constructive notice being insufficient for the purpose: *New Brunswick Railway Co.* v. *Kelly* (1).

(1) 26 Can. S. C. R. 341.

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The Chief Justice there says: "The law as to postponing subsequent purchasers who may have acquired priority over earlier grantees by first registering their conveyances is clear. Actual notice is requisite; such notice as will make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent being indispensable." It is clear from the evidence that when Rogers purchased the mortgage to Sproul it was on record, and it is equally clear that anyone reading it must have seen that the piece of land excepted from its operation was a piece which before that had been sold and conveyed to the plaintiff. This was a clear declaration by Rogers' vendor, under his hand and seal, that at some time before he had sold a piece of the land originally purchased from Loggie to the plaintiff, and if, by operation of the Registry Act, the registry of this mortgage is actual notice to subsequent purchasers of their contents, then Rogers had actual notice when he bought that a part of the land which he was purchasing from McLaughlin had been actually sold before that to the plaintiff, and conveyed to him; in which case this Court would postpone Rogers' prior registered title to the plaintiff's previously acquired title. In speaking of constructive notice, Wigram, V.-C., in *Jones* v. *Smith* (1) says that the cases may be divided into two classes, the first of which is where the party charged has had actual notice that the property in dispute was in fact in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry into the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice. As an illustration of this constructive notice, *Bisco* v. *Earl of Banbury* (2), may be cited, where it was held that the purchaser who had actual notice of a specific mortgage, which on its face referred to other encumbrances, was bound by the other encumbrances, of which an inspection of the mortgage would have afforded him full

(1) 1 Hare, 55.

(2) 1 Ch. Ca. 287.

information. In *Patman* v. *Harland* (1), Jessel, M.R., says: "Constructive notice of a deed is constructive notice of its contents, and, if you have notice of a deed relating to the title and forming part of the chain of title, you have notice of the contents of that deed." It would seem from these and many other authorities which might be cited to the same effect that, if constructive notice of the plaintiff's conveyance was sufficient, the actual notice of the mortgage which Rogers had would have fixed him with a knowledge of the plaintiff's title which appeared in the mortgage. Constructive notice, however, is not sufficient: *Ross* v. *Hunter* (2), and the question then arises how far actual notice is made out by virtue of the Registry Act, 57 Vict., c. 20. Section 69 of that Act enacts that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration," etc.

It cannot, I think, be successfully argued that the only effect of this section is to substitute a statutory notice of an encumbrance or something affecting the property in the place of an actual notice, but that the rule still remains that you are fixed only with a constructive notice of what an examination of the registered instrument would have revealed to you; and therefore in a case like this present one the statute carries it no farther and places the parties in no different position than they were by the actual notice of the existence of the mortgage, which admittedly Rogers had. While it is true that Courts of Equity will not permit the registry laws to be used as a protection against fraudulent transactions, it cannot be denied that the trend of modern judicial decisions has been in the direction of restricting the doctrine of constructive notice rather than extending it, and in making the registry the one place to which purchasers should be compelled to go in order to ascertain the title to property. In dealing with a similar enactment in Ontario the Supreme Court of Canada, in

(1) 17 Ch. D. 356. (2) 7 Can. S. C. R. 289.

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Rooker v. *Hoofstetter* (1) say: "The object of the statute is to make every purchaser of an interest in lands, in order to his own security, to search the registry of titles established by law;" and they lay down the doctrine that, if he does so, and finds a document in point of fact upon the registry relating to the land he is about acquiring, he acquires thereby actual notice of such document, although there may have been some informality in the proof or acknowledgment of the execution of the instrument which rendered its registration irregular. But, if the purchaser fails in searching the registry, he must accept the registration as equivalent to actual notice, unless the registration is a nullity altogether. This was a case of an equitable charge on land created by an agreement, and such instruments are by the present Registry Act entitled to be registered. See section 2.

In *Bell* v. *Walker* (2) it appeared that by a deed duly executed and registered lands with a water frontage were vested in a man for life, with remainder to his son in fee. The deed contained an agreement that neither party should be at liberty to dispose of or encumber the property in any way without the consent of the other. The father, with the knowledge, but without the consent of the son, sold portions of the water frontage, and the purchaser, with the son's knowledge, improved thereon. After the father's death the son sold and conveyed the lands, including the whole water frontage to W., whereupon a bill was filed by the vendee under the father against the son and W., claiming absolutely the part of the water frontage which had been conveyed by the father on the ground of acquiescence by the son, and that W. had notice of the plaintiff's interest. The present Chief Justice of Canada, then Vice-Chancellor of Ontario, says: "The registration, by force of the Statute 13 and 14 Vict., c. 63, s. 8, constituted notice of the deed to all persons claiming any interest in the lands subsequent to the registry. I consider therefore that the rights of the Bells must be regarded as though they had made their improvements after having had from

(1) 26 Can. S. C. R. 46. (2) 20 Gr. 558.

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Stanislaus express notice of his title." Blake, V.-C., concurred in this view.

In *Haynes* v. *Gillen* (1) it appeared that the owner of two town lots, 25 and 26, sold a portion of 26 to P., but by mistake the description in the deed was such as at law included the whole lot. He subsequently sold lot 25 and all that part of lot 26 not before sold to P. to the plaintiff, and the deed thereof was registered. After the registration of this deed the defendant obtained a conveyance from P., the description of the land being the same as that in the deed to P. It was held that the registration of the plaintiff's deed was notice to the defendant of the plaintiff's claim to that part of lot 26 not sold to P. The conveyance of lot 25 and 26 described the latter as "all that part of lot number 26 on said west side of George street not heretofore sold and conveyed by said party of the first part to one William Powell." Blake, V.-C., held that the registry of this conveyance was actual notice to a purchaser from Powell that there was in fact a portion of lot 26 which had not been previously conveyed to Powell. After citing authorities to shew that, notwithstanding the Registry Act, notice of an equity must still prevail against registration, the Vice-Chancellor goes on thus: "The defendants allege that they had no notice of the equitable interest of the plaintiff when their purchase was effected. But section 64 of this same Act says, 'The registry of an instrument under this Act, or any former Act, shall, in equity, constitute notice of such instrument to all persons claiming any interest in such lands subsequent to such registry,' so that when the defendant purchased she then had notice of the conveyance to the plaintiff which had been registered against lot 26, and she then knew that, notwithstanding the conveyance by Cronk to Powell, Cronk still claimed he had not conveyed the whole of the lot; still claimed he had a right to deal with a portion of it, and that he made the subject of an agreement between himself and the plaintiff that part of the lot 'not heretofore sold and conveyed by him to William Powell.'"

(1) 21 Gr. 15.

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If this case was well decided, I can see no material difference between it and the present. Notice of the mortgage is as much notice that McLaughlin had already sold and conveyed to the plaintiff a part of the lot which Rogers was then buying as notice of the conveyance to Powell in the other case was notice to the subsequent purchaser that a portion of lot 26 had not been sold. See also *Clark* v. *Bogart* (1).

It is not necessary to decide to what extent this rule applies. There may be cases of mere recitals in deeds and other cases of a similar character where it does not apply. In this present case, however, the exception in the description of the property in the mortgage was a distinct declaration by McLaughlin and wife that they had already sold and conveyed to the plaintiff a piece of the property for the sale of which to Rogers they were then negotiating, and it was in a registered document by which the legal title of that property was vested in the mortgagee. I can apply to this case Vice-Chancellor Blake's language in *Haynes* v. *Gillen*. If it were clearly established that McLaughlin had made the statement in the Sproul mortgage to Rogers, it could not be questioned that, if the sale were thereafter concluded, the purchaser would take subject to whatever right the plaintiff may have had; and he adds: "I do not think it weakens the plaintiffs' case, because the notification, in place of being verbal, has been given through the medium of an instrument under the hand and seal of the person giving it, and solemnly recorded in the office where such information is to be looked for."

There is evidence in this case which was relied on as shewing actual notice of the plaintiff's rights to Rogers before he purchased. McLaughlin swears that, before the purchase was completed by Rogers, he pointed out to him on the ground that this land to be sold did not include the piece lying between the road and the lake, which, in fact, was the piece the plaintiff had bought, though he did not tell Rogers so. As against this is the fact, not only that Rogers

(1) 27 Gr. 450.

denies that any such thing took place, but that the evidence of McLaughlin himself clearly shews that when Rogers made the offer of $700 for the lot he was dealing with the whole lot, and that at that time he knew nothing whatever of the plaintiff's purchase, and this McLaughlin must have known. It is also true that Mrs. McLaughlin swears, and her husband does also, that at the conversation at McLaughlin's house in Rogers' presence she asked her husband if he had told Rogers about the piece sold to Carroll, and that he said he had. This is also positively contradicted by Rogers. If this were a bill filed by McLaughlin to reform the conveyance on the ground of mutual mistake, I should think the evidence fails in shewing it. And, in my opinion, if this were the only evidence of notice to the defendant Rogers of the plaintiff's purchase, it is not of that character which would warrant this Court in postponing a registered owner, who had purchased his property and paid for it in good faith, to an earlier purchaser who had failed in completing his title by registry.

There was some suggestion that, as Mr. Benson had acted in all these conveyances as the solicitor, and therefore knew from having drawn the Sproul mortgage, and in some other way, of the plaintiff's purchase, that that amounted to notice to Rogers when he came to act for him in preparing his conveyance. There is, however, nothing in this. Mr. Benson said he thought nothing of it, and I did not wonder at his forgetting the fact. It is unreasonable to suppose that a solicitor is to recollect all that he sees in the conveyances he draws, and more unreasonable still to hold a subsequent client bound by notice to his solicitor when acting for some one else in a different employment and in a different transaction altogether. There must be a decree in the plaintiff's favor with costs, declaring the plaintiff, as against the defendant Rogers, entitled to priority as to the piece of land sold to the plaintiff, and the usual order.

1900. October 16.

BREWSTER v. THE FOREIGN MISSION BOARD OF THE BAPTIST CONVENTION OF THE MARITIME PROVINCES.

Will — Construction — Blanks in Will — Charitable gift — Trust for benevolent purposes — Uncertainty — Failure of trust.

A testator by will provided for a bequest of money to the defendants, to be paid yearly or at such times as his executor should think advisable, but omitted to fill in the amount. In the same paragraph of the will it was then declared that, when "Home Missions" were considered more needy, an amount might be given to it, or to any such good and benevolent Christian objects as the executor should consider most deserving. The will then directed the executor to sell a part of the testator's real and personal estate, "and the proceeds to be placed so as to be conveniently drawn to assist in aiding good and worthy objects."

Held, that the gift of an unnamed amount of money to the defendants was void, and that the gift in the rest of the will was not a gift to charitable, but to benevolent, uses, and failed for uncertainty.

John Wilbur, late of the Parish of Harvey, Albert County, by his will, dated May 14, 1900, gave and bequeathed in the second paragraph thereof, "to The Foreign Mission Board of the Baptist Convention of New Brunswick, Nova Scotia, and Prince Edward Island, the sum of dollars, to be paid yearly, or at such times as my executor or executors think advisable, until the sum of dollars are paid; and, when Home Missions are considered more needy of assistance, an amount may be given to it or to any such good and benevolent Christian objects as my executor or executors consider to be the most deserving." "Third, I direct my executor or executors to sell one-half of my real estate in my farm and buildings and improvements, and all my farming utensils of every kind and description; also, all my household effects, and my pews and shares in pews in the Harvey Baptist meeting house, and the proceeds to be placed so as to be conveniently drawn to assist in aiding good and worthy objects. Fourth, I give and bequeath to

Samuel Wilbur, his heirs, and assigns, one half of my farm and one half of the improvements, provided he continues to occupy it as he has been doing, and continues to take good care of me and provides for me the remainder of my life. But, if the said Samuel Wilbur fails to do as herein provided, I direct my executor or executors to sell all my real estate and personal effects, and use the proceeds for missions or other good and worthy objects." The plaintiff was named in the will as executor thereof, and on the testator's death on August 6, 1900, duly probated the will. The conditions attaching to the devise and bequest to Samuel Wilbur were fulfilled by him. It was admitted that the testator meant by the words, "The Foreign Mission Board of the Baptist Convention of New Brunswick, Nova Scotia, and Prince Edward Island," the defendants in this suit, "The Foreign Mission Board of the Baptist Convention of the Maritime Provinces;" but it was not admitted that the words in the will, "Home Missions," meant "The Home Mission Board of the Baptist Convention of the Maritime Provinces," a corporation incorporated by Act 53 Vict., c. 122, of the Acts of the Legislature of Nova Scotia. The defendants, Aaron Sprague and Lydia Sprague, are respectively the nephew and niece by the half-blood of the testator. The suit was brought by the plaintiff, as executor of the will, to have its meaning determined, and for directions as to the distribution of the estate.

Argument was heard September 12, 1900.

C. N. Skinner, Q.C., and *C. A. Peck*, Q.C., for the plaintiff:—

The gift to the defendant Board manifestly fails, and the discretionary gift to "Home Missions," etc., is too vague and uncertain as to the identity of the object and the extent of the gift, to be effective.

A. A. Wilson, Q.C., for the defendant Board:—

There is a gift to "The Home Mission Board of the Baptist Convention of the Maritime Provinces" in the

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event of their being more needy than the defendant Board. Consequently, if they are not more needy, the gift goes to the defendant Board. We are, therefore, entitled to an amount in the discretion of the executor, though we fail to take any express sum owing to the failure of the testator to name it. If the bequest to the defendant Board fails, the bequest to the Home Mission Board is good. The will will also bear the construction that a separate gift was intended to the Home Mission Board. If Home Missions are more needy, then an amount is to be given to them. That does not mean an amount out of the fund given to the Foreign Board.

A. I. Trueman, Q.C., for the heirs and next of kin:—

There is no gift to the defendant Board, and therefore there cannot be one to the Home Mission Board, for the gift to the latter is dependent upon the validity of the gift to the former. The discretionary amount to be paid by the executor to "Home Missions" is only payable if he considers they are more needy of assistance than the Foreign Mission Board. Therefore the gift to "Home Missions" is payable out of the fund intended to be bequeathed to the Foreign Mission Board. But, as the gift to the defendant Board fails for want of definitiveness, the gift to "Home Missions" necessarily fails with it. Independently of this view the gift to "Home Missions" is too vague to be given effect. The executor cannot exercise a discretion as to the amount to be given to an object of the testator's bounty, and the Court will not determine the amount. See *Jarman* on Wills (1). The third paragraph of the will cannot be resorted to by the defendant Board and the Home Mission Board upon the contention that, as they were intended to be benefited by the will, they fall within the class described by the testator as "good and worthy objects." Further, the language of this paragraph is not explicit and authoritative enough for the executor to act upon it. He cannot under it

(1) 5th ed., p. 328.

appropriate and devote money for any scheme or object he may fancy, even though it be the defendant Board. He is not given even the discretion confided to him under the preceding paragraph of the will. The third paragraph does not fall within the general principle that a gift for charitable purposes will not be allowed to fail for want of certainty in the object. If it was within the principle, the Court might frame a scheme for the disposal of the fund in the interests of the defendant Board. But "good and worthy objects" are not necessarily charitable objects, or the objects referred to in the second paragraph of the will. Where the bequest may be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purpose, whether charitable or otherwise, the bequest will be void, on the ground that it is not exclusively charitable. Thus in *Vezey* v. *Jamson* (1), where a testator gave the residue of his estate to his executors upon trust to apply and dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum, appoint, and as the laws of the land would admit of; and, in default, upon trust to pay and apply the same in or towards such charitable or public purposes, as the laws of the land would admit of; or to any person or persons, and in such shares, manner, and form as the executors should in their discretion think fit, Sir J. Leach, V.-C., observed that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity.

Wilson, Q.C., in reply.

1900. October 16. BARKER, J.:—

I think the bequest contained in the second clause of this will altogether too vague and uncertain to be operative. I am unable to fill in the blanks which the testator left for the amount which he intended giving to the Foreign Mission Board. As to the last clause of the bequest, it

(1) 1 S. & S. 69.

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seems impossible to give any very satisfactory meaning to it or to find in it, either as to the object or subject of the bequest, that certainty which Courts consider essential to the validity of such testamentary dispositions. In this view it is, I think, immaterial whether the money intended to be given by it to home missions, or other good and benevolent objects, forms a part of the fund primarily intended for the benefit of the Foreign Mission Board or not. It is true that charitable gifts, so-called, are sustained in cases where the bequest would otherwise be held void, and I at first thought the bequest might, perhaps, be sustained on that ground. I am, however, of opinion that the purposes indicated by the testator are simply benevolent in their character, and in such cases, when there is evidence to indicate the testator's intention to create a trust as to the fund, the object and purposes of the trust must be sufficiently clear and certain to enable the Court to see to its execution. It is difficult to ascertain from a will so obscure and ambiguous as this one is, the testator's intention; any conclusion must be little more than conjecture. It does, however, seem clear that he did intend that certain objects benevolent in their character — objects which he speaks of as Home and Foreign Missions — good and benevolent Christian objects, and good and worthy objects, should be promoted and aided by the funds in the hands of his executor. And it may be added that the extent of such aid, and the particular object to which it should be given were left to the judgment and discretion of the executor. The testator's language entirely negatives the idea that the executor was to take the property beneficially for himself. It is not devised in words to him, neither does he claim any beneficial interest in it. There is a power of sale as to the real estate, but his title to the proceeds and the personal estate comes to him *qua* executor by operation of law. The will, however, directs the amount intended to be given to the Foreign Mission Board to be paid yearly, or as the executor should think advisable. It directs the fund created under clause three to be drawn, — that is, by the executor, in whose hands it was — for the

purposes mentioned. And under the conditions mentioned in clause four of the will all the proceeds of a sale of the real and personal estate were to be used by his executor for missions and other good and worthy objects. These provisions clearly indicate that the executor was not to have the funds for himself, but was to hold them upon trust for the benefit of the objects named. In such a case, where the trust, as here, is so vague and uncertain that the Court cannot deal with it as one capable of execution, it is declared void, and the property goes to the next of kin.

In *Vezey* v. *Jamson* (1) the testator gave the residue of his estate to his executors in trust, in default of appointment, to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons, in such shares as they in their discretion should think fit. The Vice-Chancellor said: "In the event of no appointment of this residuary estate by the testator himself, he has given it to trustees to dispose of it at their will and pleasure, either for charitable purposes or public purposes, or to any person or persons, in such shares and proportions, sort, manner, and form, as they in their discretion shall think fit and the laws of the land shall not prohibit. It is in effect a gift in trust, to be absolutely disposed of in any manner that the trustees think fit, which is consistent with the laws of the land, and so that it be not applied for their own use and benefit. The testator has not fixed upon any part of this property a trust for a charitable use, and I cannot, therefore, devote any part of it to charity. He has given it to the trustees expressly upon trust, and they cannot, therefore, hold it for their own benefit. The necessary consequence is that, the purposes of the trust being so general and undefined that they cannot be executed by this Court, they must fail altogether, and the next of kin become entitled to the property."

In *Morice* v. *Bishop of Durham* (2) the bequest was in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, and it

(1) 1 S. & S. 69.

(2) 9 Ves. 399; 10 Ves. 522.

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was held that it was not a charitable legacy, and was, therefore, a trust for the next of kin. The Master of the Rolls says: "That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this Court has not been, and cannot be, denied. There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner."

It is true that in both of these cases the property was expressly devised in trust, whereas in the present case there is no such devise. This, however, is immaterial where, from the language used, it is clearly indicated that the testator intends to create a trust in reference to the property, as, I think, is the case here. See *Buckle* v. *Bristow* (1); *Ellis* v. *Selby* (2); *Flint* v. *Warren* (3); *White* v. *White* (4).

There will be a declaration that the bequests contained in the second and third clauses of the will are void for uncertainty, and the plaintiff, as such executor, will be ordered to distribute the proceeds of the sale of real estate and the personal estate in his hands as follows: —

1. In payment of the debts, funeral and testamentary expenses of the testator, including in such expenses his own commission, and the taxed costs of all parties to this suit, and succession duty, if any.

2. The residue equally to and among the testator's next of kin in equal degree.

(1) 10 Jur. N. S. 1095.
(2) 1 M. & C. 286.
(3) 15 Sim. 625.
(4) [1893] 2 Ch. 41.

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December 18.

Statute of Limitations, c. 84, s. 13, C. S.— Tenants in common — Death of co-tenant — Exclusive adverse possession of land by survivor — Title of heir extinguished.

Land was conveyed in fee to two brothers as tenants in common. One brother died on May 9, 1876, intestate, leaving him surviving his co-tenant, his mother, and three sisters, of whom the plaintiff is one. The mother died September 5, 1876. The surviving brother had from the time of his brother's death until his own death on November 8, 1896, exclusive possession and use of the land, and the receipt of the rents and profits therefrom, without accounting. He and his sisters lived together on premises situated elsewhere until his marriage in 1890. He always contributed to their support, but the contributions were not meant, and were not understood, to be a share by the sisters in the rents and profits of the land. In a suit commenced September 21, 1899, by the plaintiff for the partition of the land:—

Held, that the plaintiff's title was extinguished by c. 84, s. 13, C. S.

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

Argument was heard October 30, 1900.

L. J. Tweedie, Q.C., for the plaintiff:—

The possession of Thomas H. Ramsay with respect to the share in the land belonging to the deceased co-tenant was that of a trustee for the heirs, and he therefore could not gain an adverse title. If he were not a trustee, he was the agent of the heirs, and his possession would not be adverse unless he expressly claimed to be holding adversely to them. It will be presumed that he went into possession of the undivided moiety of the heirs on their behalf: *Doe dem. Kirkpatrick* v. *Armstrong* (1); *Thomas* v. *Thomas* (2). Being, therefore, clothed with a fiduciary character, he cannot convert a possession so obtained into a possession for his own benefit without positive evidence that he renounced his fiduciary character. The relationship of the parties, and their dealings with each other in

(1) 30 N. B. 57. (2) 2 K. & J. 79.

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respect to money matters connected with the property, are opposed to the view that Thomas H. Ramsay's possession was adverse to the plaintiff.

M. G. Teed, for the defendants: —

The plaintiff's interest in the land is extinguished by the *Statute of Limitations*, c. 84, s. 13, C. S. Thomas H. Ramsay was neither a trustee nor an agent for the heirs of the deceased tenant in common, as his possession must be ascribed solely to his own title, and the character of trustee, or agent, cannot be imputed to him by implication.

Tweedie, Q.C., in reply.

1900. December 18. BARKER, J.: —

This is a suit for partition, and the only question involved in it is whether or not the plaintiff's right is extinguished by the *Statute of Limitations*. The land in question was conveyed to Thomas H. Ramsay and James Ramsay as tenants in common by one John Henderson by deed dated July 1, 1858. Thomas and James Ramsay were brothers of the plaintiff Jane Ramsay, and the defendants Agnes and Barbara Ramsay. In addition to these five children, their father on his death was survived by his widow. The widow died September 5, 1876, and James Ramsay died May 9, 1876, intestate and unmarried. Thomas H. Ramsay was married in 1890, and had two children, Harvey and Florence, who are defendants herein. He died intestate on November 8, 1896, leaving him surviving a widow and these two infant children. His widow subsequently married the defendant William F. Copp. This suit was commenced September 21, 1899. The plaintiff's right is admitted by her two sisters, against whom the bill has been taken *pro confesso*, but the contest is between her and the infant children of her brother Thomas, represented in this suit by Copp, their guardian *ad litem*. The evidence shews that for about five years before his death James Ramsay was an inmate of the Provincial Lunatic Asylum at St. John, where he had been

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sent in consequence of an illness brought on by an accident which befell him while working on a bridge. There seems to be no question that he and his brother went into possession of the lot in dispute, and continued in such possession until James' death. The evidence is also clear that Thomas, being then in possession as a tenant in common, remained in the occupation and possession of it from that time until his death, except as to the small piece sold to Morrison. Whether this possession has been of such a nature as to result in a statutory title in Thomas Ramsay is the whole point in the case. I regret to say that the evidence is not in all respects satisfactory. For reasons which were apparent to those who were present at the hearing, the plaintiff's evidence was not very reliable; and her sister Barbara seemed to entertain such a dislike for Mrs. Copp, who is only protecting the rights of her infant children, that her evidence must also be accepted with caution. All of them, however, agree in one thing, that is, in thinking Thomas Ramsay to have been a man kind in heart and generous in disposition.

The plaintiff's right accrued on the death of her mother on September 5, 1876, and the twenty years would, therefore, have elapsed some two months before Thomas Ramsay's death. The effect of the *Statute of Limitations*, c. 84, s. 13, C. S., is to render the possession of a tenant in common a separate possession; so that, if Thomas Ramsay continued in possession of this lot, or in the receipt of the rents and profits for his own benefit, for these twenty years, the plaintiff's interest would be extinguished: *Culley* v. *Taylorson* (1); *Doe dem. Thompson* v. *Marks* (2). In such a case the possession is adverse, and at the end of the twenty years, if our Statute is to be construed like the English one, the tenant so holding acquires a statutable title, which would not be extinguished either by a subsequent accounting for the rents or a subsequent acknowledgment: *Sanders* v. *Sanders* (3); *In re Alison* (4). I have gone over the evidence carefully, and I cannot

(1) 11 A. & E. 1008.
(2) 3 Kerr, 650.
(3) 19 Ch. D. 374.
(4) 11 Ch. D. 284.

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find that the plaintiff or her sisters either (though possibly their rights may not be involved in this suit), ever interfered in any way with this lot of land or had anything to do with it at all, or exercised any act of possession, control, or ownership, until after Thomas Ramsay's death. If the plaintiff can escape the effect of the Statute it must be on the ground that during the period in question Thomas Ramsay was holding for her as well as himself and receiving the rents and profits, not for his sole benefit but for the benefit of all.

The property in question consists of some 130 acres about 13 or 14 of which are cleared, and a part is under cultivation.

Charles Morrison says that he has known the land 16 years, and he knew before that of Thomas Ramsay having to do with it. Sixteen years ago Morrison rented the lower part of it for $6 a year, and has had it ever since. In addition to this, he looked after the fences on the balance of the lot, for which Ramsay paid him. This rent was always paid to Ramsay while living, and to Mrs. Ramsay afterwards. During this time Ramsay farmed the rest of the lot, and cut wood off it. In addition to this, about 13 years ago Morrison bought from Ramsay part of this lot — a building lot 100 feet square — got a conveyance from him, and on the lot built a house, which he has always occupied without objection from anyone. When Ramsay sold this lot he professed to be the owner and said, according to Morrison, that his sisters had no title to it. The purchase money, $100, was paid to Ramsay. John Clarke rented the upper part of the lot in 1892 from Thomas Ramsay for pasturage for $25, and paid the rent to Ramsay. Andrew Cobb says that he worked on the lot for Thomas Ramsay a year before James Ramsay died; that he continued in Thomas' employ for some six years after that, and in two or three of those years worked at the crops on the lot. He says that he cut wood on the lot for Thomas Ramsay, and hauled it to his (Ramsay's) lime kiln for use there; that about 18 years ago, when working for Thomas Ramsay, he helped clear the land where

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Morrison's house now is, and that he knew of others working on the lot for Ramsay. James McKendrick ploughed the lot, and put in crops for Ramsay eight years ago, and since Ramsay's death did the same, by Mrs. Copp's instructions. John Carroll says that he has known the property for 23 or 24 years; that Thomas Ramsay has always managed it, and that he worked for him on it 22 years ago, ploughing and cropping it, hauled wood off of it to the lime kiln, looked after the fences and did other work.

During all this period Thomas Ramsay had sole and entire control. None of these witnesses ever had anything to do with the plaintiff or her sisters in any way; neither did they interfere or take part in the management or control of the land, except the message sent to Carroll by the plaintiff after her brother's death as to some fence. Neither is there anything in the evidence to shew that during this long period the plaintiff or her sisters made any claim upon their brother for any portion of the proceeds of the farm, or in any way sought information as to its management, or asked for any account of its rents and profits. Neither can I find in the evidence anything to indicate that James Ramsay ever paid to his sisters money, or supplied them with necessaries, as being a share, or representing, in whole or in part, a share of the profits of this land. There are, however, two transactions which, it is claimed on the plaintiff's behalf, lead to an entirely different conclusion. One relates to Morrison's purchase money, and the other to rent paid by Stables in 1895. As to the Morrison matter, the plaintiff says that she knew about the sale, but took no interest in it, and the reason was that, as her brother had sold it, it would come out of his share. The plaintiff's sister Barbara, on the contrary, says she and her sisters all agreed to the sale, and that shortly before Thomas' marriage he came and paid the other sister Agnes $20, which, she put forward, her brother said in effect was their share of the Morrison purchase. When, however, she was asked what her brother said when he paid it, she answered, "Morrison had given him this,

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and he handed it to my sister Agnes." There is no pretence that any one joined in the conveyance to Morrison except Thomas Ramsay, and, if the plaintiff's understanding of that sale was correct, neither she nor her sisters had any right to any of the purchase money. If Barbara Ramsay's version is correct, neither she nor her sisters had any interest in it, because they had never parted with their right in the land. So far from this being the case, the plaintiff files this bill for a partition and sale of the whole lot, including this Morrison piece, and the two defendants, Barbara and Agnes, assent to that by allowing the bill to be taken *pro confesso* against them. It is a much more natural inference, and one, in my opinion, more consistent with the plaintiff's conduct and the account of the transaction as given by either her or her sister, that the money given to Agnes at this time (though it may have come from Morrison on account of his purchase) was but one of the many contributions which for a series of years the brother was making towards the maintenance of the plaintiff and her sisters. The other transaction to which I have alluded—the Stables' rent—is thus described. George Stables was produced as a witness, and he stated that in 1895 he rented a part of the land from Thomas Ramsay for pasture, for which he was to pay $15. At the time, Ramsay told him to give his sister some things and charge them to him, which he did. Stables kept a grocer's shop, and the sisters, or some of them, came and got groceries on Thomas Ramsay's account amounting to about $15. Stables charged these goods to Thomas Ramsay and credited the rent, and struck a balance. This circumstance was relied on as furnishing strong evidence from a disinterested witness of an accounting to the plaintiff and her sisters for the rent of this land. And, if such were the case, as it occurred before the expiration of the twenty years, it might fairly be used as shewing by inference, as was done in *Sanders* v. *Sanders*, already cited, the precise nature of previous transactions. But, when the matter is analyzed, it amounts to nothing more than Thomas Ramsay giving Stables authority to pay the

$15 payable to him for rent in goods to be delivered to his sisters. As a mere isolated transaction it proves too much; for the sisters would only be entitled to three-eighths of the amount — the balance admittedly belonging to the brother.

I have given the evidence in this case the most careful consideration, and I have arrived at the conclusion that Thomas Ramsay was holding this property for his own benefit, and receiving the rents and profits for his own benefit, and not for that of the plaintiff, and that by virtue of the Statute, the twenty years is a bar to the recovery in this suit. This case is, in its circumstances, far removed from that of a brother making use of the Statute, in order to deprive his sisters of property to which they were justly entitled. The evidence shews that these three sisters, of whom the plaintiff at least seems ill-adapted for making her own way in the world, were left with little or no means of support. At the time of their mother's death, they were all living together at what they called the homestead, in Newcastle, and where the sisters continued to make their home until they sold the property, two or three years ago. The plaintiff and Barbara sought to convey a different impression as to their circumstances, but so far as I am concerned their object failed. They spoke of their brother James having had money, from which they got a benefit. The plaintiff, however, says she got nothing from him, and Barbara will only speak on cross-examination of a small sum. He had only been in the employ of his brother, and cannot have accumulated much, and his last five years were spent in the Asylum. They also sought to create the impression that their mother had some private fortune from which they derived some benefit. But what it amounted to, or where it came from, they could not tell. Thomas Ramsay seems to have been a man of some means, doing a paying business in trade and other ways, and as the evidence leads me to conclude, he saw that on his mother's death he must practically assume the care and maintenance of his sisters. The title to the homestead property was in him, and so far as the evidence goes

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belonged to him, though his sisters rather put it forward that they had some interest in it. At this homestead they all lived together. It is no doubt true that Agnes Ramsay acted as housekeeper, that Barbara assisted in the shop and the plaintiff may have aided in some measure in the household, but the principal support of the establishment must have come from Thomas Ramsay, for there was no one else to furnish it. It was true that wood cut off this farm, and crops taken from it were brought to the homestead and used for the general support of the family. That was, however, in my opinion no contribution of the rents and profits as such. The evidence shews that the total rents and profits did not amount to more than $20 or $25 a year, the sisters' share of which would be a comparative trifle. The evidence satisfies me that Thomas intended taking the rents and profits of this place for his own use, as he had to provide for the support and maintenance of his sisters. This state of affairs continued down to 1890, when Thomas was married. He then made his sisters a present of the homestead property, executing a conveyance of it to them, and a few years later they realized some $800 on its sale. This secured to them a home, and Mrs. Copp tells of the constant contributions in materials for the house which were afterwards made, a statement corroborated by the the order on Stables for the $15 worth of groceries. Such is the conclusion to which the evidence leads my mind; it is, I think, a natural and reasonable one, and the only one consistent with admitted facts and surrounding circumstances. I have not overlooked the fact that Barbara Ramsay speaks more than once of their receiving their share of the rents. The statement is too general to be of any value, and when asked to say how they were received, it amounted to nothing more than what I have already said.

I think the evidence shews that the plaintiff's right is extinguished by the Statute, and therefore the bill must be dismissed. The defendants, except Barbara and Agnes Ramsay, must have their costs.

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December 18.

Deed — Quit-claim deed — Competing purchasers — Priorities — Registry Act, 57 Vict., c. 20.

It is not a deed of quit-claim where the grantor remises, releases, and quit-claims unto the grantee, his heirs and assigns, a lot of land, and covenants that the land is free from incumbrances made by him, and that he will warrant and defend the same to the grantee, his heirs and assigns, against the demands of all persons claiming by or through the grantor; and the grantee under such a deed, if registered, will not be postponed under the Registry Act, 57 Vict., c. 20, to the equities of a prior purchaser, of which he had no notice.

Bill for the specific performance by the defendant Liffey Chappell of an agreement for the sale by him to the plaintiff of a piece of wilderness land situated in Westmorland County, or for a declaration that the land is the property of the plaintiff, or that the defendant Bentley H. Jackson be declared to hold the same in trust for the plaintiff, and for an injunction to restrain the defendants from selling or encumbering said lands, or committing waste thereon.

In June, 1892, the defendant Chappell being owner in fee simple of the land in question agreed by parol for its sale to the plaintiff for $50. A deed of the property from Chappell's vendor was then handed by Chappell to the plaintiff for the purpose of enabling the plaintiff to prepare a conveyance to himself, which was to be forwarded by Chappell's agent, Joseph Goodwin, of Baie Verte, to Chappell's address in Somerville, Massachusetts, for execution. It was agreed that the purchase-money should be paid by the plaintiff to Goodwin as Chappell's agent. About the month of October following, the plaintiff went over the lines of the land, and in the month of December re-blazed the lines, and put in a logging road. On December 19, the plaintiff took a warranty deed of the property to Goodwin to be sent to Chappell for execution, and at the same time paid to Goodwin $40

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on account of the purchase-money, it being agreed that the balance should be paid on the return of the deed. Towards the last of December the plaintiff received the following letter from Chappell, dated December 24, 1892: "I have just seen Joseph Goodwin, and would like to have you send me my old deed so that I can be sure about the boundaries and dates. Please send it by return mail, so I can sign your deed and return it by Mr. Goodwin." The plaintiff duly complied with this request. Early in January, 1893, the plaintiff called upon Goodwin to pay the balance of the purchase-money, and to obtain his deed, when he learned that Chappell did not intend to sell the property to him, and that Goodwin was instructed to return to him the $40 he had paid on account of the purchase-money. In reply to an inquiry by the plaintiff, Chappell wrote under date of January 24, 1893, that he did not care to give a warranty deed of the property, and for the plaintiff to get back his money from Goodwin. Subsequently, in response to a letter dated January 30, 1893, from the plaintiff's solicitor offering to take a deed of bargain and sale of the property, Chappell wrote under date of February 8, that he had considered the agreement off, and had sold and conveyed the property to the defendant Jackson. The deed of the land by Chappell to Jackson was dated, and its execution was acknowledged, February 8, 1893. The deed remised, released, and quit-claimed unto Jackson, his heirs and assigns, the land in question, and contained a covenant by Chappell that the land was free from all incumbrances made or suffered by him, and that he would warrant and defend the same to the grantee, his heirs, and assigns, against the claims and demands of all persons claiming by, through, or under the grantor, but against none others. The deed was registered April 6, 1893. Jackson purchased the land in good faith, for valuable consideration, and without notice of the agreement between the plaintiff and Chappell. The bill was taken *pro confesso* against the defendant Chappell for want of an appearance.

Argument was heard December 11, 1900.

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W. B. Chandler, Q.C., for the plaintiff:—

A purchaser under a deed of quit-claim buys subject to any equities existing against the property, though he has no notice of them. He does not contract for the land itself, but only for such interest as the grantor may have. He consequently cannot under our Registry Act, 57 Vict., c. 20, obtain by registering his deed a priority over an antecedent purchaser, but will be postponed to him. See *Goff* v. *Lister* (1); *Miller* v. *Duggan* (2).

H. A. Powell, Q.C., for the defendant Jackson:—

The deed to Jackson is not a conveyance of his vendor's interest in the land, but of the land itself. It also contains a covenant by the vendor of his title. The point is concluded by *King* v. *Keith* (3). Even if the instrument were a quit-claim deed, it is not plain on principle why the grantee should not be within the protection of the Registry Act. A deed of "all the right, title, and interest," or of "all the interest" of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of the Registry Act that a purchaser of land shall only be bound by what an examination of the registry of deeds discloses to him concerning the title of his grantor. Section 29 of the Act enacts that an unrecorded deed unknown to the purchaser is fraudulent and void against him if his deed is previously recorded. The principle of the Act applies with equal force in the case of a deed of the grantee's right, title, and interest, as in that of a deed of the land. To hold otherwise would defeat the purpose of the registration Act, and create confusion in the titles to land. The argument that, as a quit-claim deed only releases to the grantee the interest of the grantor, it is notice to the purchaser that there may be outstanding claims affecting the title of the property, and therefore that he cannot be

(1) 14 Gr. 451.

(2) 21 Can. S. C. R. 38, 47.

(3) 1 N. B. Eq. 538.

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a *bonâ fide* purchaser, involves no inconvenient result where the purchaser has actual notice of a defect in his vendor's title. But if he has no notice why may he not accept a quit-claim deed as well as a deed of bargain and sale? See *Moelle* v. *Sherwood* (1), and *Dow* v. *Whitney* (2).

1900. December 18. BARKER, J.:—

The only point necessary to be considered in this case is whether the defendant Jackson purchased the property in question *bonâ fide* for value, and without notice of any agreement between the plaintiff and Chappell. It is very doubtful whether the evidence shews any agreement between the plaintiff and Chappell capable of being enforced, but, whether that is really so or not, it can make no difference if the defendant Jackson purchased in good faith for a valuable consideration, and without any notice of the plaintiff's rights. I think the defendant's evidence on this point must prevail. He swears positively that he knew nothing whatever, and never heard anything, as to the plaintiff's purchase, or even of negotiations for a purchase, until after he had himself bought the property in question, paid the purchase-money, and acquired his title, and there is nothing to throw any doubt upon this statement. The plaintiff is here seeking to obtain priority over the defendant Jackson's registered title, and one of the essential elements in a suit of this kind is that the plaintiff should establish affirmatively to the Court's satisfaction that the owner of the registered title had actual notice of the plaintiff's right before purchasing. This onus, I think, the plaintiff has failed to discharge.

My attention was called to the conveyance from Chappell to Jackson, which was said to be a mere quit-claim deed; and *Goff* v. *Lister* (3) was cited as an authority for holding that in such a case the purchaser is not a purchaser for value under the Statute. Considering the *habendum* clause and the covenant as to title in Jackson's conveyance, I think it must be regarded as more than a mere release or quit-claim. It was clearly the intention of the parties to

(1) 148 U. S. 21. (2) 147 Mass. 1. (3) 14 Gr. 451.

convey by the deed all the right, title, and interest of Chappell in the land to Jackson; and in such a case a conveyance in this form would operate to carry out that intention, even if the grantor was owner in fee. See section 36 of the Registry Act, 57 Vict., c. 20, and *Doe dem. Wilt* v. *Jardine* (1). The conveyance in reference to which this case was decided is almost identical in form with that involved in this present suit.

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The bill in this case has been taken *pro confesso* for want of an appearance against the defendant Chappell, but it must be dismissed as against the defendant Jackson with costs.

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—No. 2. See Ante, page 112.

Partnership — Loss of capital — Depreciation of machinery — Referee's Report — Exceptions — Costs.

Where, under a partnership agreement, a partner contributed to the partnership business his time and skill, and the use of, but not the property in, certain machinery, in consideration of a weekly salary and one half of the net profits, he was held, in the absence of an agreement, not entitled on taking the partnership accounts to an allowance for the depreciation in the value of the machinery, arising from ordinary wear and tear, as a loss to him of capital put into the business.

Where exceptions to a Referee's report were allowed in part, costs were refused to either party.

Exceptions to the Referee's report on the reference ordered by the judgment in this suit, *ante*, page 112, to take an account of the business carried on by the plaintiffs and defendant on the terms of the plaintiffs and defendant being partners on equal shares, and by which he reported the sum of $1,554.56 to be due by the defendant to the plaintiffs. The business resulted in a loss of

(1) Bert. 142.

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$1,776.38, which was paid by the plaintiffs. The Referee in making up the account added to the half of this sum, for which the defendant is liable to the plaintiffs, a sum of $500 advanced by the plaintiffs to the defendant under the circumstances stated in the report of the case, *ante*, page 112, and also a sum of $166.37, advanced by the plaintiffs to the defendant to purchase material to set up the machines of the defendant used in connection with the business. The first exception related to the item of $500, which, it was contended, was advanced on the security of defendant's machines, and was not a part of the partnership accounts. The second exception was to the item of $166.37, on the ground that it was a loan outside of the partnership business. The third exception was to the refusal of the Referee to allow to the defendant for the loss of his capital in the wear and tear and depreciation in value of his machines used in connection with the business. The fourth exception was based upon the refusal of the Referee to make any allowance to the defendant for the loss of his capital in the value of his services in connection with the business above the salary received by him.

Argument was heard October 16, 1900.

A. I. Trueman, Q.C., and *E. R. Chapman*, in support of the exceptions.

J. D. Hazen, Q.C., *contra*.

1900. December 18. BARKER, J.:—

The first two exceptions relate to the two items of $500 and $166.37, and I think they must both be allowed. It was scarcely contended that the $500 which the plaintiffs by the agreement were to advance to the defendant, and for which they had a lien on the machinery, extend properly into the partnership accounts, or was anything more than a loan from the plaintiffs to the defendant. I do not think the other sum stands in any different position, except that there is nothing in the agreement about it. The only evidence on the point is that of the defendant;

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and from that it appears that the sum was paid by the plaintiffs for the defendant for, or on account of, some machine in no way connected with this business at all. The amount was not charged as a debt due by the defendant to the partnership business, but by the plaintiffs against the defendant. As a matter of fact, the Referee has not treated either of these items as partnership items, but simply added them to the half of the loss on the partnership business, apparently as a ready and convenient way of arriving at the total indebtedness of the defendant to the plaintiffs. The defendant, however, objects to this, and says these items are in no way involved in this suit; and with this view I agree.

Under the third exception it is contended that the Referee should have made an allowance to the defendant for an alleged depreciation in the value of his machinery as a loss to him of capital put into the business. I am unable to agree with this view. There is nothing to shew that there was any depreciation in the machines except what is is due to their use in the ordinary way in carrying on the business — a depreciation which must have been contemplated at the time the agreement was entered into, and for which no special provision was made. There was no specific capital put into the business by anyone. The plaintiffs agreed to advance upon certain terms the money which might from time to time become necessary for the business, and the final result of the whole venture is that they are out of pocket $1,776.38. And to my mind, in this case it is immaterial in the result whether you call this capital or an indebtedness by the partnership to an individual partner for advances, for, in either case, the other partner must contribute his share of the loss. The defendant gave his time and experience, and the use of his machines, for a fixed remuneration and one half of the net profits; and the plaintiffs agreed to make certain advances, and do other things in connection with the business, for which they were to receive a fixed remuneration and the other half of the net profits. The rule in such a case is thus laid down in *Bates* on Partnership,

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section 815: "As already stated, the fact that one partner has furnished all the capital, and the other all the services, does not alter the rule; the loss of capital is like any other loss, and the partner who contributes his services and loses them is debtor to the other for such share of the capital as represents the amount of loss he has to bear." And at section 253 the same writer says: "But where one partner contributes only his time, skill, and experience, it is improper to call them his capital, for it has none of the attributes of capital, and, in case of loss, counts for nothing against the amount due the other partner for contributions of capital proper."

In this case the machines never became the property of the partnership. The defendant, who owned them, agreed to give their use, and his services in operating them, without any stipulation for remuneration for wear and tear beyond a right to participate in the profits of the business. I think this exception must be overruled.

The result will be that the first and second exceptions will be allowed, and the third overruled; and, as each party has succeeded in part, there will be no costs to either party.

The report of the Referee will be varied by changing the amount due the plaintiffs from the defendant on the partnership account from $1,554.56 to $888.19, for which there will be a decree in plaintiffs' favor with costs.

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January 4.

TOBIQUE VALLEY RAILWAY CO. v. CANADIAN PACIFIC RAILWAY CO.

Railway — Lease of line — Passenger train service — Contract with Government — Breach by lessee — Waiver by lessor — Damages — Mandatory injunction — Suit by lessor.

By an agreement the plaintiffs were to lease their line of railway to the defendants upon the condition, *inter alia*, that the defendants would run a passenger train each way each day between stations A. and B. The lease was not executed, but the defendants went into possession of and operated the line. The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the government of New Brunswick to run a passenger train each way each day between A. and B., but the contract was not set out in full. In 1897 a lease was executed by the plaintiffs and defendants by which it was provided that the defendants would run a passenger train one way each day between A. and B., "and if and whenever it may be necessary to do so in order to exonerate the [plaintiffs] from its liability to the government of New Brunswick then the [defendants] will run at least one train carrying passengers each way each day." On July 31, 1899, the Attorney-General of New Brunswick gave notice to the plaintiffs that their contract with respect to running a passenger train each way each day between A. and B. must be enforced, but no further proceedings with respect to the matter were taken by the government, though the defendants continued to run a passenger train but one way each day. It did not appear whether the notice of the Attorney-General might not have been given at the plaintiffs' instance. On a motion for an interlocutory mandatory injunction in this suit which was brought to compel the defendants to run a passenger train each way each day between A. and B. :—

Held, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which by the lease of 1897 the plaintiffs had agreed to accept in event of their liability, if any, to the government, and that it did not appear that such liability had arisen.

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

Argument was heard December 19, 1900.

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James Straton, for the plaintiffs:—

The agreement between the plaintiffs and defendants will be enforced as against the defendants by mandatory injunction: *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (1); *Greene* v. *West Cheshire Railway Co.* (2); *Woodruff* v. *Brecon and Merthyr Tydfil Junction Railway Co.* (3). The jurisdiction of the Court to compel specific performance of a contract by mandatory injunction does not depend upon the existence of a covenant by the defendant not to do any act inconsistent with the contract, but rests upon the nature and substance of the contract, and whether it is a proper subject of equitable jurisdiction, or whether it is a case for damages only. See *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (4); and *Donnell* v. *Bennett* (5). The contracts of railway companies to perform duties of a public character have always been regarded as an exception to the rule that the Court of Equity will not decree the specific performance of a contract where supervision by the Court of the carrying out of the contract will be required: *Hood* v. *North Eastern Railway Co.* (6); *Phillips* v. *Great Western Railway Co.* (7); *Wilson* v. *Northampton Railway Co.* (8); *Ryan* v. *Mutual Tontine Westminster Chambers Association* (9); *Whitwood Chemical Co.* v. *Hardman* (10). See also *Rankin* v. *Huskisson* (11); *Browne* v. *Warner* (12); *Sevenoaks Railway Co.* v. *London, Chatham and Dover Railway Co.* (13).

[Barker, J., refers to *Ex parte Attorney-General of New Brunswick: In re New Brunswick and Canada Railway Co.* (14).]

(1) L. R. 16 Eq. 433.
(2) L. R. 13 Eq. 44.
(3) 28 Ch. D. 190.
(4) L. R. 16 Eq. 433.
(5) 22 Ch. D. 85.
(6) L. R. 5 Ch. 525.
(7) L. R. 7 Ch. 409.
(8) L. R. 9 Ch. 279.
(9) [1893] 1 Ch. 116, 124.
(10) [1891] 2 Ch. 416, 427.
(11) 4 Sim. 13.
(12) 14 Ves. 10.
(13) 11 Ch. D. 265.
(14) 1 P. & B. 607.

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A. O. Earle, Q.C., and *H. H. McLean*, Q.C., for the defendants: —

No case is made out by the plaintiffs for an interim mandatory injunction, which will only be granted where the Court is satisfied that on the facts before it there is a probability that the plaintiff is entitled to relief: *Preston* v. *Luck* (1); *Child v. Douglas* (2); and that the injury will be irreparable if allowed to continue until the hearing: *Westminster Brymbo Co.* v. *Clayton* (3); *Salomons* v. *Knight* (4); *Mogul Steamship Co.* v. *McGregor* (5). The remedy of specific performance by mandatory injunction does not lie, for the Court cannot undertake to superintend the performance of the agreement. See *City of Kingston* v. *Kingston Electric Railway Co.* (6). The plaintiffs are not in a position to complain of the violation of the agreement of 1892, for by the new lease of 1897 between the plaintiffs and defendants it was provided that one passenger train one way every business day should be run, instead of one train each way every business day, as provided by the original agreement. The new lease provided that a passenger train would be run each way each day whenever necessary to exonerate the plaintiffs from their liability to either the Government of Canada or the Government of New Brunswick. Clearly, therefore, we can only be compelled to run a passenger train each way each day on the intervention of either government. For any damages, if any, being incurred in the meantime by the plaintiffs they are accepting our corporate responsibility, otherwise there would be no sense in their consent to the varying of the original agreement.

Straton, in reply.

1901. January 4. BARKER, J.: —

This was an application for an interim mandatory injunction order, made on a sworn bill supported by

(1) 27 Ch. D. 506.
(2) Kay, 578.
(3) 36 L. J., Ch. 476.
(4) [1891] 2 Ch. 294.
(5) 15 Q. B. D. 476.
(6) 25 A. R. 462.

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affidavits. For the purposes of this application the facts may be briefly stated as follows. In March, 1892, these two companies entered into an agreement, confirmed by an Act of the Dominion Parliament, 55-56 Vict., c. 60, which provided for a lease of the plaintiffs' road to be given to the defendants upon certain conditions. Certain differences which grew out of the agreement gave rise to a bill being filed in this Court by the plaintiffs; and in that suit a consent decree was made on April 10, 1897, which, among other things, provided for a lease to be given of the road: and accordingly, on April 30, 1897, the plaintiffs executed a lease of their road to the defendants for a period of ninety-nine years, at an annual rent equivalent to 40 per cent. of the gross receipts of the road, which the defendants were to use and operate as a part of their railway system. By the original agreement of 1892 (which is set out at length in the Act 55-56 Vict., c. 60), it is provided that the lease therein provided for should, among other provisions, contain one by which the defendants undertook to run duly equipped trains for passengers each way on every business day. See section 10 of the agreement as set out in the Act. In the lease which was actually executed clause 9 contains the provision with reference to the running of trains, and it is as follows: "That the Pacific Railway Company will during the said term provide and run over the said railway duly equipped trains for the carriage of passengers and freight, as frequently as shall be necessary for the traffic of the country through which the said railway is constructed, and, except during the period of a strike (if any occur) amongst employees of the said Pacific Company, and unless some accident prevent, it will run at least one train carrying passengers one way on every business day, instead of each way on every business day, as contemplated by the said agreement confirmed by the Act of Parliament aforesaid, and, if and whenever it may be necessary to do so in order to exonerate the Tobique Company from its liability either to the Government of Canada or of New Brunswick in that behalf, then the Pacific Company will

run at least one train carrying passengers each way on every business day, and generally will operate and work the said railway so as to secure therefor as much traffic as is possible within such limit of expenditure as would be adopted by any well-managed railway company working the same entirely on its own account."

The plaintiffs' bill contains the following allegations: "Section 6. That, as was well known to the defendant company at the time of the execution of the said lease, the said plaintiff company was under covenant to the government of the Dominion of Canada truly and faithfully to keep the said line of railway, and the rolling stock required therefor, in good sufficient working and running order, and to continuously and faithfully operate the same." "Section 7. That, as was also known to the said defendant company, at said time the said plaintiff company was under covenant with the Provincial Government of New Brunswick to run on said railway on each and every day, Sunday excepted, at least one sufficient passenger train each way over the said line of road, commencing at a point on the Canadian Pacific Railway in the Parish of Perth, Victoria County, to Plaster Rock, in the Parish of Gordon, not exceeding twenty-eight miles, unless prevented by snow or other unavoidable casualty." The bill goes on to state that on the 8th of July, 1897 — that is, a little over two months after the lease had been executed, and considerably over three years before this suit was commenced — the Deputy Minister of Railways sent a notice requiring that a train should be run each way daily over said railway. The precise terms of this notice are not stated, nor does it appear to whom it was given, but I assume, to the plaintiffs. It is further alleged that, notwithstanding this notice was communicated to the defendants, they continued to operate such railway by only running one train one way each day, and thus were guilty of a breach of the conditions of the lease. And that, on the 31st day of July, 1899, the Attorney-General of New Brunswick gave the plaintiffs a notice, by which it appears that, in consequence of complaints made of the way in

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which the road was being operated, he had been requested by a committee of Council to notify the plaintiffs that the provisions of section 13 of their contract with the New Brunswick Government must be enforced. The notice quotes that section as follows: "'The company shall be bound to run on each and every day (Sunday excepted) at least one passenger train each way over the said line of road, commencing at a point on the Canadian Pacific Railway in the Parish of Perth, Victoria County, to Plaster Rock, in the Parish of Gordon, not exceeding twenty-eight miles, unless prevented by snow or other unavoidable casualty.'" The bill then goes on to allege that this notice was also communicated to the defendants, but that they, illegally, as is alleged, only ran one train a day until some time in June or July last, when they began to run a train each way daily; but that on the 14th of October last a new time table was issued by the defendants providing for only one train one way each day, and that the road is now being run on that arrangement. There are other allegations in the bill as to the improper running of trains and the illegal manner of operating the road, but, however important they may be as to the accounting which is sought by this suit, they are unimportant so far as this particular motion is concerned.

The principal object of this present motion is to procure a mandatory order restraining the defendants from running trains so seldom as to cause the plaintiffs to be liable to the Dominion and Provincial Governments, and to compel the defendants to run a passenger train at least once each way over the said line of railway each business day. Whatever questions may arise at the hearing of this suit as bearing upon the question of accounts between the parties, and what bearing upon those questions the action of the two Governments may have, are matters which can better be determined when the facts are fully known. It may turn out when the contracts are produced that they bear no such construction as that put upon them, or it may be that the notices which have been given were given at the plaintiffs' instance, or that there

was never any intention of following them up by proceedings, a very reasonable inference at all events so far as the Dominion government is concerned, seeing that it is now over three years since they gave them notice, and they have done nothing since. At present it is only necessary to allude to two points — one relates to a question in some respects one of practice; the other to the merits, so far as I can judge of them upon the somewhat imperfect material before me. Upon both these grounds I think this application must fail. In the first place, mandatory injunctions are never granted unless for the prevention of some very serious damage. In *Durell* v. *Pritchard* (1) Turner, L.J., says this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld. That was on a hearing, but the rule applies with much greater force to an interlocutory motion like this. Apart from the question that this is a case where the operation of a railway is in question, and one, therefore, in which this Court would not be disposed to interfere any more than seemed absolutely necessary, it is evident that so far as these plaintiffs are concerned, whether there are daily trains or not is a mere question of money to them, for which on an accounting these defendants are perfectly able to respond, that is even if the plaintiffs are right in the contention they put forward on the merits; and this brings me to the second point. The present question is not one between these companies and the government, but solely between themselves as arising out of their lease. The plaintiffs' contention is that these notices — one or both of them—created a liability upon the plaintiffs to run daily trains both ways, and that the defendants by force of clause 9 were bound to run the trains, and in that way exonerate the plaintiffs from that liability. So far as the Dominion Government are concerned they do not seem to have had any contract about running trains specifically at all, so they may be eliminated from the discussion. And

(1) L. R. 1 Ch. 244.

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so far as the Provincial Government are concerned — altogether apart from all questions as to the effect of the Act 55-56 Vict., c. 60, already referred to—the plaintiffs' liability does not arise out of, or in consequence of, any notice they were to get. When they entered into the lease, and substituted, in lieu of a daily train service each way, a daily train each day as the defendants are now operating the road, they were themselves contracting for a violation of their own agreement with the government, and accepted as a protection, the defendants' undertaking to exonerate them from liability. So far as I am able to form an opinion upon the material before me, I should think the mere notice by the Provincial Government created no liability at all. If it were followed up by proceedings it might be that the defendants might have a perfectly good defence to them, in which case there would be nothing from which to exonerate the plaintiffs. At all events the plaintiffs are suffering nothing, no action has been brought against them, no one is threatening any action. On the contrary nearly a year and a half has expired since the notice has been given, without anything further being done. Under these circumstances, it would I think, be altogether without precedent, and contrary to all principle, to grant this application. It will therefore be refused, and with costs.

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January 25.

— No. 2. See Ante, page 51.

MILLER v. CRONKHITE.

Deed — Easement — Agreement respecting easement — Effect of, upon subsequent purchasers of dominant and servient tenements — License — Revocation — Expenditure — Equitable Compensation — License to lay water pipes — Repairs — Burden of making — Refusal of licensor to allow repairs to be made.

The lower and the upper half of a lot of land were respectively conveyed to separate purchasers. In the deed of the lower half the grantor reserved to himself, his heirs and assigns, the right of way to convey water by aqueduct or otherwise from one of the springs on the lower lot to the upper lot. The easement was assigned in the deed of the upper lot. On the lower lot were two springs known as the front and back springs. It was agreed, and acted upon, by the purchasers of the lots that the back spring should be set apart for the exclusive use of the owner of the upper lot under the reservation in the deed of the lower lot. Plaintiff and defendant, becoming respectively the owners of the lots, entered into a parol agreement for the construction by the defendant of a pipe from the front spring to her house, to be tapped on her land by a pipe leading to the plaintiff's house. The plaintiff paid for the pipe connecting with his house and for the part of the main pipe from the spring to the dividing line between the lots, and the defendant paid for the remainder. The flow of water to the plaintiff's house having been stopped by the defendant, the plaintiff forbade the defendant the use of the front spring. In the plaintiff's bill it was admitted that the defendant was entitled to use the back spring.

Held, that the agreement between the original purchasers of the lots to limit the easement to the back spring was binding upon the defendant; and that the license to the defendant to use the front spring was revocable upon the plaintiff making equitable compensation fixed by the Court to the defendant for her expenditure under the license.

Where license is given to lay pipes on another's land to convey water to the licensee's land the burden of repair rests in law upon the licensee, and it is a revocation of the license to refuse to the licensee permission to go upon the licensor's land for the purpose of making repairs.

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

Argument was heard October 5, 6, 1900.

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CRONKHITE v. MILLER.

MILLER v. CRONKHITE.

J. D. Phinney, Q.C., for the plaintiffs, in the first suit, and for the defendants in the second suit.

F. St. John Bliss, for the defendant in the first suit, and for the plaintiff in the second suit.

1901. January 25. BARKER, J.:—

These two cases were heard together, and, as they arise out of the same matter, they may be disposed of together. The dispute is one which, with persons disposed to live on terms of peace with each other, would never have arisen. The exciting cause, however, seems to be a dispute between the parties as to a line fence which is in no way involved in this case, and of the merits of which I know nothing. It seems, however, to have created an ill-feeling which has fostered and promoted this litigation, developing a comparatively insignificant dispute between two neighbors into litigation of considerable proportions, involving very considerable expense. All efforts at effecting a settlement having failed, it only remains to dispose of the cases on their merits.

In 1883 one John T. Clark executed two conveyances of a piece of land in the Parish of Queensbury, in the County of York, which he then owned. By one conveyance, which is dated May 19, 1883, Clark and his wife conveyed to one George Miller the lower half of this lot, and by the other conveyance, which is dated the same day, they conveyed the other or upper half of the lot to one Hiram U. Clark. Both conveyances were registered on May 28, 1883, the one to Miller being registered first and bearing the registry number 33,132, the other 33,133. The conveyance to Miller, which is not executed by him, is an ordinary conveyance in fee, and contains the following reservation: "And the said John T. Clark hereby reserves to himself, his heirs, administrators and assigns, the right of way to convey water by aqueduct or otherwise from one of the springs back of the highway road on the lower half of said farm to the upper half of said farm." And

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in the conveyance of the same date to Clark are these words: "And the said John T. Clark and Henrietta, his wife, hereby give, grant, and convey right of way to convey water from the lower half of said farm to the upper half of said farm to the said Hiram U. Clark, his heirs, administrators, and assigns for ever." In 1887 Hiram U. Clark conveyed the upper half of the lot to Lounsbury, who conveyed it in May, 1896, to Sarah Cronkhite, wife of Peter F. Cronkhite and mother of Sarah E. Cronkhite, the plaintiff in the first action, and the defendant with her husband in the second. And by deed dated December 31, 1897, registered on January 3, 1898, Sarah and Peter F. Cronkhite conveyed it to the plaintiff, Sarah E. Cronkhite. All these conveyances profess to convey the right to take the water from a spring on the lower half of the lot, which Clark, the original owner, reserved in his deed to Miller in 1883. It is not disputed, I think, that whatever right to take water from the lower half of the lot was vested in John T. Clark by virtue of the reservation in his conveyance to Miller, became vested in the plaintiff Cronkhite by the conveyance to her in 1897, and was vested in her when these proceedings were taken, subject to whatever change in the rights of the parties may have resulted from the selection by George Miller and Hiram U. Clark during their ownership and possession of the respective lots, of the back spring on the lower half of the lot as the one to be used under the reservation by the owners of the upper half of the lot; and subject also to whatever change in the rights of the parties under their conveyances may have resulted from the agreement between the present litigants as to laying an aqueduct from the front spring for the use of the plaintiff Cronkhite, out of which agreement arises the present litigation. In December, 1888, George Miller conveyed the lower half of the lot to the defendant Theodore Allison Miller, who has since then been in possession of it:

In April, 1899, the plaintiff Sarah E. Cronkhite jointly with George A. Cronkhite, her husband, filed a bill against the defendant Miller, and on the 14th of that month, on

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this bill, and certain affidavits which were produced in support of it, an *ex parte* injunction order was granted by Mr. Justice *Van Wart* restraining the defendant Miller from interfering with the plaintiff in replacing an aqueduct from the front spring (so called) on the defendant's land across his land towards the plaintiff's house. The bill, which was sworn to by George A. Cronkhite on April 8, 1899, after setting out the documentary title of the parties to their respective lots, as I have above outlined it, proceeds in the 10th section as follows: "That in or about the month of October, 1897, and before the upper half was conveyed to the plaintiff Sarah E. Cronkhite, the plaintiff entered upon the said farm under an arrangement entered into with the said Peter F. Cronkhite and wife to convey the same to the said plaintiff Sarah E. Cronkhite, and, immediately upon taking possession of the said farm, the plaintiff George A. Cronkhite, as husband of the said Sarah E. Cronkhite, occupied and enjoyed the right of way to one of the springs on the said lower half known as the front spring, and conveyed water therefrom for the purposes of his stock and household use, and in the month of October the defendant entered into an arrangement with the plaintiff George A. Cronkhite to lay an aqueduct from the said spring to the plaintiff's house, with a branch aqueduct to the defendant's house, and by the arrangement the expense of purchasing the pipe and the laying of the aqueduct was to be borne equally between them, and, in pursuance of this agreement, George A. Cronkhite procured the necessary pipe for the laying of an aqueduct from the said spring to his own house; and the said George A. Cronkhite and the defendant spent one half day in settling upon and laying out the course of the aqueduct from the said spring to the lands of the plaintiff, and cleared the ground preparatory to digging the said aqueduct, and took down the line fence in marking out the course of the same. The following morning, when the plaintiff George A. Cronkhite was about to resume work, the defendant Miller came to him and refused to have anything further to do with the aqueduct, and forbade the plaintiff

George A. Cronkhite from going on with the work, and about noon of the same day the plaintiff George A. Cronkhite and the defendant came together, and agreed that the aqueduct should be laid from the said spring to plaintiff's house on the site already agreed upon, at the expense of the plaintiffs, and that the defendant was to tap the aqueduct at a certain point on the plaintiff's land, and that the plaintiffs were to leave a T joint for him to connect with at the point of tapping, for the purpose of bringing his water therefrom to his own house; and after this agreement was made both the plaintiff George A. Cronkhite with his men and the defendant worked together, dug the ditch and laid the pipe from the spring to the plaintiff's house to a depth of about two feet, and filled up the ditch and levelled off the ground, and the said defendant made his connection with the T in the aqueduct, and laid a pipe therefrom to his own house; and under the arrangement it was agreed that each was to have one half of the water, and, as there was greater descent to the house of the defendant, it was arranged that a valve or stop-cock should be put upon the pipe at the defendant's house in order to gauge the same, so that not more than one half would escape through the defendant's pipe." The bill goes on to allege that this arrangement continued "with more or less friction" until December 27, 1898, when the defendant opened the aqueduct, and disconnected the pipe extending from the spring to the line between the two lots, a distance of about 163 feet, and took it out of the ditch, and refused to permit the plaintiffs to relay the pipe or use the spring in any way, except by carrying the water in pails from the spring to the house, a distance of 778 feet. The plaintiffs by their bill claimed an injunction to restrain the defendant from interfering with them in restoring the aqueduct, and using it for the purpose of obtaining water from the spring for their use.

On May 14, 1899, the second suit was commenced by the plaintiff Miller against Cronkhite and wife, and he filed a bill, in which after setting out the titles of the parties to

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their lots, he alleges that shortly after the two farms had been conveyed to George Miller and Hiram U. Clark respectively, and while they were the owners in fee, they agreed that the back spring should be set apart, and appropriated for the use of the owners of the upper lot, and that it was set apart, and so appropriated under the reservation in the conveyance to Miller, and that it was fenced in so as to give access to it by the owner of the upper lot, and that it was used to supply water to that lot after that time. This bill further alleges that after the Cronkhites had acquired the lot, George A. Cronkhite requested the plaintiff (Miller) to give him permission to lay an aqueduct, that is, a line of galvanized iron water pipe, three quarters of an inch in diameter, from his farm to the front spring on the lower lot, and that after some negotiations he (Miller) consented to this on the express condition that he should have the right and license to lay a half inch pipe from his farm to tap the three quarter inch pipe at a point on the upper half or Cronkhite farm, and that he the plaintiff (Miller) should have the free and uninterrupted right to the water which would flow through this half inch pipe; and that he (Miller) was to pay the cost of that portion of the three quarter inch pipe which ran through his land. On this arrangement the plaintiff (Miller) says the pipes were laid, and that he paid for all the half inch pipe, and his share of the three quarter inch pipe, which amounted to some $14. The bill further alleges that in October, 1898, the water ceased to flow, and in order to ascertain the cause he opened up that portion of the half inch pipe trench which was on his own land, up to the line between him and Cronkhite, but that Cronkhite refused him permission to open it up on his land, or to go on his land for the purpose. At this time the flow of water continued uninterrupted through the three quarter inch pipe to Cronkhite's house. The bill then alleges that he the plaintiff (Miller) then arranged to connect his pipe with the three quarter inch pipe at a point on his own land; and in order to do this it was necessary to disconnect for a short time the three quarter inch pipe, but that Cronkhite prevented this being done. Whereupon the

plaintiff (Miller) revoked his license to lay the pipe through his land. The bill further alleges that after Mr. Justice *Van Wart* had granted the injunction in the first suit the defendants (Cronkhites) entered on Miller's land, dug up his water pipe which he had laid between the front spring, and the point where he intended to put in the T joint in the three quarter inch pipe, and disconnected his (Miller's) pipe from the spring altogether; removed it from the trench, and cut off his water supply altogether; that they also laid a pipe from the front spring, across the Miller lot, and boarded over and nailed up the wooden box in the spring with which the pipe was connected, thereby preventing him from getting water from the spring, even in pails. And the plaintiff (Miller) charges in his bill that under cover of the injunction order granted in the first suit, Cronkhite was wilfully seeking to deprive Miller of the use of the spring altogether. On this bill and affidavits used in support of it, on the 15th May, 1899, I granted an *ex parte* interim injunction order restraining the defendants from preventing the plaintiff from taking water from the spring. On the 6th June, 1899, on notice given, applications were made to this Court to dissolve the injunction in the first suit, and to continue the interim injunction in the second. For reasons given on disposing of these motions, I continued both injunctions until the hearing, reserved the question of costs, and gave the plaintiffs (Cronkhites) leave to amend their bill if they desired to do so. On the 17th day of November, 1899, I made an order on the application of the plaintiffs in the first suit, allowing them on payment of costs to amend their bill by striking out the name of George A. Cronkhite as a plaintiff, and making such verbal alterations in the bill itself as were thereby rendered necessary.

The evidence given at the hearing — in addition to the documentary evidence as to title about which there is no dispute — disclosed the following facts. There were two principal springs of water on the lower lot back of the highway road — one on the rear of the lot which has been

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called the "back spring," the other nearer the front of the lot, and called by the witnesses the "front spring." There are no springs on the upper lot at all, and it was to secure a water supply for the use of those occupying the upper lot that the reservation was put in the conveyance when the original lot was divided. Soon after Hiram U. Clark and George Miller had purchased, and while they remained in the ownership and possession of their respective lots, they agreed upon the back spring as the one to which the reservation in the deed should apply, and they seem to have selected and appropriated that spring as the one to be used by the owner of the upper lot in the manner provided for in the reservation. This fact is not only proved by Miller who was a party to the arrangement, but by the acts of the parties at the time, and the subsequent user of the spring. This back spring is quite near the dividing line between the two lots, and at the time this arrangement was made between Miller and Clark the line fence was diverted around the spring so as to enclose it as part of the upper lot and altogether exclude the occupiers of the lower lot from access to it. This fence remained practically in that condition until after the present owners went into possession and the agreement as to the use of the front spring had been made, when Cronkhite straightened out the line fence, leaving the back spring on the lower lot as it had been originally. The evidence also shews that in October, 1897, at least two months before the plaintiff Cronkhite had acquired any title to the lot an arrangement or agreement of some kind was made between her husband George A. Cronkhite and the defendant Miller in reference to the construction of an aqueduct from the front spring, and its joint use by the parties afterwards. This agreement was not in writing and there is some dispute as to some of its terms, but as to its principal features the parties agree. In pursuance of this agreement an aqueduct or water pipe was laid from the front spring, with connections to the house of Miller on his lot, and the house of Cronkhite on hers. The pipe from the spring to Cronkhite's house, which was a three quarter inch pipe, was joined

at a point some distance over on Cronkhite's lot by a half inch pipe, which branched off and connected with Miller's house. That portion of the three quarter inch pipe between the spring and the division line was on Miller's lot, and the portion of the half inch pipe, from the junction point of the two, to the division line, was on Cronkhite's lot. Besides assisting in the work of laying these pipes Miller paid for and laid all the half inch pipe which supplied his house, and he paid $14 to Cronkhite, as he says, as the cost of that part of the three quarter inch pipe laid through his land. Cronkhite admits the payment of this money, but says it was for the use of the pipe. It seems to have been the intention of the parties that each should get one half the water, and as the Miller house was at a considerably lower level than the other, Cronkhite says that it was part of the agreement that Miller was by means of a stop-cock in the pipe at his house to regulate the discharge of water so as to secure to Mrs. Cronkhite one half the water. That, however, is denied. It is not very clear from the pleadings whether the plaintiff Cronkhite relies on this agreement or on the reservation in the deed or upon both. Her Counsel claimed the right to rely upon both. The effect of that contention, as I understand it, is that assuming that the agreement amounted to nothing more than a revocable license, the plaintiff Cronkhite could fall back upon the reservation in the deed, as giving her an easement in reference to a spring upon the lower lot to be selected by herself, and that the aqueduct in question was within the limits of the easement, and its use an appropriate enjoyment of it. This brings me to the first ground of objection taken on Miller's behalf. He contends that the reservation in the deed does not create an easement at all; but that if it did, so soon as Miller and Clark selected the back spring, the easement was limited to that spring as effectually as though it had been expressly named in the reservation clause. The argument is that an easement such as this, is an interest in land and can therefore be created only by grant — that if George Miller had executed the deed to him from John T.

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Clark in which the reservation is contained, it would in law have operated as a grant of the land to Miller, and a re-grant by him to Clark of the easement, but in the absence of Miller's execution of the conveyance, the reservation does not create the easement. See *Doe dem. Douglas* v. *Lock* (1); *Wickham* v. *Hawker* (2); *The Durham, etc., Railway Co.* v. *Walker* (3); *Proud* v. *Bates* (4).

There are two reasons which render it unnecessary to express any opinion on this point, at best a technical one. In the first place I should not feel called upon to give effect to any such contention in this case if I thought the above authorities established the proposition for which they were cited, in view of allegations placed on the record in this case by the plaintiff Miller himself. In the 13th section of his bill after alleging that in consequence of certain facts and circumstances therein stated he had revoked the license for the construction of the aqueduct, he adds: "But plaintiff never has refused and does not now refuse or deny the right of defendants to have access to or take water from the said back spring." Upon this allegation with others the plaintiff Miller obtained an injunction order from this Court. The right which is thus admitted is derived solely from the reservation in the deed coupled with the selection of the back spring by the predecessors in title of these parties: and if Miller admits this right the Court may, I think, as against him, admit it also. The second reason is this, that in my opinion when Miller and Clark agreed as I have already stated they did agree, upon this back spring as the one to which this reservation should have reference, it was final and conclusive upon them and those claiming under them. It therefore follows, that in October, 1897, when George A. Cronkhite and Miller entered into this agreement, Miller held his lot free from any servitude except as to the back spring, and Sarah Cronkhite (mother of the plaintiff Cronkhite) who was then the owner of the lot, held it with a right appurtenant to it of taking water from the back spring

(1) 2 A. & E. 705.
(2) 7 M. & W. 76.
(3) 2 Q. B. 967.
(4) 11 Jur. N. S. 441.

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on Miller's land by aqueduct or otherwise as mentioned in the reservation. It would of course be quite competent for the present owners of the lots to make altogether different arrangements, and substitute in the place of those thus acquired, privileges of an entirely different nature. There are many reasons for concluding that the arrangement made between Miller and Cronkhite was not intended by Cronkhite, at all events, as a substitute for the rights acquired as to the back spring. He tells us that he never heard of any such thing, or had any knowledge of the agreement between Clark and George Miller, until long after he and the present defendant Miller had completed their work. More than that he had no interest in the lot at the time. I have no doubt that if the arrangement had worked satisfactorily, both parties would have been willing to put an end to all rights as to the back spring. Neither have I any doubt that while Cronkhite believed that he had certain rights under the reservation, and that that led to the negotiations which ended in the agreement, what was ultimately done by him was not done as a mere matter of right under the reservation, but under an agreement entered into with Miller for their mutual use and convenience. The reservation in the deed gave in effect only a right to an aqueduct of sufficient capacity for the reasonable use of the owner of the upper lot. The present one is double that capacity. If constructed as a mere matter of legal right under the reservation, both the cost of construction, and maintenance must have fallen upon Cronkhite; but Miller has contributed a large proportion. In the one case Cronkhite would have had the exclusive use, while in the other there is a joint use. The clause in question did not necessarily confer any exclusive right to the water in the spring: *Lee* v. *Stevenson* (1), and a service pipe of half the capacity of the present would have answered all of Cronkhite's requirements; the present pipe however practically exhausts the spring; at all events there is not sufficient water to supply the pipes. The rights of the parties must therefore depend upon the agreement

(1) E. B. & E. 512.

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alone. And I should think this the case, even if the selection of the spring as of right under the reservation were still an open question. Now what are the rights of these parties under this agreement? It is contended that as the agreement was merely a verbal one, it operated simply as a license from the one party to the other to do certain acts in reference to the land of the licensor which would otherwise be trespasses, and would for that reason be revocable at will. In *Cocker* v. *Cowper* (1), it was held that a verbal license was not sufficient to confer an easement of having a drain in the land of another to convey water, and that such license might be revoked though it had been acted upon. *Hewlins* v. *Shippam* (2), and *Wood* v. *Leadbitter* (3), are to the same effect.

From the evidence it appears that when the stoppage in the pipes took place in October, 1898, the plaintiff (Cronkhite) refused to allow Miller to go on his land, and open up that part of the half inch pipe in Cronkhite's land in order to try to discover the cause of the stoppage. This, I think, was equivalent to a revocation of the license; the right to open up the pipe for such a purpose was implied in the original license to lay it. In *Gale* on Easements (4), it is said in reference to the right to go on and repair without leave, "as if a man gives me a license to lay pipes of lead in his land to convey water to my cistern I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me;" for which are cited the following cases: *Liford's Case* (5); *Pomfret* v. *Ricroft* (6); *Taylor* v. *Whitehead* (7); *Bullard* v. *Harrison* (8); and at page 545 the same author says: "The burden of repair is by law imposed upon the owner of the dominant tenement, and a corresponding right is conferred upon him to do all those acts which may be necessary to secure the full enjoyment of the easement, even though he should thereby be compelled to commit

(1) 1 C. M. & R. 418.
(2) 5 B. & C. 221.
(3) 13 M. & W. 838.
(4) 5th ed., 547.
(5) 11 Rep. 42 a.
(6) 1 Saund. 321.
(7) 2 Doug. 745.
(8) 4 M. & S. 387.

a trespass:" *Bell* v. *Twentyman* (1). See also *Goodheart* v. *Hyett* (2). If, therefore, there had been an easement, it would have carried a right which Cronkhite refused to allow Miller to enjoy or exercise. This would in the case of a mere license amount to a revocation of it: *Hyde* v. *Graham* (3). Under these circumstances I think Miller was justified in revoking his license, so far as he could do so, after what had taken place. Courts of Equity have, even in the case of licenses revocable at will, held them irrevocable after an expenditure of money on the faith of the license, unless in some way compensation was made. See *City of Toronto* v. *Jarvis* (4); *McManus* v. *Cooke* (5). The plaintiff (Cronkhite) did not by her bill, neither did her Counsel at the hearing, base her claim to relief on any such ground, but I think it right to notice it.

In *Plimmer* v. *Mayor of Wellington* (6) it is said, at page 714, that the Court must look at the circumstances in each case to decide in what way the equity can be satisfied. In this case, even assuming that, after the expenditure made by Cronkhite, the license would be held to be irrevocable, I think this Court has power to satisfy the equity which Cronkhite has, if she has any. She has reserved to her her rights as to the back spring, and the evidence shews that in laying an aqueduct to that spring much of the work already done can be utilized. She has already received $14, and I think this ample compensation (if, under the peculiar circumstances of this case, she is entitled to any), coupled with the undertaking which the plaintiff Miller must give, as hereafter mentioned. In the disposal of this case which I intend to make, it is unnecessary to determine which of the parties is right as to the precise object for which this $14 was paid, for the plaintiff Miller must give an undertaking to abandon all claim to that part of the three quarter inch pipe laid through his land as well as all claim to the half inch pipe laid through Cronkhite's land. Two other points were raised at the

(1) 1 Q. B. 776.
(2) 25 Ch. D. 182.
(3) 1 H. & C. 593.
(4) 25 Can. S. C. R. 237.
(5) 35 Ch. D. 681.
(6) 9 App. Cas. 699.

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hearing, which it is not, in my view, necessary to discuss at any length. One was that Cronkhite, who made this agreement with Miller, was not acting, and did not profess to act, on behalf of his wife the plaintiff, and that she was not at the time the owner of the land. It is true that she was not then the owner, but she was in possession under an agreement with her mother, who was the owner, for a conveyance of the property, which was actually made soon after. Miller, when he entered into the arrangement, knew, or at all events had ample means of ascertaining, the precise position of the parties with whom he was contracting. He claimed a right to enjoy the privileges secured to him under the arrangement, and did actually enjoy them for some time. He can scarcely be heard to repudiate the balance of the agreement on the ground of Cronkhite's want of authority to make it. As to the costs, I have had some doubt as to whether the bill filed by Miller was really necessary, but, on a consideration of all the evidence, and the facts and circumstances, I think he was justified in instituting proceedings for the final determination of the parties' rights as well as for the injunction which was granted when the bill was filed. In the first of these cases, the bill will be dismissed with costs, including the costs of the motion to dissolve the injunction in that suit. In the other case there will be a declaration that the agreement between the parties as to the aqueduct is of no further force, and, the plaintiff Miller undertaking as I have already mentioned, the defendant Cronkhite will be perpetually enjoined from using the said aqueduct for taking water from the front spring, or interfering in any way with the plaintiff's use of it. The plaintiff will have his costs of suit, and also the costs of the motion to continue the interim order of injunction.

