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NOVA SCOTIA.

SUPREME COURT.

FULL COURT. APRIL 29TH, 1911.

PITTS v. CAMPBELL

Chattel Mortgage — Preference — Action by Judgment Creditor to Set aside — Consequential Relief — Cummings v. Taylor (28 S. C. R. 337) Applied—Distress Proceedings — Irregularity — Point not Susceptible of being Raised by Plaintiff Seeking to Recover Proceeds of Alleged Irregular Sale.

Appeal from the judgment of LONGLEY, J., in favour of plaintiff, in an action to set aside a chattel mortgage as fraudulent and void as against creditors.

D. McNeil, K.C., in support of appeal.

W. F. O'Connor, K.C., contra.

The judgment of the Court was delivered by

GRAHAM, E.J.:—The plaintiff recovered judgment on the 13th May, 1910, against a firm of McGillivray and Guihan for $315.55, and on that date placed an execution in the sheriff's hands. On the 5th May, these debtors had given a chattel mortgage to the defendant Campbell, another creditor, of certain of their goods, and this action is brought 31st May, 1910, the plaintiff suing on behalf of himself and all other creditors, &c., to have that chattel

mortgage set aside as being an unjust preference, and made to hinder, defeat and delay creditors under the statute. And the learned Judge at the trial has given a decree to that effect, and that is not impeached. But it is claimed on behalf of the plaintiff that he was entitled to consequential relief. The case of Cummings v. Taylor, 28 S. C. C. 337, not to mention the English cases, is against him. He is to go on with his judgment and execution. But there is a statute, copied from an Ontario Act, passed no doubt to help a plaintiff in such a case, that is chapter 31 of the Acts of 1903-4, and the plaintiff claims that under that he is entitled to have an account of the proceeds of the goods taken by the defendant. He has the general prayer in the statement of claim.

The statute provides:—

"In case of a transfer of a property, which in law is invalid against creditors, if the person to whom the transfer was made shall have sold or disposed of, realised or collected the property or any part thereof, the money or other proceeds may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the transfer was made, and such right to seize and recover shall belong not only to an assignee for the general benefit of the creditors of the said debtor, but in case there is no such assignment, shall exist in favour of all creditors of such debtor.

"(2) Where . . . the proceeds are of a character to be seizable under execution they may be seized under the execution of any creditor and shall be distributed, &c."

(3) Contains a provision for an action whether the proceeds realised as aforesaid are or are not of a character to be realised under execution on behalf of himself and other creditors, &c. &c., to make the proceeds available for creditors.

(4) This section shall not apply as against innocent purchasers of the property.

This brings the question down to whether the defendant has "money or other proceeds," or proceeds which are available.

It appears that Campbell had against the debtors a claim for rent of the shop. On the 5th of May he distrained for rent up to the 1st of April, but under this warrant it

was things which were not covered by the chattel mortgage which were sold.

The fact of the defendant being a purchaser of some of the articles at this sale is not therefore material. It appears that there was due for rent the sum of $116.35, and the bailiff realised for defendant $103, after paying $22.50 for taxes, a statutory claim, and $10, costs of distress. There was another distress for one month's rent, $25. This sale realised $88, of which $30 was paid over to one of the debtors after payment of the month's rent and costs, and the balance due on the previous transaction.

Later there was a distress for two months' rent, June and July, and the amount realised was $27.57, of which $23 was paid over to Campbell by the bailiff. Beyond this the defendant Campbell has realised nothing, and that which he has realised has been by virtue of the warrants of distress, not the chattel mortgage which the defendant himself, apparently, regarded as useless.

If the plaintiff had intended to attack the proceeds to recover the rent, because they were fraudulent and collusive, and as part of the scheme to prefer creditors or to defeat creditors, he should have said so in his pleadings. And then he could not have recovered more than the amount of the proceeds, less the rent due.

Apparently under this statute it is not necessary to have the transaction of preference or to defeat, set aside or declared void The proceeding may be simply one to recover the proceeds. Beattie v. Holmes, 29 O. R. 264. But at some time or another he should, either in the statement of claim or in the reply, when the distress proceedings were interposed, have attacked them as fraudulent or as part of the scheme to prefer. He must be taken to go for the proceeds as he found them. The defendant has sworn to the rent being due and there are two answers to the recovery of the last two months' rent One is that the proceeding was justifiable as the terms of the lease survived, notwithstanding the previous distress, and, second, that it all occurred after this action was brought.

The plaintiff contended that there was some irregularity in the distress proceedings, a want of notice of the sale or something of that kind. The plaintiff cannot raise that question. He is after the proceeds and they are the result of this sale. Besides, under the statute respecting distress

for rent, R. S. ch. 172, sec. 10, a special action is the only remedy given for such an irregularity, and it is not given to a person in the position of the plaintiff.

In my opinion the defendant sufficiently pleaded the distress proceedings.

The appeal will be dismissed with costs, to be set off against the costs of the plaintiff recovered in the action.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. APRIL 29TH, 1911.

THE ATTORNEY-GENERAL v. LANDRY ET AL.

School Lands Held in Trust for School Purposes—Unincorporated Religious Order — Mortgage — Breach of Charitable Trust — Intervention of Attorney-General— Attorney-General v. McIntosh (36 N. S. R. 177), Relied on

Appeal from the judgment of LONGLEY, J. (9 E. L. R. 270), in an action to enforce a trust.

W. B. A. Ritchie, K.C., for appellant.

J. A. Wall, contra.

The judgment of the Court was delivered by

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge has very clearly and fully stated the facts before him in evidence in this case, and the conclusions at which he arrived, and I can see no reason for doubting that his findings were correct and justified by the testimony. There were indeed some contradictions on the part of the witnesses on the different sides of the controversy, but those he has fully considered, and was in the best position to determine which were entitled to credit. I also think his conclusions as to the law applicable were perfectly right. It is sufficient to refer to the document M 5 signed by the defendant and two others, to indicate that they held this land in trust for the

benefit of school section 8. As that document is given in full in the decision appealed from, it is unnecessary to repeat it here. Holding the title as the defendant Landry did, on a trust, it would be impossible for him under any circumstances to become the purchaser for his own benefit—much less under the circumstances in which he acquired it for the Mother of the Order. Moreover, she had no title which she could convey, neither legal nor equitable. It will be observed that the conveyance was made, not to her by name, nor to her heirs or successors, but simply to the Mother of the Order of the Daughters of Jesus. The order, so far as appears, was not incorporated, at any rate in this province, and such a conveyance would be a simple nullity. The result would be that no title ever passed from the defendant and his co-trustees, but they must be taken to hold it on the original trust.

