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June 11, 28.*

THOMAS W. CHESLEY.....APPELLANT ;

AND

ALBERT MURDOCH AND }RESPONDENTS.
TREMAIN RUMSEY, }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Construction of 41st sec., ch. 96, Rev. Stats. N.S. 4th Series—Actions against Administrators—Evidence of Plaintiff not admissible.

C. sued M & R., M. accepted service and acknowledged amount due, but R. pleaded to the action. Before trial both defendants died. Then C. R. & R. R., as administrators of R., were, before trial, made parties to the action. At the trial C. was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased M. & R., the learned Judge ruled that the evidence was inadmissible under sec. 41, ch. 96 of the *Revised Statutes of Nova Scotia*, 4th series. (1)

(1) SEC. 41. On the trial of any ceeding in any Court of justice, issue joined, or of any matter or or before any person having by question, or on any inquiry arising law or by consent of parties in any suit, action, or other pro- authority to hear, receive and

*PRESENT.—Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

Held (affirming the judgment of the Court below):—That under said section, in an action against administrators made parties to an action after issue joined, but *before* trial, the Plaintiff cannot give any evidence in his own favor of dealings with a deceased Defendant. [*Henry*, J. dissenting.]

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THIS was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* for a new trial, granted by the said last mentioned Court to the Appellant herein.

The action was brought by Appellant against the Respondents to recover \$395.91 for orchard produce, and also for money due on an account stated, and for interest on money forborne to the Defendants.

The Defendant *Murdoch* accepted service of the writ, and confessed his indebtedness to the Plaintiff to the amount of \$375.71.

examine evidence, the parties or question or on any inquiry thereto, and the person in whose arising in any suit, action, or behalf any such suit, action, or other proceeding in any Court of other proceeding, may be brought justice, or before any person or defended and the husbands having by law or by consent of and wives of the parties thereto, parties, authority to hear, receive and examine evidence brought by or against the executor or administrator of a deceased person, it shall not be competent hereafter for any other of the parties to such action, or the wife of any such party to give evidence on behalf of such party of any dealings, transactions or agreements with the deceased, or of any statements or acknowledgments made or words spoken by him, or of any conversations with him; provided that any such party or his wife shall be competent and compellable to give evidence on behalf of any such executor or administrator.

Provided, that on the trial of any issue joined or of any matter

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In the year 1874 the Defendant *Tremain Rumsey* pleaded to said action, denying indebtedness, and also denying contract.

Prior to the year 1876, both of the persons named as Respondents herein died—*Murdoch* died first.

In the year 1876 the Appellants suggested the death of *Tremain Rumsey*, and the fact that *Charles Rumsey* and *Kinsman Rumsey* were the administrators of the estate of *Tremain Rumsey*, and that the said *Murdoch* confessed the action.

No suggestion of the death of *Murdoch* appears in the proceedings, and no judgment appears to have been entered against him.

The action was thereafter carried on against *Charles Rumsey* and *Kinsman Rumsey*, and the issues between the Appellant and the said *Charles Rumsey* and *Kinsman Rumsey* were tried before a Jury, at *Bridgetown*, on the 21st June, 1876. At the trial Plaintiff was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased defendants, the evidence, under sec. 41 ch. 96 *Rev. Stat. N.S.*, 4th Series, was declared to be inadmissible. A verdict was found for the Defendants.

The Appellant obtained a rule *nisi* for a new trial on the ground that the learned Judge who presided at the trial of the issues improperly rejected the evidence of the Plaintiff.

The Court below discharged the rule.

The Appellant thereupon brought this appeal against the said judgment of the Court below discharging the rule.

Mr. *Cockburn*, Q. C., for Appellant :—

The question here is a question of evidence: Whether the evidence of a party to an original contract is admissible when the action is brought against the executors?

The evidence of the Plaintiff was rejected on the trial as against the administrators of the surviving debtor. The proviso in section 41, ch. 96, *Rev. Stat. N. S.*, 4th Series, must be strictly construed. The Court cannot supply any omission.

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[HENRY, J. :—The great object of the section was to prevent a living person giving evidence against a dead person. The question is whether the words used in the Statute can apply to administrators made parties to suit before trial ?]

The action was brought before the death of these parties and at that time Plaintiff was entitled to give his evidence. Can this vested right be suddenly taken away from him by no act of his own, unless expressly provided for by the Statute? The Legislature has not foreseen a case of this kind.

It is a case of omission and it is not unreasonable to contend that this Court will not provide for what the Legislature has not provided.

This Statute, if construed as the Court has construed it, would be retroactive in its effect, and would defeat an action already begun on the faith of a different state of things: *Couch v. Jeffries* (1); *Wood v. Oakley*, (2); *Sedgwick* on the Construction of Statutes and Constitutional law (3).