WOOD v. CONFEDERATION LIFE INSURANCE CO.

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January 25.

Life Insurance — Note given for premium — Part payment — Extension of time — Forfeiture — Waiver — Assignment of policy — Receipt — Estoppel — Duty to assignee.

A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due the policy should be void. A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid, and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue and balance on note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured.

Held, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void.

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

Argument was heard August 23, 1900.

A. A. Stockton, Q.C., and *A. J. R. Snow* (of the Ontario Bar), for the defendants: —

It is made an express proviso in the policy, that if default be made in the payment of any premium, or note, should one be given and accepted, the policy shall cease and determine. The proviso is an absolute one, and the payment of the premium, or the note given therefor, is made by it a condition precedent to the liability of the defendants: *McGeachie* v. *North American Life Assurance Co.* (1); *New York Life Insurance Co.* v. *Statham* (2); *Klein* v. *New York Life Insurance Co.* (3). It was also

(1) 20 A. R. 187; 23 Can. S. C. R. 148. (2) 93 U. S. 23.
(3) 104 U. S. 88.

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stipulated in the note given by the assured that, if it were not paid at maturity the policy should forthwith become void. Forfeiture was not prevented by the part payment of the note after its maturity: *Joyce* on Insurance, s. 1114. When default was made in paying the last renewal the policy became void. The only effect of accepting part payments and granting extensions was to postpone forfeiture, and the right of forfeiture was not lost. The plaintiff does not occupy any more favored position with respect to the policy, than did the assured. We were under no obligation to notify the assignee, of the premium accruing due, or being over due, and that a forfeiture would take place unless payment were made. In *Joyce* on Insurance, s. 1106, it is laid down that, "if there is an express provision for forfeiture in case of non-payment of the premium on or before a specified day, and the time expires without payment, the policy thereupon becomes absolutely void at once, without notice of forfeiture, or any action on the part of the company, nor need a formal declaration of forfeiture for non-payment of premiums when due be declared by the company when the policy stipulates for forfeiture for such non-payment." See also *Thompson* v. *Insurance Co.* (1), and *Conover* v. *Grover* (2). No estoppel is created in the plaintiff's favor by the receipt given to the assured by the defendants. It states that payment is made by note due September 5, 1898, in terms thereof. The assignee was thereby notified that the payment was made in an equivocal form, and it became his duty to make himself acquainted with its conditions. The receipt was given before the assignment, and before any duty could be owing to the plaintiff. Moreover an estoppel cannot be founded upon a receipt: *Straton* v. *Rastall* (3). It was the duty of the plaintiff to make inquiries concerning the position of the policy, for the defendants were not bound to keep him informed: *Mangles* v. *Dixon* (4). The assent of the defendants to the assignment of the policy to the plaintiff did not effect any alteration in the contract

(1) 104 U. S. 252.
(2) 31 N. J. Eq. 539
(3) 2 T. R. 366.
(4) 3 H. L. C. 702.

contained in the policy: *Mutual Life Insurance Co.* v. *Allen* (1).

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

The proviso in the policy for forfeiture, in event of the non-payment of the premium, being for the benefit of the defendants could be waived by them, and was waived by their acceptance and retention of several part payments of the note. See *Brown* v. *Massachusetts Mutual Life Insurance Co.* (2); *Hodson* v. *Guardian Insurance Co.* (3). By taking the money after the assignment they accepted the personal liability of the assured, and agreed to keep the policy in force. If that were not so then they should have advised the plaintiff that the premium was unpaid. The note was in negotiable form and therefore was taken as an actual payment of the premium. This is confirmed by the language of the receipt. The reference in it to the note did not qualify the absolute character of the receipt. It amounted to nothing more than an indication of how payment was made. The defendants are estopped by the receipt as against the plaintiff from setting up that the premium was not paid. See *Bickerton* v. *Walker* (4); *French* v. *Hope* (5). By assenting to the assignment of the policy the company bound themselves to treat with the assignee for the payment of the premium before forfeiting the policy. In *McGeachie* v. *North American Life Insurance Co.* (6), provision was made that payments after maturity should not prevent a forfeiture.

1901. January 25. BARKER, J.:—

The bill in this case was filed by the Honorable Josiah Wood, as assignee of a life insurance policy effected by the defendant company on the life of the late Charles A. Palmer for the sum of $7,000, to enforce payment of the amount; Mr. Palmer having died on January 7, 1899. The policy is under the corporate seal of the company, and

(1) 138 Mass. 25, 28.
(2) 47 Am. Rep. 205.
(3) 97 Mass. 144.
(4) 55 L. J., Ch. 227.
(5) 56 L. J., Ch. 363.
(6) 23 Can. S. C. R. 148.

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bears date November 3, 1897, and the annual premium is $231.70. At the hearing a question was raised as to the sufficiency of the proofs of death, there having been, as was alleged, no sufficient proof of age. On the evidence, however, I held that that objection, if it were well-founded, had been waived by the company, and leave was given to amend the bill in accordance with that finding. The sole question now involved in the case is whether the policy had lapsed for non-payment of the premium before the life dropped. There is, I believe, no dispute about the facts. The material parts of the policy are as follows:

"By this policy of assurance, in consideration of the application therefor, which is hereby made a part of this contract, and in further consideration of two hundred and thirty-one $\frac{70}{100}$ dollars, and of the annual payment of a like sum, to be made on or before the fifth day of June in each and every year, during the continuance of this policy, doth insure the life of Charles A. Palmer, of St. John, in the County of St. John and Province of New Brunswick, Attorney-at-Law, hereinafter called the insured, in the sum of seven thousand dollars, which shall be payable at the head office of the Association in Toronto, upon due proof of the death of the insured, during the continuance of this policy, to the insured's executors, administrators or assigns." The policy contains a clause making it incontestable in case of a claim by death after it had been in force a year, "provided the premiums had been duly paid as set forth herein." The provisoes endorsed on the policy, and which are expressly declared to be a part of it, so far as they are material for the determination of this case, are as follows:

"All premiums are due and payable at the head office in Toronto, but will be accepted elsewhere in exchange for the Association's receipt only, signed by the Managing Director or Actuary, and countersigned by the agent holding the same. If default be made in the payment of any premium, note or cheque, should one be given and accepted, whether notice of such payment falling due was received by the insured or not, then, and in every such case, this

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policy shall cease and determine, except as hereinafter provided, that this Association may within one year from the date of the first unpaid premium, on satisfactory evidence of the good health of the insured and payment of the past due premiums with interest, renew the policy. Thirty day's grace allowed for the payment of renewal premiums under this policy."

Mr. Palmer paid the first premium, but when the 1898 premium became due — that is, on June 5 of that year — he was unable to pay it. Accordingly on July 5 — the last day of the month's grace allowed by the policy — by arrangement with McLeod, the company's local agent at St. John, through whom the insurance had been effected, he gave a note for the premium, dated June 5, 1898 payable with interest at the rate of 6 per cent. on September 5, then next. When this note became due, on September 5, Palmer paid McLeod $50 on account of it, and he, at Palmer's request, extended the time for paying the balance until November 1, 1898. On November 1, Palmer paid $25 on account, and McLeod extended the time until December 5, 1898, which would be six months after the premium had become due. On December 5, Palmer made another payment of $20 on account, and a further extension was granted by McLeod until December 10. Nothing more was paid, so that at the time of Palmer's death, on January 7, 1899, there remained, exclusive of interest, a balance of $136.70 unpaid on the premium due on June 5 previous. McLeod who is the only witness who gives any evidence as to what took place in reference to these extensions (speaking of the time the $20 was paid), says: "I then said that if he (Palmer) would give me—it was either $75 or $100, I am not sure which, I would be able to hold him 30 days longer; then he came in and gave me $20 and I said that I could not do that, and that it would be impossible, as I was then breaking the rules of the company even as it was in what I did. And he said, 'cannot you carry me any longer?' and I then said I would carry him till December 10, which was the best I could do, and he said 'I will give it to you before that.' I think this was on December 5—

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and then on December 10 he did not come in. I was coming down on the train—he was then stopping at Hampton—and I said to him, 'Charlie, I cannot carry that any longer,' and I explained that it went over for six months, and that I had only got so little, and I told him I had come to the end of my string, and I said to him 'I cannot go any further.' He looked harrassed and worried. He said nothing in reply to me but turned and read a book. I do not think he spoke at all after that." McLeod says that he emphatically told Palmer on December 10 or 11 that the policy had lapsed; that on January 5, the day on which he made his returns for the month, he returned the note to the head office, and the money he remitted on December 31. The company gave McLeod credit for the $95 paid, and they still retain the money and the note, knowing when they received the money that it had been paid on account of the note which had been given for the June premium of 1898. The evidence also shews that after Palmer's death the plaintiff, who was the assignee of the policy, caused a tender to be made to McLeod as agent of the defendant company of the amount due on the note, but the tender was not accepted.

It will be convenient to ascertain in the first place whether if the policy had not been assigned and this action had been brought by the executors of Palmer, they could have recovered. In my opinion they could not. In *McGeachie* v. *North American Life Insurance Co.* (1) it appeared that for the initial premium of $31.10 a note of the assured was taken payable with interest at the rate of 7 per cent. When this note matured it was renewed for the full amount and interest, and when this renewal fell due $10 was paid on account, and a third note was taken for the balance, $22.40, also with interest; and when this note fell due it was renewed a fourth time, which last renewal remained in the company's possession overdue at the time of the assured's death, which took place about three weeks after the last renewal matured. During the currency of some of these notes the assured had requested

(1) 23 Can. S. C. R. 148.

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the company to cancel the policy, but they refused to do so. And after the maturity of the last renewal, they wrote the maker demanding payment. This letter reached its destination the day on which the assured died. It was delivered to his brother on the same day, and the local agent of the company was immediately communicated with in order to ascertain if he would accept payment of the note, but he refused to do so. A few days later the amount was formally tendered to the company, but it was refused. The Court held that the plaintiff could not recover; that the policy had lapsed and that the demand of payment of the note did not operate as a waiver of the forfeiture. The clause of the policy in that case, relied on as creating the forfeiture, is as follows: "If any premium, note, cheque or other obligation given on account of a premium be not paid when due * * * this policy shall be void, and all payments made upon it shall be forfeited to the company." Excepting the latter part of this clause, the proviso is almost identical in language and altogether identical in meaning with the proviso in the policy involved in the present case. The circumstances of the two cases — the giving of the note — the various extensions of the time of payment — the payment on account — the tender after the death — are all so similar in character that it is difficult to see why the decision in the case just cited should not govern this. That part of the clause to which I have referred, by which it is stipulated that payments on account of the premium shall be forfeited to the company, is relied on as creating a substantial distinction between the two cases. It may, possibly, in some cases make a difference as to the ownership of the money, but I cannot agree that a mere payment on account or a retention of the amount so paid can, under the circumstances of this case, be said to amount to a waiver of the forfeiture of the policy or to be in any way inconsistent with it. A clause forfeiting to the company all payments on account of an overdue premium is altogether unnecessary, if as is contended here, the payment of a part of the premium operates so as to keep the policy alive for

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the year, for in such a case the money must belong to the company, otherwise there would be an insurance for a year without payment of premium at all. Then does the retention of the money paid as it was in this case, make any difference? Of course if that money had by the terms of the policy been forfeited to the company its retention would not alter the parties' rights, because the money by agreement was the company's money, and it therefore could be retained. This particular policy is an unusually liberal one and free from onerous conditions, but it is well known that in many insurance policies the conditions are such that many acts of the assured may create a forfeiture of the contract. Engaging in occupations unusually dangerous to life and therefore prohibited, or residing in a country where climate is regarded as unusually unhealthful and therefore not allowed, may be mentioned as illustrations. Could it be said that if an assured who had paid his year's premium in full was, on a breach of such a condition, in a position either to recover back his premium in whole or in part, or else to attribute its retention after forfeiture to an intention on the part of the company to waive the forfeiture? Neither in that case, nor as it seems to me in the present case, can such a position be maintained. This premium was due on June 5, and on that day the company was entitled as a condition to the continuance of the contract, to payment of the premium in full in cash, if they chose to exact it. To prevent the policy lapsing the company agreed to accept the assured's undertaking to pay the premium with interest in four months, subject to a condition that, if not paid at maturity, the policy would become void, and in consideration of that undertaking to keep the policy alive for the four months. The effect of that was, that, if the life dropped within the four months, the company was liable for the whole insurance, but if not, and the note was paid at maturity, the policy was kept alive for the remaining eight months of the year. At the end of the four months the assured paid $50 on account of his indebtedness, and the company, in consideration of that, agreed to extend the time for another

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period. The effect of that was to prevent a forfeiture of the policy, which would otherwise have taken place, to keep it alive for a further specified period, and to preserve to the assured his right by paying the balance of the premium within that period, to keep the policy alive for the remainder of the year. Where the object of the parties—the one in paying, and the other in receiving—is so plain, and the effect of what they did is so obvious, it seems impossible to attribute to the company either by receiving the money, or retaining it after having given full value for it, an intention evidently foreign to the minds of all parties at the time, and, so far as I can discover, in no way suggested by any of the terms in the policy or any other document connected with the transaction. The moneys were paid before there was any forfeiture; they were paid on account of a premium payable long before; they were made to prevent a forfeiture, not to secure a waiver of one.

In *McGeachie* v. *North American Life Insurance Co.*, already cited, and in *Manufacturers Life Insurance Co.* v. *Gordon* (1), and *Frank* v. *Sun Life Insurance Co.* (2), affirmed by the Supreme Court of Canada (3), the judgments do not proceed on that part of the clause upon which the plaintiff relies as distinguishing those cases from this. See per McLennan and Osler, JJ., in *Manufacturers Life Insurance Co.* v. *Gordon* (4). See also *Joyce* on Insurance, s. 1114, where many American cases are cited to the same effect.

Another argument used by the plaintiff's Counsel in support of his contention that the note (so called) was taken as payment, was that it is made payable with interest, thus imposing an additional burthen on the assured. The same argument was used in *McGeachie* v. *North American Life Insurance Co.*, but did not prevail (see 20 A. R. 180). Such a contention, at all events so far as Palmer's representatives are concerned, can scarcely

(1) 20 A. R. 309.
(2) 20 A. R. 564.
(3) 23 Can. S. C. R. 152.
(4) 20 A. R. 329, 335.

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succeed in the face of the note itself, which is in the following terms:

"Toronto, June 5, 1898.

On September 5th after date, I promise to pay to the Confederation Life Association, or order, at the Head Office of the Association in Toronto, the sum of $231.70 with interest at six per cent. per annum till paid, being the renewal premium for an insurance under policy No. 39,576 in the said Association, on the life of myself.

And it is understood and agreed that if this note is not paid at maturity, the policy shall forthwith become null and void.

It is further agreed that, should payment of this note be made after maturity, such payment shall not put the policy in force, but the policy may be re-instated on evidence satisfactory to the Association, of continued good health."

It is, however, contended that the plaintiff who is the assignee of the policy, has acquired rights by way of estoppel against the company, altogether beyond those of Palmer, his assignor.

In *Mangles* v. *Dixon* (1), the Lord Chancellor says: "If there is one rule more perfectly established in a Court of Equity than another, it is, that whoever takes an assignment of a chose in action takes it subject to all the equities of the person who made the assignment." The evidence shews that while the assignment to the plaintiff is absolute on its face, it was really given in order to secure a loan of $8000 made by the plaintiff to Palmer, in December, 1897, at which time the policy was, with the assignment then made, delivered to the plaintiff, and it remained in his possession from that time until Palmer's death. The plaintiff gave no notice of this assignment to the company until sometime in August, 1898, some seven months after the assignment had been made. It was then given to McLeod, the company's agent at St. John, who sent it to the agent at Halifax, to whom apparently he reported, instead of the head office. The Halifax agent

(1) 3 H. L. C. 702.

returned the document to McLeod at St. John, suggesting the propriety of having an assignment in the form used by the company, properly authenticated. This was done on the 10th of August, 1898, and a duplicate given to the company on the 20th of August, 1898. In the meantime, and before the company had any notice, or knowledge of the plaintiff's assignment, the June premium had fallen due and the note given for it as already explained. In exchange for the note, the company had given Palmer a receipt which he delivered to the plaintiff on the 5th of July, 1898. This receipt which is relied on as creating the estoppel is as follows:—

"Confederation Life Association,
Head Office, Toronto, Canada.

Premium, $231.70.
T. R. (if any).
Balance—

Policy No 39,576, on the life of C. A. Palmer.

Received the sum of $231.70 (less temporary reduction if any, as indicated in the margin hereof) being the yearly renewal premium, from the 5th day of June, A. D. 1898, on the above policy.

This receipt is valid only when countersigned by the agent, to whom payment must first be made. Countersigned this 4th day of July, 1898.

(Sgd) J. K. McDonald, Managing Director. (Sgd) S. A. McLeod, Agent at St. John.

Paid by note due September 5, 1898, in terms thereof."

The last words "Paid by note due September 5, 1898, in terms thereof," are in McLeod's writing. The receipt is a printed form filled in. Endorsed on it is the following:—

"NOTICE TO POLICY HOLDERS.

All premiums are due and payable at the Head Office of the Association in Toronto.

For the convenience of the assured, agents having the proper receipts signed by the Managing Director or

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Actuary, are authorized to receive premiums not over due, countersign and deliver the receipt.

No agent has authority to receive payment on this receipt after the expiry of the thirty days of grace allowed. Any person making such payment, does so on the agreement that the acceptance thereof by the Association shall not be claimed, or regarded as evidence of waiver of any of the terms or conditions of the policy.

Agents are not authorized to make, alter or discharge contracts or waive forfeitures.

(Sgd) J. K. M."

The plaintiff admits that when he received this receipt from Palmer on the 5th July, 1898, he made no inquiry as to the payment of the premium. He also says that he saw the memorandum on it, "Paid by note due September 5, 1898, in terms thereof," but that he made no inquiry as to it. He says that from the terms of the receipt, he considered the note had been taken in payment of the premium, and that he was safe. And if by the terms of this receipt which the company placed in the hands of its agent to be handed over to Palmer on his paying his premium, the company has represented that the premium had been absolutely paid so as to keep the policy on foot until the expiration of the year, I think the plaintiff was right in thinking himself safe; for in that case the company would I think be estopped from denying the truth of the representation to any one acting on it, or refrainng to act in consequence of it, to his prejudice, unless such person had knowledge and actual notice of facts which shewed that the representation was not true. I must, I think, eliminate from the discussion all considerations as to the doctrine of "constructive notice," which does not apply to "commercial instruments," a phrase which at this day ought to be regarded as sufficiently comprehensive to include life insurance policies and receipts such as these. See *London Joint Stock Bank* v *Simmons* (1); *Manchester Trust* v. *Furness* (2).

In the first place, let us see precisely what, by the receipt relied on, the company has represented to the

(1) [1892] A. C. 201. (2) [1895] 2 Q. B. 539.

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plaintiff or any one into whose hands it might come, for, whatever advantages may attach to the doctrine of estoppel, no one can or ought to be estopped beyond what the reasonable meaning of the language relied on warrants. I am unable to read this receipt as representing or meaning anything more than that the premium had been paid by Palmer's note due September 5 in the terms of that note. It did not state what the terms were, and therefore made no representation about them one way or the other. The representation was quite true, and, if the plaintiff chose to rely upon the giving of the note subject to terms as equivalent to a payment of the premium by a note not subject to terms, he must take the consequences. If he relies on the note, he must take it as it is, or as it was represented to him — in both cases as a payment in the terms of it, whatever they may be. The company say, We only represented to any one reading the receipt that Mr. Palmer paid us this premium by giving his note due September 5 according to its terms, and as you, the plaintiff, rely upon that note as being an absolute payment, we propose to shew that one of the conditions or terms of that note is that, if it was not paid in full at maturity, the policy to which it refers became void.

Now, what did the plaintiff actually know? He knew by the terms of his policy, which he is now seeking to enforce, that, where the premium was paid by a note as here, the policy became void in case of non-payment at maturity — that is, that the payment by note was merely a conditional one, and not, as he seems to have supposed, an absolute one. In *In re Veuve Monnier et ses Fils, Limited; Ex parte Bloomenthal* (1), it was sought to create an estoppel against a company by certificates of shares which they had issued, in which the shares were represented as being fully paid up, when in fact they were not. There was nothing on the face of the certificates themselves to lead any one to suppose that the shares were not as represented but Bloomenthal, the holder of them, who was setting up the estoppel, knew facts which shewed the

(1) [1896] 2 Ch. 525.

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statement in the certificate to be inaccurate, though he said, with every evidence of truthfulness, that he believed what the certificate stated. Lindley, L.J., says: "But what did Mr. Bloomenthal know? It appears to me that he knew so much that, if he had taken the trouble to avail himself of what he knew, he would have realized the fact that these shares could not be fully paid up — in other words, he knew facts which shewed that that statement was not true, although I believe him perfectly when he said that he did not think about the matter." Lopes, L.J., says: "If Mr. Bloomenthal did not know, and had no reason to know, that these shares were not fully paid up, the certificates to which reference has been made, which state in the clearest and most unequivocal language that the shares were fully paid up, would estop the liquidator, and would prevent his setting up the truth: but if, on the other hand, he knew, or ought to have known, that those shares were not fully paid up, the estoppel would be unavailing." Rigby, L.J., says: "The question is whether he had not before him direct and positive facts which ought to have been sufficient to bring any reasonable man to the conclusion that the statement made in the certificates, that the shares were fully paid up was not made in the sense that cash had passed from any person to the company to the extent of £1 per share, but that it was made only in the sense that the company were content to treat them, as I believe they did intend to treat them, as fully paid-up shares." I cannot but think that many of the observations made by the Judges in the above case might appropriately be made in reference to the plaintiff in this. There are few business men of the present day so ill-informed as to life-insurance policies as not to know that their vitality depends upon a prompt payment of the yearly premiums. There are still fewer business men who are not fully alive to the difference between the absolute payment of a debt in money and the conditional payment of it by a promissory note. And, if I were called upon to select from all these business men one more competent than the rest to

form an accurate opinion as to the plaintiff's true position in reference to this policy upon the facts within his own reach and his own knowledge, I should feel quite safe in selecting the plaintiff himself. Unfortunately for him, he either relied on Mr. Palmer to do what Mr. Palmer failed to do, or else he gave little thought or consideration either to the requirements of the policy which he is now seeking to enforce or to the terms of the receipt which he is now seeking to set up by way of estoppel. In my opinion the plaintiff must be treated as having knowledge that the policy premium had only been paid by Palmer's note due on the 5th September, and that, if it were not paid then, the policy would lapse.

It was also contended that the company, when they found that Palmer was unable to pay the premiums, and knew that the plaintiff was the assignee of the policy, should have communicated with him and notified him that the premium had not been paid, so that he might have protected himself. It is probable that such a course would have resulted in the premium being paid; it is equally probable that an inquiry as to the premium by the plaintiff would have led to the same result. But was the company under any obligation to notify the plaintiff? They had no contract with him for the payment of the premium; he was under no obligation to them in any way to pay it; neither was the company in any way informed as to the transactions between the plaintiff and Palmer which led up to the assignment, or the object for which it had been made. In *Mangles* v. *Dixon* (1), already referred to, the Lord Chancellor, at page 734, is thus reported: "I think the principle is perfectly clear that, where there is no fraud, nothing to lead to the conclusion in the mind of the party who receives the notice that the party who gives it has been deceived and is likely to sustain a loss; I say it is clear that the former is not bound to volunteer information. I conceive that equity will not require the party who receives the notice, impertinently almost, to interfere between two parties who have dealt behind his

(1) 3 H. L. C. 702.

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back, and who have never made any communication to him or ever seen him on that subject." The Lord Chancellor is there speaking of fraud in the assignment, where it is obvious to the person who receives the notice that a fraud has been committed by the assignor on the assignee. There is nothing of that kind here. To hold that companies like the defendants are under any obligation to notify assignees of policies, of the non-payment of premiums by the assured would impose a burthen upon them, not warranted by any principle applicable to insurance contracts. The assured knows, and his assignee knows, that it is a condition precedent to the continuance of such contracts, that the premium should be paid in advance according to the terms of the policy, and it is their duty if they wish the insurance kept alive to perform the condition necessary to accomplish that object. By the extensions given the plaintiff's position was not prejudiced, but benefited, for the policy was thereby kept alive for six months. The plaintiff, I think, has nothing to complain of against the company or its agent McLeod. The bill must be dismissed with costs.

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April 16.

Court of Equity—Jurisdiction—Account—Co-owners of Ship—Concurrent Jurisdiction of Exchequer Court in Admiralty—Act 54-55 Vict., c. 29 (D).

The jurisdiction of the Court in Equity in a suit for account between co-owners of a ship has not been taken away by Act 54-55 Vict., c. 29 (D.), which confers a like jurisdiction upon the Exchequer Court in Admiralty; any discretion the Court of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit.

Bill for an account of what monies are due to the plaintiff, a co-owner with the defendants of the British ship *Jennie Parker*, for monies expended and liabilities incurred by him for the ship's benefit, and of the ship's earnings and the share therein due to the plaintiff. At the hearing it was objected by the defendants that the Court had no jurisdiction to entertain the suit.

Argument was heard March 15, 1901.

A. I. Trueman, K.C., for the defendants:—

This Court is without jurisdiction in an action for account between co-owners of a ship. By Imperial Act, 24 Vict., c. 10, s. 8, "the High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship * * * or any part thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto." The jurisdiction conferred by this Act upon the High Court of Admiralty in England is vested in the Exchequer Court of Canada in Admiralty: Imperial Act, 53-54 Vict., c. 27, and Dominion Act, 54-55 Vict., c. 29. And see *The Seaward* (1). No jurisdiction in the Court of Chancery is reserved by the Act 24 Vict., c. 10, and while the jurisdic-

(1) 3 Ex. C. R. 268.

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tion of this Court is not taken away, it appears to be the uniform course in England since the enactment to submit questions of account between co-owners of a ship to the disposition of the Court of Admiralty. The rule of the Court of Chancery is that it will not exercise a concurrent jurisdiction with the Court of Admiralty except for valid reason: *Castelli* v. *Cook* (1); *Haly* v. *Goodson* (2).

A. O. Earle, K.C., for the plaintiff:—

Prior to the Act 24 Vict., c. 10, s. 8, the Court of Admiralty had no jurisdiction to entertain questions of account, and the only process by which part owners could compel an adjustment of the ship's accounts amongst themselves was a suit in Equity. See *Maude & Pollock* (3). To take away the jurisdiction of the Court of Chancery prohibitory or restrictive words must be used, and in their absence the Court will not decline to exercise jurisdiction.

Trueman, K.C., in reply.

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The bill in this suit was filed for an account of the earnings and disbursements of a vessel, of which the plaintiff and defendants were owners. A preliminary objection was taken that this Court had no jurisdiction to entertain such a suit, but that the remedy was in the Court of Vice-Admiralty. The jurisdiction of the Exchequer Court under the Canadian statute, 54-55 Vict., c. 29, to entertain and determine a question like this was not disputed. In fact it was so determined in the case of *The Seaward* (4). It was, however, contended that the jurisdiction of this Court has not been in any way interfered with, and I have no doubt that such is the case. The Imperial statute, 24 Vict., c. 10, s. 8, gave to the Court of Admiralty jurisdiction over such matters, but it did not profess to interfere in any way with the existing jurisdiction of the Court of Chancery in England, much less the jurisdiction of this Court. The

(1) 7 Hare, 89.
(2) 2 Mer. 77.
(3) 4th ed. 103.
(4) 3 Ex. C. R. 268.

jurisdiction of a Superior Court is never taken away simply by conferring a similar jurisdiction on another tribunal, unless such a result is a necessary inference from the language. As to this Court there is authority for saying that its jurisdiction is never taken away except by express language: *Byrne* v. *Byrne* (1); *Rex* v. *Abbot* (2). In *Maxwell* on Statutes (3), it is said: "It would not be inferred, for instance, from the grant of a jurisdiction to a new tribunal over certain cases, that the Legislature intended to deprive the Superior Court of the jurisdiction which it already possessed over the same cases." The Canadian statute already cited only confers upon the Exchequer Court the same authority and jurisdiction in Canada over such a cause of action as this, as the Imperial statute conferred on the Court of Admiralty in reference to similar causes of action arising in Great Britain. I entertain no doubt that the jurisdiction of this Court remains as it always has been. See *The Maria Luisa* (4). It was, however, contended that if this Court had jurisdiction it would not exercise it, except in cases where the Court of Exchequer, from defect in procedure or some other cause was unable to afford the parties the full measure of relief to which they were entitled. *Castelli* v. *Cook* (5) was cited in support of this proposition; and in addition thereto it was stated that no reported case can be found where the Court of Chancery in England has entertained any such suit since the jurisdiction of the Court of Admiralty was enlarged. This may be true, and I have no doubt it is equally true that there is no reported case the other way, so the remark is of not much importance one way or the other. *Castelli* v. *Cook* was an entirely different case, and arose out of widely different circumstances. This Court has always had and exercised jurisdiction over matters such as are involved in this suit. Its jurisdiction has not been in any way altered or diminished, though a similar jurisdiction has been conferred upon another Court. To what extent or in what particular

(1) 2 Dr. & W. 71.
(2) 2 Doug. 553.
(3) 3rd ed. 178.
(4) 2 Jur. N. S. 264.
(5) 7 Hare, 89.

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direction this Court will go in the exercise of any discretion it may possess as to enforcing its jurisdiction and authority, must obviously depend upon the circumstances of individual cases. I think, however, I may safely say that if, in cases like the present, such a discretion can be made to depend upon considerations of expense to suitors, or the facility of having their differences settled by a Court of Appeal, the procedure which prevails in this Court has manifest advantages in both these points over that which prevails as to Admiralty matters in the Court of Exchequer.

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May 21.

AMHERST BOOT AND SHOE MANUFACTURING COMPANY, LIMITED v. SHEYN.

Debtor and Creditor—Preference—Confession of Judgment—Assignment of Book Debts—Pressure—Collusion—Presumption of Fraudulent Intent—Commencement of Suit—Act 58 Vict., c. 6.

The defendant in consideration of a promise by a trader to pay to the defendant a sum of money on account of his indebtedness within a given time or to give security, and believing the trader to be solvent, gave him on credit a further supply of goods. Subsequently the trader becoming insolvent announced the fact to his creditors. The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him.

Held, that the confession of judgment having been obtained by pressure and without collusion, was not within s. 1 of Act 58 Vict., c. 6, and that the assignment of book debts having been obtained by pressure, was not within s. 2 of the Act.

The presumption created by sect. 2 (a) of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the Sheriff for service, though the sixty days had not expired at the date of the teste of the writ.

Bill to set aside a judgment and assignment of book debts as being fraudulent and void within the Act 58 Vict., c. 6. The facts are fully stated in the judgment of the Court.

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Argument was heard April 9, 1901.

J. D. Phinney, K.C., and *G. W. Allen*, K.C., for the defendant:—

The Act relied upon by the plaintiffs is *ultrà vires* the Provincial Legislature as being legislation upon bankruptcy and insolvency within the meaning of sect. 92, art. 21, of the British North America Act, 1867: *Clarkson* v. *Ontario Bank* (1); *Reg.* v. *Chandler* (2). The character of the Act must be determined by a consideration of its provisions as a whole as they support and confirm each other, and serve a common object. The scheme of the Act is to provide for an assignment by an insolvent debtor, and to secure the rateable distribution of his estate among his creditors. Machinery is provided for the regulation of proceedings attendant upon the assignment, and the duties of the assignee, and various minute directions for certain contingencies in the winding up of the insolvent's estate are given. It is true that the Act does not provide for compulsory liquidation, but this is not the ultimate test of whether the Act is insolvency legislation, as any legislative system of bankruptcy and insolvency contains provisions for voluntary as well as compulsory assignments. Assignments at common law are superseded by the Act. The sections of the Act declaring preferences to be void must be dealt with as ancillary to and as being bound up with the general scope of the Act, and cannot be dealt with as having an independent operation. In their absence an assignment for the general benefit of creditors would seldom be effective. By preventing preferences they dispose and compel an insolvent to make a general assignment. Their position in the Act is wholly similar to that of sect. 9, by which an assignment for the general benefit of creditors under the Act shall take precedence of all judgments and of all executions not completely executed by payment. That the Act rests upon a general scheme is illustrated by sect. 7, sub-s. 1, providing that the assignee

(1) 15A. R. 166. (2) 1 Han. 556.

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shall have an exclusive right of suing for the recission of transactions entered into in fraud of creditors. This section is also referred to in denial of the plaintiffs' right to attack the confession of judgment given to the defendant.

To succeed upon the substantial question before the Court the plaintiffs must shew under sect. 1 of the Act that the confession of judgment was given voluntarily or by collusion with the defendant. The confession was not voluntary, for it was pressed for by the defendant. To be voluntary it must have been given, in the words of Strong, J., in *Molsons Bank* v. *Halter* (1), as the "spontaneous act of the debtor," or as said by Gwynne, J., in the same case, "as a favor or bounty proceeding voluntarily from the debtor." Numerous authorities have decided that a mere demand is sufficient pressure by a creditor to destroy the voluntary character of an act of the debtor in his favor. See *Molsons Bank* v. *Halter* (2); *Stephens* v. *McArthur* (3); *Long* v. *Hancock* (4); *Gignac* v. *Iler* (5); *Beattie* v. *Wenger* (6); *Kennedy* v. *Freeman* (7); *Slater* v. *Oliver* (8). To constitute collusion within the meaning of the section there must have been a fraudulent intent on the part of the defendant and the debtor to defeat or prejudice the other creditors of the debtor, and its existence is here negatived by the circumstance that the preference to the defendant is shewn to have been induced by pressure and in fulfillment of a promise made by the debtor when he was considered solvent to secure the defendant, in consideration of receiving additional goods from him. A preference given in pursuance of an antecedent valid agreement is not within the section: *Webster* v. *Crickmore* (9). The preference relates back to the time the agreement for it was made, and if the agreement would have been valid had it then been consummated the preference will be upheld: *Allan* v. *Clarkson* (10);

(1) 18 Can. S. C. R. 88.
(2) 18 Can. S. C. R. 88.
(3) 19 Can. S. C. R. 446.
(4) 12 Can. S. C. R. 532.
(5) 29 O. R. 147.
(6) 24 A. R. 72.
(7) 15 A. R. 230.
(8) 7 O. R. 158.
(9) 25 A. R. 100.
(10) 17 Gr. 570.

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McRoberts v. *Steinoff* (1); *Clarkson* v. *Sterling* (2); *Lawson* v. *McGeoch* (3). Section 2 (a) of the Act by which a preference impeached within sixty days shall be presumed to have been made with intent to defeat, delay or prejudice the other creditors of the debtor, does not apply to sect. 1 of the Act, but is limited to sect. 2 (1) and (2). The presumption is also not available here with respect to the assignment of book debts since the suit was not brought within sixty days from the time the assignment was given. As the presumption does not arise evidence of pressure to disprove that the debtor acted fraudulently or in collusion with us was admissible: *Webster* v. *Crickmore* (4); *Lawson* v. *McGeoch* (3). Moreover, it is submitted that an assignment of book debts is not within sect. 2.

L. A. Currey, K.C., for the plaintiffs:—

There is nothing in the point that the Act is unconstitutional. Section 7 of the Act does not deprive a creditor of the right of attacking a transaction made fraudulent by the Act, except where there has been a general assignment. A corresponding section exists in the Ontario Act, but the reports disclose that where there has been no assignment suits under the Act are brought by creditors in the name of themselves and other creditors of the insolvent. See *Ross* v. *Dunn* (5); *Lawson* v. *McGeoch* (3); *Davies* v. *Gillard* (6). In *MacTavish* v. *Rogers* (7), Osler, J. A., recognizes the right of a creditor to attack a fraudulent or preferential transaction; and in *Clarkson* v. *McMaster* (8), counsel presumably states the Ontario practice when he says that it is only after an assignment that creditors have no *locus standi* to impeach a transaction within the Act.

The doctrine of pressure is never applied except where it is shewn that the demand by the creditor upon the debtor for security was made under circumstances satisfying the Court that it was a real pressure and was the efficient

(1) 11 O. R. 369.
(2) 15 A. R. 234.
(3) 22 O. R. 474; 20 A. R. 464.
(4) 25 A. R. 100.
(5) 16 A. R. 552.
(6) 21 O. R. 431.
(7) 23 A. R. 17, 23.
(8) 25 Can. S. C. R. 98.

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cause of the security being granted. If the debtor is so far gone in insolvency that it is of no advantage to him to give the security he is not amenable to pressure, and an act on his part in favor of the creditor is wholly due to a motive of partiality. A pressure for payment or for security when a debtor is hopelessly insolvent, and after he has informed his creditors that unless they accept an offer of compromise he will assign is equivalent to an invitation to him to enter into a collusive and fraudulent bargain with the creditor. The pressure in such a case is a sham, and is evidence of collusion. See *Davies* v. *Gillard* (1). Speaking of pressure under such circumstances, Boyd, C., in *Meriden Silver Co.* v. *Lee* (2), says that it is but a suggestion by the creditor to evade the Act and to enable him to obtain a priority over other creditors acquiesced in by the debtor, and that it is a joint act of such a character as to come within the term "collusion" used in the Ontario statute. In *Ex parte Hall* (3), Jessel, M. R., uses this illustration to shew that the act of the bankrupt under such circumstances is voluntary, and that it is absurd to call it pressure. "A man says to his creditor: 'I am about to become bankrupt, or I shall stop payment in a week.' The creditor says: 'Pay me my debt, or I will sue you for it.' Can that be called *bonâ fide* pressure by the creditor?" The present case is not unlike *Ex parte Hall (supra)*. There on the 17th of February a trader told one of his creditors that he was about to stop payment. The creditor then pressed for security for his debt and threatened to commence proceedings against the debtor at once if he did not fulfil a verbal promise which he had on the 17th of January, when the debt was contracted, made to supply the creditor with goods, or their equivalent, as security. The creditor had on the 14th of February, before he knew that the debtor was about to stop payment, pressed the debtor for the promised security, and the debtor had then promised to give it. On the 19th of February the debtor delivered two bills of exchange, accepted by some other firms, to a third person, telling him to hand

(1) 21 O. R. 431. (2) 2 O. R. 451. (3) 19 Ch. D. 585.

them to the creditor. On the 24th of February the debtor filed a liquidation petition, and on the 10th of March he was adjudicated a bankrupt. It was held that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy under Section 92 of the Bankruptcy Act.

1901. May 21. BARKER, J.:—

The plaintiffs on behalf of themselves and other creditors of Urbain Babineau filed this bill against Babineau and one Joseph Sheyn to set aside a certain judgment and assignment of book debts as being fraudulent and void under the provisions of 58 Vict., c. 6, "An Act respecting assignments and preferences by insolvent persons." The bill has been taken *pro confesso* against the defendant Babineau, and the contest is between Sheyn, to whom the assignment and judgment were given, and the plaintiffs, both of whom were creditors of Babineau. There is practically no dispute as to the facts. At the hearing Counsel filed in Court the following admissions, made for the purposes of this suit:—

"1. That the Amherst Boot and Shoe Manufacturing Company, Limited, is duly incorporated by law and entitled to sue and be sued.

"2. That the said Urbain Babineau previous to the 26th day of January, 1900, had purchased from the said Amherst Boot and Shoe Company goods in connection with his trade and business on credit, and that he gave his acceptance to the said Company for the amounts due them.

"3. That on the 17th day of February, 1900, the said Company commenced an action in the Supreme Court of the Province of New Brunswick against Babineau to recover the sum of $605.85, and on the 12th day of March, 1900, procured a judgment in the said Court against Babineau for the sum of $638.60, which judgment remains unsatisfied.

"4. That a bill of exchange was drawn by the plaintiffs

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on Babineau bearing date November 1st, 1899, for the sum of $306.70, and payable four months from date at the Merchants Bank of Halifax, Kingston, and that this bill was accepted by Babineau but not paid at maturity, and was dishonoured and remains unpaid."

On the 26th January, 1900, Babineau gave the defendant Sheyn a confession of judgment in the Supreme Court of this Province for $5,000, and on that day a judgment on the confession was signed for $5,034.50, on which a fi. fa. execution issued and was placed in the hands of the Sheriff of Kent for execution on or about the 29th January, 1900. Under this execution the Sheriff seized and sold all the stock in Babineau's shop, and all his personal property, and afterwards seized and advertised for sale certain real estate. This execution was endorsed to levy $3,898, and it is admitted that when the confession of judgment was given that sum was due to Sheyn from Babineau. In addition to the judgment Babineau on the same day (January 24th, 1900), executed and delivered to Sheyn an assignment of all debts and accounts owing to him, and also, as is said, some promissory notes. The object of this suit is to set aside this judgment and the assignment of book debts as being fraudulent under the Act I have cited. The bill alleges that when the judgment and assignment were obtained, Babineau was unable to pay his debts and was in insolvent circumstances and on the eve of insolvency, and that Sheyn knew this, and that the two colluded together with the intention by means of the judgment and assignment of enabling Sheyn to seize all Babineau's property and thus obtain an unjust preference over his other creditors. The bill contains other similar allegations to bring the case within the Act, and prays that both judgment and assignment be declared fraudulent and void, and that an account be taken of all moneys received or derived by means thereof. The bill was sworn to on the 28th April, 1900, and on it Mr. Justice *McLeod* granted an *ex parte* injunction restraining the sale of Babineau's real estate then advertised by the Sheriff to take place on the 12th of May under Sheyn's execution.

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Sheyn is a merchant, carrying on business at Quebec, and he had for some years previous to this transaction been supplying Babineau with goods. These sales were made I think altogether by one Loisel, who was Sheyn's traveller and salesman. Sheyn admits that Babineau was insolvent and unable to pay his debts on the 26th of January, 1900, and that he knew that to be the case about a week before that date. He also admits that Babineau gave him the confession and assignment in question when he (Babineau) knew that he was on the eve of insolvency and in insolvent circumstances and unable to pay his debts. He, however, denies all collusion and alleges that the securities were given under pressure and in pursuance of an agreement made in the month of September previous, by which Babineau undertook, if supplied with more goods, to give security for his indebtedness, if he failed in paying the sum of $1,000 in a month. This agreement was made between Babineau and Loisel, acting for Sheyn. It appears that Mr. Carter, an Attorney, who acted for Sheyn in entering up the judgment, shortly before at Babineau's request and acting for him, prepared and sent to Sheyn and other creditors of Babineau a circular letter bearing date January 15th, 1900. In this letter it is stated that Babineau was unable to pay his debts; his assets are put down at about $2,800 and his liabilities about $6,000, and an offer to pay 40 per cent. by way of compromise, payable in six months, is made. The letter then proceeds thus: "If this offer is not accepted he (Babineau) intends assigning all his property to the Sheriff of the County for the benefit of his creditors." The contents of this circular were immediately communicated by Sheyn to Loisel, who was then in this Province, and he immediately went to see Babineau at St. Louis, the latter's place of business. Loisel was produced as a witness and he gave the following account of what took place between him and Babineau when the security was given, and also of the interview in the September previous when the alleged agreement to give the security was made. He says that he had been selling for Sheyn goods to Babineau for some years; that

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although like all country traders he would sometimes be a little slow in his payments, they had never any trouble with him, and that in September, 1899, he owed Sheyn about $3,400, of which some $1,400 or $1,500 were overdue. Speaking of the interview of that date Loisel says: "Being that he (Babineau) had such a large amount overdue we did not feel inclined to advance him any more goods unless we had security, and we did not care to advance him any more goods unless he paid some money or gave security. He told me he could not give me any money at the time, but that he was expecting money from the Government on some contracts on building bridges—about $2,000—and he would give $1,000 to us within a month, so I felt satisfied, and asked him, in case he did not pay the amount, what he would do, and he said he did not know; and I said he would have to give us $1,000 on the old account or give security on the amount he owed us, and he promised to do this, and on the strength of that we advanced him goods to the extent of $500 more. He was to pay us $1,000 inside a month, and if he did not do that he was to give us security for the whole amount of the account." He also says that no money was paid, and the $500 of goods were delivered to Babineau. Loisel says that at the time he fully believed Babineau was solvent, having this money coming from the Government, and so confident did he feel that the $1,000 would be paid that in writing his principal (Sheyn) he himself guaranteed it. He also says that about a fortnight later he casually met Babineau and his wife on the train going to St. John when the matter was spoken of again, and both Babineau and his wife promised that either the $1,000 would be paid or that security should be given. He did not see him again until the following January, when he went to St. Louis to see him after hearing of Mr. Carter's circular and the offer of compromise contained in it. Speaking of this interview Loisel says: "At that time we had Mr. Carter's letter saying he was insolvent and offering 40 per cent., and I told him it was not all right or in accordance with our former undertaking; that we had to get the $1,000, and

that in the meantime he had promised to give us security and did not give it. I was there three or four hours I guess, and I asked him for the security. He was not willing to give it that night and he told me to come back to Richibucto and he would come in and give me an answer, and the next morning he came, and according to the promise he gave me that he would give me security, he gave me security because he did not pay the $1,000." The next morning Babineau came from St. Louis to Richibucto and told Loisel that he had concluded to give the securities according to the promise he had made, and the securities in question were accordingly given. There is no doubt that all the property secured by the judgment and assignment of book debts are not sufficient to pay Sheyn's claim. Loisel states that when he took the securities he did not know what Babineau's total indebtedness was except from what was stated in Carter's circular. Whatever money was received on the Government contracts seems to have been disposed of by Babineau, but in what way does not appear. I have quoted thus copiously from Loisel's evidence because outside the admissions the case turns upon his testimony, which is not contradicted in any way, and which was given in a manner entitling it, as it seemed to me, to full credit.

In the view which I take of this case it is unnecessary that I should expresss any opinion upon the important constitutional question raised as to the validity of this Act. The same point has arisen in other Provinces in reference to similar enactments, and though the weight of judicial authority seems in favor of the validity of the Act, the point can scarcely be considered as settled: *Stephens* v. *McArthur* (1); *Edgar* v. *Central Bank* (2).*

In my view the plaintiffs cannot succeed in this suit if the Act is valid, and if I am right in that view it is, at all events for the purposes of this case, immaterial whether the Act is *ultrà vires* or not. The defendant contends

(1) 6 Man. 496. (2) 15 A. R. 193.

* See *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* [1894] A. C. 189— Rep.

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that no proceedings can be taken under the Act where a recission of contracts is sought on the ground that they are fraudulent under the Act, except by an assignee under an assignment made under the Act. Section 7 is cited as sustaining this position; and if that contention be well founded this action must of course fail. On this point, also, it is unnecessary for me to express an opinion, as in my opinion the plaintiffs must fail if this point were decided in their favor. The construction contended for is perhaps a narrower one than some Judges in Ontario have placed upon a similar Act in force in that Province: *Molsons Bank* v. *Halter* (1); *Bank of London* v. *Wallace* (2); *Brown* v. *Grove* (3).

The provisions of the Act are not uniform in reference to all classes of securities. Section 1 renders a confession of judgment void when given by a person in insolvent circumstances, or when he is unable to pay his debts in full, or knows himself to be on the eve of insolvency, to delay or defeat creditors or with intent to give one creditor a preference over another. In order, however, to bring about this result the cognovit must have been given either voluntarily or by collusion with a creditor. If not so given the section does not apply. In *Edison General Electric Co.* v. *Westminster and Vancouver Tramway Co.* (4), the corresponding section in the British Columbia Act, and which is almost identical in language with ours, was under discussion. It was a suit brought by a creditor, as this is, to set aside a judgment, and it was alleged that the debtor had actively assisted the preferred creditor in obtaining his judgment so that other creditors might be defeated. In delivering the opinion of the Judicial Committee of the Privy Council, Sir Richard Couch says: "If the appellants' case had only been that there was a fraudulent preference of the bank, the pressure by the bank might have been an answer to it; but their Lordships do not see how pressure alone can be an answer to a case which alleges collusion. The statute is in the

(1) 16 A. R. 323.
(2) 13 P. R. 176.
(3) 18 O. R. 311.
(4) [1897] A. C. 193.

alternative. The confession of judgment may be given either voluntarily or by collusion with a creditor. In either case, if there is the intent to defeat or delay creditors or to give a preference over other creditors, the confession is made null and void against creditors. In *Gill* v. *Continental Gas Co.* (1), Lord Bramwell said that the word 'collusion' only signified agreement. In their Lordships' opinion 'collusion' in this section means agreement or acting in concert." Their Lordships in that case expressed their approval of the decision of the Court of Appeal for Ontario in *Martin* v. *McAlpine* (2). It this latter case the Court was dealing with a judgment attacked under the corresponding section in the Ontario Act, which is practically the same as the other Acts. In that case Hagarty, C. J. O., says: "The statute describes two sets of circumstances, under either of which a cognovit given by an insolvent debtor is to be deemed and taken to be null and void. One is, if given voluntarily. Granted that the cognovit was not given voluntarily, so far it is not impeachable; but what if given under the other set of circumstances, collusively and with the intent pointed at by the statute?" The question then is was this cognovit given either voluntarily or collusively. Numerous authorities may be cited to shew that in construing an Act of this nature the word "voluntarily" means "without pressure"; a distinction which is, I think, alluded to in sub-sections (a) and (b) of sect. 2 of the Act, where assignments are spoken of as being fraudulent whether made voluntarily or under pressure. Such is the construction which has been placed on the Ontario Act, which is, I think, identical in its so-called preference clauses. I need only refer to *Stephens* v. *McArthur* (3), a decision by which this Court is bound. In that case it is distinctly held that pressure rebuts all presumption of fraudulent preference, and that the word "preference" as used in such enactments means a voluntary act on the part of the debtor, and is therefore a term which is not applicable to an act brought about by

(1) L. R. 7 Ex. 337. (2) 8 A. R. 675.
(3) 19 Can. S. C. R. 446.

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the active influence of the creditor. As to what constitutes pressure sufficient to deprive the act of its voluntary character, there are also numerous authorities familiar to us all. One passage from the case last cited will answer all purposes. At page 453 I find the following: "Then as to what acts are sufficient to constitute pressure the decided cases are equally explicit. The cases on this head are also all collected in the book last referred to (Tudor's L. C. on Mercantile Law, 818), and from them it appears that a mere demand by the creditor without even a threat of, much less a resort to legal proceedings, is sufficient pressure to rebut the presumption of a preference." The evidence in this case clearly shews pressure far beyond a mere demand, and brings it within the cases on the subject. The next question is, was the cognovit given by collusion with Sheyn or Loisel who was acting as agent for him. There is absolutely no circumstance in this case to suggest any such thing. Babineau had agreed to pay $1,000 or give security, and on the faith of that arrangement he secured an additional advance in goods to the value of $500. Loisel on hearing of his embarrassment went and insisted, as he had a right to do, on getting the security which had been promised him. There was no concerted action with a view of prejudicing other creditors, and nothing whatever to stamp the transaction as collusive within the meaning of the Act as defined by the cases I have cited. I think the evidence altogether fails in establishing collusion, and does shew ample pressure to prevent the act being held as voluntarily done. For these reasons the plaintiffs' case as to the cognovit entirely fails.

A somewhat different question arises as to the assignment of the book debts, which was also made on the 24th January, 1900. Reliance was placed on sub-sect. (a) of sect. 2 of the Act, by which it is provided that if any assignment within that section be made whereby a preference is given to one creditor over another it shall, in case any suit or proceeding be taken to impeach or set aside such transaction within sixty days thereafter, be presumed to have been made with such fraudulent intent and to be

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an unjust preference whether made voluntarily or under pressure. This suit was said to have been brought within the sixty days, in which case the presumption arose; and as the presumption in such case was not capable of being rebutted, the plaintiffs' case as to the assignment was complete. There was no proceeding in this suit of any kind before the summons was issued. It is dated March 23rd, 1900, which is within the sixty days. From the memorandum endorsed on it by the Sheriff, to whom it was sent for service, it appears to have been received at his office on the 10th April, and it was in fact served on Babineau on the 12th April. By the practice of this Court all suits are commenced by writ of summons or order for appearance, and such writs, though issuing under the seal of the Court and tested in the name of the Chief Justice, are really delivered to Solicitors in blank, filled up by them and issued as required. The issuing of the writ is the act of the party and not of the Court: *Clarke* v. *Bradlaugh* (1). It is therefore competent to inquire at what precise time the writ actually issued: *Pomeres* v. *Provincial Insurance Co.* (2); *Barlow* v. *O'Donnell* (3); *Seelye* v. *Bliss* (4). The practice is, I think, settled that though the day on which the writ is tested is *prima facie* the date of its issue, the actual date of its issue may be established by evidence. A writ cannot, I think, be said to be issued until the Solicitor issuing it has given or sent it to the proper officer or some other competent person with the *bona fide* intention of its being served if possible, and so that in the ordinary course such service would be accomplished without further instructions from the Solicitor. According to the evidence of Mr. Robidoux, the Solicitor for the plaintiffs in this suit, the summons was made out on the 23rd March, but it remained on his desk in his office until the 7th of April (that was the earliest date he would fix), when he sent it by mail to the Sheriff of Northumberland for service. The delay in sending it to the Sheriff was intentional on Mr. Robidoux's part.

(1) 8 Q. B. D. 63.
(2) Stevens' Dig. 237.
(3) 1 All. 433.
(4) 1 P. & B. 53.

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The reason given was that he did not know exactly where Babineau was at the time, or something of that kind. On the 7th of April the sixty days had expired; and as that is the earliest date at which this suit can be said to have been commenced, I think the plaintiffs are not in a position to take advantage of the presumption of fraud which, under the circumstances, would have arisen. The question thus is narrowed down to two points. Is the transfer void under the statute of Elizabeth, or does the evidence bring it within the provisions of sect. 2 of the Act now under discussion? Not much reliance was placed on the statute of Elizabeth. Under a statute which did not prohibit preferences, where the debt was a *bona fide* one and the preference was not given with any fraudulent intention, the transaction was not impeachable, even though creditors were in fact, as they generally were, both delayed and defeated. I need not repeat the circumstances under which this assignment was given. There is nothing in them which, in my opinion, brings this case at all within the statute of Elizabeth. I think the case equally fails as to sect. 2 of the Preferences Act. It would be a mere waste of time even to refer to the numerous cases which are to be found in the books bearing upon similar statutes, many of which were cited at the hearing, for so far as the present Act is concerned I feel bound by the case of *Stephens* v. *McArthur* (1), already cited. In construing an Act between which and our own there is to my mind no substantial difference so far as this section is concerned the Supreme Court of Canada held that preference in the Act meant fraudulent preference, and that where pressure was exercised the preference was not fraudulent. It is true that in that case the creditor did not know that the debtor was in insolvent circumstances, but Strong, J., expressly says that this fact is altogether immaterial. See also *Smith* v. *Pilgrim* (2); *Ex parte Tempest* (3).

The term "unjust preference" means nothing more than a preference fraudulent under the Act: *McLeod* v. *Wright* (4). The section in the Manitoba Act in reference

(1) 19 Can. S. C. R. 446.
(2) 2 Ch. D. 127.
(3) L. R. 6 Ch. 70.
(4) 1 P. & B. 68.

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to which *Stephens* v. *McArthur* was decided is substantially sub-sections 1 and 2 of sect. 2 of our Act. The only difference between the two is that the word "unjust" is omitted in the Manitoba Act, which speaks of preferences, while our Act uses the term "unjust preference;" and in the Manitoba Act the words "or which has such effect" are added to the clause as to the intention to defeat or delay creditors. These verbal differences are, however, altogether immaterial, and the principle enunciated in *Stephens* v. *McArthur* is, I think, altogether applicable to our Act. In fact many of the dissenting judgments given in that case, both in Manitoba and on appeal, were based on the effect of these added words I have just mentioned, a circumstance which makes the case stronger as to our Act, where there are no such words. The same point was in reality decided in *Molsons Bank* v. *Halter* (1). In *Gibbons* v. *McDonald* (2) the Court treats the question as settled by the previous decisions. And Ritchie, C. J., who had not taken part in the previous decision of *Molsons Bank* v. *Halter*, there expressed his entire approval of that case. In accordance with what I understand is the decision in these cases I hold that the assignment in question is not fraudulent under the Act.

It is unnecessary, with the view I have expressed, to discuss two other questions which were argued—(1) Whether the presumption mentioned in sections (a) and (b) is rebuttable by evidence; and (2), whether the assignment mentioned in sect. 2 includes an assignment of book debts. In declining to express any opinion on these points, as well as the other two I have mentioned, I am following also the case of *Stephens* v. *McArthur*, where the Supreme Court of Canada, for similar reasons, thought it unnecessary to decide two of the same questions.

The bill must be dismissed with costs.

(1) 18 Can. S. C. R. 88. (2) 20 Can. S. C. R. 587.

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Fishery License — Holder not entitled to Renewal — Exclusion of former co-licensee—Tenants in common of personal property —Use and possession—Exclusion of co-tenant—Title to profits —Account — Stat. 4 Ann., c. 16, s. 27.

A Dominion Government fishery license for one year, without right of renewal, was taken out a number of consecutive years by the plaintiff and defendants until 1899, in which year and in the year following, the license was taken out and the fishing thereunder was carried on by the defendants. The plaintiff and defendants owned as tenants in common fishing gear used in fishing under the license. They were not partners in respect of the license, and each catch of fish was divided at the time it was made among such of the licensees as assisted in it. The expense of repairing the fishing gear was proportionately borne by the plaintiff and defendants up to the years 1899 and 1900, when it was borne by the defendants. In the years 1899 and 1900 the fishing gear was possessed and used exclusively by the defendants in fishing under the license.

Held, that the plaintiff was not entitled to a declaration of interest in the license, nor to a share of the earnings thereunder for the years 1899 and 1900, and that the defendants were not liable to account to him for profits from the use by them of the fishing gear in those years.

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

Argument was heard February 26, 1901.

M. N. Cockburn, K.C. (*A. I. Trueman*, K.C., with him), for the plaintiff.

M. McMonagle, K.C. (*A. O. Earle*, K.C., with him), for the defendants.

1901. May 21. BARKER, J.:—

The amount involved in this suit is so insignificant, and so entirely out of proportion to the time and money expended in its trial and determination, that one feels at a loss to conjecture why it was ever brought. There is probably some good reason which I have not discovered.

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The bill alleges that the coast and shores of Long Island, in the Parish of Grand Manan, and the waters adjacent thereto, are valuable fishing grounds, and have long been marked out as fishing grounds and fish weir privileges under the authority of the Canadian Government, by the Department of Marine and Fisheries, and that one of such fish weir privileges is known as "Envy Weir," number 52, and is situate in the south-westerly portion of the island. That the Government has annually granted to persons applying therefor, upon payment of certain fees, licenses to erect weirs and to fish upon these grounds, which licenses are renewed from year to year to the holder, unless there is some good reason for not doing so. That prior to and in the year 1893 one Nelson Wormell, and Frank Ingersoll, Turner Ingersoll, and Adrian Ingersoll, the defendants in this suit, held the Government license for this weir, issued in their names, and that they then owned together with the privilege secured under the Fisheries Act by the license a seine, seine float, reel, seine boat and other fishing gear necessary to work and use the weir—the interest of the four in this property being as follows: Wormell, one quarter; Frank Ingersoll, one half, and the other two one eighth shares each. That in September, 1893, the plaintiff purchased from Wormell his interest in the license, weir and property, for the sum of $800; that he went into possession of the property, and still owns a one fourth interest in the same. The bill goes on to allege a joint user of this property by the plaintiff and defendants, they participating in the profits according to their interests until the year 1899, when the license was issued to the defendants alone, since which time, the plaintiff alleges, the defendants have deprived him of all use, both of the weir and fishing property; and in fact refused to recognize him as having any interest in it. The bill prayed that it might be declared that the plaintiff is owner and entitled to one fourth interest in the license, and also in the fishing privilege, weir and other property, and also a one fourth interest in the profits and earnings of the weir. Also, that it might be declared that the defendants, or some of them, are a trustee as to a one

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fourth interest in the license and property for him, the plaintiff; and an account was asked for of the transactions of 1896, 1899, and the then expired portion of the season of 1900, and a division of the profits on the basis of interest already stated.

Except in one or two unimportant points there is not much difference between the parties as to the facts. In 1890 the license issued to "Nelson Wormell & Co.," which seems to have been a sort of firm name for Nelson Wormell and the defendants. A similar license issued for the years 1891 and 1892. In 1893 the license issued to "Hayden C. Guptill & Co.," a kind of firm name for the plaintiff and defendants—the plaintiff having purchased Wormell's interest in the meantime. Similar licenses were issued to Guptill & Co. down to and including 1899, though as to the latter year there is some dispute. In a communication which bears date January 3, 1898, addressed to Captain Pratt, the inspector of fisheries, by the defendant, Frank Ingersoll, on behalf of himself and the other two defendants, who are his brothers, the Department was requested to issue the licenses in future to Frank Ingersoll & Co., meaning the defendants. The reason given for asking the change is that the plaintiff had not paid any license for the past four years; that for one year he did not build the weir, or contribute any portion of the expense, and that he was in debt to Ingersoll for moneys expended on the weir, which he refused to pay. Though this communication is dated January 3, 1898, it is said that it was in fact written in January, 1899, a year later—the mistake having been made, as is often done in letters written at the beginning of the year. I think that the evidence of Frank Ingersoll, and Fraser, shews that this mistake really was made, and that the request to change the license was made in January, 1899, and not in 1898, as appears on its face. The license for 1898 seems to have been originally made out to Hayden C. Guptill & Co. Their name is erased and "Frank Ingersoll & Co." inserted in its place. The licenses for 1899 and subsequent years are in the name of "Frank Ingersoll & Co." These licenses are only for one year;

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they are not transferable, and they convey no right to renewal. In the licenses themselves is this stipulation: "The granting of this license neither conveys nor implies any right or claim to its continuance beyond the period stated."

There seems to prevail a somewhat peculiar custom in Grand Manan by which this description of fishing business is regulated—a custom which the evidence shews to be universally recognized and acted upon, and which the parties to this suit have certainly recognized and acted upon. Notwithstanding the Fisheries Act, c. 95, s. 14, subsect. 3, R. S. C., requires stakes placed for fishing purposes in any water to be removed at the expiry of the fishing season, that provision was not observed by those interested in this particular weir. The weir, however, required more or less repairs on it at the beginning of each season. These repairs, the payment of the license fee of $5.00 a year to the Government, and such other outlay as might be necessary to put everything in order for the fishing were not made by any one person in interest. The license fee seems to have been paid by the person to whom the license was delivered, and the repairs generally made by each person doing, or employing others to do, what would be considered his share. At some later date these expenditures were settled upon and paid for by each according to his interest in the weir. While the fishing operations were going on each man sent his boat and men, and the catch seems to have been as a rule, then and there, divided, and if one owner sent no boat, he got no fish. There is no dispute between the parties as to this arrangement. It was acted upon by them and is I understand from the evidence a custom universally recognized in that part of the Province in cases where the weir is owned by two or more persons.

In October, 1895, the parties had a settlement up to the end of that year's fishing season. The defendant, Frank Ingersoll, at that time had an account of $111.82 against the concern; Turner Ingersoll, one for $22.69, and the plaintiff one for $207.12, all of which were adjusted and paid according to the respective interests of the owners.

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The plaintiff in his bill makes a claim as to the fishing for 1896, but as that was expressly abandoned on the hearing it is not necessary to discuss the grounds upon which the claim was based beyond what may have a bearing upon subsequent transactions. The plaintiff in that year contributed nothing in any way towards repairs or expenses connected with the property, and denies all liability to do so. On the other hand, the defendants claim that he is liable to bear his share of that expense, not only by reason of his joint ownership, but by virtue of an express agreement to that effect.

In 1897 the plaintiff furnished 16 new stakes for the weir, and he fished the weir in that year, and also in 1898. The license for 1899, which, as I have already pointed out, was issued to "Frank Ingersoll & Co." at the instance and on the application of Frank Ingersoll, made in January of that year, is dated April 13, 1899. On the 14th of June following the defendant, Frank Ingersoll, wrote the plaintiff the following letter: "We expect to commence driving stakes in the Envy weir, Saturday, if nothing happens, and I should like you to come and settle for the past three years before we commence work this year." To this letter the plaintiff replied on the 16th of June as follows: "Yours of 14th inst. received and noted. It seems that you want me to pay for building weir A. D. 1896. To that will say that if I had tended the weir, or sent any one to fish my part of it, it would certainly be proper and only reasonable for me to bear one quarter of all necessary expenses. But as I did not send a boat at all, neither did I order material for the building of the weir, and you had all the fish, more or less, you have no just claim on me for that, except the Government tax. It would surely be more reasonable for me to look for something from you for use of weir, seine, seine boat, etc., than for you to ask me to bear one quarter of all expenses and give me nothing. If you had sent me a bill of items, as I asked you last winter by letter, I should made a great effort to have had the matter settled in a satisfactory manner, if it were possible. You allow boats (American as well as others) in the weir and load up with

herring, which are my herring as well as yours, and sell them for good prices, and put the money in your pockets and give me nothing; so it is not strange that we differ in opinion if you think that is right. So I hope you will meet me in a friendly spirit and fix up the matter agreeably. Send a bill, which is only a reasonable request, and I will pay every demand within the bounds of reason, and send a man or two right away to help repair the weir. For going up to Bayside for the weir stakes expressly make them come high, if I have enough to pay daily wages, but we will not fall out about that. The enclosed bill shews equal to 16 tides' work for one man on weir last year, which, I think, is more than my part of labor. You probably know about it."

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To this letter Ingersoll replied on the 19th June as follows: "Yours of 16th inst. to hand, and note what you say about paying the bills on the weir. Now, all I have to say is that you will pay the 1896 bill on the weir with interest, and your part of all other bills to date, and at once, so you need not send men to build it." The plaintiff then sent two men to assist in building the weir, and to do his share of the work, but Frank Ingersoll refused to let them go to work, and said that he would not allow the plaintiff to build the weir, and they thereupon went away.

In the following year, 1900, the plaintiff again wrote to Ingersoll in reference to the weir. This letter is not in evidence, but Ingersoll's reply, which is dated March 28, 1900, is as follows: "Your letter of the 19th inst. received, asking me for an offer on one quarter of the Envy weir. In reply I have to say you have never paid for the license, or any part thereof, for the past five years. Five years ago the weir was confiscated, and I took out a new license in my own name. I do not consider that you have any interest or claim in said weir, and am prepared to defend any action you may bring in the matter."

The plaintiff, it will therefore be seen, is making no claim that in the expenditures he made in work and money on the weir in 1897 and 1898 he contributed more than his

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share, and his claim is confined, so far as any accounting is concerned, altogether to the years 1899 and 1900 (having abandoned all claim as to the year 1896), during which time he contributed nothing, but on the contrary he was, as he says, prevented from participating in any way in the use or control of the weir and property. The plaintiff's rights are, I think, not the same in reference to the fishing privilege as they are in reference to the fishing property or apparatus, by which the privilege was made useful and profitable. By fishing privilege I mean the right conferred by the licenses from the Department of Fisheries. The licenses are in the following form (I copy that for 1898):

"Dominion of Canada,

Province of New Brunswick,

Department of Marine and Fisheries.

"Special Fishery License (issued under authority of the Fisheries Act).

"The herein named Frank Ingersoll & Co., resident of Grand Manan, in consideration of payment made before the delivery of this license of the sum of five dollars, is hereby licensed, during the year 1898, to fish one weir for herring, known as the "Lower or Envy Weir," located at Long Island, Grand Manan, N. B. The granting of this license neither conveys nor implies any right or claim to its continuance beyond the period stated. The present license requires strict conformity with the various provisions of the Fishery Laws now (or hereafter) in force, and to all regulations emanating from the Governor-General in Council, and directions by fishery officers. In default of such compliance the same will become void and forfeited forthwith, saving, moreover, the penalties imposed by law. This license is not transferable."

It will be seen that these licenses are only for a year, and that they convey no right to renewal; in fact, on their face they distinctly state that no such right is given, either expressly or impliedly. Each fishing season seems to stand by itself. The law requires the stakes to be removed, and everything is clear for the next occupant, and the licensee

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of one year takes his chances of securing the privilege afterwards. When, therefore, on the representation of Ingersoll, the Department issued the license to the defendants in 1899, the plaintiff lost no right, either legal or equitable, however likely it may have been that, except for Ingersoll's intervention, the license for that year would have issued as before. It is said that this would not determine the rights of the parties *inter se* as to the license, Ingersoll having obtained it as he did. This involves a determination of the relation in which the parties stood to each other. This bill is filed to enforce a claim based upon a joint ownership of chattels. It is not claimed, and I think on the evidence it could not be claimed, that the plaintiff and defendants are partners in this business, or that they ever were so. Between such joint ownership and partnership there are of course many things in common. There are, however, important distinctions. The parties have never acted as such, or so far as I have heard, have they ever claimed that any such relation existed between them. In a case of partnership, even where the license was not renewable, this Court might hold—I do not say that it would—that the new license enured to the benefit of the partnership. Neither is it the case that these parties acquired this property under any agreement, or with a view of together carrying on the business so long as the license for the weir could be secured. The evidence does not shew that between the original owners—Wormell and the defendants—there was any such agreement, or any agreement at all, in fact; and as for the plaintiff, he bought his interest in the property without consulting the defendants in any way, and without their consenting to it in any way. It is true that they acted with him, and recognized his rights as a purchaser from Wormell. I cannot think, however, that if the defendants, when they learned of the plaintiff's purchase in 1893, concluded that he was not a desirable person to be associated with in the business, and for that, or any other similar reason, procured the license in the following year, to be issued to themselves, any trust would therefore be created by operation of law in favor of

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the plaintiff as to the privilege. All he bought was a quarter interest in the chattels; the fishing gear or apparatus, which he still holds, and the same interest in whatever was conveyed or given by the then current license, which, as I have pointed out, expired at the end of the year, and contained no contract, express or implied, for renewal. It is obvious that Ingersoll never intended to assume any such trust, and I do not think the law would imply any, either as appurtenant to the rights purchased by the plaintiff from Wormell, or as arising in any way out of the relation in which the parties stood to each other, or their dealings with one another. In my opinion the plaintiff had no interest under the licenses of 1899 and 1900, and so far as his claim to an account is based on any such interest it cannot be sustained.

This brings me to the second branch of the case. What are the plaintiff's rights to an account in reference to the use of the other property—which, for convenience sake, I shall call fishing gear—and in which the plaintiff and defendants admittedly have a common interest in the proportions already mentioned, except, perhaps, the seine, which has been purchased by the defendants and paid for by them, I think, since 1899, or in that year? What constitutes an unlawful conversion of a chattel so as to sustain an action by one tenant in common against his co-tenant is sometimes a difficult question to determine. If the Ingersolls have rendered themselves liable to the plaintiff by what they have done, he has a full and adequate remedy at law, and this Court would not interfere; and I shall, of course, not complicate the position of either party by any expression of opinion on the subject, which a determination of this case does not require. The plaintiff in this suit makes no such claim; it must be sustained, if at all, on altogether different principles. On investigating what authority there is to be found on the question I think it will be seen that the right for one co-tenant of a chattel to maintain an action, either at law or in equity, except for an unlawful conversion, is an exceedingly limited one.

In *Leigh* v. *Dickeson* (1) Lindley, L. J., says: "I have looked into the titles 'Account,' 'Contribution' and 'Action upon the Case' in the Digests; and it is not a little singular that no remedy for any of the inconveniences attending a tenancy in common can be found except that of partition. Tenancy in common is a tenure of an inconvenient nature, and it is unfit for persons who cannot agree amongst themselves; but the evils attaching to it can be dealt with only in a suit for partition or sale, in which the rights of the various owners can be properly adjusted." *Schouler*, an American author, in a work on personal chattels, expresses the same idea, and says that persons who own a chattel in common, and cannot agree as to its use, if they have any common sense will sell it and divide the money. I gather from the evidence that during the years in dispute the defendants have been in possession of this fishing gear, and have used it for fishing this weir; that is, they have used it for the ordinary purposes for which it was intended, and in no other way. In my opinion, one tenant in common has the right to hold such possession when once obtained, and use for his own benefit the chattel without being liable to account to his co-tenants in any way for profits derived from such use. The obtaining of such possession and holding it afterwards, even to the exclusion of the co-tenant, is entirely lawful, unless the circumstances of the particular case make the exclusion equivalent to an unlawful conversion of the property.

In *Henderson* v. *Eason* (2) Parke, B., says: "There are obviously many cases in which a tenant in common may occupy and enjoy the land, or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling-house, or barn, or room, is solely occupied by one tenant in common, without ousting the other, or a chattel is used by one tenant in common, nothing is received; and it would be most inequitable to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay

(1) 15 Q. B. D. 60. (2) 17 Q. B. 701, 720.

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a rent, or anything in the nature of compensation to his co-tenants for that occupation or use to which, to the full extent to which he enjoyed it, he had a perfect right. It appears impossible to hold that such a case could be within the statute; and an opinion to that effect was expressed by Lord Cottenham in *McMahon* v. *Burchell* (1). Such cases are clearly out of the operation of the statute." The Judge is there referring to the Statute of 4 Ann., c. 16, but as to the law which prevailed before that statute was passed, he says: "There is no doubt as to the law before the Statute of 4 Ann., c. 16. If one tenant in common occupied and took the whole profits, the other had no remedy against him, whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate." By the statute of Ann. it was, however, pointed out one tenant in common might maintain an action of account against the other for receiving more than his just share or proportion. And the authorities shew that under this statute the tenant is only bailiff by virtue of his receiving more than his just share. And it is only to such a case that the statute applies. He is to account for what he receives, not what he takes, more than his just share; and issues and profits are not receipts within the Act. It only applies to cases where the tenant in common receives money or something else where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion. Parke, B., in the case cited, gives illustrations of cases not within the statute, some of which are similar to the present. In *Jacobs* v. *Seward* (2) the Lord Chancellor, after discussing the nature of acts which when done by a tenant in common of a chattel amount to an unlawful conversion of

(1) 2 Ph. 134.

(2) L. R. 5 H. L. 475.

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it, adds: "But where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed. * * As long as the tenant in common is confining his use of that property to its legitimate purpose trover will not lie against him." In *Thomas* v. *Thomas* (1) the plaintiff claimed, in an action for money had and received against his co-tenant, his share of rents received by such co-tenant, who was in sole possession of the property, and in receipt of all the rents. Parke, B., held that the action could not succeed, but that the remedy was by action under the statute. He says: "It appears to us to be clear from Co. Litt., 200 b., that by the common law a tenant in common could bring no such action as this. In that page several cases are put in which one tenant in common may bring an action against his companion; but it is there said that if two be tenants in common of a chattel, and one of them takes it away, the other has no remedy by action except when the subject-matter is destroyed, but must watch his opportunity to retake it. Several other instances are there put illustrative of these distinctions, and it is expressly laid down that no action of account lay by the common law by one tenant in common against his companion for taking more than his share of the profits, unless where he had constituted him his bailiff to receive them." See also *Gregory* v. *Connolly* (2); *Re Kirkpatrick* (3); *Frost* v. *Disbrow* (4). In this present case the defendants, as I have already pointed out, only used this property for fishing purposes in the ordinary way; the operations were carried on at their own risk and expense, and in case of loss they had no claim upon the plaintiff for contribution.

I do not think it necessary to discuss two other points which were mentioned at the hearing, because, for the reasons I have given, I think the plaintiff cannot succeed. One was that there could be no reference, even if the right

(1) 14 Jur. 180.
(2) 7 U. C. Q. B. 500.
(3) 10 P. R. 4.
(4) 1 Han. 73.

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to an account were sustained, as the evidence shewed that there were no profits derived from the fishing during the years in question. The other was that as the transfer of the one quarter interest in the property was made by Wormell to the plaintiff's daughter, this suit could not be maintained in his name, though the purchase was with his money, and he has so far acted and been recognized as the beneficial owner.

The bill will be dismissed with costs.

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May 21.

In re KEARNEY.

Dower — Report of Commissioners — Right of widow to have land set off to her — Payment of money — Convenience of owner of land subject to dower — Act 53 Vict., c. 4, s. 250 (4) — Practice — Admissibility of affidavits on motion to confirm Commissioners' report.

Under Act 53 Vict., c. 4, s. 237, *et seq.*, a widow will not be compelled to take money in lieu of land because such a course will be more satisfactory or profitable to the owner of the land subject to dower.

Affidavits upon questions of fact inquired of or relevant to an inquiry by Commissioners to admeasure dower cannot be read on a motion to confirm their report.

Motion to confirm report of Commissioners to admeasure dower. The facts are fully stated in the judgment of the Court. Argument was heard April 16, 1901.

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

The Court will not interfere with the Commissioners' report in the absence of fraud, or mistake so gross as to amount to fraud: *Lister* v. *Lister* (1); *Jones* v. *Totty* (2); *Manners* v. *Charlesworth* (3).

(1) 3 Y. & C. Ex. 540.
(2) 1 Sim. 136.
(3) 1 Myl. & K. 330.

Louis Young, contra.

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1901. May 21. BARKER, J.:—

An application on behalf of one Howard S. Kearney was made to me under sect. 243 of Act 53 Vict., c. 4, for the admeasurement of the widow's dower in certain lands which he had acquired and which were subject to dower. Counsel for the widow attended at the time for which notice of the application was given; the right of dower was admitted; the amount of the arrears of dower was agreed upon at $45, and the Commissioners were also agreed upon. The order was issued in the usual form and the Commissioners have returned the following report, omitting the formal portions: "We beg to report that we assembled at the said lands and premises on Monday, the 25th day of March, 1901, at the hour of ten of the clock in the forenoon and in the presence of Mr. Louis Young, Counsel for the said Mary Frances Kearney, and Mr. D. McLeod Vince, Counsel for the petitioner Howard S. Kearney, and commenced our duties as such Commissioners, and we found it difficult to make an admeasurement of the dower of the said Mary Frances Kearney in the said lands and premises which would in our judgment be satisfactory or profitable to the said Mary Frances Kearney and Howard S. Kearney on account of the location of the buildings and water privileges. And after fully and carefully considering the value of the said widow's dower in the said lands and premises we value it at $325." A motion was made to confirm this report at the April sittings. Mr. Young opposed this motion on affidavits which he read, and by which it appears that he protested on behalf of the widow to the Commissioners against their making any valuation of the dower as they have done, but insisted on the dower being set off. The affidavits shew that the widow is 35 years of age, having been born on the 30th day of April, 1866, while it is stated, on the authority of one of the Commissioners, that the valuation reported was based on the assumption that she was 38 years old. It was also stated that the Commissioners' valuation was based on the

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assumption that the rental value of the lands in question was $90 a year, while the widow puts it at $150 a year. In reply to these affidavits Mr. Vince read three affidavits—one was by one of the Commissioners—by which it appears that the buildings on the land in question were in a somewhat delapidated state when Kearney died and that the present applicant had since that time expended $500 in repairing them. The affidavits were also directed towards shewing the value of the land to be less than that given by the widow. It was not denied that the valuation of $325 reported by the Commissioners was based on the assumption that the rental value of the land did not exceed $90 per year and that the widow's age was 38. So far as appears no witness was produced before the Commissioners, and the Counsel for the parties did not offer any. No doubt as to many questions involved the judgment of the Commissioners would be sufficient. The value of improvements put on the land since Kearney's death is an important question under sub-s. 2 of sect. 250, and the widow's age is also an important question in computing the value of the dower. Upon these points it may be assumed the Commissioners would have no personal knowledge, and as to one of them at least they seem to have been in error. So far as all questions of value and such like questions are concerned I should hesitate before interfering with the judgment of the Commissioners. The Act requires them to be, as no doubt they were in this case, "respectable disinterested freeholders residing in the County where the lands in which dower is claimed or the greater part thereof are situate"—a provision evidently intended to secure persons with personal knowledge of the values of lands in the particular locality. If there were no other difficulty in the way except that the Commissioners had erred as to the widow's age and I felt at liberty to act under the affidavits, I think under the peculiar circumstances of this case I should be making an order consistent with justice if I exercised the power which the Court has under sect. 252 and amended the report by increasing the valuation of the Commissioners to what it should have been, based on the

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rental value fixed by them and the widow's age as proved by herself—a computation readily made from the tables in constant use in this Court for this and similar purposes. There seems, however, to be an insuperable difficulty in the way of taking this course.