This defect would equally affect the title acquired by Felix Landry as mortgagee, but under the evidence it would be difficult to come to the conclusion that he was not aware of all the circumstances connected with this land when he took the mortgage. The learned Judge has so found, and on a review of the evidence I agree with him.

Nor do I think the action of the ratepayers in the resolution passed of the first day of March, 1909, exhibit M/M, instructing the trustees to discontinue their proceedings against the defendants for the recovery of this property can in any way affect this action, in which one of the ratepayers seeks to secure for the school section property which rightfully belongs to it under the trust. The action is not now carried on at the risk of the school trustees, nor at the risk of the section, although if successful, the section gets all the benefit.

This leads to the consideration of the point whether the Attorney-General is rightly a party.

I am of opinion that the learned trial Judge has dealt very satisfactorily with this objection, when he says:—

"It was an account to which every ratepayer was entitled to the benefit, and the majority of the ratepayers, in my judgment, had no legal authority to dispose of it. There has been a breach of a public trust, and as I understand the law the Attorney-General is precisely the functionary who has the right to intervene and ask performance of the trust."

He has referred to some of the judgments of the Court in the Attorney-General v. Mackintosh, 36 N. S. R 177, in support of this view, and I think it sufficient to point to the authorities cited in my own decision in that case to uphold the judgment here. The Attorney-General here has intervened for the protection of the ratepayers of the section where mischief or injury has been done or intended to be done. Vide James, L.J., in Attorney-General v. Great Eastern Railway Co., 11 Ch. D. 484.

But there is yet another substantial ground on which the Attorney-General properly became a party—that is to say, the fact that being for the use and benefit of the school section it was a charitable trust, and for the protection of such trusts he is always a proper party. That it came rightly under this designation is beyond question and all gifts for the promotion of education are charitable in a legal sense and are highly favoured. Vide, 5 Am & Eng. Ency. 929, and the authorities there given. On the right and duty of the Attorney-General to be a party in cases of charitable gifts I refer to the learned and full judgment of Gray, J , in Jackson v. Phillips, at p. 539, 14 Allan Mass. Reps., also Lewin on Trustees, p. 1139, and authorities cited.

It was argued that the trustees had no power to accept a gift of property unless given for the use or support of common or high schools. This property certainly was obtained, subscribed for and intended for the use of the school section, and seems tome to come within the meaning of sec. 55, ch. 52, sub-sec. (a) of the Education Act, and it became the duty of the trustees under that section to take possession of it, and hold it as school property; and they were guilty of a breach of trust in abandoning proceedings for its retention.

For these reasons, I am of opinion that, this appeal should be dismissed with costs.

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DENSMORE v. HILL.

Sale of Goods—Cross Accounts—Settlement—Over-due Acceptance—Judgment for Amount by Default—Action by Judgment-debtor for Alleged Balance Due Him by Judgment-creditor — Verdict Against Weight of Evidence—New Trial.

Motion to set aside verdict for plaintiff.

Mellish K.C., and Ferguson, in support of motion.

Sangster, contra.

RUSSELL, J.:—The case is that the plaintiff had a claim against the defendant for logs, to be paid for according to the quantity of deals of specified sizes that were turned out, and defendant sold slag to the plaintiff on account of which he drew on the plaintiff and plaintiff signed acceptance. These transactions took place in 1906. The defendant's account of the matter is that he drew for part of the amount due for the slag in October, 1906, and the plaintiff accepted the draft, which was renewed for the full amount with the added discount several times until February, 1908, when the full amount payable for the slag was assumed by the plaintiff—the previous acceptances having been made for only so much of the slag as plaintiff had disposed of—and a new note or acceptance was made for $210 35. When this came due or was overdue a settlement of the cross accounts was made, and defendant having previously made cash payments, amounting to $505, and sold a house to the plaintiff for $85, the balance due plaintiff on lumber account was adjusted at $109.40, and deducted from the amount of the current or overdue acceptance of $210 35, when a new note or acceptance was made for the balance of $10.95, which after being renewed several times from April 21st, 1908, to December 14th, 1908, became due on January 15th, 1909, for $105.30, and was unpaid. It is undisputed that defendant soon after the date last mentioned sued plaintiff on this acceptance, that the case was undefended, that no set off on the lumber account was pleaded and plaintiff suf-

fered judgment by default. Defendant realised the amount of this judgment on execution in May, 1909. About two months later the present action was brought by the plaintiff, claiming a balance due on the lumber account of $199.11, and the cause having been tried by the learned County Court Judge, with a jury, the issues put to the jury in the form of a series of questions, have all been found in the plaintiff's favour, although on nearly all, if not on all the issues of fact, the plaintiff's statements are wholly unsupported, and the defendant's version of the matter is corroborated by the statement of another witness and by all the circumstances of the case. There is no substantial difference between the parties as to the price to be paid for the logs sold and no difference worth going to law about between the parties as to the quantities delivered. The defendant, in fact, claims that there was a shortage of 2,000 feet. The only important difference that I can discover between the parties is as to an alleged agreement that plaintiff was to be paid an amount, which in the particulars is charged at $31.97, for hauling the logs to the mill where they were being sawed for the defendant by a person employed by him. It was part of the defendant's undertaking with the sawyer to deliver the logs at the mill, and it would be reasonable to suppose that he would bargain with the plaintiff to so deliver them, but plaintiff says that some of the logs were a hundred yards from the mill, and that the defendant agreed to pay twenty-five cents a thousand for putting the logs into the mill. Defendant and his partner in the transaction both say that there was no such agreement, but when a demand was made by plaintiff on account of the hauling of the logs to the mill, an arrangement was made that plaintiff should have the slabs in consideration of this work. Crowe, the defendant's partner, states this explicitly, and defendant says it was so agreed, but that it was not a hard and fast bargain.

As to the acceptances given by the plaintiff for the slag, plaintiff in his rebuttal evidence says, he had nothing to do with fixing the amount of them. He only signed them "to oblige the defendant." But this is not consistent with his earlier statement on the subject. He says defendant sent him the account for the slag by mail. "He owed me at this time $199, and he sent me $200 worth of slag. After this delivery the defendant sent me a note to sign for the slag. I signed it and sent it back to him."