On the point that the proviso, limiting the prior enactment in the same clause, can receive no effect beyond its words, the learned Counsel referred to *Jones v. Walcott* (4); *Bigelow v. Heyer* (5); *Mass. General Stats.* (6).

Mr. *Gormully* for Respondents :—

This is an appeal to ascertain the value of the word

(1) 4 Burr. 2460.

(4) 15 Gray (Mass.) 541.

(2) 11 Paige (N. Y.) 400.

(5) 3 Allen (Mass.) 243-4.

(3) Pp. 161-2-3-4, *et seq.*

(6) C. 131, sec. 4.

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“brought.” The proviso in section 41, ch. 96, was first introduced in 22 Vic. ch. 2, section 7. The policy of the Act was to prevent a living person giving evidence against a deceased party. The word “brought” must therefore mean when the evidence can be taken, viz.: the moment of trial.

In any case the word “brought” does not necessarily mean “originally brought;” so soon as the administrators of a deceased Defendant are brought before the Court by way of suggestion, the action then is brought against them.

See *Revised Statutes N. S.* (1); *R. v. Hants* (2); *R. v. Pembridge* (3).

This last case is in point, and on all fours with the present case.

#### THE CHIEF JUSTICE:—

Both of the Defendants died after the action was brought. *Murdoch* suffered judgment and *Rumsey* pleaded.

After issue joined, *Tremain Rumsey* died, and his death is suggested, and that *Charles Rumsey* and *Kinsman Rumsey* had become Administrators of his estate. At the trial, therefore, *Rumsey* and *Murdoch* were both dead. The learned Judge ruled that the testimony of *Mr. Chesley* as to what took place when he sold the apples, could not be received. The Jury having found for the Defendants, the question was raised before the Supreme Court of *Nova Scotia*, whether the provisions of the Statute of *Nova Scotia* as to parties not being excluded from giving evidence in civil suits, on the ground of interest, allowed the Plaintiff to give evi-

(1) 4th series, ch. 94, sec. 104.

(2) 1 B & Ad. 654.

(3) 3 Q. B. 901.

dence in this case, the action having been commenced when both Defendants were living, and *Rumsey's* administrators having been made parties to the suit, after issue joined, but before trial.

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The Supreme Court held that the Plaintiff was not allowed to give evidence in his own favor under the proviso of the Statute, Mr. Justice *Wilkins* dissenting.

The 41st section of the *Revised Statutes*, ch. 96, declares parties to suits, their husbands and wives, competent and compellable to give evidence, except as thereafter excepted. Then comes the proviso :

That on the trial of any issue joined, or of any matter or question, or on any enquiry arising in any suit, action or other proceeding in any Court of Justice, or before any person having, by law, or consent of parties, authority to hear, receive or examine evidence brought by or against the executor or administrator of a deceased person, it shall not be competent for any of the other or opposite parties to give evidence of any dealings with, or of any acknowledgments made, or words spoken by the deceased.

For all the purposes of this enactment, I think going on with the action against the administrators in this suit "is an action or proceeding brought against them."

They are made parties to the proceeding ; they are brought into Court ; the judgment will be against them, and, for all practical purposes, it is as if the action had been in the first instance commenced against them. The allowing of proceedings to be taken against administrators in this way was to avoid the necessity of commencing a new action, when under the old practice the suit would abate by the death of the Defendant. The Plaintiff "is entitled to the like judgment as in an action originally commenced against the executor or administrator." (1)

I have no doubt the proper view to take of the proviso in the Statute is to construe it

(1) Imp. Stat. 15 and 16 Vic., Ch. 94, Sec. 105 ; *Benge v. Swane*, ch. 76, sec. 138 ; Rev. Stat. N. S., 15 C. B. 791.

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when the trial takes place after the executors or administrators are made parties to the suit just as if the action had been brought against them originally.

This carries out what is the unmistakable intention of the Legislature, viz.: That the surviving party should be allowed to give evidence as to transactions occurring personally with the deceased party. If both parties were living at the trial, both could be heard, and the jury, after hearing both, would decide, but, when one of the parties is dead, it would seem unfair to allow the survivor to give his own version of transactions and conversations which took place when only the two were present and when no one could be called to contradict him.

I think the appeal should be dismissed with costs.

RITCHIE, J.:—

I think the grammatical construction put forward by Judge *Wilkins* that the word “brought” refers to the action, not to the evidence, is correct; but I differ from him in thinking the evidence receivable. I think this would not only be contrary to the object and intention of the Act, but at variance with the fair construction of its language; and I think that when the executors were made parties to the suit, it was then an action brought against them, on which action judgment might be given for or against them; that, at any rate, it was a proceeding against them, before a Court; and to allow the opposite party to give evidence in such an action or proceeding would be both against the letter and spirit of the proviso.