There has always been a close analogy between proceedings for partition and proceedings for admeasurement of dower. In both cases the object was to have set off by metes and bounds the lands which were in the one case to be held in severalty, and in the other to be held by the widow for life. The practice of selling the property where actual partition could not be beneficially made and dividing the proceeds, and of paying the widow a sum in cash in lieu of dower, is of comparatively recent origin, though now in general use. The primary object of proceedings of this kind is, I think, to set off the land for the use of the widow; the payment of the cash value, except where she assents to it, is only an alternative remedy, to be adopted under special circumstances. Sect. 250 of Act 53 Vict., c. 4, explicitly provides what the Commissioners are to do. They are to lay off a portion of the land equivalent to one-third part of the land mentioned in the order. And in doing so they are to take into account any permanent improvements made upon the lands since the husband's death, and if practicable shall award such improvements within the land not allotted to the widow; and if that is not practicable then they are to make a deduction from the land allotted to the widow equal to the value of the benefit she will derive from the improvements. The land set off is to be designated by boundary marks on the ground, and the Commissioners are to make a full report to the Court of their proceedings, shewing the quantity, courses, distances, metes and bounds of the land set off for the widow. Then comes the clause under which the Commissioners made their report and which is as follows: "If both parties desire it, or if from any cause the Commissioners find it difficult to make such admeasurement, they may make a special report shewing the value of the widow's dower in the said premises." Now the Commissioners have reported

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that they found it difficult to make an admeasurement of the dower which would in their judgment be satisfactory or profitable to Mrs. Kearney and Howard D. Kearney, the applicant, on account of the location of the buildings and water privileges. I am unable to see how it is important that the admeasurement, if there is no other difficulty in the way, should not be made because it will not be satisfactory or profitable to Howard D. Kearney. He has no interest in the matter so as to make his convenience a ground for compelling the widow to take a cash payment in place of the use and occupation of one-third of the land. The water privileges referred to and the location of the buildings may of themselves render it difficult to make the admeasurement so as to warrant the alternative remedy of a cash valuation, but I cannot agree that the section warrants that course in cases where the admeasurement can be made, and the only difficulty in the way is that it involves some inconvenience to the occupants of the remaining part of the land. I can only dismiss this motion to confirm the report and set the report aside and leave the applicant to make any further motion in the matter he may think best. I wish to add that it is not to be inferred that because I have referred to the affidavits used on this motion that the use of such affidavits is a practice to be adopted. No objection was made to them and I have not acted upon them in any way, but I can see many and obvious objections to the questions of fact which must be determined by the Commissioners as a basis of their action, coming up here on a motion of this kind to be determined on affidavits. If parties wish to give evidence before the Commissioners let them do so, and if they desire to leave the matter altogether to the judgment of the Commissioners that course is open to them. The Legislature has made them the judges of matters largely questions of opinion. Facts which are relevant to that inquiry, and which the parties may think it useful to lay before the Commissioners, should be shewn before them and not left open to come originally before the Court on a motion like this. Otherwise we should have the Commissioners exercising their

judgment and making their report on one state of facts and this Court setting it aside or amending it upon an entirely new state of facts. While I should not be surprised if the acceptance of the sum of money reported by the Commissioners, or rather what they would have reported had they not have erred as to the widow's age, would be the wisest course for the widow to adopt, I have no power as matters stand at present to so order.

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This motion to confirm the report will be refused—the report will be set aside, but the applicant will have leave to apply in the matter again as he may see fit. There will be no costs to either party.

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August 13.

GALLAGHER v. CITY OF MONCTON.

Referee — Fees — When payable — Proceeding with reference where fees in jeopardy.

A Referee having entered upon a reference is not entitled to payment of his fees from day to day as a condition of proceeding with the reference.

Semble, where special circumstances shew a probability that the fees of a Referee will not be paid the Court will require that his fees be secured to him before ordering the reference to be proceeded with.

Notice by the defendants to the Referee in this cause, Mr. Francis J. Sweeney, of an application for an order directing him peremptorily to proceed with the reference in the cause; and notice to the plaintiff of the application, and that in the alternative she be ordered to pay the Referee's fees on the reference from day to day. By decree in the suit a reference was ordered to examine and report upon the accounts between the parties. On May 29, 1901, the Referee entered upon the inquiry under the reference, and the matter was subsequently proceeded with on a number

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of days. At the close of a sitting on July 30, adjourning to August 2, the Referee stated that he would not proceed further with the reference unless his fees at the rate of $10 per day for previous days were paid, and unless each day's fees at this rate were paid at the close of each day. Up to this time the business of the reference had been occupied in examination and proof of the defendants' accounts, which were still undisposed of. Application was heard August 13, 1901.

W. B. Chandler, K.C., for the defendants:—

The plaintiff should pay the fees as she has the carriage and prosecution of the decree: *Morgan* Ch. Orders (1); 2 *Daniell* Ch Pr. (2).

M. G. Teed, for the plaintiff:—

The Referee is seeking to fix his rate of compensation, contrary to the Act 53 Vict., c. 4, s. 159, which provides that his fees shall be taxed by the Clerk of the Court. Until the reference is concluded, and the report is ready for delivery, the fees cannot be taxed. If sufficient grounds were presented to the Court it might require the deposit of a sum of money to meet the fees of the Referee before requiring him to proceed, but such a case is not made here. See vol. 20, *Amer. & Eng. Ency.* (3). Having entered upon the despatch of the reference the Referee cannot decline to proceed with it until his fees are paid on account: *Doherty* v. *Doherty* (4). If it is considered that the Referee should be paid his fees *de die in diem*, they should be paid by the defendants during the time they are proving their accounts.

E. R. Chapman, for the Referee.

BARKER, J.:—Dealing with the question raised by this application as one unaffected by special circumstances, as there is no evidence before me that the Referee's fees are in jeopardy, I am of opinion that the Referee must proceed

(1) 3rd ed. 531.
(2) 5th ed. 1082, 1084, 1121.
(3) 1st ed. 711.
(4) 8 Ir. Eq. R. 379.

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with and conclude the reference before he can demand payment of his fees. If it were shewn that it was unlikely that his fees would be paid it would be the duty of the Court to protect him before ordering him to proceed. The order applied for here is scarcely necessary, and certainly need not be taken out for the present.

In re ABELL.

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August 27.

Arbitrator — Disqualification — Bias — Alderman — Expropriation of property by city — Act 61 Vict., c. 52.

An alderman of the City of Saint John is disqualified from acting as an arbitrator appointed by the city to determine with other arbitrators the value of property expropriated by the city under Act 61 Vict., c. 52.

Appeal to Mr. Justice *Barker*, as a Judge of the Supreme Court, upon the question of the qualification of J. Russell Armstrong, an alderman of the City of Saint John, to act as an Arbitrator under Act 61 Vict., c. 52. The facts are fully stated in the judgment of the learned Judge.

Argument was heard July 19, 1901.

W. B. Wallace, K.C., for the appellant:—

Section 11 of Act 61 Vict., c. 52, provides that any person appointed arbitrator under the Act shall be disinterested, but that no person shall be deemed disqualified by reason of owning land or other property, or residing or being rated or assessed in the City of Saint John. I anticipate the contention that as Mr. Armstrong was not an alderman at the time he was appointed an arbitrator he is disinterested within the meaning of the section. The section proceeds: "If any question shall arise as to the qualification of any person appointed, the same shall be raised forthwith." The question, therefore, may not exist

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at the time the arbitrator is appointed, but may arise afterwards. The language of the section is more stringent than the common law, as it particularizes what shall not constitute a disqualification, and should be strictly construed as against the city. See *Re Muskoka and Gravenhurst* (1); *Conmee* v. *Canadian Pacific Railway Co.* (2).

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

The objection to the qualification of Mr. Armstrong was not taken "forthwith," as required by the Act. Mr. Armstrong had been sworn in, and the arbitrators had entered upon their duties before the objection was raised. The Act does not contemplate that an arbitrator shall be disinterested except at the time of his appointment. Mr. Armstrong is not disqualified from acting by reason of being an alderman. His bias as an alderman cannot be any greater than his bias at the time of his appointment, when he was a ratepayer of the city.

Wallace, K.C., in reply.

1901. August 27. BARKER, J.:—

The appellant has filed a claim against the City of Saint John for damage sustained by him by reason of certain lands or water privileges having been expropriated by the city under the provisions of Act 61 Vict., c. 52. Under sect. 11 of that Act the city appointed Mr. J. R. Armstrong as their arbitrator, and this application is made to me under that section to determine as to whether Mr. Armstrong is disqualified to act. The section is as follows: "Any person appointed arbitrator under any of the aforegoing sections shall be disinterested, but no person shall be deemed disqualified by reason of owning land or other property, or residing or being rated or assessed in the City of St. John. If any question shall arise as to the qualification of any person appointed, the same shall be raised forthwith, and shall be determined by any Judge of the Supreme Court

(1) 6 O. R. 352. (2) 16 O. R. 639, 646.

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upon affidavit of the facts, and if any person appointed shall be thereupon rejected, the party appointing him may appoint another in his place."

It appears that Mr. Armstrong was appointed on the 25th October, 1898, and that shortly after, Abell appointed Mr. Pugsley as his arbitrator. Nothing was done by the arbitrators until July, 1900, when they met and appointed Mr. James G. Taylor, as third arbitrator. They were sworn in on the 24th July, 1900. In the meantime, that is to say, on the third Tuesday in April, 1900, Mr. Armstrong was elected an alderman of the city. He was sworn in as such alderman on the 1st of May, 1900, and since that time has been and still is such alderman. The arbitrators met for the first time on the 15th of August, 1900, when Mr. Wallace, acting as Abell's counsel, objected to Mr. Armstrong acting, as he had been elected alderman and was, therefore, not disinterested. Mr. Armstrong seems to have expressed an intention of resigning, but nothing definite was settled upon, and the arbitrators adjourned until the following 13th of September. When they met on the last date, it appears by the affidavit used before me, and which was sworn to by the appellant on the 28th of September, 1900, "that the said John R. Armstrong then stated he did not intend to resign, but would sit and act as such arbitrator, because the said City Council had, upon his offering to resign, requested him not to do so, or words to that effect, and the meeting was therefore adjourned to allow the matter of said John R. Armstrong's qualification to sit and act as such arbitrator, to be determined by a Judge of the Supreme Court, under section 11 of said Act." Mr. Skinner, on the part of the City, relied upon three grounds: First, he said the Act only applied to some interest existing at the time of the appointment. This would, however, be too narrow a construction to place upon the section, and would by no means meet the evil it was intended to provide against: *Conmee* v. *Canadian Pacific Railway Co.* (1). The second ground is that the objection was not raised *forthwith*, as required by the Act; but, I think, if that word be

(1) 16 O. R. 639.

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given a more restricted meaning than I should be disposed to give it, Mr. Wallace would be within it. He objected at the first meeting, and could not well have done it earlier. The third ground relied on by Mr. Skinner is the substantial one—that is, that the fact of being an alderman does not disqualify Mr. Armstrong from acting. I think the objection taken to Mr. Armstrong's acting is well founded.

The principles governing such cases, though by no means new, are laid down in a case decided in England in June last. I refer to *Rex* v. *Justices of Sunderland* (1). The rule is that where there is a real likelihood that the judge will, from kindred or any other cause, have a bias in favor of one of the parties, it would be very wrong in him to act. If the circumstances are such as to fairly lead to the conclusion that the arbitrator's mind is likely to be biased and not left entirely free as it should be, then the party is disqualified from acting. The difficulty lies more in applying the rule than in stating it. In all cases, however, as Sir William Erle says, it is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal.

In *Vineberg* v. *Guardian Assurance Co.* (2), the arbitrator was held not indifferent and therefore disqualified from acting because he was sub-agent for an agent of the Company in obtaining risks though he had acted to only a small extent. And in *Conmee* v. *Canadian Pacific Railway Co.*, already mentioned, the rule was applied to a case where the arbitrator during the pendency of the arbitration entered into negotiations with the defendants for permanent employment as their Counsel. These may be thought extreme cases, but they shew how jealously are judicial tribunals guarded against all appearance or suspicion of prejudice or unfairness.

Now let us see in what position Mr. Armstrong as an alderman stands in relation to this claim. It is to be remembered in the first place that the city has expropriated this land, and that by law the city is bound to pay for it the sum which the arbitrators may award. It is nothing

(1) [1901] 2 K. B. 357. (2) 19 A. R. 293.

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more nor less than a debt due by the city to Abell, the amount of which is to be ascertained by these three disinterested arbitrators. The Common Council of the city, which consists of the Mayor and Aldermen, has the entire control of the city government and the administration of its fiscal, prudential and municipal affairs. The Aldermen are duly sworn to a faithful discharge of their duties and they are entitled to $100 a year for their services. It is Mr. Armstrong's duty as an alderman to guard the taxpayers, to see that the city expenditure is kept within proper limits and as low as possible consistent with the requirements of good government. Surely an alderman can scarcely be the person to sit in judgment on a claim against a corporation to which he owes a duty such as I have described. Though under no personal liability in the matter he is practically one of the defendants. At all events he is one of the Board whose duty it is to see that in this matter the damages claimed by the appellant should be reduced to what that Board considers a proper amount. He can therefore scarcely be considered as free from a bias in the direction in which his duty to the city leads him. I therefore determine that Mr. Armstrong is disqualified from acting and that he should be, and he is, rejected as such arbitrator.

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August 20.

THORNE v. PERRY.

—No. 2. See Ante, p. 146.

Practice—Execution against body—Decree for payment of money—Disobedience—Principles under which execution will be granted or refused—Act 53 Vict., c. 4, s. 114; Act 58 Vict., c. 18, s. 2.

Where defendant made default in paying to the plaintiff under the decree of the Court a sum of money received by the defendant as a *donatio mortis causâ* in favor of the plaintiff an order was granted under Act 53 Vict., c. 4, s. 114, as amended by Act 58 Vict., c. 18, s. 2, for an execution against his body.

An order under the above Act for an execution against the body of a party making default to a decree of the Court for payment of a sum of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and that his arrest is sought for a vindictive purpose, or to bring pressure upon his friends to come to his assistance.

Application under sect. 114 of Act 53 Vict., c. 4, as amended by Act 58 Vict., c. 18, s. 2, for an order for an execution against the body of the defendant, George Perry, for disobedience to a decree of the Court for the payment by him to the plaintiff of $400, and taxed costs of suit. The defendant was handed by Mary C. Perry, while in her last illness, and shortly before her death, a Government Savings Bank pass book, in which was credited in the names of herself and the defendant $1,176.00, with instructions to pay to the plaintiff $400 of it, to which the defendant assented. The sum credited in the bank book came to the hands of the defendant after the death of Mary C. Perry, and on his refusing to pay to the plaintiff the amount directed to be paid to her, a suit was brought to have it declared that the gift was a *donatio mortis causa* to the defendant in trust for the plaintiff; and the above decree was made. The judgment of the Court, together with a full statement of the facts, is reported at page 146, *ante*. It appeared on this application that the defendant shortly previous to the commencement of the suit made a conveyance of all his real estate to his son, a student at

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Acadia College, and that since the decree the defendant had delivered all his personal property to his son. An execution issued under the decree was returned *nulla bona*.

Application was heard August 20, 1901.

G. H. V. Belyea, for the application.

BARKER, J.:—

This application must be allowed. I have laid down the rule in matters of this kind that where the party disobeying a decree of the Court to pay money is shewn to have either present means of satisfying the decree or to have disposed of his property since the commencement or in anticipation of the suit, for the purpose of evading obedience to the decree of the Court, an order for an execution against his body will be granted. I think the discretion of the Court to grant or withhold an order for an execution should be so exercised as to mould the practice of the Court in conformity with the principles embodied in the Act 59 Vict., c. 28, s. 48, as amended by Act 61 Vict., c. 28, s. 4. I have repeatedly refused applications for an order for an execution where I was satisfied that the party in default was without means and had made no fraudulent disposition of his property, and his arrest was sought for a vindictive purpose, or to bring pressure upon his relatives or friends to come to his assistance. Each case must to a large extent depend upon its own peculiar circumstances, but I can see no use in imprisoning a man for a debt which he has no means to pay. To do so seems to me to be opposed to the policy of the legislation in this Province abolishing, except in certain cases, imprisonment for debt. Parties can take out an execution against goods, and, if necessary, have the debtor up for disclosure, and if it appears in that way that he is really in a position to pay or there are other circumstances which seem to warrant his imprisonment, an order for that purpose can be made. These remarks refer only to cases where the decree is merely for payment of money. Other cases can be dealt with on different principles.

Application allowed.

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August 27.

DEBURY v. DEBURY.

Married Women's Property Act, 58 Vict., c. 24, s. 4 (1) and (4)—Married woman married before the commencement of Act—Conveyance of real estate without husband's concurrence—Tenancy by the curtesy.

Under The Married Women's Property Act, 58 Vict., c. 24, a married woman married before the commencement of the Act may make a conveyance without her husband's concurrence of her real estate not acquired from him during coverture, subject, however, to his tenancy by the curtesy consummate.

The facts in this suit are fully stated in the judgment of the Court. Argument was heard May 30, 1901.

A. A. Stockton, K.C., and *D. Mullin*, K.C., for the plaintiff:—

The plaintiff and his wife were married in 1869, and his rights then in the real estate of his wife were those enjoyed by a husband at common law, except as modified by c. 114, Rev. Stat. N. B. By that statute it was provided in sect. 1 that "the real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from the husband while married, shall be owned as her separate property so as to exempt it from seizure or responsibility in any way for the debts or liabilities of her husband, and shall not be conveyed, encumbered, or disposed of without her consent," etc. The statute did not divest the husband of the enjoyment of the income of his wife's real estate but merely placed the income out of the reach of the husband's creditors. The same observation is applicable to c. 72, C. S. N. B. While it is declared in that Act that the real estate of a married woman shall vest in her and be owned by her as her separate property, the *jus disponendi* was not conferred upon her: *Wallace* v. *Lea* (1). This being the state of the law at the time the Act 58 Vict., c. 24, was passed, it is not to be considered that that Act destroyed or impaired a

(1) 28 Can. S. C. R. 595.

husband's vested marital rights in the real estate of his wife unless conclusive language for the purpose has been used. The Act makes a distinction between the case of a woman married before and a woman married after the commencement of the Act in order to preserve rights which were in existence at the commencement of the Act. In the case of a woman married after the commencement of the Act her real estate, and the rents, issues and profits thereof, are declared to be for her separate use, free from any estate therein of her husband. These words must have been advisedly omitted from the sub-sect. relating to the real estate of a woman married before the commencement of the Act; otherwise the real estate of a woman married before and a woman married after the commencement of the Act must be considered to be on the same footing. That construction would deprive the deliberate effort of the Legislature to make a distinction between the two classes of married women of any significance. The difficulty in the construction of sect. 4, sub-sect. 1, in a sense favorable to the husband is said to lie in the declaration that the wife may "dispose" of all her real estate in as full and ample a manner as if she were sole and unmarried. Those words cannot be divorced from their context. Reading the sub-sect. as a whole it means that the wife's real estate may be disposed of free from the debts of the husband, and not that she may convey or dispose of her real estate by deed or will without the concurrence of her husband. The husband here has a vested freehold estate in the real estate of his wife. If she has a power of disposition as a *feme sole* under the sub-sect., its exercise is limited to disposing of the estate of inheritance remaining in her, less the estate existing in the husband. Sect. 3, sub-sect. 1, of the Act providing that "a married woman shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee," is an enabling section and does not add to the force of sect. 4, sub-sect. 1. If any right existed in the wife to the income of the

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property it has been divested by the leases executed by herself and the plaintiff, as the rents thereby reserved accrue to the plaintiff.

A. O. Earle, K.C., for the defendants:—

It may be an inadvertence, but sect. 4 is drawn more favorably to a woman married before, than to a woman married after, the commencement of the Act. Sect. 4 (1) provides that a woman married before the commencement of the Act may dispose of her real estate, whereas in the case of a woman married after the commencement of the Act it is merely declared by sect. 4 (2) that she shall hold and enjoy her real estate for her separate use. If nothing more was intended by sect. 4 (1) than that a woman's real estate should be exempt from liability for her husband's debts there was no conceivable object in enacting that she could dispose of it as a *feme sole*. These words can only be given a sensible and effective rendition by holding that a conveyance by a married woman excludes the tenancy by the curtesy of the husband, though he is not a party to the conveyance. The provision of sub-sect. 4 of sect. 4, that nothing contained in the Act shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of the wife, refers only to real estate the wife dies possessed of. During the wife's lifetime the tenancy by the curtesy cannot arise and consequently it cannot be prejudiced by her disposition of her real estate.

Stockton, K.C., in reply.

1901. August 27. BARKER, J.:—

The bill in this case was filed by the plaintiff, Count DeBury, against his wife, Madame DeBury, and Charles J. Coster and Irene M. Simonds, as trustees of the wife under an assignment in trust made by her to them; and the object of the bill is to obtain a declaration of the rights of the parties. The question involved depends upon the construction to be given to the Married Women's Property Act, passed in 1895, and is of somewhat general importance.

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The facts are briefly these: The late Henry G. Simonds, father of the defendant, Madame DeBury, died in the year 1860, leaving a widow and three children, and a large and valuable estate, consisting principally of real estate in this Province. The plaintiff and the defendant Madame DeBury were married at Stuttgart, in Germany, on the 5th of August, 1869, but for many years past they have been living in St. John, where the most of the property is situate, and which, on Mr. Simonds' death, came into the possession of his widow and children. In August, 1880, this property was divided by a partition deed, to which the plaintiff, his wife, Mrs. Simonds, and the two other children were parties, the effect of which was to vest in Madame DeBury, in severalty, her share of the estate; and it is in reference to this real estate thus acquired that the question in this suit arises. The plaintiff and Madame DeBury have several children living, the youngest being about ten years of age. For many years previous to October, 1900, when the conveyance to Coster and Miss Simonds was made, the plaintiff had the management of his wife's property, and at one time he held from her a power of attorney, under which he acted, and which empowered him, among other things, to make leases. A few of the leases now existing were made during Mr. Simonds' lifetime, and came to Madame DeBury under the partition. Some of the others were executed by Madame DeBury personally and some by her husband for her, acting under the power of attorney, which is dated November 9, 1898. These leases are principally renewable building leases for long terms. The rent roll is large, and the number of tenants upwards of one hundred. On the 16th of October, 1900, Madame DeBury, without her husband's knowledge, consent or concurrence in any way, executed a conveyance of all her property, including her interest in this real estate under lease to these various tenants, to her sister, the defendant Irene M. Simonds, and the defendant Charles J. Coster, upon certain trusts for her benefit, under which they claim the right to collect the rents and profits of the property under leases already existing, as well as the

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entire control of the property conveyed to them, to the exclusion of the plaintiff. On the other hand, he claims that by virtue of his marital rights he has a vested estate for life in his wife's real estate; that he is entitled to the rents and profits of it, and that she cannot lawfully execute the conveyance in question, or at all events so as to impair the rights which he claims *jure mariti*. And the sole question here is whether by virtue of "The Married Women's Property Act," which came into operation on January 1st, 1896, a woman married previous to that date has power to convey her real estate without the concurrence of her husband, so as to deprive him of the rents and profits of it during his life; the husband and wife living together at the time, as was the case here, when the conveyance in question was made.

There is no class of legislation which in later days seems to have given rise to a greater diversity of judicial opinion than these statutes relating to the separate property of married women. With a profound reverence for common law rights of property, especially those which owed their origin to the marital relation, legislatures have moved slowly in making changes. Timidity or excessive caution has sometimes led them into the use of language so guarded that it was obscure and difficult to construe, and at other times, from a desire of uniformity on a subject of such general importance, they have borrowed from similar enactments in other countries provisions not altogether suited to the conditions under which they were themselves legislating. As a result the process of emancipating the wife's property from the control of the husband has been a somewhat slow one, though it does seem now to have advanced sufficiently to warrant the opinion of those modern text-writers who affirm that the wife of to-day enjoys all the freedom as to the enjoyment and disposal of her own property that her husband enjoys as to his. Statutes were passed in England in 1870, 1874, 1882, and lastly, in 1893, all of which, except, perhaps, that of 1874, made radical changes in the status of a married woman as to her enjoyment, control and power of disposal over her separate property; as to her power to enter into binding contracts, and

her right to sue and her liability to be sued without reference to her husband. In the judgments delivered in *Moore* v. *Jackson* (1) is to be found an epitome of the legislation on this subject in Ontario—some of it original and some of it, no doubt, borrowed from the English enactments. In that case, which went through several courts and gave rise to a great variety of opinion, the present Chief Justice of Canada says: "The English cases decided upon the Married Women's Property Act, 1882 (Imp.), so far as the legislation here has been borrowed from the English enactments, are applicable, but we have to be careful in applying them for the reason that the preceding legislation in England, and in the Province of Ontario, was entirely different, and the Ontario statutes are, of course, all to be construed, especially as regards the meaning of terms, as *in pari materiâ*." The same learned judge in the same case affirms it as a principle applicable to statutes of this character, which are restrictive of common law rights, that they should be construed so as not to infringe further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give. I have made these general remarks because they afford some answer—at least to those who have had much to do with drafting Acts of Parliament—to the criticisms which the plaintiff's Counsel made to the form and arrangement of some of the sections of our Act of 1895, and which, they contended, supported their views. To these, however, I shall refer later on. It is necessary to go back and see how legislation stood on the subject in 1869, when this marriage took place, and also see the changes made since the first Act was passed in 1851 (14 Vict., c. 24), and which was substantially re-enacted as chapter 114 in the revision of 1854. It, like all those Acts which have followed it, down to that of 1895, provided for two classes of cases, having no reference either to the date of marriage or to the time when the property was acquired, but based on what, for want of a better term, I shall call co-habitation. The property of the married woman living with her husband was

(1) 22 Can. S. C. R. 210.

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by force of that Act exempted from all liability by reason of the husband's debts, and he could not convey, encumber or dispose of it without his wife's consent, and it was liable for her debts contracted before marriage, and for judgments recovered against her husband for her wrongs. The woman who had been deserted or abandoned by her husband stood in an entirely different position. She could recover in her own name, and for her own use, for her services, and for debts due her, and for damages for injuries to herself or her property. If, while deserted by her husband, or while compelled to support herself, she acquired property it vested in her, was at her disposal and not subject to the debts, interference or control of the husband. No change was made until 1869, when by Act 32 Vict., c. 33, the provisions of c. 114, Revised Statutes, were made to apply to married women living separate and apart from their husbands, not wilfully and of their own accord, though they had not been abandoned or deserted. Additional provisions were made with a view of securing to wives thus separated from their husbands complete control and power of disposal over their property. And it is clear from these provisions, as they were re-enacted in 1876, the husband was deprived of all interest in the wife's property quite irrespective of the date at which it had been acquired, or the date of the desertion or separation. See sections 3 and 4, c. 72, C. S. N. B.

The rights and liabilities of a married woman living with her husband in regard to her separate property, as secured to her by the provisions of c. 72, C. S. N. B., have been judicially determined by the case of *Wallace* v. *Lea* (1), in which the Supreme Court of Canada gave its unqualified approval to the dissenting judgment of Mr. Justice *Hanington*, given in the Supreme Court of this Province. Those rights and liabilities may be stated in a few words. Her property could not be conveyed or encumbered by her husband without her consent evidenced by her joining in the deed and acknowledging it; her property was not liable for his debts; she was not given any power to contract so as to bind either herself or her property, and she had no power

(1) 28 Can. S. C. R. 595.

of disposal of her property, except with the concurrence of her husband. Such was the plaintiff's position in regard to his wife's real estate when the Act of 1895 was passed. He had at that time all his common law rights, except so far as they had been infringed upon by the provisions of c. 72, C. S. N. B., which have now been repealed. In the case just cited (*Wallace* v. *Lea*) the Chief Justice, in delivering the judgment of the Court, says: "The first section of chapter 72 of the Consolidated Statutes of New Brunswick does, it is true, provide that the property of a married woman shall vest in her, and be owned by her as her separate property, but while this indicates that her enjoyment of her property shall be free from the control of her husband, and that it shall not be liable to her husband's debts, it does not indicate that she shall have the power of binding it, encumbering and disposing of it as if she were an unmarried woman. So far from this being the case, it contains an express provision that she can only convey it by a deed 'duly acknowledged as provided by the laws for regulating the acknowledgments of married women,' thus conclusively shewing that her *jus disponendi* was not enlarged, but remained as it was before the Act, requiring a conveyance duly acknowledged, to which her husband would be a necessary party. This certainly does not do away with the disability of a married woman to alienate her freehold lands, or to enter into contracts which, at common law, would be absolutely void. Again, it is apparent that the Legislature did not intend any such change in the law from the circumstance that the same section provides for her power of disposition as if she were a *feme sole* in the case of desertion by her husband, a power which is not conferred generally but is confined to that particular case." It will I think be seen that all these disabilities of the wife to which the Chief Justice here alludes have been removed by the legislation of 1895. The general scheme of this Act is similar to that of the English Acts of 1882 and 1893, upon which it seems to have been modelled—in fact many of the sections are identical. While there are differences in some of the provisions which have no bearing upon this

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case, there is one important point upon which our Act does differ from not only the English Acts but also those of Ontario. Speaking generally, the Imperial Act of 1882 secures to all women marrying after that Act came into force, full right to hold and dispose of their separate property not only what they owned at the time of marriage but what they might afterwards acquire. In this respect it is similar in effect to sub-sect. 2 of sect. 4 of our Act, though in our Act a different form of words has been used for the purpose. Section 5 of the Imperial Act of 1882, which deals with the separate property of women married before the Act came into force, only authorizes them to hold, have and dispose of as their separate property, the real and personal property, the title to which accrued to the wife after the commencement of the Act. The husband's interest in the remainder of the wife's property was not affected by the Act: *Reid* v. *Reid* (1).

In the Ontario legislation we find the same idea prevailing. In the revisions both of 1887 and 1897 three classes of married women are dealt with—those married on or before May 4th, 1859; those between that date and March 2nd, 1872, and those subsequent to that time; and the rights of each class have been preserved. So that—as a general rule at all events—this class of legislation has not been retroactive. It is unreasonable to attribute either to the person who drafted the Act of 1895 or to the Legislature which passed it, ignorance of the features in the English and Ontario legislation to which I have referred. When therefore our Legislature enacted sub-sect. 1, sect. 4, of this Act, by which the husband's existing interest in his wife's property and his future interest in her subsequently acquired property were put upon precisely the same footing, there ought not to be much doubt that it meant precisely what it said. That sub-sect. is as follows: "Every married woman who shall have married before the commencement of this Act, shall and may, without prejudice and subject to the trusts and provisions of any settlement affecting the same, notwithstanding her coverture, have,

(1) 31 Ch. D. 402.

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hold, enjoy and dispose of all her real estate, whether belonging to her before marriage or in any way acquired by her after marriage, otherwise than from her husband, free from his debts and obligations and from his control or disposition without her consent in as full and ample a manner as if she were sole and unmarried." I have no hesitation in holding that so far as this section alone is concerned the rights and interest of a husband married before the Act passed in and to his wife's real property are precisely the same as to all her property whenever it may have been acquired. His *status quo* as to property acquired by his wife before the Act passed has not in any way been preserved by the section. To hold otherwise would I think be ignoring the meaning and effect of language both plain and positive.

The next question is, what change in the law has been made by this Act in regard to the real property of women married prior to the commencement of the Act, and does it reach the important point involved in this suit?

In *Turner* v. *King* (1), Kekewich, J., in speaking of the Imperial Act of 1882, says: "It seems to me that the policy of the Act is to make the married woman a *feme sole* —to put her in precisely the same position as regards her property as that which she would occupy if she were a *feme sole*, or in other words, if she were a man instead of a married woman." Other judges and many authors have expressed the same opinion as to that and similar enactments; and in my opinion it expresses in a direct way what is the policy of our Act of 1895. This present case depends upon the meaning to be given to sect. 4, sub-sections 1 and 4 of the Act of 1895. The first one I have already quoted; the other is as follows: "Nothing contained in this Act shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of the wife." I shall endeavor to keep the discussion of the two sub-sections distinct, and I shall deal with sub-sect. 1 first. It relates to property to which the other may have no reference. If the wife's property were estates for life, for instance, or

(1) [1895] 1 Ch. 366.

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there had never been issue of the marriage, no question of tenancy by the curtesy could arise, because the conditions upon which that particular form of tenure depends had never come into existence. The rights of the husband as such would, however, have arisen; and to the extent that this section cuts down his rights in such a case, it would also cut down his rights in property as to which the tenancy by the curtesy might exist, except so far as these rights have been preserved by the saving clause. Section 3 of the Act confers upon every married woman the power to acquire, hold and dispose of by will or otherwise any real or personal property as her separate property in the same manner as if she were a *feme sole*; and sect. 4, subsect. 1, which I have already quoted, provides how a woman married before that Act passed shall have, hold, enjoy and dispose of her real estate; that is, she shall, notwithstanding coverture, have, hold, enjoy and dispose of it free from her husband's debts and obligations and from his control or disposition without her consent in as full and ample a manner as if she were sole and unmarried. The husband by virtue of the marriage and altogether irrespective of any tenancy by the curtesy, and though he might never become tenant by the curtesy initiate, at common law took a freehold interest in his wife's estate of inheritance which she possessed at the time of marriage or of which she became seised during coverture. On this point it is said as follows in *Macqueen* on Husband and Wife (1): "Such real estate as belonged to the wife before the marriage, or may come to her during the marriage, is placed by the marriage under the dominion of the husband; a dominion, however, limited by and commensurate with the coverture. The law says that by the marriage the husband acquires, and during the marriage enjoys, a freehold interest in his wife's real estate for their joint lives; both being seised together in her right by entireties; the effect of which is to put the ownership for the coverture entirely in the husband's power. Hence he can alienate this ownership at pleasure; and his conveyance will pass the freehold

(1) 2nd ed. 28.

without the wife's co-operation. So he may of course charge his wife's estate for their joint lives; the charge, however, of whatever kind, ceasing with the marriage. But the ultimate property, that is to say, the inheritance or fee of the estate, is not in the husband, whose marital right is bounded by the coverture. Where then is the ultimate property or inheritance or fee of the wife's estate while the marriage lasts? It remains in the wife herself subject to the husband's rights and can be departed with by the joint act only of both the married parties."

In *Caldwell* v. *Stadacona Fire and Life Insurance Co.* (1), Ritchie, C. J., says: "The husband has a freehold estate in the land and the exclusive right of occupation; an indefeasible title to the land which no one can defeat or disturb, which gives him a full and perfect title to the rents and profits of his wife's real estate during the coverture, and, in the event of the birth of a child, after the death of his wife during his life."

To give effect to the plaintiff's contention and preserve all these rights to the husband during his life would leave the position of husbands married before the Act passed practically unaltered as to the real estate of their wives, a result which renders that section of the Act altogether useless. Before the Act passed the wife's real estate was free from all liability for the husband's debts and obligations; and even if the Act of 1895 conferred upon the wife a power of disposal without her husband's concurrence, which before that she could only exercise with his concurrence testified in a particular way, her conveyance under the late Act, according to the plaintiff's contention, carries with it no right of possession and no right to the rents and profits during the husband's lifetime. Such a construction seems to me unreasonable, and I think is not warranted by the language of the section or the general scope and object of the Act.

How can it be said that a wife holds her real estate as if she were sole and unmarried if her husband can alienate it during coverture without her co-operation?

(1) 11 Can. S. C. R. 226.

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How can she enjoy it as if she were sole and unmarried if her husband can take all the rents and profits without reference to her? And how can she dispose of it as if she were sole and unmarried if her husband must in some way concur in the act to give it validity?

In *Cooper* v. *Macdonald* (1), an authority constantly referred to in this class of cases though it had reference to separate estate created by will, Jessel, M. R., says: "A gift of a fee simple estate or a gift of a capital sum of money to the separate use of a married woman gives her the same power of alienation over it as if she was a single woman. She is entitled to dispose of it as if she were not a married woman at all, and that at once gets rid of any notion of the husband having an interest."

Again the married woman—as well the woman married before the Act as after—has full power of making contracts in reference to her separate property and to bind it by her contract. She can be sued upon such contracts and a judgment against her can be enforced by execution against her separate property: *Moore* v. *Jackson* (2). In *Furness* v. *Mitchell* (3), Moss, C. J. A., says: "To require the concurrence of the husband and the execution of the deed by him in order that the estate may be conveyed would seem to be equivalent to neutralizing or at least largely impairing the provision that she shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*. How, it may well be asked, can the husband be compelled to join in a conveyance when he is not a party to the contract? And if he can be compelled, what is the object of requiring his concurrence?" When the Act gave the wife a power of disposing of her property the Legislature must have intended to confer a power of disposal independently of the husband, because she always had the power of disposal with his concurrence.

It was further argued that to give to sub-sect. 1 the meaning contended for by the defendants would virtually place women married before the Act passed and those

(1) 7 Ch. D. 288.

(2) 22 Can. S. C. R. 210.

(3) 3 A. R. 517.

married afterwards upon the same footing, whereas it was obvious from a reading of the Act that this was not intended. And certain verbal differences in the two sub-sects. (1 and 2) were relied on as clearly indicating such intention. Sub-sect. 2 is as follows: "The real estate of any woman married after the commencement of this Act, whether owned by her at the time of her marriage or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively shall, without prejudice and subject to the trusts and provisions of any settlement affecting the same, notwithstanding her coverture, be held and enjoyed by her for her separate use, free from any estate therein of her husband, during her lifetime, and from his debts or obligations, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried, and her receipts alone shall be a discharge for any rents, issues and profits of the same." The remainder of the sub-sect. relates altogether to personal property, and will be referred to hereafter.

There may be differences more or less substantial between the rights of these two classes of married women as secured by these two sub-sections. There certainly are differences in their language, but not more so as it seems to me than one might fairly look for. One is dealing with an existing state of things, the other with a future state of things. One is taking away from the husband rights which he possessed and transferring them to the wife, if it is operative at all, while the other is preventing any such rights in the case of future marriages ever coming into existence. One is removing the wife's disabilities as to her real estate while the other is preventing the wife of the future from ever being under any such disabilities. I am not called upon now to place any construction upon sub-sect. 2, and desire to leave myself entirely open to deal with cases under it when they arise. Subject to that remark I may point out that it is not an altogether unusual thing to find provisions in statutes inserted from abundant caution, as is said; special provisions which are in reality

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covered by general ones. Neither is the insertion or omission of words to be relied upon in all cases as furnishing a key to the true construction. For instance, sub-sect. 2 confers no power of disposal as is done in sub-sect. 1. Is it therefore to be said that women married after the Act passed have no such power while those married before have? Might it not be argued that the husband in that case never took any interest during coverture in the wife's real estate; she always had the entire control and sole ownership and, therefore, could alienate it; a power by law incident to such ownership. The husband's right of possession is not by that section taken away in words. Is it therefore to exist? In the remainder of the sub-sect. the wife's right to her personal estate is dealt with, and the section in words deals with all married women alike in that respect. There is nothing said about it being separate estate, and yet, can there be any doubt that it is to be held as separate estate, in the meaning of that phrase as used in the Act, in the same way as the wife's real estate is? That part of the section which deals with the personal estate is as follows: "And every married woman, whether married before or after the commencement of this Act, shall and may, subject to the trusts and provisions of any marriage contract, or settlement affecting the same, notwithstanding her coverture, have, hold, enjoy and dispose of all her personal property whether belonging to her before marriage or acquired by her by inheritance, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition without her consent in as full and ample a manner as if she continued sole and unmarried." This clause is in all essential respects identical with sub-sect. 1 dealing with the real estate of women married before the Act passed; and there seems no reason for attributing to the Legislature an intention to deal differently with real and personal property. They are put on the same basis by the Married Women's Property Acts of England, and they were dealt with in the same way by

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our own previous legislation. In *Lea* v. *Wallace* (1), Mr. Justice *Hanington* in speaking of *In re Cleveland* (2), says: "That case, it is said, deals with personal property alone. I can see no difference in its effect, whether confined to personal or extending to real property. The words of the statute are and always were, 'the real and personal property,' and the term 'separate' applies to each alike, and must I think have the same effect on each as to the husband's rights." Previous to the passing of the Act of 1895, the personal property of the wife on her death went to the husband by virtue of his marital right—he was entitled to it by common law right for his own benefit: *In re Cleveland* (3), affirmed on appeal, *sub nom. Lamb* v. *Cleveland* (4). The Act of 1895 by sect. 22 makes a special provision for the devolution of the separate personal property of the wife (which includes all of her personal property except what she received from her husband during coverture), in case of the wife dying intestate and leaving children; in which case the surviving husband is entitled to one-half if the children are his, and one-third if they are those of a former marriage. The husband therefore now takes from his wife—her personal property descends to him, whereas formerly he took it all as her husband. This I think indicates that the personal property was by the Act divested from the husband and vested in the wife with a full power of disposal. And it must be borne in mind that this is true not only as to women married after the Act passed but of those married before, and it is true as to women married before the Act not only as to the personal property which they might acquire after the Act passed but also of that which they had when they married. The intention of the Legislature to interfere with the vested rights of husbands in the personal property of their wives seems to be clear beyond doubt; and it is difficult to see how any different intention as to the real estate can be arrived at when the two are dealt with by clauses which are identical in language and

(1) 33 N. B. 544.
(2) 29 N. B. 70.
(3) 29 N. B. 70.
(4) 19 Can. S. C. R. 78.

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there is nothing in other parts of the Act to denote or suggest any such different intent.

I have already referred to the effect of construing this sub-sect. 1 in accordance with the plaintiff's contention and shewed how it would in that way be practically rendered useless. The conveyance of the wife would not carry any right to the possession or enjoyment of the property during the husband's life; and though she is empowered to bind her separate property by the contracts no judgment against her for a breach of such contract could be enforced against such property so as in any way to interfere with the husband's possession or enjoyment of it during his life. In addition to this, as c. 72, C. S. N. B., has been repealed, the position of married women who at the time the Act of 1895 passed were for sufficient cause living separate from their husbands, or had been deserted or abandoned by them, and had therefore acquired that full control and title to their real and personal property secured to them under that chapter was, according to the plaintiff's contention, entirely altered to their detriment. They are included in the class of married women whose rights as to their real property are governed by sub-sect. 1; and as a necessary result of the plaintiff's contention their rights vested in them have been taken away, their husbands' right of possession and enjoyment during life has been restored to them; and instead of the recognized policy of the Act being advanced this particular class of married women have not only been deprived of their vested rights, but their husbands have been restored to the marital privileges which, by their misconduct, they had forfeited. I can scarcely think the Legislature ever intended any such result. On the contrary, I should say this sub-sect. 1 was intended to take away the husband's rights during coverture, and that the plaintiff's contention that he is entitled to the rents and profits cannot be maintained under this sub-section. I shall make but a brief reference to a few cases, which seem to have a direct bearing upon this part of the case. In *Moore* v. *Jackson* and *Lea* v. *Wallace*, already cited, the question involved was as to the

power of a married woman to bind her separate property by contract. Though that is a different question from the one involved in this case, it depended largely upon the same provisions in the Acts. In the former case, it appeared that the married woman held and enjoyed her property under c. 125, R. S. O. (1877), "free from the debts and obligations of her husband, and free from his control and disposition without her consent, in as full and ample a manner as if she were sole and unmarried." This language is identical with that of sub-sect. 1 of sect. 4 of our Act, except that our Act says, "shall have, hold, enjoy *and dispose of*." By virtue of sect. 3 of c. 127, R. S. O. (1877), then in force, a married woman was enabled to convey her estate in her lands by deed as fully and effectually as if she were a *feme sole*, except that her husband must be a party to and execute the deed—a provision similar to that in c. 72, C. S. N. B., in force prior to the Act of 1895. An Act passed by the Ontario Legislature in 1884, by which the provision requiring the husband to join in his wife's deed was repealed; and after that repeal the married woman made the notes sued upon, in reference to which it was sought to make her separate property liable. At page 233 of the report (22 Can. S. C. R.), Gwynne, J., says: "*Eo instanti* upon the passing of that Act" (that is, the Act of 1884), "the defendant became absolutely entitled to convey the said lands in fee simple as her separate property as fully and effectually as if she were a *feme sole*, by a deed executed by herself alone, without her husband being a party to and executing the deed." Sect. 1 of the Ontario Act of 1884 (47 Vict., c. 19) is precisely the same as sub-sect. 1 of sect. 3 of our Act,—"A married woman shall be capable of acquiring," etc. At page 235 of the same report Gwynne, J., says: "I have already expressed my opinion that sect. 1 of 47 Vict., c. 19, enabled every married woman to dispose of her real property by will or otherwise; but apart altogether from this clause, and resting solely upon the repeal of the exception in sect. 3 of c. 127, R. S. O., 1877, it is clear that every married woman can dispose of absolutely (by deed executed by herself alone) the whole estate

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which is vested in her. So long as she lives, therefore, it cannot be doubted that she has an absolute *jus disponendi* of all real property which the law enables her to hold and enjoy free from the control and disposition, and from the debts and obligations of her husband." In the same case the present Chief Justice of Canada, after speaking of the effect of the repealing section in the Act of 1884 as to the husband joining in the deed, says (1): "Thenceforward married women were completely emancipated from their husbands' control, both as regards the enjoyment and the disposition of their real estate."

In *Wallace* v. *Lea* (2) it was also sought to make the separate property of a wife liable for her contracts made during coverture; and the liability was based, not upon any express power given to her to enter into contracts, for her common law disability in that respect had not been expressly taken away, but upon an implied power arising out of and incident to that peculiar kind of separate estate which she took and held under sect. 1 of c. 72, C. S. N. B. That contention failed, and it failed as I have already pointed out upon two grounds; first, that the wife had no *jus disponendi* apart from her husband, and second, that the wife had no power, express or implied, to make contracts. Now the Act of 1895 repeals c. 72, C. S. N. B.,—the necessity for the husband joining his wife in the conveyance no longer exists—the wife has the express power of making contracts and of disposing of her property by will or otherwise as if she were sole and unmarried; so that her emancipation from her husband's control as to her separate property seems as complete under our Act of 1895 as was that of the wife whose rights and powers were adjudicated upon in *Moore* v. *Jackson*.

In *In re Drummond's Contract* (3) a question arose as to the validity of a conveyance by two married women made without the concurrence of their husbands, the marriage having taken place after the Married Women's Property Act of 1882 (Imp.) had come into operation. Chitty, J., in

(1) At p. 223.

(2) 28 Can. S. C. R. 595.

(3) [1891] 1 Ch. 524.

giving judgment deals with three different classes of cases, only one of which is important here. He says: "First, as to the lands of which a married woman is tenant in fee-simple in possession or remainder, the 77th section of the *Fines and Recoveries Act* in substitution for the old fine enables her by deed to dispose of such lands as effectually as she could do if she were a *feme sole*, save that no such disposition shall be valid unless the husband concurs in the deed and it is acknowledged. Sect. 1, sub-sect. 1, of the Act of 1882, read in connection with the 2nd sect. of the same Act, enables her to acquire, and dispose of, all real property belonging to her at the marriage, or acquired by, or devolving upon her subsequently as if she were a *feme sole*. It cannot be doubted that the effect of the Act of 1882 is to abolish in such cases the necessity of the concurrence of the husband and of the acknowledgment of the deed, and thus to enable the married woman to make a valid disposition of her fee simple lands whether in possession or remainder." And he cites *Taylor* v. *Meads* (1) in support of that conclusion. Now the two sections which Chitty, J., says have that effect are sect. 1, sub-sect. 1, of the Imperial Act of 1882, which is the same as sub-s. 1 of sect. 3 of our Act, and sect. 2 of the Imperial Act, which is as follows: "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all her real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage, including any wages," etc. See also *Riddell* v. *Errington* (2); *Hope* v. *Hope* (3).

In my opinion, therefore, the clauses to which I have referred, unless limited in their application by the other clause as to the husband's tenancy by the curtesy, conferred upon Madame DeBury authority without her husband's consent or concurrence to make the conveyance in question, and that such conveyance would carry with it to the grantees, Coster and Miss Simonds, a right to take the

(1) 4 DeG. J. & S. 597.
(2) 26 Ch. D. 220.
(3) [1892] 2 Ch. 336.

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rents and profits of the real estate conveyed by it, as well as the possession of the property, subject, of course, to the rights of the lessees.

This brings me to the other question involved in the case as to the effect of sub-sect. 4 of sect. 4, saving the husband's rights as tenant by the curtesy—a question not unimportant, nor altogether free from difficulty. This sub-sect. is as follows: "Nothing contained in this Act shall prejudice the husband's tenancy or right to tenancy by the curtesy in any real estate of the wife." This section, which applies alike to those married after as those married before the Act came into force, cannot mean that *all* the husband's rights are preserved, for that would render entirely nugatory all the provisions of the Act relating to the wife's real property. It is clear that the husband's rights, *qua* husband, are not within the scope of this section. His rights in reference to his wife's real estate, which he holds during coverture, may be the same as those he holds after the wife's death as tenant by the curtesy, but they are held by different titles; during coverture the husband holds as husband in right of his wife, and after her death he holds as tenant by the curtesy in his own right. I am unable to find any authority which determines that the husband, on the birth of a living child capable of inheriting, and when he thereby becomes tenant by the curtesy initiate, acquires any interest in or right to the control, or disposal or enjoyment of his wife's real estate beyond what he had as husband. All the authorities agree that the estate of the tenant by the curtesy comes into active existence only when it becomes consummate by the death of the wife. In *Burchell* v. *Brown* (1), Parker, J., speaks of the husband's right as being a continuance of the wife's possession, or possessory right. And in *Cooper* v. *MacDonald* (2) Sir George Jessel treats tenancy by the curtesy as a mere devolution of the estate by operation of law. All authorities agree that there are four requisites necessary to make this tenancy. (1) Lawful marriage; (2) the seizin of the wife in the land; (3) issue born alive and capable of

(1) 2 All. 168.

(2) 7 Ch. D. 288.

inheriting, and (4) the wife's death. *Blackstone*, 126, says: "As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child was not suffered to determine by the subsequent death or coming of age of the infant." In Vol. 8, *Amer. & Eng. Ency. of Law*, 2nd ed., at page 507, tenancy by the curtesy is defined as "an estate for life, accruing to the husband on the death of the wife, in the estate of inheritance of which she was seized in possession in fee simple, or fee tail, during coverture, provided he has had by her lawful issue, capable of inheriting the estate, born alive, before her death." That the husband, as tenant by the curtesy, takes no interest in his own right until after the wife's death, is decided by *Jones* v. *Davies* (1), where all the authorities are cited in the elaborate argument of that case in the Court of Exchequer. The question there was as to the merger of a term of years, and a freehold, the reversion in fee having been devised to the wife, whose husband was possessed of a term of years. It was held that the two estates were enjoyed by the husband in different rights during coverture, and there was, therefore, no merger. In that case the Court say: "It was said that the husband in truth held both estates in his own right; that having issue born he was already tenant by the curtesy of England as well as termor. His wife is still living, but it was contended that this made no difference. Lord Coke says, Co. Lit. 30 *a*: 'Four things do belong to an estate of tenancy by the curtesy, namely, marriage, seizin of the wife, issue and death of the wife.' And again, he says,—'That albeit the estate (of tenant by the curtesy) be not consummate until the death of the wife, yet it has such a beginning after issue had in the life of his wife, that it is respected in law for divers purposes.' And he calls this estate a tenancy by the curtesy 'initiate' and not 'consummate.' He also mentions the purposes for which such estate is considered in law to exist during the

(1) 5 H. & N. 766.

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life of the wife; such as doing homage to the lord and avowry. According to this high authority then, it would seem that until the wife's death, when the estate would be 'consummate,' the husband would only be the tenant by the curtesy for certain limited purposes. No decision, or even dictum, was cited to shew that the husband during the wife's life was tenant by the curtesy in any more extended sense. And in the absence of all decision, we see no ground for confounding the distinction between 'initiate' and 'consummate,' taken by Lord Coke, and for holding that the husband, during the wife's life, is tenant by the curtesy for any further purposes than those which he enumerates." This case came before the Court of Exchequer Chamber on appeal, and is reported in 7 H. & N. 507. That Court sustained the decision, and in their judgment say: "It is only upon the death of the wife that the husband becomes tenant by the curtesy, in the proper sense of the term."

It may be said that *Pourrier* v. *Raymond* (1) is in conflict with this view, but on examination of that case it will I think be found not so. The simple point there was, whether the Sheriff was justified in seizing the crops off of land said to be owned by the wife on an execution against the husband, the crops having been acquired by the husband's labour. It is true that the Chief Justice told the jury that if the wife was seized in fee of the land the husband would be tenant by the curtesy, and if as such he cultivated the land for his own benefit by his own capital and labour, or by the labour of his servants or children, to whose services he was entitled, then the proceeds of such cultivation would belong to him and be liable to the execution, and if he was in possession the Sheriff would have a right to enter and levy. It is also true that this direction was upheld. The question arose under c. 114, R. S. N. B., then in force as to married women; the contention being that the land belonged to the wife and that the crops off the land necessarily belonged to her also, and therefore were free from seizure for the husband's debts. There was no question as to the particular

(1) 1 Han. 520.

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rights of a tenant by the curtesy initiate; and though the Chief Justice uses the term "tenant by the curtesy" his charge would be equally accurate if he had substituted the word "husband" for the words "tenant by the curtesy." That he had no intention of thereby attributing to the husband as tenant by the curtesy initiate any rights not enjoyed by him as husband is clear from other parts of the judgment. He says: "Even if the wife had an estate in the land (which we do not admit), by common law the husband would have the right to the possession and would be entitled to the rents and profits. Whatever the effect of the Rev. Stat., c. 114, may be upon the rights of the husband, it does not exempt the produce and profits of the wife's land, of which the husband is in possession, and which produce and profits are created by his labour, from being taken in execution against him."

In my opinion, therefore, the rights which are saved by the section are the husband's rights as tenant by the curtesy consummate—or as the Court in *Jones* v. *Davies* say—as tenant by the curtesy in the proper sense of that term—that is to say, the rights in his wife's real property after her death, which became initiate on the birth of the eldest child alive. Notwithstanding the conveyance by Madame DeBury, the plaintiff, should he survive her, will on her death be entitled to his right as tenant by the curtesy in her real estate during his life, carrying with it, of course, the possession and the rents and profits. This construction carries out what seems to me the intention of the Legislature as indicated by a consideration of all the sections of the Act; it renders all the parts of the Act operative to carry out the true policy of the Act, which is to take away during coverture the control of the wife's real estate from the husband and give it to her, and it does not infringe the rule of construction as to taking away vested rights further than is necessary to give the effect to the intention of the Legislature as gathered from this Act, and such other Acts as one may properly refer to in determining that question. *Hope* v. *Hope* (1), and *In re Lambert's Estate* (2) may be

(1) [1892] 2 Ch. 336. (2) 39 Ch. D. 626.

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cited as shewing that the conclusion at which I have arrived carries the right of the husband, as tenant by the curtesy, no further than the law would have done had the saving section been omitted from the Act altogether. This is not so because the decision in *Hope* v. *Hope* has reference only to that part of the wife's real estate which may remain undisposed of at her death, that is to say, her disposal of the property defeated the husband's right as tenant by the curtesy in the land disposed of, and his interest only accrued on her death as to what remained. The clause in our Act—at all events as to women married before the Act came into force—prevents the conveyance of the wife having any such effect. The effect of the clause upon the property of women married since the Act came into operation, may possibly be more restricted as regards the husband's rights, but upon that I express no opinion.

A further contention was made to the effect that as the rent by the terms of the leases was reserved payable to the plaintiff and wife, as I believe is the case as to the most of them, his right to receive the rents would not be taken away by the wife's conveyance of the reversion. I do not think this contention well founded. These Married Women's Property Acts only have reference to the rights and remedies of husband and wife *inter se*, and if the effect of the Act is to take away from the husband all interest in the reversion during coverture, and in the rents and profits, and vest it in the wife, as the rent follows the reversion, it becomes payable to her or to whomsoever the reversion for the time being belongs: *Beer* v. *Beer* (1).

The main question involved in this suit must be decided adversely to the plaintiff, and as to so much of the relief asked for, as relates to a declaration that the conveyance to Coster and Miss Simonds is void and an injunction restraining them from receiving the rents and profits, the bill must be dismissed. One other question remains. The plaintiff alleges that he advanced from his own moneys certain sums which were expended on the Rankine wharf property, which is a part of his wife's property,

(1) 16 Jur. 423.

conveyed to Coster and Miss Simonds, for its preservation and in repairing it, and for the amount so expended the plaintiff claims a lien. It was agreed that this matter should remain in abeyance until after the main question should be determined. Should the parties disagree as to this claim the case can be set down at any time convenient to those engaged in it, and the claim can be determined. In the meantime the question of costs will be reserved.

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Jurisdiction—Assessment of damages—Common law remedy—Dam—Structural alterations—Washout—Injury to riparian owner—Diversion of natural stream—Proof of damage—Mandatory injunction—When granted—Form of mandatory injunction.

A dam erected in 1858 across a natural stream upon land owned by the defendants, and used for the defendants' purposes, was in 1891 altered in respect of its devices for carrying off surplus water by the defendants' immediate predecessors in title, contrary to the protest of the plaintiff, a riparian owner since 1880. In 1900 a portion of the dam was carried away by a freshet, owing, it was alleged by the plaintiff, to the insufficiency of the alterations in the dam, and it was alleged that material damage was done to the plaintiff's land, but the evidence as to its precise nature and extent was slight and unsatisfactory, and the defendants denied any liability.

Held, that the questions involved being the liability of the defendants, and the extent of the injury sustained by the plaintiff, and the Court doubting its jurisdiction to assess the damages, the bill should be dismissed, and the plaintiff left to his remedy at law.

A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage.

A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue if the injunction is withheld.

The form of a mandatory injunction adopted in *Jackson* v. *Normanby Brick Co.* [1899] 1 Ch. 438, approved of.

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

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Argument was heard May 7, 1901.

A. B. Connell, Q.C., and *A. R. Slipp*, for the plaintiff.

G. W. Allen, Q.C., and *R. W. McLellan*, for the defendants.

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In August, 1880, the plaintiff became the owner, and has, since that time, continued to be the owner, of a lot of land lying on the southerly side of Burnt Land brook, a small stream flowing into the southwest branch of the Miramichi River, at Boiestown, in the County of Northumberland. In August, 1891, one William D. Richards and the defendant, Gunter, purchased and acquired a lot of land and certain mill privileges, also on the said brook, lying to the east of the plaintiff's lot, extending across the stream and down the stream opposite the plaintiff's lot to the highway bridge, where it recrossed the stream to the south side. In 1899 the defendants, the William Richards Co., Ltd., were incorporated under the New Brunswick Joint Stock Companies' Act, 1893, for the purpose of carrying on a milling business; and with a view to that object acquired from Richards & Gunter, in 1899, among other properties, their lot on Burnt Land brook just mentioned, with the mills and mill privileges belonging to it. This property was afterwards conveyed to the defendants, The Eastern Trust Co., to secure an issue of bonds made by the Richards Co. By the provisions of this last assignment the Richards Co. were left in possession to operate the mills in question; and this suit may, therefore, be determined irrespective of the conveyance to the Trust Co., and it was so argued. Some twenty years before the plaintiff purchased his lot, the owner of what is now the Richards lot, built a dam across the river on his own land, and also a grist mill, a carding mill and a saw mill. The grist and carding mills were on the northerly side of the river and the saw mill was built on what may be called a small island which, at this point,

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divided the stream into two branches, spoken of as the northern and southern branches. These mills and the dam connected therewith came into the possession of Richards & Gunter at the time of their purchase in 1891; and although they seem to have been changed to some extent in the meantime, I understand the plaintiff to find no fault with matters as they stood at that time. He contends, however,—and this is the substantial part of this case—that by reason of certain structural changes made in the dam by Gunter & Richards in 1891, and by the Richards Co. in 1900, not only has its capacity for carrying off the surplus water, and resisting the pressure upon it in case of such sudden and extreme freshets as are common in such streams, been materially lessened, but that also the natural course of the stream as it flows over or along the plaintiff's land has been so diverted as to cause material and permanent injury. It is, perhaps, necessary to point out here that the plaintiff claims that the northern branch of the stream is the main branch of the stream at this point, and that his land extends *ad medium filum aquæ*, so that when, in his bill, he speaks of his land, I presume he means what he claims to be his. In section 10 of the bill the plaintiff alleges that the dam as originally built (which, as appears by the evidence, was in 1858), reached from the northerly to the southerly side of the brook, and its southerly end was not more than a few feet, if any, south of the saw mill then standing upon the same site as the present saw mill. And in section 11, it is alleged, that by several washouts caused by the said dam the southerly bank of the said brook at the said dam was washed away, and at the time the plaintiff became the owner of the said described lot of land the said dam extended southerly from the said mill twenty five feet or thereabouts, and that that part of the dam on the southerly side of the mill contained a wasteway about 30 feet wide, and about 3 or 4 feet from the south side of the saw mill, which wasteway could be opened to allow surplus water to flow from the upper side of the dam, thereby relieving pressure upon the said dam; and that when the said wasteway was opened water from

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the upper side of said dam flowed westerly along the southerly side of the saw mill, and after leaving the said land of Richards & Co. flowed on to the plaintiff's land, and, striking against the highway bridge, whirled in a pool about 65 feet wide upon the plaintiff's land, but doing no material damage to the land. And in section 12 the plaintiff alleges that when he became the owner of his land, the portion of the dam north of the saw mill—that is, between the mills—was so constructed that the surplus water flowed over the top of the dam into Burnt Land brook proper (i. e. as I understand it, the northern branch), below the dam, and that the water from the water-wheels flowed in a northerly direction also into Burnt Land brook proper. The bill then alleges that in 1891 Richards & Gunter closed up the wasteway in the dam south of the mill—closed up the passage of the water from the wheels into the northern branch, and made one for the passage of the water into the southern branch, and substituted a series of gates for the old rolling dam between the mills. The bill then proceeds to describe the freshet, which occurred in May, 1900, by which the dam to the south of the mill was carried away, and material damage done to the plaintiff's land, and to a private bridge, which had been put up in 1891 for use in connection with the mill, and which the plaintiff now alleges is in whole, or in part, on his land. Sections 16, 17, 18, 19, 21 and 22 of the bill are as follows:—

"16. That the washout herein in paragraph 15 mentioned, with its attendant damage, could not have occurred if the said wasteway so stopped up had been left open, or had the wasteway on the northerly part of the said dam, hereinbefore referred to, been large enough to carry off the surplus water or had the said dam been properly constructed and proper and reasonable wasteways constructed therein.

"17. That shortly after the washout herein in paragraph 15 mentioned, the defendant company, William Richards & Company (Limited), repaired the said dam, tearing away a considerable portion of what remained thereof on the south side of the said saw mill, and built a

new dam, or continuation of the old dam, reaching from where the wasteway said William D. Richards and Herbert H. Gunter had closed up, as hereinbefore set out, southerly about ninety feet into the bank as it remained after the said washout.

"18. That the new portion, or continuation of the said dam so built, is not as high as the dam which was so partially destroyed, and on the nineteenth day of July last past, and since, water has run over the top of this new portion of said dam, and after leaving said land occupied by the defendant company, William Richards & Company (Limited), flowed over and upon plaintiff's land; and that unless the new portion or continuation of said dam is built at least two feet higher water will from time to time continue to flow over that part of said dam and thence over plaintiff's land doing damage thereon and thereto.

"19. That the said defendant company, William Richards & Company (Limited), built and constructed in said new portion, or continuation of said dam, a wasteway with two gates, each eight feet wide and eight feet deep, which said wasteway is situated in the said dam where previously to the said washout the bank of said brook had been and is entirely outside of where the previous dam had reached to.

"21. That the effect of constructing and opening said wasteway as now situated in said dam will be to tear, wash away and undermine the bank upon plaintiff's land still remaining, and will also inevitably prevent and render useless any repairs undertaken by plaintiff upon that part of his land damaged by the said washout and will cause great additional damage to said land, and the said wasteway is now a standing menace to plaintiff's land.

"22. That the defendant company, William Richards & Company (Limited), subsequently to repairing and extending said dam dug and cut a passageway just below the dam in a southerly direction nearly parallel to said dam and through a pile of slabs piled in that position over thirty years ago, from the water-wheels of the said saw mill to the wasteway now in the new portion of the said

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dam, and water is continually running from said water-wheels through said passageway, and after leaving said passageway turns at right angles and flows from defendants' land over and upon the plaintiff's land and is continually washing away and undermining plaintiff's land." In sect. 23 of the bill the plaintiff alleges that by the washout and the flowing of the water over the dam since its reconstruction in 1900 a well upon his land, used for domestic purposes, has been injured, and that unless the defendants are restrained from allowing water to flow over plaintiff's land the plaintiff will be unable to fill in around said well to prevent it from freezing up as soon as the cold weather sets in. The prayer of the bill is as follows: "That an injunction order may be granted restraining the defendants, their agents, servants and workmen from allowing water to escape from the wasteway as now constructed in the newly built portion, or continuation of the said dam, to and upon plaintiff's said land, or to flow over the said dam to and upon the plaintiff's land, and compelling defendants to construct the said dam in a proper manner and to locate a wasteway in a proper place in said dam and restraining the defendants from allowing to escape from the water-wheels of the saw mill and flow along the passageway constructed by them to and upon the plaintiff's land and from allowing water to escape or flow from and over said dam to and upon plaintiff's said land." The bill also prayed that the bridge should be removed from the plaintiff's land, and for an assessment of the damages sustained by the washout and since by the water flowing over the dam and through the passageway.

The relief sought by this bill ranges itself under three different heads: (1) the damage occasioned by the washout in May, 1900; (2) the removal of the bridge; and (3) the damage—existing or apprehended—caused to the plaintiff's property by the changes in the dam, the continuance of which it is sought to prevent by way of mandatory injunction. Damages are claimed against the defendant company for having maintained the dam in an inefficient state arising out of its faulty construction or in some other way,

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by reason of which it was unable to resist the pressure of water upon it caused by a freshet which took place in May, 1900, and from which damage ensued to the plaintiff's property. That the plaintiff's property was injured is not denied, though the evidence as to the precise nature and extent of it is so slight, that I should feel some difficulty in fixing the amount at which it should be assessed. The defendants, however, deny all liability and put forward that the dam was properly constructed and amply sufficient for all ordinary purposes, but that the freshet in question was of that extreme and unusual character which one had no right to expect and which therefore no ordinarily-prudent person could be expected to provide against. If the defendants in repairing the dam had simply restored it to the condition in which it was immediately before the accident, the fact that the plaintiff had actually sustained damage while the dam was in that condition might and probably would be evidence upon which the Court would act so as to prevent a continuance of that state of things, but as the defendants in restoring the dam have extended it, introduced gates into it, and otherwise remodelled it for the express purpose of improving its efficiency and preventing any similar accident in the future, the fact of this particular washout having occurred under the conditions which then prevailed has no bearing upon the question of equitable relief now asked for under conditions essentially different. It remains simply a question of money compensation to be paid for the injury done in case of the liability being established in an action at law. I am disposed to think that in such a case this Court has no right to assess damages, but if it has, the plaintiff has an adequate remedy at law, and the questions which are involved in it are peculiarly for the consideration of a jury. The question as to the bridge is of a similar nature. It involves a mere trespass, and for it there is also an adequate remedy at law. As to these two heads of relief the decree made in this case will in no way prejudice the plaintiff in any remedy open to him at law, and his rights for that purpose are entirely reserved.

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The remaining ground for relief involves some important points as to the rights of riparian owners in a stream like the one in question. Before going into that part of the case I wish to say one word in reference to the plaintiff's title. At the argument the defendants' Counsel admitted that the plaintiff's lot extended to the middle of the stream, though they assert that the main channel—that is the stream proper—is the south branch and not the north one as plaintiff claims. No doubt it is a general rule that the title to a lot so situated runs *ad medium filum aquæ*, carrying with it the title to one half of the *alveus* of the stream in front of the lot. That is a presumption which may be and often is rebutted, either by the terms of the conveyance itself or by other circumstances which clearly indicate an intention on the part of the grantor that the lot should not so extend: *Micklethwait* v. *Newlay Bridge Co.* (1).

I have accepted Mr. Allen's admission as containing the true construction of the deed from Jane Smith to the plaintiff, because it would not have been made I am sure without due consideration. Should the point arise again it may be useful to refer to Chancellor Walworth's opinion as expressed in *Child* v. *Starr* (2), acted upon as it was in *Robertson* v. *Watson* (3), and *McArthur* v. *Gillies* (4).

The rights of a riparian owner on a stream such as this, so far as they are involved in this suit, are stated concisely by Lord Blackburn in *Orr Ewing* v. *Colquhoun* (5). He says: "My Lords, where the property in the banks of a natural stream, above the flow of the tide, is in different persons, *prima facie*, and until the contrary is shewn, the boundary between their properties is the *medium filum aquæ*. In this respect there is no difference between the law of England and Scotland. And, after some diversity of opinions, it has, I think, been for many years the settled law of England, that the proprietor of land on the bank of such a river has, as incident to his property in the land, a proprietary right to have the stream flow in its natural

(1) 33 Ch. D. 133.
(2) 4 Hill (N. Y.) 369.
(3) 27 U. C. C. P. 579.
(4) 29 Gr. 223.
(5) 2 App. Cas. 839, 854.

state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the water." In all these cases there must be, as pointed out by Lord Blackburn in the judgment just referred to, an injury sustained by reason of the obstruction placed in the *alveus* of the stream, where the obstruction is not *per se* unlawful, before Courts will interfere. If the stream has thereby been diverted from its natural channel over or in front of the land of a lower proprietor, that is of itself *injuria*, because it is an interference with a proprietary right, and this Court would afford relief, though the plaintiff could neither shew actual damage nor demonstrate in what particular way such damage would likely arise in the future. If, however, the diversion is not a diversion of the stream from its natural channel nor from a course through which the plaintiff has in some way acquired as against the defendant a right to have the water flow, then it is necessary for the plaintiff to shew either that actual damage has resulted or a well-founded apprehension that the mischief will in fact arise, in order to warrant this Court to interfere. And when I say damage, I mean a sensible injury and not damage of so trivial a character that it is within the application of the maxim *De minimis*, etc.: *Embrey* v. *Owen* (1); *Orr Ewing* v. *Colquhoun* (2); *Bickett* v. *Morris* (3); *Attorney-General* v. *Corporation of Manchester* (4); *McLean* v. *Davis* (5); *Keith* v. *Corey* (6).

The present case comes within the last of the two classes I have mentioned. The case put forward by the bill, or supported by the evidence, has no reference whatever to a diversion of this stream from its natural channel. The condition of things which the plaintiff in section 25 of the bill expresses himself as willing to have restored, has no reference to the natural course of the stream, but to the course, as he says, it took in 1891, before Richards & Gunter took possession, and changed the dam. The case made

(1) 6 Ex. 353.
(2) 2 App. Cas. 839.
(3) L. R. 1 H. L. Sc. 47.
(4) [1893] 2 Ch. 87.
(5) 6 All. 266.
(6) 1 P. & B. 400.

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by the bill and supported by the evidence is, that by reason of these changes made in the dam and mill since 1891 the water runs upon his land; that the land has already been injured in that way, and there is reason for apprehending greater damage unless means are taken to prevent it. And unless the evidence sustains one or other of these allegations the plaintiff cannot have the relief asked for.

I have examined the evidence very carefully and I am of opinion that the plaintiff has failed in establishing either allegation. In the plaintiff's own statement I cannot find anything in support of the allegations in the 18th section of the bill to the effect that on the 19th day of July, and since, water ran over the top of the new portion of the dam on his land. In fact, he says nothing about it at all. He speaks of damage which he sustained during the years prior to Richards going there; that in that period some 30 feet of his bank had been torn away, and he describes the injury caused by the washout in May, and the damage likely to be caused by the dam since its restoration after the freshet. But he says nothing of any damage done to his land since 1891, except by the freshet. During that period he never complained of any, and it was not until that accident took place that he seems either to have sustained any damage, or anticipated any. It may be quite true, as he says, that water escaping through the present gates south of the saw mill does not run down in the same place as the water formerly did, when it escaped through the old wasteway, but in both cases it must run over the land, or in front of the land of the plaintiff. If he owns to the middle of the stream, as he contends, the water's course is over that half as well as the other. While the parties differ as to whether the north or south channel is the main course of the stream, the evidence clearly shews that there has always been a south channel through which the water flowed, either in front of or through the plaintiff's lot. This bill was filed in August—a very short time after the repairs had been made, rendered necessary by the washout. The evidence was taken in this case in October following. If any damage to the plaintiff's land had actually taken

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place by reason of the dam in its present condition, or by the water flowing where it does, it ought to have been an easy matter to have shewn it. The plaintiff himself does not prove it, and I think the other witnesses disprove it. The changes made in the passage way for the water from the wheels after the freshet in 1900, seem to have been unimportant. Indeed, if the testimony of McConnell, one of the plaintiff's witnesses, is to be taken and that of the defendants' witnesses who spoke of them, what was done amounted to nothing more than clearing the passage which had existed before of the dirt and rubbish which had been thrown there by the washout. It could have had as it seems to me no perceptible effect upon the course of the current when the water entered the plaintiff's lot, and it could not have in any way resulted in injury. It is not necessary that I should put in writing my analysis of all the evidence—it will be sufficient if I state the conclusions to which my mind was directed. It is true that Richards & Gunter made some important changes in the mill and dam in 1891. They substituted gates for the old rolling dam between the mills and closed up the wasteway to the south of the saw mill. The plaintiff says he pointed out to both Gunter & Richards at the time the danger they were incurring in closing up the wasteway. They deny this. Events proved that the plaintiff's opinion was right, for in 1891 the washout with its consequent injury to both plaintiff and defendants came. The defendants then substituted gates in the dam to the south of the mill, not where the old waterway had been but further to the south, and extended the dam further into the land. The gates in the dam between the mills are so arranged that when closed the head of water can be increased four feet over what it was before, though when the gates are open the water flows over the dam at a less depth than before. I have no doubt whatever that this arrangement furnishes much greater safeguard from the dangers of washouts than was afforded by the dam in its condition previous to 1891. The capacity for discharging the water is greater, the pressure upon the dam is more quickly relieved, and so

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far as the plaintiff is concerned I should say the effect of the existing arrangement is to carry off the principal volume of water down the north channel where it does not reach the plaintiff's land, or at all events either his bank or cribwork around his well or other point which he says is in danger. And as to the gates to the south of the mill, though they are not placed where the old wasteway was, the defendants were guided as to their location by the advice of a skilled and experienced workman, and they are so placed that water discharged through them flows down in a straight channel past the plaintiff's lot. The whole arrangement seems to me to be eminently in the interest of the plaintiff and calculated to prevent further injury to his land from the flowage of the water down this channel. There seemed to be a consensus of opinion on this point among the witnesses who testified as to it, and they were men of experience in such matters.

In *Durell* v. *Pritchard* (1), Turner, L. J., speaking of mandatory injunctions, says: "The authorities upon this subject lead, I think, to these conclusions — that every case of this nature must depend upon its own circumstances, and that this Court will not interfere by way of mandatory injunction, except in cases in which extreme or, at all events, very serious, damage will ensue from its interference being withheld."

In *Earl of Ripon* v. *Hobart* (2), a case similar in its objects to this, it appeared that the defendants had in contemplation the erection of a steam engine for throwing off the water from some low lands under their management into some drains communicating with the river Witham. Alternative relief was asked for by way of restraining the defendants from using any such engine thus throwing off the water so as in any manner to injure the banks of the river Witham or interfere with the drainage of the lands lying lower down the river than lands known as the Nocton lands. The witnesses had differed widely in opinion as to the probable effect of the proposed use of the engine, and the Lord Chancellor on that point said: "The

(1) L. R. 1 Ch. 244. (2) 3 M. & K. 169.

conflict of these opinions is undeniable and evinces the impossibility of any one being able to tell beforehand whether any given change proposed to be made is or is not such as in any manner to injure the banks of the Witham, and interfere with the drainage of the lower lands. What purpose, then, could such an injunction serve, as the second alternative of the motion describes? It would give no information; it would prescribe no rule or limits to the defendants; it could not in any manner of way be a guide to them, if it did not operate as a snare. It would in reality amount to nothing more than a warning that, if they did anything which they ought not to do, they would be punished by the Court; but it would leave to themselves to discover what was forbidden and what allowed. If, after receiving such a warning, they acted upon the opinion of impartial and experienced professional men, and yet some damage followed, this Court could not visit them very severely. The parties injured might then indeed recover damages at law, having leave to sue; but so they may, of course, recover damages if no injunction be granted, and without asking the Court's leave to sue. I can see no ground whatever, therefore, for granting an injunction of this description, which fails in the very point that forms the ground of the relief, the preventing irreparable mischief. In the present case, till the event happens no man can take upon himself to say with confidence, upon such evidence as is here brought forward, whether or not mischief will happen from any given change of machinery, so long at least as that change does not go to a length so great as to be extravagant, and to which no one supposes the defendants could think of proceeding."

If this is true, when the evidence as to the anticipated danger is conflicting, how much stronger is the case where, as here, all the evidence is opposed to the idea that any danger exists at all. See *Ellis* v. *Clemens* (1).

For the form of injunction which should be followed in cases like this, Mr. Connell directed my attention to the case of *Jackson* v. *Normanby Brick Co.* (2), where the Court

(1) 21 O. R. 227.

(2) [1899] 1 Ch. 438.

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of Appeal seems to have decided that in future, when granting mandatory injunctions, they would no longer adhere to the indirect, roundabout, method which had hitherto prevailed, but would substitute for that practice the much more sensible one of directing specific acts to be done. The advantages of this change are manifest, especially in cases where there has been an alleged breach of the injunction. If that rule were applied here what order should I make? Ought I to make any—at all events on the ground of anticipated danger — when the evidence clearly shews that the existing arrangements afford ample guarantee against the anticipated mischief? The plaintiff asks that the defendants be restrained from allowing water to escape from the wasteway as now constructed in the dam south of the saw mill to and upon his land, or to flow over the dam upon his land, and compelling defendants to construct the dam in a proper manner, and to locate the wasteway in a proper place in the dam. The plaintiff also asks that the defendants be restrained from allowing water to escape from the water wheels of the saw mill and flow along the passage way constructed by them to and upon plaintiff's land. This relief involves important changes in the dam, remodelled as it has been under the direction of skilled and experienced workmen, with a view of avoiding the very dangers which the plaintiff anticipates and complains of. The plaintiff does, in his bill, suggest increasing the height of the dam south of the mill, but that suggestion was made, I think, under a misapprehension of the true dimensions of the dam. Except this, he affords this Court no assistance in the way of determining what should be done. I do not say that this is a necessary part of his case, for if in fact he is sustaining an injury to his property by reason of the defendants' works, which this Court thinks ought in point of law to be discontinued, the defendants must find the means necessary to furnish the remedy; and if it be as a matter of practice, necessary or desirable for the Court specifically to point out what those are, no doubt its powers will be found adequate for the purpose. This

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Court would, however, require the plaintiff to make out a clear case before it would exercise a jurisdiction involving such serious consequences, and which ought therefore to be exercised with caution. It is true that in sect. 25 of the bill the plaintiff has indicated a condition of things which he is willing to have restored; but that also involves water flowing over the dam down the channel across the plaintiff's land. And while it is no doubt true that this channel is not, in all respects, the original natural channel of the stream, any more than the point where the water as it flows at present leaves the defendants' land and flows on to the plaintiff's, is the precise point where it, in its natural course, flowed on the plaintiff's lot, the fact still remains that this southern channel is a natural channel of the stream; that the plaintiff's land admittedly extends to the centre of it; that water has, since the building of the dam over forty years ago, flowed over the dam and through the wasteway in it into this channel, either through and over the plaintiff's land, or in front of it, according as the real boundary of his lot is. The mere flowage of the water, as described here, if in its natural channel can give plaintiff no right of action, for that is of right; and if not in its natural channel the plaintiff cannot maintain his bill without shewing actual damage, which, I think, he has not done. And as to the apprehension of danger the evidence, I think, falls short of establishing any ground for it. This is not a case, in my opinion, where an injunction should be granted. It is probably not necessary to reserve to the plaintiff leave to proceed at law, but if it is, leave is reserved for that purpose.

The bill must be dismissed, and with costs.

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August 27.

In re TURNER, an INFANT.

Referee — Report — Order of reference not attached to report — Act 53 Vict., c. 4, s. 170 — Entitling evidence — Illegible abbreviations in evidence — Evidence in lead-pencil writing — Absence of notice of hearing before Referee to parties interested — Act 53 Vict., c. 4, s. 160.

A motion to confirm report of a Referee, on a reference for the appointment of a guardian, recommending the appointment of the father, was refused where the order of reference was not attached to the report as required by Act 53 Vict., c. 4, s. 170, and the evidence taken by the Referee was not entitled in the matter, was in lead-pencil writing, contained abbreviations impossible to understand, and it appeared that relatives of the infant, except her father, had not been notified of the hearing before the Referee.

Motion to confirm report of Referee on a reference upon an application for the appointment of a guardian.

Motion was heard June 18, 1901.

G. L. Harris, in support of motion.

1901. August 27. BARKER, J.:—

In this case the usual order of reference was made on an application for the appointment of a guardian. At the June sittings a report by the Referee was filed and a motion made to confirm it, though no petition for that purpose was presented. The order of reference is not attached to the report as required by sect. 170 of Act 53 Vict., c. 4. In addition to the report a paper was produced on the motion which was said to be, and I suppose is, the original evidence by the Referee. It is taken down in lead-pencil—it is full of all kinds of abbreviations difficult if not impossible to understand—it is not entitled in any cause or matter, and, except for an endorsement which seems to have been put on by the Solicitor, there is nothing whatever to connect it with this matter, or in any way to authenticate it as the evidence upon which the Referee acted. No less than eleven witnesses were sworn,

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principally to prove the father's fitness to be appointed guardian, though no one else was proposed. Notice of the hearing was not given to any one of the relatives, though at least four aunts were living in the immediate neighborhood where the infant and all parties were living. One reason given for recommending the appointment of the father is that no one else was proposed. It is difficult to see how any one else could be proposed when no one else had any notice of the hearing. I have never known a reference carried on with such disregard of the ordinary rules of practice and procedure. The practice in such cases is so simple that there can be no excuse for not following it. In the first place the proper parties should be served with the Referee's summons to proceed: sect. 160 of Act 53 Vict., c. 4, so as to afford them an opportunity of being present and proposing a guardian if they wish. The evidence of the witnesses should be carefully taken down, and though perhaps not a necessary course it is certainly a prudent course to read the testimony of each witness over to him, let him sign it, and then the Referee can certify it. If the evidence is required for the purpose of exceptions or otherwise copies can then be furnished Counsel. This report contains a long statement as to the causes for certain adjournments—matter altogether foreign and irrelevant. The adjournments, if the minutes had been properly kept, would have been noted in the record of the proceedings, and if any question should arise as to the cause of them, the Court can take the necessary steps to ascertain it. The report should be made as directed by sect. 170 of the Act. I have no doubt that the father is the proper person to be appointed, and from such portions of the evidence as I have been able to translate I judge there is no question as to his fitness. I regret under the circumstances that I feel compelled to refuse the motion. If the parties wish the order of reference sent back they are at liberty to apply at any time.