The findings of the jury are so entirely at variance with the clear preponderance of the evidence, and the plaintiff's conduct throughout is so manifestly inconsistent with his present claim that I do not think a reasonable jury, correctly apprehending the effect of the evidence could have come to the conclusion at which they have arrived. The learned trial Judge thinks that he would not have arrived at the same conclusions, and I suppose we may fairly understand that he does not approve of the findings. In the case that he has cited of Webster v. Friedenberg, 17 Q. B. D. 736, the case for setting aside the verdict on the weight of evidence is said to be that in which the verdict is one such as reasonable men ought not to have come to, and it is added that in determining whether a verdict is against evidence you must take into serious consideration the opinion of the Judge who tried the case. I think that in this case the jury acting as reasonable men ought not to have rejected the consistent evidence of the defendant's witnesses against the confused and unsupported statements of the plaintiff, and that they ought not to have wholly ignored the evidentiary force of the plaintiff's conduct in allowing judgment by default and failing to avail himself of the set off.

I think that in mercy to the plaintiff the action should be dismissed.

If I understand the practice of the Court, we are to make the judgment that the learned County Court Judge should in our opinion have made, and if he could under O. 38, r. 10, have set aside the findings and dismissed the case, we can and should do so. In Bobbett v. S. E. Railway Co., 9 Q. B. D., at 430, Denman, J., says: "The test to apply is whether there is evidence such as if left to the jury, would warrant them in finding a verdict for the plaintiff, which the Court would not set aside as wholly unreasonable. If there be such evidence there ought to be a new trial. If not, in the absence of any ground for thinking that further light could be thrown upon the matter by a new trial, judgment ought to be entered for the defendant."

If this is the proper test to apply the plaintiff's action should be dismissed.

SIR CHARLES TOWNSHEND, C.J.:—I have a judgment reaching the same conclusion on the facts. The conclusion of the Court is that there should be a new trial, with costs.

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SUPREME COURT.

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THE CATHOLIC EPISCOPAL CORPORATION OF ANTIGONISH v. THE MUNICIPALITY OF THE COUNTY OF RICHMOND.

Assessment and Taxes—R. S. N. S. 1900, ch. 73, sec. 4—"Churches"—Lands Used in Connection With Churches, &c.—Glebe House and Rectory—Exemption Provisions Not Applicable.

Case stated to determine whether lands and buildings not being churches or places of worship, or the sites actually occupied by the same were exempt from taxation under the Assessment Act, R. S. (1900), ch. 73, sec. 4.

J. A. Wall, for plaintiff.

Mellish, K.C., for defendant.

The judgment of the Court was delivered by

GRAHAM, E.J.:—Under the Assessment Act, R. S. 1900, ch. 73, sec. 4, it is provided that: "The following property shall be exempt from taxation, that is to say—(b) every church and place of worship and the land used in connection therewith and every churchyard and burial ground."

It is claimed under this provision that this exemption extends to the following property vested in the plaintiff:

"Certain glebe houses, that is to say, houses used as places of residence for the pastors of the various Catholic congregations within the said municipality together with the lands and ordinary out-buildings used in connection with such residence occupied and used by the pastors in actual charge of the churches and not rented or let to third persons or used otherwise than as means of aiding through ordinary cultivation and user in the support of such pastors."

I agree with the defendant's argument that "churches" in that provision means the edifice or building, not the institution.

This Act has the following definition: "Real property" includes land and land covered with water and whatever is erected or growing upon or affixed to land and also rights issuing out of, annexed or exercisable within or about the same.

Throughout the Act the expression, real property, is used, and when the word land is used you are not, I think, to extend it to land in the legal sense, but only in the popular sense. The expression "real property" was ready to its hand.

I think the legislature would have used the expression "the property in connection therewith" instead of "land," if it had intended to exempt these residences. It has added "every churchyard," which would have hardly been necessary if "land" is to have the signification claimed for it here. It exempted "church and place of worship," the mere edifice, but did not wish the exemption to stop at the very eaves and corner-stones. There must be means of access to the edifice from the street, light, and air. There must be land for the repairer of the edifice to use. Very frequently, in country places at least, there is a fence about it for protection. That which in a dwelling house would be called the curtilage is I think at most included.

A glebe house, rectory, parsonage or manse, the residence of pastors, can hardly be spoken of as land used in connection with the church edifice. In most cases they are not physically attached to the edifice, the lands do not join even. They are not directly or proximately or primarily used in connection with the church or place of worship, but only remotely so. It would be very easy for the legislature to have used some such words as glebe house, rectory, &c., if it had intended such residence to be exempted. And any such construction would let in the residences of the clergymen of all denominations. Even a farm which a clergyman has, rent free as part of the stipend. You would hardly speak of their vegetable fields or gardens as land used in connection with the church or building. The American cases are helpful although the language of the statutes is not always precisely the same.

In the case of Gerke v Purcell, 25 Ohio St. 247, the statute declaring the exemption was:—

"Houses used exclusively for public worship . . . . and the grounds attached to such buildings necessary for the

proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit."

The Court said:—

"But a parsonage, although built on ground which might otherwise be exempt as attached to the church does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of its being used exclusively for public worship, it becomes a place of private residence. Nor does it make any difference that by the usages of the church the presence of a priest or pastor is essential to conduct the services of public worship. (It was the case of a Catholic church.) Other persons are necessary to carry on public worship as well as a minister to conduct the services. There must be a laity or congregation as well as a minister or preacher, and it is equally necessary that they should have a place of abode. Yet it would not be claimed that their residences could be exempt. . . . Nor does it seem to us that the question as to whether the parsonages are taxable or not, depends upon their proximity to the church edifice or the contrary. That question is to be determined by the direct and immediate uses to which they are applied.

In the People v. O'Brien, 53 Hun. N. Y. 582, this statement is made where the statute was slightly different, but an exemption was claimed for parsonages:—

"Certain general principles applicable to the subject of exemptions from taxation are, however, well established. Taxation is the rule and exemption from taxation the exception. Every presumption is in favour of the tax and against the exemption. A statute in order to create an exemption must be clear, explicit and free from doubt. Its language is to be strictly construed, and must plainly express the intention of the legislature. If its meaning is doubtful the decision of the Courts must be against the exemption."

In Les Commissionaires v. Montreal, 12 S. C. R. 54, Taschereau, J., says:—

"Having in mind that exemptions are to be strictly construed and embrace only what is well within their terms, &c."

In the case of Commissioners of Taxation v. Trustees of St. Mark's Glebe (1902), A. C. 416, which decided another point altogether, there is a dictum of Lord Davey in the

Privy Council, rather a conjecture as to the meaning of certain words, which in this case has been relied on. Of course, even a dictum of that august tribunal is binding on us, but I think the provision was not the same in effect. He says:—

"The words 'for or in connection with' (say) a hospital or a church are probably intended to include, not only the actual site of the hospital or church, but also other buildings or lands occupied in connection with the principal building, as for example, land used for a residence for the head or minister, or a room for church meetings or other similar purposes."