STRONG, TASCHEREAU and FOURNIER, J. J. concurred.

HENRY, J.:—

The question, and the only one, in this case, arises

upon the proviso to section 41 of chap. 96 of the *Revised Statutes of Nova Scotia*, 4th Series, which provides :

That on the trial of any issue joined, or of any matter or question, or on any inquiry, arising in any *suit, action*, or other *proceeding*, in any Court of Justice, or before any person, having by law, or by consent of parties, authority to hear, receive and examine evidence brought by or against the Executor or Administrator of a deceased person, it shall not be competent hereafter for any other of the parties, to *such action*, or the wife of any such party, to give evidence on behalf of such party, of any dealings, transactions or agreements with the deceased, or of any statements or acknowledgements made, or words spoken by him, or of any conversations with him, &c.

The action in this case was not "brought" against the present Respondents as Administrators, but against two parties, who died after action, and the cause was at issue, under pleas pleaded by one of the Defendants, the other confessing judgment. The Defendants both having died subsequently, the action—still pending by force of the *Revised Statutes* and unabated—was *continued* by a suggestion, under the Statute, of the death of the Defendant in question, and that the now Defendants were Administrators of the estate. The law applicable to this branch of the case is in section 105, chap. 94, *Rev. Stat. N. S.*, 4th Series (1).

Under it the Administrator, where the cause was at issue before the death of the intestate, can plead to the suggestion only by way of denial, or such plea as may be appropriate and rendered necessary by his character of Executor or Administrator, unless by leave of the Court, or a Judge, he should be permitted to plead fresh matter in answer to the declaration. The question, therefore, is as to the effect of the proviso, where, as in this case, the suit was *brought* in the lifetime of the original Defendants and pleas pleaded by one, and the cause thereupon at issue.

(1) Pp. 460, 461.

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In construing this proviso, the first legislation upon the point, and the legal rights of the parties as they then stood, is important to be considered. I find that by the Statute law of *Nova Scotia* for many years previous to 1869, parties to suits with Executors or Administrators were competent witnesses in every respect. In that year the Legislature of *Nova Scotia*, with the laudable intention of preventing injustice by testimony incapable of contradiction, in consequence of the death of parties, passed an Act identical in language with the proviso in question (1).

We have, therefore to consider: 1. What the law was before the last mentioned Act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy has been provided, and to what extent, and; 4. The reason of the remedy (2).

1st. What was the law previously?—

The law previously, as I have stated, made the party a competent witness, and his statutable right, as such, is restrained by the Act, but no further than the words of it reasonably go.

2nd. What was the mischief for which the law had not provided?

The mischief, or defect, consisted in allowing parties to bring actions to recover money not due them by the party's own evidence of transactions, etc., with the deceased when *he knew* he could not be confronted—in allowing parties, in a word, to trump up false claims against the estate of a deceased person, which they would not have attempted to do were he alive; and further, in allowing parties, by their own testimony, to avoid payment of honest claims due to the estates of deceased persons. These I take to be the "mischief or defects" in the legislative mind, sought to be provided against.

(1) *Stat. of N. S.* 1869, chap. 7. (2) *Maxwell* on Int. of Stats. 18.

## 3rd. The remedy provided?—

The Statute undoubtedly provides a remedy for the cases I have just put, and I cannot think that at the time the Act passed (1869) the case of a sole or surviving Defendant dying after issue joined, as in this case, was ever considered or thought of; it being a contingency likely but seldom to arise. I am free to admit the sound policy of the contention, that the party in a case like this ought not to be permitted to give evidence, but, at the same time, the reasons for excluding such evidence are not nearly so strong as in the cases clearly covered by the Act. Here the Appellant brings his suit, knowing that his testimony may be contradicted by both Defendants, and thereby establishes the fact that (unlike the other cases) he is not afraid of the testimony of his opponents. The "mischief" is likely to arise in only rare cases, and therefore does not necessarily call for the same legislative checks; and the principles for excluding the testimony in the one case, do not hold good in regard to, or, in fact, at all apply to, the other. I am the more convinced that the Legislature did not mean the Act to apply to cases like the present, or other words would have been employed, and the word "brought" would not have been used, but the word "pending"—or would have been added to by such words as "or pending" The provision, too, is that it shall not be competent hereafter for any other of the parties to *such action*—so that the prohibition only applies where there is an action, and that "brought by or against an executor or administrator," and although the word "proceeding" is used in a previous part of the section, it cannot mean that where an action is once commenced or "brought" the word "or" couples "proceeding" with it, and makes the latter a joint object with it, and gives force and applicability to the Act which it otherwise could not have. The ac-

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tion is one position by itself, so is "proceeding," and if the former has been "brought" the position is attained where the evidence is to be rejected, and I cannot, therefore, think the Legislature meant to make any and every step afterwards a "proceeding."