Motion refused.

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August 27.

In re VAN WART.

Trustee — Trust for benefit of creditors — Passing accounts — Jurisdiction of Court — Commission on receipts.

A trustee under an assignment for the benefit of creditors is not entitled upon his own application to have his accounts passed by this Court.

Trustee allowed a commission of 5 per cent. on receipts.

Petition by trustee to pass his accounts and for an allowance for commission. The facts are sufficiently stated in the judgment of the Court.

The petition was heard August 20, 1901.

A. B. Connell, Q.C., in support of the petition.

1901. August 27. BARKER, J.:—

James A. Van Wart made an assignment to D. McLeod Vince, of an equity of redemption in some lands in Fredericton, and also of certain moneys, upon certain trusts for the benefit of certain creditors. This is an application by Mr. Vince, the trustee, by way of petition to this Court to have his accounts as such trustee, allowed and passed, and for an order allowing him a commission, by way of remuneration for his services. The petition has annexed to it a copy of the account, by which it appears that the total receipts amount to $6,700.00, and the amount disbursed is $6,388.70, leaving a balance in the hands of the trustee of $311.30. I asked the Counsel who made the application if there was any statute which authorized a reference of the accounts to a Referee in such cases, or if there was any precedent for the motion. He admitted that there was no statute, but said that he understood that the late Mr. Justice *Palmer* when Judge in Equity had made such orders. On inquiry, however, I cannot find that he ever did. Mr. Vince is not asking to be discharged from the trust; no one is asking to have a new trustee appointed

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in his place, and no one is questioning the correctness of his accounts in any way, or making any claim against him. In the absence of any precedent, and without any such practice established by statute, I must refuse that part of the motion as to the accounts. As to the commission which the law allows this Court to fix I shall allow the trustee 5 per cent. on the receipts — $6,700.00 — that is, $335.00. There will be no order as to the costs of this motion.

SAGE v. THE SHORE LINE RAILWAY COMPANY.

1901.

May 21.

Railway Company — Debentures secured by mortgage — Foreclosure suit — Receiver and manager — Repairs to road — Authority to issue receiver's certificates charging property in priority to debenture security.

In a debenture-holders' suit to enforce their security, which was against all the property of a railway company, receivers appointed to operate and manage the railway and business of the company, and maintain the road and rolling stock, were empowered to borrow a limited sum on receivers' certificates made a first charge on the company's property, in priority to the debenture security, to pay expenses incurred by them in necessary repairs, and in operating the road.

The Shore Line Railway Company was incorporated by letters patent dated January 19, 1889, under "The New Brunswick Joint Stock Companies Letters Patent Act," 48 Vict., c. 9, and amending Acts, pursuant to Act 51 Vict., c. 10, intituled, An Act relating to the foreclosure of mortgages on railways. The letters patent were confirmed and the powers of the company thereunder were enlarged by Act 52 Vict., c. 26, and by Act 53 Vict., c. 79, the company's powers were further enlarged. By the Act 52 Vict., c. 26, the company was empowered to issue its bonds or debentures to an amount not exceeding $800,000, which should, without registration or

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formal conveyance, be a first and preferential claim and charge upon the railway and other property, real and personal, of the company, then held, or at any time thereafter to be acquired, by the company, and the company was also enabled to secure such bonds by a mortgage deed upon the whole of its said property, assets, rents, and revenues, present or future, or both. Bonds to the amount of $800,000, of $1,000 each, were issued by the company, secured by mortgage to The Mercantile Trust Company, trustee for the bondholders, dated May 1, 1890, of the railway of the company, and of all its lands and property of various kinds then owned or thereafter to be acquired by the company, together with all its corporate rights, privileges, immunities and franchises, including the franchise to be a corporation. The mortgage provided that if default should be made in payment of interest for a period of six months, the trustee might, with or without judicial proceedings, take possession of the railway and other the property conveyed by the mortgage, and thereupon manage and operate the railway and receive the tolls, incomes, and profits thereof until the principal and interest due under the bonds should be fully paid, and should apply, *inter alia*, the money so received, in the management of the railway, and in making such repairs as might be needed to keep the railway in good working order.

Default having been made in payment of interest due upon the bonds, on February 20, 1900, Russell Sage and Levi P. Morton, who were holders of the bonds of the company to the amount of $536,000, commenced this suit against the company on behalf of themselves and all other the bondholders of the company, to enforce their security, and for the appointment of a receiver and manager. On July 13, 1900, an order was made appointing Russell Sage and Hugh H. McLean receivers in the suit, with power to enter and take possession of the railway and other property of the mortgagors, to operate the railway according to the usual course of its business, and to maintain the road and its rolling stock and appurtenances

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in a thoroughly good, sufficient and safe condition for use, and for that purpose to purchase for cash or on credit, or partly for cash and partly on credit, materials and supplies whenever necessary, and to use and apply the current earnings of the railway towards the maintenance and repair of the road. The Bank of Montreal was by amendment made a defendant to the suit, having claimed a lien on the property of the company for an advance of $8,585.95, made on the representation of the company that the money was required to pay wages and other expenses connected with the actual working of the railway. By petition of the receivers, dated May 21, 1901, for authority from the Court to them to issue receivers' certificates to the amount of $25,000 in addition to receivers' certificates already authorized and issued to the amount of $20,000, and constituting a first charge on the property and lands of the railway company, it was shewn that up to April 30, 1901 the receivers had expended $46,061.45 in the necessary maintenance and repair of the road and carrying on of the railway; that the gross earnings of the road were $21,798.96, and that further necessary repairs to the road and rolling stock would cost about $24,300. Evidence of the superintendent and accountant of the railway was given in support of the petition. The application was not opposed except by the Bank of Montreal, which intervened for the protection of its lien.

Application was heard May 21, 1901.

H. H. McLean, K.C., for the receivers.

A. O. Earle, K.C., for the plaintiffs.

H. F. Puddington, for the defendants.

BARKER, J., ordered that the receivers should be at liberty to borrow a sum not exceeding $25,000 in addition to the sum of $20,000 already borrowed upon receivers' certificates, and to issue receivers' certificates for the same, to be a first charge on the moneys to be realized from the

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sale of the railway and property of the railway company, and that the certificates should in the meantime be a charge on the railway property and effects of the company; but subject to the lien of the Bank of Montreal.*

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October 15.

AITON v. McDONALD.

Practice—Security for costs—Plaintiff resident out of the jurisdiction—Administration suit—Estate insolvent—Plaintiff's debt not admitted.

Security for costs will be ordered against a plaintiff resident out of the jurisdiction in a suit against an administrator for the administration of his intestate's estate, where the estate is insolvent, and the plaintiff's claim against the estate is not admitted.

Application for order for security for costs. The facts are fully stated in the judgment of the Court.

Argument was heard October 11, 1901.

A. O. Earle, K.C., and *A. A. Wilson*, K.C., in support of the application.

C. N. Skinner, K.C., and *A. W. MacRae, contra*:—

It is a proper matter of inquiry, in determining the application, to consider the merits of the suit. It is brought by the plaintiff on behalf of herself and other creditors of the intestate, for the administration of his estate. The indebtedness to the plaintiff by the estate arises out of money received by the intestate in his character of

* See *Greenwood* v. *Algesiras (Gibraltar) Railway Company* [1894] 2 Ch. 205; and *Securities and Properties Investment Corporation, Limited* v. *Brighton Alhambra, Limited*, 68 L. T. 249,—Rep.

guardian of her estate. The case, therefore, is one where the defendant has in his possession funds of the plaintiff, out of which he can retain his costs in case the plaintiff does not succeed, and security for costs will not be ordered: *Duffy* v. *Donovan* (1); *Thibaudeau* v. *Herbert* (2); *Doer* v. *Rand* (3); *Anglo-American Casings Co. (Limited)* v. *Rowlin* (4). In an administration suit, though the plaintiff may fail in his claim, as he enables the Court to distribute the estate, costs will not be given against him, and he is usually allowed costs: *Wedgwood* v. *Adams* (5). Here the debt being admitted, the plaintiff cannot fail, and costs cannot possibly be given against her.

Earle, K.C., in reply:—

The debt is not admitted. The suit is aimed principally against the defendant, Mrs. McDonald, in her own right, and quite irrespective of her character as administratrix of her husband's estate. It seeks to have her account for life insurance moneys, of which she was the sole beneficiary, and which she claims to hold in exclusion of claimants against her husband's estate, as assets of his estate. Security should therefore be ordered to secure costs to which she may be entitled in her personal capacity.

1901. October 15. BARKER, J.:—

The plaintiff, who resides out of the jurisdiction, filed this bill against the widow and children of the late M. McDonald on behalf of herself and other creditors of McDonald, seeking to have the estate administered in this Court, and seeking as incidental to that relief, that the widow, who is a party to the bill as administratrix of her husband's estate and in her own right as well, should account to the creditors for some $17,000 which she had received as insurance moneys on the life of her husband and which she claims as her own. This present application

(1) 14 P. R. 159.
(2) 16 P. R. 420.
(3) 10 P. R. 165.
(4) 10 P. R. 391.
(5) 8 Beav. 103.

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is for an order for security for costs. The foreign residence of the plaintiff is not disputed; but in answer to the application for the security, it is said that the indebtedness of McDonald to this plaintiff being admitted, the defendants cannot incur any costs against her, and therefore in the exercise of the discretion which it is said this Court possesses in such cases, no order would be made, especially under the peculiar circumstances of this case. By the bill it is alleged that the plaintiff in 1893, who was then an infant, became entitled to some $500 as her distributive share in an estate being administered in this Province, and that McDonald was appointed her guardian by the Probate Court here, and as such received the $500, none of which except some $75 has ever been paid to her or on her account. The plaintiff is now of age and has filed this bill. McDonald's estate according to the bill and affidavits before me is altogether inadequate to meet his liabilities—in fact there seems no prospect of the creditors getting more than a small per centage of their claims. In support of the plaintiff's contention several cases decided in Ontario were cited, but as they do not seem to be applicable to this case it is not necessary to do more than make a brief reference to them. I am not sure that they were not decided under a procedure somewhat different from that in force in this Court, but if that is not so, the circumstances of this case are altogether different from those of any that were cited. In the first place it is a fallacy to say that in an action against the personal representative of an insolvent debtor, he has the debt in his hands. The debtor himself might be said to have it in his hands; but his executor or administrator only has what he actually gets, and if that only amounts to a per centage of the indebtedness, he never has any more than that in his hands. The administratrix has to pledge her own credit for the costs of her defence in this suit, both so far as it relates to the claim against herself personally and the recovery of the plaintiff's debt, and if she only gets ten cents on the dollar from the creditors, she would only have that sum to pay her costs of this suit recoverable against the plaintiff. In addition to this there is

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no evidence before me that the plaintiff is a creditor—at all events no evidence which I could act upon. The cases cited proceeded upon an indebtedness admitted by the defendant, and I think in one case proof by the plaintiff of the debt uncontradicted in any way, was held so far equivalent to an admission as to warrant the refusal of the security. Assuming that decision to be correct, it does not apply here. The only affidavit I have here is that of Mr. Sinclair, the solicitor, who certainly does swear to the indebtedness as it is alleged in the bill. He does not, however, give me the slightest information as to the way in which he has the knowledge necessary for the purpose. It does not appear that he had anything whatever to do with the original transaction, nor is there anything in the affidavit to suggest the probability that he has the knowledge necessary for him to state what he has. I must assume that he has such knowledge, but I should not in a case like this act upon such evidence, for without the explanations and additional facts I have mentioned, it could not be proof sufficient for the purpose for which it was offered. I think the order for security must be made.

1901. November 26.

BANK OF MONTREAL v. THE MARITIME SULPHITE FIBRE COMPANY, LIMITED.

Company — Winding-up — Debenture-holders' suit — Receiver — Liquidator — Displacing receiver by liquidator — Order appointing receiver — Order varied, and limited to property conveyed by debenture security.

Where debenture-holders in a suit against a company to enforce their mortgage security obtained the appointment of a receiver before, but subsequently to an application for, an order to wind up the company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and the liquidator had obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver, or to appoint the liquidator receiver in his place.

Order appointing receiver in a debenture-holders' suit varied by limiting property to be received by him to property conveyed by their mortgage security.

Summons on the application of the liquidators appointed in the winding-up proceedings of the defendant company for the plaintiffs to shew cause why an order previously made in the cause appointing Mr. W. C. Winslow receiver should not be set aside or varied, and why the property of the company should not be administered and distributed by the liquidators. The facts sufficiently appear in the judgment of the Court.

Argument was heard November 13, 1901.

W. Pugsley, A.-G., and *R. A. Lawlor*, K.C., in support of the application:—

The official liquidator is usually appointed receiver in a debenture-holders' action; and where the receiver has been appointed before the winding-up he has been removed, and the liquidator appointed in his place: *Tottenham* v. *Swansea Zinc Ore Co.* (1); *Perry* v. *Oriental Hotels Co.* (2); *Campbell* v. *Compagnie Gen. de Bellegarde* (3).

(1) 51 L. T. 61. (2) L. R. 5 Ch. 420. (3) 2 Ch. D. 181.

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Especially will this course be taken where there are outstanding assets which can be more expeditiously and economically got in under the winding-up machinery: *Re Joshua Stubbs, Limited* (1). It is only where debenture-holders have power under their security to appoint a receiver to carry on the company's business and manage and dispose of its undertaking and assets and have appointed a receiver that the Court will not interfere: *In re Henry Pound, Son & Hutchins* (2). As mortgagees under a legal mortgage the plaintiffs have that power, but they have not exercised it, preferring to have the assistance of the Court. Two sets of officials should not be retained both because of the expense such a course would involve and the friction that would arise between them. The receiver would claim assets which the liquidators would deny were included in the mortgage. If the entire property were confided to them they would act impartially towards all interests. The order appointing the receiver is too comprehensive and should be limited to the property conveyed by the mortgage.

H. H. McLean, K.C., *contra*:—

It is not the practice to appoint the liquidator receiver for debenture-holders or mortgagees. The practice is the other way: *Re Joshua Stubbs, Limited* (3), where Kekewich, J., points out one advantage of the latter course. If the whole of the property is going to be absorbed by the debenture-holders so that nothing would remain to pay the liquidator he would be under temptation to act unjustly towards the debenture-holders; whereas if he were both receiver and liquidator he would be paid for his work as receiver. It is only where calls, and outstanding assets of the company of that kind, are to be got in, which a receiver would have no power without the sanction of the Court to collect, but which a liquidator would have, or where some other strong reason exists, that the receiver is ever displaced. See *Re Joshua Stubbs, Limited* (4); *Strong* v. *Carlyle Press* (5).

(1) [1891] 1 Ch. 475. (2) 42 Ch. D. 402. (3) [1891] 1 Ch. 187.
(4) [1891] 1 Ch. 475, 483. (5) [1893] 1 Ch. 268.

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BANK OF MONTREAL v. THE MARITIME SULPHITE FIBRE COMPANY, LIMITED.

1901. November 26. BARKER, J.:—

This suit has been brought by the Bank of Montreal, on behalf of itself and other bondholders of the defendant company, to enforce a mortgage given by the company to the Royal Trust Company and one Hugh Robertson, to secure the payment of these bonds. The receiver was appointed before the winding-up order was made, but after an application had been made for that purpose. This present motion is based solely upon the notion that as a matter of law the receiver for the debenture-holders should be discharged upon the appointment of the liquidators under the winding-up proceedings. The liquidators do not ask that they should be appointed receivers in place of Mr. Winslow; neither have they brought forward any one fact which, in view of the convenient or economical administration of the company's affairs, might influence this Court in the exercise of any discretion it may have in the selection of a receiver. I think all the authorities agree in holding that the debenture-holders are entitled to have a receiver appointed, though their own nominee will not necessarily be selected for the position: *Re Joshua Stubbs, Limited* (1); *British Linen Co.* v. *South American Co.* (2); *Strong* v. *Carlyle Press* (3).

There is in this case a conflict of opinion between the liquidators and the mortgagees as to what property the mortgage covers, and perhaps, when the precise facts come to be known, some nice questions may arise for determination. It also appears by other proceedings in this case that the liquidators, as representing the general creditors, dispute the validity of the plaintiffs' mortgage; and in an application made by the plaintiffs for leave to continue this suit, one of the conditions imposed was that the liquidators should be made parties with liberty to raise this very question. In view of these conflicting interests between the bondholders and the other creditors, it does not seem to me to be desirable that the same receiver should

(1) [1891] 1 Ch. 475. (2) [1894] 1 Ch. 108.
(3) [1893] 1 Ch. 268.

represent both parties: *Strong* v. *Carlyle Press* (1); *In re Henry Pound, Son & Hutchins* (2).

As to the other branch of this summons, I mentioned to the Counsel who applied to me that if the order appointing the receiver was more comprehensive, and covered more property than the mortgage, that was not my intention. And on the hearing of the summons I suggested to the liquidators' Counsel that I thought it would save time and expense if a specific application were made as to the particular property which the receiver had taken possession of under the order, and which the liquidators alleged was not covered by the mortgage, so that an order might be made for the receiver to withdraw from such possession. On such an application the facts in reference to the property relied on as shewing that the mortgage did not cover it, might be shewn and the right determined. My suggestion, however, was not accepted. At present I have no such facts before me at all, and the variation I shall make in the order will probably not assist materially in the settlement of the disputed matters. The order directed the receiver to go into possession "of the Sulphite Fibre Mill and the freehold and leasehold properties belonging to the said defendants, The Maritime Sulphite Fibre Company, Limited, together with all stock-in-trade, manufactured and unmanufactured, and all other property of whatsoever description belonging to the said company, together with all debts due the company." The bonds on their face represent that they are secured by a mortgage on the company's real and personal property then owned or thereafter acquired; and the mortgage after conveying specifically described real property—freehold and leasehold, and certain acquired water privileges, contains the following general clause:—"And all the coal, wood, and sulphur pyrites, and supplies of all kinds on, in or about the said described land and the buildings erected thereon and used by the company in and about their business, and all goods, wares, merchandise manufactured and in process of manufacture in, about, or on the said lands, premises and buildings; and all timber

(1) [1893] 1 Ch. 268. (2) 42 Ch. D. 402.

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licenses owned by the company or which they may hereafter acquire; and all and singular the rights, powers, privileges, franchises and immunities of the company, and also all other property both real and personal of the company, including all such as they may own at the time of the execution of these presents, and also all such as the company may hereafter acquire, and especially (but without restricting the generality of the above conveyance), all supply stock-in-trade, and pulp manufactured or in process of manufacture, logs, lumber, goods, chattels and effects of every kind and nature now or at any time hereafter belonging to the company, and which shall be in, about or upon, or used in connection with the said sulphite fibre mill and premises of the company, situate at Chatham aforesaid, or on the limits or premises of the company in the Province of New Brunswick."

Whether the language of the order is more comprehensive than that of the mortgage, it is not now necessary to decide, for I shall vary the order so that the two will correspond. The words I have quoted from the order "together with," etc., will be struck out, and the following inserted in their place:—

"Described in and conveyed by the defendants, The Maritime Sulphite Fibre Company, Limited, to the defendants, the Royal Trust Company and Hugh Robertson by mortgage bearing date the 16th day of November, A. D. 1900, to secure an issue of bonds amounting to $500,000, together with all other property, real and personal, goods, chattels and effects conveyed by the said mortgage or thereby in any way charged as a security for the payment of the said bonds."

This motion having failed in part and succeeded in part, there will be no costs to either party.

SIMPSON v. JOHNSTON.

1901.

December 17.

Trustee—Executor—Breach of Trust—Loss to Estate—Liability of Trustee—Trustee Relief Act, 61 Vict., c. 26—Will—Construction.

A testator, in one part of his will, gave all his real and personal estate to his wife "to be hers in such a way that she shall, during her life, have the full use, benefit and enjoyment thereof," and then over, and in a subsequent clause, after directing his executors to sell his real estate, empowered them to make investments in certain classes of securities, "so that my said wife may have the interest and income therefrom during her life." The plaintiffs, with testator's widow, were appointed executors of the will. The estate was comprised in part of real estate, which was sold by the executors, and the proceeds were handed by the plaintiffs to their co-executor to be held by her under the terms of the will, they honestly believing that such was their duty under the will. On her death an investment made by her representing a part of these proceeds came to the hands of the plaintiffs; the remainder of the proceeds having been either used or lost by her.

Held, that the estate was devised in trust to pay the income only therefrom to the widow during her life, and that there was a breach of trust by the plaintiffs; but that they had not acted unreasonably in the view they took of the meaning of the will, and that they should be relieved from personal liability, under Act 61 Vict., c. 26.

Bill by the plaintiffs, as surviving executors and trustees of the will of Andrew Moffitt, deceased, for the construction of the will; for the taking and allowing of their accounts as such executors; and to ascertain who are entitled to the residue of the estate in their hands upon the distribution of the same; and for relief for breach of trust, if any. The facts fully appear in the judgment of the Court.

Argument was heard November 26, 1901.

A. I. Trueman, K.C., for the plaintiffs:—

The trustees should be relieved from their liability, if any, to make good the loss that has happened from the handing over by them of estate funds to the deceased's widow, their co-trustee. Their opinion that the will authorized them

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to do so was adopted in good faith, and was not unreasonable. The will directed that she should have the full use, benefit and enjoyment of all the testator's property, real, personal, and mixed. This would give her the right of absolute disposition over the personal estate, at least. A trustee is not answerable for the misapplication of assets committed by him into the keeping of his co-trustee, if he had a good reason for so acting: *Williams* on Executors (1).

[Barker, J., refers to Act 61 Viet., c. 26, entitled, "An Act to amend the law respecting the administration of trusts, and the liability of trustees."]

S. L. Fairweather, for Elizabeth T. Johnston and other defendants who had appeared, consented to decree.

1901. December 17. BARKER, J.:—

There is no dispute as to the facts of this case. The bill has been taken *pro confesso* against some of the defendants, and a decree has been consented to by Counsel for those who entered an appearance. The plaintiffs, Simpson and Bell, are the surviving executors of the will of the late Andrew Moffitt, who died on the 12th January, 1881, leaving him surviving his widow, Jane Moffitt, whom he named executrix, but no children. The will was duly proved in the Probate Court of St. John; an inventory of the estate was filed shewing real estate to the value of $6,500, and personal of the value of $890. In October, 1881, the executors and executrix passed their accounts up to that date in the Probate Court, by which it appeared that they had received $4,339.71, and disbursed $4,382.27, leaving the estate indebted to them in the sum of $42.56. Jane Moffitt, the widow and executrix, died on the 4th January, 1899, but, previous to her death, and after the accounts had been passed in 1881, she and the executors disposed of all the remainder of the estate property in their hands, for which they realized the sum of $4,680. Of this sum the plaintiffs say that they forwarded $4,489 to Jane Moffitt, who was then living in England, to be held

(1) 9th ed. 1727.

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by her under the terms of the will. Jane Moffitt appears to have invested this sum, or a large portion of it, with the Sunderland Working Men's Building Society, a society doing business in Sunderland, in the County of Durham, in England, the interest from which investment she received for her own use. This investment of £882 Mrs. Moffitt appears to have called in sometime between October, 1882, and June 1, 1885, and on the second day of June, 1885, she invested £700 sterling in the same building society, in the joint names of herself and the plaintiff, Simpson, though she received the interest on it up to the time of her death, amounting to £443 11s. 11d. The difference between the £700 so invested and the original $4,489, remitted to Mrs. Moffitt—some £200—seems to have been lost, no trace of either the money, or any investment of it, having been found. It is this loss which has caused the plaintiffs to file this bill, as they have in their hands the £700 for distribution under the will; all the debts and liabilities of the estate having been paid; and the principal object of this suit is to obtain a decree declaring the plaintiffs free from personal liability to make up to the devisees the loss incurred by Mrs. Moffitt. The will in question is as follows:

"In the name of God, amen. I, Andrew Moffitt, of the Town of Portland, in the City and County of Saint John, in the Province of New Brunswick, Miller, do hereby make and publish this my last will and testament, hereby revoking and making void any and all former wills and codicils thereto by me at any time heretofore made. First—I hereby direct that all my just debts, funeral and testamentary expenses, be first paid out of my estate. Second—I hereby give, devise and bequeath unto my beloved wife, Jane Moffitt, all and singular, all my estate and property, real, personal and mixed, of every nature and kind, no matter where situate, the same to be hers in such a way that she shall, during her natural life, have the full use, benefit and enjoyment thereof, and upon her death the same shall be divided into two equal shares, one of which shares shall then go to my next of kin, according to the *Statute of Distributions*, and the other of said shares shall

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then go to the next of kin of my said wife, according to the said *Statute of Distributions*. Third—So soon as the same can conveniently be done after my decease, I direct that my executors hereinafter named, or the survivors or survivor of them, shall proceed to sell, either at public sale or private sale, all and every part of my real estate, for the price or prices that they, in the exercise of their discretion, can best obtain for such real estate; and upon the same so being sold at public auction, or private contract, my said executor, or the survivors or the survivor of them, and each and every of them, if all but one be dead, are hereby authorized and directed to make good deed and deeds and conveyances of said real estate, and every part thereof, to the purchaser or purchasers of the same. Fourth — At any and all times hereafter, whether before or after the sale of my real estate, my said executors, or the survivors or survivor of them, are hereby empowered to invest any money belonging to my estate in good security, by way of mortgage upon real estate, or in Dominion, Provincial or municipal debentures, so that my said wife may have the interest and income arising therefrom during her life. Fifth — My said executors may, during the life of my wife aforesaid, sell and convert into money such of my personal estate as my said wife may not desire to use during her life. Sixth — All property that under this will may come to the next of kin of myself, and of my said wife, shall be held by such next of kin respectively, absolutely forever. Seventh — I hereby nominate, constitute and appoint my said wife executrix, and John Simpson, of Torryburn, Farmer, and John Bell, of the City of Saint John, Senior, Blacksmith, executors of this will. In witness whereof," etc.

The bill as originally framed set forth the facts as I have above stated them, and by the prayer it was asked that the Court should give and declare the construction of the said will; referring, I presume, to the plaintiffs' liability for the loss of the money; that the accounts of the plaintiffs should be taken and allowed, and that it should be ascertained who are entitled to the residue of the estate under the will now in the plaintiffs' hands for distribution.

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At a later date the bill was amended by the addition of a specific allegation to the effect that if the plaintiffs, in entrusting Mrs. Moffitt with the sole control of the money, had been guilty of a breach of trust, they had acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter, thus bringing themselves within the provisions of Act 61 Vict., c. 26, to which Counsel's attention had apparently not been directed when drafting the bill. No one pretends to question the plaintiffs' honesty in what they did. Of that there seems no doubt. Neither have the defendants, or at all events those who were represented by Counsel, made any question as to the reasonableness of what the plaintiffs did. Of that, however, I think I ought to be satisfied before granting the relief which the Act authorizes this Court to give. Were it not for the Act, I think there might be difficulties in the way of holding that these trustees who have chosen to abandon to their co-trustee the sole control of the trust property, even though she were the sole beneficiary of the income, had not rendered themselves liable to make good to the trust estate any loss which such co-trustee had caused by a misappropriation of the money. In view of the second clause of the will, Mr. Trueman contended that, at all events so far as the personal property was concerned Mrs. Moffitt was entitled to an absolute interest. It is, however, unnecessary to discuss that point, for the money which was remitted to England was the proceeds of a sale of the real estate made under the power for that purpose contained in the will, and which, in my view, when received, went to the executors and executrix in trust for the benefit of Mrs. Moffitt during her life, and the next of kin of herself, and the next of kin of her husband, after her death.

The Act in question is taken from a section in the Judicial Trustees Act, 1896 (Imp.), and differs only in one respect. The Imperial Act has reference to both executors and trustees, while ours refers only to trustees. While, therefore, the Provincial Act might not apply to a mere *devastavit* by an executor as such, it does apply to a breach

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of trust committed by him where, as in this case, he is acting as a trustee, and his default is in that capacity. It is, however, not every breach of trust that is dishonest. In *In re Smith* (1), the Court of Appeal in correcting a decision of Kekewich, J., say: "But in this case the learned Judge exercised the discretion reposed in him by the *Debtors Act*, 1878, upon a ground which, in our opinion, was erroneous. Andrews trusted his co-trustee Hooton, and handed money to him, and this money was misapplied. Andrews is liable for it; but he was not himself guilty of any dishonesty or fraudulent breach of trust. Mr. Justice Kekewich ordered an attachment to issue against him on the broad ground that every trustee who trusts his co-trustee, and remits trust money to him, and does not look sharply after him, is dishonest and fraudulent. We cannot agree in this view, and, consistently with the principles upon which this Court acts in reviewing discretionary orders, we have come to the conclusion that Andrews's appeal ought to be allowed." It is clear, therefore, that from the mere act of entrusting the control and possession of the fund to their co-trustee, dishonesty is not to be attributed to the plaintiffs, and there is no other circumstance upon which such a charge can rest. It must, however, also appear that the act which constituted the breach of trust was done reasonably so that the trustees ought fairly to be excused. For while this Statute should receive a liberal construction in favor of the honest and prudent trustee, sufficient care and caution should, I think, be exercised in applying it, to prevent trustees from getting the notion that they no longer owe a duty to their *cestuis que trustent* to administer their trusts as faithfully and as prudently as they did before the Act was passed. Especially is this the case where, as in this Province, they are, on a proper application, entitled to a remuneration for their services. Sir George Jessel, than whom in my opinion no more competent judicial authority on a question like this can be quoted, in 1882, and before the Imperial Act was passed, laid down the doctrine that a trustee was bound to conduct the business of the trust in the same way in which

(1) [1893] 2 Ch. 18.

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an ordinary prudent man of business conducts his own, and that he had no further obligation. In *In re Speight* (1), at page 746 of the report of that case that learned Judge says: "My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability; but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him. I think it is the duty of the Court in these cases where there is a question of nicety as to construction, or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavor as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit. I think that is the view which has been taken by modern Judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation. It appears to me that the Vice-Chancellor has adopted an entirely different view. I think he has inferred that which is not fairly to be inferred in this case, and even if he were right it could only be inferred by taking one of two views, and we ought not to take the adverse view if the other view, being equally as good, can be adopted." In *In re Grindley* (2), Chitty, L. J., says: "In my experience, there is no source of trouble from which trustees have become more frequently entangled in breaches of trust than obscure wills; and in

(1) 22 Ch. D. 727. (2) [1898] 2 Ch. 593, 601.

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dealing with this section we may take into consideration the nature of the will itself and the difficulty in which it placed the trustees."

I have already pointed out that in my view of the construction to be placed on this will, the executors held the proceeds of the sale of this real estate in trust for investment in order that the widow might receive the annual interest for her own use, and that on her death the corpus might be delivered or assigned to the next of kin. I come to that conclusion from the provisions of the whole will. The executors are to sell the real estate; they are to execute the conveyances, and they are empowered to invest the money on mortgage or in Dominion, Provincial, or municipal debentures. I may be wrong in so construing this will, but if I am right it does not follow that it was unreasonable for these plaintiffs to conclude that the effect of the first clause of the will was to give the widow a life interest in the property with a remainder over to the next of kin, in which case they may have well thought they had no more to do with the estate as the debts and expenses had been all paid. It is true that so far as the will contains any direction on the point, the money was to be invested in a specific class of securities in which these Sunderland Building Society shares are not included. But the investment is good, so far as it goes, the loss having occurred by reason of a portion of the money not having been invested at all.

I think this case is one where the Court ought fairly to excuse the breach of trust, if one has been committed, and that it is within the cases decided on the provision of the Imperial Act: *In re Lord de Clifford's Estate* (1); *In re Chapman* (2); *Perrins* v. *Bellamy* (3).

I shall, therefore, relieve the plaintiffs from personal liability for the difference between the $4,489 remitted to England, and the value of the shares in the Sunderland Building Society, and there will be a decree to that effect.

I cannot give the plaintiffs their costs, as that would simply be making the *cestuis que trustent* pay the expense

(1) [1900] 2 Ch. 707. (2) [1896] 2 Ch. 763,
(3) [1899] 1 Ch. 797.

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of their trustees getting an order of this Court excusing them from the result of their own breach of trust. I think it best to treat this bill as one intended solely for a declaration as to the plaintiffs' liability. The accounts and other matters connected with winding up the estate can be made more expeditiously and with less expense in the Probate Court.

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January 7.

Mortgage — Payment — Authority of solicitor of mortgagee to receive mortgage debt — Fraud.

Land subject to mortgage to secure a loan arranged through the mortgagee's solicitor was purchased by the plaintiff. On the death of the mortgagee certain monies of her estate were left by her administrator with the solicitor for investment, and the solicitor opened up in his books an account with the estate. The solicitor, without the knowledge or authority of the administrator, required the plaintiff to pay off the mortgage. To raise the money the plaintiff gave a mortgage to one J, who paid the money to the solicitor, and he credited the payment of the mortgage in the accounts of the estate in his books. The money was never paid or accounted for to the administrator. Some months afterwards he instructed the solicitor to get in the mortgage. The solicitor died insolvent.

Held, that the relation of solicitor and client between the administrator and the solicitor did not authorize the latter to receive payment of the mortgage; that an express authority for the purpose, or an authority implied from a course of dealing between the parties, neither of which existed here, was necessary; that the subsequent authority did not operate as a ratification of the payment; and that the plaintiff must bear the loss.

Bill to redeem a mortgage. The facts fully appear in the judgment of the Court.

Argument was heard December 3, 1901.

F. St. John Bliss, for the plaintiff.

R. W. McLellan, for defendant Seeley.

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1902. January 7. BARKER, J.:—

The plaintiff by his bill seeks to redeem a certain mortgage made by one Stewart and wife to one Melinda V. Penington, of whose estate the defendant Seeley is the administrator. The real contest, however, is as to whether under the circumstances detailed in the evidence, the mortgage has not already been paid in full, or whether as between the plaintiff and the Penington estate, it should not be so held and declared. The mortgage in question was given in 1893 to secure the sum of $300 and interest. The loan was arranged through the late Wesley Van Wart, a solicitor, then in practice at Fredericton, who seems at that time to have been acting for Miss Penington, and who subsequently collected the interest from Stewart, and also $50 on account of principal. This mortgage was originally on two lots of land; but in 1895, and after the payment of the $50, Stewart sold one of the lots to the plaintiff, subject to this mortgage, on which there then remained owing on account of principal a balance of $250. At the same time it was arranged with Van Wart, acting for Miss Penington, that Stewart's bond given with the mortgage was to be delivered up, and the plaintiff's bond to Miss Penington substituted in its place. In pursuance of this arrangement the plaintiff on the 23rd March, 1895,—the date of the conveyance from Stewart to him—gave his bond to Miss Penington, by which he became bound to pay this $250 with interest in one year. Stewart's bond which according to the arrangement should have been given up to him at the time, was in fact not given up until after Miss Penington's death, which took place on the 9th February, 1898. This bond with the mortgage seems to have been in her possession at that time, as Seeley found them among her effects on his taking charge of the estate immediately on his appointment as administrator. Whether the plaintiff's bond was ever actually in Miss Penington's possession or not, or whether she knew anything about it at all, the evidence does not shew. At all events it was in Van Wart's possession in June, 1898, for at that time according to

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Seeley's evidence, he handed over to Van Wart the Stewart bond, and took in its place the plaintiff's bond, on Van Wart's representation to him that such was the arrangement between the parties. Miss Penington died intestate, possessed of a small amount of real and personal property in addition to this mortgage. Seeley employed Van Wart as his proctor in procuring letters of administration, and in selling what few personal effects there were and in paying some few claims against the estate. Miss Penington's father as the next of kin took the real estate, and I presume by his directions and that of Seeley, who was his son-in-law, it was also sold and the proceeds of these sales paid over to Van Wart. He opened an account with the Penington estate in his books in the usual way; and after charging his own professional expenses and other disbursements and crediting the proceeds of these sales, the account on the 9th July, 1898, shewed a balance due the estate of $409.43. At this date Van Wart sent Seeley a copy of the account and a cheque for the balance. This cheque was subsequently returned to Van Wart and his deposit receipt taken in its place. There are no entries in this account having any reference whatever to this Stewart mortgage. Sometime after this and before the following October, Van Wart without any authority whatever, but professing to act on behalf of the Penington estate, wrote to the plaintiff, calling upon him to pay off the mortgage. In consequence of this the plaintiff came to see Van Wart, who told him that he could borrow the money for him or something to that effect. At all events, it was then arranged between the plaintiff and Van Wart, that he (Van Wart) was to borrow the $250 on the security of a mortgage to be given by the plaintiff on this property, and that the money was to be used by Van Wart in paying off the Stewart mortgage. The money was obtained from Miss Jouett, for whom Van Wart seems also to have been acting—in fact I infer from the evidence that it was money already in Van Wart's hands for investment on Miss Jouett's account. The plaintiff executed the mortgage to Miss Jouett for the $250 which Van Wart sent him for that purpose; it was duly

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recorded, but the Stewart mortgage was not cancelled, nor was the plaintiff's bond to Penington delivered up. The Jouett mortgage is dated October 18, 1898, and on or about that date Van Wart in his books charged Miss Jouett's account with the $250 loaned to the plaintiff on his mortgage; and, in continuation of the Penington estate account, which had been balanced in the previous July by the cheque for $409.43, this $250, as the principal due on the Stewart mortgage, was carried to the credit of the estate. It was not until after Van Wart's death, which took place on the 3rd August, 1899, that Seeley knew or heard of this money having been borrowed by the plaintiff, or that Van Wart had the money, or that the amount had been carried to his credit in Van Wart's books; or that Van Wart had called upon the plaintiff to pay the mortgage off. The evidence shews that it was not until the end of February, 1899, more than four months after the plaintiff had paid the money, that Van Wart received any instructions to collect this mortgage. At that time Seeley gave him the mortgage and the plaintiff's bond, with instructions to collect the amount. Seeley says that he saw Van Wart on the 1st April, 1899, when he asked him if Foreman (the plaintiff) had paid, and he said that he had not. As to some of these parties, it is therefore clear that Van Wart's action has been simply dishonest, and as his estate is insufficient to make the loss good, it becomes necessary to ascertain upon which of them it must fall, and in my opinion it must fall upon the plaintiff.

In the absence of legal proceedings taken for the purpose of enforcing a mortgage security, there is nothing in the mere relation of solicitor and client which carries with it any authority to the solicitor to receive payment of either interest or principal due his client on a mortgage. The question is one simply of agency, and in order to discharge the paying mortgagor from further liability, there must either be an express authority from the mortgagee to receive the money, or else an authority for that purpose necessarily implied from the course of dealing between the parties; and the onus of establishing this is always upon

the mortgagor. The following authorities may be cited in support of this view: *Kent* v. *Thomas* (1); *Wilkinson* v. *Candlish* (2); *Bourdillon* v. *Roche* (3); *Viney* v. *Chaplin* (4); *Ex parte Swinbanks* (5); *McMullen* v. *Polley* (6); *Gillen* v. *Roman Catholic Episcopal, etc., of Kingston* (7); *In re Tracy* (8).

These cases also decide that an authority to receive the interest confers no authority to receive the principal, and that mere possession of the securities is no evidence of an authority to collect or receive the money due on them. If Van Wart, when he, as the plaintiff's duly authorized agent, received the money from Miss Jouett for the purpose of paying off this mortgage, had been also the duly authorized agent of Seeley, as administrator of this estate, to collect and receive payment of this mortgage debt, and, acting under such authority, had in the usual course of business carried the amount to the credit of the estate account in his books, as was done, it might perhaps be said that that would be an unequivocal act, by which, acting as fully authorized agent of both parties, he had withdrawn the money from the plaintiff's control and elected to hold it as the money of the estate. In *Gordon* v. *James* (9), Cotton, L.J., at page 256, says: "There is a difficulty in that view, viz., this, that even if the solicitors had the authority to receive this money on behalf of the plaintiffs, yet, in fact, they got the money as agents of the defendant, and there is nothing to shew that there was any alteration of the capacity in which they held it, or even that at the time when this deed was executed and handed over to Mr. James the money was still in their hands, so as to be capable of being considered to be received by them as agents on behalf of the plaintiffs." See also *London Freehold and Leasehold Property Co.* v. *Baron Suffield* (10); *Wall* v. *Cockrell* (11); and on appeal (12).

(1) 1 H. & N. 472.
(2) 5 Ex. 91.
(3) 27 L. J. Ch. 681.
(4) 2 DeG. & J. 468.
(5) 11 Ch. D. 526.
(6) 13 O. R. 299.
(7) 7 O. R. 146.
(8) 21 A. R. 454.
(9) 30 Ch. D. 249.
(10) [1897] 2 Ch. 608.
(11) 6 Jur. (N. S.) 768.
(12) 9 Jur. (N. S.) 447.

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It is, however, unnecessary to determine that question, because the evidence fails altogether in establishing any authority in Van Wart to collect or receive the money when he did, and when the transfer of accounts was made in his books in October, 1898. The authority given some months later can have no bearing on the case, because nothing whatever was done by Van Wart acting under it; and the authority could not operate by way of ratification of what had been previously done, because Seeley, when he gave it, was in entire ignorance both of the payment of the money and the credit entry in Van Wart's books. Ratification is based on knowledge. The plaintiff's Counsel, however, contended that if there was no express authority there was an implied authority arising out of the dealings between the parties. I say between the parties, because reliance was placed not only upon transactions between Seeley, as administrator, and Van Wart, but also upon dealings between Van Wart and Miss Penington herself. As to the latter, it was said that because during her lifetime the $50 had been paid by Stewart to Van Wart as agent or solicitor of Miss Penington, on account of the principal of this mortgage, without objection, so far as there is any evidence on the subject, that that conferred upon him a general authority to receive and collect the balance of the principal. I should hesitate before adopting the conclusion that an isolated transaction such as that, of the exact nature of which we have very meagre information, would necessarily confer any such authority as that claimed. But apart altogether from that, even if any such agency had been thus established, Miss Penington's death must have determined it, and left Seeley the new principal with duties and responsibilities of his own in reference to this estate, free to discharge them by means of agents of his own choosing. Neither do the transactions and dealings between Seeley and Van Wart in reference to this estate in any way constitute any agency such as is contended for. On the contrary, the matter of collecting this mortgage never seems to have been mentioned until after Van Wart had actually collected the money. He had not even possession of the mortgage or of

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the plaintiff's bond. The other transactions in reference to the estate were of an entirely different character. When Van Wart received the $250 from Miss Jouett he received it as agent of the plaintiff, and I cannot discover any circumstance which altered that state of things; and it was, I think, in that capacity alone he continued to hold it up to the time of his death. The plaintiff, unfortunately for himself as it has turned out, employed Van Wart as his solicitor, trusted him to borrow this money for him, and to appropriate it in payment of this mortgage, and Van Wart failed in doing what the plaintiff trusted him to do. But the defendant Seeley was in no way responsible for this; he did nothing which in any way contributed to the plaintiff doing what he did. I must, therefore, hold that the principal of this mortgage has not been paid, but that the $250 for which the plaintiff gave his bond is owing as principal, and a charge upon the land in question.

There must be a reference as to interest due unless the parties can agree.

1902.

March 18.

DEBURY v. DEBURY.

—No. 2. See Ante, p. 278.

Husband and wife—Purchase by husband of real estate in name of wife—Repairs by husband to wife's real estate—Purchase by husband of leasehold interests in wife's real estate—Lien—Intention—Onus of proof—The Married Women's Property Act, 58 Vict., c. 24.

Notwithstanding that the common law rights of a husband to the use and income of his wife's real estate are taken away by The Married Women's Property Act, 58 Vict., c. 24, he is not entitled to a charge on such real estate for money paid by him prior to the Act for repairs thereto, and for the surrender of leasehold interests therein, where the expenditure was made solely to improve the property.

The onus is upon the husband of establishing a resulting trust in his favor in land purchased by him in the name of his wife.

The facts in this suit are fully stated in the judgment of the Court. Argument was heard November 2, 1901.

A. A. Stockton, K.C., and *D. Mullin*, K.C., for the plaintiff:—

The defendant Madame DeBury holds the freehold property purchased by her husband with his own money as a trustee for him. The presumption that he intended the property to be a gift to her is displaced by the circumstance that the conveyance was made in her name wholly because she owned adjacent property, and it was convenient that the property should be in one name. The plaintiff is entitled to a declaration that this is his property, and not merely to a lien for the purchase money, as prayed for in the bill. For this purpose we ask leave to amend the bill. The plaintiff is also entitled to a lien for money expended in necessary repairs and improvements on the property in question, and in the extinction of the leases. The expenditure was reasonable, and was made by him as agent, and not as husband, in the management of the property. It might be said that on the surrender of the

leases the estate represented by them merged in the wife's freehold, and that no lien could attach for the outlay made in that connection. A like argument is not allowed to prevail against the claim of a trustee to be indemnified by lien for money laid out in discharging a mortgage or other incumbrance affecting the trust estate. See *Re German Mining Co.* (1); *Mathias* v. *Mathias* (2).

A. O. Earle, K.C., for the defendants: —

A wife takes the benefit of any outlay made by the husband upon her real estate. See *Fitzpatrick* v. *Dryden* (3). The presumption that a purchase by a husband in the name of his wife is intended to be a gift to her is not necessary to effect that result, which consequently cannot be affected by evidence of intention of the husband to retain a lien for the expenditure. Money, if any, spent by him in acquiring the surrender of the leaseholds, and in making repairs, belongs irrevocably to the wife. With respect to the freehold purchased by him the presumption that it was a gift to the wife is not displaced by evidence necessary to establish a resulting trust in his favor. He never acted toward any expenditure made by him upon the basis that it constituted a debt due him by his wife, and there being no debt there could not be a lien. The expenditure was not entered in his books as a charge against his wife, and rents received during his management of his wife's various properties were not appropriated by him towards discharging it. In the state of the law at that time he was entitled to the revenues from his wife's property for his own use, and felt himself under no necessity to safeguard with a lien money of his own used in improving his wife's property, or in acquiring property in her name, by advancing it as a loan. Before he could charge the wife's property with repairs he should have obtained her consent, otherwise his expenditures might consume the property. Leave to amend the bill should not be granted.

(1) 4 De G., M. & G. 19. (2) 3 Sm. & G. 552.
(3) 30 N. B. 558, 583.

1902. The relief claimed in the bill depends upon evidence of a lien, and cannot be granted on proof of a resulting trust.

DEBURY v. DEBURY.

1902. March 18. BARKER, J.:—

The main question involved in this case having been determined adversely to the plaintiff (1), I have now to dispose of the claim put forward by him in sections seven and eight of his bill. These sections are as follows: "7.—The plaintiff charges and alleges that he has advanced the sum of three thousand dollars out of his own moneys to pay the purchase money of certain properties at Portland Point in the City of Saint John, known as the Rankin wharf property, purchased in the year 1893 from Robert Rankin, of Liverpool, being certain leaseholds held by the said Robert Rankin, the freehold of which was vested in the said plaintiff, Robert Visart DeBury and the said defendant, Lucy Gertrude Visart DeBury, and also certain freehold lands and premises there situate, which properties were so purchased pursuant to a memorandum of agreement made between the said plaintiff and his wife, Lucy Gertrude Visart DeBury of the one part, and the said Robert Rankin of the other part, to which memorandum of agreement the said plaintiff craves leave to refer, and which memorandum of agreement is now in the custody of the said plaintiff, and that the said leasehold interests of the said Robert Rankin were surrendered by him to the said plaintiff and the said defendant Lucy Gertrude Visart DeBury, his wife, on the tenth day of May, A. D. 1893, and the said plaintiff craves leave to refer to the said surrender of lease, which surrender of lease is now in the said plaintiff's custody, and that the said freehold property was conveyed by the said Robert Rankin to the said defendant Lucy Gertrude Visart DeBury at the request of and by the direction of the said plaintiff by deed dated the first day of May, A. D. 1893, to which deed the said plaintiff craves leave to refer, and which deed is now in the said plaintiff's custody, and the plaintiff claims that he is entitled to a lien or charge upon

(1) *Ante*, 278.

the said property thus acquired from the said Robert Rankin to the extent of the said purchase money so advanced and paid by him the said plaintiff out of his own moneys as aforesaid."

Section 8, as amended, is as follows: "That the said plaintiff has also advanced out of his own moneys a large amount, to wit, the sum of $1,100 for expenditures made in repairs and improvements placed upon the said Rankin wharf property after the same was acquired as hereinbefore set forth, and before the first day of January, A. D. 1896, and a further sum of $450 since the last mentioned date, and that such repairs and improvements were necessary for the preservation and advantage of the said wharf property, and the said plaintiff claims that he is entitled to a charge or lien upon the said last mentioned property for the moneys so laid out and expended on such repairs and improvements."

Annexed to the bill is an affidavit of the plaintiff, in which he says he has carefully read over the bill, and that the statements and allegations in it are just and true. I mention this fact only for the purpose of shewing that the statement of the plaintiff's claim in the section I have just quoted, was made deliberately, because his Counsel on the argument rested the claim upon what seems to me an altogether different ground, as I shall presently point out. The bill among other things prays for a declaration that the plaintiff has a lien or charge on the property in question for the sums expended in its purchase and repair, amounting in all to the sum of $4,550. The agreement referred to in section 7, is made between the plaintiff and Madame DeBury of the one part, and Robert Rankin of the other part, and provides that in consideration of $3,000 to be paid by the plaintiff and his wife to Rankin, he was to surrender to them four leasehold lots, and to convey his interest in certain freehold lots. It appears by the evidence that in performance of this agreement the $3,000 was paid, and by an indenture dated May 10, 1893, Rankin surrendered to the plaintiff and his wife the leasehold premises in question, which surrender they accepted, and by the instrument

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they released Rankin from the covenants in the several leases binding upon him. By a separate indenture dated May 1, 1893, and made between Rankin and Madame DeBury, and to which the plaintiff is not a party, Rankin conveyed to her all his right, title and interest in the freehold lots in question to hold them for her own use and benefit. Madame DeBury had acquired the reversionary interest in the leasehold lots as a part of her father's estate which came to her on the partition, and when the surrender was made in terms to her and her husband he had no interest in or title to the property except in right of his wife. There is no question here as to the fact that the $3,000 was paid, or that the $1,550 was expended in repairs, which were, at that time, necessary for the useful and profitable enjoyment of the property. The evidence has satisfied me, and I so find, that the $3,000 paid to Rankin by the plaintiff in the purchase of the freehold lots and the surrender of the leaseholds, was his own money and not that of his wife, but as to the remaining $1,550 expended for repairs I am unable to say from the evidence whether any of it can be said to have been his money, or if so, what amount. And as the onus is upon him, not only to establish the fact that the lien exists, but also the amount for which it is a charge, I think he has not discharged that onus. It is to be remembered that at this time, and for many years before and after, the plaintiff had the entire management and control of his wife's property; he received all the rents and profits, disbursed the moneys, and—except the $3,000 I have mentioned, which seems to have been kept substantially distinct from other investments—the moneys of the plaintiff and those of his wife seem, as one would naturally expect would be the case, to have been put into one common fund so that it would be impossible to attribute a payment from it to the money of one more than of the other. Such, at all events, seems to me to be the effect of the evidence.

It does not appear that this purchase took place at all at the instance of Madame DeBury, although of course she concurred in it. The plaintiff, in the management of his

wife's property, of which he was receiving the benefit, seems to have thought, for reasons which he has given in his evidence, that the purchase was a wise one with the view of improving his wife's estate. I am unable to see upon what principle the purchase money in such a case becomes a charge upon the property. As between husband and wife it must be regarded either as a gift or as creating a resulting trust in favor of the husband. Where the transaction is between husband and wife, and the conveyance is to the wife, the presumption is that a gift was intended. That is, of course, a presumption which may be rebutted by the facts and surrounding circumstances, but the transaction itself, unexplained, is evidence of a gift, and will be so held; the presumption of gift arising from the moral obligation to give. So well recognized is this principle that it applies as well to purchases by the husband in the joint names of himself and wife, in which case it enures for the benefit of the wife as survivor. This is the case whether the gift be of real or of personal property: *Drew* v. *Martin* (1); *In re Eykyn's Trusts* (2); *Fowkes* v. *Pascoe* (3); *Brett's* Modern Ld. Cas. (4).

As the question is one of intention, evidence of declarations at the time, or of what took place then is admissible to prove it, though subsequent declarations, except so far as they prove intention at the time, are not: *Marshal* v. *Crutwell* (5). And in *Ex parte Cooper* (6), it is said that when the parties are alive and give evidence, there is no occasion to resort to presumption, as the question is one of fact. The plaintiff himself is the only witness examined on this point and his evidence is as follows:—"How did you come to have the deed taken in your wife's name? Was that an arrangement between you and her?" To which he replied: "Yes, I told her I had put it in her name; of course I could have put it in my own name if I thought so; the income from my wife's property and this property was not then under the control of others, and

(1) 2 H. & M. 130.
(2) 6 Ch. D. 115.
(3) L. R. 10 Ch. 343.
(4) P. 6, *et seqq.*
(5) L. R. 20 Eq. 328.
(6) [1882] W. N. 96.

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I thought it was better, because she owned the fee in property adjacent, and I did it in that way as a matter of convenience, but I could have put in my own name then." This evidence taken in connection with matters as they existed at that time, so far from rebutting the presumption of gift, entirely supports it. Here was the case of man and wife and family living amicably together. Madame DeBury owned a large and valuable property yielding a large rental. The plaintiff by virtue of his marital rights received the rents and profits, and enjoyed in reference to this property all the rights and privileges by common law given to the husband, subject only to the few limitations prescribed by the Married Women's Property Act in force at that time. Under these circumstances it was of very little importance to him whether the title was in his wife or himself, and as she owned all the adjacent property it was better that she should own this also. I have no doubt whatever that the plaintiff had no idea or intention of creating any trust in his own favor, a conclusion which seems to me supported by the fact that years afterwards when this bill was filed and when circumstances had been materially changed to the plaintiff's disadvantage by the present Married Women's Property Act, he only asserted a right to have the property charged with the amount of his expenditure; a claim which is not only inconsistent with the idea of any trust, but is rather based on the assumption that the title is beneficially as well as legally in Madame DeBury. The freehold lots therefore stand in the position of property acquired by Madame DeBury from her husband during coverture, and as that class of property is specially exempted from the operation of The Married Women's Property Act, 1895, the assignment made in pursuance of that Act by Madame DeBury, and which is in question in this suit, would not operate to transfer either the title or possession of the lots to the defendants Coster and Miss Simonds, at all events during the plaintiff's lifetime.

The position of the leasehold properties is somewhat different. At first blush it may seem that the changed condition in the husband's status, brought about by The

Married Women's Property Act, 1895, by which his marital rights as to his wife's property have been so materially curtailed, ought to give him an equity to be in some way compensated or secured for moneys expended out of his own fortune for the purchase of the surrender of the leases and in making useful and necessary repairs upon the leasehold premises. Upon consideration, however, I have arrived at the conclusion that no such equity exists. It was argued that by the surrender there was no merger of the two estates, and reference was made to the payment of charges, such as mortgages and the like—in support of that view. In such cases it is always a question of intention whether the person paying intends to keep the charge alive for the benefit of himself or not: *Adams* v. *Angell* (1); *Thorne* v. *Cann* (2),

There is really no analogy between such cases and the present, but if there was, the evidence as I have already pointed out, shews that the plaintiff had no intention except to put an end to the outstanding term, and thus improve what was his wife's property in point of law, but his property in point of use and benefit during his life. Now what is the effect of the surrender? The less estate merges in the greater, and the outstanding term of years ceases to exist. In *Co. Litt.* (3), it is said that, "Having regard to the parties to the surrender the estate is absolutely drowned." See also *Saint* v. *Pilley* (4). The instant that the surrender was delivered to Madame DeBury and accepted by her as owner of the reversion, the plaintiff as husband came into the possession of the property entitled to the rents and profits, not in right of himself, but in right of his wife. The lease was ended, and there was no further relation of landlord and tenant. This being the effect of the surrender, and there being ample evidence to shew that in the expenditure of his money, both in the purchase and the repairs, the plaintiff's sole intention was to benefit his wife's property, and thus benefit himself who had a life estate in it, he could not

(1) 5 Ch. D. 634.
(2) [1895] A. C. 11.
(3) 338 b.
(4) L. R. 10 Ex. 137.

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during his life, any more than his representatives could after his death, claim to have a charge upon the property for the expenditure. What has occurred since to create any such right? It is true that the Legislature has enacted a Statute which, in effect, has taken away from the plaintiff many of his marital rights and given to his wife full power of enjoyment and disposal of her own property quite irrespective of his control. But upon what principle can the wife's right thus secured to her by legislative enactment, only be exercised on condition that she incumber her property by a charge in favor of her husband which did not exist before, and the only ground for which is that the legislation has been prejudicial to his common law privileges? I can see none. It was not the wife's act which took away the husband's rights; it was the act of the Legislature, and if the wife has chosen, in the exercise of that right, to make a conveyance of her property, she has done no more than the law authorized, and has, therefore, done no one any wrong which this Court can recognize. Neither am I able to see, at all events as between husband and wife (and there is no question arising here as to the rights of creditors) how the exception in The Married Women's Property Act, 1895, by which property acquired by the wife from her husband during coverture is exempted from its operation, affects the conveyance of this property by the wife. That Madame DeBury can convey all her interest in this property acquired from her father cannot be and is not denied. Would that not necessarily carry with it the whole title? What outstanding interest or property would remain in the plaintiff which he could convey? He has no lien, no charge, and no lease. He stands, as it seems to me, in no better position than he would if he had spent his time or his money in repairs or improvements which had become part and parcel of the freehold and inseparable from it, and for which he had no lien or charge in any way.

I have already pointed out that this is not a case between debtor and creditor, but one involving the rights of husband and wife *inter se*. It will, however, not be

altogether irrelevant to cite a few cases in which the rights of creditors, in reference to property similarly situated, have been discussed. In *Ford* v. *Bowser* (1), and in *Bell* v. *Wetmore* (2), the wife's separate property, though in part purchased by the husband's money, was held not liable to seizure under an execution against him. In *Jackson* v. *Bowman* (3), it appeared that a person in insolvent circumstances conveyed by way of settlement on his intended wife a lot of land on which he had commenced to build a house. The house was completed after marriage. On a bill filed by the husband's assignee in insolvency, the Court declared that as against the creditors the wife had a right to the benefit of the value of the building as it was at the date of the marriage, but that the expenditure afterwards, was voluntary. The Vice-Chancellor said: "As to that part of it which was built before; suppose it had been completed before the marriage, I do not see how I could in that case separate the house from the land. I must have held both settled upon the wife before marriage, the conveyance of the land, though before the building of the house, being effectual for that purpose, and if so, an incomplete house must follow the same rule." In *Hill* v. *Thompson* (4), it appeared that the husband expended money in improving property purchased by his wife from him out of money belonging to her separate estate. Spragge, C., says: "It is suggested that a large expenditure of moneys of the husband having been made in building upon the land in question, the case falls within the principle of *Jackson* v. *Bowman*. If there is no creditor defeated or hindered by what has been done in this respect, Mrs. Thompson is entitled to the benefit of this improvement upon her property." In *Barrack* v. *M'Culloch* (5), Wood, V.-C. says: "It appears that there was a settlement made of some land to her (the wife's) separate use in 1841, long anterior to the transaction in question; and upon the property so settled two houses had been built. There is some discrepancy in the evidence as to what was the exact amount of her money, and the exact

(1) 24 N. B. 510.
(2) 3 P. & B. 534.
(3) 14 Gr. 156.
(4) 17 Gr. 445.
(5) 3 K. & J. 119.

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amount of her husband's money, applied in the building of the second house; but the matter occurred too long ago for any attempt now to be made to open that transaction, and counsel, very properly, did not seek to do so. As far as the original transaction is concerned, that property became hers; and whether the second house was mainly built with the husband's money or her own money is not material, the property unquestionably when the houses were so built, became hers, and her interest in it was for her separate use."

In *Hamer* v. *Tilsley* (1), there was a demurrer to the bill, and the material facts, which, for the purposes of the demurrer were admitted, were these: The husband purchased an outstanding life interest in some property to which his wife was entitled in remainder, and his principal motive in doing so, was that he might obtain possession of the premises and effect the repairs which were absolutely necessary for their preservation, with a view to his interest therein in right of his wife. These repairs which were made at the request of his wife, amounted to £230; and it was admitted that this amount was expended and advanced by the husband on the faith of his being entitled to receive the rents and profits of the premises during the joint lives of himself and wife, and that it was intended to be charged in Equity thereupon. After this expenditure had been made the husband obtained a divorce on the ground of the wife's adultery, and she thereupon commenced an action of ejectment to recover possession of the premises. He then filed a bill seeking to have the amount of his expenditure declared an equitable charge on the premises, and asking for an injunction to restrain the action. The defendant demurred for want of equity. The argument there was that the wife by her adultery had transferred from the husband the rents which his expenditure created, and which, but for her breach of the marriage contract, he would have enjoyed during his life. Wood, V.-C., refused to adopt this contention. He says (I quote from the Jurist report): "If the husband had died, it is clear that his executors could not have claimed anything. The repairs are executed, not upon the wife's

(1) Johns. 486; 5 Jur. (N. S.) 1344.

estate, but upon that which is his own during their joint lives, and the misconduct of the wife cannot give him any equity against her. If I were to hold that the expectations of the husband are to form the subject of equity, I might have all the husbands in the country making claims for expenses incurred in the confidence that their wives would do their duty." This case is in many respects stronger than the present. There the repairs were made at the express solicitation of the wife, and they were intended to be an equitable charge, but there is nothing of that kind in this case. In that case the husband's loss was the result of a gross wrong committed by the wife, while here the wife has done no wrong. A distinction is sought to be drawn between the plaintiff's position as to the repairs put upon the property since 1st January, 1896, when the present Married Women's Property Act came into operation, and his position as to those put upon the property before that date. As I have already said, it is not in my opinion possible from the evidence to shew that the money so expended was in either case the plaintiff's money, not derived in whole or in part from his wife as part of her income. But if it were, I should think under the circumstances of this case there is no distinction between the two claims, and the plaintiff has no lien as to either.

I think as a result of the whole case, that the freehold lots purchased from Rankin should be exempted from the operation of the trust deed, as being property exempted from the operation of the Act of 1895, but that in other respects it must be declared as against the plaintiff valid. The plaintiff will also fail as to his claim for repairs, etc., to the Rankin wharf.

As to costs, while it is true that the plaintiff has failed in the main contention, I think it was a proper course, considering the large number of the tenants, to obtain an opinion from the Court as to the construction of the trust deed and the powers of the trustees thereunder. This was in the interest of all concerned. There will therefore be no order as to costs, each party paying their own; the trustees to have their costs out of the trust estate.

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Practice—Reference—Warrant to proceed—At whose instance warrant may be taken out—Authority of Referee to order parties to proceed—Act 53 Vict., c. 4, s. 160.

By the practice of the Court, and by s. 160 of Act 53 Vict., c. 4, where a reference has been entered upon, a warrant to proceed may be taken out by either party.

Semble, on a failure to adjourn a reference, the Referee has power under Act 53 Vict., c. 4, s. 160, to issue of his own motion a warrant for the parties to proceed.

Motion to dismiss bill, or for such other order as to the Court might seem right. The facts are sufficiently stated in the judgment of the Court.

Argument was heard February 19, 1902.

W. B. Chandler, K.C., in support of the motion:—

The plaintiff has the carriage of the decree, and the onus was upon her of proceeding with the reference by taking out a warrant for the purpose under sect. 160 of the Supreme Court in Equity Act, 53 Vict., c. 4. Failing to do so we are obliged, under sect. 161 of the Act, to apply to the Court for an order against the plaintiff to peremptorily proceed with the reference, on pain of dismissal of the cause; or we may make the present application to have the bill dismissed as for delay in prosecuting the suit. The practice of the Court laid down in *Smith's* Ch. Pr. (1), that if the party actually prosecuting a decree or order does not proceed before the Master with due diligence, the Master is at liberty, upon the application of any other party interested, to commit to him the prosecution of the decree or order, is superseded by the Act.

M. G. Teed, K.C., *contra*:—

The practice of the Court is contained in the Act.

(1) Vol. 2, p. 108.

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Under sect. 160 a warrant to proceed may be taken out by either party, and if either party fails to attend, the Referee may under sections 163 and 164 proceed in his absence. The delay is that of the defendants, whose accounts are still before the Referee. The notice of motion is insufficient for any other purpose than to dismiss the bill, and as that will not be granted no order under it can be made.

Chandler, K.C., in reply.

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In January, 1901, there was a reference made in this case, on the plaintiff's application, to a Referee to inquire and report upon certain accounts between the parties. Mr. Sweeney, the Referee named under the order, on receiving the order of reference issued his warrant for the parties to proceed. This was done on the plaintiff's application, and the warrant was made returnable on the 29th May, 1901. It seems that the defendants claim a large sum as due them from the plaintiff on various accounts, and on the return of the Referee's warrant they filed with him a sworn statement of account. To this the plaintiff filed a sworn objection to some sixty items of the account. The onus, therefore, of proving the items so objected to was on the defendants, who were, or at all events seem to have been regarded, as the accounting parties. Evidence was being given by the defendants when some question was raised by the Referee as to his fees, which was brought before me in an informal way for an expression of opinion, which I gave (1). The Referee then expressed his willingness to proceed, but nothing has been done since the 13th of August last. The plaintiff has not applied for any warrant to proceed, as she claims the defendants should do that, as their case is unfinished, and the defendants refuse to take out a warrant, as they contend the plaintiff alone has that right, as she has the carriage of the decree. The defendants now apply on notice for an order that the bill be dismissed, or for such other order as the Court may think right, on the

(1) *Ante*, 269.

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ground that the plaintiff has unnecessarily delayed in proceeding with the reference.

Had it not been that this motion has been made by a gentleman so familiar with the practice of this Court as Mr. Chandler is, I should have thought the point involved was not open to argument. I have myself, when acting under an order of reference, granted so many warrants to proceed under the same circumstances, and obtained so many from other officers, including in the number old practitioners who had had a long experience as Masters in Chancery, that I had considered the practice as settled. It may, however, be as well to see what warrant there is for it.

When the original Equity Act was passed in 1854, provisions as to references were made, which have substantially remained unchanged up to the present time. In a note which the late Mr. Botsford, who was well versed in the practice of the Court of Chancery which prevailed previous to 1854, appended in his "Rules of Court" (1) to sect. 2 of chap. 3 of Act 17 Vict., c 18, he says that the practice before the officer—that is, the Referee of the present day—must necessarily be regulated by the practice in the Master's office; for which he refers to *Grant's* Ch. Pr. (2), and *Smith's* Ch. Pr. (3). I have consulted both of these authorities and find the same practice laid down in both. The first step is for the solicitor obtaining the reference to carry in the decree, and to take out a warrant to proceed. On its return the parties attend and, if necessary, settle the course of procedure as to the matters referred. That seems a warrant, which is taken out on the application of the solicitor who obtained the order of reference; and so it is provided by sect. 161 of our present Act (53 Vict., c. 4), as it was by the corresponding section of the Act of 1854, that if he does not proceed within a month from the date of settling the order an application may be made under that section. That the Referee can issue subsequent warrants I think there can be no doubt, and I can find nothing either in *Smith* or *Grant*, which gives support to the idea that warrants to proceed

(1) P. 70. (2) Vol. 1, p. 311. (3) Vol. 2, p. 96.

on a reference can only be taken out by the party at whose instance the order of reference was obtained. On the contrary quite a different practice prevails. In *Smith* (1) it is said: "If the plaintiff is an accounting party, one of the defendants leaves interrogatories for his examination. So where the plaintiff neglects to proceed, any defendant may take such steps as are necessary for the due prosecution of the reference before the Master." At page 117 of the same book it is said that when the charge has been allowed the defendant (that is, the accounting party—see note to page 116) carries in his discharge. A warrant to proceed on this discharge is then taken out and served. It is not stated in words that this warrant is taken out by the defendant, but it is clear that it is so. At page 121 it is said that if the discharge is brought in, and the accounting party does not proceed with it, or having partially proceeded on it, queried items remain to be disposed of, the plaintiff should take out and serve a warrant to dispose of the same, and if the defendant does not then support the items, or crave time, the whole of such payments may be struck out. From this passage it seems to me clear that two things are provided for. In the first place it is provided that a certain course can be adopted if the defendant does not proceed. Involved in that is, I think, a power to the defendant to proceed, which he can only do by taking out the warrant for that purpose, as already mentioned. If he does not do that the plaintiff can himself force him on by taking out a warrant for that purpose. I have no doubt, whatever, that under this old practice it was quite competent, in the condition in which this matter now is, for the defendants to have taken out a warrant to proceed with their evidence, and complete their proof in support of the items in their account to which an objection has been filed. I also think that it would have been quite competent for the plaintiff to have taken out a warrant for the defendants to proceed, if she had so desired. I should have come to the same conclusion under section 160 of the present Equity Act, by which it is provided that "no summons or warrant

(1) Vol. 2, p. 104.

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shall be issued by any Referee on a reference other than to require the parties to proceed, which they shall do forthwith, if required by the Referee, with power of adjournment, and, on omission to adjourn, with power to proceed on notifying the parties." It is not necessary to express an opinion on the point, but I am disposed to think that this section gives the Referee ample power on his own motion, if he thinks fit, to issue his warrant for the parties to proceed, where the continuity of the proceedings has been broken by an omission to adjourn them. He is an officer of the Court, to whom certain matters have been referred, in reference to which he is to inquire and report to the Court, so that the matters involved in the suit may be determined, and such a power is therefore not an unreasonable one. But if the section does not go so far, I entertain no doubt that it does authorize the Referee, after the first warrant has issued, to issue any subsequent warrant either on the application of the party who wishes to proceed himself, when it is his duty to proceed, or to force the other party to proceed when it is his duty to proceed.

I therefore think that while the plaintiff might have taken out a warrant he was not bound to do so, and that the defendants, if they wish to go on, can take out a warrant for that purpose. This is, I think, in accordance with the old practice. I think it is warranted by the section I have quoted, and so far as my experience goes, it is the practice which has prevailed for very many years.

This motion must be dismissed with costs.

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April 15.

Agreement—Option to purchase land—Time the essence of the agreement—Injunction—Restraint of ejectment action—Terms of granting injunction—Equitable relief in ejectment action—Specific performance—Act 60 Vict., c. 24, s. 283.

Time is of the essence of a unilateral agreement, such as an option to purchase land.

On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to recover possession of the land, the Court ordered that on the defendant confessing the action of ejectment the plaintiff should be restrained until further order from taking possession; otherwise the application should be dismissed.

Semble, that relief by specific performance cannot be obtained under s. 283 of Act 60 Vict., c. 24.

Motion for an interim injunction order. The facts are sufficiently stated in the judgment of the Court.

Argument was heard April 1, 1902.

D. McLeod Vince, and *J. C. Hartley*, in support of the motion.

A. B. Connell, K.C., *contra*: —

Time is of the essence of a contract in equity as well as in law, and the Court will not relieve against the failure to perform the contract on the date appointed for its completion, except where it would be inequitable not to do so. See *Tilley* v. *Thomas* (1); *Parkin* v. *Thorold* (2); *Patrick* v. *Milner* (3); *McLaggan* v. *Hutchison* (4). No equity exists here in excuse of the plaintiff's delay in making a tender from October 6th, the last day on which the option to purchase could be exercised, to November 15th, the date on which the tender was made. The agreement was unilateral, and

(1) L. R. 3 Ch. 61.
(2) 16 Beav. 59.
(3) 2 C. P. D. 342.
(4) 30 N. B. 185.

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consequently time must have been originally of its essence: *Fry* on Specific Performance (1); *Moss* v. *Barton* (2); *Austin* v. *Tawney* (3). The Court will not restrain the ejectment action if the equitable rights of the parties can be there conserved: *Bispham's* Principles of Equity (4).

Sect. 281 of The Supreme Court Act, 60 Vict., c. 24, enables a defendant who has a defence to an action of ejectment on equitable grounds, in addition to the notice denying the plaintiff's title, and asserting title in himself, to state by way of defence facts which entitle him on equitable grounds to retain possession; and by sect. 283 it is provided that the defendant may in such statement, as in a bill in Equity, or in an answer asking cross relief, attack the title of the plaintiff on any ground whatever, and in all such cases he may pray and ask for relief against the plaintiff; and it shall be competent for the Court, on the hearing or trial of the cause, in all such cases to grant or withhold the relief prayed for, as law and justice shall demand, and generally to do justice, and to determine all questions between the parties arising in the action according to law. The plaintiff is defending the action of ejectment upon equitable grounds, and has put in a statement of defence disclosing the facts shewn by the bill in this suit.

Vince, in reply:—

The plaintiff's repeated efforts to pay the money shew his good faith, and entitle him to relief. Time is not in Equity the essence of a contract in the absence of an express stipulation for the purpose; or unless it can be necessarily implied from the nature of the property, or the surrounding circumstances: *Tilley* v. *Thomas* (5). The mere mention of a time at or before which an act is to be performed is not sufficient: *Hearne* v. *Tenant* (6); *Webb* v. *Hughes* (7). The former doctrine of the Court of Equity was that the parties could not contract that time should be

(1) 2nd ed., ss. 1061, 1073.
(2) L. R. 1 Eq. 474.
(3) L. R. 2 Ch. 143.
(4) S. 409.
(5) L. R. 3 Ch. 61.
(6) 13 Ves. 287,289.
(7) L. R. 10 Eq. 286.

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of the essence of their agreement, and that rule is only modified where it clearly appears they intended that time should be of the essence of the agreement: *Hudson* v. *Bartram* (1); *Hudson* v. *Temple* (2); *Hatten* v. *Russell* (3). Time cannot be of the essence of an agreement to a vendor, for the failure of the vendee to make payment on a named date does not inflict upon him an injury for which money will not be sufficient compensation. Interest is usually sufficient amends, and the plaintiff included that in his tender. The action of ejectment will not afford the relief to which the plaintiff is entitled. It would leave him in possession, whereas he is entitled to a conveyance from the defendant under a decree for specific performance. See *Eden* on Injunctions (4). No jurisdiction to grant relief of this nature in the action of ejectment is conferred by the Supreme Court Act.

1902. April 15. BARKER, J.:—

This is an application for an interim injunction order to restrain the defendant from proceeding in an action of ejectment against the plaintiff for recovery of the possession of a piece of land in Carleton County. The motion is founded upon a sworn bill, by which it appears that the plaintiff is the assignee of a certain lease, dated October 7, 1892, made by the defendant to one Perkins, by which the land in question was leased to Perkins for a term of three years at a rent of $150, payable in advance, with a right to extend the term for a further period of six years—that is, two terms of three years each—on paying a further sum of $150 in advance, at the beginning of each term of three years. Perkins paid the first $150 on obtaining the lease, and the second $150 on the 7th October, 1895. On the 29th August, 1898, he assigned the lease to the plaintiff, who paid the third $150 on the 7th October of that year, in extension of the term for the full period of nine years. The lease contains the following purchase-clause: "And it

(1) 3 Madd. 440.
(2) 29 Beav. 536.
(3) 38 Ch. D. 339.
(4) P. 27.

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is hereby agreed that the said Perkins shall have the right to purchase, and the said Freeman hereby agrees to sell, alien, release, convey and confirm the said building plot of land, with all improvements thereon, to the said Shedric A. Perkins at any time within the said nine years conveyed by the said three terms of this indenture, on the payment by the said Shedric A. Perkins, his heirs and assigns, of the sum of six hundred dollars. And it is further agreed that any payment which may have been made on account of this lease rent in advance of the time at which such conveyance may occur, may be allowed as part payment of the sum of $600, and the full time effected by the lease is nine years, subject to all conditions and provisions contained therein."

The bill alleges that two or three days before October 7, 1901, the plaintiff informed the defendant that on that day he would be prepared to pay him the sum of $150, as the balance of the purchase money for the land. Section 7 of the bill is as follows:—"That on the seventh day of October, in the year of our Lord one thousand nine hundred and one, the plaintiff went to the home of the said defendant in the said Parish of Wicklow, and took with him one hundred and fifty dollars, and did not find the said defendant at his home, and upon making diligent inquiry, the plaintiff ascertained that said defendant was not at home, but was in the County of Aroostook, in the State of Maine, one of the United States of America, and the said plaintiff offered to pay the money to the person at the time in possession of the house of the said defendant, who would not accept the same, and telling him that it was the balance of the purchase money due the defendant for the lands occupied by the plaintiff, and mentioned in the agreement hereinbefore in the first paragraph of this bill set forth;" that is, the agreement in the lease which I have mentioned. Except as to the meagre information in the section of the bill which I have quoted, I am altogether in the dark as to what took place on the 7th October last at the defendant's house. The bill, however, goes on to allege in sections 8 and 9, that the plaintiff on the 15th November, 1901, and again on the 25th

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of the same month, offered the defendant to pay him $160 as the final payment of this purchase money, and that the defendant on both occasions refused to accept it. The plaintiff then commenced this suit for a specific performance of the contract to convey, and the defendant commenced his action of ejectment. In fact, the writ of summons in ejectment was issued before the summons in this suit, but not served until afterwards, but it appears that when the suit was commenced the plaintiff did not know anything of the ejectment proceedings. The defendant claimed that this motion should be refused on several grounds; but for the purposes of the order which I shall make, it is only necessary to consider one of them.

The defendant's Counsel contended, and the plaintiff's Counsel admitted, that the nine years expired with the 6th October, 1901, and therefore if any sufficient offer to pay were made on the following day it would be after the expiration of the time within which the defendant had agreed to convey. In any case, I cannot think that what took place on the 7th October, as described in the bill, would necessarily amount to a tender of the money. The plaintiff's Counsel does not in fact contend that it does amount to more than evidence of a *bonâ fide* intention on the plaintiff's part of acting on the agreement and exercising his option to purchase. And he relies altogether upon the principle that time is not the essence of the contract, it not being specifically made so by the contract itself, and there being nothing either in the nature of the property or the surrounding circumstances, to imply any such condition. And in that case, he contends, as there is clear proof of a *bonâ fide* intention on his part to purchase, the offer to pay on the 15th November would, in Equity, be considered sufficient, the additional $10 tendered being ample compensation by way of interest on the money for the few weeks' delay. I dare say this contention would prevail if this were the ordinary case of vendor and purchaser—where the one had agreed to buy and the other to sell, and where each had an enforceable contract with the other. But that

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principle does not apply to unilateral covenants or options to purchase such as this, where but one of the parties is bound, and he is only bound upon certain conditions to be performed by the other party. In such a case, if the conditions are not strictly performed, the party is not bound to convey, for if he were, a condition would be imported into his contract by which his liability would be regulated, although he had never in any way assented to it. In such contracts time is always of the essence of the contract, and the party seeking the performance of it must, at all events in the absence of fraud, or some other circumstance which would as between the parties be an excuse, shew a strict performance of the condition upon which his right depends. This proposition is, I think, supported by the following, among other cases: *Lord Ranelagh* v. *Melton* (1); *Brooke* v. *Garrod* (2); *Weston* v. *Collins* (3); *Harris* v. *Robinson* (4); *Ball* v. *Canada Co.* (5); *Forbes* v. *Connolly* (6).

As this case now comes before me I should, under ordinary circumstances, dismiss this application with costs, as the plaintiff has not shewn any right to the relief he asks for. I think it, however, the duty of the Court to prevent, so far as it is possible, unnecessary complication between litigants, and to adopt a course which seems to afford them the most complete remedy in as speedy and inexpensive a manner as possible. It seems that the plaintiff, with other defences to this action of ejectment has, in pursuance of sect. 281 of The Supreme Court Act, 60 Vict., c. 24, stated by way of an equitable defence, the facts relied on in this suit and set forth in this bill. And it is contended by the defendant that, having thus selected his tribunal at law he must abandon this suit, especially as sect. 283 of the Act gives the Judge at Nisi Prius ample power to determine the equitable rights of the parties. It may be quite within the Judge's power in such a case if he thought the defendant in possession had an equitable right to have a legal title conveyed to him by the plaintiff, to direct a verdict to be

(1) 10 Jur. (N. S.) 1141.
(2) 3 K. & J. 608.
(3) 11 Jur. (N. S.) 190.
(4) 21 Can. S. C. R. 390.
(5) 24 Gr. 281.
(6) 5 Gr. 657.