The words there are "lands occupied or used for or in connection with, &c." "Public hospitals—churches"

I think that the expression used there is more comprehensive than that used here, and in order to give the words "In connection with" scope, you must extend it to something not already taken up. There is a difference between "lands occupied or used for public hospitals or churches" and "churches" or "place of worship."

But whether this is so or not, I think, that on the strength of a conjecture of that kind it is not necessary to overrule the practice of this province.

The action should be dismissed.

SIR CHARLES TOWNSHEND, C.J.:—This is a stated case in which the plaintiff corporation claims exemption from taxation under the provisions of the Assessment Act, ch. 73, sec. 4, sub-sec. (1), which reads as follows:—

"The following property shall be exempt from taxation, that is to say,

(b) Every church and place of worship, and the land used in connection therewith, and every churchyard and burial ground."

The stated case sets forth:—

"As such corporation and for the uses and on the trusts in the said chapter mentioned, the plaintiff holds within the defendant municipality and elsewhere in the island of Cape Breton, and the counties of Antigonish, Pictou, and Guysborough, certain glebe houses, that is to say, houses used as places of residence for the pastors of the various Catholic congregations within the said municipalities, together with the lands and the ordinary outbuildings

actually used in connection with such residences occupied and used by the pastors in actual charge of churches, and not rented or let to third persons or used otherwise than as a means of aiding through ordinary cultivation and user and in the support of such pastors."

The above is the description of property which it is claimed is included in the exemption enumerated in sub-sec. (b).

In my opinion it would be placing on the words of that section a much more extended meaning than they will bear to hold, such glebes and lands exempt. The language is very clear in confining the exemption to lands "used therewith," that is to say, with the church or place of worship, which no doubt was intended to exempt only the land on which the church was built, and the land immediately surrounding the church, such as is usually the case in country places; such land as might be necessary, and would be used for the immediate needs and purposes of the church and the congregation attending thereat, but it would be an extreme interpretation of the section to say that these words cover parsonages or glebes or rectories, often long distances from the churches, and in some instances large acreages and to say, because they are used by the pastor, therefore they are used in connection with the church. If this kind of interpretation is adopted it might be applied to many other descriptions of land where the occupier was a servant in connection with the church. It will be observed how specifically the exemptions are enumerated, such as "churchyard" and "burial ground," and if glebes and manses and rectories and farms in connection therewith were intended we should expect to see them in the list. But the very omission seems to me very conclusive that such were not intended. The case of Commissioner of Taxation v. Trustees of St. Mark's Glebe (1902), A. C. 416, was referred to on the argument, and some expressions used by Lord Davey in giving judgment as favouring the view of the plaintiff It will be observed that he was there discussing a particular statute differing from the one under consideration, and applicable to a different state of things and forms no part of the grounds of the decision. Indeed he only remarks the words "for or in connection therewith" probably intend to include, &c., without committing himself to that construction. He then proceeds to say:—

"In short, their Lordships, while admitting the words are not free from ambiguity, think that they should be construed strictly. If it had been intended to include all lands which are vested in or held as an endowment only of the churches, grammar schools, and the like, they cannot but think that the legislature would not have found words to express its meaning."

I think that language very accurately applies to the question now before us.

Taschereau, J., in Les Commissionaires v. Montreal, 12 S. C. C. 54, points out that exemptions are to be strictly construed and "embrace only what is within their terms."

In Dillon on Municipal Corporations, at 952, the rule as to exemptions is stated as follows:

"As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied to exist, unless it is so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption."

These are, of course, the rules which must be applied here, and it is not possible to construe this section and hold that the lands in question were clearly intended by the legislature to be exempt from taxation.

In my opinion judgment should be in defendants favour, with costs.

The other members of the Court concurred.

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SUPREME COURT.

FULL COURT. APRIL 29TH, 1911.

LANE v. DUFF.

Solicitor and Client—Retainer—Settlement for Professional Services Rendered—Further Proceedings in Respect of Matter, Which was the Subject or Original Retainer——Estoppel—Lack of Instructions or New Retainer—Effect of on Solicitor's Right to Costs.

Appeal from the judgment of RUSSELL, J., in favour of plaintiff in an action for services rendered as a solicitor in opposing a second application for the discharge of seamen convicted and imprisoned for desertion.

W. F. O'Connor, K.C., in support of appeal.

H. Mellish, K C., contra.

SIR CHARLES TOWNSHEND, C.J.:—The plaintiff was retained as solicitor in the prosecution of three sailors, who deserted from the schooner "Mary A. Duff" The retainer was given by Captain Elias Walters—then master and the managing owner—about the 1st of June, 1906. His services before the magistrate were completed on the 11th June, resulting in the conviction and imprisonment of the sailors. An application for their discharge on habaes corpus was made to Mr. Justice Graham at Halifax, and refused. The plaintiff attended and opposed the application. For his services before the magistrate, he charged $35, and before Mr. Justice Graham $50, in all $85, for which Captain Walters gave his note on behalf of the owners, and which defendant subsequently paid. The master sailed on his voyage on the 29th June, and after he had left a further application for discharge was made—this time before Mr. Justice Russell, and plaintiff attended on this occasion also, and unsuccessfully opposed the application. For this last service defendant refuses to pay on the ground that the retainer was at an end, that he had no authority to act further in the matter. The defendant is a part owner and was appointed managing owner shortly after plaintiff was originally em-

ployed by Captain Walters. It appears that after or about the time the prosecution was being carried on, the owners of the vessel had a meeting, and being dissatisfied with Captain Walters' conduct in this matter dismissed him from being managing owner and appointed defendant in his stead. That was apparently unknown to the plaintiff. The parties differ as to what took place between them respecting the second application, but as the learned trial Judge has accepted plaintiff's version the conclusion must be based on his evidence. The notices of the applications were left at Captain Walters' house, and by a member of his family, were brought to the plaintiff. He communicated the fact to defendant, who very curtly replied that Captain Walters had left no instructions with him about this. He also mentioned the matter to Mr. Edwin Kaulbach, another owner, who said he thought the application should be opposed, but added that he had no authority to do anything.

The plaintiff without any further or other authorisation took it upon himself to prepare the necessary papers and affidavits again to oppose them and went to Halifax attending before the Judge. The question is simply this: whether under this state of facts he had any authority or retainer to act further in the matter.