But the words of the enactment themselves provide a limitation. It does not say "in any proceeding," but "on any inquiry arising in any *suit, action* or other proceeding." The "proceeding" here after issue joined, *so far as the Defendants were concerned* in their representative capacity, must, under the circumstances, have been limited not to an "inquiry" at all, but to the "trial" of the issues joined and *the truth of the suggestion*. There are only two positions referred to in the Statute, and to which its restrictions apply, first, the position of the case as in an action "brought," and still unabated and at issue for trial; and that of a case where an "inquiry" is to be had in case of a default or otherwise. "Inquiry" has a technical meaning, known to all lawyers and others who are accustomed to draft Acts, and as no "inquiry," in its technical sense, was to be held in this case, the subordinate word "proceeding" has no application; besides, "proceedings *taken*," would be the usual and proper expression, and "brought" not only inapplicable to it as in general parlance, but the proper term to be applied to an "action." It is, therefore, plain that the Statute only applied where an action was "brought," and without an action first "brought," it could not be held applicable to a "proceeding." The latter word is, therefore, only available to characterize something done in a suit after being "brought."

Section 102 chap. 94, *Rev. Stat. N. S.*, 4th Series, provides that

The death of a Plaintiff or Defendant shall not cause the action to

abate, but it may be *continued* in manner and under the restrictions hereinafter mentioned.

We are now asked to say that the Legislature meant the Act to apply to cases like the present; but, with all due deference to other views and opinions, I cannot arrive at that conclusion. The Plaintiff, during the pendency of his suit, and up to the death of the Defendants, had a statutable right to sustain his case by his own testimony, and, unless he has clearly been deprived of that right by legislation, the evidence should have been received, and, having been rejected at the trial, I think it was improperly rejected. I think it is a case not foreseen or provided for by legislation, and I have not the power to remedy a legislative defect in a Statute, but to measure the extent to which the enactment restrains the right of the Plaintiff, and in doing so not to strain language beyond its ordinary meaning. If a clear case of omission is presented, and I think this is one, it is the prerogative and duty of the Legislature, and not ours, to remedy the mischief or defect. We have given judgment this term in a case where, by our unanimous decision, there was an insufficiency of legislation on the point in question in that case to sustain the contention of one of the parties. The Judges of another Court, sought by forcing language beyond its ordinary meaning to supply the defect, but we felt bound to decide against them, and we have now the fact before us, that legislation within the past few months, and since the argument of the case, has remedied the mischief. So, I say, should all cases of uncertain legislation calculated to interfere with the acknowledged legal right of parties be dealt with in Courts of Justice. This case, I think, is one of that class, and should be treated accordingly.

We have several well understood principles to aid us in the proper construction and application of Statutes :

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It is the duty of all Courts to confine themselves to the words of the Legislature—*nothing adding thereto, nothing diminishing*. We must not import into an Act a condition or qualification not found there (1).

In construing the words of an Act of Parliament and collecting from them the intentions of the Legislature, the terms are always to be understood as having a regard to *the subject-matter*, for that, it is to be remembered, will always be in the eye of the framer of the law and all his expressions directed to that end (2).

It is said in words of authority, to be a sound general principle in the exposition of Statutes, that less regard is to be paid to *the words that are used* than to *the policy* which dictated the Act (3).

I therefore (and I regretfully do so against the majority of the Court) can come to no other conclusion than that already intimated, that the “mischief” of allowing the Plaintiff’s evidence in cases like the present, was one not thought of by the Legislature, and not by the words of the Statute provided against. I think, therefore, the testimony of the Plaintiff was improperly rejected and that there should be a new trial.

*Appeal dismissed with costs.*

Solicitor for Appellant : *T. W. Chesley.*

Solicitor for Respondents : *T. D. Ruggles.*

(1) Per *Tindal*, C.J., in *Everett v. Mills*, 4 Scott, N. C. 531. citing *The King v. Hale*, Cro. Car. 330 ; 3 Lev. 82 ; *The King v.*

(2) *Potter’s Dwaris Statutes* 201. *The Mayor of Liverpool*, 1 A. & E. 176 ; and *Hine v. Reynolds*, 2

(3) *Potter’s Dwaris*, p. 214, Scott, N. C., 419.