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entered for the defendant in ejectment, and thus prevent him from being turned out of possession; but that would not give this plaintiff the substantial relief to which he is entitled, if he is entitled to anything, that is, a conveyance. This relief he can certainly get by means of this suit, but so far as I can see he could not get it by any procedure established by the sections to which I have referred. I think the proper course is, and I shall so order, that on the defendant giving a confession in the action of ejectment on or before the 22nd of April instant, when the next Carleton Circuit opens, with leave to enter up judgment immediately, the present defendant, that is, the plaintiff in ejectment, will be restrained from proceeding to enforce the judgment by writ of possession or otherwise until further order, in which case the costs of this present application will be reserved until the hearing. In case the plaintiff shall not give such confession this application will stand dismissed with costs.

1902. *April 15.*

TRAVERS v. THE ROMAN CATHOLIC BISHOP OF SAINT JOHN.

Will—"All my estate, real and personal"—Explanatory declarations—Intestacy—Suit for construction of will—Costs.

The Roman Catholic Bishop of Saint John is a corporation sole. The testator, incumbent of the bishopric, by his will made in his private name declared that, "although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of Saint John, for the benefit of religion, education and charity, in trust, according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of Saint John, in trust for the purposes and intentions for which they are used and established." He then gave coupon bonds to the same devisee in trust for described charitable objects, a sum of money for masses, and a legacy of a sum of money. The testator held in his own name certain real estate which had been conveyed to him for religious, charitable and educational purposes of the church. He possessed in his own right real and personal estate, the income from which he had used in common with income from all sources of church revenue, for the uses of the church, including its educational and charitable needs, as well as for his private purposes. In a suit by the next of kin for a declaration that the testator had died intestate as to his real and personal estate, less the specific and pecuniary bequests:—

Held, that the testator's real and personal estate passed by the will.

The Court being of opinion that the above suit was one proper to be brought, allowed the plaintiffs their costs, to be paid out of the estate.

Bill for the construction of the will of The Reverend John Sweeny, deceased, late Roman Catholic Bishop of Saint John. The facts fully appear in the judgment of the Court.

Argument was heard March 25, 1902.

A. A. Stockton, K.C., *J. H. Barry*, K.C., and *J. L. Carleton*, K.C., for the defendants:—

The will passes all the testator's real and personal estate. The words, "I give and devise and bequeath all

my estate, real and personal, wherever situated," are conclusive of the question. The testator would not have used them if his purpose was merely to vest in his ecclesiastical successor property of the church in the testator's name. He would in that view have limited the devise to church property. But a will of that scope would have been a futile instrument. Moreover, were the will so limited, the testator would have died intestate as to his own property. The testator makes it clear that he intended the will to include his own property, by the words, "Yet to meet any want or mistake, I give," etc. No more explicit indication could have been made by him that he was conscious that he was disposing of his own property, and that it was his intention to do so. The operative clause of the will will not be cut down to signify only church property by reason of the words, "in trust for the purposes and intentions for which they are used and established." The testator's real estate was treated by him as ecclesiastical property equally with property of the church. The revenue from it was mixed with church monies, and therefore it must have come to be regarded by him as indistinguishable in that respect from church property.

[BARKER, J.:—Upon what trust would Bishop Casey take this property?]

Any obscurity in the trust would not destroy the gift. If the words were, "all my estate * * * in trust for the purposes and intentions for which it is used and established," the validity of the gift would be unassailable though the trust could not be ascertained.

[BARKER, J.:—Do not the words signify that the testator is referring only to church property?]

That can only be allowed if the will is not read in its plain, grammatical sense, and in that construction the testator would have died intestate as to his own property. That is a result always avoided where possible, and it is a rule of construction that a testator must not be assumed

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to have intended to die intestate: *In re Harrison* (1); *In re Redfern* (2); *Edgeworth* v. *Edgeworth* (3). The words "for the purposes and intentions," etc., can be read as referring not to the testator's own property, but to "church * * * properties." The general words, "all my estate, real and personal," ought to receive their full and natural meaning, and should not be limited under the doctrine of *ejusdem generis* by the precedent reference to church property. The modern view has been to disregard or ignore that doctrine. In *Anderson* v. *Anderson* (4), the rule is stated thus by Lord Esher, M. R.: "*Prima facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before." Reading the operative words of the will in their plain and common meaning, or determining their meaning by a scrutiny of the will as a whole, there can be no doubt that the testator intended the will to embrace his own and church property. See *Jones* v. *Curry* (5); *Seale* v. *Rawlins* (6); *Grey* v. *Pearson* (7); *Lowther* v. *Bentinck* (8). It is proper to take into consideration the estrangement between the testator and the plaintiffs, and the unlikelihood that he would intend that Mrs. Travers should inherit his property.

C. N. Skinner, K.C., and *L. A. Currey*, K.C., for the plaintiffs:—

The key for the construction of the will lies in the declaration of the testator of his object in making the will, and in the circumstance that the title to property of the church was in his name. It is to meet a want or mistake, he says, that he gives and devises his property. But the want or mistake is not met by a gift of his own property. The

(1) 30 Ch. D. 390, 393.
(2) 6 Ch. D. 133, 136.
(3) L. R. 4 H. L. 35, 40.
(4) [1895] 1 Q. B. 749, 753.
(5) 1 Swan. 66, 72.
(6) [1892] A. C. 342.
(7) 6 H. L. C. 61, 106.
(8) L. R. 19 Eq. 166.

gift must, therefore, be held to refer to property that is affected by a want or mistake. That this intention was single to his mind is apparent in the words, "in trust for the purposes and intentions for which they are used and established." Those words do not apply to his own property. Church, ecclesiastical, and charitable properties, previously described as being held "for the benefit of religion, education and charity in trust, according to the intentions and purposes for which they were acquired and established," are manifestly meant by the reference. His own property was not "acquired and established for the benefit of religion, education and charity," nor was it "used and established" for such "purposes and intentions." The argument that the revenue from the real estate was thrown into hotch-potch with revenue from ecclesiastical sources proves nothing, for the common fund was used indiscriminately for private and ecclesiastical objects. The simple fact of mixing the income from his own real estate with that of church property could not divest him of his ownership and control of it. It was, therefore, not subject to a trust, and did not fall within the classes of property enumerated by him. Had he intended to dispose of his own property, the elaborate reference to church property was unnecessary. The only property he had in mind was that of the church, and the only object he wished to achieve was to take the title out of himself and vest it in his successor.

[BARKER, J.:—If the will relates merely to church property, there was no necessity to include personal estate, for with respect to that, there was no want or mistake to be met. It seems clear that he intended to dispose of his personal estate, why therefore not also his real estate?]

The words "real and personal" are so trite that he would use them without stopping to analyse them. We submit that he died intestate as to his personal estate, minus the coupon bonds and the pecuniary bequests. As gifts out of personalty they are inconsistent with the notion that the earlier disposition of all "my" personal

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estate referred to his own personal estate. By Act 25 Vict., c. 75, s. 5, provision is made for the vesting in the Roman Catholic Bishop of Saint John of lands held in trust by any person for any Roman Catholic Church within the diocese of Saint John. The testator was familiar with the Act, and sought by his will to anticipate the difficulty the Act was passed to obviate.

1902. April 15. BARKER, J.:—

The object of this suit is to obtain a declaration as to the construction to be placed on the will of the late Right Reverend John Sweeny, who was the Roman Catholic bishop of St. John for very many years previous to his death, which took place on the 25th March, 1901. Mrs. Travers, who with Dr. Travers her husband, are the plaintiffs, is a sister of the late Bishop, and his sole next of kin, and the defendants are the executors and devisees under the will. The will in question is in the testator's own handwriting, it is dated April 2, 1895, nearly six years before his death, and it has been duly proved, and letters testamentary granted by the Judge of Probates of St. John. It is claimed by the plaintiffs that the Bishop's sole intention in making this will, was to remedy some supposed defects in the title to certain properties standing on the records in his individual name, but which really were church properties, and should have been legally as well as beneficially vested in the Bishop, in his corporate name—"The Roman Catholic Bishop of Saint John," and that as to his own individual real estate there was a total intestacy, and as to his personal estate a partial intestacy, in which case the whole of the real and the undisposed of personal property would go to Mrs. Travers as the sole next of kin. The will in question is as follows:—

"In the name of God, amen. I, the Right Reverend John Sweeny, of the City of St. John, in the Province of New Brunswick, being of sound mind and in good health, but remembering the uncertainty of life, do hereby declare this to be my last will and testament, hereby revoking all former wills by me at any time made.

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"It is my will that all my just debts be paid and discharged without unnecessary delay, after my decease. Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of Saint John, New Brunswick, for the benefit of religion, education and charity, in trust, according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of Saint John, New Brunswick, in trust, for the purposes and intentions for which they are used and established.

"I give and bequeath to the R. C. Bishop of Saint John, the coupon bonds that I may have, to keep invested and re-invested for the benefit and support of the Orphan Asylum, Cliff street, the Saint Patrick's Industrial School, Parish of Simonds, and the Mater Misericordiæ Hospital, Sydney street, City of Saint John.

"I give also to my executors five hundred ($500) dollars to have masses said by the priests of the diocese, for the benefit of my soul and the souls of my departed relatives.

"I give also to Monsignor Thomas Connolly, V. G., one hundred dollars, in token of good will and on account of the trouble he may have in the execution of this will, etc.

"And I hereby appoint the Roman Catholic Bishop of Saint John and the Very Rev. Thomas Connolly, V. G., executors of this my last will and testament.

"In testimony whereof, I have hereunto set my hand and seal, in the City of Saint John, New Brunswick, the second day of April, in the year of our Lord one thousand eight hundred and ninety-five."

The controversy in this suit arises over the true meaning of the sentence in the will commencing with the words, "Although all the church," etc., and it is said there is an ambiguity in the language which can only be made clear by reference to surrounding circumstances. The evidence, which was given practically without objection

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by either side, shews, according to the plaintiffs' contention, that the Bishop when using the words, "any want or mistake," in the introductory part of the sentence, could only have had in his mind the position of the properties to which I have already referred. And in order to prove that these were properties actually in that position, the plaintiffs read the admissions in the fifth section of the defendants' answer, as follows:—

"We admit that while such Bishop there had been devised and deeded to the said The Right Reverend John Sweeny certain real estate which was intended by the devisors and grantors to be in trust for the Roman Catholic Church for the benefit of religion, education and charity, but which stood on the records in the name of the said The Right Reverend John Sweeny personally. The particulars of such real estate are as follows:—Property on old Loch Lomond Road, deeded to deceased by H. Bowyer Smith, intended for cemetery purposes. Property known as the Campbell property, situate on the corner of Cliff and Coburg Streets, in the City of Saint John, deeded by Ellen S. Campbell to the deceased. Stephenson lot (so called) on Duke Street, in the City of Saint John, deeded by Susannah Stephenson to deceased for her maintenance in Mater Misericordiæ Home."

The Bishop at the time of his death was the owner of a valuable lot of land on Union Street, in the City of Saint John, upon which there is a large brick building which yields, and has for many years yielded, a substantial rental. This property, and an adjoining lot spoken of as the Hopkins lot, belonged to the late James Sweeny, the Bishop's father, who died intestate some forty years ago, leaving a widow and several children surviving. The title to these two properties had sometime previous to 1894, become vested in the Bishop and his sister, Mrs. Travers, as tenants in common, the Bishop being entitled to five-eights, and Mrs. Travers, three-eights. In 1894, after some discussions and negotiations, carried on principally through their solicitors, an agreement for a partition of this property and a settlement of the James Sweeny estate

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was made by the Bishop and his sister. In execution of this agreement the Bishop released his interest in the Hopkins lot to Mrs. Travers, and paid her $2,000 in cash, and she, in return, released her interest in the remainder, that is, the lot which the Bishop owned at the time of his death, and also released him from all claims as administrator of his father's estate and otherwise. The evidence goes to shew that Mrs. Travers was not altogether satisfied with this settlement though she agreed to it; that in the negotiations which led up to it, she claimed to be entitled to more than she actually received; and there is no doubt that, as a result of these differences, the intercourse between the Bishop and Mrs. Travers was for a considerable period by no means so cordial as it had been. It is said to be a highly improbable thing that under these circumstances the Bishop should only eleven months afterwards have executed a will, written by himself, in words disposing of all his real estate, and yet intended to die intestate as to the only real estate he owned, and, in that indirect way, give it to his sister. The brick building on this lot had been erected some years before the partition took place, by the Bishop at a cost of $11,000 as given by Dr. Travers, and of $17,000 as given by Mr. Carleton, neither of them having any personal knowledge of it, but speaking from information derived from the Bishop himself. According to Dr. Travers's account the money was a part of moneys left in the Bishop's hands by Catholics of Saint John on interest, and which was afterwards all paid back. According to Mr. Carleton's account the money was money contributed by the Catholics of Saint John for church purposes, and in which event Mr. Skinner contends the surplus rents would have long since paid off the amount.

The financial affairs of the diocese, so far as they relate to St. John, where they were under the direct personal direction of the Bishop, were managed in this way. The moneys received from all sources—the Cathedral collections, pew rents, interest on investments, rents of school houses, and the rents from this Sweeny property—were all put into one common fund, and as the amount from time to time

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accumulated to a sum sufficiently large for the purpose, it was deposited in the Bank of British North America to the credit of an account which had been current there for a great many years, and kept in the Bishop's individual name. Whatever the Bishop required either for his own personal expenses, or for the maintenance of any of the church, educational or charitable organizations, or for any other purpose, was drawn from this fund. The rents from the Sweeny property were treated as, and in fact, made, a part of it. Insurance premiums, water and city taxes and disbursements necessary for the repair of the properties were drawn for against this fund. The Bishop kept no accounts of the several properties—he kept no books of accounts, and he had no fixed stipend or income as Bishop. His cheque books for a number of years were produced, and a reference to the stubs of the cheques, shewed the purposes for which the moneys were from time to time used.

In 1862 the Roman Catholic diocese of New Brunswick, which up to that time included the whole Province, was divided into the dioceses of Saint John and Chatham, the former comprehending the counties of Carleton, York, Sunbury, Queen's, King's, Saint John, Charlotte, Albert, Westmorland, and a part of Kent. And by an Act of Assembly, 25 Vict., c. 75, passed on the 23rd April, 1862, the late Bishop was created a corporation sole, under the name of "The Roman Catholic Bishop of Saint John," with power to acquire and hold, subject to certain limitations, real and personal estate within the Province, for eleemosynary, ecclesiastical or educational purposes. Mr. Currey in his argument referred to section 5 of this Act, as curing defects in titles similar to those which the plaintiffs contended the Bishop desired to cure by his will; and it was said that this section, with which the Bishop would be familiar, evidently suggested to him a reason for doing what he has done. On looking over the Act, it will be seen that section 5 has no such meaning as Mr. Currey sought to give it. This section has nothing whatever to do with remedying defects in titles. It simply vests in the new corporation—that is, the Bishop of Saint John, in his corporate name—the several

church properties within the territorial limits of his diocese, which up to that time had been held by or in trust for the old corporation. Section 2 does make it lawful for any person in whose name church property might then be held, or which might thereafter be held, in trust for the Roman Catholic Church in the diocese, to transfer the same by deed to the Roman Catholic Bishop of Saint John, a provision which simply created the new corporation a trustee of such property in case of such transfer. With such a provision in this Act, it seems difficult to see why the Bishop should not have taken advantage of it, and transferred the properties which were in his own name by deed, if his sole purpose in making a will were to accomplish the object attributed to him.

While I have thought it necessary, in view of an appeal, to state the above facts as I find them, they are not in my opinion material to the determination of the question involved in this suit.

It was not disputed on the hearing, that the devising clause in this will—"I give and devise and bequeath," etc., was amply sufficient, if taken without the words which precede it, to pass all the testator's real and personal estate. They are plain, apt words for that purpose, clear in their meaning, and altogether, as it seems to me, free from doubt or ambiguity of any kind. Taken alone no one would think of attributing to an illiterate person, much less an educated one, any other intention than that of giving away and disposing of all his property to the person mentioned as devisee. The intention, however, must be gathered from the whole will, and, most certainly, not from a selected portion of a sentence. And this intention, it is said, is altogether changed by the preceding part of the sentence. As I read the first part of this sentence, it is nothing more than giving, in the Bishop's language, a reason or explanation for the disposition of his property which he intends to make. What that reason really is he does not clearly tell us; and even if extrinsic evidence were admissible for the purpose, I am unable to say, and I think it the merest conjecture, to attempt to say precisely

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what was operating on the Bishop's mind when he wrote the words he did.

What was the want or mistake he proposed to meet? I admit I have no very well-defined ideas on the subject, and the suggestions of Counsel, varied as they were, only go to prove how uncertain and unreliable any conclusion on the subject must be. One thing, however, is certain, that whatever the want was, or whatever the mistake was, which the Bishop had in his mind, he intended to supply the want and meet the mistake by "giving and devising and bequeathing all his estate, real and personal, wherever situated, to the Roman Catholic Bishop of Saint John." That was his remedy, and I am unable to see upon what principle this Court should supply an altogether different one. Neither am I able to see, upon any rule of construction applicable to wills, why the clear and unambiguous language of this devise should be limited to these church properties, even if it were capable of clear demonstration that it was to them the Bishop referred in the first part of the sentence.

In *Belaney* v. *Belaney* (1), Lord Chelmsford, L.C., says: "The rule laid down by the House of Lords as to the construction of wills is, that you are to take the words as being used in their proper meaning, unless something is found in the will to shew that the testator intended to use them in a different sense. If the words of the will are ambiguous, you may resort to the surrounding circumstances as a help in ascertaining the testator's meaning, but it has never been decided that you can do so when the words are clear" In that case the testator devised "all his personal property estate and effects." And the Court held that the meaning of these words was clear; that the word "personal" qualified the three following words, and therefore the devise did not pass real estate. The Lord Chancellor adds: "I might here guess that it was the testator's intention that all his interest in this property should go in the same direction, but that would be mere conjecture, and I should have to strike out the word 'personal' in order to give the will such a construction."

(1) L. R. 2 Ch. 138.

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In *Cole* v. *Wade* (1), the Master of the Rolls says: "I do not apprehend, that a bequest, actually made, or a power given, can be controlled by the reason assigned. The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear." This doctrine is adopted in rule 12 of Jarman's Rules of Construction. In *Savile* v. *Kinnaird* (2), Kindersley, V.-C., says: "Now, I think it may be considered as a rule of construction, that if, according to the language of the operative part of the instrument, there would be no reason for doubt as to the construction, if the words are large enough to embrace two classes of objects, that you should not cut down that large scope and effect of the operative part merely because that recital does not refer to both the classes. If, indeed, the language used in the operative part of the instrument were language ambiguous, upon which, if it stood by itself, you would have a doubt as to what it meant to embrace, then, indeed, you may use the recital for the purpose of giving a construction to the operative part." Applying this principle to this present will, why should the devise be restricted to these church properties, even on the assumption that the Bishop had them in his mind? The operative clause is clear and amply sufficient to include the property in question as well; why then cut down and restrict the scope of the operative clause, especially when the effect would be to cause an intestacy, a result never permitted except in the clearest cases, and where by no rule of construction can it be avoided.

There can be no doubt that the Bishop intended to dispose of his personal property. There does not seem to be any defects of title in reference to that to be cured; and he gives the coupon bonds to his successor for certain specified objects—a sum for masses, and a legacy of $100 to his executor, Monsignor Connolly. The plaintiffs' Counsel did contend that, notwithstanding all this, there is an intestacy as to the residue; and that when the testator said that he gave all his personal estate to the Roman Catholic Bishop of Saint John, he intended that it should go

(1) 16 Ves. 46. (2) 11 Jur. (N. S.) 195.

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to his next of kin, as in the case of an intestacy. I do not agree in this view. The whole will must be taken together, and in my opinion the effect as to the personal property is to give it to the Episcopal Corporation less what is required for payment of debts and the pecuniary legacies. What the trusts are upon which it is to be held is another thing altogether. In that, these plaintiffs have no interest. It was argued that neither the personal nor real estate of the Bishop was used or established for any particular purpose or intention, and that as the property devised was to be held in trust for such purposes, nothing was included but the church properties. I should myself rather read the words, "they are used and established" as referring to the properties in the early part of the sentence, as they must do if the words "real and personal estate" have reference to these properties. "They" is not a very apt term to use in reference to real and personal estate; neither is the word "established" applicable to it. Both are applicable to the word "properties"; and by that construction the trusts are defined to be, in a general way, those upon which these other properties had been held, or the purposes for which they had been established, which was precisely the way the Bishop himself had been using the rents and income derived from them. There is no question here as to the devise being void for uncertainty, and if there was, this Court would not permit a charitable legacy to lapse for want of a specified scheme for administering it.

There has always been the strongest disinclination on the part of Courts so to construe wills as to leave some portion of the testator's property undisposed of. The assumption is that if a will has been made the testator intended thereby to dispose of all his property, not a part of it. In *Waite* v. *Combes* (1) the Vice-Chancellor says: "I think, that if it were necessary to decide the point, it would not be unsound to hold that the whole property passed by the will, though the words used should be held to point only to a specific portion of it. The testator commences his will thus: 'I, Thomas Stanning, being of good

(1) 5 DeG. & Sm. 676.

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understanding, and desirous of making a settlement of my affairs, do accordingly declare the contents of this paper to be those of my last will.' This is the language of a man who is about to make a complete disposition of the whole of his property." Now, these words are no stronger than the similar clause with which the Bishop commenced his will, and the words he uses in disposing of his property point to all of it.

In *In re Harrison* (1), Kay, J., says: "The last thing which the Court should do is to hold that there is an intestacy"; and Lord Esher in the same case says: "There is one rule of construction, which to my mind, is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule." Fry, L. J., says: "Where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy." See also *In re Redfern* (2), and *Edgeworth* v. *Edgeworth* (3).

I have already intimated my opinion that in view of the clear and express language in the will, the evidence of the surrounding circumstances in explanation of what seems to me nothing more than a reason for making the devise, is unimportant. But if I were called upon to consider it, what am I asked to conclude from it? I am asked to conclude that because two or three church properties in Saint John stood in the Bishop's name on the records, his intention in making this will was to remedy that defect, and confine its operation exclusively to that description of property, and to die intestate as to his own. Now, leaving out of the question the evidence of intention to be derived from the language of the will itself, is it by any means a clear inference that when the Bishop spoke of a want and a defect which he desired to meet, he had these and such like properties, and

(1) 30 Ch. D. 390. (2) 6 Ch. D. 133.
(3) L. R. 4 H. L. 35.

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nothing else, in his mind? I think not. In the first place he is not speaking of church properties which are in Saint John, but of those in the whole diocese. More than this, the Bishop himself says these properties were *then* vested—"are now and should be vested," are his words—in the Episcopal Corporation. If that were true, there was no such defect to remedy as that suggested. If that were not true, but the Bishop thought it was, as I have a right to assume from his language he did, then he can scarcely be fixed with an intention to remedy a defect or meet a want which in his mind did not exist, more especially when he has used language in his will which he must have known was inappropriate and altogether too comprehensive merely to carry into effect an intention so precise and special in its character. In *Grey* v. *Pearson* (1), Lord Wensleydale says: "The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz., as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing."

The words in the operative clause of this will are clear, plain, positive, and free from ambiguity. To give them their ordinary and grammatical meaning they avoid the intestacy which the plaintiffs seek to establish, but which Courts have ever striven to avoid. The Bishop may have intended by his will to include church properties in the diocese or elsewhere, the title to which might at the time of his death stand in his name, but that does not involve an intention to die intestate as to his own. And if you conjecture that the reasons which operated on the Bishop's mind for making the devise in no way required a remedy such as he himself provided, that seems to me altogether immaterial as indicating an intention directly at variance with that which his own language penned by himself plainly indicates. There will therefore be a declaration

(1) 6 H. L. C. 106.

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that the plaintiff, Mrs. Travers, is not entitled as next of kin, as she claims, but that all the testator's property, real and personal, is disposed of by the will.

As to the costs, I think under the authorities, the plaintiffs, although they have not succeeded in their contention, should be allowed their costs out of the estate. The peculiar wording of this will raised a doubt as to its meaning, which sooner or later it seems to me, must have come up for discussion in this or some other Court, for it would scarcely be prudent for the executors to distribute the personal estate without having the protection of an order from some Court of competent jurisdiction.

Notwithstanding the plaintiffs have failed in their contention, the defendants by that failure have obtained for themselves, what is of as much value to them as to Mrs. Travers, that is, a declaration of their rights under the will; and in such a case it is deemed inequitable that the plaintiffs should be placed in a worse position as to costs, than they would have been had the defendants or executors filed the bill, and made the plaintiffs parties. The litigation has not been caused by any act or failure of either plaintiffs or defendants, but is the necessary result of the obscurity or uncertainty of the testator's own language, and in such cases the Court as a rule directs the costs of all parties to such litigation to be paid out of the estate.

In *Wedgwood* v. *Adams*(1), the Master of the Rolls says: "If, through the exertions of a plaintiff, the Court is enabled to distribute a fund, or if it makes a declaration of rights necessary for its administration, there, although the plaintiff may fail in his claim, the Court will not permit the other parties to carry off the fruit of his exertions without defraying his costs out of the fund." And in *Merlin* v. *Blagrave*(2), the Master of the Rolls says: "It may be laid down as a general rule, that when the Court dismisses a bill it will not give the plaintiff his costs. But there are two cases, certainly, and perhaps more, in which where the plaintiff has failed altogether, but the bill has not been dismissed, the Court has given the plaintiff his costs. One

(1) 8 Beav. 103. (2) 25 Beav. 135.

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of those cases is, where the fund is administered by reason of the suit of the plaintiff, and the rights of all parties have been ascertained and determined, and the funds divided accordingly, in consequence of the suit of the plaintiff. The Court in that case, though the plaintiff takes nothing by the ultimate decision, gives him his costs. Another case is this: where, in fact, the fund is not administered by the Court, but where the Court is of opinion that it is either necessary or proper at the instance of some person, that a declaration should be made determining the rights of the parties; and in that case the Court makes a decree, and gives the plaintiff his costs."

The costs of all parties will therefore be paid out of the estate of the testator, the costs of the executors as between solicitor and client, and the costs of all other parties as between party and party.

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July 22.

BANK OF MONTREAL v. DUNLOP.

Mortgage—Interest clause—Construction.

The proviso for payment in a mortgage to secure an indebtedness, provided for the payment of "said overdrawn account and all promissory notes or bills of exchange (and interest upon the same) then due and payable."

Held, that interest was made chargeable upon the overdrawn account.

Exception to report of Referee. The facts are sufficiently stated in the judgment of the Court.

Argument was heard June 17 and July 8, 1902.

W. W. Allen, K.C., in support of exception:—

The words of the proviso for payment in the mortgage, "(and interest upon the same)" do not authorize interest upon the overdrawn account. The clause being parenthetical, its sense must be controlled by the words

immediately preceding it. Where the application of words in parenthesis is doubtful, it is proper to resolve the difficulty by paraphrasing them. If this is done the proviso will read as follows: "Pay * * * full amount of said overdrawn account, and all promissory notes or bills of exchange now held by said Bank of Montreal on which the said Ellen Dunlop is maker, drawer or indorser, or in respect to which she is liable, then due and payable, and interest upon the same." So drawn, there can be no doubt that the overdrawn account would bear interest. Had it been intended that interest should be charged, the proviso would have been framed in that way. To entitle the plaintiffs to interest the agreement should give it, either impliedly or by express terms: *Thomas* v. *Girvan* (1); *Hill* v. *South Staffordshire Railway Co.* (2).

W. B. Chandler, K.C., *contra*:—

Independently of the language of the proviso, a mortgage to secure overdrawn account, bills of exchange and promissory notes should bear interest. The Referee would have the same legal discretion to allow interest as a Judge or jury have under s. 175 of the Supreme Court Act, 60 Vict., c. 24. An agreement to pay interest would here arise from the previous course of dealings between the parties. As the bills of exchange and promissory notes bear interest by law: "The Bills of Exchange Act, 1890," s. 57, the provision for payment of interest must be considered to refer to the overdrawn account.

Allen, K.C., in reply.

1902. July 22. BARKER, J.:—

There was a reference in this case to inquire and report upon the amount due on the mortgage of the plaintiffs, the Bank of Montreal, on the footing that they were mortgagees in possession. The Referee has reported that there is due the sum of $21,195.08, and in that amount he

(1) 1 N. B. Eq. 257. (2) L. R. 18 Eq. 154.

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has included $1,508.09 as interest on overdrafts. Defendant, Ellen Dunlop, excepted to this report as to this interest. The mortgage in question is dated December 7, 1897, and was given to secure an overdraft at the bank, and notes and bills upon which the defendant was liable, held by the bank. The mortgage recites that the defendant was liable to the bank in the sum of $26,080 for money payable by her to the bank on the overdrawn account, and upon promissory notes and bills of exchange made, drawn or endorsed by her, and discounted by her at the bank; and in order to secure the payment of the said money owing upon said overdrawn account, and of the notes and bills, the defendant had agreed to convey by way of mortgage, the lands and premises thereinafter described. Included in the $26,080 is a sum of $5,705, the amount of the then overdraft, and $30.75 interest on it. The proviso for payment in the mortgage is as follows: "Provided always, that if the said Ellen Dunlop, her executors, administrators or assigns, shall well and truly pay, or cause to be paid unto the said Bank of Montreal, their successors or assigns, the full amount of said overdrawn account and all promissory notes or bills of exchange now held by the said Bank of Montreal, on which the said Ellen Dunlop is maker, drawer or endorser (by the name, firm and style of Dunlop & Co. or otherwise), or in respect to which she is liable to the said Bank of Montreal (and interest upon the same) then due and payable, then these presents, and every matter and thing herein contained, shall be void." The mortgage also contains a proviso authorizing the sale of the mortgaged premises at any time, on giving three months notice, and an appropriation of the proceeds in payment of the moneys secured.

The rule which prevails at law as to the recovery of interest, as laid down in *Page* v. *Newman* (1), was affirmed by the House of Lords in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (2). It is there held that "interest is not due on money secured by a written instrument unless it appears on the face of the

(1) 9 B. & C. 381. (2) [1893] A. C. 429.

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." There are cases where in Equity proceedings this rule is relaxed in favor of the creditor: *Mackintosh* v. *Great Western Railway Co.* (1). There can be no doubt as to the intention of both parties that interest should be charged on the overdrawn account. That course of dealing was recognized by the interest charges in the account itself, and admitted to be the true amount of the indebtedness for which the security was given. Apart from this there is on the face of the mortgage itself sufficient to indicate that both parties intended that interest should be charged on the overdraft. I think the words of the proviso for payment indicate that. To what do the words "(and interest upon the same)" apply? The mortgage was given to secure the indebtedness on overdrawn account, on bills and on notes. Why should the words "and interest upon the same" apply to one species of indebtedness more than to another? I think grammatically they apply to the whole three. There is some reason why the words "and interest on the same," which are in brackets and were interlined in the mortgage, should have been intended to refer specially to the overdrawn account, for it by law would not carry interest, whereas notes and bills do. Mr. Chandler argued that the interest would be payable under the Statute, as the whole sum was a sum certain payable at a time certain. I do not think it necessary to decide that, for I think the mortgage itself carries the interest.

The exception will therefore be overruled with costs, and the Referee's report be confirmed.

(1) 4 Giff. 683.

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July 22.

Will—Construction—Subject of gift—"Farm on which I reside"—Change of residence—Codicil—Intestacy—Wills Act, c. 77, C. S. N. B., s. 19.

Testator by his will devised to his daughter "the homestead farm on which I reside," and made no devise of the residue of his real estate, except a life estate therein to his wife. After the date of the will he acquired other real estate, including land known as lot A, to which he removed from the homestead farm, and where he resided at the time of his death. The will was confirmed by codicil executed after the testator had removed to lot A. By s. 19, c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Held, that lot A was not included in the devise to the daughter.

The facts in this suit, which was for the partition of lands situate in Westmorland County, belonging to Edward Estabrooks at the time of his death, fully appear in the judgment of the Court.

Argument was heard June 16, 1902.

H. A. Powell, K.C., for the plaintiffs:—

The description, "homestead farm," is clear enough in itself, but when it is particularized as the farm "on which I reside," and it is shewn that at the date of the execution of the will the testator was residing there, the question does not present a doubt. If the testator had used the words "on which I now reside," it could be said with more force than the present words will allow, that the testator referred to property on which he resided at the time of his death. Yet the authorities hold that these words refer to the property occupied by the testator at the time of executing the will. See *Cole* v. *Scott* (1); *Hutchison* v. *Barrow* (2); *In re Portal and Lamb* (3).

(1) 1 McN. & G. 518. (2) 6 H. & N. 583.
(3) 30 Ch. D. 50.

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

Lot A, upon which the testator resided at the time of his death, passed to Rebecca Estabrooks under the devise to her of "the homestead farm on which I reside." By s. 19 of c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Had the will, in fact, been executed immediately before the testator's death, there could have been no question that lot A was meant as well as the homestead farm. Where a testator has devised property by the description, "where I now reside," and at the time of his death is residing on other property, it would plainly have to be held that the word "now" has reference to the time of the making of the will. "Now" does exhibit an intention that the will shall not be construed as if it had been executed immediately before the death of the testator, within the proviso of sect. 19 of the Act. In the present will that term or its equivalent is absent, while the Act specifies that the contrary intention shall appear by the will. It is a principle of construction that a testator must not be held to have died intestate as to some of his property, if that result can possibly be avoided: *Re Harrison* (1). Here, unless lot A is held to be included in the devise to Rebecca Estabrooks, the testator will have died intestate as to it, except as to the life interest in it of the testator's wife. This element distinguishes the case from those cited on the other side. In *In re Portal and Lamb* (2), it was expressly pointed out by Lindley, L.J., that there was no intestacy. Lot A was farmed upon and treated by the testator in his farming affairs as a part of the homestead farm, and when he confirmed his will by codicil executed after the lot was acquired, and he had taken up his residence upon it, he thereby certainly shewed that he considered the lot to belong to the homestead farm. The codicil was in effect a re-iteration of the words of the

(1) 30 Ch. D. 390. (2) 30 Ch. D. 50.

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will, "I devise the farm on which I reside," but as he was then residing on lot A, he must be held to have intended lot A as well. *Cole* v. *Scott* (1) is distinguishable, because there the devise was, "all such manors, farms, etc., as are now vested in me, or, as to the said leasehold premises, as shall be vested in me at the time of my death." There could be no doubt in such a context that "now" was only applicable to the date of the will. The decision in that case is also explained in *Castle* v. *Fox* (2) to have depended on the word "now," while dissatisfaction is there expressed with the decision.

Powell, K.C., in reply.

1902. July 22. BARKER, J.:—

Edward Estabrooks died in January, 1901, leaving a will dated July 7, 1884. The only question involved in this case arises in respect to a portion of his property which the defendants Frederick Estabrooks, Edward Melanson and Rebecca Ayer claim as devisees under his will. By this will, the testator after giving to one Clifford Estabrooks a ten acre lot of marsh, part of the Goose Lake marsh, so called, gave all the residue of his real estate to his wife, Rebecca Estabrooks, for life, and on her death he gave specific pieces of marsh and other lands to various persons, stating that they should take on the death of his wife, an estate in fee simple in the respective lands devised to them. The lands so devised did not include all the lands owned by the testator at the date of his will; and it is admitted that as to them there is an intestacy, except as to the wife's life estate. Among these devisees, Rebecca Estabrooks, an adopted daughter of the testator, and who is now the plaintiff's wife, is given what was known as the homestead farm and some marsh land; and it is in reference to this provision of the will that the question in dispute arises. The clause in question is as follows: "To my adopted daughter, Rebecca Estabrooks, the homestead farm on which I reside, my share in the Forbes marsh," etc.

(1) 1 McN. & G. 518. (2) L. R. 11 Eq. 553.

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The testator executed a codicil to his will, by which he directed that in case his adopted daughter Rebecca should die without children living, that the real estate devised to her, should on her death go to Frederick Estabrooks and Edward Melanson. This codicil is not dated, but the evidence shews that it was executed in the year 1887. The testator acquired further portions of real estate after executing his will, and in reference to some portions of them it is also admitted that there is an intestacy, except as to the wife's life estate. The evidence shews that at the date of the will, Estabrooks owned an undivided one-half interest in the homestead farm on which he then resided, and which he devised to the plaintiff's wife, and that he afterwards acquired by purchase the outstanding interest, so that at the time of his death he was the sole owner of that farm. Among these after acquired properties, was one spoken of in the evidence and pleadings as lot A, part of which was purchased in 1885, and the remainder in 1896. The testator removed from the farm on which he was living when he made his will to this lot A in the year 1887, and continued to live there up to the time of his death. The first question is, does the clause in question refer to the homestead farm upon which the testator was residing at the time of his will? I think it does, and that the words indicate a clear intention to restrict the devise to that farm. In treating of the effect of that provision in the *Wills Act* (1), by which, in the absence of anything indicating a contrary intention, the will shall speak as to the property comprised in it, as of the date of the testator's death, Mr. Jarman says (2): "Another question is, whether the enactment which makes the will speak from the death, has the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath 'all that messuage in which I now reside,' and that after making his will he changes his residence to another house belonging to him, which he continues to occupy until his death, does the Act make the word 'now' apply to the house occupied by the testator at his death? It is conceived

(1) 1 Vict., c. 26, s. 24 (Imp.) (2) Vol. 1, 5th ed. 297.

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that the principle will not be carried such a length, and that this would be considered as a case in which 'a contrary intention appears by the will,' for the reference is to a specific thing then in existence, and the words —'in which I now reside' are the only distinguishing terms of description." For the purposes of construing a clause like this, I cannot see any substantial difference between the effect of the words, "in which I reside," and that of the words, "in which I now reside." One may be stronger than the other, but they both refer to the present time, and the then residence was the only description by which the farm devised could be identified. The defendants, however, contend that lot A was a part and parcel of this homestead farm; that it was so used and recognized by the testator, and would therefore pass as a part of the homestead farm under the devise in question. To hold otherwise, it is said, would leave lot A altogether undisposed of except during the widow's life. It is no doubt true that Courts avoid, if possible, a construction which involves an intestacy, either partial or total. I had occasion to consider that point in the recent case of *Travers* v. *The Roman Catholic Bishop of Saint John* (1). Notwithstanding this, such cases must arise, and I think this is one of them. Admittedly the testator in this case left substantial portions of his real estate which he owned at the date of his will undisposed of after the determination of the wife's life estate; and neither by a residuary clause, nor in any other way, did he make any disposition whatever of his after acquired property, except as to his wife's life interest. I am unable to collect from this will anything indicating an intention to dispose of this lot A that would not be equally applicable to the other properties, in regard to which there is admittedly an intestacy. Then comes the question, was lot A so situated in reference to the homestead farm, or was it so used and treated by the testator that it can fairly be said to be a part and parcel of it? The evidence seems to me to preclude any such inference. The two properties were separated by about three quarters of a mile; the

(1) *Ante*, 372.

farms and residences of some half-dozen or more other proprietors lie between them; the testator changed his residence from one to the other, and the farm continued after the changes for most of the time in possession of a tenant; and in speaking of the homestead farm he spoke of it as a separate property, and of his own residence as a separate property also. It may be true that the testator, when farming the homestead and residing on lot A, may have at times used the latter for what, in a limited sense, might be called farming purposes. But there was nothing to induce me to think he ever imagined the two properties as other than two separate and distinct properties. It was further contended by Mr. Teed that the testator, by executing the codicil in 1887, after he had purchased and removed to lot A, by which he confirmed the will except as thereby altered, republished the will, so that lot A would pass under the devise, or else that it amounted to a declaration by the testator at that time that lot A was included as part of the homestead farm. No authority was cited in support of this proposition, neither do I think that in the case of a specific devise like this a republication of the will, by the execution of a codicil as here, would operate so as to extend the gift to property which the gift did not originally embrace, even though it might extend it to a new estate in the same property.

The partition, therefore, must be made on the footing that there was an intestacy as to lot A, as well as to the other lots, about which there is no question.

1902. THE CITY OF SAINT JOHN v. WILSON.

February 26.

Charter of Saint John — Boundary of city at low water mark — Right of city to fishery beyond low water mark.

By its charter the City of Saint John is granted "all the lands and waters thereto adjoining or running in, by or through the same" within defined boundaries, including a course at low water mark; "as well the land as the water, and the land covered with water within said boundaries." The fisheries between high and low water mark of the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city.

Held, that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour.

Bill for a declaration of the title of the City of Saint John to sell the fishing privileges to lots 3 and 4, known as the Bluff Weir and Wier Weir, respectively, situate between high and low water mark, at Strait Shore, in the said city, and for an injunction to restrain the defendants from preventing or interfering with the plaintiff in making sales of the fishing privileges to said lots, and the purchasers thereunder from enjoying the same.

The charter of the City of Saint John, dated May 18, 1785, and confirmed by Act 26 Geo. III., c. 46, granted to the inhabitants of the Town or District of Parr, lying on the east side, and of Carleton, on the west side of the River Saint John, "all the lands and waters thereto adjoining or running in, by or through the same, bounded by a line to commence and beginning near Fort Howe, at Portland Point, at low water mark, and thence running a direct line to a small point or ledge of land at the causey by the old saw mill; thence east north-east until a direct line shall strike the creek running through Hazen's marsh, on the east side of the eastern district aforesaid; thence along the course of the said creek to its mouth; thence by a line running south 19° west into the Bay, until it meets a line run-

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ning east from the south point of Partridge Island, and along the said line to the said point; thence by a direct line to a point on the shore which is at the southeast extremity of a line running south 42° east from the River Saint John to the Bay of Fundy, and terminating the town lots of the western district aforesaid; thence along the said line north 42° west to the River Saint John aforesaid, and continuing the said course across the said river until it meets the opposite shore; and from thence along the north shore of the said river at low water mark to Portland Point aforesaid * * *, as well the land as the water, and the land covered with water, within the lines, limits and boundaries aforesaid." Clause 20 of the charter grants to the city all and singular the messuages, lots of ground, and all other lands whatsoever, covered or uncovered with water, situate and being within the limits and boundaries of the city; together with all and singular the rivers, rivulets, fens and streams of water, land covered with water, bays, inlets, harbours, fishing, and all other profits, privileges, advantages, emoluments, hereditaments and appurtenances whatsoever to the said lands and premises within the lines, limits and boundaries of the city belonging or in anywise appertaining. Clause 21 declares that "the fisheries between high and low water mark along the east side of said bay, river and harbour, shall be and forever remain to and for the sole use, profit and advantage of the freemen and inhabitants of the said city, on the east side of the said harbour; and they, the freemen and inhabitants of the said city, on the east side of the said harbour, shall and may, by virtue hereof, have and enjoy the sole fishing, hauling the seine, erecting weirs, and taking the fish between the said high and low water mark on the said east side, to the total exclusion of all and every the freemen and inhabitants of the west side of the said harbour, and all others, under any pretence whatsoever." A similar exclusive grant of the fisheries on the west side of the harbour is made for the benefit of the freemen and inhabitants of the city on that side of the harbour. The fisheries between high and low water mark on and surrounding Navy Island are

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declared to be for the benefit in common of all the inhabitants of the city. The mayor, aldermen and commonalty of the city are made by the charter the conservators of the water of the river, bay and harbour of the city, with sole power of amending and improving the said river, bay and harbour; "and that they, the said mayor, etc., shall and may, as they shall see proper, erect and build such and so many piers and wharves into the said river," etc. Act 26 Geo. III., c. 1, for confirming the boundaries of the counties within the Province, and subdividing the counties into towns or parishes, enacts that the Town or Parish of Portland, in the County of Saint John, shall be bounded on the south by the Bay of Fundy, the eastern shore of the harbour of Saint John, and the several northern bounds and limits of the City of Saint John; on the east by the eastern boundary line of lot number one, granted to Samuel Hughes, continued to the northern boundary line of the county, said eastern boundary line running from the shore of the Bay of Fundy—north fifteen degrees west—on the north by the northern boundary line of said county, and on the west by the eastern shore of the River Saint John to the limits of the said city." Act 52 Vict., c. 27, uniting the City of Portland and the City of Saint John, annexes to the latter city all the territorial limits of the Parish or Town of Portland. Up to 1862 the fishery lots of the City of Saint John were drawn for annually by lot by the freemen and inhabitants of the city, but by Act 25 Vict., c. 51, that practice was declared to be illegal and was abolished, and it was enacted that "the fisheries between high and low water mark along the east side of the said bay, river and harbour of Saint John, and the sole fishing, hauling the seine, erecting weirs, and taking the fish between high and low water mark on the said east side of the harbour, as granted by and described in the said charter of the City of Saint John, and all other fisheries in the said harbour heretofore enjoyed and possessed by the inhabitants of the east side of the harbour, shall annually, on the first Tuesday in January in each year, be set off in lots, and each lot shall be sold by auction to the highest bidder." By grant

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of the Crown of October 2, 1765, there was granted to James Simonds and others a quantity of land, situate in part between the Falls and Portland Point, and described as "Beginning at a point of upland opposite to his house, and running east till it meets with a little cove or river; thence bounded by said cove till it comes to a Red Head on the east side of the cove; thence running north eleven degrees, fifteen minutes west, till it meets the Kennebeccasis river; thence bounded by the said river, the River Saint John and harbour, till it comes to the first mentioned boundary." William Hazen, James Simonds, and James White, owners of this land, memorialized Thomas Carleton, Lieutenant-Governor of the Province, that doubts had arisen whether the boundary of this land extended to low water mark, and that disputes upon the subject had taken place between them and the inhabitants of the City of Saint John. The Lieutenant-Governor, by license dated February 25, 1802, granted to the memorialists, their heirs and assigns, license "to possess and occupy the place from high to low water mark, in front of their respective lots of the said tract, now in their possession as aforesaid, so far as the said lots are bounded by the river and harbour of Saint John." The fishing lots in dispute lie between the point where the western line of the city crosses the river below the Falls and Portland Point, where the boundary line of the city, as defined by the charter, begins, and admittedly are outside the limits of the old city, though they would be within the harbour of the city, and could be described as being upon the eastern side of the harbour. On January 1, 1900, pursuant to public notice, the City of Saint John sold at public auction to one George L. Lord the fishing privileges to the fishery lots the subject of this suit for a term of one year at the sum of $63 for one lot and $1 for the other. The defendant David P. Merritt appeared by his agent at the sale and protested against it. The city sought to put Lord in possession of the lots, but were prevented by the defendant Merritt, who claimed to be the owner of the lots, and by the defendant Allen O. H. Wilson, tenant of the lots under

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a lease from Merritt. Annual sales of the lots had been made by the city since the passing of the Act 25 Vict., c. 51, but, owing to the right of the city to make a sale being disputed by Merritt or his predecessors in title, the sales were generally at a nominal figure, and the purchasers never obtained possession of, or the use of the lots. In many instances the purchase money was refunded to the purchasers by the city. The defendant Merritt and his predecessors in title alleged that since the date of the license of the Crown to them, February 25, 1802, they had been in possession of the lots and the profits therefrom. Evidence in support of the bill having been concluded, defendants moved that the bill be dismissed.

February 25, 1902.

W. Pugsley, A.-G., and *A. O. Earle*, K.C. (*J. Roy Campbell* with them), for the defendants:—

The question involved is one of law. The title set up by the city is to property outside of its limits, as defined by the city's charter. Where these fishing lots lie the city is bounded by low water mark. The language of the charter is conclusive in that respect. The twentieth clause of the charter particularly restricts the rights of the city in the fisheries to those which are within the limits and boundaries of the city. The contention of the city is to be found in clause 21 of the charter. It is therein declared that "the fisheries between high and low water mark along the east side of said bay, river and harbour, shall be and forever remain to and for the sole use, profit and advantage of the freemen and inhabitants of the said city, on the east side of the said harbour." It cannot be the meaning of these words that they conferred upon the inhabitants of the east side of the city a right of fishing beyond the limits of the city, and within the limits of the parish of Portland. See *Wilson* v. *Codyre* (1). If "bay, river and harbour" are not confined to that portion of them lying within the limits of the city, then the inhabitants of

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the city have an exclusive right of fishing over the full length of the Saint John river.

[Landry, J.:—At the date of the charter were the boundaries of the parish or township of Portland prescribed?]

Yes, by Act 26 Geo. III., c. 1, and they are stated to be the northern limits of the city of Saint John. The Act 25 Vict., c. 51, does not enlarge the rights of the plaintiff, as it is dealing with rights previously "enjoyed and possessed" by the city. The decision in *Wilson* v. *Codyre* (1) that the city has not an exclusive right of fishery in these lots is fatal to this suit, which sets up that the city has such an exclusive right. The license of 1802 to us from the Crown has never been revoked. The city cannot impeach it in this suit. If it is sought to impugn its validity, it must be attacked by a writ of *scire facias* on an information by the Attorney-General. A fishery in severalty is, of course, contrary to Magna Charta, and we cannot claim that our license amounts to a grant of the fishery. It is, however, effective as a license of occupation, and valid as against any claim to dispossess us not made at the instance of the Crown. If the Crown were seeking to revoke it, considerations would arise which are not present here.

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

If the argument that the boundary of the city is at low water, and that the boundary of Portland commenced there, is to be allowed, the legislature had disposed, previously to the license, of the subject matter covered by the license, and it would be void. If the territory in dispute was not embraced within the limits of the city, the strained view is presented that until 1802 no disposition had been made of it. The charter grants to the city all the waters adjoining or running in, by or through the lands granted to the city. That makes it clear that, while the city is not

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granted the land beyond low water mark, it is granted the waters that cover it. It is reasonable to hold that, as the charter invested in the inhabitants of the city the fisheries between high and low water mark along the east side of the bay, river and harbour, the intention was that the waters above low water mark should belong to the city. It is submitted that the license of occupation relied upon by the defendants was illegally granted, and no effect can be given to it. In *Wilson* v. *Codyre* (1) Allen, C.J., was clearly of the opinion that it did not give to the grantees any rights as against the public. These lots are situate within the harbour and river of Saint John, and by the charter the mayor, aldermen and commonalty are made the conservators of the water of the river, harbour and bay of the city, "and shall have the sole power of amending and improving the said river, bay and harbour, * * * and shall and may, as they see proper, erect and build such and so many piers and wharves into the said river." This grant of powers is illusory if the city is held not to have possession of the water above low water mark.

1902. February 26. LANDRY, J.: —

The plaintiff by bill prays that the City of Saint John be declared to possess the lawful authority to annually sell at auction the two fishing lots, Nos. 3 and 4, and that the defendants be declared to have no right or title to said lots, and that they be enjoined from interfering with the plaintiff's exercise of such authority.

To support this contention the plaintiff proved the granting of a charter to the city, and cited the Act of Assembly passed in 1786 ratifying the charter. By these the boundaries of the City of Saint John, as it then existed, are defined, and the inhabitants of said city were granted two certain districts "and all the lands and waters thereto adjoining or running in, by or through the same." The part of the boundaries of the city bearing on this case particularly is worded thus: "and from thence along the north

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shore of the said river at low water mark to Portland Point." There is no dispute that here where the two lots, Nos. 3 and 4, are situate, the boundary of the city northerly is low water mark, and that the two lots are without this boundary. It is not disputed either that the charter and the Act of Assembly relating thereto, viz., 26 Geo. III., c. 46, vested the fisheries between high and low water mark along the east side of the bay, river and harbour in the freemen and inhabitants of the said city on the east side of the harbour, who had thereby the right to enjoy the sole fishing, hauling the seine, erecting weirs and taking the fish between the said high and low water mark on the said east side, to the total exclusion of all others.

The plaintiff affirmed and offered to prove that from 1786 to 1862 the City of Saint John had exercised the right of fishing in and over the *locus in quo* by annually drawing lots among the freemen and inhabitants of the city, and that since 1862 the plaintiff had exercised the same right by selling the fishing privileges at auction. Sufficient proof was given to satisfy me that since 1862 the city did sell such rights at public auction, though it was not done without pretty constant interference by the defendants. I decided that I would not hear evidence as to the exercise of ownership over these lots by the city prior to 1862, as I considered such evidence immaterial and irrelevant, inasmuch as the plaintiff could not establish its right to such fisheries by possession. The plaintiff had moved for an amendment to the pleadings to admit of such evidence from 1786 to 1862, which amendment I allowed; but for the reasons given I declined to hear evidence under it.

In my opinion, the whole question turns on the construction of the charter and of the Act 26 Geo. III., c. 46, ratifying it. If the charter and Act do not vest in the plaintiff the rights and authority it seeks by this suit to have declared to possess, no acts of ownership or of possession exercised, or attempted to be exercised, by the city since 1786 can lawfully give the city such right or authority.

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The majority of the Court in *Wilson* v. *Codyre* (1) declared by the judgment of the then Chief Justice that the grant of the exclusive right of fishery did not extend to places beyond the bounds of the city, as defined by its charter. Though the decision of the issue in that case may not have necessarily required a judgment on that point, yet such a decision, so closely allied to this case, I consider binding on me, and particularly do I so recognize it when I agree fully with that construction of the charter and Act ratifying it.

In general terms the charter seems to speak of two principal divisions of the territory comprising the city, viz., the west side, meaning generally Carleton, and the east side, meaning generally what was known as Saint John before the addition of Portland, or, as it was then known, the district of Parr. The use of these general terms, as they are applied to different matters in several places in the charter, causes some ambiguity. When, however, the charter speaks of the inhabitants of the town or district of Parr, lying on the east side of the River Saint John, it no doubt means the inhabitants of the incorporated territory exclusive of Carleton; and when it speaks of Carleton on the west side thereof, at the entrance of the River Saint John, it means what was popularly known as Carleton, though Parr Town was not directly to the east of the River Saint John, nor was Carleton directly to the west thereof. We find in the twenty-first clause of the charter these words: "The fisheries between high and low water mark along the east side of the said bay, river and harbour," etc., and it also speaks of the fisheries on the west side of the river, as it also refers to the common lands on the east side and the common lands on the west side, meaning clearly, in my opinion, the fisheries and common lands within the city limits only, and speaking of the east side and west side as a division of the territory only as between Carleton and Parr Town, and without any intention of vesting in the corporation any rights or privileges beyond the limits of its territory as defined by the charter. Giving the charter

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the meaning I ascribe to it, this opinion does not necessarily deprive of meaning the words: "the fisheries between high and low water mark along the east side of the said bay, river and harbour shall be, and forever remain to and for the sole use, profit and advantage of the freemen and inhabitants of the said city, on the east side of the said harbour." Reading the whole charter, one cannot avoid the conclusion that the freemen and inhabitants "on the east side of the said harbour" mean the freemen and inhabitants of Parr Town, exclusive of Carleton. And the reference to the fisheries on the east side of the same bay, river and harbour, must mean the same territory. There were other fisheries between high and low water mark on the Parr Town side than the ones now in dispute, and to these other fisheries no doubt this provision applied. Therefore, being able to give a reasonable application to the language that refers to the fisheries between high and low water mark on the east side of the fisheries in dispute, and finding the fisheries in dispute clearly outside of the city limits, and being unable to discover in the charter or Act any good reason for supposing an intention to give the inhabitants of the city fishing privileges outside of the limits of the city, I readily find that such privileges do not go beyond the city limits. Concluding for these reasons, as I do, that the city has no exclusive right of fishing, as claimed by the bill, between high and low water mark at the place in dispute, I order and decree that the bill be dismissed with costs.

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— No. 2. See ante, p. 365.

Pleading — Bill — Demurrer — Question in suit one of fact.

Where in a suit for specific performance of an agreement for the sale of land, the question whether the plaintiff had made a tender of the purchase money within the time limited by the agreement was one of evidence, a demurrer to the bill on the ground that it did not allege a tender in time was overruled.

Demurrer to bill. The bill alleged that by lease dated October 7, 1892, the defendant, Charles F. Freeman, in consideration of $150, leased to Shedric A. Perkins, certain land in Carleton County for the term of three years. The lease provided that Perkins should have the right to retain the land for a second term of three years on payment of a further sum of $150, and for a third like term on payment of the like sum, each of which sums, it was expressed, was payable in advance. Provision was made for the purchase by the lessor of buildings erected by the lessee in event of his giving up possession of the land, or for their removal by him. It was then agreed "that the said Perkins shall have the right to purchase, and the said Freeman hereby agrees to sell, * * * the said land, with all improvements thereon, to the said Perkins, at any time within the said nine years conveyed by the said three terms of this indenture, on the payment by the said Perkins, his heirs and assigns, of the sum of $600. And it is further agreed that any payment which may have been made on account of this lease rent in advance of the time at which such conveyance may [be made] may be allowed as part payment of the sum of $600. Perkins paid the first $150 upon the execution of the lease, and the second payment, on October 7, 1895. On August 29, 1898, he assigned the lease to the plaintiff, who made the third payment on October 7 following.

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The bill alleged that two or three days before October 7, 1901, the plaintiff informed the defendant that he was prepared to pay the balance of the purchase money. On October 7, 1901, the plaintiff called at defendant's house, and, the defendant being absent, offered to pay $150 to the person in charge of the house, telling him what it was for, but he declined to receive it. An offer and tender of $160, as the balance of the purchase money for the land, was made on two occasions in November following by the plaintiff to the defendant, but was refused. The bill alleged that the plaintiff at all times has been ready and willing, and has offered to perform and fulfil the agreement. Plaintiff remained in possession of the land, and the defendant commenced an action of ejectment against him. The bill in this suit was for specific performance of the agreement, and an injunction to restrain the defendant from proceeding in the action of ejectment. A motion for an interim injunction order was made by the plaintiff before Mr. Justice *Barker*, who ordered that, on the defendant giving a confession in the action of ejectment, the plaintiff in that action would be restrained from enforcing the judgment until further order. See report of case, *ante*, 365. The grounds of demurrer are set out in the judgment of the Court *infra*.

Argument was heard August 19, 1902.

A. B. Connell, K.C., in support of the demurrer, cited the judgment in the case at page 365, *ante*.

D. McLeod Vince, and *J. C. Hartley*, *contra*:—

The questions involved in the suit depend on evidence, and cannot be decided on the bill: *Levy* v. *Lindo* (1). A tender was not necessary before October 7. The notice before that date that plaintiff intended paying the balance of the purchase money, coupled with his effort to make the payment, was sufficient. See *Nicholson* v. *Smith* (2).

(1) 3 Mer. 81.

(2) 22 Ch. D. 640.

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1902. October 10. McLEOD, J.:—

The defendant demurs to the plaintiff's bill, alleging three grounds of demurrer:—

1. The bill does not state such a case as entitles the plaintiff to the relief prayed for.

2. The bill does not state or allege a sufficient amount tendered as the purchase money for the land described in the agreement set out in the bill, and there was no sufficient money so tendered.

3. The bill does not state or allege any tender of the purchase money for the land described in the agreement set out in the bill in proper time, as provided for in the said agreement. Any such tender should have been made prior to the 7th of October.

The defendant's contention is that the agreement set out in the bill is merely an option to purchase, and, in order to bind the defendant to convey, the acceptance and tender should have been made before the 7th of October, and that there is no allegation in the bill of a tender of the money according to the terms of the agreement. This appears to have been the principal, and indeed, I think, the only, question discussed before Mr. Justice *Barker*, and he, I think, decided, or at all events expressed the opinion, that the agreement was an option to purchase, and that the time would expire with the 6th of October. It was strongly contended by the defendant's Counsel that Mr. Justice *Barker* had practically decided that the plaintiff could not succeed on the bill as filed, but I do not think that is the result of his judgment. He granted the injunction restraining the defendant from proceeding with the action of ejectment against the plaintiff on the bill as filed, although the matters involved in this demurrer were argued before him, and I think he must have been of the opinion that the plaintiff might on the bill filed shew such facts as would entitle him to relief.

I myself think it is a case that should not be decided on a demurrer. It is true that a demurrer will lie whenever it is clear that, taking the charges in the bill

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to be true, it would be dismissed at the hearing, but it must be absolute, certain, and clear that it would be so; for, if it is a case of circumstances, in which a minute variation between them as stated by the bill and those established by the evidence, may incline the Court to modify the relief or grant no relief at all, the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer *Daniell* Ch. Pr. (1); and in *Brooke* v. *Hewitt* (2), in which a bill was filed for specific performance of an agreement, Lord Chancellor Loughborough, although he appeared to be of opinion that the plaintiff could not succeed on the bill, declined to decide it on demurrer, saying: "It is impossible to dispose of it upon a demurrer. There are a great many shades and circumstances. A demurrer must be founded on this: that it is an absolute, certain, clear proposition that the bill would be dismissed with costs at the hearing. It is not a dry point of law. It is a case of circumstances; in which a minute variation of circumstances may either incline the Court to modify the relief or to grant no relief at all."

I think that applies to this case. It does appear by the bill that at least one of the previous payments was made and accepted on the 7th of October, and it is alleged that the other two were made on or about the 7th of October. The plaintiff alleges in the tenth section of the bill that he has at all times been ready and willing and has offered to perform and fulfil the said agreement. When the conduct and all the acts of the parties have been looked at, it may be that the Court would say that there had been a substantial compliance with the terms of the agreement. I cannot, I think, say that the plaintiff might not under the bill shew such circumstances as would entitle him to some relief. I think I cannot determine it on demurrer. The demurrer will be overruled with costs.

(1) Vol. 1 (4th ed.), 544.

(2) 3 Ves. 253.

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October 21.

FAIRWEATHER v. ROBERTSON.

Easement — Right of way — Agreement — Evidence — User.

Plaintiff claimed a right of way over a private road of several hundred feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title, K., was, that shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing, a right of way with them over the road. B. denied that an agreement was concluded, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement, containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the land was included in the conveyance to the plaintiff. The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, until it was torn down, situate about two hundred feet from the public highway, and plaintiff had used, but not without interruption, the road for about 15 years for a considerable part of its length. Shortly after the date of the alleged agreement, fences, with gates, crossing the road at separate points a considerable distance from its entrance, were erected by H. without objection by K.:—

Held, that plaintiff's bill for an injunction to restrain defendant from obstructing plaintiff in the use of the road, should be dismissed.

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

Argument was heard May 2, 1902.

C. J. Coster, for the plaintiff.

A. H. Hanington, K.C., and *M. G. Teed*, K.C., for the defendant Robertson.

A. O. Earle, K.C., for the defendant Lloyd.

1902. October 21. BARKER, J.:—

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The plaintiff's case, as set out in his bill, is, that in the year 1881 he purchased from the late Mr. Justice King a lot of land in Rothesay, fronting on the southeasterly side of the public highway leading from Saint John to Hampton. On obtaining a conveyance of the premises in March, 1881, the plaintiff removed there, and has continued to reside there from that time to the present. Between this lot, which was a part of lot No. 10, and the adjoining lot, No. 11, lying to the northeast, and which was owned by the late Charles Stewart, there had been laid out by Stewart a road some fifty feet wide, bound on the one side by the division line between the two lots, and extending from the main highway back in a southeasterly direction some 2400 feet. The bill, which was filed in 1896, alleges that upwards of twenty-four years before that, there was a farm house on the northerly corner of the plaintiff's farm, and that, in or about the year 1869, an agreement was entered into between the then owners of the plaintiff's lot and the owner of this roadway, by which it was agreed that, in consideration that the then said owners of the plaintiff's farm would remove the farm house farther back from the main highway and would give up a portion of the land, so as to widen and improve the entrance from the main road into the private road, they, the owners of the plaintiff's lot, should have a right of way over said private road in common with the owners of the adjoining land, with the privilege of entering this private roadway at any point on it, and of erecting any buildings on the land fronting on the private roadway. The bill goes on to allege that, in pursuance of this agreement, the farm house was removed, and the piece of land required for the improvement of the entrance to the private road was given up; and that, after that had been done, the owners of the plaintiff's lot—that is to say, King up to the time of his sale to the plaintiff in 1881, and the plaintiff afterwards—used this private road for all purposes. The bill further alleged that the defendant

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Lloyd, who then owned the adjoining property, had recently obstructed the plaintiff in the use of this road—had locked a gate to prevent his passing along it, and had placed trees and other barriers to prevent his access from the road to his own property. On this bill, sworn to and supported by the affidavits of Aaron Darcus, Albert Warren, and James Hanratty, an *ex parte* injunction was granted by Mr. Justice *McLeod* on the 31st of August, 1896, which, I understand, is still in force, there having been no application to vary or dissolve it. On the 18th of December, 1896, the defendant Robertson purchased from Lloyd the property in question, better known as the Rothesay School property, and he was then made a party defendant to this suit.

It will be seen, therefore, that the plaintiff by his bill bases his right to relief mainly, if not solely, upon an agreement which, he says, was made about the year 1869 between Judge King and his brothers, who then owned lot No. 10, and Stewart, the owner of the adjoining lot, No. 11, the terms of which I have already mentioned. It is therefore necessary to determine, first, whether there ever was any such agreement, and, second, if there was, are the defendants bound by it, for both propositions are denied. The plaintiff, as purchaser from King, claims a right to use the road to the same extent as King could have done; and, in stating the extent of his right in his evidence, he claimed that he was entitled to use the road for all purposes, free from any obligation to contribute to the expense of maintaining it.

So far as is necessary to be known for a determination of this case, the title to this Rothesay School property is as follows: On the 2nd of May, 1859, Charles Stewart, who then owned this lot No. 11, in what is now the Parish of Rothesay, executed a mortgage upon all of it except that portion lying between the highway road and the river, to one Dawson, to secure the payment of £1600, and on the 20th of April, 1866, he executed a conveyance of all his property to Alexander Ballantyne, in trust for his creditors, with full power of sale and other powers usual in

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such conveyances. Proceedings were taken in equity by Dawson for the foreclosure of his mortgage, and by a decree made therein on June 5, 1866, the mortgaged premises were directed to be sold in lots at public auction, with the approbation and under the direction of Mr. H. W. Frith, the officer of the Court named for that purpose under the practice which prevailed in this Court at that time. In order to carry out this decree the property was divided into lots under the supervision of Mr. Frith, as representing the mortgagee, and Mr. Ballantyne, as owner of the equity of redemption, they were numbered, and a plan made of them, by which they were sold. In order, however, to give the purchasers of the back lots access to the main highway, the private road in question was laid out and reserved for the use of the owners of the Stewart lots. The road in question is known as Mount Stewart street; it is described in the conveyances as three rods wide; and it comprises a strip off the Stewart property, along the line of the King property, back from the main highway to the rear lots sold. At the sale of these lots S. S. Hall became the purchaser of lot No. 3, which was conveyed to him by Frith, December 17th, 1866. Lots 10 and 13 were purchased by C. H. Fairweather, and were conveyed to him by Frith, October 10th, 1868. D. C. Perkins purchased lots 7, 8 and 14, which were conveyed to him by Frith, October 10th, 1868. Part of these lots was sold at one time and part at another—the evidence shews that the first sale took place in 1866 and the last on September 26th, 1868—and at these sales Hall, in addition to lot 3, already mentioned, purchased lots 4, 11, 12, 5, and 6, and the whole rear of the original Stewart farm mortgaged to Dawson, over to the plaintiff's line. All of these lots, except the rear lots, were bounded on Mount Stewart street; and the conveyances to the respective purchasers, so far as they relate to the matters in dispute in this suit, contain a provision as to the use of Mount Stewart street, and another reserved road to the rear of the Perkins lots, which is in no way involved in this litigation, as follows (I cite from the conveyance from Frith to C. H. Fairweather,

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dated October 10th, 1868, but the same condition is found in all the conveyances): "And also a right of way in, upon, along and over said Mount Stewart street and the reserved road aforesaid, which are to be kept open, free and common, to the owners and proprietors of all lands (being part of the said mortgaged premises) fronting thereon, their and each of their heirs and assigns, servants, agents, horses, cattle, carts and carriages." King acquired what is now the plaintiff's land in 1863, it having been conveyed to Judge King and his two brothers by deed dated March 11th of that year.

It will be convenient here to dispose of a point made by the plaintiff, that Mount Stewart street is a public highway, dedicated to the use of the public by Stewart, the owner of the property, or Ballantyne, as his assignee. I do not think the evidence sustains any such view. The plaintiff in his bill speaks of the street as a private road, and in no way suggests that there had ever been any dedication of it to the public, or that the public had ever used it as a highway. The recitals in the conveyances and the evidence conclusively shew that the street was laid out for the use and convenience of the owners of the lots into which the mortgaged premises had been divided for the purposes of sale. The plaintiff's case is based on an alleged right secured by an agreement between King and Ballantyne, which would have been wholly unnecessary if, as one of the public, he had that right. That contention must, I think, fail.

It is clear under the evidence that whatever negotiations took place in reference to the right of way, which the plaintiff now claims, took place between Judge King, on the one hand, and Ballantyne, on the other; that these negotiations never resulted in any agreement reduced to writing, and that, so far as Judge King is concerned, the agreement, if made at all, was entered into by him with a knowledge of the easement acquired by Hall, Perkins and C. H. Fairweather, as purchasers under the Stewart mortgage, and under the impression that they concurred in the arrangement which was being, as he says, made with

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Ballantyne. Judge King in his evidence expressly states this. The defendants contend that, as there was no written agreement, any verbal arrangement would not avail under the *Statute of Frauds*. They also contend that Ballantyne could not, without the assent of those who had already acquired a right to the use of this private road, give the right to King. The use of the road was specifically and, as the defendants contend, exclusively for the benefit of the owners and proprietors of these Stewart lots purchased at the equity sale; and, as they are solely responsible for the maintenance of the road, the granting of a right of way to others than those for whose exclusive benefit it was made would, it is said, be a derogation from Stewart's own grant, as acquired under the sale, and would be increasing the burthen of keeping the road in repair beyond that which was involved in the terms of their purchases and implied in the terms of their conveyances: *Ingram* v. *Morecraft* (1); *Reg.* v. *Chorley* (2).

It is in my view unnecessary to discuss these and some other points raised at the hearing, because I think the evidence fails in shewing any such agreement as that upon which the plaintiff relies, or any user, independent of any agreement, that would entitle the plaintiff to the relief which he asks. There are only two witnesses who give any evidence as to the alleged agreement, Judge King himself, and Ballantyne. These witnesses were both produced by the plaintiff, and their evidence, I think, fails in proving that anything more than negotiations took place in reference to the proposed arrangement. Such, at all events, is the positive evidence of Ballantyne. It is corroborated by Mr. Hall, so far as he was informed of what was going on, and he was perhaps more interested in the matter at the time than any one else, because he had been a large purchaser at the Stewart sale; and it is not inconsistent with other circumstances to which I shall refer. Judge King's evidence on this point is as follows: "About the time that the adjoining property to the northward, known as the Stewart property, was being divided into

(1) 33 Beav. 49. (2) 12 Q. B. 515.

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lots and sold, Mr. Ballantyne, whom I understood to have the arrangement of the matter, expressed a wish that we would remove the small building spoken of, at the corner of the lot, to improve the appearance of the entrance to the roadway, and that, if required, we should move back our fence and enlarge the opening of the roadway. And he stated that, if we would do so, we should have a right of way along the roadway as far as our clearings then extended. This was stated by him to be a distance of 70 or 90 rods, I cannot state positively which. I consulted with my brothers, who, with me, owned the place, and told Mr. Ballantyne that we would do so. Subsequently—I cannot fix the time—in order to carry out this arrangement, and in the belief that it was concurred in by Messrs. Hall and Fairweather and Perkins, who had acquired rights to the land along the roadway, we moved the building to the place marked No. 2 in the sketch. We also moved back our fence, and made it a curved line at the entrance from the great road to the roadway in question." Judge King is unable to fix the precise time in 1868 when this arrangement was made, but, as he speaks of Hall, Fairweather and Perkins having acquired rights to the land along the roadway, it is fair to assume that it was after the sale on the 26th of September, 1868, when Fairweather and Perkins first purchased; Hall alone having purchased, so far as conveyances in evidence shew, at the first sale, which took place in 1866. Ballantyne at this time really had no interest in this Mount Stewart street. It is said the freehold was not even in him. However that may have been, all the properties for whose benefit the street had been expressly laid out had been sold, and neither Ballantyne nor Stewart had any interest in any of them. They all belonged to Hall, Fairweather and Perkins, upon whom, at that time at all events, fell the expense of making, improving and maintaining the road in question. Under such circumstances one would scarcely expect Ballantyne to negotiate with Judge King, much less to conclude an agreement with him, whatever his legal rights may have been, except at the suggestion and

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by the authority of those who were really interested. And that view was evidently present to Judge King's mind from what he says in his evidence. Now Ballantyne admits that there was talk between him and King, brought about at the instance of Hall and Fairweather, but that he never could get from them what they wanted from King, or what privileges they were willing to give in return. It ended, he says, in talk; nothing ever was decided or agreed upon in any way, and such proposals as were made resulted in nothing, and the whole matter was dropped. Mr. Hall says that Fairweather, his partner, and Ballantyne used to talk about the improvement of the entrance to the road, but the matter never amounted to anything; that he himself never agreed to anything; that he was never asked to agree to anything; and he always understood that whatever had been proposed or talked of fell through altogether and was abandoned. This Court, it seems to me, in a case like this, where the plaintiff seeks to establish a servitude of so important a nature as the one in question by virtue of an agreement, ought not to give effect to it unless the evidence is clear that there really was such an agreement, and that its terms were concurred in by both parties. The evidence on this point, I think, falls short of what this Court requires in such cases, unless Judge King's own remembrance of the transaction is so fortified by other circumstances that Ballantyne's version and Mr. Hall's understanding of what took place ought to be altogether rejected. Later on I shall have occasion to speak of the user of the road as bearing upon the existence of any such agreement. I have thus far not alluded to the two draft agreements put in evidence, because some question may arise as to their admissibility. In his evidence Mr. Ballantyne stated that King had submitted to him a draft of the proposed agreement, and he had submitted another containing alterations, and that neither was ever agreed to. This evidence is undisputed, and, I think, the fact that such drafts were in fact made not only supports Ballantyne's recollection of what took place, but affords some evidence that the parties intended to reduce their agree-

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ment to writing whenever its terms should be concluded: *Calhoun* v. *Brewster* (1); *Rossiter* v. *Miller* (2).

It is, I think, clear that, so long as any one who is to be a party to a contract has a right to object to its terms as proposed, the matter is still in negotiation and is not concluded. I am, therefore, of the opinion, and so hold, that, altogether apart from the two draft agreements in evidence, and as to the admissibility of which some question has been made, the plaintiff has failed not only in establishing any such agreement as he has alleged in his bill, but any agreement at all, by evidence such as this Court requires to warrant its interference.

The drafts of two agreements, said to be the two drafts alluded to by Ballantyne, but not expressly identified as such, were put in evidence. One, as originally written, is in the writing of Judge King, and the other, in its original condition, is in the writing of Ballantyne. Both are mutilated by additions and alterations, and they both relate exclusively to this alleged right of way. There are many differences between the terms of these two drafts of more or less importance, but provision is made in both by which a liability to repair and maintain the street is imposed upon King, in common with the other owners of the easement. They also contain an agreement on King's part to convey the piece of land which was to be made a part of the street at the entrance, and this conveyance is mentioned as the real consideration for the agreement. Neither of these provisions is mentioned by Judge King in his evidence, and the liability for repairs the present plaintiff altogether repudiates. Judge King continued to be an owner of this property from 1868, when this arrangement is said to have been made, up to 1881, when he sold it to plaintiff; yet he never made any conveyance of the piece of land at the entrance of the road. On the contrary, he conveyed to the plaintiff by metes and bounds which include this corner, and, so far as the deeds in evidence shew, the plaintiff still owns it. It seems to me a much more reasonable inference that no agreement was ever arrived at than

(1) 1 N. B. Eq. 520. (2) 3 App. Cas. 1151.

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that Judge King, after having made it, not only did not carry it out, but disabled himself from doing so. More than that, it seems much more likely that the negotiations which no doubt did proceed to a certain point, eventually fell through, as Ballantyne says they did, than that they resulted in a mere verbal agreement as to a matter of such importance, in reference to which the parties had already drawn two long draft agreements, which they must have known no prudent man would ever think of leaving in so uncertain and unsatisfactory a condition as is said to have been done in this case. Of course, one must not overlook the fact that the Birch house was actually removed, and the land on which it stood, though not conveyed, as seems to have been contemplated by the parties, is actually made a part of the road by the removal of the fence, and that this was done, as Judge King says, in performance of his agreement with Ballantyne. I should, of course, feel like accepting any statement of Judge King without hesitation. It is beyond doubt, however, as shewn by his own draft agreement, that the terms proposed by him included at least two important matters not mentioned by him in his evidence—matters of very considerable importance to Ballantyne and those for whose benefit the street was laid out. I allude to the transfer of the piece of land and the agreement as to the maintenance of the street. It would not be in accordance with the principles by which this Court is governed, to decree specific performance of a contract—and this case is substantially a case of specific performance—where the evidence of the contract and its terms is so indefinite as it is in this case.

The bill, however, alleges a user of this street by the plaintiff and his predecessors in title from the time this alleged agreement was made in 1868 down to the time the defendant Lloyd interfered, shortly before this suit was commenced, in 1896—a period of some 28 years. Although this user is alleged in sect. 6 of the bill to have been in pursuance of the agreement, the allegation is perhaps sufficient to admit of evidence of an uninterrupted user of the road for the period named with a view of establishing the

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plaintiff's right to relief, altogether irrespective of any agreement, and even though he may have failed in his attempt to establish one. An uninterrupted user of the road as of right by the plaintiff and his predecessors in title for a period of 20 years, with the knowledge of the defendants and their predecessors in title, and without objection on their part which they were in a position to enforce, would establish in the plaintiff, as against the defendants, a right of way co-extensive with the user. *McLean* v. *Davis* (1); *Jones* v. *Jones* (2); and *Ring* v. *Pugsley* (3), may be cited as instances in which this doctrine as to easements of this character has been applied in this Province. The plaintiff claims that his right of way in the street extends back from the entrance from the main highway a distance of some 2,352 feet to the Warren house, so called, or to about that point. In that distance there are two fences directly across this street—one 1,133 feet from the entrance, and the other 1,556. There is a third one further back to which it is not necessary to refer. The first one is immediately above the main entrance to the defendant's property. In each of these cross fences there is a gate. These cross fences were put up, Mr. Hall says, by him over 21 years before he sold to Lloyd, which would be about 1870. He says that his object in putting them up was to take exclusive possession of all that part of Mount Stewart street to the rear of the first cross fence, and his reason for doing so was that, as he had become the owner of all the Stewart property reached by that part of this street, no one else had any interest in it. Whether this reason is a good or bad one it is unnecessary to discuss, but the fact remains that these cross fences have always continued there, and are there yet. Without explanation, they seem unequivocal evidence of an actual possession in Hall, and an exclusion of every one else; and when he sold to Lloyd he conveyed to him by a description which includes the piece of this street which he fenced off some 30 years ago, and of which, he contends, he and

(3) 6 All. 206. (2) 2 Kerr, 265.

(3) 2 P. & B. 303.