In my opinion, he had no authority or right whatever to attend on the second application, or to prepare papers. His retainer was at an end, especially when it was settled and fixed by a note, which was paid on the first application. He admits that he had no fresh or express authority on the second occasion, and he can only base his right to recover on what took place before. Now in the decision appealed from, his retainer is treated as if in some pending action, which might justify his course in all the proceedings to the termination of the suit, but applications of this nature are not proceedings in or suits in Court—in fact are totally outside the purpose for which he was originally retained. In the first instance the captain authorised him to oppose the application, but the captain did not authorise, and could not have authorised, his opposition on the second application. He had been deposed from his position, and as a matter of fact, the then managing owner, another one, did not wish the second application to be opposed. It is said he did not know of this, but his want of knowledge in this respect does not help his

case; does not justify him without special instructions in acting on behalf of those, who alone, had authority and did not call for his services. I should have thought defendant's short and abrupt answer as detailed by himself should in the absence of any further authority have put him on his guard.

In answer to the question on cross-examination, whether he regarded his original retainer by Captain Walters as sufficient for his proceedings he says:—

"The original retainer by Captain Walters, well, he retained me in the first instance, and he knew that the first application was going on. Those are the only times he spoke to me about it."

He subsequently admits that he had no other instructions from anyone. It is uncontradicted that the owners had a meeting and decided not to go any further in the matter, as early as the 11th of June, but it is suggested that he paid the note for his services after the first application. I think, however, the defendant's explanation of this is satisfactory, when he says that the captain having given a note making the vessel liable he thought, and I think rightly thought, it was the easiest way to pay the note and get out of litigation in respect to it.

Looking at all the circumstances I am very clearly of opinion that the defendant is not liable for plaintiff's services on the second application, and that this appeal should be allowed with costs, and judgment entered for defendant with costs of trial.

MEAGHER, J.:—I have prepared a judgment reaching the same conclusion.

GRAHAM, E.J.:—This is an appeal from a judgment of a Judge of this Court in favour of the plaintiff, for solicitor's costs, which have been taxed. The sole question is whether this was a retainer or not. There was some conflict in the testimony which the Judge settled in favour of the plaintiff.

The plaintiff was retained to prosecute before a magistrate under the Seamen's Act, three seamen, for deserting from a ship. He was retained by the master, Captain Elias Walters, who was also then the managing owner. Other owners, were this defendant and the late C. Edwin Kaul-

bach. The seamen were convicted, and the defendant was present in the Court, taking an interest in the proceedings. For this the plaintiff was paid the sum of $35, and there is no dispute about that.

It will be necessary now to give some dates. The services before the magistrate were concluded the 11th June, 1906. There was an application on the part of the seamen to a Judge at Halifax, for a release in the nature of a habeas corpus, and the plaintiff attended and successfully opposed the application. Those services were concluded the 27th June. On the 29th of June, the master sailed from Lunenburg with the ship.

In the meantime the owners, on the 11th June, had changed the managing owner from the master to this defendant, but of this act the plaintiff had not notice. Then there was a fresh application for a discharge to come on before another Judge, on the 10th of July, notice of which was given on the 6th of July, and the seamen were discharged. Service of these papers was made at the house of Captain Walters, and he being away his daughter took them to this solicitor, the plaintiff, telling him the master had sailed. The plaintiff rang up the defendant upon the telephone, the master being away, and informed him of the application. He also informed the late C. Edwin Kaulbach, another part owner. This is what he tesifies to. In cross-examination he says:—

"I had no particular reason for not communicating with the captain—he was not there. I called up Mr. Duff, for this reason, because he was one of the chief owners of the vessel, and he was attending at the magistrate's Court nearly all of these days and was very much interested in the matter from the beginning. Mr. Griffiths was there several times. I said to Mr. Duff, I had received a notice of motion. I said that those sailors were making another application to get out of jail, and the papers had been left with me by Captain Walters' family, that had been served at his house, and they were making another application. I informed him of that. He did not preserve a stony silence. I thought possibly he might be interested in the matter or have something to say, and his reply was that he had no instructions whatever from Captain Walters—and he was pretty short and to the point—and that was all the conversation passed between us. I did not tell him that I was com-

ing to Halifax—not that I remember. He simply said he had no instructions from Captain Walters, and I told him I thought it was my duty to come to Halifax.

Captain Walters was the man who retained me at the time and represented all the owners to pay my bill. I thought I might as well let Duff know out of courtesy; he was the only one I could think of at the time. Edwin Kaulback was another I had a talk with; he was another owner at the time. I had a good retainer. They were practically my clients and I suppose I might talk to my own clients."

That is my story as to the ringing up of Mr. Duff.

Re-examined by Mr. Mellish, K.C.:—

"I stated to Mr. O'Connor I had a conversation with Mr. Walters after he returned, about these men having got out of jail. He ratified what I had done. (Objected to by Mr. O'Connor), in opposing their discharge before Mr. Justice Russell. On the day that I received this notice of motion for the second application, after the conversation I have detailed with regard to Mr. Duff on the telephone, I was on my way home to dinner, passing Mr. Kaulbach's office and I saw him in the window. (Objected to by Mr. O'Connor.) I happened to see him (Kaulbach) at his window as I was passing. I did not go specially to see him, and I knew he would be interested, and I told him these men were making another application to get out He had been previously pleased to know that they had not got out before, and I gave him the information that they had made another application, as one of the owners. And I told him that Captain Walters was away and that I had some little conversation with Mr. Duff over the telephone. He said in effect it would be a great shame if they were allowed to get out unopposed. He presumed I was going up to oppose this application. I told him what Mr. Duff had said, and he said he had no power to give any instructions; he said he thought they ought to be opposed, but he did not give me any instructions. He told me it ought to be opposed. Referring to the letter with respect to the writer telling me not to go to Halifax, that is not a fact; it is absolutely untrue; it is not a fact. I did not ask his permission to go To the Court. Duff said he had no instructions from Captain Walters. I thought he was a little bit short. He answered me shortly and rang off. He had no instructions from Captain Walters, is what he said. I don't know whether he

rang off or whether I rang off; anyway his answer was abrupt. . . ."

Charles W. Lane, recalled by Mr. Mellish:—

"I was never advised of this meeting spoken of where the owners had decided to change the managing ownership. I knew nothing about it. I did not hear anything about it until to-day. Mr. Duff did not tell me that the owners had decided not to go any further. He did not tell me that at any time. He certainly did not tell me anything of the kind, that Captain Walters was deposed on account of bringing the action. I did not ask Mr. Duff if I should go to Halifax.

Q. You appreciate now that he said he actually told you so—that you actually asked him if you should go to Halifax? A. That is not a fact.