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those claiming under him have had the exclusive possession ever since. It strikes me as strange that, if there had ever been any agreement concluded upon between the parties such as is claimed, nothing should ever have been said in reference to such palpable obstructions as these cross fences, yet in all the evidence there is not a suggestion that Hall had not the right to put them there, or that in doing so in 1870, and in continuing them there ever since, any right, either of the Messrs. King or the present plaintiff, was in any way invaded. Judge King was an owner of the plaintiff's lot from 1863 down to 1881—a period of 18 years, and for the latter part of the time he was the sole owner. He had ample means of knowing precisely the extent to which this road was used by him and his servants during that period. He says the street was used all the time he was in possession, for the purpose of obtaining access to the Birch house, and that the street was used for any purpose for which it was needed to get to that house. He says positively that he has no recollection of any further use of it, and that there was a farm roadway on their own land, which was used by them and their workmen for all ordinary farm purposes, as far as he knew. This Birch house is the small house removed by King. The distance from the main highway back to where it was removed is given by the plaintiff as 200 feet. So far, therefore, as Judge King's evidence goes, the user of this road previous to his selling to the plaintiff in 1881 was not only confined to this short distance, but it was also confined to a special purpose—that is, getting access to the Birch house, which was torn down long since by the present plaintiff and has never been replaced. The evidence of Fred. A. King goes to prove a more extensive user. He says they (that is, the Kings), from the time the Birch house was moved, used the road for the purpose of hauling off or on crops or manure, for bringing black mud from the back of the property, for logging purposes, and as an entrance to and from the Birch house; and he says it was actually used for these purposes by Birch, Matthews, Green, and Clancy. Of these, Green is, I believe, dead, but

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neither of the other three was called as a witness. From Fred A. King's evidence it appears that he lived on the property for two years previous to 1881; that he was there in the summer months for two or three years after 1866; and that he did not live there much more until May, 1879. His means of observation as to the user of this road were therefore limited to comparatively short periods. As it is, his recollection of events is, according to Hall and others, altogether at fault, and their view, rather than his, is strengthened by some outside circumstances to which I shall briefly refer. It is very clearly proved that, previous to 1882, this street, back of the reserved road behind this school property and the Taylor land, which joins Mount Stewart street some 700 feet back from the main highway, was entirely impassable for vehicles of any kind. In addition to this, the Kings had on their own land a farm road, which, as Judge King says, was used for their ordinary farm purposes, and would be available and suitable for the very uses for which Fred. King says this road was used. Fred. Hall, Charles Warren and S. S. Hall contradict King, and say he is mistaken. More than this, neither Albert Warren nor James Hanratty, whose affidavits were used in support of the bill in applying for the injunction, was sworn at the hearing, though, by their affidavits, they profess to give favorable evidence for the plaintiff on this point. In the face of this evidence it seems impossible to find any such user during King's occupation of that part of the street between its entrance and the first cross fence as the plaintiff alleges, and which, for the purposes of his case, it is necessary for him to establish, for his own user, whatever it was, is limited to some 15 years before this action was commenced. I think the evidence does establish precisely what Judge King says, that is, during his ownership, a user of the road for the purpose of having access to the Birch house, but nothing more. That house was, however, torn down and destroyed by the plaintiff many years ago. No new building has been erected in its place, and, so far as the evidence goes, the plaintiff has no intention of doing so. A new

house on the farm was built by the plaintiff some 500 or 600 feet further up the street. The user proved by Judge King having been simply for the purpose of gaining access to this Birch house, would cease when that house was taken away, as I have mentioned, and would not, I think, amount to an easement for all purposes. So far as the evidence relates to that part of the street from the first cross fence back to the Warren house, which is considerably more than half the whole distance over which the plaintiff claims a right of way, it fails, I think, altogether in establishing the plaintiff's contention. It is proved by Hall, and admitted by the plaintiff himself, that, until the street was made passable in 1882, the rear portion of it was altogether inaccessible by way of the street for carts or vehicles of any kind, and but fourteen years elapsed from that time until this action was brought. During that period it is clear from the evidence that the plaintiff's use of that portion of the street was by no means an uninterrupted one. F. H. Hall speaks of the gate in the first cross fence being locked in 1884, and 1885 and 1886, to prevent the plaintiff's men from driving through. Charles Warren, who lived with S. S. Hall as farmer from 1875 to 1892, speaks of having on several occasions, by Hall's directions, locked the gate in the first cross fence to prevent the plaintiff's servant from driving through, and that the man stopped in consequence. Mr. Hall speaks of the same thing. Darcus, the plaintiff's servant, who was at times stopped from using this street and prevented from going through the gate in the cross fence, though living in Rothesay, and though his affidavit was used in the application for an injunction, was not produced on this hearing. It is true that the plaintiff says he himself never heard of the gate being locked, but I do not think that makes any difference, for personal notice was not necessary in order to preserve to Hall his rights. He effectually stopped for the time the plaintiff's use of what he claimed to be his property by acts quite unmistakable in their object and effect. The result of the evidence is that the plaintiff has failed in establishing the agreement

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set out in his bill, or any agreement giving him the right of way which he claims, and that he has only established by user a right to use Mount Stewart street from its entrance to the Birch house, and only as incident to the use and occupation of that house, which right terminated on the plaintiff's destruction of the house without having replaced it with a new building on the same site, and without having, so far as the evidence shews, any intention of doing so.

I have not thought it necessary to refer at any length to the different conversations which, according to the plaintiff's testimony, took place at various times between him and S. S. Hall as to the use of the street or as to the agreement said to have been made by King. These conversations, if admitted to be correct, which is by no means the case, would only operate to the plaintiff's advantage in one of two ways—either as evidence of the agreement itself, or, if in fact no such agreement had been made, then by way of estoppel. I have already given my reason for holding that no agreement was ever made, and, as to the estoppel, no such case is made by the bill; neither does the evidence shew that the plaintiff, either in purchasing the property, or in any other way, acted, or refrained from acting, by reason of any representations of Hall as to the use of this street. Where persons are living as neighbors and on terms of intimacy, such as all these gentlemen seem to have been doing for many years, very little importance, it seems to me, should be attached to casual conversations, such as were most of those alluded to, as establishing, or intended to establish, any right. It would be unwise and unsafe so to view them. The evidence shews that Hall occasionally, or perhaps often, in going from his own house to pay a friendly call on Judge King, would go from this private street through bars or a gate in King's fence, and thus make a short cut to his house across his farm. It would be equally unsafe and unwise to accept such acts as evidence against Hall that King had a right of access to his farm from this street by way of those bars or the gate, or to hold that, because King had permitted, or

had not objected, to this short cut across his farm, he had furnished any evidence against himself of a right of way over his land in Hall. Such neighborly acts are among the ordinary courtesies of suburban life, and of themselves are unimportant as establishing any such right as is claimed here.

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The plaintiff's bill will be dismissed with costs.

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December 16.

Interlocutory injunction — Cutting timber — Title to land in dispute — Possessory title — Action of replevin — Verdict — Appeal — Reference to verdict on motion to dissolve injunction.

A bill, upon which an *ex parte* injunction was granted restraining defendants from cutting timber, stated that the land upon which it was cut had been seized and possessed by plaintiff's predecessor in title, that he was the owner of it in fee, and that defendants were cutting timber upon the land wastefully, and, without documentary title, were pretending to have a title by possession. On an application to dissolve the injunction, it appeared that the plaintiff had not a documentary title, and that both parties claimed title by possession :—

Held, that the injunction should be dissolved.

Semble, that on such application, the verdict of a jury in an action of replevin for timber cut upon said lands should not be disregarded, although a motion for a new trial was undisposed of.

Motion to dissolve an *ex parte* injunction granted February 6, 1902, by Mr. Justice *Barker*, restraining defendants from cutting logs on certain lands, and from removing or in any way interfering with poles and firewood cut upon the lands by the defendants. The facts sufficiently appear in the judgment of the Court.

Argument was heard October 21, 1902.

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

The injunction was obtained by suppression or misrepresentation of material facts. In the bill upon which the injunction was granted, it was alleged that the plaintiff's predecessors in title were seized and possessed of the lands in dispute; that the plaintiff was owner in fee; and that the defendants, having not a documentary title, were trespassing upon the lands, pretending to have title by possession. This was a representation that the plaintiff claimed under documentary title, whereas his claim of title rested, like ours, upon acts of possession, and the jury has found that our possession is the more ancient. The injunction would not have been granted had the facts been truthfully stated. See *Domville* v. *Crawford* (1).

M. G. Teed, K.C., *contra*:—

An appeal is pending from the findings of the jury, which, until confirmed by judgment, have no legal value: *Bainbrigge* v. *Baddeley* (2). The need of preserving the property *in statu quo* until the determination of the action at law is as urgent now as before the verdict. This Court is not in a position to pronounce upon the ownership of the lands. Where the interference of the Court is sought by interlocutory injunction, pending the decision of a legal right, the duty of the Court is not to determine the question at law, but to protect the property until the question is decided by the jurisdiction to which it properly belongs. See *Harman* v. *Jones* (3). There has not been a suppression of material facts by the plaintiff. Whether he claimed that he was the owner of the lands by documentary title or by possession, made no difference respecting our right to have the property preserved. Further, it was admitted in the bill that the defendants claimed ownership.

Pugsley, A.-G., in reply:—

Our point is that we are enjoined, while the plaintiff

(1) N. B. Eq. Cas. 122. (2) 3 MacN. & G. 413.
(3) 1 Cr. & Ph. 299.

is free to exercise acts of ownership, such as cutting timber. Putting the matter at the lowest, and ignoring the verdict of the jury, as both claims depend upon possession, we should not be enjoined since the plaintiff is not.

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It appears by the bill that previous to the year 1867, one John Dickie was seized and possessed in fee of certain lands in the Parish of Sackville, in the County of Westmorland, known as the Dickie lot; that Charles G. Palmer and Wm. Ogden were on the 22nd day of December, 1870, seized and possessed of another piece of land in the same parish, known as the Estabrooks lot; and that these two lots, with a third, known as the Reynolds lot, and a fourth, known as the McManus lot, eventually became vested in the plaintiff, who now claims to own them in fee. The bill also alleges that, two or three miles from these lands, there is in the Parish of Dorchester a settlement or community known as the Bonhomme Gould settlement, and that the residents there have from time to time for several years committed trespasses upon the Dickie and Estabrooks lots, and, without any grant or documentary title, pretend to claim title or ownership in common by possession to all the Estabrooks lot, about 600 acres of the Dickie lot, and a portion of the Reynolds and McManus lots, the whole tract so claimed comprising about 5,000 acres. It is further alleged that this settlement has upwards of a hundred persons who claim to have an interest in this tract, and the eight defendants are, so to speak, representatives of the leading and most active members. After alleging various acts of cutting trees upon these lots by the defendants, both before and after notice forbidding them to do so, the bill alleges that the parties—that is, the defendants and others—"were cutting in a wasteful and reckless manner, and destroying and wasting much of the trees so cut down by them, some doing great and irreparable damage to said lands, the chief value of which is the timber and trees thereon, and what is growing thereon." It also appeared

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by the bill that two actions of replevin were then pending, which the plaintiff had brought against these defendants or some of the parties interested, in which was involved the title to these lands, and which in the ordinary course would be tried at the then next Circuit. In granting the injunction I was influenced by the fact that the question of title would be disposed of in a short time, and I was led to infer from the bill that the defendants were guilty of acts of spoliation in stripping the land in question of its lumber, which was its principal value, without in reality having any title, or really any ground for claiming any title. In April last an application was made to dissolve the injunction order, but, as the replevin causes stood for trial at the Westmorland Circuit, which was to sit in May, the motion to dissolve stood over until after the trial. One of the causes was tried, and resulted in a verdict for the defendants, and, if the jury were right in their findings upon the questions left to them, this bill must be dismissed. A motion for a new trial has, however, been made, and is now under consideration by the Court. The motion to dissolve was renewed in October last, and on the argument a number of affidavits were read on both sides. From these it appears that the lands in question are what are known as the Sackville rights, which comprise large tracts of land in the County of Westmorland. To these lands no one has a documentary title from the Crown. All record of the original grant was destroyed many years ago, and those who claim title to the lands hold by possession only. It appears from the affidavits of Amiable Sonier and others, that these French settlers, of whom the defendants are representatives, did take possession, or exercise acts of ownership or possession, of some parts of these lands, sixty years ago, and in reality prior to any possession of the plaintiff's predecessors in title. Whether that can be made out eventually or not, I need not now say. The priority of this possession was certainly found in favor of the defendants in the replevin case. Apart from that, however, it does appear that since the trial of the case of *Estabrooks* v. *Breau* (1), in 1874,

(1) 2 Pug. 304.

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these French settlers, or those claiming under them, by deed or otherwise, have been lumbering on these lands, and doing under a claim of right precisely what an undisputed owner of the land would do—that is, cutting the lumber for domestic or commercial purposes; not committing acts of spoliation—for, in my view, there is no question of waste—but simply using the lumber as it was found useful, and thus merely using the fruit of the land itself, or clearing it up for cultivation. It may be true that during the same period the plaintiff and those under whom he claims may have been doing much the same thing. So that it makes little difference whether you call these acts trespasses, or acts of possession, or acts of ownership—they have been done about to the same extent, for the same purpose and with the same object, and under a *bonâ fide* claim of right. More than that, this joint possession, if I may so call it, has gone on for over a quarter of a century without objection by the plaintiff or those through whom he claims. And, for all that appears to the contrary, the lumber and wood cut, the removal of which is restrained by the order, was cut during the period when each party was remaining passive. I do not think the order should be continued as to the lumber poles and firewood, for, in addition to what I have said, the plaintiff has an adequate remedy at law by replevin. Neither do I think the order should stand as to the further cutting. As the evidence stands before me, I see no greater reason for the plaintiff restraining the defendants than for the defendants restraining the plaintiff. For the past 30 years they have both been doing similar acts of ownership, or possession, for the same purpose, and I see no reason why I should stop one and permit the other to go on. And, if the facts as they now appear had been before me when the application was originally made, I should have refused the motion. At the argument great stress was laid upon the fact that the jury had found in favor of the defendants in the replevin suit, and for that reason it was said this injunction should be dissolved. In answer to that, my attention was directed to the case of *Bainbrigge* v. *Baddeley* (1), in

(1) 3 MacN. & G. 413.

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which it is said that no Court will act upon the verdict of a jury until it has ripened into a judgment. For the purpose of aiding a Judge in disposing of an interlocutory application, such as a motion for an injunction, or a motion to dissolve one, I am disposed to think under our practice that a verdict of a jury, even without a judgment, is not to be altogether disregarded because of the possibility of its being set aside. The question does not arise here, because I am acting without reference to the verdict. By our practice I could have called in a jury to try the legal right, and, if I had done so, it would seem to me to be an exceptional course to have granted the injunction if the verdict had been, as it is here, for the defendants, or to have refused it if the verdict had been the other way. I have ample authority to do so. Especially would this be the case where, as here, the controversy is between two persons without title, each seeking to make a title for himself, in which case, as the Court said in *Estabrooks* v. *Breau*, "the finding of the jury should not be interfered with, unless clearly and unequivocally wrong."

Injunction dissolved with costs.

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January 20.

Partnership — Powers of partner after dissolution of firm — Hypothecation of lumber to secure advances — The Bank Act, 53 Vict., c. 31 — Sale of lumber by partner — Application of proceeds — Payment of other indebtedness — Knowledge of pledgee.

A firm of lumber operators hypothecated under *The Bank Act* their season's cut of lumber to a bank to secure future advances. A member of the firm, without the knowledge of his co-partner, sold the lumber and applied part of the proceeds in paying a past indebtedness of the firm to the bank, and, with the consent of the bank, applied a portion of the remainder in paying other debts of the firm :—

Held, that he had power to do so, though the partnership had then been dissolved, and that his co-partner was not entitled to have the money so appropriated, charged in reduction of the secured indebtedness to the bank.

Bill for an injunction to restrain defendants, The People's Bank of Halifax and John G. Murchie, from selling or disposing of certain timber licenses, and for an accounting to the plaintiff by the bank and George A. Murchie, and for an accounting to the plaintiff by the firm of James Murchie & Sons. The facts fully appear in the judgment of the Court.

Argument was heard November 21, 1902.

L. A. Currey, K. C. (*W. C. H. Grimmer*, K. C., and *F. B. Carvell*, with him), for the defendants, renewed an objection mentioned at the close of the plaintiff's case, that the suit should have been brought by the receiver for the creditors of Hale & Murchie, and moved that the bill be dismissed on that ground. It is claimed by the plaintiff that the sum of $27,000 paid to the bank on account of the old indebtedness was wrongfully appropriated, and to be fraudulent as against other creditors of the firm. If so, those creditors should be represented in the suit. The plaintiff does not represent them. The receiver should have

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brought the suit, and if he refused to do so, he should have been made a defendant. Payment cannot be made of the balance of the fund in Court after the bank is paid, except to the receiver, when made a party to the suit. The plaintiff therefore has no interest in the suit.

W. Pugsley, A.-G., and *G. W. Allen*, K. C., for the plaintiff: —

The motion proceeds upon a misapprehension of the nature of the suit. The controversy is one between partners, and involved in the question is the dealings of the firm with the defendant bank. To enable the receiver to bring the suit he should have a title to the fund in Court. But a receiver has nothing more than possession. He has no right to originate actions except by leave of the Court, and his title could be objected to did not the Court overrule the objection. See *Ireland* v. *Eade* (1); *Parker* v. *Dunn* (2); *Portman* v. *Mill* (3); *Wrixon* v. *Vize* (4). A receiver appointed *pendente lite*, leaves the title of parties in the same position as before the appointment. It is as yet uncertain what the assets and liabilities of Hale & Murchie are, and until that is known it cannot be said that the plaintiff has not an interest in the suit. If necessary the receiver could be added as a defendant. See 53 Vict., c. 4, s. 133.

Currey, K. C., in reply.

Question reserved.* Argument then proceeded upon the merits of the suit.

Pugsley, A.-G. (*Allen*, K. C., with him), for the plaintiff: —

The $27,000 received by the bank should have been applied in reduction of the secured account. Otherwise the

(1) 7 Beav. 55.
(2) 8 Beav. 497.
(3) 8 L. J., Ch. 161.
(4) 5 Ir. Eq. Rep. 276.

*Judgment upon the merits of the suit being for the defendants, it became unnecessary for the Court to pronounce upon this point.—Rep.

security will be applied in a way absolutely prohibited by law. Section 74 of *The Bank Act*, 53 Vict., c. 31, provides that "the bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture." Then sect. 75, as amended by 63-64 Vict., c. 26, s. 18, enacts that "the bank shall not acquire or hold any warehouse receipt or bill of lading or security under the next preceding section to secure the payment of any bill, note or debt or liability, unless such bill, note or debt or liability is negotiated or contracted at the time of the acquisition thereof by the bank, or upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank," etc. The words of the section are clear that security cannot be taken for a past indebtedness. Murchie as a co-partner with the plaintiff ordinarily might have authority to make the appropriation, though that is doubtful, but no such power would exist where the partners were in conflict, and the bank was aware of their differences. It is also submitted that the partnership was *ipso facto* dissolved by the transfer by Murchie to his brother of the firm's milling property. Of that act the bank had knowledge previous to the appropriation in question. A suit for winding up the affairs of the partnership had also been previously commenced by the plaintiff. The mill was the basis of the firm's business, and its transfer was inconsistent with the continuation of the business, and brought the business to an end. See *Lindley* on Partnership (1); *Abel* v. *Sutton* (2); *Cameron* v. *Stevenson* (3); 17 Amer. & Eng. Ency. of Law (4). The secured indebtedness to the bank should further be reduced by the amount received by James Murchie & Sons from lumber which came into their hands, hypothecated to the bank. Under an accounting by James Murchie & Sons they would be entitled to deduct all payments made by them to Hale & Murchie in assisting them to get out the lumber, leaving

(1) 4th ed. 698.
(2) 3 Esp. 108.
(3) 12 U. C. C. P. 389.
(4) 1st ed. 1100.

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the balance to be applied on account of the bank's secured indebtedness. The fact that the bank permitted Hale & Murchie in previous dealings to make sales of hypothecated lumber free of the bank's control, relying upon them to appropriate the proceeds to the bank's account, does not authorize an abandonment by the bank of its security. The bank must be held to have consented that James Murchie & Sons should have the lumber. In so doing they were acting collusively with them and in fraud of the plaintiff and the unsecured creditors of Hale & Murchie. The lumber belonged to the bank and could not be parted with by it to the detriment of the bank's security. It would be most inequitable to allow George A. Murchie to appropriate behind the plaintiff's back the proceeds of lumber towards payment of an indebtedness due Murchie's own firm in violation of the agreement by Hale & Murchie with the bank. The evidence shews that $17,000 paid by Murchie to James Murchie & Sons was from proceeds of lumber hypothecated to the bank sold to Dobell, Beckett & Co., and that this amount is in excess of any advances by James Murchie & Sons to Hale & Murchie.

L. A. Currey, K. C. (*Grimmer*, K. C., and *Carvell*, with him), for the defendants:—

The $27,000 was paid to the bank in payment of the firm's debt by a member of the firm having power for the purpose. It was also part of the agreement by the firm with the bank, in consideration of which it made fresh advances, that the old indebtedness should be retired. The right of Murchie to make the payment was not at an end. The firm was not dissolved; certainly the bank had no intelligence of it. Even if it were, it was proper that its engagements should be kept. The payments made to James Murchie & Sons from proceeds of lumber hypothecated to the bank are unobjectionable. *The Bank Act* leaves a lumber operator free to dispose of hypothecated lumber in the ordinary way of his business, but accounting to the bank for the proceeds of its sale. No onus is cast upon the bank to take possession, unless it wishes to do so by reason of

the security being overdue and in default, but until it does take possession the operator may pass a valid title.

[BARKER, J.:—I have knowledge of another case in which this bank was interested, in which it put forward a different view, and took action upon it.]

If the bank here intervened and took charge of the logs, it would have to account for their full market value to Hale & Murchie, but until it does so the firm could vest the property in the lumber in a purchaser. Section 78 of *The Bank Act* supports this view. The bank cannot intervene until after maturity of the notes for which the security is given. In the meantime the lumber operator has an unqualified power to sell.

[BARKER, J.:—If that is so, the security is of no value.]

We contend that is the meaning of the Act. Clarke stated in his evidence that the bank did not make advances on the security given under sect. 74, but in reliance upon the credit and good faith of the firm.

[BARKER, J.:—He meant by that, that the bank did not require an indorser.]

Pugsley, A.-G., in reply:—

Hypothecation under the Act vests a title to the goods in the bank, and a sale cannot be made of them, except on the consent, express or implied, of the bank. The bank here could and should have claimed the proceeds of the lumber handed to James Murchie & Sons, and their security must be debited with the amount. The further question here is not whether George A. Murchie could appropriate the proceeds of the lumber in paying the debts of the firm, but whether he could divert it from the purpose for which it had been specifically pledged by Hale, acting for the firm.

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In order to expedite the settlement of the questions in dispute in this suit the application to continue the interim injunction granted by Mr. Justice *McLeod* was by consent of parties turned into a hearing. The absence of the usual pleadings may account in some measure for the admission of evidence and discussion of questions which are really not relevant to the points involved in the suit. I allude more particularly to the claim put forward by the plaintiff that the firm of J. Murchie & Sons were partners in the firm of Hale & Murchie. There is a suit pending in this Court, instituted by the present plaintiff for the winding up of the partnership of Hale & Murchie, and one of the questions there raised is this alleged partnership between the two firms, but all the questions involved in this suit may, I think, be determined altogether outside of the other question.

In 1889 the plaintiff and the defendant, George A. Murchie, by a verbal agreement entered into partnership for the purpose of carrying on a milling and lumbering business under the name of Hale & Murchie. George A. Murchie was then and ever since has been a member of the firm of J. Murchie & Sons. Up to the fall of 1900 the plaintiff seems to have had the active management of the business, and in order to carry it on, his firm, acting by him, had borrowed from the defendants, The People's Bank of Halifax, through its agency at Woodstock, such sums of money as were required from time to time for their lumbering operations. These advances so made each year were secured by an hypothecation under *The Bank Act*, of the lumber cut during that season, and in the fall of 1900 the firm of Hale & Murchie were indebted to the bank in the sum of upwards of $75,000, for which they held as security a large quantity of manufactured lumber under contract of sale to Dobell, Beckett & Co., of Quebec, and ready for delivery, the price of which was in round numbers, $50,000. For some reason not disclosed in the evidence, the bank, on being applied to by the plaintiff in the fall of 1900 to make

the usual advances for the coming season's operations, by its agent at Woodstock declined to do so, whereupon the plaintiff's partner, George A. Murchie, on behalf of the firm, and with the plaintiff's full concurrence, went to the head office of the bank at Halifax, in order if possible to make some arrangement, and the result of his application there was that the bank agreed to advance the firm for the operations of 1900-1901, up to $91,000, upon the terms contained in a letter dated December 20, 1900, from Mr. Clarke, the cashier of the bank, to George A. Murchie, and which is as follows:—

"HALIFAX, N. S., Dec. 20, 1900.

"GEORGE A. MURCHIE, ESQ.,

"Calais, Me.

"Dear Sir,—

"The Board of Directors have considered the proposal made by you at your interview this morning, and have decided to make advances to the firm of Hale & Murchie for the present season, extending to 1st July next, upon the following terms: The amount of lumber to be cut is to be limited to thirteen million feet, and we will make advances at the rate of seven dollars per thousand feet, (viz., $5 for logging, $1 for driving, and $1 for browing), you to provide the money for the stumpage. As security for these advances we will require: (1) A lien upon all the logs cut, under the terms provided by our Bank Act and in accordance with usage; (2) an assignment to the bank of all timber leases at present held by the firm of Hale & Murchie, situated on the Tobique and elsewhere; (3) a personal guarantee bond to be given by yourself and John G. Murchie covering the full amount of all advances made by the Bank from this date to Messrs. Hale & Murchie. All these conditions must be fully complied with before any advances can be made. In addition we wish it to be understood that no indirect liabilities will be created in the shape of jobbers' time drafts and that obligations incurred at the bank will have prompt personal attention. We wish it understood that the firm of Hale & Murchie is domiciled at Fredericton, and that the books and papers of the firm will

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be properly kept at that place and accessible to the bank, for the purpose of information at any time and that no office or branch office will be permitted at any other place. In reference to present indebtedness of the firm to the Bank, we accept the figures of your specification, showing that under your contract with Dobell, Beckett & Co., $50,578.89 worth of lumber is ready for the latter firm's acceptance, and, according to Dobell, Beckett & Co.'s contract, that this will be settled for by note due not later than 4th February. We accept your assurance that either Mr. Hale or yourself will visit Quebec at a very early date to bring about this settlement. The balance of the debt we are willing to carry along, provided that at least one-half is repaid within a year, and your assurance on this point is sufficient for the directors. We require that the affairs of the firm generally will be closely supervised by you and that the financial part will have your particular personal attention. When you are in a position to transfer and complete the securities mentioned in this letter I will acquaint our manager at Woodstock with the particulars and will then have the funds made available to your firm. Should any further explanation be required I shall be pleased to furnish same. Any correspondence necessary to the completion of this understanding should be had with this office. After the account is once opened in accordance with the terms agreed upon the matter will be in the hands of Mr. White, our manager at Woodstock.

"Wishing you the compliments of the season,

"I remain, yours faithfully,

"D. R. CLAKKE, Cashier."

It is not denied that this letter was shewn to the plaintiff, or that with a full knowledge of its contents he accepted its terms. A change was made by the consent of all parties, at the instance of John G. Murchie, that is to say, that the licenses, instead of being assigned by Hale & Murchie direct to the bank as a security for the advances, were to be assigned to him as a security against loss on his guarantee bond, and the bank also agreed to extend the

limit of the advances from $91,000 to $94,000. The plaintiff does not dispute the terms of this arrangement. In fact he complained then and still complains of the stipulation that his partner was to assume the supervision of the financial affairs of the firm, which up to that time he had managed, and he subsequently made it a distinct ground for dissolving the partnership that his partner had, in violation of the terms of this letter, removed the books and papers of the firm from Fredericton to Calais. In accordance with the arrangement, the plaintiff and his partner, George A. Murchie, professing to act as the firm of Hale & Murchie, and John G. Murchie, entered into an agreement, dated January 14, 1901, by which Hale & Murchie assigned to John G. Murchie a number of lumber licenses covering an area of some 300 square miles, and their interest in some other timber limits, as a security against loss on his guarantee to the bank for these advances and any other liability to the bank which he might assume for Hale & Murchie. This agreement recites as follows: "Whereas the said firm of Hale & Murchie are receiving advances from The Peoples' Bank of Halifax to the sum of about $91,000 to enable them to carry on their lumber operations for the season of 1900-1901, and the said John G. Murchie has agreed to guarantee the said advances so made as aforesaid by The People's Bank of Halifax in the sum above stated." The licenses in question were in the name of the plaintiff and George A. Murchie, and it is not denied that they form a part of the partnership assets of Hale & Murchie. By the above mentioned agreement it was expressly stipulated "that upon payment by said firm to said John G. Murchie of and for all amounts or sums assumed or guaranteed by him for said firm as aforesaid, or upon due and proper discharges, acquittances or releases thereof being obtained, then and thereupon the said John G. Murchie is to re-assign at once the said licenses and timber lands to the said Frederick H. Hale and George A. Murchie." John G. Murchie gave the bond to the bank as he had agreed, and as a security for its performance he assigned the Hale and Murchie timber licenses and limits

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assigned to him, over to the bank. The bank made the advances up to $94,000. Hale & Murchie got out some thirteen millions of lumber, all of which was hypothecated to the bank, and all of which has been manufactured and disposed of. During the year 1901 Hale & Murchie paid to the bank on account of these advances, $30,000, so that irrespective of interest and one or two small sums which are to go in reduction of the amount, the balance according to the bank's contention due them by Hale & Murchie, on account of the moneys so advanced, is $64.000, for which they hold, or at all events did hold, the lumber hypothecated, the timber licenses and John G. Murchie's guarantee as security, in addition to Hale & Murchie's personal obligation. So far there is no substantial difference between the parties. The plaintiff, however, says that this balance of $64,000 is subject to a deduction of two sums; one an ascertained amount of $27,745.23, and the other of an amount to be ascertained by an account asked for in this suit, and his contention is that these two sums would pay off the bank in full, or at all events that he was ready to pay any balance which might remain due, thus relieving John G. Murchie from liability on his guarantee, and the timber licenses and other securities held by the bank, would then be assignable to Hale & Murchie by the terms of the assignment to John G. Murchie.

Taking these two contentions in their order, the facts of the first claim of the plaintiff are as follows: On the 6th February, 1901, a payment of $50,000 was made by Hale & Murchie to the bank on account of the old indebtedness, that is, the 1899-1900 account, which left a balance of $27,745.23. The $50,000 is the amount due by Dobell, Beckett & Co., mentioned by Mr. Clarke in his letter to George A. Murchie of 20th December, 1900, and which he urges either Hale or Murchie to go to Quebec in order to have arranged. The balance was carried along by way of renewals until January, 1902, at which time it was represented by Hale & Murchie's promissory note, held by the bank, dated August 5, 1901, and maturing February 8, 1902. On the 7th January, 1902, that is, a month before

this note fell due, George A. Murchie, acting on behalf of the firm of Hale & Murchie, paid the bank $23,171.30, and on the following day (January 8th, 1902,) a further sum of $3,987.50, both of which sums were paid on account of the balance of $27,745.23, and were so credited by the bank on the note held by them. This appropriation of these two payments was made by the consent and agreement of George A. Murchie, acting for himself and partner, of the bank's manager and of John G. Murchie, the guarantor. The $23,171.30 was received from Dobell, Beckett & Co., in payment of lumber sold them by Hale & Murchie from the cut of 1900-1901, and the $3,987.50 was the proceeds of a draft drawn by Hale & Murchie, by George A. Murchie, on J. Murchie & Sons, in favor of the bank. These payments were appropriated in the way I have mentioned without the plaintiff's knowledge in any way, and, as I think from the evidence, with a knowledge on the part of the bank that the money from Dobell, Beckett & Co. was the proceeds of lumber hypothecated to the bank of the 1900-1901 cut, and the plaintiff's contention, as to both of these claims, is that as the lumber got out that season was hypothecated to secure the advances for that season, it was a fraud upon him, or rather upon the unsecured creditors of Hale & Murchie, to utilize the moneys derived from its sale in payment of an indebtedness of another year altogether, and thus throw an additional burden on the securities. The bank, being unable to obtain payment of their indebtedness, and the original security upon the lumber having been exhausted by the manufacture and sale of the logs by Hale & Murchie, was proceeding to realize upon the timber licenses, when this bill was filed, upon which Mr. Justice *McLeod* granted an interim injunction staying the sale. The licenses have since been sold, by consent of all parties, at auction, and the proceeds — some $72,000 — have been paid into Court, to be dealt with as representing the licenses. The bill which was filed by the plaintiff against the bank and his co-partner, George A. Murchie, and the other members of the firm of J. Murchie & Sons, of whom John G. Murchie

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is one, alleges, among other things, that of the thirteen million feet of lumber cut during the season in question, about twelve hundred thousand were sold to D. Fraser & Sons at Fredericton, for which they paid an average price of $10.50 per thousand; that three and one-half millions were manufactured at Plaster Rock by the Tobique Manufacturing Co., about three-quarters of which were sold to Dobell, Beckett & Co., and that the remainder of this three and one-half million was shipped to J. Murchie & Sons; that about eight millions were manufactured at the Victoria Mills, a large portion of which was shipped also to J. Murchie & Sons. The bill also alleges that the thirteen millions, if sold at the market price, would realize $140,000, much more than sufficient to pay the bank in full. The charge in the bill against George A. Murchie is that he sold a large portion of the lumber to Dobell, Beckett & Co., and did not, as he was bound to do, use the proceeds in reduction of the secured debt, and that he shipped large quantities of the lumber to J. Murchie & Sons, who have not accounted for it. The charge which the plaintiff makes against the bank is not only that they illegally and wrongfully credited the payments on the old note, as I have mentioned, but that they, in violation of their duty and in fraud of the plaintiff, permitted George A. Murchie and J. Murchie & Sons to receive large portions of this lumber and the proceeds thereof, instead of having the same applied in payment of the advances. The 15th section of the bill alleges that prior to making these advances, the bank and George A. Murchie entered into an agreement that George A. Murchie should have charge of the financial portions of the business of Hale & Murchie, in connection with the lumber and advances and the repayment thereof, and in consequence he, the plaintiff, was thereafter excluded by George A. Murchie and the bank from any management or control of the lumber, or the financial transactions connected therewith. The bill further alleges that the plaintiff was ready and willing to pay the bank the amount really due it, for which the licenses were held as a security, and that it would be a great wrong, not only to him, but the unsecured

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creditors of Hale & Murchie, if the licenses were sold before the real indebtedness to the bank, for which they were held as a security, was ascertained. And the bill prayed for an injunction restraining the sale of the licenses until the amount due the bank in respect of the advances was ascertained. Also an account from the bank of all moneys received on account of said advances, and also all moneys received by it as the proceeds of the lumber or any part thereof. Also an account from George A. Murchie of the lumber sold or disposed of by him; and also an account by J. Murchie & Sons of all the lumber received by them, of all sales made thereof, and the moneys received therefor and the disposition thereof.

As to the allegations in sect. 15 of the bill, I am unable to see what bearing they have upon the case, unless they are put forward as an excuse for the plaintiff not knowing the nature or extent of his firm's business subsequent to the end of the year 1900, or as one of a series of acts by the bank and George A. Murchie, done to curtail the plaintiff's power as a partner for some purposes of their own. Whatever may have been intended, it seems to me that the evidence in no way sustains the allegations. The only evidence on the subject is the letter of Mr. Clarke of December 20, in which the bank, as one of the conditions of making the advances, stipulates for a personal supervision by George A. Murchie of the financial affairs of his firm. The plaintiff had the option of refusing or accepting these terms and he chose to accept them. There is no evidence whatever of any attempt by the bank to exclude the plaintiff from the business management of his firm, even if they were in a position to do so, of which there is no evidence whatever. Neither can I find in the evidence anything to suggest that the transactions between the firm and the bank were in any way concealed from the plaintiff, or that either by enquiry of the bank or of George A. Murchie, or by an inspection of the books of his firm, he could not have obtained full information in reference to them.

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As to the appropriation of the $27,000, there is no dispute that the debt was owing by Hale & Murchie to the bank, and that it was the balance of the $75,000 indebtedness existing from the 1899 transaction spoken of by Mr. Clarke in his letter. George A. Murchie and the bank justify this payment on two grounds. In the first place it was simply carrying out the terms of the letter to which the plaintiff himself assented; and in the second place it was competent for Murchie to bind his partner by the payment, even without any express authority. In determining this question, it is, I think, immaterial whether the partnership had been dissolved or not, for in either case the authority to wind up its affairs and deal with its property remained in the partners, this Court not having at that time intervened by the appointment of a receiver. In *Butchart* v. *Dresser* (1), affirmed on appeal (2), it is virtually laid down that, notwithstanding a dissolution, a partner, until at all events a receiver is appointed, has all the power and authority he had before the dissolution to complete contracts previously made, and in order to wind up the business. In this case, on appeal, Turner, L.J., says: "The general law is clear, that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after, and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes, as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution, it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account." It is true that Hale & Murchie had a right to compel the bank to utilize the proceeds of the lumber in payment of the debt which it was pledged to secure; but that is a right which the parties interested may waive, and, in my opinion, had the partnership been existing, it would have been quite competent for George A. Murchie to do precisely what he

(1) 10 Hare, 453. (2) 4 DeG., M. & G. 542.

did, quite apart from his assurance to the bank, and that he would have the same power after a dissolution, and before this Court had taken charge of the assets, by way of appointing a receiver. I confess, as a practical business matter, I cannot see from the standpoint of the plaintiff the force of his objection. There is no dispute as to the debt being due, and its payment enured to the benefit of both partners alike, and neither can get anything out of the partnership assets until all the debts are paid in full. Apart from this, the plaintiff knew that his firm were under the assurance given by George A. Murchie, and adopted by himself, that during the year 1901, at least one half of this old balance would be paid, and when this payment was made the year had passed and nothing had been paid. I do not at all think it was in the contemplation of the plaintiff or any one else that this balance was to be paid from funds other than those received from the sale of these logs cut in the season of 1900 and 1901. The evidence and all the circumstances point to an entirely different conclusion. Where was the money to come from if not from that source? It must be remembered that if, as the plaintiff affirms, these thirteen millions of lumber at current rates were worth $140,000, and the evidence rather sustains that estimate, there was a margin of nearly $50,000 over and above the bank's claim, which belonged to the firm. Who ever supposed that not a dollar of that sum was to be used until the bank had been paid off? Where was the money to come from to pay wages, stumpage, and all the other expenses incident to carrying on a large milling business such as Hale & Murchie were then carrying on, saying nothing of providing for such indebtedness as we all know firms of that kind not unusually carry from one year's transactions into another, of which this very $27,000 is an illustration? I think the plaintiff has no ground and no reason for complaining of this payment or of its appropriation.

Coming now to the plaintiff's second contention, it would seem at first blush that this case is the simple one of a bill filed by the pledgor of two distinct and separate

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kinds of property seeking to secure the same debt, to restrain the pledgee from realizing or selling one kind or part of the whole property pledged, on the ground that from the remainder of it he had already realized, or ought to have realized, sufficient to discharge the indebtedness. The bill is in form a redemption bill. There is nothing in it, however, alleging any partnership between the two firms. That is involved in the other suit pending, and if the evidence sustains the plaintiff's view on that point, the whole account can be taken and must be taken in that suit. The bank has no interest in the taking of a mere partnership account between these two firms. It is only because it is alleged here that the bank has wrongfully, and in fraud of the plaintiff, permitted J. Murchie & Sons to get this property, and for which they must account to the plaintiff, that any account can be asked here, because that is the only accounting by J. Murchie & Sons in which the bank has any interest. Neither has the bank any interest in a mere accounting between the members of the firm of Hale & Murchie *inter se*. It is only because of the allegation as to George A. Murchie's management of the firm's business for the benefit of the bank that any accounting can be claimed in this suit involving that question. The facts in evidence, I think, shew that this is not the ordinary case of mortgagor and mortgagee of chattels, which I have mentioned. It appears that from the formation of the plaintiff's firm in 1889 down to this last transaction in 1900, Hale & Murchie had carried on their financial matters principally with the defendant bank. The bank had from year to year made them the advances which they required for their lumbering operations, taking as security a lien on the lumber under *The Bank Act*. During all that time the plaintiff had the principal arrangement of the firm's business, and practically the entire management of its money matters. The disposal of the lumber and the management of the business was left entirely with Hale & Murchie, which, during that period, practically meant the plaintiff. They took charge of the property, manufactured it, sold it, and dealt with it in

every way—so far as I can gather from the evidence—so far as the outside world was concerned, as if they alone were interested in it. No doubt the bank was consulted from time to time and kept informed of the business matters and how they were likely to result, but they made contracts of sale, shipped and sold apparently to whom they chose, and collected all the proceeds. It was Mr. Hale or Mr. George A. Murchie, not any bank official, who, by the terms of Mr. Clarke's letter of December 20, was to go to Quebec to secure and arrange the payment by Dobell, Beckett & Co. of the $50,000 due by them, though the money really belonged to the bank, and it represented lumber pledged to the bank and sold by the pledgors by their consent. The bank put forward that this is the only practical way of handling a security of this kind. That may be so. At all events that is the method by which Hale & Murchie and the bank dealt with them for all these years. After George A. Murchie took charge in 1900, precisely the same course of dealing was adopted. As in previous years, Hale & Murchie sold the lumber and should have accounted to the bank for the proceeds. In the one case the plaintiff was the active partner, while in the other George A. Murchie was the active partner. During all these years Hale & Murchie sold largely to J. Murchie & Sons. Their account between the two firms, as kept by them up to 1900, shews a yearly increasing balance against Hale & Murchie, except, I think, in one year. The balance in January, 1899, was $121,977.46; a year later it was $112,642,37; in 1901 it was $120,874.49; and in January, 1902, it was a trifle over $100,000. It is true that the plaintiff entirely denies the correctness of these figures, and states his belief that, on a proper accounting, the whole indebtedness would disappear. But even in that case the fact would still remain that the cash payments and advances by J. Murchie & Sons to Hale & Murchie were at least equal to the value of the lumber shipped to them.

Now in all this, wherein consists the fraud of which the plaintiff complains? Were he and the bank, for the ten years previous to 1901, dealing fraudulently as to

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George A. Murchie? If not, George A. Murchie and the bank were not dealing fraudulently as to the plaintiff in 1901. Upon what principle, then, can the plaintiff be heard to say to the bank, you can not go on realizing your securities, because if you credit what you should have but for your default or neglect received, your debt would have been paid in full? The default or neglect was that of the plaintiff and his partner. They were under an obligation to pay the proceeds of these sales of lumber to the bank until the bank was paid. Instead of doing that, they used them in paying another creditor. As between these parties, Hale & Murchie can not complain if the bank realizes on their securities: and if there is a dispute between the plaintiff and J. Murchie & Sons, or between the plaintiff and his partner, George A. Murchie, the parties can settle it between themselves. The bank has no interest in these accounts unless their claim against Hale & Murchie, which they are seeking to realize from the securities, would be affected by the result; which, in my opinion, would not be the case. I can see no reason whatever why the bank, holding the security on the lumber and on the licenses for the one debt, should be debarred from realizing on the licenses because a portion of the other security had been received by the plaintiff and his partner. The bank could surely, at their instance, relinquish a part of their security, and if there was any fraud, or the bank did not relinquish, the plaintiff and his firm, having the benefit of the money, can not complain.

The plaintiff's bill must be dismissed with costs, and out of the fund in Court the bank must be paid the amount due them for their advances, and it will be so ordered.

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—No. 3. See ante, pp. 365 and 408.

Tender—Bank Notes.

A tender in bank notes not legal tender, is good, if not objected to on that account.

Bill for specific performance. The facts are stated in the report of the case at page 365, *ante*, and in the present judgment of the Court.

Argument was heard December 16, 1902.

D. McLeod Vince, and *J. C. Hartley*, for the plaintiff.

A. B. Connell, K.C., for the defendant.

1903. January 20. BARKER, J.:—

The case stands in an entirely different position from what it did when it was before me on a motion for injunction (*ante*, 365). At the hearing the plaintiff amended his bill by adding a section averring a tender of the $150 by the plaintiff to the defendant on the 3rd of October, 1901, and I had the advantage of hearing the witnesses examined, and of finding out what really had taken place between the parties. The condition upon which plaintiff had the right to purchase was the payment by him of the sum of $600 at any time during the nine years mentioned in the agreement, if the lease continued for that time, which was the case. If, therefore, the plaintiff tendered the $150 on the 3rd of October, as alleged, and that is the proper amount due, the plaintiff should obtain the relief he asks for. In the first place, is $150 the real amount to be paid, or was it $450, as claimed by Mr. Connell? I do not agree with the construction sought to be put upon the contract by the defendant's Counsel. The

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total purchase money was $600, and the contract contained a stipulation that, in case of a purchase, the advanced rent then paid should go on account of the purchase money. That, at all events, seems to me to be the plain meaning of the agreement. Now, let us see what actually took place on the 3rd of October. It seems that the defendant, who lives but a short distance from the plaintiff's house, was at the plaintiff's house on that day. There is no doubt, from the evidence of the plaintiff and two independent witnesses, who were at the house at the time, that the plaintiff had the money ($150) there for the purpose of paying it to the defendant; that he then and there produced it, and then and there distinctly offered to pay the defendant $150, as the balance due on the purchase, in performance of the condition subject to which he was entitled to have a conveyance. Neither is there any doubt as to the defendant fully understanding at the time the purpose for which the money was being offered him. It is said this was not a legal tender, and therefore amounted to nothing. I do not agree with that. I think it quite likely that there was not a legal tender note among the $152 in bills produced at the time; but what difference does that make, if the defendant did not object to them on that ground? They were bills which passed as money in the commercial world, and of the kind used by everyone in the discharge of legal obligations. The defendant did not object to the kind of bills. He said he did not want to do business, or, as he said when giving his evidence, that he was afraid that he would spend the money, or something of that kind. See *Polglass* v. *Oliver* (1); *Jones* v. *Arthur* (2).

I quite adhere to what I said when this case was before me as to the literal performance of conditions in unilateral contracts, or options, as they are called, and I think in this case there was a literal compliance, or what this Court would hold as a literal compliance, with the condition subject to which the plaintiff was to have a conveyance of the land in question. There must, therefore, be a decree in the plaintiff's favor with costs, less the costs of the application

(1) 2 C. & J. 15.

(2) 4 Jur. 859.

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for injunction, which, I think, the defendant must have. The defendant will also be restrained from proceeding to enforce his judgment in ejectment, entered up under the confession pursuant to the terms of my order made in disposing of the application for injunction.

GOULD v. BRITT.

1903.

February 20.

Practice—Security for costs—Plaintiff a judgment creditor of the defendant.

It is not a ground for refusing to order security for costs to be given by plaintiff, a resident out of the jurisdiction, in a suit to set aside a conveyance by defendant as fraudulent against him, that he has an unsatisfied judgment against the defendant in the Saint John County Court.

Thibaudeau v. *Scott*, 1 N. B. Eq. 505, followed.

Summons before Mr. Justice *Barker*, by the defendant Patrick Britt for an order for security for costs, on the ground that the plaintiff is resident out of the jurisdiction.

The plaintiff obtained on April 3, 1901, a judgment in the Saint John County Court against the defendant Patrick Britt for $67.75, which was unsatisfied, and to which a return of *nulla bona* was made. This suit was brought to have set aside as fraudulent and void against the plaintiff, and as having been made without consideration, and to defraud and defeat the plaintiff in the recovery of his judgment, a deed of certain real estate and a bill of sale of certain personal estate from the defendants Patrick Britt and Susan Britt to the defendant William J. Britt.

Argument was heard February 6, 1903.

G. H. V. Belyea, for the plaintiff:—

The defendant being indebted to the plaintiff by reason of the plaintiff's judgment against him, it is the

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same as though the defendant had money belonging to the plaintiff in his hands, out of which he could pay his costs in case he is successful in the suit. Under such circumstances security for costs will not be ordered. In *In re Contract and Agency Corporation (Limited)* (1), it was held that a petitioner who had a judgment against a company need not give security for costs in a winding-up petition against the company. See also *De St. Martin* v. *Davis* (2), and *Crozat* v. *Brogden* (3), per Davey, L.J. *Thibaudeau* v. *Scott* (4), it is submitted, should not be followed. In *Crozat* v. *Brogden*, referred to in that case, the judgment of the plaintiff against the defendant, relied upon by the plaintiff as a reason for refusing an order for security for costs in an action upon it, was a foreign judgment, and a defence of fraud was raised to the action, which, if made out, was a good defence. The plaintiff might give the ordinary security if the amount of the judgment is deemed insufficient, on the defendant paying the amount into Court, to be applied *pro tanto* in case he succeeds in the suit.

J. J. Porter, for the defendant Patrick Britt: —

The question is concluded by *Thibaudeau* v. *Scott* (4).

On February 20, His Honor ordered that security for costs be given.

(1) 57 L. J., Ch. 5.
(2) W. N. (1884) 86.
(3) [1894] 2 Q. B. 30, 34.
(4) 1 N. B. Eq. 505.

KERRISON v. KAYE.

1903.

February 17.

Will—Construction—Legacy—Date at which beneficiaries to be ascertained.

Testator, by his will, bequeathed to his niece for life the interest on a sum of money directed to be invested in the name of her son A., or any more issue of hers there might be; "and in case of the death of the said [niece] or her son [A.] leaving more issue, the [principal] to be equally divided among them, and in case of the death of the said [niece] and her said son leaving no other issue," over to H.

Held, that the issue of the niece at the time of her death, and not at the time of the death of A., took.

Bill for delivery to the plaintiffs, Alfred William Hastings Kerrison, Mary Blanche Davenport Kerrison and Charles Metcalf Kerrison, by the defendant, Edmund G. Kaye and said Alfred W. H. Kerrison, of trust funds in their hands as trustees, and for a declaration that the defendants, Henry H. Harvey and Catherine Harvey, his wife, have no interest therein. The facts are sufficiently stated in the judgment of the Court.

Argument was heard January 23, 1903.

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

A. I. Trueman, K.C., for the defendants Henry H. Harvey and Catherine Harvey.

A. O. Earle, K.C., for the defendant Edmund G. Kaye.

1903. February 17. BARKER, J.:—

William F. Smith died on March 15, 1888, having made a will dated May 1, 1880. He left a widow, but no children. His widow died September 1, 1898, leaving her surviving her niece, Mary Smith Kerrison, who was an adopted daughter of the testator, and her three children, the plaintiffs in this suit, that is, Alfred William Hastings Kerrison, who was born before the date of the testator's

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will, and Mary Blanche Davenport Kerrison and Charles Metcalf Kerrison, who were born after the date of the will. Mary Smith Kerrison died December 7, 1902, leaving the plaintiffs surviving her. By the will in question the testator gave his wife a life interest in all his property and made specific devises of it to take effect on her death. The question involved in this suit arises as to the disposal of a fund of $6,500, now in the hands of the defendant Kaye, who holds it subject to the trusts declared in and by clause four of the will, which is as follows:—

"In trust I give and bequeath on the death of my said wife, Mary, to my niece and adopted daughter, Mary Smith Kerrison, the sum of six thousand five hundred dollars ($6,500) currency of the Dominion of Canada, for her sole and separate use, respectively freed and absolutely discharged of and from any control of her respective husband; and I wish this to be clearly understood that the above named sum is to be invested in the name of Alfred William Hastings Kerrison, her son, or any more issue there may be child or children of the said Mary Smith Kerrison; and the interest of the said sum to be for the sole use and benefit of the said Mary Smith Kerrison during her natural life; and in case of the death of the said Mary Smith Kerrison or her son, Alfred William Hastings Kerrison, leaving more issue, the remainder to be equally divided among them; and in case of the death of the said Mary Smith Kerrison and her said son leaving no other issue, then the above named sum is to revert back to her sister, Catherine Hastings, my niece and adopted daughter or her issue."

The plaintiffs contend that, as the surviving issue of Mary Smith Kerrison, they were entitled, on her death, to this fund absolutely. On the other hand, the defendant, that is, the other niece, Catherine Hastings, claims that the trust as to the fund continues until the death of Alfred William Hastings Kerrison, and that if at that time he leaves no brother or sister surviving him, the fund goes to the defendant, but if he does leave brothers or sisters it goes to them. It is simply a question as to whether those who are to take this fund are to be determined by the con-

ditions existing on the death of the mother or on the death of her son Alfred. I think the plaintiffs' contention is the correct one. It seems to me quite clear, and in fact the defendant's Counsel did not deny, that the testator's intention as indicated by this clause was primarily to benefit Mrs. Kerrison during her life and her issue after her death, including not only the son living when the will was made but any other children born to her after that date. In endeavouring to provide for this contingency the language of the will is somewhat obscure, but to my mind that is the clear intention. It is only in the case provided for in the last part of the clause, that the defendant can take, and in my opinion the fair meaning of it supports the construction which I have placed upon the previous part of the clause. That part of the clause is as follows: "And in case of the death of the said Mary Smith Kerrison and her said son leaving no other issue," that is, if on the death of her and her son, she leaves no other issue; not that the son leaves no other issue. The word "other" means other issue beside himself—issue of his mother. It is the parent who leaves the issue and the parent leaves the issue at the time of death. My reading of the clause is, that if the son, Alfred, predeceased his mother and she left no other children at the time of her death the fund would go to the defendant, but if Mrs. Kerrison died leaving her son her sole issue he would take and if there were other issue beside him they would all take. The date of the mother's death is, I think, the time when the fund goes over, and by the conditions then existing it is to be determined who shall be entitled to it.

I think the plaintiffs are entitled to the fund. The costs of all parties will come out of the fund.

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March 17.

THE CUSHING SULPHITE FIBRE COMPANY, LIMITED v. CUSHING.

Practice — Discovery — Production of Documents — Act 53 Vict., c. 4, ss. 59, 61.

Where inspection is sought of documents in the possession of the opposite party, an order should be obtained under s. 59 of Act 53 Vict., c. 4, for discovery by affidavit as to what documents are in his possession, when an order may be made under s. 61 for their production and inspection (1).

Hegan v. *Montgomery*, 1 N. B. Eq. 247, followed.

Summons by the defendant for an order for the inspection of documents alleged to be in possession of the plaintiffs, to enable defendant to prepare interrogatories for the examination under commission of a witness in Great Britain.

Argument was heard February 15, 1903.

(1) "59. Any party to a suit or proceeding may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the Court or a Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit or proceeding, or make such order either generally or limited to certain classes of documents, as may in their or his discretion be thought fit.

"60. The affidavit to be made by a party against whom such order as is mentioned in the last preceding section has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it shall be in the Form (10), with such variations as circumstances may require.

"61. It shall be lawful for the Court or a Judge at any time during the pendency of any suit or proceeding, to order the production upon oath by any party thereto, of such of the documents in his possession or power relating to any matter in question in such suit or proceeding, as the Court or Judge shall think right, and the Court or Judge may deal with such documents when produced in such manner as shall appear just. The costs of such application and production to be in the discretion of the Court or Judge."

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W. Pugsley, A.-G., and *A. P. Barnhill*, for the application.

A. H. Hanington, K.C., *contra*, citing *Hegan* v. *Montgomery* (1).

1903. March 17. BARKER, J.:—

This application is made under sect. 61 of Act 53 Vict., c. 4, which is substantially a copy of sect. 18 of the English Equity Act of 1852 (15 & 16 Vict., c. 86), and which was afterwards adopted as Rule 11, Order XXXI., under the Judicature Act, 38 & 39 Vict., c. 77. The practice established under that rule in England is, that the Judge has no discretion as to making an order for the inspection of documents, and that the only documents which are privileged are professional and quasi-professional communications: *Bustros* v. *White* (2); *Anderson* v. *Bank of British Columbia* (3).

As no question of privilege arises here, it would seem that an order for inspection ought to be made, provided this application is not premature. The plaintiffs contend that it is, and that the correct practice is, first, to apply for an order for discovery under sect. 59 of the Act, and, after the affidavit has been made pursuant to that order, an application may then be made for production and inspection under sect. 61. *Hegan* v. *Montgomery* (1) was cited in support of that contention. These two sections relate to two entirely different matters—one is the discovery of documents in the possession of a party to the suit relevant to the matters in question; the other is the production of these documents for the purpose of inspection. They and the other sections in the Act relating to the same subject have superseded the old practice without in any material way altering its object or the principles upon which the discovery and production were ordered. I think the correct practice is as stated in *Hegan* v. *Montgomery*. It may be, and very often happens, that documents in the possession

(1) 1 N. B. Eq. 247.
(2) 1 Q. B. D. 423.
(3) 2 Ch. D. 644.

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of a party may be privileged, and, therefore, not liable to production or inspection. Hence it is, that when an order is made under sect. 59 for the discovery of documents, the party is obliged by sect. 60 to state under oath what the documents are, and to specify those which he objects to produce, with his reasons. The sufficiency of those reasons can be determined when an order for inspection is made, and, if the affidavit is sufficient, it will state the documents with sufficient clearness and in sufficient detail to enable them to be identified. In *Taylor* v. *Batten* (1) it is said the only object of the affidavit is to enable the Court to order the documents to be produced, if it think fit to make an order to that effect. Cotton, L.J., says: "The principle of our decision is that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient." Now, what order am I in a position to make on the papers before me? And, in considering this, it must be borne in mind that disobedience to the order is punishable by attachment. What papers am I to order to be produced? And where am I to find a description of them which would, in the case of non-production, enable the order to be enforced? The defendant in his affidavit states that certain correspondence had taken place between himself and Partington, who is the president of the plaintiff company and the witness to be examined in England, which correspondence is material to his defence in this suit. Some of these letters, he says, were signed by him personally, some by him as managing director of the company, some in the name of the company itself, and some by Andre Cushing & Co., of which firm he was then a member. He also states that all, or the greater portion, of these letters were copied into the plaintiffs' letter press book, and that Partington's letters in reply were either placed on the files of the plaintiff company or subsequently delivered by him to the company. The only order I could here make would be in general terms, to include

(1) 4 Q. B. D. 85.

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copies of all letters relevant to the questions involved in the suit copied in the letter books of the plaintiffs, written by the defendant, as he has described, and which are in plaintiffs' possession, and the letters from Partington to him. I think before doing that we should have the plaintiffs' admission on oath of the papers in their possession, and their reasons, if any, why they, or any of them, should not be produced.

I think this summons must be dismissed with costs.

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April 25.

Interlocutory injunction — Rule as to granting — Facts on motion in dispute — Partnership — Receiver.

On a motion for an interlocutory injunction to restrain defendant from disposing of assets of an alleged partnership between him and the plaintiff to carry on a business previously conducted by the defendant, and for a receiver, the plaintiff alleged that books of account were opened up, and a bank account kept, in the firm's name; that bill heads with the name of the firm, and names of the plaintiff and defendant thereon, were used, and a circular under the firm name distributed by the defendant, announcing that plaintiff was associated in the business. The defendant denied that a partnership was formed, and alleged that it was contingent upon the plaintiff paying into the business a sum of money equal to the value of the defendant's stock in trade on hand; that this had never been done; that the plaintiff was employed at a weekly salary; and that the bill heads were ordered by plaintiff without authority, and their use only permitted after his assurance that he would shortly purchase an interest in the business. These allegations were denied by the plaintiff: —

Held, that the motion should be granted.

On a motion for an interlocutory injunction, the Court should be satisfied that there is a serious question to be determined, and that under the facts there is a probability the plaintiff will be held entitled to relief.

Motion to continue an interlocutory injunction order granted by Mr. Justice *Landry*, restraining until April 23,

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1903, the defendant, Lorenzo R. Howard, from selling or in any wise disposing of the stock in trade and effects of the tailoring firm of L. R. Howard & Co., at Port Elgin, and from collecting, receiving, assigning, or in any wise disposing of the debts and assets of the said firm, acquired by or incurred to said firm since April 28, 1902, and for the appointment of a receiver.

The plaintiff, Isaac C. Burden, a tailor, by the bill in the suit, alleged that he was in April, 1902, residing in Fredericton, when he received a letter from the defendant, who was carrying on a tailoring business at Port Elgin in his own name, proposing a partnership, on the strength of which he went to Port Elgin and discussed the matter with him. The plaintiff went to work in the defendant's shop, and the question of the partnership was left open for further discussion. The plaintiff alleged that at the end of two or three weeks, and towards the latter part of April, a partnership agreement was concluded between them to carry on business together under the firm name of L. R. Howard & Co., and upon the terms that each should devote his whole time to the business and share equally in the profits and losses; and that an appraisement of the stock of the defendant then on hand was made. New books were said to have been opened in the name of L. R. Howard & Co., bill heads to have been used in the business with the firm name of L. R. Howard & Co., and the names of the plaintiff and defendant, thereon, and a circular issued to the public in the name of L. R. Howard & Co., announcing that the plaintiff was associated with the defendant. An account was opened in the firm's name with the Bank of Nova Scotia, upon which cheques were drawn in the name of the firm by the defendant, while the defendant had a private account in the same bank; and goods were purchased for the business in the firm's name. The plaintiff alleged that he was recognized and held out by the defendant as a co-partner in the business, and was so regarded by the firm's employees and customers. The plaintiff alleged that about April 1, 1903, he asked the defendant for a statement of the firm's affairs, but was

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unable to obtain it; that he had been refused permission by the defendant to examine the firm's books of account, or to have anything to do with the business, and that the defendant denied that a partnership existed or ever existed between them, or that the plaintiff had any share or interest in the business. The affidavit of the defendant on the motion stated that he employed the plaintiff at a weekly salary, with a right to take an interest in the business, if he should wish to do so, upon putting into the business cash to the value of the stock then on hand, when articles of partnership were to be executed. The defendant stated that such purchase money had never been paid; that the plaintiff had continued in his employ at a weekly salary, and a statement of payments of varying amounts was exhibited, shewing a balance of $42.47 due the plaintiff. The defendant stated that the bill heads were ordered by the plaintiff, and that he (the defendant) remonstrated with him for placing his name on them; that the plaintiff replied that he shortly would purchase a share in the business, and that on the strength of that assurance he (the defendant) had made use of them. The defendant denied that the plaintiff's name appeared in the books of the business. The plaintiff replied that it was not agreed that he was to put money into the business, and that he told the defendant he had no means to do so.

Argument was heard April 21, 1903.

M. G. Teed, K.C., and *L. C. Hanington*, for the motion.

D. Jordan, K.C., *contra*, citing *Martin* v. *Martin* (1).

1903. April 25. BARKER, J.:—

If the plaintiff's account of the arrangement between himself and the defendant is correct, a partnership between them would, I think, be established, and if his account of what has taken place since is correct, there is ample ground shewn for the intervention of this Court by way of injunction and appointment of a receiver for the winding up of

(1) 1 N. B. Eq. 515.

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the partnership business. The defendant, however, denies the existence of any such partnership, and on that ground justifies his actions in reference to the business, which otherwise would amount practically to an expulsion of the plaintiff, and a refusal to allow him to have any further connection with it. The defendant contends that it is a question of fact whether any such partnership existed or not, and that however much the acts and declarations of the parties might as to third persons operate by way of estoppel to prevent them from denying the existence of such partnership, no such question can arise between the parties themselves. I agree in this; but the case of *Martin* v. *Martin* (1), cited by Mr. Jordan, is distinguishable from this. In that case there had been a written agreement entered into between the parties, and the only point was as to its construction and effect. The acts of the parties under it were only important, if at all, to shew how they had themselves regarded it. In the present case the existence of the agreement is denied altogether; there is no question as to the construction of it. The plaintiff has, however, sworn distinctly that he and the defendant did enter into co-partnership to carry on the tailoring business. What was done by them is put forward as corroborating that fact, but has nothing to do with the effect or the meaning of the agreement, for as to that there is no question. In order to keep the property *in statu quo* until the hearing, it is necessary that the Court should be satisfied on the material before it, not absolutely as to the rights of the parties, but that there is a serious question to be tried at the hearing, and that under the facts now before it there is a probability that the plaintiff is entitled to relief: *Preston* v. *Luck* (2); *Joyce* on Injunctions (3). I do not intend to go into the facts at any great length, because it is not necessary to do so, except to shew that there is a substantial question to be determined, and which, on the material before me, may be decided in the plaintiff's favor. What are the facts which sustain the plaintiff's sworn statement that the partnership was entered into? He says that he

(1) 1 N. B. Eq. 515. (2) 27 Ch. D. 497. (3) P. 1032.

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was living in Fredericton and the defendant wrote to him to come to Port Elgin to discuss the question of a partnership. That is not denied, nor is it denied that the question was discussed. The business which was carried on in the defendant's name was afterwards carried on in the name of L. R. Howard & Co., new books were opened in the firm name, a bank account was kept in the name of the firm—while the defendant swears to have kept a private bank account of his own—bill heads were printed shewing the name of the firm and the plaintiff and defendant as partners, and these were used as late as March of this present year, only a short time before the defendant refused to permit the plaintiff on the premises or to have anything more to do with the business, and a circular was ordered by the defendant himself and sent out, in which the defendant, as L. R. Howard & Co., announces that he had associated the plaintiff in the business. There is substantially no denial of these facts and, except as to the bill heads, no attempt at any explanation of them. Under these circumstances it cannot be said that the evidence before the Court does not strongly support the plaintiff's contention. It is true that the defendant swears positively that there never was any partnership agreement entered into, and that the plaintiff was in his employ as his servant, and there are affidavits of others produced which sustain the defendant's view. But a dispute as to the facts always exists in these cases. Considering all the circumstances, I think the motion to continue the injunction and for the appointment of a receiver must prevail, and there will be an order accordingly.

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May 29.

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—No. 2. See ante, p. 458.

Practice—Discovery—Identification of documents—Sufficiency of description.

An affidavit of discovery should sufficiently identify documents referred to, as to enable the Court to order their production; the convenient and safe course being to letter or number each document. Where, therefore, an affidavit referred to two sealed parcels of letters marked A and B, and as containing correspondence between named dates, it was held insufficient.

Summons for further affidavit under an order for discovery of documents by the plaintiffs. The facts sufficiently appear in the judgment of the Court.

Argument was heard May 21, 1903.

W. Pugsley, A.-G., and *A. P. Barnhill*, for the defendant:—

The letters are not sufficiently identified to enable the Court to compel their production. It is proper practice where documents are numerous to put them in bundles duly scheduled, but the documents must be referred to by number or date, so that the opposite party when requiring any document may call specifically for it. The test of the sufficiency of the description in the affidavit is whether the Court may upon it enforce production: *Taylor* v. *Batten* (1), where a description of documents numbered 50 to 76, inclusive, tied up in a bundle marked A and initialed by the deponent, was held sufficient. In *Cooke* v. *Smith* (2) Kay, L. J., says: "I dissent entirely from one point taken by Mr. Mansfield. He said the trustees will not have any trouble; they can put all the documents into bundles and mark the bundles. I beg to say that is not the way in which discovery should be made. You must not only make up the

(1) 4 Q. B. D. 85. (2) [1891] 1 Ch. 509, 522.

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documents in bundles, but you must describe what the documents are—for example, a bundle of letters from A. to B.; and you must identify each document by marking it specially." See also *Walker* v. *Poole* (1); *Bewicke* v. *Graham* (2).

A. H. Hanington, K.C., for the plaintiffs:—

The affidavit is sufficient. Being described as letters in sealed and marked bundles and as correspondence between named dates, their production could be moved for. The same description was held sufficient in *Christian* v. *Taylor* (3).

1903. May 29. BARKER, J.:—

On the 4th day of April last, I made an order on the application of the defendants, under sect. 59 of Act 53 Vict., c. 4, directing the plaintiffs to make discovery on oath of documents in their possession or power, relating to the matters in question in this suit. The affidavit produced scheduled a variety of books and documents, and among others, two sealed parcels or bundles of letters, one marked A and the other marked B, containing correspondence between the plaintiffs and one Partington and others between certain specified dates.

I subsequently granted a summons for the plaintiffs to shew cause why they should not furnish a further affidavit, on the ground that the first one was defective in not sufficiently identifying these letters in question. The rule, I think, is that the applicant is bound by the affidavit made in answer to his application, if the documents referred to in it are sufficiently identified to enable the Court to order their production. It is not necessary to hold that letters put up in sealed bundles cannot be sufficiently identified except by means of numbers, in the way contended for by the defendant, but I think the more recent cases do agree in holding that such a course is both a convenient

(1) 21 Ch. D. 835, 836. (2) 7 Q. B. D. 400.
(3) 11 Sim. 401.

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and safe one to adopt. *Taylor* v. *Batten* (1), and *Bewicke* v. *Graham* (2), both support this view. In *Cooke* v. *Smith* (3), Kay, L. J., distinctly says that putting documents into bundles and marking the bundles is not the way in which discovery should be made. He adds: "It has been settled, I believe, without the least dissent for years past, that such a proceeding would not be proper. You must not only make up the documents in bundles, but you must describe what the documents are—for example, a bundle of letters from A. to B., and you must identify each document by marking it specially. I quote the words of Lord Justice Cotton in one of the last cases, *Hill* v. *Hart-Davis* (4). "They ought to have been set out in bundles and scheduled and numbered in such a way that the defendant might have asked for those which he wanted to see, specifying them by their numbers." In *Walker* v. *Poole* (5), Kay, J., says: "The ordinary mode of setting out such letters has been settled after an immense amount of litigation, and the proper method is to refer to them as contained in a bundle, each document in the bundle being identified by a letter or some other method of identification; that is all that is necessary." See also *Budden* v. *Wilkinson* (6); *Morris* v. *Edwards* (7).

In the present case there is no way of identifying any particular letter in these bundles, and I think, under the authorities I have mentioned, the affidavit is defective in this particular. There will therefore be an order for a further affidavit. I shall make no order as to costs at present, but reserve that question until a later stage of the cause, when it can be more equitably dealt with.

(1) 4 Q. B. D. 85.
(2) 7 Q. B. D. 400
(3) [1891] 1 Ch. 522.
(4) 26 Ch. D. 470, 472.
(5) 21 Ch. D. 836.
(6) [1893] 2 Q. B. 432.
(7) 15 App. Cas. 309.

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June 18.

—No. 3. See ante pp. 458, 466.

Production Abroad—Power of Court—Inspection—Demand for, previous to application to Court—Act 53 Vict., c. 4, s. 62—Technical practice—Avoidance by Court of needless costs.

While the Court may have power to order production abroad of documents here, it will not exercise it except in special circumstances.

Where inspection of documents was had by consent, an objection on a summons for an order for inspection subsequently taken out, that a demand in writing for inspection was required by sect. 62 of Act 53 Vict., c. 4, to be first made, was overruled as technical—the Court declining to express an opinion upon its correctness—and as entailing costs, while without benefit to the suitors,—a result avoided by the Court where possible.

Summons for an order for inspection of documents in possession of the plaintiffs, and for their production before a Commissioner for taking evidence in the suit abroad. The facts sufficiently appear in the judgment of the Court.

Argument was heard June 16, 1903.

A. H. Hanington, K.C., for the plaintiffs:—

The defendant was allowed by the plaintiffs inspection of all documents in their possession; he has taken copies of them, and if he again desired to inspect them, permission would not have been refused. So far as inspection is concerned, therefore, this application was unnecessary. Production of the documents outside the jurisdiction of the Court will not be ordered, the right to inspect documents being limited to inspection of them here. See *Sichel & Chance* on Discovery (1); *Prestney* v. *Corporation of Colchester* (2). Before inspection can be ordered, the applicant must shew that he has made a request in writing of the opposite party for the production of the documents sought to be inspected, which has been refused: *Sichel & Chance* (3); sect. 62 of Act 53 Vict., c. 4.

(1) P. 155. (2) 24 Ch. D. 376. (3) P. 155.

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Pugsley, A.-G. (*L. A. Currey*, K.C., and *A. P. Barnhill*, with him), for the defendant:—

The application is made under sect. 61 of the Act, by which a request for inspection, if called for by sect. 62, is not required. The inspection already had by the defendant at the office of the plaintiffs' Solicitors was attended with much inconvenience, while he should be allowed inspection under suitable conditions. The Court has ample power to order the production of the documents before the Commissioner. The section allows the Court to deal with documents, when produced, in such manner as shall appear just. Unless they are produced before the Commissioner, the taking of evidence will be greatly embarrassed.

1903. June 18. BARKER, J.:—

An order was made some time ago, on the application of the defendant, for a discovery of documents in the plaintiffs' possession, and, in pursuance of that order, an affidavit of documents was made. It was alleged that these documents, which consisted mainly of correspondence, were necessary to enable the defendant to prepare interrogatories for the examination of a witness in England, for which purpose an order was also made several weeks ago. The present application was for an order for an inspection of these documents here, and for their production before the Commissioner in England, or for such other order as I might see right to make. In shewing cause, plaintiffs' Counsel produced an affidavit by which it appears that the documents in question, and which were duly scheduled and marked for identification, and to the production of which there is no objection, had been in fact produced to the defendant's Solicitor, and he had been permitted to make, and, in fact, had made, copies of such of them as he desired, except one letter, which he said he could not find. The plaintiffs object to any order being made as asked for, on three grounds: (1) because it is wholly unnecessary under the circumstances; (2) because no order for production can be made until after a refusal

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to produce when notified in writing to do so, as mentioned in sect. 62 of Act 53 Vict., c. 4; and (3) that this Court had no power to order the production of the documents out of the jurisdiction. I do not intend to decide the point of practice raised as to the notice in writing mentioned in sect. 62 being also required in a case of discovery under sect. 59 before an order for production can be made, because in this case the plaintiff was willing to produce the documents, and did produce them, without any notice; and, even if the summons was only for an order of inspection, to discharge it on this somewhat technical ground would simply mean to make some person pay costs, without the litigants being in any way benefited — a course I do not adopt where I can avoid it. The summons, however, asks for an order to produce these documents in England; and this is a substantial question. It is true that sect. 61 gives the Court power to deal with the documents when produced in such manner as shall appear just, and to order their production as the Court shall think right. In *Lafone* v. *The Falkland Islands Co.* (2), Wood, V.-C., refused to make such an order, saying that it was without precedent. At the same time he seems to have thought that the Court had the power, and would exercise it where it would be right and proper, for the sake of justice, to do so, but that special circumstances should exist to justify such an order. I think there are no special circumstances shewn here to warrant any such order. In fact, the production of the documents was never until now asked for except for the purpose of preparing interrogatories to accompany the commission to be issued to England. Whether, therefore, I have the authority or not, it seems clear that this is not a case where it should be used. I shall make an order that the plaintiffs do produce at the hearing of this cause the books and documents which, by the affidavit already made, are in their possession, and, in the meantime, that they produce at the office of Messrs. Hanington & Hanington, their Solicitors, in the City of St. John, at all reasonable times, upon reasonable notice, the

(1) 4 K. & J. 39.

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said books and documents, or such of them as shall be required; and the defendant, his Solicitors and agents, are to be at liberty to inspect and peruse the books and documents so produced, and to take copies and abstracts therefrom, as the defendant shall be advised, at his expense.

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June 18.

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—No. 4. See ante, pp. 458, 466, 469.

Practice—Discovery—Immateriality—Issue in suit.

Discovery ordered by defendant of books shewing profits on sales by him to the plaintiff company while its managing director, in a suit for an accounting of such profits, to which the defence was set up that the sales were at a price fixed by an agreement with the company, and though the production of the books might not be ordered until the title of the company to relief was established at the hearing.

The plaintiff company was incorporated April, 1898, under "The New Brunswick Joint Stock Companies Act, 1893," and amending Acts, for the purpose, among other objects, of manufacturing pulp from wood. The defendant, George S. Cushing, is a manufacturer of lumber at Union Point, in the County of Saint John. He was one of the promoters, and is a shareholder, of the company, and from the organization of the company until August 7, 1901, was its managing director. The company erected a mill and wharves at Union Point, for the construction of which lumber was alleged to have been purchased by the defendant as such managing director from himself for the company, at a profit to himself, and it was alleged that he charged for lumber that was not delivered to the company, or which was taken back by him. It was also alleged that he had made a profit on lumber and other materials used in the construction of the mill and wharves, purchased by him from other parties. It was further alleged that the defendant had purchased from himself for the company, while he was its managing

director, waste or slab wood of his own mill, used for fuel and in the manufacture of pulp by the company, upon which he had made large profits, and that he had also charged for fictitious quantities of waste wood. Other allegations of breaches of duty to the company by the defendant were stated in the bill, which need not be here set out. The bill prayed for discovery, and for an account by the defendant to the company of all profits made by him from sales of lumber, refuse wood, and other materials, to the company, and of all monies wrongfully received by him from the company. In answer to the plaintiffs' interrogatory, whether he had not, while managing director of the company, purchased from himself for the company, for fuel and for the manufacture of pulp, waste or slab wood, and whether he did not receive prices therefor in excess, or to some and what extent in excess, of its fair value, and whether he had not made large and what profits thereby, and whether he had not charged for quantities in excess, or to some and what extent in excess, of that actually supplied, the defendant stated that waste or slab wood supplied by him to the company was supplied in accordance with an agreement with the company, and that the prices paid therefor were not in excess of its fair value, and were the prices agreed to be paid by the company under its agreement. He declined to state whether or not he had made any profits from the sale of such slab wood to the company, and submitted that he was not bound to answer the interrogatory in that respect. He denied that he had charged for any waste wood that had not been supplied, and he denied all other breaches of duty charged in the bill against him. On May 29, 1903, a summons was taken out by the plaintiff company for discovery by defendant of all books, letters, accounts, invoices and writings containing any entry or account relating to or shewing the amount of slab wood or waste wood supplied by the defendant to the company while he was managing director thereof, and of all other lumber and materials supplied by him to the company, and the quantities thereof, or shewing the cost to the defendant

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of such slab or waste wood or other lumber and materials, and the profits made by the defendant thereon, and the value thereof; also the prices received by the defendant for waste wood previous to selling the same to the plaintiff company.

Argument was heard June 16, 1903.

W. Pugsley, A.-G. (*L. A. Currey*, K. C., and *A. P. Barnhill*, with him), for the defendant: —

The defendant has set up by his answer that the prices charged by him for slab wood were those agreed by the company to be paid to him, and he declined to state what his profits were, as being of no concern to the company. The question is therefore an issue in the suit, to be decided at the hearing. Until it is determined adversely to the defendant, it must be assumed that the discovery sought is immaterial. The discovery can only be useful to the company if it succeeds in establishing its title to relief. In *Verminck* v. *Edwards* (1), which was an action claiming an account of profits made by the defendants as agents of the plaintiffs, the agency being denied, the Court declined to order production of the invoices of goods sold by third parties to the defendants, and resold by them to the plaintiffs, until after the trial of the question of agency. See also *Wood* v. *Anglo-Italian Bank* (2); *Kettlewell* v. *Barstow* (3); *Fennessy* v. *Clark* (4), *Schreiber* v. *Heymann* (5); *Elkin* v. *Clarke* (6); *Marquis of Donegal* v. *Stewart* (7). The plaintiffs, not having excepted to our answer declining to give the information sought, are precluded from asking for it by discovery. The right to discovery of books of account shewing the quantity of slab wood supplied is not contested.

A. H. Hanington, K. C., for the plaintiffs: —

The defendant has misapprehended the nature of the application. The question of the immateriality to us of

(1) 29 W. R. 189.
(2) 34 L. T. 255.
(3) L. R. 7 Ch. 686.
(4) 37 Ch. D. 184.
(5) 63 L. J., Q. B. 749.
(6) 21 W. R. 447.
(7) 3 Ves. 446.

the cost to the defendant of the slab wood can only arise when production of the documents shewing it is called for. What is now sought is an affidavit of books, etc., in the defendant's possession shewing the cost to him of the slab wood. Such an affidavit will be ordered as of course. In *Robertson* v. *St. John City Railway Co.* (1), it was decided that application may be made for production, though the information has been refused in answer to interrogatories, and that it cannot be objected that the answer should have been excepted to.

Pugsley, A.-G., in reply:—

The defendant is not obliged to make discovery of documents he is not bound to produce.

1903. June 18. BARKER, J.:—

The plaintiffs took out a summons for the defendant to shew cause why he should not make an affidavit of documents in his possession relating to matters in question in this suit. Two objections were made to the discovery sought for. First, it was said that as to certain documents mentioned specially in the plaintiffs' affidavit, he had already been interrogated in reference to them and by his answer, which was not excepted to, he had declined to answer these interrogatories on the ground that, at the present stage of the suit, the discovery sought related to matters altogether irrelevant, or, at all events, it was altogether unnecessary until it should be first tried out whether there was, in fact, a contract as alleged by the defendant. I do not think the refusal to answer the interrogatories furnishes any answer to this application. *Wigram* so lays down the rule at page 200 of his work on discovery, and *Palmer*, J., so held in this Court in *Robertson* v. *St. John City Railway Co.* (1). The second objection to this application is that which I have just mentioned as the reason assigned by the defendant for not answering the interrogatory. It seems that the company, by its bill, alleges that the defendant, while managing director of the plaintiffs'

(1) N. B. Eq. Cas. 462.

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mill at St. John, furnished from his own saw mill to the company, for fuel in its mill, large quantities of slab wood, charging for the same prices in excess of the value, and upon which he made large profits. The defendant admits furnishing the lumber for fuel, but alleges that it was supplied under a specific contract between him and the plaintiffs, by which the price was fixed, and that if that fact is established, the cost of the lumber to him, or whether he made a profit or not, are matters with which the plaintiffs have no concern, and they are matters which are not in any way relevant to the question really at issue — that is, whether there is really such a contract or not. The defendant, therefore, contends that this application, so far as it relates to documents or books shewing the cost to him of this wood, or his profit on it, is altogether premature, but to the remainder of the discovery sought he, as I understand, raises no objection. If this were an application for production of documents, possibly the objection now set up by the defendant might be good, but this is only an application for discovery, and that, I think, is governed by a different principle. In *Swanston* v. *Lishman* (1) Jessel, M. R., says the rule as to discovery is exactly opposite to that of production. You must set out every document you have in your possession, whether you are bound to produce them or not. The following cases are to the same effect: *The New British Mutual Investment Co.* v. *Peed* (2); *Lazarus* v. *Mozley* (3); *Rombolt* v. *Forteath* (4); *Quin* v. *Ratcliff* (5). I think the plaintiffs are entitled to an order for discovery under sect. 59 of the Act 53 Vict., c. 4. It will be time enough to consider the question of the production when application is made for that purpose. I will make a general order for the defendant to make discovery on oath of the documents which are, or have been, in his possession or power relating to any matter in question in this suit. Such discovery to be made on or before the 14th of July next.

(1) 45 L. T. 360.
(2) 3 C. P. D. 196.
(3) 5 Jur. N. S. 1119.
(4) 3 K. & J. 44.
(5) 6 Jur. N. S. 1327.

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1903.
August 18.

Will — Construction — Legacy — Revocation of life interest — Acceleration — Period of distribution.

A testator directed a sum of money to be set apart by his trustees, and the income paid to A for life, and that after his death the capital should be divided among A's children in certain shares. The testator further directed that in the event of A dying while any of his children should be under the age of twenty-five years, the income of the fund should be paid to their mother while such children respectively should be under that age "for the maintenance and education of such child or children respectively while he or she shall be under that age." By a codicil the testator revoked the "legacy and annuity" to A.

Held, that the gift to the children was not revoked, but vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of twenty-five years.

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

Argument was heard July 28, 31, 1903.