Q. Did he instruct you not to go to Halifax? A. I still say that is not a fact, that he did not at any time.

To the Court: It was incidentally that I spoke to Mr. Kaulbach. I spoke to Mr. Duff first. When I spoke to Mr. Kaulbach, I said to him I had been speaking to Mr. Duff. It was in the same day. I was going home, and I passed Kaulbach's office on my way home, and on that day I saw him (Kaulbach) standing in the window and I told him of my conversation with Mr. Duff, and Duff seemed a little short with me."

I must go back to another incident. Before the master went to sea, and was about sailing, he in anticipation of the costs of the first application gave the plaintiff a note for the sum of $50, and subsequently that note was paid by the defendant. The plaintiff has taxed $85.76 in respect to these applications, at least, that is the sum sued for. I may say there was an application in the case of each one of the three seamen on both occasions.

The defendant, as a business man, would know that it is not the best thing to stay away when papers have been served, and there is litigation going on against him. Take this case. There might be a favourable termination, but if it was the other way there was still something to be said. It is a very usual thing to obtain a provision in the order against actions for false imprisonment and so on, and if there is not such a provision, such an action is an unpleasant one to defend.

I think that the defendant, if he intended to object to the plaintiff's opposing the second application, should have told him so. All he had to say was: "No, I am now managing owner and you are not to oppose it." But having succeeded before one Judge, he evidently expected to succeed again and let it go on. That was the occasion when he should have spoken. And he paid the note too, when he knew that he was the managing owner, when the master gave it. The principle of estoppel surely applies. Being abrupt or curt will not do

In dealing with this subject it is said, 3rd Eng. & Am. Ency. 436:—

"Acts of recognition or acceptance are in general equivalent to a prior engagement. When services are rendered by an attorney at the request of another, or where the benefits of such services are knowingly accepted, a promise to pay therefor will be presumed unless the circumstances shew that the services were intended to be gratuitous. Thus, when there is even slight proof of any employment of the attorney by the client the fact that the latter stood by without objection and allowed the attorney to render valuable services in her behalf will estop him to deny the fact of employment."

The giving of the note for the time of service was not a discharge from all future costs in the matter, those not then anticipated as well as those which were. Nothing is more common than a note given in that way. The solicitor could have been compelled to bring in his bill of costs for taxation, notwithstanding that if they were under that amount, and the matter is reciprocal. It would require a very express agreement if he proved that they were to be compromised at that sum whatever they would amount to.

The appeal in my opinion should be dismissed, and with costs.

DRYSDALE, J., concurred with GRAHAM, E.J.

NOVA SCOTIA.

SUPREME COURT.

TRIAL.

GRAHAM, E.J. MAY 11TH, 1911.

DREW v. ARMSTRONG.

Land—Trespass—Agreement for Sale of Standing Timber —License to Enter and Cut—Extension by parol of Period for Cutting—Reasonable Time—Interest in Land.

Action claiming damages for trespass to land.

J. J. Ritchie, K.C., and J. M. Owen, for plaintiff.

W. E. Roscoe, K.C., and A. L. Davison, for defendant.

GRAHAM, E.J.:—This action was brought on the 24th January, 1911, and there was an interim restraining order granted the 31st January, 1911, which, on the 14th February, 1911, when the parties were heard, was varied so as to permit the defendant to haul away the logs already cut on the land of the late Solomon Drew.

This action charged the defendant with cutting down trees and timber about the months of October, November, and December, 1910; also since the 1st of January, 1911, and until the time of the injunction, with hauling to his mill a quantity of the timber and logs so cut.

The prayer is for a declaration that the agreement to which I shall refer presently, expired and became void on the 1st of January, 1909, and for an injunction and damages.

This agreement referred to was made between the plaintiff's father in his lifetime and the defendant. The former having died on the 27th December, 1909, the plaintiff became the successor in title. It is as follows:—

"Drawn in duplicate.

"This agreement made this first day of January in the year of Our Lord, on thousand nine hundred and three, between Solomon Drew of Nictaux Falls, in the county of Annapolis and province of Nova Scotia, of the first part, and Daniel Armstrong of Bloomington, county and province aforesaid of the other part, Witnesseth that the said Solomon Drew for and in consideration of the sum of two

hundred and fifty dollars, currency of Canada, to him in hand well and truly paid by the said Daniel Armstrong, that is to say, fifty dollars on the signing and sealing of this agreement and two hundred dollars on or before the first day of February next, 1903, has sold the said Daniel Armstrong all the soft wood timber on a certain piece of land situated and lying in Bloomington, and known as the Stearns lot. The said Daniel Armstrong may enter on said lot, or on the part of said lot which the said Solomon Drew is in possession of, and may cut and haul away all the soft wood timber down to six inches through but. And the said Daniel Armstrong is to have the term of six years from January 1st, 1903, to remove the timber from said lot And if the said Daniel Armstrong fails to pay the full amount of purchase-money on the time specified in this agreement, then the said Daniel Armstrong shall forfeit all moneys paid; also all the timber which he has cut or removed from said lot.

Signed and sealed (Sgd.) Solomon Drew, L.S.
in presence of (Sgd.) D. B. Armstrong, L.S."

The agreement which I have quoted is, I think, a sale of the timber growing on this land with a license to cut and remove it. Perhaps that license would have been implied with the sale, but it is subsidiary to the sale. It will be noticed that by its terms the defendants right was to expire on the 1st day of January, 1909. It is proved by parol that in the fall of 1908, it was extended by the late Solomon Drew, over the year 1909. It is in respect to a later extension, however, that the question in this case arises. And first, let me say, that early in the six years' term the defendant entered under the agreement and cut upon the land and removed some of the timber. He had paid the $250 mentioned in the agreement, but he had bad luck; among other things a fire had burned his mill. He was logging another lot where he had a mill and wished to finish that before moving his mill to where he would cut the logs on this lot. He applied to Solomon Drew for an extension of the time, and he paid him for that extension the sum of ten dollars to cover the year, 1910. That sum was paid on the 3rd of December, 1909. On the 27th December, 1909, Solomon Drew unfortunately died, and there is no writing to evidence the extension. There is a good parol agreement proved. The defendant says:

"In the summer of 1909, I was down to the Falls. I think Mr. Drew was standing in his dwelling. I talked to him a few minutes, and explained to him that I wanted an extension of time to log the Torbrook lot, as it is expensive to move a portable mill. I wanted to finish this Torbrook lot, before moving the mill, so that I would not have to move my mill back. I asked him what he would ask me for a year for an extension of time. He said he would take ten dollars a year until such time as would be convenient for me to get the logs off the Sterns lot. In the fall of 1909, my wife and I called at Mr. Drew's house and paid him the $10. I asked Mr. Drew for a writing. He did not think it was needed. We ought to be able to trust one another. I said to Mr. Drew that would be all right as long as you live. He said he would tell his wife about it."