C. N. Skinner, K.C., for the defendant, R. S. C. Lewin:—

The revocation of the annuity to Richard S. C. Lewin did not affect the legacy to his children. The bequest to the father is distinct from that to them, and a revocation of the former could take place consistently with the continuance of the latter gift. If it should be considered that the revocation extends to the bequest to the children, it is then contended that it does not fall into the residuary estate, but that the testator has died intestate as to it. The revocation is limited to the annuity to Richard. Its effect is to vest the interests of the children immediately in them, as there is no longer a reason for postponing the date of vesting to the father's death. The direction to pay the income from the fund to the mother, while they are under the age of twenty-five years, does not entitle her to receive the whole income until the youngest child attains that age. The share of Mary, who survived the testator,

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vests in her administratrix, for the benefit of the defendant, Richard S. C. Lewin, just as the shares of the other children vested in them on the testator's death.

W. Pugsley, A.-G., for the defendants, J. D. Pollard Lewin, Sarah Elizabeth Scammell, and Margaret Lewin, administratrix of Mary L. C. Lewin:—

The revocation of the father's life interest is equivalent to his death, and accelerates the interests of the children: *Lainson* v. *Lainson* (1); *Eavestaff* v. *Austin* (2); *Jull* v. *Jacobs* (3). There may be a question whether the vesting of the legacy in each child is not conditional upon his or her attaining the age of twenty-five years. The fund is not divided and the income from each share applied separately to the respective children. If it were, so as to be an absolute gift of the income to each, the legacy would immediately vest on the testator's death in each child. See *Bolding* v. *Strugnell* (4). But here the income is given to the mother to be applied indiscriminately. In such a case it would seem that the gift to each child would not vest until he or she reaches the age of twenty-five years. In that view the share of Mary L. C. Lewin never vested, but went into the residuary estate. It would seem that, until the youngest child reaches twenty-five years of age, the income of the fund is payable to the mother. The will provides that "in case of the decease of my said son, Richard Samuel Clarke Lewin," and the revocation of the gift to him has the same effect as if he had died, and the gift to him had been unrevoked, "any or either of his said three children shall be under the age of twenty-five years, and their mother, the said Margaret Lewin, be still living, then I direct my trustees to pay to the said Margaret Lewin while such children respectively shall be under that age the yearly annuity of three hundred dollars from the said sum of six thousand dollars, to which such child or children will be entitled on the decease

(1) 18 Beav. 1.
(2) 19 Beav. 591.
(3) 3 Ch. D. 704.
(4) 45 L. J. Ch. 208.

of their said father, as hereinbefore mentioned, in or towards the maintenance, education, or otherwise for the benefit of such child or children respectively while he or she shall be under that age." While each child is under twenty-five years the income is to be applied towards his or her maintenance and education. When each child reaches that age, he or she ceases to share in the income, and it is to be wholly expended on the remaining children, or child, under that age. Until the youngest child attains that age, there can be no distribution of the fund.

A. O. Earle, K.C., for the defendants, Percival Lewis Lewin, Elizabeth Ellman Cook, and Charles Lewin Cook:—

The legacy is revoked to the children as well as to the father. The legacy was to him for life, and over to his children. It was, therefore, but as one gift, and when it was withdrawn as to him, it was withdrawn for all purposes. The doctrine of acceleration has never been decided to be applicable to personalty. It will certainly not be applied unless it can be seen that, under the circumstances, its application accords with the testator's intentions. The gift to the children on any construction is only to take effect after the father's death. Until then their interests do not vest, and the income in the meantime passes to the residuary estate.

Skinner, K.C., in reply.

B. S. Smith, for the plaintiffs, the trustees and executors, was not heard.

1903. August 18. BARKER, J.:—

The executors and trustees of the will of the late Hon. J. D. Lewin have filed this bill in order to obtain a declaration as to the rights of the defendants in reference to a certain fund of $6,000. The part of the will which relates to the fund is as follows:—

"And I direct my trustees to set apart the sum of six thousand dollars and invest the same in their names or

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under their legal control, and from the interest thereof or of the investments representing the said sum of six thousand dollars, pay unto my son Richard Samuel Clarke Lewin, during his life, the annuity or yearly sum of three hundred dollars payable quarterly from my decease. And I declare that in case the said capital sum of six thousand dollars, so set apart as aforesaid, does not yield an income sufficient to pay the said annuity of three hundred dollars my trustees shall and they are hereby empowered to resort to the capital or corpus of the said sum of six thousand dollars for payment of the said annuity. And in case of the income from the said appropriated sum of six thousand dollars being more than the sum of three hundred dollars per year then and in such case such surplus income shall be added to the capital or corpus of the said appropriated sum so set apart as aforesaid. And after the death of the said Richard Samuel Clarke Lewin I direct my said trustees to stand possessed of the said capital or corpus that remains after paying the said annuity of three hundred dollars, upon trust to pay unto the said James Davies Pollard Lewin one-half of the capital sum, and to pay one-quarter of said capital sum to Sarah Elizabeth Lewin, and one-quarter of said capital sum to Mary Louisa Clarke Lewin."

In a subsequent part of the will is the following clause:—"And in case of the decease of my said son, Richard Samuel Clarke Lewin, any or either of his said three children shall be under the age of twenty-five years, and their mother, the said Margaret Lewin, be still living, then I direct my trustees to pay to the said Margaret Lewin while such children respectively shall be under that age the yearly annuity of three hundred dollars from the said sum of six thousand dollars to which such child or children will be entitled on the decease of their said father as hereinbefore mentioned, in or towards the maintenance, education or otherwise for the benefit of such child or children respectively while he or she shall be under that age."

This will is dated November 2, 1892. The testator executed two codicils, the latter of which is only important

for the purposes of this case. It is dated November 22, 1899, and contains the following clause:—"And whereas in and by my said will I directed my said trustees to set apart the sum of six thousand dollars and invest the same, and from the interest of the investments pay unto my son Richard Samuel Clarke Lewin during his life the annuity of three hundred dollars, now I hereby revoke the said legacy and annuity to the said Richard Samuel Clarke Lewin. And in all other respects I confirm my said will as altered by the previous codicil thereto."

The testator died March 11, 1900, leaving him surviving his son, Richard Samuel Clarke Lewin, Margaret Lewin, wife of Richard, and their three children — James Davies Pollard Lewin (whom I shall hereafter speak of as Pollard), Sarah Elizabeth Lewin (whom I shall speak of as Sarah), and Mary Louise Clarke Lewin (whom I shall speak of as Mary). These three children were all under the age of 25 years at the testator's death. Pollard is still under that age. Sarah has attained that age, and is now the wife of J. Kimball Scammell—and Mary died December 11, 1900, at the age of 19 years, intestate and unmarried. Richard Samuel Clarke Lewin, and his wife Margaret, parents of Pollard, Sarah, and Mary, are still living, and letters of administration of the estate of the deceased daughter Mary have been granted to her mother, Margaret Lewin.

If this will had stood as it was before the second codicil was added, it would, I think, be clear that the three children of Richard would have taken vested interests in the fund of $6,000, subject to the father's life interest, and subject to the mother's interest in case she survived her husband, and the children had not all reached the age of 25 years before that: *Jones* v. *Mackilwain* (1); *Chaffers* v. *Abell* (2); *Browne* v. *Browne* (3); *Hanson* v. *Graham* (4).

Now, what is the effect of the codicil? It does not, in my opinion, revoke the whole gift of the fund so as to make it fall into the residuary estate. It in terms only

(1) 1 Russ. 220.
(2) 3 Jur. 578.
(3) 3 Sm. & G. 568.
(4) 6 Ves. 239.

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revokes the legacy and annuity to Richard, and it is a settled rule of construction that a codicil only alters the will so far as is necessary for the purposes of the codicil. See Per *Turner*, L. J., in *Norman* v. *Kynaston* (1).

The effect of the revocation is to accelerate the interest of the children in the same way as though the event upon which the particular estate was to terminate had actually happened — that is to say, as though Richard had died. The principle is that these and similar dispositions shew an intention to dispose of the property for the benefit of those named in a certain order of succession — that is, in the present case, first, for the benefit of Richard during his life, and ultimately for the benefit of his three children. The codicil does not alter this intention, but only changes the order of succession in which the devisees are to take. And it seems immaterial in what way the particular estate is determined whether by revocation, as in this case, or by forfeiture, or by any other circumstance which prevents the devisee from taking.

Lainson v. *Lainson* (2), affirmed on appeal (3), was a case of revocation like the present. The Master of the Rolls, Sir John Romilly, there says: — "The question is, whether this creates an intestacy, or an acceleration of the estate to the son of John Lainson; and I am of opinion that it is an acceleration of the estate to the son, and not an intestacy. I have looked carefully at the authorities, and I am unable to distinguish the case where a person gives an estate to another, and that fails, from the case where the testator himself directs that it shall fail; and although the expression used is, that the estate to the son of John Lainson is only to take effect 'from and after John Lainson's decease,' I am of opinion that the meaning is 'from and after the determination of his estate by death or otherwise.' In deciding thus I fulfil the intention of the testator."

Eavestaff v. *Austin* (4) is precisely similar to the present case, and it was there held that the interest of

(1) 3 DeG. F. & J. 29.
(2) 18 Beav. 1.
(3) 5 DeG. M. & G. 754.
(4) 19 Beav. 591.

the children was accelerated and took effect at once. *Jull* v. *Jacobs* (1); *Clark* v. *Randall* (2); *Craven* v. *Brady* (3); and on appeal (4), are all to the same effect. These cases also shew that in the application of this doctrine there is no distinction between real and personal estate. Chitty, J., in *Townsend* v. *Townsend* (5), decided in 1886, accepts without question, Vice-Chancellor Malin's decision in *Jull* v. *Jacobs*, where this doctrine is distinctly put forward.

This brings me to the clause of the will relating to the interest of Margaret Lewin — a clause which is not very clearly worded, and which may fairly give rise to some discussion. While this clause, in the event which has happened, provides for the payment of the annuity of $300 to Margaret Lewin, it differs materially from the clause by which the same annuity was given to Richard in this particular. It terminates on the children attaining the age of twenty-five, and it is in its terms for the education, maintenance and benefit of the children under that age. It in no way alters what seems to me to be the intention of the testator that on the determination of Richard's estate, the fund should go for the benefit of the children, either administered indirectly by the mother or directly by themselves. The clause refers solely to the case of a child or children under the age of 25 years at the date of the father's death; and it would, in my opinion, follow that in the case of a child over that age when the father's estate ended, the child's share would come into possession and he would be entitled to receive it. This present clause makes no provision for a child over that age at the date of the father's death, coming into possession of his share. That right he has under the first clause of the will. Neither can I find anything in this clause which indicates it as the testator's intention to make the share of the child, who has reached the age of 25, contribute to the support and maintenance of those under that age. That would, in effect, alter the proportion in which they were to share in

(1) 3 Ch. D. 704.
(2) 31 Ch. D. 72.
(3) L. R. 4 Eq. 209.
(4) L. R. 4 Ch. 296.
(5) 34 Ch. D. 357.

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the fund, and would prevent such child from any enjoyment or benefit of the fund for the period between his attaining the specified age and the youngest child attaining it. I have no doubt it was the testator's intention that each child should come into possession of his share on attaining the age of 25. After that period he had no interest in the annuity to be paid to his mother — that enured solely to the benefit of those under that age, and in my opinion the true meaning of the clause is that the annuity was payable solely from the shares of those who were entitled to benefit by it. Let us analyze the clause. In the event which has happened the testator directs as follows:—"I direct my trustees to pay to the said Margaret Lewin while such child or children"— that is child or children under 25 at the date of the father's death — "respectively shall be under that age"— the word *respectively* shewing that the period during which the annuity was to be paid for the benefit of each child terminated on that child reaching the age mentioned — "the yearly annuity of three hundred dollars from the said sum of six thousand dollars to which such child or children"— that is as before — the child or children under 25 — "will be entitled on the decease of their father as hereinbefore mentioned," etc. But no one child or two children under that age was in any case entitled to the whole fund of $6,000, so that the true meaning is, not that the annuity was to be paid out of the whole fund of $6,000, and that it was to remain in the trustees' hands for that purpose, but that it was to be paid out of that part of the fund which such child or children — that is the child or children under the age, and thus participating in the benefit of the annuity — would be entitled to on the decease of the father. This makes the whole clause harmonize with what seems to me to be the testator's manifest intention. It may be said that an annuity of $300 is far in excess of the interest which would arise from anything but the whole fund. It might, perhaps, with more force be said that if the testator's intention was that $300 a year was all he intended to give towards the support of three children, it is three times what he intended to give for the support of one. The

testator contemplated the possibility of the fund not producing the $300 a year during Richard Lewin's lifetime, and made provision for it. Whether that provision can be read into the clause of the will as to Margaret Lewin I do not say, but whether or not it is not, I think, a very material matter in determining the meaning of the clause, and one which should it arise can be easily disposed of. See *Watson* v. *Watson* (1).

There will be a declaration as follows:—

1. That the fund of $6,000 did not fall into the residue, nor is there an intestacy as to it, but that on the testator's death the three children of Richard Samuel Clarke Lewin, that is to say, the defendants—Sarah Elizabeth Scammell, then Sarah Elizabeth Lewin; Mary Louisa Clarke Lewin, since deceased; and the defendant, James Davies Pollard Lewin, took vested interests in the same as follows:—Sarah, one-quarter; Mary, one-quarter; Pollard, one-half — to the possession of which they were entitled on their respectively attaining the age of 25 years.

2. That the defendant, Sarah Elizabeth Scammell, is now entitled to have paid to her one-quarter of the said fund, and the defendant, Margaret Lewin, as administratrix of the estate of the said Mary Louisa Clark Lewin, also one-quarter of the said fund, and that the trustees are entitled to hold the remainder of the fund in trust to pay thereout to Margaret Lewin the annuity secured to her under the will for the maintenance and support and benefit of James Davies Pollard Lewin, until he attains the age of 25 years, when the same will go to him.

The parties having consented that the costs should be paid out of the fund, they will be taxed as follows — the costs of the trustees as between solicitor and client, and the costs of the remaining parties to the suit as between party and party, and when taxed they will be paid out of the fund, and one-quarter thereof charged against and deducted from the share of Sarah — the same as to the share of Mary, and the remainder charged against and deducted from the share of Pollard.

(1) 11 Sim. 73.

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MASTERS v. MASTERS.

Partition—Practice—Proof of unsoundness of mind of defendant by affidavit—Costs—Act 53 Vict., c. 4, s. 80.

Unsoundness of mind of defendant in a partition suit, proved by affidavits under Supreme Court in Equity Act, 53 Vict., c. 4, s. 80.

Application refused in a partition suit, that costs of appointing guardian *ad litem* of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by defendant's share in estate.

Bill for partition, or, in the alternative, for the sale, of lands in Westmorland county, owned as tenants in common by the plaintiff, Whitman Masters, and the defendants, Angeline Masters, Lavinia Dimock, Emma Adams, and Priscilla Masters, heirs of Hanse W. Masters, deceased. Plaintiff and defendants reside in Nova Scotia. The bill alleged that Priscilla Masters is a lunatic and person of unsound mind, not so found, and incapable of managing her affairs, or attending to business. The plaintiff claimed that it is difficult and impossible to make a beneficial partition of the lands, and prayed that a sale might be ordered, and the proceeds divided according to the respective interests of the plaintiff and defendants. The defendant, Priscilla Masters, put in an answer by guardian *ad litem*, by which it was admitted that it is difficult and impossible to make a beneficial partition of the lands, and that it is in the interests of the parties to the suit that a sale should be ordered. The bill was taken *pro confesso* against all the defendants except Priscilla Masters. At the hearing an order of Mr. Justice *Hanington* was read allowing proof to be made by affidavits of, *inter alia*, the unsoundness of mind of the defendant, Priscilla Masters.

M. G. Teed, K.C., for the plaintiff, contended that the affidavits were admissible under s. 80 of the Equity Act, 53 Vict., c. 4, by which it is provided that affidavits by particular witnesses or affidavits as to particular facts or

circumstances may, by consent, or by leave of a Judge, obtained upon notice, be used on the hearing. The order of Mr. Justice *Hanington* was consented to by defendant's Solicitor.

Mr. Justice *Barker* ordered the affidavits to be read.

The case having been further proved against the defendant, the usual decree of sale was made.

Mr. *Teed* submitted that the costs of appointing the guardian of the defendant, Priscilla Masters, and of proving defendant's lunacy should be borne by her share of the estate. Her lunacy alone occasioned the suit.

BARKER, J.:—Such costs are incidental to the proceedings, and are not properly the subject of special direction. There will be the usual order as to costs.

NOTE.—The Court has power to decree partition against a tenant in common, being a lunatic not so found: *Hollingworth* v. *Sidebottom*, 8 Sim. 620. In *Porter* v. *Porter*, 37 Ch. D. 420, it was held that a partition suit may be brought by a person of unsound mind, not so found, by a next friend, and the case of *Halfhide* v. *Robinson*, L. R. 9 Ch. 373, deciding that an action cannot be brought by a next friend in the name of a person of unsound mind, not so found by inquisition, in respect of his real estate, was distinguished.—Rep.

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WATSON v. PATTERSON.

Floatable river—Riparian rights—Use of stream—Mill owner—Timber driving—Obstruction—Mandatory injunction—Removal of obstruction before hearing—Dismissal of bill—Costs—Injunction for apprehended injury—Assessment of damages—Absence of ground of relief in Equity.

The defendant, the owner of a saw mill on a floatable river, erected booms in connection therewith, which, with logs of the defendant, impeded the passage of logs of the plaintiff. The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted:—

Held, that the bill should be dismissed, but without costs, and with costs to the plaintiff of the taking out and service of the injunction order.

An injunction to perpetually restrain defendant from closing or obstructing the river refused.

The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of the river in operating a saw mill.

The Court refused, in the above suit, to assess plaintiff's damages, as he had a remedy at law, and at the time the bill was filed the grounds for an injunction had ceased.

The facts in this case are sufficiently stated in the judgment of the Court. Argument was heard July 16, 1903.

Thomas Lawson, for the plaintiff.

Silas Alward, K.C., for the defendant.

1903. August 18. BARKER, J.:—

This case stands in a somewhat peculiar position. The bill which was sworn to on the 15th May, 1902, and filed on the 23rd of that month, alleges that the plaintiff had entered into a contract with one Adam J. Beveridge, by which he was during the lumbering season of 1902 to cut on lands held by Beveridge under license from the Crown, a quantity of lumber, and drive it down Salmon river to the limits of the Saint John River Log Driving Corporation, at the mouth of the Salmon river. Under the contract the plaintiff got out one hundred thousand of spruce

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and cedar logs, which he was proceeding to drive down the river when he found the passage closed at or near the defendant's mill by his logs and the booms used by the defendant in and about his lumber operations. The Salmon river in question flows into the Saint John a short distance below Grand Falls. It is described as an unusually rapid stream—so rapid, in fact, that, except at one or two points, it does not freeze in the winter. The defendant is the owner of a saw mill and dam erected on this stream about three miles from its mouth, together with piers and booms used in operating the mill. This mill and dam were erected, substantially as they now are, some thirty years ago, although the defendant only purchased them in 1900. The property extends on both sides of the river, and admittedly includes the *alveus* of the stream at that part. The defendant also owns timber lands on the river and some of its tributaries, and in the spring of 1902 he got out some five million feet of lumber, of which one and a half millions were cedar logs, to be manufactured at his mill, while the balance was to be driven to the main river for the Saint John market. It was also alleged that the defendant had, in the spring of 1902, erected a pier in the channel of the river, which impeded the passage of the logs down the stream. On the 23rd May, 1902, a motion was made for an injunction to compel the defendant to remove the booms and logs sufficiently to allow of a free and uninterrupted passage for plaintiff's lumber, and also to remove the pier which he had erected in that spring. For reasons which are unimportant now the motion was not opposed on its merits, though it was stated that the passage was then actually open. I granted an order for a passage to be cleared before a certain date, making no order as to the pier. The evidence on the hearing shewed that the passage was actually open on the 21st May, two days before the injunction was applied for, and that the pier complained of had been also entirely removed before the injunction was applied for, if not before notice of the motion was given. So that the two grounds of complaint upon which the plaintiff's case rests had been actually removed before the

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bill was filed or the suit commenced. The plaintiff asks for a mandatory injunction to compel the defendant to remove the pier, and to keep the passage open so as to permit the plaintiff to drive his logs. He also asks for damages occasioned by the delay in driving, and "that the defendant be forever enjoined from closing, hindering or impeding the free passage of logs and lumber of any and all persons." The bill also alleges that in consequence of the delay caused by the damming of the river by reason of the defendant's operations, there was reason to apprehend that the water would fall off so as to prevent the plaintiff's lumber being driven down that season to market. And this fear was put forward as a reason for the immediate intervention of this Court. The plaintiff did, however, get his lumber down; and the damages to which his evidence was directed arise out of the delay in getting the lumber over the defendant's dam, the most of which took place after the suit was commenced. It is not claimed in the bill, nor was it put forward at the hearing, that the defendant had not a right to maintain his mill and dam in the stream, as they were and as they had been for many years past. The plaintiff proved by several witnesses that during the ownership of the mill by the defendant's predecessor no difficulty was experienced in getting lumber down the stream past the mill, though the operations on the river were then quite as large as those of the season of 1902. The plaintiff did put forward that the defendant could not legally impede the flowage of logs down the river by his booms, or in any way interfere with the navigation of the stream. The true question in this case arises, I think, on the method of operating the mill by the use of the booms. It cannot be said that the use of booms, when reasonably necessary for the operation of a mill on a stream like this, is illegal *per se*. It may have been an unreasonable use of the water under the circumstances, and so have given rise to a claim to compensation for any loss thereby sustained. The damage is not permanent; the same circumstances may never occur again, and it is not, I think, a case where a mandatory injunction ought to be granted,

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but the plaintiff should be left to recover at law for such damages as he may be entitled to.

In *Dunning* v. *Grosvenor Dairies, Limited* (1), and in *Carr & Co.* v. *Bath Gas Light & Coke Co.* (1), the former, a decision of Sterling, J., and the latter, a decision of Joyce, J., it was held that where the ground for injunction had ceased before the hearing, no injunction is ever granted, nor is liberty to apply reserved. If the nuisance is recommenced a fresh action must be commenced. Those were cases where the nuisance complained of was removed after the commencement of the suit, but before the hearing, and in those cases the plaintiffs were given their costs, because when the suits were commenced there was a good cause of action. This seems to be a recognized course of procedure, but apart altogether from that there are obvious reasons why no injunction should be granted in this case.

The river in question is a private river, subject to the public right of passage—a floatable river, which owners of lumber and others have an undoubted right to use in conveying their property, as upon a highway, and upon which the owner of property through which the stream flows, and who is therefore *prima facie*, and in this case admittedly, the owner of the bed of the stream, has also, I think, the undoubted right of erecting a mill and dam, with the appliances, such as booms and piers, necessary for a reasonable use of the river in operating the mill. There are concurrent rights to be used and exercised by each in a reasonable way and without negligence. This is, I think, the principle recognized to-day by Courts here and in the United States, as well as in England. See *Keith* v. *Corey* (2); *Roy* v. *Fraser* (3); *Ward* v. *Township of Grenville* (4).

Davis v. *Winslow* (5) has been repeatedly cited as containing a clear exposition of the rights of parties in regard to such streams. It is there said: "The general doctrine to be deduced from the authorities we

(1) [1900] W. N. 265.
(2) 1 P. & B. 400.
(3) 36 N. B. R. 113.
(4) 32 Can. S. C. R. 510.
(5) 51 Me. 291.

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have collected in reference to the use of navigable rivers, or public streams, as public highways, is that each person has an equal right to their reasonable use. What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream; also, the fall of water, its volume, velocity and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into a stream, in respect to their management, as would be required of a shipmaster in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in so doing, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained."

In the absence, therefore, of any structure illegal *per se*, and in the absence of any use of the water illegal *per se*, the sole question must be whether the use of the water complained of is, under the particular circumstances, a reasonable use. That is a question of fact to be determined in each particular case. This being so what order of injunction can I possibly make? I cannot order the pier to be removed, for that has been done long ago. I cannot order the passage to be opened for the plaintiff's logs, for that was also done long ago, and the occasion for it has gone, and may never return. The only order I could make would be that the defendant permit the plaintiff, as one of the public, to have a reasonable use of the water of

the river. But no Court would make such an order. It was refused in *Ellis* v. *Clemens* (1); and in *Earl of Ripon* v. *Hobart* (2), the Lord Chancellor, in speaking of a similar order, says: "It would give no information; it would prescribe no rule or limits to the defendants; it could not in any manner of way be a guide to them, if it did not operate as a snare. It would in reality amount to nothing more than a warning that, if they did anything which they ought not to do, they would be punished by the Court, but it would leave to themselves to discover what was forbidden and what allowed."

This present plaintiff was simply driving down this lumber under contract with Beveridge. If he has suffered any injury it is in no sense permanent, and it is capable of complete remedy by means of an action at law. In *Darrell* v. *Pritchard* (3), it was held that where no sufficient grounds existed for filing a bill in Equity damages would not be assessed, but the party would be left to his remedy by action at law. In the present case, as matters stood at the time the bill was actually filed, there does not seem to have existed any reason for filing it, as the grounds of complaint had been removed. It, however, may be said — in fact was said — that but for the notice of motion for injunction the passage would not have been opened up. This may possibly be so, and I think substantial justice will be done the parties if the bill is dismissed without costs, except as to the obtaining and serving the interim injunction, the costs of which the plaintiff must have; and there will be an order accordingly, but which is not to prejudice the plaintiff's right to bring an action at law for damages.

(1) 21 O. R. 227. (2) 3 M. & K. 169, 173.
(3) 12 Jur. (N. S.) 16.

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August 18.

ROBERTSON v. MILLER.

Decree—Application to vary—Rehearing.

In a suit to restrain the sale of property by K., an auctioneer, at the instance of M., and for a declaration of the plaintiff's title, K. appeared and jointly answered with M. M. thereafter undertook the conduct of the suit and alone appeared at the hearing, K. holding himself to be but a nominal party. Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs, was refused.

Application on behalf of the defendant Kerr, to have the suit reheard, with a view to the decree being varied in so far as it ordered him to pay the plaintiff's costs. The facts are sufficiently stated in the judgment of the Court.

Argument was heard May 2, 1903.

George W. Allen, K.C., for the application.

1903. August 18. BARKER, J.:—

The plaintiff is, or at least professes to be, owner in fee of a lot of land in the town of Bathurst, and he alleges in his bill that the defendant Kerr, who is an auctioneer living at Bathurst, did, at the instance and in the interest of his co-defendant, Miller, advertise this land to be sold at public auction. The bill also alleges that on two or three other occasions similar notices of sale had been given, but that the proceedings had been abandoned. The plaintiff denies that the defendant, Miller, has any right in or title to the land, and he alleges that in causing the land to be so advertised for sale, Miller was acting maliciously in order to annoy the plaintiff, and to cast a cloud upon his title, or with a view of extorting money from him for the purpose of procuring a discontinuance of the proceedings. An interim injunction was granted by Mr. Justice *Hanington* restraining the sale, and at a later date an application on behalf of both

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defendants was made to dissolve the injunction, and was dismissed with costs. Both defendants appeared by the one solicitor, and they joined in an answer by which Kerr, while alleging his ignorance of many of the matters as to which he was interrogated, does state it as his belief, founded on Miller's representation, that he (Miller) was the owner of the land. Why Kerr was made a party to the bill is not apparent, but he neither demurred on the ground that he was not a proper party, nor did he disclaim. Whether he has in this way so adopted the defence of his co-defendant as to render him liable for the plaintiff's costs of this litigation, in whole, or in part, is a question not raised here, and one upon which it is unnecessary to express any opinion. The defendant, Kerr, however, claims that he is not, and it is in order to have that question determined that this application was made. When the cause eventually came down for hearing it was arranged by the parties, and an order of the Court made to that effect, that the question of title between them should be disposed of by an action of ejectment. This was done, and the trial resulted in a verdict for the plaintiff, which was sustained on a motion for a new trial. Kerr was not a party to the ejectment proceedings. After considerable delay the cause was set down for hearing — one or two postponements were had on the defendant, Miller's, application, based on the representation of his Counsel that proceedings by way of appeal to the Supreme Court of Canada from the decision of the Supreme Court of this Province in the action of ejectment were pending, but eventually the hearing was proceeded with — the defendant's Counsel refusing to appear thereat, but remaining in Court until the decree was made. The plaintiff proved the judgment in the ejectment suit, and no other evidence being offered, a decree was made in plaintiff's favor, and against the defendants, with costs. On no occasion was it ever suggested by anyone that the defence of the defendants was not a common one, or that the defendant, Kerr, stood in any different position as to his liability for costs, though his Counsel was present in Court when the decree

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was pronounced. The defendant, Kerr, now states that since he put in his answer he has had nothing whatever to do with the conduct of the case; that Miller told him that he would take charge of the defence, and that he need not bother himself about it as he was really only a nominal party, and that he (Kerr) consequently paid no further attention to the proceedings, believing that he had no real interest in the case, and was not responsible for the conduct of the case, or for the costs. After the minutes of the decree had been settled, the defendant, Miller, appealed direct to the Supreme Court of Canada, and that appeal is still pending.

It will be seen, therefore, that the decree, whether right or wrong, is precisely the decree I intended to make. If it was wrong in point of law, the remedy is by way of appeal. If, on the other hand, it is not as I should have directed if Counsel had argued the cause, or argued it differently, or raised points which by design or inadvertence were not raised, is that a sufficient ground for opening the matter up in order that these matters may be discussed? It would be establishing a somewhat dangerous and inconvenient practice if every litigant, after having a decree passed against him, and the proceedings advanced as they are here, could have the whole matter opened, that some new phase of the case should be presented, and which, if presented, would have resulted in a different conclusion.

In *Glasier* v. *Rolls* (1), in a somewhat similar case, Bowen, L. J., says: — "It is quite a different thing to come after a judgment, and ask that it should be amended so as to express the real intention of the Court, entertained by the Court at the time that judgment was given. If an intention so entertained by the Court is not expressed in the order, there has been a miscarriage, and you set it right as a slip; but to seek to alter the judgment by asking that something may be embodied in it, the demand for which was not even thought of at the time, and was never brought to the attention of the Court, is really to ask us to make a different judgment from that which has already

(1) 59 L. J., Ch. 63.

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been perfected. It seems to me, therefore, that it is too late for the applicant to come with any part of his request." The same principle is laid down in *Preston Banking Co.* v. *William Allsup & Sons* (1), in which the Lord Chancellor says:—"If, by mistake or otherwise, an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. But this is an application to the Vice-Chancellor in effect to rehear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it. If such a jurisdiction existed, it would be most mischievous." See also *In re Suffield & Watts* (2); *In re St. Nazaire Co.* (3).

This application must be refused, but, under the circumstances, without costs.

(1) [1895] 1 Ch. 141. (2) 20 Q. B. D. 693.
(3) 12 Ch. D. 88.

TRUE v. BURT.

1903.

September 15.

Evidence—Payment of debt—Onus of proof.

Payment of a debt must be proven by the debtor beyond reasonable doubt.

Bill for the redemption of a mortgage, bearing date March 5, 1892, given by the plaintiff to the defendant to secure the payment of $1,000, and interest at six per cent. The facts are fully stated in the judgment of the Court.

Argument was heard May 4, 1903.

J. R. Murphy, K.C., and *F. B. Carvell*, for the plaintiff.

A. B. Connell, K.C., for the defendant.

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1903. September 15. BARKER, J.:—

The principal money secured by a mortgage from the plaintiff to the defendant is made payable in ten yearly instalments of $100 each, falling due on the 1st day of April in each year, the first one falling due April 1, 1893, though the plaintiff had the right of accelerating the payment, and the defendant was bound to accept the whole or any part of the money at any time it was tendered. The dispute between the parties is as to a payment of $400, made on the 15th March, 1899. There is no dispute as to this sum having been paid, but the parties disagree as to whether or not the whole sum was paid on account of the mortgage.

In determining whether a debt has been paid, or otherwise satisfied, the onus is upon the debtor to shew such payment or satisfaction beyond reasonable doubt. The debt having existed, the creditor cannot be deprived of his money upon evidence of a doubtful character. I have arrived at the conclusion in this case that the plaintiff has not discharged that onus, and that he has not made out, beyond reasonable doubt, that he is entitled to credit the whole $400 on the mortgage as he contends. There is no dispute between the parties as to the first five payments which were regularly made, and which were endorsed on the bond under the date of March 12, in each of the years 1893, 4, 5, 6, and 7. This would leave $500 due on account of principal. The next payment was the $400 in question, which appears to have been made on the 15th March, 1899. As to the appropriation of this payment the plaintiff relies mainly, if not altogether, upon a receipt which the defendant gave at the time. It was written by Mr. Carvell, with whom the plaintiff seems to have been in consultation at the time the payment was actually made. It is dated before March 15, 1899, and is as follows:—"Received from William E. True, four hundred dollars, being all principal and interest due up to this date on mortgage which I hold against his property dated March 8, 1892." As it originally stood the last part of the receipt read,

"dated about January ——, A.D." Before signing it the defendant erased the words, "about January," and substituted the words, "March 8, 1892." The plaintiff says that when he paid this $400 he had forgotten all about the payment of $136.00, made in 1897, only two years before, and that he never found out his mistake until February, 1902, when he accidentally found the defendant's receipt. He also says that he believed that he owed the $400 on the mortgage when he paid it. Giving full credit to the plaintiff as to these statements it is difficult to escape the conclusion that his memory as to money matters is not very reliable, and that his business habits were somewhat loose. A person in his circumstances, with an average memory, would not be apt to forget a payment of $136.00 on a mortgage made only two years before. What led up to this payment of $400 was this. Shortly before that, the defendant wrote the plaintiff a letter by which, according to the plaintiff's version—for the letter itself, unfortunately, could not be produced—he was called upon for a payment on account of this mortgage of $400, or about that sum. The defendant, on the contrary, states that the $400 was made up of the two instalments due on the mortgage, and the balance was for moneys loaned the plaintiff in 1898 and other times, and that this actually appeared by the letter itself. This is corroborated by the evidence of Kyle, the defendant's clerk, who actually wrote the letter, and made up the memorandum of the amount enclosed in or forming a part of the letter from the figures given him by the defendant at the time. The defendant further says that there was due him at that time the two instalments on the mortgage and interest, and $135.60, or thereabouts, for money at different times lent the plaintiff, and interest thereon, and that in the letter it was distinctly stated that all the money then due him would be required, to quote his own words, "when the mortgage was due in that year." Assuming it to be true, as the plaintiff says, that the fact of the 1897 payment was entirely forgotten when he paid the $400, it is clear that the defendant was under no such mistake. He knew the $136.00 had been

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paid; he had himself endorsed it on the bond, and he knew that he had given the plaintiff a receipt for the amount. It is absurd to suppose that, under the circumstances, the defendant would write a letter claiming $400 as due on the mortgage. There is this improbability in addition to the evidence of the defendant and his clerk against the plaintiff's version of this letter, and their evidence should prevail. I conclude, therefore, that the letter did not call for a payment of $400 as due on the mortgage, and that if the plaintiff was misled by it into any such belief, there was no reason for it. I think all the circumstances shew, and shew very clearly, that there was no intention on the plaintiff's part to pay more than was due at that time on the mortgage, and that there was no intention on the defendant's part to take or to demand more. The question still remains did he, notwithstanding this, in fact receive more? The receipt is the only remaining evidence to shew this. In reference to this the plaintiff's Counsel very properly called attention to the fact that the defendant could not have carelessly signed the receipt, because he himself inserted the exact date of the mortgage. The defendant says the receipt was brought to him, not at the time the money was actually paid, but later on, in the afternoon of the same day, when he was busily occupied with other matters, and that seeing the words "principal and interest due up to this date on mortgage, etc.," he thought it all right, for that was the fact, though his attention was not directed to the amount mentioned as it was to the date of the mortgage, which was incomplete, and which he supplied. I think this explanation must be accepted. At any rate, it would be difficult to fix the defendant by this receipt with an appropriation of money in payment of a debt not due, not demanded, and which the plaintiff did not intend to pay, and the defendant did not intend to receive. According to the defendant there was due on the mortgage at that time $264.40 — that is, the 1898 instalment of $100 and $30 interest, and interest thereon for a year at 8 per cent., amounting to $10.40, and the 1899 instalment of $100, and interest, $24.00, making in all $264.40.

The other loans amounted to something over $135.60, and the whole matter was closed up by crediting the $264.40 on the mortgage, and the $135.60 to the other indebtedness, and the balance, with the price of a cow then purchased, made up the $49.24, for which the plaintiff gave the defendant his note, and that this closed up all transactions up to that time. The defendant swears that he at the time, and with the plaintiff's knowledge, endorsed a memorandum of these payments on the bond under a uniform date, as the others were, of March 11th, omitting the payment of extra interest, as had been done before — that is under date March 11, 1898, a payment of $130, and March 11, 1899, one of $124. The plaintiff denies that this was done in his presence, or that he knew anything about it, and he also denies, though not very positively, that he had been borrowing money from the defendant, as was alleged. The evidence not only of the defendant, but that of his clerk, Kyle, and his daughter, who acted as bookkeeper in his shop, and in that way derived some knowledge of the defendant's private money transactions, which he kept separate from those of his regular business, all go to prove that for some years past the plaintiff had been in the habit of constantly borrowing moneys from the defendant. At least two of the payments on the mortgage were settled by notes, which were only paid after repeated renewals.

I cannot avoid expressing my surprise that a business man, such as the defendant is represented to be, should surround what he is pleased to call his private money transactions with such an air of secrecy; and that he should neither by books, nor in any other way, keep any record of them. Such a course is likely to cast a suspicion upon the nature and character of the transactions themselves, and in case of disputes, such as have given rise to this litigation, renders the means of proof difficult, and throws a responsibility upon Courts which, in most cases, could as well have been obviated as not. I have not thought it necessary to attempt to reconcile much of the conflicting evidence that has been given, and which, as it

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appears to me, has but an indirect bearing upon the real point in dispute. It is after all a question of not much practical importance as to whether the whole sum is credited to the mortgage, or only a part of it, as the defendant has done, when once it is established that the amount due on the mortgage, and the amount due on outside loans, together exceeded the sum paid, (and I think the evidence shews this to have been the fact,) for in either case the plaintiff is but paying a legitimate debt. I do not, of course, rest my judgment on this ground, but if the case were less doubtful than it is, that is a consideration which, in all probability, would not be altogether ignored. The onus of shewing that the whole $400 was paid on account of the mortgage was upon the plaintiff, and in my view of the evidence, he has failed in the proof.

I suppose the parties will have no difficulty in agreeing upon the amount due, and thus avoid the cost of a reference, but in case the plaintiff shall not, on or before the 8th of October next, file a memorandum, signed by Counsel for both parties, of the amount due upon the mortgage, there must be a reference to ascertain the amount. Should such a memorandum be filed the amount will be entered in the decree as the amount due, and in case the plaintiff shall, on or before the 8th day of January, A. D. 1904, pay to the defendant, or his solicitor in this suit, the said amount and subsequent interest, and the defendant's costs, to be taxed, the defendant shall, on request by the plaintiff, or his solicitor, and at the plaintiff's expense, execute a discharge of the mortgage, and deliver up the bond and mortgage, but in default of the plaintiff making such payment, then this action is to stand dismissed out of this Court with costs.

HAWTHORNE v. STERLING.

1903.
September 15.

Account — Jurisdiction — Master and Servant — Division of Office Receipts — Discovery.

In a suit for account plaintiff stated that he was appointed Deputy Sheriff by the defendant, under an agreement that he was to have half of the net receipts of the Sheriff's office. The defendant stated the agreement to be that the plaintiff was to have one half of the fees from writs and executions only. On the probabilities of the evidence the Court found in favor of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff might be entitled on discovery to share, the fees in one case, amounting to $33.00, alone remained undivided:—

Held, that the bill should not be dismissed.

Bill for an account of certain moneys received by the defendant as Sheriff of York County as the fees of his office, to one-half of which the plaintiff claimed to be entitled under an agreement said to have been made between them. The facts are fully stated in the judgment of the Court.

Argument was heard May 6, 1903.

J. D. Phinney, K. C., for the plaintiff.

A. J. Gregory, K. C., for the defendant.

1903. September 15. BARKER, J.:—

The bill in this suit, which was filed November 4, 1902, sets forth that the defendant, who has been Sheriff of York for the last twenty years or more, in the year 1883 appointed the plaintiff his deputy under a verbal agreement entered into between them at that time, by which for his services as such Deputy Sheriff the defendant was to allow him one-half of all the moneys, fees, and emoluments received by or which might come into the hands of the defendant as such Sheriff, and also the free use of the common gaol of the county as a residence, and the emoluments pertaining to the keeping of the common gaol of the said county, and including an annual salary of

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two hundred dollars additional for keeping the said gaol, payable by the municipality of York. As the bill alleges, the agreement further provided that all legal and other expenses incurred in connection with the said office of High Sheriff of York and incidental thereto, including, *inter alia*, all expenses in connection with and all matters pertaining to said office, and the expenses of horse hire, board and lodging incurred by said plaintiff or defendant, when either of them should be absent in the service or execution of papers, or other matters pertaining to the business of said office, were to be borne in equal proportions by the plaintiff and defendant. Stated briefly, the agreement as the plaintiff alleges it to be, is this — that the defendant was to appoint the plaintiff Deputy Sheriff, and also gaoler of the county gaol; that the defendant was to have the two hundred dollars a year paid by the municipality; free residence, with fuel and light, in the gaol; all the fees or perquisites of the office of gaoler, and one-half of the fees derivable from the office of Sheriff, less the expenses. The plaintiff, in his evidence, stated that for some months previous to November 1, 1883, when this agreement was made, he had been acting as the Sheriff's deputy under an arrangement with the Sheriff by which he was to be appointed gaoler in the following November, when a new arrangement was to be made, and that the agreement in question was accordingly made. The defendant denies positively that there ever was but the one agreement, and as to the terms of that, he differs very materially from the plaintiff. He states it as follows:—"In or about the month of September, A. D. 1883, I, being at that time Sheriff of York County, appointed the plaintiff Deputy Sheriff, and entered into a verbal agreement with the plaintiff that he should generally discharge such duties as appertained to the office of Deputy Sheriff; also that he should act as gaoler and have a residence in the common gaol; that the plaintiff should have such salary for keeping such gaol as the Municipality of the County of York might choose to pay for that service, which, I believe, was at that time, and has since been, two hundred dollars per

annum; and for the plaintiff's services as Deputy Sheriff he was to have one-half the fees accruing from the service of writs and executions issued out of the Supreme and County Courts, after deducting necessary expenses incurred in the service of such writs and executions; all other fees and emoluments accruing from said office of Sheriff were to be for the exclusive use and benefit of myself, the said Sheriff." The plaintiff has continued to occupy the position of Deputy Sheriff since his appointment in 1883 down to the time of his dismissal, which took place soon after the commencement of this suit in February, 1902, though he still retains the position of gaoler. He claims that on a proper accounting he is entitled to four thousand dollars, as his proportion of fees due him under his agreement with the defendant.

The first and most important question to be settled is, What in fact is the agreement which the parties made? In determining this, as we have no positive testimony except that of the parties themselves, we must look at their position at the time, and their conduct and dealings since in reference to the business. The probabilities, to my mind, are all in favor of the defendant's version. The Sheriff, on his appointment, gave up the business in which he was then engaged, and it seems to me a most unlikely thing that he should assume all the duties and responsibilities of the office, and give away one-half or more of the emoluments to a deputy, besides giving him the position of gaoler, with a free residence, fuel, light, a yearly allowance of two hundred dollars from the municipality, and his perquisites as gaoler in addition. The plaintiff's position in that case was a much more lucrative one than that of the Sheriff himself. And it does seem to me that in the absence of some special reason why such an arrangement should be made — and there is no suggestion of any such reason here — to be altogether improbable that any such arrangement ever was made. Very much stronger evidence in favor of the defendant's contention is furnished by the manner in which the parties have themselves dealt with this business for the eighteen years which preceded

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the bringing of this action. The plaintiff says that on a proper accounting he is entitled to a balance of four thousand dollars — equivalent to over two hundred dollars a year. And yet, according to his own evidence, he never, until immediately before commencing this action, made any claim to more than he was receiving, or in any way intimated that he was entitled to anything more. The fees for summoning jurors, and attending Courts, must have realized between two and three hundred dollars a year, and the fees after 1895, on assignments under the *Assignments and Preferences Act*, must at all events have amounted to a sufficiently large sum to be worth looking after; and yet, according to the plaintiff's own admission, he never, on any occasion previous to the bringing of this action, even intimated to the plaintiff that he claimed to participate in these fees at all. He and the Sheriff were constantly, during these years, having money transactions; he was receiving hundreds of dollars each year from the other fees, and there was no difficulty whatever in his getting what he now claims, provided he was entitled to it. His long silence, altogether unexplained, seems to me substantially conclusive against his present contention. In the settlement of partnership accounts there is a well-settled principle acted upon in this Court, that where the partners have themselves for a long time adopted a method of accounting among themselves this Court will adopt the same, though it may be at variance with the true construction of the articles of co-partnership.

In *Coventry* v. *Barclay* (1), the Lord Chancellor says: "For if the usage, which on this subject has been uniform and without variation, be not strictly in accordance with the written articles, it becomes evidence of a new agreement by the partners, and is as binding as if it had originally been clearly prescribed by the articles." This is not a case of partnership, but, I think, especially in view of the fact that the appointment of both Sheriff and deputy is a yearly one, it may well be said that the course of dealing, uniform as it has been during all these years, is evi-

(1) 3 DeG., J. & S. 320.

dence of what the agreement really is, even if it varied from an agreement about which there was originally no question. In *Great Western Insurance Co.* v. *Cunliffe* (1), a broker took commissions on business done for a firm for whom he was acting. They continued employing him after they knew he was receiving these commissions. In a suit by which the firm sought to recover these commissions from the broker, James, L. J., says: "It is not pretended that there was a shadow of a complaint by those gentlemen at the time; and they allowed the matter to go on during the remainder of that year, 1866, and during 1867, and part of 1868, without the slightest suggestion that there was anything wrong in what their agents were doing; and they were allowed to go on upon that understanding. I think that, after that, the dispute on the part of the company is deficient in honesty as well as in law. I think that, if they had any reason to find fault before, they ought not to have disputed the thing when they allowed it to go on after 1866." I have no hesitation in finding that the agreement between the parties is what the defendant says it is; all the surrounding circumstances, and the course of dealing, point to that as the correct conclusion. This case must be disposed of on that basis.

As to the course of dealing between the parties there is no dispute. There were kept in the office the following books: one in which first processes were entered; a similar one for executions; a book in which all fees on first processes and executions were entered, and a book which contained the individual accounts of the attorneys for fees. To all these books the plaintiff at all times had free and full access. In fact, the books were in a great measure kept by him. As a rule he executed all processes for service out of Fredericton, and he kept an itemized account of his travelling and other expenses. These accounts were produced from time to time, settled, and the balance paid. The last of these accounts was settled on the 25th January, 1902, and this suit was commenced on February 12th of the same year—only eighteen days later. There is absolutely

(1) L. R. 9 Ch. 525.

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no dispute as to this account having closed up the expense charges to that date. Some expenses were incurred afterwards by the plaintiff, but he has never rendered any account of them, though asked to do so, and the defendant has no means of knowing, except in a general way, what they are. The practice in the office as to payment of fees was this: they were sometimes received by the defendant, but I should say more frequently by the plaintiff, but in both cases they were divided then and there—each taking one half—and the particular transaction ended. The plaintiff was asked on his direct examination if he could mention any instances in which the fees had not been entered in the books. In reply he was only able to mention four cases. Two of these were tax executions, with the fees on which the plaintiff has nothing to do and the other two were the fees in the cases of *Clowes* v. *Brewer* and *McKinny* v. *Murch*. The fees in the first case were $4.00. They were charged in the book, but the method of payment as entered in the book was not very clearly indicated. The transaction took place about five years ago, and though the plaintiff knew all about it he did not think it necessary to say anything about it to the Sheriff for a long time, but when he did the matter was satisfactorily explained, and the $2.00 coming to the plaintiff was paid. This was before this action was brought. The fees in *McKinny* v. *Murch* amounted to $33.00. They are not entered in any of the office books I have mentioned. The defendant says there were fees paid him by Messrs. Phinney & Crockett under an assignment, and therefore the plaintiff has nothing to do with them. There may be some question as to whether the plaintiff has a right to some portion of these fees, but there can be no question that they had nothing to do with this suit being brought, because the amount was not paid until August, 1902, some six months after the suit was commenced. This evidence entirely supports the defendant's evidence when he says that, with the exception of the outstanding expense account which I have mentioned, and which the plaintiff has never rendered, he had paid the plaintiff before this

suit was commenced every dollar that was coming to him. Now what is the plaintiff's position, according to his own evidence? Apart from the fees received by him on limit bonds, the amount of which does not appear, he has in his hands $23.00, collected from one attorney, and $21.00 collected from another. Besides this he has agreed to settle an account for $26.00 against Mr. McLellan, his solicitor in this suit, in payment of his fees as such solicitor. These three items amount in all to $70.00, to one half of which the defendant is admittedly entitled, and this would more than pay the one-half of the fees in *McKinny* v. *Murch*, even assuming that the plaintiff is entitled to share in them. Now, it is abundantly clear, therefore, that no necessity existed whatever for this suit, and in that case, the defendant contends, the bill should be dismissed, but to that motion I cannot accede at present.

The plaintiff and defendant do not stand in the ordinary relation of accounting parties to each other. The plaintiff is merely the servant of the defendant, whose remuneration is not a fixed sum, but depends upon certain specified fees of the office. He has an ample remedy at law to recover his one-half, provided he is able to prove the total amount received. In other words, he may require a discovery from the defendant, who has the books of account, and who is therefore in a position to furnish the information; and for that discovery he has a right to come to this Court, even though he might be able, under the present practice, to get the same discovery in an action at law. Whether there was in reality any necessity for filing a bill, even for the discovery, is a question to be considered in determining the question of costs at a later stage in the suit. In *Falls* v. *Powell* (1), a case of precisely the same nature as the present, the bill was sustained on demurrer, and though that case was in its facts a much stronger one than this for the interference of the Court, the two are precisely alike in principle. The item of $33.00 for instance, as I understand the evidence, does not appear in any of the defendant's books to which the plain-

(1) 20 Gr. 454.

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tiff had access, and it is an open question as to whether the amount was not made up altogether, or in part, of fees in which the plaintiff is entitled to participate. I cannot say that the plaintiff has not the abstract right of coming to this Court for the discovery, and for such consequential relief as he may be entitled to. He assumes the risk of having to pay costs, but that is another story. To dismiss the bill would leave the account between the parties unsettled, and in case of a legitimate dispute, such as apparently exists as to the item of $33.00, it would have to be settled in some other action, if not in this. This Court having jurisdiction ought to determine the matter of account in dispute.

There remains but one other question, and that is as to the fees on limit bonds. In my opinion these all belong to the defendant. The plaintiff claimed them as being fees pertaining to the office of gaoler. He admits that these fees were not specifically mentioned when the agreement was made. It is obvious that the gaoler as such has nothing to do with them. The bond is to the Sheriff; he is the responsible party, and the fee charged is a fee to the Sheriff in the prescribed table of fees. The plaintiff, so soon as he was dismissed from the position of Deputy Sheriff, very properly refused to take limit bonds, though he continued to be gaoler, clearly shewing that he himself did not think he was acting as gaoler in admitting debtors to bail for the limits. The fees belong to the Sheriff. He has collected them in cases where he himself took the bond, and long since told the plaintiff that he was not entitled to any part of them, and the plaintiff continued to accept the office of deputy year after year after that notice. They may amount to too small a sum for the Sheriff to have further insisted on the plaintiff paying them over to him, but, in my opinion, he has never relinquished his right to them, and the plaintiff must account for them.

There will be a declaration that the agreement between the parties is as given by the defendant; and upon that basis the account will be taken, for which there will be a reference.

CROSBY v. TAYLOR.

1903.
November 17.

Interrogatories — Answers — Exceptions — Costs.

The bill alleged that a testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son, who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the said son, or that she was living at the date of the will, or that she was beneficially entitled to an interest in the estate, although they were so informed and believed: —

Held, sufficient.

Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference.

Where some exceptions were allowed, and others overruled, costs were allowed to each party.

EXCEPTIONS TO ANSWERS.

The bill alleged that Hartwell B. Crosby by his last will, dated April 7, 1879, bequeathed his residuary personal estate, and all his real estate, to his executors, Sarah Crosby, his wife, John M. Taylor, and Bela R. Laurance, in trust, among other purposes, to pay from the income thereof an annuity to his wife during her life, and upon her death upon trust to sell the same, but with power to postpone, if they saw fit, and out of the proceeds and accumulations of the estate, after paying a mortgage upon certain of the real estate, to divide, *inter alia*, one-fourth part of the surplus equally among "the four children now living of my son James Horace Crosby." The testator declared that in case any of the children of said James Horace Crosby should die before him (the testator) the share of the child or children so dying should be added to the shares of the survivors or survivor of such children. Power was given to the trustees to apply the surplus yearly income, or the accumu-

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lations, in repairs to the property, in paying off the mortgage indebtedness, and in purchasing certain leasehold improvements. The bill alleged that the testator at the time of his death, was possessed of real estate situate in the city of St. John, including a lot of land and premises on the corner of Union and Coburg streets, and also of personal property, and that he was survived by his wife, who died in 1895. The plaintiff, Ernestine Helen Crosby, alleged that she is one of the four children of the said James Horace Crosby, who were living at the date of the will, and that she is a beneficiary thereunder. It was alleged that the trustees were still seized and possessed of the lands and premises situate at the corner of Coburg and Union streets, and that they had collected the rents therefrom, but had made no division thereof among the beneficiaries after the death of the widow. The defendant John E. Irvine was appointed trustee in the place of Bela R. Laurance, who had died, and it was alleged that the trustees had caused or permitted the defendant John M. Taylor to collect the rents; that they had failed to keep the same in a separate bank account, and that the defendant John M. Taylor had been permitted to mingle, and that he had mingled, the funds of the estate with his own monies, and had used them for private purposes. The bill alleged that the trustees had passed their accounts on January 16, 1902, in the St. John Probate Court, when a balance of $1,833.51 was found in their hands. This sum, the bill alleged, had not been applied in accordance with the directions of the will, and the plaintiff alleged that she had been unable to ascertain whether the amount was in the hands of the trustees, or how it had been invested or disposed of. It was alleged that the plaintiff had applied to the trustees for the sale and division of the property, and that this had not been done. It was also alleged that there were further monies in the hands of the defendant John M. Taylor, belonging to the estate, and that he was in insolvent circumstances. The bill prayed that the defendants might be decreed to make good the sum of $1,833.31, found to be due by them upon the passing of the accounts of the estate

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in the Probate Court, with interest thereon; that an account might be taken; that performance might be decreed of the trusts under the will; and for the removal of the trustees and the appointment of others in their stead.

Interrogatories for the examination of the defendants were in part as follows:—

2. Is not the plaintiff one of the four children of James Horace Crosby mentioned in the said will above referred to, and was not the plaintiff living at the date of the said will, or how otherwise? Is not the plaintiff beneficially entitled under and by reason of the said will, to some and what interest in the said trust estate of the said Hartwell B. Crosby, or how otherwise, and to what proportion of the said estate is the plaintiff entitled? And what is the plaintiff's interest as to principal and income in the said estate? Which, if any, of the said four children of the said James Horace Crosby, who were living at the date of the said will, have since died? And what are the names and addresses of all the said children of said James Horace Crosby who are now living? Which, if any, of the children of the said James Horace Crosby have died without issue living at his or her death?

3. Set out fully and describe all the real and personal property that came to the hands of the said executors and trustees of the said estate, and the value thereof at the time of the death of the said Hartwell B. Crosby, and how the same was disposed of? Did not the said Hartwell B. Crosby devise to his said executors and trustees a lot of land and premises on the north-east corner of Coburg and Union streets, and is not the said lot of land and premises still the property of the said estate, or how otherwise?

9. What if any property of the said estate of Hartwell B. Crosby have the trustees of the said estate, or any of them, sold or realized on since the death of the said Hartwell B. Crosby, and what was done with the proceeds of such sale or sales, and how were the same disposed of and invested at the present time?

10. Have not the rents and income of the said estate of said Hartwell B. Crosby, ever since the death of the said

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testator, always been collected by the defendant John M. Taylor, or by his agent or agents, or how otherwise and by whom, and at what periods, and why have the same been otherwise collected? Are not the only payments that have been made to beneficiaries under the said will the payment of the annuity in the said will to the said Sarah Crosby, namely, $400 per annum, and the payment of $100 to George F. Barker, on or about the twelfth day of December, A. D. 1901, or how otherwise, and what other such payments to such beneficiaries have been made, and when and for what amounts and why? Was not the last payment made on said annuity to the said Sarah Crosby, made in the month of May, A. D. 1895, or how otherwise, and what other payment or payments have been made since the last date to the said Sarah Crosby and when and why? What, if any, payment was made by the defendants, or any of the trustees of the estate of the said Hartwell B. Crosby, by way of purchase of the improvements on the property of the said estate leased to Dr. Hamilton, or on account of the same?

11. Did not the defendants, on or about the 16th day of January, A. D. 1902, or when otherwise, file the accounts of the estate of the said Hartwell B. Crosby in the Probate Court of the said City and County of St. John, or how otherwise? Did not the Judge of the said Court make a decree allowing the said accounts? How is the said balance of $1,833.51 so found to be due from the said executors and trustees to the said estate by the said Judge invested, or where is the said balance and monies, and how have the same been disposed of? What, if any, part of the last mentioned sum has been divided as directed in the said will?

12. Have not the rents, income, profits and monies of the said estate of Hartwell B. Crosby at all times been collected by the defendant John M. Taylor, or by his agent or agents, or how otherwise, and when and by whom have the same been collected? Has not the said defendant John M. Taylor, at all times since the taking upon himself of the said trust mingled the funds of the said trust estate with

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his own proper monies, or when or how otherwise? Has not the said defendant John M. Taylor, at all or what times or time since the undertaking of the said trust deposited the said trust funds, or some and what portion thereof, to the credit of his own private bank account, or how otherwise? In whose name and in what bank or banks have the said trust funds and income of the said trust estate been deposited since the death of the said testator at any and all times thereafter? Has not the said defendant John M. Taylor, drawn money out of the said bank account in which, and to the credit of which, the said trust funds, or a portion thereof, were deposited, by his own private cheque, for his own private purposes, or for purposes other than the purposes of the said trust, to such an extent, and for such amounts, that there would remain to the credit of the said bank account a sum of not less than the amount due at that time by the said John M. Taylor to the said trust estate, or how otherwise? Have the defendants, or which (if any) of the trustees of the said estate of Hartwell B. Crosby, at any and what time or times, and for how long, kept a separate bank account for the monies of the said trust estate? Has not the said John M. Taylor, or the said John E. Irvine, or either of them, applied the said trust monies, or a portion thereof, for their own or his own private purposes and use, and to what extent, if at all, or how otherwise?

13. Has not the plaintiff frequently applied to the said defendants, and to their solicitor, since the death of the said Sarah Crosby, for a division of the said estate, or for the payment to the plaintiff of her proportion thereof, or how otherwise, and what, if any, applications have been made to the said defendant, or the said solicitor, for that purpose?

These interrogatories the defendants, after admitting the will, answered as follows:—

2. We do not know that Ernestine Helen Crosby is one of the children of the said James H. Crosby, mentioned in the said will above referred to, and that she was living at the date of the said will, and that she is beneficially

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entitled to an interest in the said estate, although we are so informed and believe. We have no knowledge as to the death of any of the children of the said James H. Crosby, but are informed and believe that all the children of the said James H. Crosby are living. We are informed and believe that James H. Crosby has five children living. At the hearing before the Judge of Probate at the Probate Court in and for the City and County of St. John, at the passing of the accounts of the executors and trustees of Hartwell B. Crosby's estate, and wherein a decree was made dated the sixteenth day of January, A. D. 1902, as mentioned in the eleventh paragraph of the plaintiff's bill of complaint, four persons claiming to have a beneficiary interest in the said estate, and to be the children of the said James H. Crosby, were represented by proctor, and the names of the said children are as follows: George B. Crosby, Hartwell B. Crosby, Annie Wessels and Bessie L. Crosby, and by the said decree it does not appear that the plaintiff was represented at the hearing.

3. The real estate that came to the hands of the executors and trustees is situate in the city of Saint John, and is described as follows:

"Beginning at the north-east corner of Union and Coburg streets, in the said City of St. John," etc.

9. We admit that the trustees of Hartwell B. Crosby, deceased, have not sold the land and premises on the corner of Union and Coburg streets, but we allege that the same has been held by the trustees at the request of all beneficiaries, including the plaintiff. We allege that after the death of the said Sarah Crosby the trustees intended to sell and dispose of the said property, according to the terms of the will, but owing to the then general depression of real estate the legatees and persons interested represented that it would not be in the interests of the beneficiaries that the said property should be sold, and requested the trustees to hold the same for a time until there should be a better market for the property, and that the trustees should continue to administer the same. The trustees, in compliance with the said request, and deeming it to be in the interest

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of all parties, have continued to administer the property, and have regularly filed and passed their accounts of such administration in the Probate Court in and for the City and County of St. John, up to the sixteenth day of January, A. D. 1902. We charge and allege that the plaintiff was a party to the request that the trustees should continue to administer the said property, and the said trustees have continued to administer the said trusts for eight years and upwards after the death of the life tenant, in pursuance of such request, and believing that it was in the interests of the beneficiaries, and no complaint or objection was ever made by the plaintiff that said property was not sold, or was any notice given to the trustees by the said plaintiff, or any of the beneficiaries, nor any demand made upon the trustees that the said property should be sold, until just about the commencement of this suit when the plaintiff, through her solicitor, notified the trustees that she wanted the property sold. The trustees through their solicitor informed her solicitor that they would proceed to sell the property, and requested the views of the plaintiff as to the best mode of selling; but the suit was commenced before the trustees were able to carry out their intentions, and while they were endeavoring to procure the information and as to the most advantageous mode of selling. We allege that the persons representing fifteen-sixteenths of the residuary estate have, since this action was commenced, notified the trustees that they do not wish the property sold, and claim that it is against the interests of the beneficiaries to make a sale of the same at the present time; and we charge and allege that the plaintiff, against good faith and contrary to the request and assent to the trustees to continue to administer the said trusts, and without proper and reasonable notice to the trustees, and to the other beneficiaries, and through a spirit of malice, and in the hope of compelling the other interested parties to buy her out, and of extorting a large figure for her interest, if any, and against the interests of the other beneficiaries, has commenced this action, and that the plaintiff should be prevented from bringing and prosecuting this action until

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reasonable and proper notice has been given the trustees, and satisfactory proof given that she is entitled to an interest in said property.

10. We admit that the defendant John M. Taylor, as such trustee, has for some years up to the first day of July, A. D. 1903, collected all rents and income of the said estate We allege that at the time of the death of the said Hartwell B. Crosby the property was very much run down and became delapidated, and the net income was insufficient to pay the annuity mentioned in the said will. The then trustees improved the property and increased the income. From the accumulations over and above the said annuity they paid in addition to the improvements the sum of $3,000.00 on the mortgage. In the year A. D. 1899 a building in the rear of the property was destroyed by fire, and the trustees rebuilt the same and expended the sum of $1,386.00. The amount of the insurance received was $863.85. The trustees also made improvements from time to time upon the premises as required, the accounts whereof, up to the 16th day of January, A. D. 1902, are filed in the Probate Court in and for the City and County of St. John, and were passed and allowed by the Judge of Probate in due form of law. We charge and allege that all the funds of the said estate have been applied in accordance with the trusts of the will of the said Hartwell B. Crosby, both before and since the death of the said Sarah Crosby, and all such sums since the death of the said Sarah Crosby are set out in the said accounts so filed, passed and allowed by the said Judge of Probate, in a Court of Probate duly held in and for the City and County of St. John, and to which we beg leave to refer. We deny that the terms of the will provided for the payment out of the income to any of the residuary legatees while the mortgage remained unpaid. We allege that the terms of the said will require the trustees, upon the sale of the property, to pay the said mortgage and to distribute the surplus among the residuary legatees. The decree of the Judge of Probate, dated the 16th day of January, A. D. 1902, in passing and allowing said accounts of the said trustees,

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found that the sum of $1,833.51 was in the hands of the trustees. At the request of the said beneficiaries made at the said hearing in the Probate Court, the said John M. Taylor, with the assent of the said John E. Irvine, proposed to pay the sum of $1,600 out of the amount then in his hands among the beneficiaries in the proportion mentioned in the said will, and had actually distributed $1,000 of the said amount among the said beneficiaries up to the time the above plaintiff threatened to commence these proceedings, and the balance of $833.51 remains in the hands of the said John M. Taylor.

11. We admit that the defendants did on or about the sixteenth day of January, A. D. 1902, file the accounts of the said estate of Hartwell B. Crosby in the Probate Court in and for the City and County of St. John, and the Judge of the said Court made a decree allowing the accounts.

12. The defendants admit that previous to the first day of July, A. D. 1903, the rents, monies and incomes of the said estate have not been kept in a separate bank account, nor was any separate bank account opened in any bank under the name of the trustees as such; all the transactions of the said estate have been kept by John M. Taylor in a separate account, wherein all sums received have been entered under their respective dates, and also entries made of all payments; generally all funds on hand have been deposited in the bank, but not under a separate name, being in the name of the said defendant John M. Taylor. We deny that there was any using of the funds of the said estate by the said John E. Irvine, he not having collected or received any of the said funds, and the said John M. Taylor for himself denies that he, the said John M. Taylor, used the estate funds for his own purposes; and the said John E. Irvine, upon information from the said John M. Taylor, also denies that the said John M. Taylor used the funds. Since the first day of July, A. D. 1903, the said defendants have kept the funds of the said estate in a bank account in the name of the trustees.

13. The defendants deny that the plaintiff made any application to them, or to their solicitor, for the sale of the

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said property, and the division of the said estate, until just within a short time before the commencement of this suit, when a letter to that effect was received by the trustees from the plaintiff's solicitor. The defendants allege that immediately upon receiving said notification they instructed their solicitor to inform the plaintiff's solicitor that if any of the beneficiaries desired the sale of the property the sale would be made, and we charge and allege that the said solicitor was informed that immediate steps would be taken to sell the property, but that as all the stores were under lease until the first day of May, A. D. 1904, and as it might be advantageous to negotiate with the representatives of the Hamilton estate in reference to acquiring said lease, the sale could be made to better advantage later in the year, but that the said sale would be brought on as soon as the trustees could communicate with the representatives of the Hamilton estate as to the lease held by the said estate, and a decision made as to the best mode of selling, but the plaintiff, without any reasonable notice, and without allowing the said trustees reasonable time to prosecute their inquiries, and to consult with the beneficiaries, and procure proper information as to the best mode of selling the estate, immediately commenced this action; and the defendants further allege that they took immediate steps for procuring such information and to sell the said property; that they have advertised the sale of the said property for the third day of October now next, and intend to wind up the said estate and make the distributions required by the will.

Exceptions were filed as follows:—

1. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the second of the said plaintiff's interrogatories, whether or not the plaintiff is one of the four children of James Horace Crosby, mentioned in the said will referred to in the plaintiff's first interrogatory, and whether or not the plaintiff was living at the date of the said will.

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2. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the second of the said plaintiff's interrogatories, whether or not the plaintiff is beneficially entitled, under and by reason of the said will, to some and what interest in the said trust estate of the said Hartwell B. Crosby, or how otherwise.

3. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the second of the said plaintiff's interrogatories, to what proportion of the said estate the plaintiff is entitled, and what is the plaintiff's interest as to principal and income in the said estate.

4. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the third of the said plaintiff's interrogatories, what was the value of the real and personal property that came to the hands of the executors and trustees of the estate of the said Hartwell B. Crosby at the time of the death of the said Hartwell B. Crosby, and how the same was disposed of.

5. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the third of the said plaintiff's interrogatories, whether or not the lot of land and premises on the north-east corner of Coburg and Union streets, devised by the said Hartwell B. Crosby to his executors and trustees, is or is not still the property of the said estate.

6. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the ninth of the said plaintiff's interrogatories, what, if any, property of the said estate of the said Hartwell B. Crosby have the trustees of

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the said estate, or any of them, sold or realized on since the death of the said Hartwell B. Crosby, and what was done with the proceeds of such sale, or sales, and how were the same disposed of and invested at the present time.

7. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the tenth of the said plaintiff's interrogatories, whether or not the rents and income of the said estate of the said Hartwell B. Crosby have, ever since the death of the said testator, always been collected by the defendant John M. Taylor, or by his agent or agents, or how otherwise, and by whom and at what period, and why have the same been otherwise collected.

8. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the tenth of the said plaintiff's interrogatories, whether or not the only payments that have been made to beneficiaries under the said will were the payment of the annuity provided in the said will to the said Sarah Crosby, and the payment of $100.00 to George F. Barker, on or about the twelfth day of December, A. D. 1901, and what other payments to such beneficiaries have been made, and when and for what amounts, and why.

9. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the tenth of the said plaintiff's interrogatories, whether or not the last payment that was made on the said annuity to the said Sarah Crosby was not made in the month of May, A. D. 1895, and what other payment or payments have been made since the said date to the said Sarah Crosby, and when and why.

10. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the tenth of the said plaintiff's

interrogatories, what, if any, payment was made by the defendants, or any of the trustees of the estate of the said Hartwell B. Crosby, by way of purchase of the improvements on the property of the said estate, leased to Dr. Hamilton, or on account of the same.

11. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the eleventh of the said plaintiff's interrogatories, how the said balance of $1,833.51, found to be due from the said executors and trustees to the said estate by the Judge of the Probate Court in his decree allowing the accounts of the estate, is invested, or where is the said balance and moneys, and how the same have been disposed of.

12. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the eleventh of the said plaintiff's interrogatories, what, if any, part of the said last mentioned sum has been divided as directed in the said will.

13. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the twelfth of the said plaintiff's interrogatories, whether or not the said defendant John M. Taylor, has at all times since the taking upon himself of the said trust, mingled the funds of the said trust estate with his own private moneys, or when and how otherwise.

14. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the twelfth of the said plaintiff's interrogatories, whether or not the said defendant John M. Taylor, has at all or what time or times, since the undertaking of the said trust, deposited the said trust

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funds, or some, or what portion thereof, to the credit of his own private bank account or how otherwise.

15. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in the said answer to the twelfth of the said plaintiff's interrogatories, in whose name and in what bank or banks the said trust funds and income of the said trust estate have been deposited since the death of the said testator at any and at all times thereafter.

16. For that the said defendants have not, in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered to the twelfth of said plaintiff's interrogatories that portion of the twelfth interrogatory which is in the words and figures following: "Has not the said defendant John M. Taylor drawn money "out of the said bank account in which, and to the credit "of which, the said trust funds, or a portion thereof, were "deposited, by his own private cheque for his own private "purposes, or for purposes other than the purposes of the "said trust, to such an extent and for such amounts that "there would remain to the credit of the said bank account "a sum of not less than the amount due at that time by "the said John M. Taylor to the said trust estate, or how "otherwise?"

17. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the twelfth of the said plaintiff's interrogatories, whether the defendants, or which (if any) of the trustees of the said estate of Hartwell B. Crosby, at any and what time or times, and for how long, have kept a separate bank account for the moneys of the said trust estate.

18. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the twelfth of the said plaintiff's interrogatories, whether or not the said John M.

Taylor, or the said John E. Irvine, or either of them, applied the said trust moneys, or any portion thereof, for their own or his own private purposes and use, and to what extent.

19. For that the said defendants have not in and by their said answer, according to the best of their knowledge, remembrance, information and belief, answered and set forth in their said answer to the thirteenth of the said plaintiff's interrogatories, whether or not the plaintiff has frequently applied to the said defendants, and to their solicitor, since the death of the said Sarah Crosby, for a division of the said estate, or for the payment to the plaintiff of her proportion thereof, or how otherwise, and what (if any) applications have been made to the said defendants or the said solicitor for that purpose.

Argument was heard October 23, 1903.

F. R. Taylor, in support of the exceptions.

W. W. Allen, K. C., *contra*.

1903. November 17. BARKER, J.:—

The first exception is that the defendants have not, according to the best of their knowledge, remembrance, information and belief, stated whether or not the plaintiff is one of the four children of James Horace Crosby, mentioned in the will, or whether or not she was living at the date of the will. The answer to this part of the interrogatory is as follows: "We do not know that Ernestine Helen Crosby is one of the children of the said James H. Crosby mentioned in the said will above referred to, and that she was living at the date of the said will, and that she is beneficially entitled to an interest in the said estate, although we are so informed and believe. We have no knowledge as to the death of any of the children of the said James H. Crosby, but are informed and believe that all the children of the said James H. Crosby are living."

In disposing of exceptions to an answer on the ground of insufficiency there are two rules which must never be

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lost sight of. In the first place, the plaintiff is entitled to the defendant's knowledge as to the matters in reference to which he is interrogated, and if he denies all knowledge, then he is entitled to his information and belief, for it is a rule that the Court will believe what the defendant believes against himself. The other rule is that where the substantial information is given, though not strictly and technically, it is sufficient where there is nothing to suggest that the defendant is seeking to avoid giving the information: *Reade* v. *Woodrooffe* (1).

As to the first exception I think the defendants admit the facts on information and belief, though they deny all knowledge, and that is, I think, sufficient.

Second and Third Exceptions.—These also relate to the plaintiff's title or right to bring this suit, and the objection is that the defendants have not stated, either by knowledge or on information and belief, whether or not the plaintiff is beneficially entitled under the will, or to what interest in the trust estate. It is true that the defendants do not in so many words admit that the plaintiff is entitled to one-fourth of the trust property, but they do admit the will under which she claims to be entitled, and under which she in fact is entitled to one-fourth as one of the four children of James H. Crosby living when the will was made. If the interrogatory had been directed to the amount of the fund the case would have been altogether different; but the plaintiff's case is based on the fact that she is one of the four children entitled under the will, which fact is admitted. It was argued that the plaintiff might have assigned her share, and that the defendants, in view of that possibility, should have admitted the plaintiff's right in words. There is no suggestion anywhere that the plaintiff had parted with her rights; no interrogatory is framed to suggest any such thing. The defendants do not set up any such defence, and I am unable to see why they could be expected to volunteer admissions altogether irrelevant to the case as presented in the pleadings.

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Exceptions Eleven and Twelve.— These exceptions relate to a balance of $1,833.51, found to be in the defendants' hands by a decree of the Probate Court, and the manner in which it was distributed. I think the interrogatories to which these exceptions refer are substantially answered. They name the persons to whom the amounts were paid, and they are the persons entitled under the will.

These exceptions—1, 2, 3, 11 and 12—will, therefore, be overruled. The remaining exceptions must, I think, be allowed. They all relate to matters peculiarly within the knowledge of the defendants, and refer to their management of the trust property. In such a case there can be no excuse for not giving precise and specific information, and the plaintiff should not be compelled to get it as mere inference, which may or may not be accurate, and which at best has to be reached by argument upon other facts. It is unnecessary to go through each of these exceptions, for all of them are obviously insufficient — in many cases no attempt whatever having been made to answer the interrogatory.

The order will be that the exceptions — 1, 2, 3, 11 and 12 — will be overruled with costs, and the remaining exceptions — 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18 and 19 — will be allowed with costs. The Clerk will tax the costs of both parties and deduct the one sum from the other, and certify the balance due, which balance is ordered to be paid as certified.

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December 15.

SMITH v. WRIGHT.

Debtor and Creditor — Fraudulent Conveyance — Stat. 13 Eliz. c. 5.

A son living on a farm owned by his mother, worth about $700, and who had worked on it without wages, and had contributed his earnings from other work to the support of herself and family, refused to continue the arrangement. A conveyance of the farm was thereupon made to him for $500, his contributions from his earnings being placed at $300, and the balance being paid by cash and a horse. At the time, the mother was indebted to the plaintiff in the sum of $131.00 :—

Held, that the conveyance was not fraudulent under Statute 13 Eliz. c. 5.

Bill to set aside a conveyance as fraudulent under the Statute 13 Eliz. c. 5. The facts are sufficiently stated in the judgment of the Court.

Argument was heard December 5, 1903.

W. P. Jones, for the plaintiff.

F. B. Carvell, for the defendants.

1903. December 15. BARKER, J. : —

The plaintiff seeks a decree to set aside a conveyance of a house and farm in Carleton County, made by the defendant Martha A. Wright, to the defendant Clarence G. Wright, her son, dated October 26, 1900, on the ground that it is fraudulent under the Statute 13 Eliz. c. 5, as having been made with intent to delay, hinder and defeat creditors. She seems to have become the owner of this property in 1893, and with her husband and family has been residing on it ever since. The family consists of the defendant Clarence, who is the eldest child, and only son, and eight daughters. The conveyance in question was placed on record two days after it was executed, and the consideration mentioned in it is $500. The defendant Edmund Wright, who is the husband of Martha, and father

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of Clarence, some years ago had some dealings with the plaintiff, by which he became indebted to him in something upwards of $100, and at a later date, and before the conveyance was made, the defendant Martha Wright was induced, or at all events did give her own note to the plaintiff for the indebtedness of the husband. There were some small dealings afterwards, so that the indebtedness amounted to $131.64 at the time the conveyance was made, and for this sum and costs the plaintiff recovered a judgment in the York County Court, in a suit commenced on January 24, 1902. An execution was issued on this judgment, to which a return of *nulla bona* was made. The value of the premises, as given by the plaintiff, is $700 or $800, but the defendants value them at about $500. The husband does not seem to have done much work on the farm—the wife and son practically did everything.

The plaintiff gave no evidence in support of his case except the evidence of the indebtedness, and the relationship between the parties, and I was asked practically to say that a conveyance made by a woman to her son, who was then of the age of 23 years, professedly for a valuable consideration, of premises worth $700 or $800, was void under the Statute, because she was indebted in the sum of $130. There was no insolvency, nor pressure for payment; no suit even threatened, and in fact, as it seemed to me, an entire absence of all the circumstances which in such cases are usually relied on as badges of fraud. The defendant Clarence Wright, stated that he had been working since he was sixteen years of age in the woods in the winter time, and on the farm in the summer, and turning in his wages to his mother for the support of herself and the family, and that he had purchased some stock which was on the farm; that he eventually became dissatisfied with this way of living, and told his mother that he could not continue it, and was going away, and that he would not put any more money in the farm until he knew how he was to get it back, and that she then requested him not to leave them, and that she would sell him the farm for $500, and give him a deed of it—taking the sum already

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advanced as equal to $300, which was said to be the fact. He also stated that he paid his mother $100 in cash, and gave her a horse worth another $100, and that he knew nothing of his mother's indebtedness to the plaintiff. This account is corroborated by the mother, and unless I ignore their evidence altogether I must conclude that the transaction is a perfectly honest one in every way. The plaintiff's Counsel asked me to set aside the evidence of these two defendants, because some of their statements on the stand were not in all particulars consistent with statements made in their sworn answer. But these conflicting statements are not very important, and certainly do not shew that the parties are deliberately perjuring themselves. So far from that, I saw nothing in the demeanour of either of the witnesses when giving their evidence, to lead me to think they were not telling the truth. Without their evidence at all I should not have thought the plaintiff had made out any case of fraud under the Statute, or otherwise, but with it there seems no ground whatever for the plaintiff's contention. The grantor had ample means to pay her debts, for she owed nothing, except to the plaintiff, and some $6 besides. There was nothing secret about the transaction; the conveyance was immediately put upon record, and, as I said before, there is an entire absence of all those circumstances, which, even in the case of a voluntary conveyance, are considered necessary to warrant a Court in finding an intention to defeat creditors. See *Holmes* v. *Penney* (1); *Thompson* v. *Webster* (2).

The plaintiff's bill must be dismissed with costs.

(1) 3 K. & J. 90.

(2) 7 Jur. (N. S.) 531.

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1903.
November 19.

— No. 2. See ante, p. 461.

Contempt of Court — Breach of injunction order — Motion to commit — Costs.

Where, in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an interim injunction order, collected debts due the alleged firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion.

Motion by the plaintiff, on notice, that the defendant, Lorenzo B. Howard, stand committed for breach of an injunction order. The suit was brought for a declaration of partnership between the plaintiff and defendant, for a dissolution, and the usual accounts. On April 11, 1903, an *ex parte* injunction order was made by Mr. Justice *Landry* restraining the defendant until April 23rd, from, *inter alia*, collecting, receiving, or getting in, or interfering with the debts, accounts, bills, notes and assets of the firm. Service of the order was made upon the defendant the same day. On April 21st, motion on notice was made before Mr. Justice *Barker* to continue the injunction, and to appoint a receiver. On April 25th, an order was made continuing the injunction and appointing a receiver, the interim injunction having in the meantime been continued. The breach of injunction complained of was the collection by the defendant of certain debts due the alleged firm. These consisted of a debt of $21 collected from one Thomas Allen; a debt of $5 collected from one Dexter Allen, and a debt of $59.50 collected from Robinson, Wright & Co., Ltd. It was also complained that the defendant had made other collections, the particulars of which the plaintiff had not been able to ascertain, and that on April 8th, the defendant had transferred from the firm's bank account

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the sum of $19 to his private bank account. The affidavit of Thomas Allen stated that he was indebted to the firm in the sum of $21 for a suit of clothes, and that he gave the defendant some time in May or June, 1903, an order on his (Allen's) employers for the amount. That on August 28, the defendant told him the order had been paid, and gave him a receipt in these words: "Received from Thomas Allen the sum of twenty-one dollars as deposit on suit and vest." Allen at the same time ordered from the defendant a suit of clothes and vest to cost $25. This clothing had never been delivered. At the time he took the receipt he did not read it. On motion before Mr. Justice *Barker*, on October 20, 1903, it was ordered that the defendant pay to the receiver the $19 on deposit in the firm's name on April 8th, and all amounts collected by him, being assets of the firm in his hands, within ten days from the service of the order upon him, and that in default he stand committed to the common gaol of the County of Westmorland, and that a warrant should issue accordingly, unless the defendant, having fourteen days' notice thereof, should shew cause to the contrary on the third Tuesday in November. Subsequently to the service of the order the defendant paid to the receiver the different amounts, and also a sum of $17 collected from one Olsen, and a sum of $5 collected from one Sweeney. The defendant made an affidavit in defence, which is sufficiently referred to in the judgment of the Court.

November 17. *D. Jordan*, K.C., shewed cause, submitting that the case was not one for commitment, and that the Court's authority would be sufficiently vindicated if the defendant were ordered to pay the costs of the motion.

M. G. Teed, K.C., and *C. Lionel Hanington*, in support of the motion:—

The defendant has been guilty of a gross and deliberate contempt of the Court, and should be punished by imprisonment.

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This is a motion for an order committing the defendant to prison for a breach of an injunction order, granted in this cause by Mr. Justice *Landry*, on April 11, 1903. The suit is brought for the winding up of an alleged partnership between the parties, by which they carried on a tailoring business under the name of L. R. Howard & Co. The breach of injunction complained of, as set out in the affidavits, is the collection by the defendant of certain debts due the partnership. The defendant denies that any partnership ever existed between them. He, however, admits the collection of the debts in question, and if any such partnership did exist there is no doubt that the amounts collected were due the partnership, and that their collection was a breach of the injunction order. The defendant has put forward certain circumstances explanatory of his conduct, and his Counsel has relied upon them as an answer to this application, so far as it seeks to have the defendant committed.

It would be a misfortune for suitors, who are obliged to come to this Court for the enforcement of their rights, if any countenance were given to the notion that the Court's orders can be disobeyed with impunity, or that on a proper case clearly made out before it, there should be any hesitation about visiting those guilty of a wilful disobedience to its orders with a speedy and appropriate punishment. At the same time the Court must exercise a discretion as to the circumstances of each particular case. And it cannot be said that either the authority of the Court, or the proper administration of justice, for which that authority exists, can only be maintained by disposing of all cases, even of wilful disobedience, by the same rule, and by meting out to all offenders one and the same punishment.

In *Cornish* v. *Upton* (1) the Court hesitated to commit a defendant alleged to have been guilty of a breach of an interim injunction, when it appeared that he had endeavored to set himself right in respect to the original charge

(1) 4 L. T. (N. S.) 862.

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against him, and the motion was ordered to stand over till the following term, the defendant paying the costs of the application. The present case is one of an interim injunction, and one also where the fact as to the existence of the partnership is an unsettled question; and if the defendant's view on that point is correct the collection of the money was all right. Besides this, the affidavits shew that the defendant has paid over to the receiver the sum of $19, transferred from the firm's bank account to his own private bank account, on the 8th April—three days before the injunction was obtained. As to the $59.50 collected from Robinson, Wright & Co., Ltd., he says he appropriated it in part payment of a note of the firm, which fell due about the time he collected the money, but that, notwithstanding this he has, since notice of this motion was served, paid that amount also to the receiver. He has also paid over the $21 collected from Thomas Allen, and the $5 balance of Dexter Allen's account; also $17 collected from one Olsen, and $5 from one Sweeney. I do not wish it to be thought that this reparation—forced as it in all probability has been by fear of imprisonment—constitutes any answer to this motion. It is but one circumstance which may fairly be considered in disposing of it. The defendant also says that these amounts which he has paid to the receiver, are all the moneys in any way connected with the firm's business which he has received since the injunction order was granted; that he had no intention of wilfully committing any breach of the injunction order when he collected them, and that, as soon as he was advised that he should not have taken them, he paid them over to the receiver. Though the circumstances under which, at all events, some of these collections were made, as the defendant himself details them, are by no means without suspicion, I think, in consideration of all the facts, I may act upon his statement, and that, if he is compelled to pay the costs of this motion, the ends of justice will be fully met. The order for commitment will, therefore, be refused, and the costs of this application the defendant must pay to the plaintiff.

TURNER v. TURNER.

1904.
January 19.

Jurisdiction — Probate of will devising real estate — Conclusiveness of, in this Court.

Probate of a will devising real estate is not conclusive evidence of the validity of the will in this Court.

Demurrer to bill. The facts are sufficiently stated in the judgment of the Court.

Argument was heard January 8, 1904.

D. Jordan, K.C., in support of the demurrer:—

The will having been admitted to probate cannot be impeached in this Court: *Meluish* v. *Milton* (1); *Boyse* v. *Rossborough* (2); *Fitzpatrick* v. *Dryden* (3).

[BARKER, J.:—Those cases relate to personalty. I have always understood the rule to be that the decree of the Probate Court respecting personalty is binding on the Court of Chancery, but not where the subject matter is real estate.]

M. G. Teed, K.C., *contra*:—

Probate is only conclusive as to personalty. In England, legislation has been enacted giving the same effect to a probate, after proof in solemn form, in respect to realty: 20 & 21 Vict., c. 77, s. 62. If not proved in solemn form the probate is not conclusive evidence of its validity and contents. Section 64 enacts that "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give the opposite party, ten days at least before the trial or

(1) 3 Ch. D. 27. (2) 6 H. L. Cas. 18. (3) 30 N. B. 588, 565.

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proceeding in which the said proof shall be intended to be adduced, notice that he intends, at the said trial or other proceeding, to give in evidence as proof of the devise or other testamentary disposition the probate of the said will, or the letters of administration with the will annexed, or a copy * * * and in every such case such probate or letters of administration, or copy thereof * * * shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." "Sufficient evidence," has been held to mean *prima facie*, and not conclusive, evidence: *Barraclough* v. *Greenhough* (2). In this respect the section accords with the legislation of this Province: 33 Vict., c. 34, s. 15; c. 77 C. S., s. 15; 57 Vict., c. 20, s. 61. The latter section provides that when a party may be desirous of giving in evidence in any Court any will duly admitted to probate, or any copy which may have been duly registered and be relevant to the matter in question, he may produce in evidence a copy of such registry, certified by the registrar of the county where the same is registered, which copy shall be received and allowed as evidence of the contents of such will, and *prima facie* [evidence] of its validity and due execution. The section does not preclude us from denying the validity of the will. See *Doe d. Simonds* v. *Gilbert* (1).*

(1) L. R. 2 Q. B. 612. (2) 22 N. B. 576.

* By c. 152, s. 58, C. S. 1903, it is enacted that "Where probate of a will is granted in solemn form by any Probate Court in this Province, the probate shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of such Probate Court, shall, in all Courts, and in all suits and proceedings affecting real estate (save proceedings by way of appeal under chapter 118 of these Consolidated Statutes, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of

1904. January 19. BARKER, J.:— 1904.

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This is a demurrer by two of the defendants to the plaintiff's bill. It appears by the bill that one Hiram Turner died on 15th January, 1903, leaving him surviving a widow and several children, all of whom are parties to this suit. He was possessed of several lots of real estate which, it is said, are of considerable value, and which, in the case of an intestacy would, subject to the widow's dower, now belong to the parties to this suit as tenants in common. This bill is filed for a partition of this real estate. It is, however, alleged in the bill that the widow, soon after her husband's death, produced a writing purporting to be a will of her husband, by which he gave to her absolutely all his real estate, and also all his personal estate, and appointed her and Thomas Bliss Turner, one of the sons, executrix and executor. This will is dated January 13, 1903. The bill alleges that this will was admitted to probate in the Probate Court of Westmorland, and that it was recorded in the Registrar's office for that county on the 17th day of June last, and that under it the widow and the defendant, Walter Turner, claim that the said real estate passed to the widow in fee simple. The bill then alleges that this will is void, as having been obtained by undue influence, and for other reasons. It is further alleged in the bill that the widow, in July last, conveyed to the defendant, Walter Turner, a portion of the land, and that he is preparing to cut the trees from it. The demurrer is by the widow and Walter Turner, and the ground is that, as the will was allowed in the Probate Court, and the decree of that Court still stands in force,

such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where, on application to prove the will in solemn form by decree or order of the Probate Court, probate is refused or revoked on the ground of the invalidity of the will, such decree or order shall enure for the benefit of the heir-at-law or other person against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decree or order."—*Rep.*

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this Court is precluded from entertaining a suit involving the validity of the will, and that the question is *res judicata*.

I have never understood that the decision of a Probate Court as to the validity of a will on an application for letters testamentary had any effect whatever, except as to the personalty. There was a difficulty at one time in suits for partition where there was a *bonâ fide* contest as to the title of the land sought to be partitioned, but it had nothing to do with the decision of the Probate Court as to the validity of the will. It was simply a matter of practice, and when such cases arose the bill was retained until the title could be tried at law by a jury in an action of ejectment. That was the course adopted by the present Chief Justice in *Ogden* v. *Anderson* (1), where the authorities for that procedure are cited. This practice was adhered to even after the passage of Sir John Rolt's Act (25 & 26 Vict., c. 42): *Slade* v. *Barlow* (2).

By the Act now in force here (53 Vict., c. 4, s. 196) power is expressly given to this Court in a partition suit, without holding the bill, or directing an issue, to decide all questions that may arise in the pleadings with respect to the legal title to the lands sought to be partitioned. This section is ample, I think, to confer the authority upon this Court. The question, if necessary, can be tried before a jury, and there is practically no difference between the two Courts as now established in a matter of this kind. I did not understand Mr. Jordan to contend this, but I allude to it as the matter was mentioned incidentally. His objection would apply to an issue sent from this Court for a trial at law, or to an action of ejectment, it seems to me, quite as much as to this Court, if the question of title were tried in it. I think, in either of the cases, the question of the validity of the will, so far as it affects real estate, is not in any way conclusively established by the fact that probate of the will has been granted and that it is still in force.

The demurrer must be overruled with costs.

(1) N. B. Eq. Cas. 395. (2) L. R. 7 Eq. 296.

CUSHING SULPHITE FIBRE COMPANY, LIMITED v. CUSHING.

1904.
January 19.

—No. 5. See ante pp. 458, 466, 469, 472.

Company—Managing Director—Powers—Breach of Trust—Pleading—Charges of Fraud—Failure of Proof—Costs.

The defendant promoted the formation of the plaintiff company for the manufacture of pulp, upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood by the company. P., residing in England, contributed two-thirds of the capital under an agreement that he was to control the building of the mill, supply the machinery and have the selection of the manager. He was elected president and the defendant was elected managing-director of the company. The mill was erected under P.'s plans, near the defendant's mill, and was fitted with machinery for the use of mill-wood both as pulp and fuel. A bye-law provided that the managing-director should have general charge of the property and business of the company, and he was given by the directors a free hand in the management. The defendant without orders, but with the knowledge of all the directors, except P., erected, at a cost of about $17,000 to the company, a fuel house and conveyors thereto from his saw mill for the conveyance of mill-wood. The expenditure was necessary if the company was to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2.00 per thousand of mill cut, on account of which he had paid himself $52,391.30, leaving a balance due of $10,589.57. The wood was of a poor quality. No practical test was made of its relative value to round wood and coal. In the absence of any other than an approximate estimate, the Court held that it should be charged at $1.90 per cord for pulp wood and .90 per cord for fuel wood, on which basis the defendant had overpaid himself $2,432,92. The defendant resigned his position as managing-director at the end of ten months, and the company ceased to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure, and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which were unsupported at the hearing:—

Held, that the defendant should not be charged with the cost of the fuel house and conveyors, that the decree in plaintiffs' favor for the balance due by the defendant on overpayment should be without costs, and that the defendant should have the costs of the sections of the bill alleging fraud.

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

The argument, which proceeded wholly upon facts, was heard October 1, 2, 3, 5, 1903.

H. A Powell, K.C., *M. G. Teed*, K.C. (*A. H. Hanington*, K.C., with them), for the plaintiffs.

W. Pugsley, A.-G., *L. A. Currey*, K.C., and *A. P. Barnhill*, for the defendant.

1904. January 19. BARKER, J.:—

I agree with the plaintiffs' Counsel in thinking that the real point in dispute is a simple one, though its satisfactory determination is rendered difficult, not only by the immense volume of evidence that has been given but by the uncertainty of a great portion of it. The plaintiffs have sought to fix a liability upon the defendant upon four grounds. The first is that in certain transactions between himself and the company while he was its managing director he had made what is known as "secret profits," amounting to a large sum of money, which he should restore to the company. The second is that in many of the business transactions between himself and the company, while he was managing director, he had acted fraudulently, and that he had knowingly and wilfully carried on these dealings for the purpose of benefiting himself, to the detriment of the company, and that on that ground he should be ordered to make reparation. The third ground is that, altogether outside of the question of fraud — either actual or legal — he was so negligent in the management of the company's business while he was managing director that the company made heavy lossess, for which the defendant should be held liable. The fourth ground is really covered by the third, but I mention it specially as it is the most important of the four. It is this, that the defendant has paid himself from the company's funds for a greater quantity of lumber delivered to the company's

mill than was actually delivered, and at prices beyond what he was entitled to charge, and the plaintiffs claim that the defendant must account to them for the excess.

I do not think the plaintiffs' claim can be sustained on the first ground. The principle upon which persons holding fiduciary positions are held liable for secret profits has in its application often borne with great severity upon those against whom there was no suggestion of either fraud or wrong doing. The doctrine is not based in any way on fraud, but upon the principle that no agent in the matter of his agency should be allowed to make profits without the principal's knowledge or consent: *Costa Rica Railway Co., Ltd.* v. *Forwood* (1). Now, whatever may be said of the defendant's dealings with the company which have given rise to this litigation, he cannot be charged with having carried them on secretly. They were carried on with the full knowledge of his co-directors, and those in any way entrusted with the management of the company's affairs. In fact it was in the contemplation of all parties when the plaintiffs' pulp mill was built that the defendant should supply it with wood from his mill, both for fuel and for making pulp, though the prices to be paid were not definitely settled.

As to the charges of fraud put forward in the bill, and which are involved in the second ground, I shall have occasion to make more especial reference to them when dealing with the question of costs. At present it is sufficient to say that they were all practically abandoned at the hearing, and there was no attempt made to sustain them. The real controversy arises from the third and fourth grounds, and the facts which relate to them I shall state as briefly as possible.

The plaintiff company was incorporated in April, 1898, under the "New Brunswick Joint Stock Companies Act," with a capital of $500,000, for the purpose of manufacturing sulphite pulp. For some years before that, and ever since, the defendant owned and operated a large saw mill for the manufacture of lumber at Union Point, just

(1) [1901] 1 Ch. 746.

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outside the city limits. Having satisfied himself that a pulp mill could be profitably operated in immediate proximity to his saw mill, he eventually organized this company for the purpose, having in view that in the manufacture of the pulp, slab wood from his mill could be advantageously and profitably used, both as pulp wood and for fuel. About one third of the capital was taken by the defendant and other residents in this Province, and the remainder was taken by Captain Partington and his friends in England. Captain Partington had, for some eighteen or twenty years, been interested in sulphite pulp mills in England, Norway, and Austria, and in this way had acquired an intimate knowledge of the business in all its branches. These mills, it appears from the evidence, had yielded substantial profits to their owners. The defendant, on the contrary, had had no experience in pulp making. He had only that general information on the subject which an ordinarily prudent man thinks it necessary to procure before he feels justified in risking his money in such an enterprise. The company issued a prospectus, in which it was stated that the defendant had a site for the proposed mill — a part of his own mill property — which he was to sell to the company for $10,000, taking shares in the company in payment. The pulp mill was built and commenced operations in October, 1900, and, subject to certain interruptions, has been running ever since. Partington's consent to finding two-thirds of the capital was given upon certain conditions as to the control of the business, to which more special reference will be made later on. He was elected president of the company at the first meeting of the shareholders, held after he took his stock, and he has held that position ever since. The defendant was elected a director at the first meeting of the company, on March 1, 1899; he was appointed managing director on the same day, and he continued to hold that position until August 7, 1901. So that he was the managing director of the company during all the time the pulp mill was in course of construction, and for the first ten months after it commenced manufacturing. The mill and machinery seem to

have cost considerably more than the estimate mentioned in the prospectus, and which was prepared by experts at that time — one of them, at least, having furnished an itemized statement of the probable cost, which Captain Partington had seen and examined before he consented to take stock in the company, and the accuracy of which it must have been an easy matter for one of his experience to determine. This question is only indirectly involved in this suit, and I should have thought it unnecessary to notice it except for the fact that it appears by correspondence in evidence that Captain Partington was disposed to saddle the sole responsibility of this unexpected outlay upon the defendant. He should, however, not forget that during the period which elapsed, from the date of the prospectus to the time when the mill was built, labor and materials had advanced very considerably in price; in the case of machinery, I think, Captain Partington himself puts the advance as high as 50 per cent. Nor should it be forgotten that the skilled workmen whom Captain Partington especially selected and sent out from England to superintend the construction and the placing of the machinery, in some cases managed matters so badly that the cost was materially increased. Of their inefficiency Captain Partington seems himself eventually to have been persuaded. During the ten months the mill was in operation under the defendant as managing director, he supplied from his saw mill to the pulp mill, wood for fuel and for pulp, invoiced at prices which aggregated $62,980.87, on account of which he was paid by the company, acting by himself as managing director, $52,391.30, of which $50,173.84 was in cash, leaving at that time — that is in August 7, 1901 — a balance due the defendant from the plaintiffs of $10,589.57. It is admitted that this balance is correct, provided the quantities and prices are correct as charged, both of which facts are disputed. As to the prices charged they were made up on a different basis for different periods of the ten months. They were, however, intended to be equal to $2.00 per thousand of mill cut. While this is the case, the evidence shews that the prices so charged were subject to revision,

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on the ground, as the defendant alleges, that there was an agreement between him and the company by which the price to be paid was to be determined on the basis of the cost of round wood for pulp and coal for fuel, the relative cost of which to the cost of mill wood for pulp and fuel was to be determined by a practical test, which has never been made. It is in reference to this question that the substantial dispute arises between the parties. The plaintiffs' Counsel have filed an itemized account of their claim by which it appears that they seek a decree against the defendant for $40,000, in round numbers, made up substantially of two items — first, the sum of $10,000, the cost of a fuel house, erected by the defendant's orders without authority, and which is of no use to the company, and, second, a sum of $30,000 — the overcharges on the wood delivered for which the company is liable. The plaintiffs' position, therefore, is that the defendant, who was the managing director of the company, and as such occupied a fiduciary position, has illegally taken from the funds of the company for his own use $40,000, which he should restore to the company. This would wipe out the balance of $10,589.57, and leave a large balance due the plaintiffs.

I do not think the evidence sustains the contention of the plaintiffs as to the quantity of wood delivered. It points to a different conclusion altogether. Invoices were regularly furnished the company; they were open to the officers of the company. No such thing was suggested until this suit was commenced, and there is no evidence to support it. The case, therefore, is narrowed down to the two claims which I have mentioned. As to the claim of $10,000 for the fuel house, the defendant contends that there is no evidence whatever to support it, but if there was, there is an adequate remedy at law for both claims, and as the charges of fraud and taking secret profits had altogether failed, there having been no attempt at proving them, the bill should be dismissed; for where there is a claim for which an action at law furnishes a complete remedy, this Court cannot obtain jurisdiction over it because the plaintiff chooses to mix it up with nominal

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claims of an equitable nature. Supposing the defendant to be right in this view, I do not think this is a case where the principle applies. In disputes between accounting parties it does not necessarily follow that this Court has no jurisdiction because an action could be maintained at law. It is often a matter of discretion as to which tribunal has the more efficient method of determining the question. See *Falls* v. *Powell* (1), and cases there cited. There is another ground upon which the jurisdiction of this Court rests. The defendant, as managing director of the company, occupied a fiduciary position—he had the control of its funds to this extent, at all events, that its cheques required his signature, and the secretary, by whom also the cheques were signed, was an official under his control. Occupying this position, he has paid himself with the company's money some $50,000 for this wood. If he had no right at all to do that, or if the amount paid is in excess of what it should have been, the whole amount in the one case, and the excess in the other, is simply so much money which he has misappropriated—taken it for his own use, not fraudulently, of course, but under a claim of right which he is unable to establish; that is in law a breach of trust, and is always so regarded, and this Court will order the defendant to restore to the company the money so unlawfully taken from it. In *Re Bolt and Iron Co.* (2), affirmed on appeal (3), the company claimed that Livingstone, who had been its president and manager, should repay to the company a sum of money which he had taken from the funds of the company in payment of his salary. It was treated as a breach of trust in a winding-up proceeding. *In re Anglo-French Co-operative Society; ex parte Pelly* (4) is to the same effect.

The parties to this suit stand in a somewhat peculiar position in reference to the matters in dispute between them. The proposal as to building the pulp mill was under Captain Partington's consideration for a long time before he concluded to join in the venture. In order to

(1) 20 Gr. 454.
(2) 14 O. R. 211.
(3) 16 A. R. 397.
(4) 21 Ch. D. 492.

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satisfy himself of the eligibility of the site and facilities for manufacturing, he sent a Mr. Lake to inspect the place and report. Plans of the proposed building which, at the defendant's request, had been prepared by Beveridge, who had also prepared one of the original estimates of cost, had been submitted to him. It was only after these precautions had been taken, and inquiries made, that Captain Partington consented to take stock in the company, and he then consented subject to certain conditions. His consent was communicated to the defendant by a cable message from England, dated January 30, 1899, in these words: "Agree to find thirty-four thousand for pulp works. you finding seventeen thousand; plans for works under my instruction; letter follows." The letter referred to is dated January 31, 1899, and contains the condition which I have mentioned. It is addressed to the defendant, and in it Captain Partington, among other things, says: "I have decided to join your scheme on which you propose to spend £50,000 sterling, and to make arrangements for the plant and the mill to be doubled if considered necessary. You and your friends will undertake to find the £17,000, and to form a board of directors to control the undertaking, but I must have the control of arranging the building of the mill and supplying it with machinery, for which I think I can prepare plans as cheap and as good as anyone else. And I must have the full control in the management of the manufacture when the mill begins to work, namely, to nominate or elect the principal manager, and, by holding two-thirds of the shares, I must have a voting power at the meetings in proportion. I think you will agree with me that this is a proper thing to do in a business of this description, especially as I thoroughly understand the business, and as I am finding the principal part of the money." It does not appear that these conditions were accepted by the directors in any formal way, but they were in fact accepted by them and acted upon. The defendant certainly accepted them, and the case has been treated throughout as though Partington was the company as to all matters which he, by his letter, reserved to

himself the entire control. The bye-laws of the company provide for the appointment by the directors of a managing director, and to him is given the power of employing all persons required for carrying on the work or business of the company, and the general charge of the property and business of the company. (Bye-laws, Nos. 8 and 9). These bye-laws have never been altered in any way, though there was a resolution passed by the board on the 1st of April, 1899, and after Partington had been elected president of the company, by which he was given the right to name the person who should have the principal management in the manufacture of pulp in the company's works and that the managing director should employ the person named. This arrangement was strictly adhered to, and the evidence shews that the defendant, in all cases, was careful to carry out Partington's directions. If these directions were disregarded, it was by those whom Captain Partington had himself selected to represent him. The first man sent out was Allen, who was here over a year. Ellis was here as manager from January 2, 1901, until the following August. Beveridge came out in January, 1901, and remained until April of that year, and returned again in the following July. Bradbury came out in June, 1900, and remained until after Beveridge was given the full charge. There was practically no time while the works were under construction, or while the defendant continued manager, except a few weeks during Allen's illness, when there was not a special representative of Captain Partington in actual charge. When I say in charge, I mean that these persons had and exercised the sole determination of all questions of construction, involving special aptitude for a pulp factory, as well as questions involving the selection of machinery and its proper location in the building. It is possible that if Captain Partington had himself been on the spot, where he could have given the company the benefit of his long experience upon the matters which were daily coming up for settlement, he might have obviated many of the losses and mishaps which befell the company at the beginning of its operations. At the same time portions of

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the machinery sent out by himself gave constant trouble, and caused constant loss. His managers do not seem to have been very successful in their methods. Waring, who was engineer in charge of the engine room during the whole time spoken of, with ample opportunity of knowing what was going on, describes the situation in a pointed and instructive answer. He says that until Ellis got charge everybody was in charge; that everybody was pulling and hauling, and doing everything they could think of. He was asked the following question:—"Tell me the different ones you saw pulling and hauling." His answer was: "Well, Mr. Bradbury was one that was there and trying to do something; Mr. Allen was there and trying to do something; Mr. Ellis was there and trying to do something, and I was trying to hold up my end about the same." Though days were spent in giving testimony as to these matters they do not seem of much importance as the case now stands. If it was sought to throw the responsibility of the losses of the company during the first ten months of its operation upon the defendant, it was wisely abandoned, because the evidence does not support that view. That the defendant did not interfere with any of these men employed, and sent out from England by Captain Partington as trained, experienced experts in their several departments, and as his special representatives, by whom he was exercising the right of management conceded to him, is abundantly proved, not only by the defendant but by Bradbury, Ellis and Hobart, and there is no substantial evidence to the contrary.

The authority delegated by the company to Captain Partington, and which, after all, is perhaps no more than any person has who holds the requisite controlling voting power, to select a board of directors of his own choosing, is of more importance, in view of the other grounds upon which the company seeks to fix the liability upon the defendant, and it is in reference to that that we must consider it. In the first place, I do not accede to the proposition that, by the agreement, the directors had in effect effaced themselves, and surrendered all control of the company's

affairs to Captain Partington, nor do I accede to the doctrine that the defendant was a managing director with nothing to manage. He retained all the powers and authority incident to the position, except what had been taken from him and given to Partington. As between the plaintiffs and the defendant I must treat the acts of Partington within the fair meaning of the arrangement as the acts of the company, and, therefore, binding upon the defendant. I have spoken of the plaintiffs' third ground as one of negligence. I do not know that Mr. Powell so described it, but we mean the same thing. His contention was that as to the cost of the fuel house, and the machinery put in for the purpose of conveying the wood from the saw mill to the pulp mill, the defendant must be charged, (1), because as to the fuel house it was built without any authority from Partington, and (2), that as to both fuel house and machinery, because both had become entirely useless by reason of the abandonment of mill wood for pulp and fuel, under the arrangement made in reference to the use of this wood. In other words, that the use of the mill wood was an experiment made altogether at the defendant's risk. If it proved successful, and could be profitably used in the manufacture of pulp, and as fuel, or at least more so than round wood and coal, well and good, for he would then secure a profitable sale for the waste from his mill, but if otherwise the whole cost of the experiment was to fall on his shoulders, included in which are the two charges I have mentioned. In addition to this it is said that the expenditure was one altogether unnecessary and unreasonable, even for the purpose of experiment, and made under circumstances which shew that it was done with a view to advance the defendant's own private interest rather than that of the company. It is a little remarkable that while the plaintiffs' bill charges the defendant with a great number and variety of fraudulent and illegal dealings, it contains no mention of the claim now put forward. Neither was it put forward in any of the discussions that have at various times taken place between the parties as to the differences between them.

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It is admitted that Captain Partington gave no specific instructions for the erection of this fuel house. It is not in any of his plans, and he in fact knew nothing about it, I believe, until after it had been completed, though his representative must have known all about it, as did the directors, except Partington. No objection was ever made to it by the company in any way, and it is only now that the question has been started. It was quite within the authority of the company so to use its funds if it thought fit, and, therefore, in building this house the defendant did nothing that the company could not have originally authorized or subsequently ratified. That any authority was required from Captain Partington in the matter, in view of the defendant's position as managing director, and the free hand given him by the company in reference to its affairs, is by no means clear. I think there is ample to be gathered from the evidence to amount to proof of an implied authority for the purpose. So far as the construction of the works was concerned the control which Captain Partington reserved to himself was based on his experience, and should fairly be limited to such portions of the work as required special experience for their proper direction. To that extent, I think, the defendant had assented to Partington's directions being equivalent to those of the company, and therefore conclusive. There were, however, many other matters in reference to which the defendant's experience was most likely more valuable than any which Captain Partington had or pretended to have. I refer especially to this question of the wood, and the means necessary for supplying it to the pulp mill. As to these, I think Captain Partington himself looked to the defendant, for the company by no corporate act interfered in the matter one way or the other, but left it to Captain Partington and the defendant. In this, as in other points involved in the case, it would be simply wearisome to go through the whole evidence, and I shall only refer to such parts of it as seem to warrant my own conclusion as to the facts. The use of mill wood from the defendant's mill, both for fuel and for manufacturing pulp, was in the contemplation of all par-

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ties when the mill was built. The original designs of the machinery prepared by Captain Partington were changed purposely that this wood could be used — not exclusively, for the supply was inadequate for that — but that it should be used in conjunction with round wood and coal. The boilers were changed, one half being fitted for burning wood; the barkers were also changed, and such machinery and appliances as were necessary for the preparation of the wood, and for its conveyance from the one mill to the other, had to be supplied. In his evidence Captain Partington says: "The plan was made, and the principal machinery was to use round wood, and eventually in the construction of the mill I allowed changes to be made to use half and half slab wood and round wood." He says this involved more machinery: that the boilers were designed six for coal and six for waste wood, and the former could also burn wood with some slight changes. A portion of the barkers were also intended for slabs. He also says that the conveying machinery was put in as a result of the change. The fuel house Captain Partington explains was built to store the waste wood in the day time when it was more than the mill used for consumption at night. In a letter from Captain Partington to the defendant, dated March 20, 1899, he says: "I should like to hear from you respecting the waste wood from the saw mills, which is intended to be burnt at the pulp mills, and how this wood will come in comparison with the cost of coal, and whether or not you think it would be cheaper to burn wood than coal at $1.50 per long ton. I understand it will take more steam boilers, and a larger installation, to burn wood than coal; still, I understand also that it is absolutely necessary in this case to burn the wood because it is there, and on this account it ought to be very cheap to burn for steam making purposes." In a letter dated March 27, 1899, Captain Partington speaks of the advisability of having boilers capable of burning either coal or wood, as occasion required, adding: "We might not be able to get sufficient waste wood at times to keep the mill working, or a fire might take place, and other things might occur which would pre-

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vent us having sufficient waste wood to burn, so I would suggest for safety that boilers should be got to burn either wood or coal, as desired, economically." In another letter, dated December 30, 1899, Captain Partington writes to the company as follows: "With regard to using up your waste wood, this is a very important matter, and machinery must be got for this purpose, so that we can use the large slabs you make. The method of cleaning the waste wood will be different from that of cleaning the logs, but I think you will know what is wanted for this purpose, and you had better prepare, therefore, for some machinery for taking the bark off the slabs, and a saw to cut the pieces into uniform lengths of say three or four feet. This would be a nice length to handle, both for the men on the barkers and on the choppers. Kindly prepare, therefore, for some machinery for cleaning the waste wood, and put the same alongside, or in the neighborhood of the barking machine we are sending for the round wood." At another place in the same letter he says: "We might just mention again that it is very important that we should use as much of your waste wood as possible, because, if it is properly cleaned it makes a first class pulp, but we shall require some machinery and arrangements so that the cost of cleaning and handling the slabs will not be too great. We have had experience of making these slabs at Glossop and in Nova Scotia, but it has generally had to be abandoned on account of the cost of handling and barking. However, I think you will be able to find some machinery, and devise some plan whereby we can make these slabs come in rather cheaper than the round logs."

As to working the mill night and day, Captain Partington writes in the letter of March 20, 1899, as follows: "I have asked Mr. Beveridge whether he thinks it advisable to work the mill night and day, and he says it is. This of course will simplify the building of the mill and the quantity of machinery wanted very much, especially if the labor is no more expensive working night and day, alternately, than working only in the day. When working night and day we can do with half the machinery in most places that

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we should want if we only worked in the day time. I am speaking now particularly of the wood preparing department, where most of the labor is required." In a letter written by Captain Partington to Mr. Allison, vice-president of the company, under date December 12, 1900, he says as follows: "I am also sorry to learn that he (that is the defendant) thinks he has not had a free hand in building the works. I contend he has had a free hand, and the men I have sent have been entirely under his control. The only important condition I made was that no alteration should be made in the arrangement of plant and machinery without my consent, unless it could be seen that there was something wrong in what we proposed, and something better could be put in its place. Surely this is sufficient evidence that Mr. Cushing has no right to complain about any interference through the people sent from this country."

This evidence, I think, gives no support whatever to the idea that this large expenditure of money was a mere experiment; not only that, but an experiment made at the defendant's risk, and the expense of which, in case of failure, was to fall on his shoulders. The use of mill-wood for fuel was not a novelty in this country. Neither was its use for the manufacture of pulp still in an experimental stage. It was being used then, and is being used to-day for both purposes, in mills which are profitably operated under conditions almost identical with those which prevail in the case of the plaintiffs' mill. It seems to have been left to the defendant to supply such appliances as might be necessary for getting the mill in working order, which in the general design and plan of Captain Partington, he had not himself specially prepared or directed. The question then narrows itself down to this: In what the defendant did — that is, in building this fuel house, and in putting in the conveyors and other appliances for preparing the mill wood for use, either as fuel or for the manufacture of pulp, and for conveying it from the one mill to the other — did he exercise such a reasonable, business-like prudence in the management of the company's business affairs as the company fairly had a right to expect from one of its agents

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and managers. To put it in a few words, was the defendant in what he did so negligent, or so regardless of the duty which he owed to the plaintiffs, that he must be held liable for any loss which may have resulted. And upon the same principle, in my opinion, must the defendant's liability be determined as to the cost of the hogs used for hogging the fuel, and the cost of piling a large quantity of wood in the asylum yard, and elsewhere, for the plaintiffs' use, both of which are made specific grounds of complaint in the plaintiffs' bill.

Before going into the evidence on that question it is better to see what is the nature and extent of the liability of a director of a trading company to the company itself for losses incurred through his mismanagement. A director of a company is sometimes spoken of as an agent, and sometimes as a trustee. He is the agent of the company, and trustee of the powers of the company for the benefit of the shareholders. The property of the company is not vested in him, but he has the control of it, to be used and managed in carrying on the business of the company so as to ensure profits to the shareholders. Necessarily involved in this is the power to place the property at such risks as the particular business may seem reasonably to require for its successful prosecution. It is obvious, therefore, that the liability of directors cannot be measured by the rule applicable to ordinary trustees. The directors are to use the company's property under their control in prosecuting the venture in which the shareholders have embarked their capital, taking the risks to which such ventures are liable, while the primary duty of the ordinary trustee is to conserve the fund of which he has both the title and control. This distinction has been pointed out by James, L. J., in *Smith* v. *Anderson* (1), and by Kay, J., in *In re Faure Electric Accumulator Co.* (2). In the latter case Kay, J., says: "They (the directors) certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will. One obvious distinction is that the property of the company is

(1) 15 Ch. D. 247, 275. (2) 40 Ch. D. 141, 150.

not legally vested in them. Another, and, perhaps, still broader difference is that they are the managing agents of a trading association, and such control as they have over its property, and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house, to whom the control of its property, and very large powers for the management of its business, are confided; but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control, except the action of the shareholders of the company. However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees, might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent." The same Judge, at another part of the same judgment, says: "If directors apply money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust. On the other hand, if they apply the money of the company or exercise any of its powers in a manner which is not *ultra vires*, then a strong and clear case of misfeasance must be made out to render them liable."

In *In re Forest of Dean Coal Mining Co.* (1), Jessel, M. R., says: "One must be very careful in administering the law of joint stock companies not to press so hardly on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the Court should do its utmost to bring fraudulent directors to account, and on the

(1) 10 Ch. D. 450.

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other hand, should also do its best to allow honest men to act reasonably as directors." Again he says: "Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners; it does not much matter what you call them, so long as you understand what their true position is, which is that they are really commercial men, managing a trading concern for the benefit of themselves, and of all the other shareholders in it."

In *Marzetti's Case* (1), James, L. J., says that the rules of the Court of Chancery with respect to the duties of trustees of wills and settlements, where the preservation of the trust fund is the primary object, are too strict rules to govern directors. In the same case Cotton, L. J., says: "Now directors are confidential agents, with the liabilities of trustees, but they have a large discretion, and if they act *bona fide* they are relieved, and are not liable for want of judgment, or error, if they make a payment which is in fact not for the purposes of the company." Brett, L. J., says: "The director must be guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law."

In *Hirsche* v. *Sims* (2), Lord Selborne says: "If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with *dolus malus*, or breach of trust, merely because in promoting the interest of the company they were also promoting their own, or because they afterwards sold shares at prices which gave them large profits."

In *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (3), Romer, J., says: "Directors are not liable, acting *intra vires* and in good faith, for loss accruing to their company by their acts, unless arising from what has been called 'gross negligence,'" a phrase which, he says, is fully ex-

(1) 28 W. R. 542. (2) [1894] A. C. 655, 660.
(3) [1899] 2 Ch. D. 392, 418.

plained in *Giblin* v. *McMullen* (1). In the same case Lindley, M. R., is thus reported (2): "As directors, I am not aware that there is any difference between their legal and their equitable duties. If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case they clearly acted within their powers: they did nothing *ultra vires*: fraud is not imputed. The inquiry, therefore, is reduced to want of care and *bona fides*, with a view to the interests of the nitrate company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they make, although, if they had taken more care they might have avoided them. Their negligence must be not the omission to take all possible care; it must be much more blameable than that: it must be in a business sense culpable or gross. I do not know how better to describe it." See also *Overend, Gurney & Co.* v. *Gibb* (3); *Dovey* v. *Cory* (4).

The question of fact to be determined is whether in this mill, designed as it was to use mill wood from the defendant's mill, he was justified as managing director in using the company's funds for the erection of this fuel house, and the machinery connected with it. How stands the evidence? Mr. Beveridge, who differs from the other witnesses in many respects, agrees with them on this point. In his evidence he described the building with its appliances, which he estimates to have cost some $17,000, and describes the uses for which they were all intended. He was asked this question: "Do you say, if they were going to use slab wood all of that was necessary?" His answer was: "In this individual case I think it was necessary." Mr. Waring, a man of experience in such matters, whose opinion would be accepted by most persons, was asked if he knew of any other cheaper means by which this

(1) L. R. 2 P. C. 336.
(2) [1899] 2 Ch. 392, 435.
(3) L. R. 5 H. L. 480.
(4) [1901] A. C. 477.

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wood could have been brought to the mill than by conveyors, and he said he did not. He was asked this question: "If the pulp company wanted to use the mill wood for fuel, and thought it an advantage to have the mill wood, this machinery and the storage room were all reasonably necessary for the purpose?" His answer was: "Had to be there." That is, that in his opinion, the building and appliances had to be there as they were, provided the mill wood was to be used. Mr. Ellis, who, according to the evidence, was more successful than any of the other managers sent from England by Captain Partington, in his efforts to get the mill in working order, said that, in his opinion, the system of conveyors could not be improved. Mr. Cudlip, who was for several years manager of the Gibson cotton mills, where similar appliances and a fuel house are in use, said that the hogged fuel made excellent steam, and the conveyors worked satisfactorily in every way. The defendant says that before putting up this machinery he consulted Mr. Waring, the Government inspector, a man of large experience in such matters, and he advised the erection of the fuel house and conveyors. The defendant, who is himself a man of considerable experience in such matters, gives it as his opinion that the arrangements, including the fuel house and the conveyors, were all reasonably necessary in the management of the business. He says the object of the fuel house was to have storage room for fuel, so that instead of running it all up in the day time they could run the boilers of the same class all the twenty-four hours — day and night — and there would be no shifting; that he considered it necessary in the mangement of the mill, after it got going, to have the wood stored in this way, and in this view Mr. Waring, the Government inspector, agreed. I am far from saying that this building and machinery are a loss, simply because those who at present are managing the company's affairs do not choose to use them, but by other means procure the description of wood and fuel which they prefer, but if it were so I should not feel able, in view of the evidence I have just quoted, to find the defendant guilty of that negli-

gence, or disregard of duty, which, under the authorities, is necessary to render him liable. It may be that a smaller and less expensive building and plant would have answered all purposes, but that is at most an error in judgment for which, as it seems to me, he is not liable. So far as the plaintiffs' claim rests on the alleged loss by reason of the erection of the fuel house and conveyors connected with it, it cannot be sustained.

This brings me to the most important point involved in this suit, and the one which, so far as the evidence goes, is the most difficult to deal with. The first question is, was there any agreement between the parties, and if so, what is it? The defendant's position on this point has been consistent throughout, for he has always contended that although the price at which he invoiced the wood delivered to the pulp mill was a proper and reasonable one, it was subject to revision, and it was by the agreement between the parties to be finally determined on the basis of its relative value to round wood and coal, as shewn by an actual test to be made for the purpose.

Captain Partington's position has not been always quite so well defined. His Counsel claims that there was at all events no continuing contract with the defendant, and that the plaintiffs could terminate the arrangement at any time. And the evidence shews that on more than one occasion he did, so far as he could, change the terms upon which he was willing to pay for the wood. For instance, in a letter from the defendant to Skelton, dated April 15, 1901, he speaks of having received a letter from Partington, dated March 20, in which he said that he was only willing to pay such price for slabs as Cushing & Co. had obtained previous to the starting of the mill. Some stress has been laid upon the fact that while the wood was being supplied the prices charged for it were well known to Captain Partington's manager, who was here at the time, and who made no objection at any time. Especial importance is attributed to this fact in reference to the large quantity of pulp wood piled in the asylum field before the mill commenced working. Except as to this wood, or rather to that portion of

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it used in November, 1901, I do not think the matter important, because the defendant always stated that the charges made were not final, but subject to revision. And he himself changed them, or at all events the method of computing them, three or four times of his own motion without consulting any one. I think it is fairly to be inferred from the correspondence between the defendant and Captain Partington, and what took place between all parties, that Captain Partington was willing, and practically agreed, that if mill wood could be used and supplied for the manufacture of pulp and for fuel, at a price which would make the cost of production per ton no more than round wood and coal, assuming the quality of the pulp to be at least equal in both cases, then the defendant should supply it and be paid on that basis. Captain Partington's experience had led him to prefer the round wood and coal, and there is no reason to suppose that either he or the defendant — for they alike occupied fiduciary positions to the company — had any desire or intention of entering into an arrangement for a wood supply, which was detrimental to the interests of the shareholders, and proportionately beneficial to the interests of the defendant. In one of his letters Captain Partington says: "We have always been disposed to use mill wood when we could. It is simply a question of price, and if we can get it as cheap or cheaper than round wood and coal we will use it."

In stating the plaintiffs' position and grounds of claim Mr. Teed contended that as to that portion of the time during which the mill wood was supplied, between October 10, 1900, and March 20, 1901, when Captain Partington wrote the letter I have already mentioned, the basis for computing the price should be the value of the mill wood relatively to that of round wood and coal, so that as to that period the parties do not differ. The plaintiffs, however, contend that the effect of the letter of 20th March was that the defendant was only entitled to charge from that date up to June 25, at the rate the wood netted his firm before the pulp mill was built. If not that, he was either not entitled to make any charge at all, or whatever might be a

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reasonable price, or whatever the wood was worth to the plaintiffs for the purpose of their business. The parties also agree that for the last period, from June 25th, 1901, to August 10, 1901, when the defendant stopped supplying the wood, the price was to be determined the same as for the first period. So that the parties only differ as to the principle upon which the price is to be computed for the period from March 20th to June 25th. Mr. Powell admitted that in dealing with this period there were practical differences of no small importance; that he had failed in satisfactorily determining what principle should be applied, and he suggested that it might be as well to treat all three periods alike, for it was really upon that theory that the various statements and computations in evidence were made. The difference between the two methods cannot make any material difference in the general result, and I shall therefore adopt Mr. Powell's suggestion. Then comes the question, how is this relative value to be determined? The Attorney-General says, by a practical test to be made at the mill itself, and he complains that this was never done. I do not think that the evidence shews that it was agreed by the parties that it was to be determined by this test, though no doubt it was talked of, and the defendant urged that this test should be made as the most reliable way of determining the question. It is, however, not exclusive of all other methods, and we must make the best of what we have. The evidence has been directed to two ways of settling the question. One is by taking the actual expenditure under its different headings for fixed periods when round wood and coal were being used, and comparing it with the actual expenditure under the same headings for similar periods when mill wood was being used. The other is by the actual experience of practical, intelligent business men — persons, who, to quote Captain Partington, speak of "facts, not theories." Two things are agreed upon, (1) that there is no difference in the quality of the pulp manufactured from the two descriptions of wood, and (2) that the cost of handling and cleaning mill wood is greater than that of round wood, and that this difference must be over-

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come by the cheapness of the one as compared with the cost of the other. It is obvious that in any such computation it is so difficult to find the conditions nearly alike, and there are so many things which rest upon mere estimates or opinions, as to which even experts disagree, that the results, while they may point in the right direction, can never be regarded as more than approximate. There are other reasons which render such comparisons in this case more difficult to make and less reliable when made. Statement No. 70, the figures of which are, I believe, accurate, gives the expenditure on manufacturing account for six different periods. The first three include the ten months during which the defendant was managing director, and the other three include portions of the time between August, 1901, and July, 1903.

It is well known that in the early life of a manufactory like this mill as a rule occur its mishaps. The machinery is new, the workmen are unskilled and without experience, and much time is required to get things in order. Such was at all events the case with this mill. Nothing went smoothly except the engine. The digesters were constantly giving trouble; the linings in them blew out on several occasions, causing great delay and expense; there was no end of trouble with the acid plant, and the screens and barkers required changing in many ways before they worked satisfactorily. All such stoppages very seriously increase the cost of production. Messrs. Cushing, Ellis, Waring, Cudlip and others speak of this increased cost. In a letter to Mr. Beveridge, dated February 15, 1901, Captain Partington writes as follows: "It is very important that the machinery, when started on Monday morning, should be kept working till Saturday night. This machinery should be so fixed that no breakdowns or stoppages should happen at all. This can be done easily enough by practical men, and it must be done, because there is nothing more disastrous to the profitable working of a place than continuous breakdowns and stoppages, even in any department."

Mr. Clark, who has had many years' experience as a

manufacturer of sulphite pulp, and has for the past five years been manager of a large mill at Bangor, gives the following evidence on the same subject:

Q. "Mr. Clark, from your experience in connection with the starting of a mill and its early operation, where things do not run smoothly; for instance, by reason of defects in the acid plant, by reason of breakdowns in the wood room, and by reason of linings coming off the digestors, suppose there were stoppages, and the mill was running intermittently, and the production very low, what effect would that have on the relative cost per ton of pulp?

A. That would depend a good deal on the number of shutdowns you had; but I can tell you what my experience has been—in the difference between 600 tons and 850 tons—one would show a loss of a couple of thousand dollars, while the other would be a profit of $4,000 or $5,000.

Q. Where would the waste arise from?

A. The general expenses are going on just the same. You cannot go ahead; you have got your men here; you can't send them home, and at the end of the month you have got a small production, and it makes a difference whether you take your cost and divide it by 600 or 900 it will go down very rapidly.

Q. And with regard to the waste of fuel, would there be any?

A. Well, if you have got steam of course for cooking, and are not using it, you have got to open your doors and waste your fuel, and blow off the safety valves. If I should shut down now, due to a breakdown, the safety valves would soon open and the steam blow out doors.

Q. So that as the production goes down the relative cost per ton goes up?

A. Very rapidly. Yes."

The evidence shews that the mill worked only 89 days out of the 123 working days, between October 8, 1900, and February 28, 1901. From February 28, 1901, to March 28, 1901, it worked the full 27 days, and from March 28 to August 10, 113 days, it worked 100 days. From September 13, 1901, to January 17, 1902, 109 working

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days, it worked 108. So that during the first three periods, which comprise the time previous to the defendant's resignation on the 10th August, 1901, 47 working days were lost out of 263, while but one day was lost out of the 109 days which make up the two other following periods. During the first three periods — 263 working days — the mill produced 4,063 gross tons of pulp, or, at the rate of 15½ tons per day, while for the other period it produced 2,193 gross tons, or at the rate of 20 tons per day — a difference of 4½ tons per day, which is attributable mainly to the stoppages. It was suggested that these stoppages were due to some extent, at least, to the use of mill wood, or a want of proper management on the defendant's part. It is but due to him for me to say that the suggestion is not in any way supported by the evidence. On the 28th March, 1901, Mr. Allison, the vice-president of the company, addressed a letter to Captain Partington, its president, from which I extract the following. After referring to two letters he had received, in which Captain Partington had complained of the increased cost of the mill, he says: "I have read both these letters carefully, and must say that, were I situated as you are, I feel I would be inclined to write in much the same strain, but it is my firm conviction, that when you come to know all the facts in connection with building the mill, placing the machinery therein, and the attempts made by Mr. Bradbury to make pulp, you will look upon most of the matters referred to in your letters in a different light, and will place the blame of excessive cost where it rightly belongs. Of course, you understand my time is very much taken up with my own business, but there has not a week passed since the building of the mill commenced that I have not visited it, once and often twice when in town, and as far as I am able to judge, a very large proportion of the over-expenditure was caused by Mr. Allen's bad management, and also by Mr. Bradbury's inability to make good pulp. There are, of course, other causes that have tended to bring this about, that were beyond their control. I am not able to speak from any technical knowledge, but my conclusions have

been formed from what I hear from time to time, and what, I believe, is generally admitted by those who are supposed to know. I now refer to the machinery that came from your side of the water, which has not proved to be a success so far, with very few exceptions. The drying machine is, I believe, a success, but the digesters have been a lamentable failure up to now, and have cost a large amount for repairs. We have not, during the nearly six months the mill has been running, had the use of more than two at any one time, and part of the time only one, but are in hope that after the new linings (which have been ordered from Portland, Me.,) are put in that we will be able to use all three. * * Mr. Ellis, as mill manager, appears to be getting on very well. He has had mountains of difficulties to overcome, and I consider he has done the company more good since he took charge than any of the other men you have sent."

Ellis in his evidence made the following statement:

Q. "Are you able to say if the difficulties which occurred in connection with the operation of the mill, and the making of the pulp, were in any way attributable to the use of mill wood for making pulp, and also for the fuel?

A. No; in my opinion they were not.

Q. Not in any way?

A. No.

Q. But there were difficulties.

A. From the defects in the construction of the plant. That was all the difficulty I had to contend with all the time I was there."

Mr. Ellis had the sole management of the mill for about eight out of those ten months, and therefore had ample means of forming an opinion, both as to the difficulties to be overcome and the causes to which they were due.

Referring again to statement No. 70 we find the cost of the wood, coal and wages for the different periods I have mentioned. Between the third and fourth periods a month (from August 10th to September 13th) elapsed during which the mill was shut down and certain repairs

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made. The cost of wood, coal and wages for the third period was $39,758.44, and the production was 2,151 $\frac{729}{2240}$ tons of air dry pulp—making the cost per ton to be $18.48, while the cost of wood, coal and wages for the next or fourth period was $17,025.09, and the production 933 $\frac{1361}{2240}$ tons of air dry pulp, making the cost per ton to be $18.24, or a difference of 24 cents per ton in favor of the fourth period.

I am unable to see, if these elaborate comparisons are to be relied on at all, what two periods can be more suitable for the purpose than the two I have just mentioned. As an offset to the difference in cost, we have the mill stopped 13 out of 113 working days in the third period, while in the fourth there were no stoppages. In the third period they used for pulp making round wood and mill wood in about the proportion of three-fourths mill wood and one-fourth round, and for fuel mill wood and coal in about the proportion in cost of two-fifths of wood and one-fifth of coal. In the fourth period they used only coal for fuel, and round wood for pulp. A further analysis of this statement shews that while the cost of fuel per ton of air dry pulp in the third period is 62 cents in excess of that in the fourth, and the cost of wages is 68 cents per ton in excess of the cost of wages in the third period, the cost of wood pulp per ton is $1.04 less in the third period than in the fourth. As to the fairness of taking these two periods for comparison, Mr. Beveridge gave the following evidence:

Q. "It would not be fair to compare the fourth period with the third, because you had been making improvements?

A. No, I did practically nothing up until the end of January.

Q. You positively swear it would be fair to make a comparison between these two periods?

A. I think so.

Q. You swear that it would be a fair test to Andre Cushing & Co.?

A. Yes, I think it is perfectly reasonable."

In a report made by Ellis to Captain Partington, under

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date March 19, 1901, he writes at great length as to the defects in the plant, and other causes which led to the increased expense, and among other things he says: "With ten barkers of slab wood, and six barkers of round wood, it would be quite possible to produce chips for forty tons of pulp per day. As regards the difference in cost between round and slab wood, it is certainly least for the slabs. Logs cannot be got to the mill now for less than $7.00 per thousand; this means $3.50 per cord. Slab wood at the mill at $3.00 per cord costs less when made into chips, for while the round wood costs less for barking more labor is required to bring it to the barkers. * * * That it pays to use slabs has been proved at Bangor, and other mills in the United States."

We have the opinions of two practical pulp makers as to the relative cost and value of these two kinds of wood and fuel. Mr. Mooney, manager of the Mispec mill, says that he has visited the mills at Bangor and other places and also the plaintiffs' mill, and that the slabs supplied seemed of about the same quality as those used at Bangor. He also says that in 1901 he made a contract with the defendant for slab wood, delivered here, at $3.50 per cord, which would cost him $4.20 per cord at Mispec. He was asked this question:

Q. "Suppose your sulphite mill had been situated in 1900 and 1901 the same as the Cushing sulphite mill is situated relatively to the Cushing mill, so that the mill wood would be delivered in the same way, what do you say it would be worth per cord for making pulp?

A. I think, no doubt it should be worth $3.50 a cord.

Q. You say, in 1901 it would be worth $3.50 a cord?

A. Yes."

He also says that in 1901, according to the average price of round logs, it would pay to use mill wood at $3.50 a cord.

Mr. Clark, who has had several years' experience at Bangor and elsewhere, says that they bought from the defendant in 1901, for their mill at Bangor, several hundred cords of slabwood at $5.00 per cord, delivered at Bangor.

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This Bangor mill is operated under conditions almost identical with those which prevail at St. John. They use large quantities of mill wood for making pulp and for fuel. It is obtained from a saw mill within a few hundred feet from it as here. Since 1899 they have been paying $5.00 a cord for pulp wood, and $1.50 for fuel wood. He gives it as his opinion that slabs are far superior to round wood for making pulp, and states his reasons for thinking so. I quote from his evidence:

Q. "From your experience, Mr. Clark, what do you say as to the relative merits of slabwood and round wood for making pulp?

A. Slabwood is superior in every way."

He then gives his reasons, and the examination proceeded:

Q. "So you say from slabwood you can make a better pulp in every way than from round wood?

A. Oh, yes.

Q. From your experience, Mr. Clark, you pay $5.00 a cord, you say, for slabwood; now, what would you value round wood at relatively to that, taking $5.00 as the standard?

A. I would rather give $5.50 a cord for slabwood than $5.00 for round wood."

Mr. Clark further says that it costs one-third more to prepare slabwood than round wood, and that the wood bought from the defendant in 1901 was about equal to the average of what they cut at Bangor.

At first blush it strikes me as odd that in the case of two mills operating under conditions so nearly alike that one can afford to pay $5.00 a cord for pulp wood, and $1.50 a cord for fuel wood, and yet make money, while the other is only paying about three-fifths of these prices, and yet going behind hand. Mismanagement, and the frequent stoppages and mishaps, of which the plaintiffs' mill, in its early days, seems to have had more than its share, no doubt contributed largely to this result. There is, however, in my opinion, another cause which has also contributed to it. I allude to the quality of the wood furnished by the defend-

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ant. There seems to be a consensus of opinion that perfectly good pulp can be made from slab wood, and although Captain Partington's experience in Europe seems to have been different, I think it has been practically demonstrated that on this side of the Atlantic such pulp can be manufactured at a profit. It depends largely upon the price you have to pay for slabs. If they are not in point of size and quality up to a certain standard the cost of handling them is so altogether out of proportion to their value that there is no margin for profit. I again quote Captain Partington and Mr. Clark. After saying that a good pulp can be made from slab wood by going to considerable trouble and expense, Captain Partington's evidence proceeds as follows:

Q. "First, what must be the character of the slabs in order to produce this good pulp?

A. If you get a small slab you will find that it costs more than it is worth. You will have to clean it, so that the result is not worth the operation. It is a matter of size and handling.

Q. I will come to that later. So far as the expense of handling is concerned?

A. Yes.

Q. You mean not only the handling backward and forwards but the barking as well?

A. No, the handling throughout. It is a very costly process.

To Court. Q. The cost of the handling of a poor slab is as much as the cost for a good one?

A. Substantially so.

Q. Then when you speak of slabs making good pulp wood as a commercial average, you mean large slabs?

A. Yes."

Mr. Clark, in his evidence, says, "the more sticks you handle the less pulp you get." His evidence proceeds as follows:

Q. "Speaking of this wood, the mill cut of the mill is quite heavy, is it not?

A. We saw about thirty millions.

Q. And in the summer time, when you are sawing

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deals or boards, merchantable lumber, the proportion that comes to the mill is much smaller than at present, of course?

A. Yes.

Q. That would be true both in respect to pulp wood and fuel wood?

A. Yes, but not so much now; we get very little fuel wood in the summer time, we sort it down very close; for instance if we get 100 cords of pulp wood, we wouldn't get more than 16 or 20 cords of fuel. At the present time we do not get scarcely any fuel wood, because we slab so heavy there is not much at all. Ordinarily we get, perhaps, one-fifth, or perhaps it does not run quite so much as that — perhaps 16 cords of fuel to 100 cords of pulp wood.

Q. That is in the summer time?

A. Yes, and then we cut the wood very close.

Q. And take out everything for pulp wood that you can get?

A. Yes."

Mr. Beveridge, in his original report to the defendant on the eligibility of this mill site, alluded to the importance of having selected slabs for making pulp. In his evidence he speaks of the inferior quality of the wood furnished. He says that the slabs were poor, very thin, and from his point of view, as a pulp maker, not worth handling. In other words, that at the price charged for them the expense upon them was more than equal to the value of the product when cleaned; that they were not worth handling at the price charged, the waste was too great. This was some time during the period when the wood was being charged at the rate of $2.00 per thousand of mill cut. Mr. Beveridge also says that he pointed out to the defendant the poor character of the slabwood; that it was too small and too thin, but that he (the defendant) said nothing. From the invoices and other papers in evidence I have reduced the total quantity of wood charged to the plaintiffs to cords, using as a basis where the invoice did not mention the quantities in cords, the defendant's own test, by which he found that 118,000 superficial feet produced

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61½ cords of pulp wood, and 45½ cords of fuel wood. At the Bangor mill, Mr. Clark says, out of every 100 cords of wood he only gets 16 of fuel wood, leaving 84 for pulp, shewing a very material difference between the two. The total number of cords of pulp wood supplied by the defendant and used by the plaintiffs, is 16,029, and the number of cords of fuel wood supplied is 16,225, or more than one-half. Of the wood piled up in the field previous to November 10, 1900, 5,701¾ cords were pulp wood, and 5,826 fuel wood. From November 10 to March 18 there were 5,493 cords of pulp wood, and 3,327 of pulp wood, and from March 18, 1901, to August 10, 1901, the invoices shew 4,835 cords of slab wood delivered; 823 cords of fuel wood and hog fuel charged at $7,849.20, or say 7,849 cords at $1.00 per cord. It is, I think, fairly deducible from these figures that the prices paid for wood at Bangor are not applicable to the defendant's claim in this case.

Taking into consideration all these various circumstances, and the relations which existed between the parties, I think that the defendant is only entitled to charge for the pulp wood actually used by the mill, at the rate of $1.90 per cord, and of 90c. per cord for fuel wood. As to the extra charges for hauling and piling the wood in the field, I am not able to say, that in view of all the circumstances the storing of the wood was an improvident act. No arrangement had been made, and none could very well be made, for a supply of other wood in great quantities, and if the mill had been stopped for want of pulp wood the defendant might well have been open to censure. Allen, Captain Partington's representative here at the time concurred in the wisdom of doing what was done, and I think the charge is a legitimate charge against the plaintiffs. As to the 2,659 cords of pulp wood taken by the plaintiffs in November I have charged them with the price at which it was invoiced, $3.00 a cord. It stands in a different position from the rest, because the evidence shews that the plaintiffs, after having refused to take it, and the defendant had consented to take it back, went in November, some time after the defendant had resigned his position,

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and without any communication with him, took the wood and used it, knowing at the time that it had been charged at $3.00 a cord — a price which the defendant considered fair, though it had not been specifically agreed upon. I think this may be considered as an entirely new and separate contract to pay for the wood which the plaintiffs took, at the price which they knew the defendant, who then owned it, asked for it. I have deducted the 1,600 cords of fuel wood charged up in the invoices, but which have not been used by the plaintiffs, and which will, therefore, remain the defendant's property. The amount was stated at about 1,600 cords, though I have not found it in the evidence. The defendant's claim will, therefore, stand as follows:

2,461¾	cords	pulp wood	at $2.90.....	$7,139	06
2,659	"	"	" 3.00.....	7,977	00
581	"	"	" 1.90.....	1,103	90
2,588	"	fuel	" 1.40.....	3,623	20
3,238	"	"	" .90.....	2,914	20
5,493	"	pulp	" 1.90.....	10,436	70
3,327	"	fuel	" .90.....	2,994	30
4,835	"	pulp	" 1.90.....	9,186	50
823½	"	fuel	" .90.....	741	15
				$46,116	01
Add hog fuel (invoice price $7,849.20)				7,064	28
624,078 feet of pine at 25c. per M.				156	02
				$53,336	31
Less 1,600 cords at 90c., $1,440.00.					
" round wood as credited on invoices, $1,937.93.				3,377	93
Defendant's total claim.....				$49,958	38
		Cr.			
By laths sold, $2,069.82					
wood " 147.64					
cash, 50,173.84					
				$52,391	30
Due by defendant.....				$2,432	92

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For this amount there will be a decree in the plaintiffs' favor. The only remaining question is as to the costs. The rule as laid down in *Parker* v. *McKenna* (1) is, I think, applicable to the case. It is there laid down that where a plaintiff rests his claim for relief on the ground of fraud, upon which he fails, and upon a separate ground upon which he succeeds, that that part of the bill founded on the case of fraud should be dismissed with costs, and the plaintiff is not entitled to the costs of the rest of the suit.

In that case James, L. J., says: "There is, however, on the other side a general principle as to the costs of the suit. It is not because a person has made himself liable to proceedings in equity or proceedings at law, that the adverse litigant is entitled to make the Court the place, and the proceedings of the Court the means by which personal spite or party hostility is enabled to indulge itself in unfounded aspersions upon character. In my opinion that has been done here. Unfounded aspersions have been wantonly and recklessly made, and the consequence of that is that this Court is obliged to give effect to what it has so often said it would do — make persons so dealing with the proceedings of this Court pay, and pay fully, in costs for it. I am of opinion, therefore, that the plaintiff must pay the costs of so much of the proceedings as the Lord Chancellor has pointed out, and that he has so mixed that up with the rest of the suit that he has forfeited, in my opinion, his title to the costs which he otherwise would have been entitled to receive."

Section 8 of the bill alleges that the defendant, as managing director, sold to the plaintiffs large quantities of lumber used by him in the construction of the pulp mill, wharves and premises of the plaintiffs, and that he charged them for greater quantities of lumber than were used, and paid himself out of the plaintiffs' moneys; and that he also took back large quantities of this lumber so charged, and not used, and never accounted for it.

Section 9 alleges that the defendant for this lumber charged the plaintiffs prices greatly in excess of the value,

(1) L. R. 10 Ch. 96.

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and also charged large profits on timber and materials purchased by him for the plaintiffs, to be used in the construction of the mill and premises, for which he paid himself out of the plaintiffs' moneys.

Section 11 alleges that the defendant charged the plaintiffs with large quantities of pulp wood as delivered to them, which were in fact never delivered to them, and for which he paid himself out of plaintiffs' moneys.

Section 16 alleges it to have been the defendant's duty to have purchased, at the proper season of the year, large quantities of wood and lumber for the plaintiffs' mill, but that he wrongfully and wilfully neglected to do so, to compel the plaintiffs to use and purchase his mill wood at the exorbitant prices charged for it.

Section 18 alleges that no proper account or check of the slabwood supplied by the defendant was kept, and no measurement of it was made when delivered, and no means were taken to ascertain the real quantity, but it was only estimated.

Section 13 alleges that the defendant wrongfully and fraudulently used and disposed of the money of the plaintiffs for his own benefit in paying for the said wood, at the prices and for the quantities mentioned.

Many of these sections contain charges of a very grave character. If the defendant had been found guilty of them he would stand convicted of gross breaches of trust, involving in some of them wilful fraud and dishonesty. They are not supported by evidence. In fact as to the most of them no attempt has been made to support them. Captain Partington, the president of the company, repudiates all knowledge or responsibility in reference to them. Mr. Beveridge, the company's manager, does the same. I think the defendant should have his costs of these sections, and that the rule mentioned in the case I have cited, and which had been acted upon years before that, applies, and I shall therefore order that the plaintiffs pay to the defendant his taxed costs incurred by reason of sections 8, 9, 11, 16 and 18, and so much of section 13 as complains of any fraudulent act against the defendant, and that as to the remaining costs each party must pay their own.

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Fraudulent Conveyance — Debtor and Creditor — Stat. 13 Eliz. c. 5 — Interim Injunction — Deposit in Government Savings Bank — Injunction to Prevent Withdrawal at Instance of Judgment Creditor.

A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors to the knowledge of the purchaser, is not void under the Statute 13 Eliz. c. 5.

An interim injunction granted restraining the transfer of land by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the Statute 13 Eliz. c. 5.

Application refused of a judgment creditor for an injunction order restraining the wife of the debtor from withdrawing money on deposit in her name in the Government Savings Bank alleged to belong to the husband.

Motion to continue an interim injunction order until the hearing. The facts are fully stated in the judgment of the Court. The injunction, *inter alia*, restrained the defendant Rebecca J. Hamm, from withdrawing a sum of money on deposit in her name in the Government Savings Bank. The motion was heard March 15, 1904, but was directed to be re-argued, Mr. Justice *Barker* expressing a doubt whether the Court had jurisdiction to restrain the withdrawal of the money. There was no mode of enforcing the order as against the Crown. The deposit was a debt owing by the Crown, and he was unaware of any instance in which the Court had ordered a third person to make payment to the creditor money which he owed to the debtor, citing *Willcock* v. *Terrell* (1).

Argument was reheard March 22, 1904.

G. H. V. Belyea, for the plaintiff:—

There is no reason why an injunction should not be issued restraining payment out of the money on deposit in

(1) 3 Ex. D. 323.

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the Government Savings Bank. While technically the money is in the custody of the Crown, the only effect of the injunction is to take the disposition of the money out of the hands of the depositor. In *Ellis* v. *Earl Grey* (1) an injunction was granted restraining the Lords of the Treasury from paying compensation to the former occupant of a public office which had been abolished. The Lords of the Treasury demurred to the bill for want of equity, and also on the ground that they were made parties to the suit as public officers of Government, and the matters stated in the bill which in any way concerned them related exclusively to their duties as Lords of the Treasury. In opposing the demurrer it was submitted that the Lords of the Treasury were not made parties to the bill in their public character, but as mere stakeholders of the fund sought to be reached. As it was not discretionary in them either to make or to withhold the payment, there could be no objection to their being restrained from making it. The Vice-Chancellor said that the defendants were not in a different situation from the Governor and Company of the Bank of England, who were frequently prevented by the Court from transferring stock or paying dividends to individuals who appeared on their books to be entitled to them. The bill did not seek to interfere with any public duty the Lords of the Treasury had to discharge, or with any discretion they had to exercise in their public capacity. It sought to restrain them from doing a mere ministerial act, with a view to secure payment of the money to parties who might be found entitled to it. In *Tunstall* v. *Boothby* (2) the Commissioners of Customs granted to A. as a compensation for the loss of an office which he had held, an annuity payable quarterly by the Receiver-General of Customs. A. assigned the allowance to B. for value, and subsequently took the benefit of an insolvency Act. The Court restrained the Receiver-General from paying over to A., or his assignees, monies in his hands, being arrears of the allowance.

(1) 6 Sim. 214. (2) 10 Sim. 542.

[BARKER, J.:—What benefit would the injunction be to you if you are unable to compel the Crown or the deputy Receiver-General to pay the sum to you?]

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The injunction would keep the money intact until it was determined whether it was the property of the husband, and then it could be reached in disclosure proceedings.

L. A. Currey, K.C., and *A. A. Wilson*, K.C., for the defendants:—

The Crown not being a party to the suit an injunction cannot go against it. If it was sought to make the Crown a party to the suit, the Court would have no jurisdiction to entertain the application (1). The Court cannot make an order against the Crown or its officers. In *Willcock* v. *Terrell* (2), judgment having been obtained against a County Court Judge, a Judge's order, under the *Debtors' Act, 1869*, s. 5, was made for the payment of the judgment by quarterly instalments of £50 each on days named. Default being made in the payment of these instalments, writs of sequestration were issued. The debtor having resigned his office, a pension of £1,000 per annum was granted to him, charged upon the Consolidated Fund. Application was made for an order upon the Lords of the Treasury, or the Paymaster-General, to pay over to the sequestrators the accruing pension. Lord Coleridge, C.J., interposed with the objection that it was idle to call upon the Paymaster-General, as he knew no one but his superiors, the Lords of the Treasury, and, if an order was made upon them and they declined to act upon it, there would be no way of enforcing it. The Court declined to grant the order, but made an order restraining the debtor from receiving the payments under the pension, and empowering the sequestrators to receive the same when due. The procedure there adopted is quite distinguishable from that sought to be invoked here. In *Sansom* v. *Sansom* (3), *Willcock* v. *Terrell* was followed, the Court holding that an

(1) N. B. Eq. Cas. 298, Notes. (2) 3 Ex. D. 323.
(1) L. R. 4 P. & D. 6.

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order on the Paymaster-General would be *ultra vires*. In *Crispin* v. *Cumano* (1) an order was made in a testamentary suit on the defendant, as executor of the original defendant, and against himself as a party in his own right, to pay the costs of suit. These not having been paid, and the defendant being abroad, a writ of sequestration was issued against his estate. Stock was standing in the books of the Bank of England to his credit as executor, and a dividend was due thereon. It was held that the Court of Probate had no authority to make an order upon the bank to pay the dividend to the sequestrators. Sir J. P. Wilde, in the course of his judgment, said that the question was raised whether an adverse order had ever been made in the Court of Equity on a third person to pay over to the creditor money which he owed to the debtor. He said that he could not find that it ever had been. See also *Horsley* v. *Cox* (2).

1904. March 25. BARKER, J.:—

On the 19th of February last I granted an interim injunction restraining the defendants from transferring a farm and land, formerly owned by the defendant Solomon D. Hamm, situate in Queen's County, and restraining the defendant Rebecca J. Hamm, wife of Solomon D. Hamm, from withdrawing from the Government Savings Bank at St. John some money deposited there in her name, and from transferring two promissory notes, one for $100 and one for $150, given to her by the defendant Wilson. That order I extended until March 15th, and on that day the plaintiff, in pursuance of notice to that effect, made this application to continue the injunction until the hearing. The defendant Solomon D. Hamm is a policeman, and in September, 1900, the plaintiff, who was then a young man under age, brought an action against Hamm for false imprisonment, arising out of an arrest of the plaintiff on a charge of larceny. The action was tried in March, 1902, when a verdict was given for Hamm. A new trial was ordered on August 8th, 1902. The cause was tried a second

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time in January, 1903, when a verdict was given in favor of the plaintiff for $500. This was also set aside and the cause was tried a third time, in June, 1903, when the plaintiff again got a verdict for $500, upon which judgment was signed August 15, 1903. A *fi. fa.* was issued to the Sheriff of St. John August 19, 1903, which was returned *nulla bona* on November 17, 1903. On August 11, 1902—that is three days after the verdict obtained by Hamm had been set aside—he executed a conveyance of the farm in question to the defendant Black, who on the same day conveyed it to Hamm's wife — the defendant Rebecca J. Hamm. These two conveyances are for an expressed consideration of $300, and they were both registered on August 19th, 1902. On March 31st, 1903, the defendant Rebecca J. Hamm, by a conveyance to which her husband is not a party, transferred this farm to the defendant Wilson, for the expressed consideration of $300, $50 of which was paid in cash, and the two notes already mentioned were given for the balance. This suit is brought to set aside the conveyance as being fraudulent under the Statute of Elizabeth. The bill alleges that the first two conveyances were made without consideration, and with intent to defeat and hinder the plaintiff as a creditor of Hamm, and that the conveyance to Wilson was made without consideration, and for the same purpose and with full notice of the fraudulent character of the two previous conveyances. The bill prays that the conveyances should be set aside, and as an alternative relief, in case the deed to Wilson should be held good, that the two notes given as part of the purchase money to Mrs. Hamm should be declared to be the property of her husband, the judgment debtor. The money in the Savings Bank — some $50 — does not seem to have any connection with the property, or to have grown out of the transaction in any way, but the plaintiff claims it in some way as being in fact the money of Hamm, and which should be made available towards payment of his judgment. The plaintiff had Hamm up before His Honor Judge Forbes for examination by way of disclosure, and in that way had the fullest opportunity of examining all the parties to the

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transaction, so that for the purpose of this interlocutory motion he has had the advantage — and a very great advantage it is in a case of this nature — of having the oral evidence of all the parties interested to base it upon instead of affidavits. The evidence of the fraudulent intent cannot be said to be strong. This is not the usual case of a trader in embarrassed circumstances. As a policeman Hamm was earning some $9.45 a week, and so far as the evidence goes, when he made the transfer in question he did not owe a penny, and the $50 was in the Savings Bank. The ultimate result of the litigation then pending was of course doubtful, but the first trial had resulted in his favor. As I understand the case of *Freeman* v. *Pope* (1), and the construction and effect of the Statute of Elizabeth as there determined, a jury is bound to infer the fraudulent intent where the necessary result of the conveyance is to delay or defeat creditors, the debtor in such case being credited with the intention of doing that which is the necessary result of his own voluntary act. The Court was there dealing with the case of an ordinary debtor pressed by creditors, a very different case from the present, where there were no creditors, no debts present or prospective, and only the possibility of damages being recovered in the litigation then pending — a "speculative liability," as it has been called. This distinction is illustrated by the case of *Ex parte Mercer* (2). It cannot be said that the necessary result of a conveyance made under such circumstances is to defeat or delay creditors, and the question in such a case must be whether or not it was made with that intention. Though the evidence of such an intent may seem weak, I cannot say that there are not facts and circumstances from which it might reasonably be inferred that in conveying the property to his wife Hamm had the intention and object in view with which the plaintiff charges him in the bill. That being so it is a question to be disposed of at the hearing.

The next question is as to the effect of the conveyance from Mrs. Hamm to Wilson. To the extent that she

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acquired the property in question by virtue of the conveyances from Hamm to Black, and from Black to her, Black having been simply the medium by which the transfer to the wife was made, she acquired it from her husband during coverture, and in the event of their having been married previous to January 1, 1896, (of which there is no evidence one way or the other,) such property is specifically exempted from the operation of the Married Women's Property Act by sect. 4, and would not, therefore, be subject to any power of disposal conferred by that Act upon married women. That was the only point involved in the cross appeal in *DeBury* v. *DeBury* (1). Assuming, however, as it seems to have been assumed, that Mrs. Hamm had power to convey the legal and beneficial title to the property, the question of the *bona fides* of the transaction is raised by this bill. For, if Mrs. Hamm and Wilson entered into a *bona fide* contract of purchase and sale with a view of actually transferring the title in completion of that contract, the property could not be made available to the plaintiff, and this bill could not be maintained, for this suit is only in aid of the legal right of enforcing payment of the judgment by means of a seizure under the execution, which, in that case, would not reach the property at all. See *Neate* v. *Duke of Marlborough* (2); *Smith* v. *Hurst* (3).

The plaintiff seeks to avoid that result by charging and attempting to prove that Wilson, when he took the conveyance, had full knowledge of the fraudulent character of the previous conveyances, and that he was in fact a party to the whole scheme. There is not much evidence to support this view, but if the sale to Wilson was a real one, as I have mentioned, is the question of notice important? In *Whelpley* v. *Riley* (4) the late Chief Justice *Parker* told the jury "that the circumstance of Hall's (the debtor) selling the hay in order to prevent its being taken in execution on the expected judgments in the suits then pending, (no judgments or executions being then in existence,) although he intended to run away from the Province,

(1) 36 N. B. 27.
(2) 3 M & C. 407.
(3) 10 Hare, 30.
(4) 2 All. 275.

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would not constitute such fraud as to deprive him of the power to sell and thus make void the sale; nor would the knowledge of those facts by the plaintiff prevent his becoming the purchaser, and thereby obtaining the property in the hay for a full valuable consideration, although it might cast suspicion on the whole transaction and call for a careful inquiry into the reality of the bargain and sale. The property was not bound until the execution was delivered to be executed, and therefore Hall, though in debt, and even insolvent, might lawfully dispose of it for a valid consideration." This charge was sustained on the authority of *Wood* v. *Dixie* (1). In *Dalglish* v. *McCarthy* (2) the bill was filed to set aside three conveyances as fraudulent and void under the Statute of Elizabeth. The first conveyance was made by McCarthy, the debtor, to Bratton; the second by Bratton to John Cook, and the third by John Cook to George Cook. *Strong*, V.-C., before whom the suit was heard, found as a fact that the first conveyance was made without consideration, and that it was fraudulent and void; that the second was made with intent to defeat creditors, but that the sale was *bona fide* and intended to pass the property, and that full consideration actually passed, and that it was really a sale, though made to defeat creditors; that the third deed was also fraudulent and void and without consideration. It was held on the authority of *Wood* v. *Dixie* that the intermediate sale from Bratton to Cook was good and the conveyance valid. The bill was therefore dismissed with costs.

There are distinct authorities for holding that the plaintiff cannot succeed in this suit, provided the conveyance from Mrs. Hamm to Wilson was made *bona fide*, and in order to carry out an actual contract of sale between them, even though it was made to defeat the plaintiff, and with a knowledge that the earlier deed had been for a purpose fraudulent under the Statute. The substantial question then is, was this deed from Mrs. Hamm to Wilson made *bona fide* in the sense I have mentioned? The evidence upon which the plaintiff impeaches the validity of

(1) 7 Q. B. 896. (2) 19 Gr. 578.

this deed is weak — weaker perhaps than that upon which the previous conveyances have been attacked. In both cases there is the same question of fact which it is not necessary for this present motion to determine. I think that as to the farm I ought to continue the injunction until the hearing, and keep the property in the position the parties have themselves placed it. This cannot inconvenience Hamm or his wife, for they have parted with the property, and it cannot injure Wilson, as he bought the farm for farming purposes and not for sale.

It was urged as an answer to this application that in applying for the interim order the plaintiff had suppressed material facts by omitting certain parts of the evidence given by Mrs. Hamm and Wilson on the disclosure inquiry, which was calculated to qualify those portions which were produced. The rule requiring the utmost good faith in litigants coming to this Court for *ex parte* injunctions is one which should not be relaxed. There is, however, some distinction between an application like this to continue an interim order on notice and a motion to dissolve an *ex parte* order: *Fuller* v. *Taylor* (1). The omitted portions did not seem very important; they seemed, if they had any material bearing, to refer to the question of notice or knowledge of Wilson as to the object of the first conveyance, a question which does not seem important.

As to the money on deposit in the Savings Bank in Mrs. Hamm's name I see no reason for saying that it belongs to Hamm, but if it was his I do not see how it can be reached by execution. I could only restrain her from withdrawing it on the ground that eventually it could be made available in payment of the plaintiff's judgment, but I know of no instance where, in a proceeding like this, this Court has ordered a debtor of the judgment debtor to pay his debt to the judgment creditor. Garnishee Acts furnish some such remedy, but the aid of this Court is not required. Even in such cases there seem numerous difficulties, in the absence of special legislation, where the Crown is the debtor, as in the case with money in the Savings Bank.

(1) 9 Jur. N. S. 743.

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See *Crispin* v. *Cumano* (1); *Willcock* v. *Terrell* (2). As to the notes the evidence shews that they were not in Mrs. Hamm's possession, though apparently under her control. If the plaintiff is in a position to seize them under the execution, he can do so without the aid of the Court, and he can do it now as well as later on. They, however, represent a part of the purchase money of Wilson for the land, and it would seem as though the plaintiff was not entitled to both.

There will be an order restraining any transfers of the land.

(1) L. R. 4 P. & D. 622. (2) 3 Ex. D. 323.

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