Spurgeon Vidito says:—

"I asked him (Solomon Drew), I think in 1909, if he had given Mr. Armstrong an extension of the time on the lot. He said he had. I was talking to him two different times and he said he had.

Q. Did you understand at this time about this lease or agreement between them? A. Yes, and about the time being run out.

Q. Now tell us what the conversation was? A. I asked him if he had given an extension of time to Mr Armstrong on the land and he told me he had. That was about all."

It will be noticed that no particular limit in time was fixed. But that was to be a reasonable time. That is what the parties meant. In the States of the United States there have been cases in which in the agreement no time was specified for the cutting and removal of the trees, and it has been held that there was an implied term, namely a reasonable time. And so when there was an extension of the time at so much per year, but no time was specified. I refer to Perkins v. Stockwell, 131 Mass. 259; Hoit v. Stratton, 20 Am. Reps. 119; Patterson v. Graham, 164 Pa. 234, and Atwood v. Cobb, 16 Pick. 227.

At the trial this admission was made:—

"It is admitted by both parties that $10 was paid Solomon Drew before his death, December 3rd, 1909, for the extension during the year 1910, of an agreement for sale of timber on the land between Solomon Drew and Mr. Armstrong."

In his evidence the plaintiff said:—

"Q. You believe the $10 had been paid? A. Yes.

"Q. For an extension? A. Yes, for an extension.

"Q. And you are only relying on the fact that the extension was not given in writing? A. Yes."

After the death of Solomon Drew the defendant no doubt realising that he had nothing to shew for his $10 addressed a letter to the plaintiff and there was a correspondence. The plaintiff having been informed by his mother of the receipt of the $10 on account of an extension, did not in that correspondence question the extension over the year 1910, but plainly assents to it. In the letter of 26th January, 1910, he says:—

"Even now in justice to the estate I do not think you ought to cut down to the limit mentioned in the agreement, and if we do as you desire, give you two years more, it would seem that everything would be stripped clean, and the property would be valueless, at least for a generation. If it is impossible for you to remove the timber this year, it is possible that some arrangement could be made by which a portion of the purchase-money could be refunded to you, as I understand you had one winter's work on the property."

And subsequently he made the defendant an offer of a sum of money on that basis.

What he wished to do was to prevent an extension beyond 1910, and down to the time of the bringing of the action I cannot find that the plaintiff or his mother or sister did anything else than recognise the existence of the sale and the extension over 1910, of the period for the removal of the timber. But nothing can be drawn from them as to the period beyond, although Mrs. Drew must have been told about it by her husband. The defendant, when the season for cutting came, namely October, 1910, commenced logging the land and the plaintiff knew of it and never objected. Of course, there was expenditure on the part of the defendant in cutting down the trees, constructing roads, &c. The fact that the plaintiff knew that the defendant was cutting and hauling the timber is proved very conclusively. I may say that the letters between the plaintiff and his mother and sister, who were near the land are destroyed. Mrs. Drew says: "We all considered that Mr. Armstrong had a right to cut and remove the logs in 1910. . . I wrote to my son that Mr. Armstrong was cutting logs on the lot somewhere along in November last."

Spurgeon Vidito, says:—

"Q. When did you tell Mrs. Drew about Armstrong logging this lot? A. In November 1910,"

And Miss Drew, his sister, says:—

"Q. You knew of Mr. Armstrong logging on this land in the fall of 1910? A. We heard of it.

"Q. You advised your brother? A. I think we probably mentioned it in writing to my brother that Mr. Armstrong was cutting off the land—I might say I know we did."

The plaintiff himself says:

"My recollection is that sometime in November I was written to by my brother that Mr. Armstrong was operating on the land."

The defendant cut down timber during those months, but when he proceeded to remove it in January, 1911, the restraining order I had mentioned was obtained.

I think that the defendant never receded from his right to the extension over the year 1911. When he found the plaintiff repudiating the agreement and he had not even a receipt for his money he did offer him a higher price per year for an extension over 1911 and 1912, but this does not shake his evidence in my opinion or detract from the agreement made with Solomon Drew. That the defendant should lose the trees cut down during 1910 paid for and the extension of time paid for is something any Court would struggle against.

Coming to the law of the case I shall not discuss the question whether the agreement to extend the time of performance comes within the section of the Statute of Frauds relating to the sale of goods or the section relating to contracts for the sale of land, &c. Marshall v. Green, 1 C. P. D. 35, is a case for the former view, and Scorell v. Boxall, 1 Y. & J. 396 a case for the latter. Of course, if the trees were chattels the plaintiff cannot succeed. But I shall assume that it is an interest in land. I think that in equity the plaintiff cannot set up the want of a writing under the Statute of Frauds. I first refer to the case of McManus v. Cook, 35 Ch. D. 681; Way, J., at page 695, says:

"Hewlins v. Shippam, 5 B. & C. 221; Wood v. Ledbetter, 13 M. & W. 838 and other authorities at common law were cited, and it was argued that the right claimed could only be granted by deed, and that, therefore, the license was revocable, but this common law doctrine was not allowed to prevail in equity."

He then refers to a passage from Lord Kingsdown's opinion in Ramsden v. Dysen, 1 E. & I. App. 129, and Plummer v. Mayor of Wellington, 9 App. Cas. 700, and other cases. And at page 697 says: "(1) The doctrine of part performance of a parol agreement which enables proof of it to be given notwithstanding the Statute of Frauds though principally applied in the case of contracts for the sale or purchase of land or for the acquisition of an interest in land has not been confined to those cases. (2) Probably it would be more accurate to say it applies to all cases in which a Court of equity would entertain a suit for specific performance if the alleged contract had been in writing. (3) The most obvious case of part performance is where the defendant is in possession of the land of the plaintiff under the parol agreement. (4) The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract it would be fraudulent to set up the statute. (5) But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the Court would direct to be specifically performed. (6) The doctrine applies to a parol agreement for an easement though no interest in land is intended to be acquired."

I think the possession in October, November and December could only be referable to the extension of the agreement. Then there is the payment of the sum of $10 which, I think, brings the case within Nunn v. Fabian, 1 Ch. App. 35, where it was held that a payment of increased rent for one quarter under the parol agreement shewed that the possession was not referable to the previous lease. I refer also to Miller v. Sharp (1899), 1 Ch. 627, and 2 Dart on Vendors and Purchasers, 1038. Here there was a payment over and above what had been paid under the terms of the previous agreement. But this is a far stronger case than Nunn v. Fabian, because there is not as under a lease continuous possession. There is an entry at the proper season to cut and remove the logs. I am of opinion that it makes no difference that the parol agreement was made with the father, and the first year's rent paid to him, and that the part performance took place after the death.

As to the sufficiency of a parol agreement under such circumstances notwithstanding the Statute of Frauds I wish to refer to two Ontario cases which I follow. One of them

was even pronounced before this doctrine had been made as clear as it has during late years, particularly by the decision or Kay, J. Lawrence v. Errington, 21 Grant 260; and Handy v. Carruthers, 25 Ont. 279.

It was contended that this was a license which might be revoked, and was revoked by the death of the plaintiff's father. As I have said it was a license subsidiary to the contract for the sale of the timber, and it existed while that contract existed, and if the time for performance of that contract was validly extended as I have endeavoured to shew, the license was extended with it. It was not, in my opinion, revoked by the testator's death. In Marshall v. Green that point was taken by counsel that the license was a revocable license, but the Court did not give effect to that contention.

All of the English cases from Thomas v. Sorrell, Vaughan 330, to Lowe v. Adams (1901), 2 Ch. 598, shew, I think, that the fact of there being a gift or sale of the trees or the game as well as the license to cut or shoot is not a revocable license. The decision of Kay, J., which I have already quoted from at length shews that Wood v. Ledbetter is a case to be dealt with differently in a Court of Equity, namely, as to the foundation of the grant to which the license is subsidiary. A few American cases in common law Courts were cited to me. But there are cases even at common law in the States which shew that there might be a parol extension of the term of one of those agreements. I merely set them off. I do not rely on them. Granger v. Palmer, 56 Hun. 481 and Williams v. Ford, 63 Mich. 484, in which I think the Court was divided, but this view was afterwards affirmed in Macomber v. Detroit, 108 Mich. 493.

In my opinion the defendant has proved an agreement for extension for a reasonable time at $10 per year, and I hold that the years 1910 and 1911 were a reasonable time in which to remove the timber from the lot. He had all of 1911 in which to pay the sum of $10 for that year. The defendant may pay the $10 for the year 1911 into Court within thirty days.

The defendant will, thereupon, have judgment dismissing the action with costs.

All necessary amendments are made in the pleadings to cover the facts as found.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. APRIL 29TH, 1911.

GIFFORD v. CALKIN ET AL.

Conflict of Laws — Action in Nova Scotia Supreme Court upon a Judgment Obtained in Supreme Court of New Brunswick—Promissory Note Subject-matter of Action — Lex Fori — Enforcing Judgment in Personam — "Foreign Judgment" — Rule of Private International Law Considered.

Appeal from the judgment of MEAGHER, J., in favour of plaintiff in an action to enforce in this province a judgment recovered by plaintiff against defendants in the province of New Brunswick.

F. L. Milner, in support of appeal.

H. Mellish, K.C., and W. F. O'Connor, K C , contra.

The judgment of the Court was delivered by

DRYSDALE. J.:—This action is upon a foreign judgment, that is to say, upon a judgment obtained by the plaintiff against the defendants in the Supreme Court of New Brunswick. At the time of the process in the New Brunswick Court the defendants were residents of and domiciled in the province of Nova Scotia, did not appear in the said action, and, as it is contended, did not in any way submit themselves to the jurisdiction of the said Court of New Brunswick.

The learned trial Judge, Mr. Justice Meagher, has held that because the note sued upon in New Brunswick was payable in that province the defendants must be held to have contracted to submit to the forum of the plaintiffs residence (New Brunswick) with all the procedure and consequences incident to the exercise of jurisdiction by the Court of that province, and hence that the judgment of a Court of competent jurisdiction over the defendants imposes a duty or obligation on the defendants to pay the sum for which judgment is given, which the Courts of this country ought to enforce.

When foreign judgments will be enforced in actions in personam in England is, I think, well established, and the circumstances under which such judgments will be enforced in England are concisely noted in Buckley, L.J., in Emanuel v. Symon (1908), 1 K. B. 309, as follows:—

"In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) when he was resident in the foreign country when the action began; (3) when the defendant in the character of a plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

In the case before us the learned trial Judge has held that the defendants came within the fifth rule mentioned because of a contract to be performed in New Brunswick, and by reason of such contract impliedly agreed to submit themselves to the New Brunswick forum. But such an implication is directly against the ruling of the Court of Appeal in the King's Bench case mentioned. There Channell, J., the trial Judge, had held that the defendant in that case, by joining a partnership for the working of a mine in Western Australia must be taken to have contracted that all partnership disputes, if any, should be determined by the Courts of Australia and thereby subjected himself to the jurisdiction of those Courts. But this holding of Channell, J. was overruled, and it was there stated to be clear according to English jurisprudence that there is no implied obligation on a foreigner to the country of that forum to accept the forum loci contractus as having, by reason of the contract acquired a conventional jurisdiction over him in a suit founded upon that contract for all future time, wherever the foreigner may be domiciled or resident at the time of the institution of the suit; that such an obligation may exist by express agreement, but is not to be implied from the mere fact of entering into a contract in a foreign country.

This case seems to me to conclude the question and against the ruling of the learned trial Judge.

It was urged before us that because the judgment in New Brunswick was obtained regularly there in accordance with the provisions and practice of that province for service

abroad, the case could be distinguished from the English cases cited and referred to in Emanuel v. Symon. But I am satisfied that a foreign judgment, even regularly obtained according to the practice and procedure of the foreign country, in order to create that duty or obligation to pay which the English Courts will enforce, must come within one of the five cases above enumerated. The plaintiff's judgment was not obtained under circumstances coming within any of the enumerated classes, and I am of opinion, is not a foreign judgment that can be enforced in this province.

It was further urged before us that a foreign judgment in this province stood on a different footing from foreign judgments sought to be enforced in England by reason of the provisions of Order 35, Rule 38 But I think that rule was merely intended to give to a defendant another defence to an action on a foreign judgment, was not intended to and does not regulate or alter the law of the country, as to when a foreign judgment can be enforced in this country.

I am of opinion the appeal should be allowed with costs and the judgment below vacated.

As the plaintiff's counsel on the argument intimated that if the opinion of the Court should be against him on his right to hold his judgment, he desired to amend by adding or substituting a claim against defendants on the original note or cause of action.

I think the right to amend ought to be allowed on the usual terms, viz., on payment of the costs occasioned by such an amendment.

RUSSELL, J.:—I cannot dissent, although I have some doubts. It is a new question.