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*May 14.

*Dec. 9.

F. H. FRANCIS AND S. A. D. BERTRAND (DEFENDANTS)..... APPELLANTS;

AND

JAMES L. TURNER AND DANIEL NAISMITH, JR (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Debtor and creditor—Agreement—Conditional license to take possession of goods—Creditor's opinion of debtor's incapacity bona fides of—Replevin—Conversion.

F., a trader, having become insolvent, and being indebted, among others, to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors 50 per cent of their claims, T. M. & Co. indorsing his notes for securing such payment, they to be paid in full but payment to be postponed until a future named day. T. M. & Co. were secured for indorsing by an agreement under seal, by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due T. M. & Co. should at once become due and they could take possession of the stock in trade, book debts and property of F. and sell the same for their claim, having first served on F. a notice in writing, signed by the firm name, stating that in their opinion F. was so incapable; and that on a change in the firm of T. M. & Co. the agreement should enure to the benefit of the firm as changed if it assumed the liabilities of, and took over T.'s indebtedness to, the old firm.

This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed, and T. M. & Co., then consisting of T. and N., M. having retired, persuaded F. to assign his book debts to them, and afterwards served on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co. until a certain day after, and resumed possession, but when T. M. & Co. returned on said day he disputed their right and ejected them from the premises. Two days after he assigned to the official assignee for the benefit of all his creditors, and T. M. & Co. issued a writ to replevy the goods from him and the assignee.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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Held, affirming the decision of the Court of Queen's Bench, Gwynne J. dissenting, that F. and the assignee were guilty of a joint conversion of the property replevined. Gwynne J. held that there was no conversion by either.

Held, also, affirming said decision, Gwynne J. dissenting, that if T. M. & Co. formed an honest opinion that F. was incapable such opinion must govern, though mistaken in point of law or fact, illogical or inconclusive; that they were justified in believing, from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by worry and generally unfit for business; that the fact that the notice would not have been given if certain demands of T. M. & Co. had been complied with did not necessarily show *mala fides*; and that the change in the firm of T. M. & Co. did not vitiate the notice as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F.

APPEAL from a decision of the Court of Queen's Bench for Manitoba (1) affirming the judgment at the trial against the defendant Francis, but reversing such judgment in favour of the defendant Bertrand.

The material facts of the case are sufficiently stated in the above head-note and fully set out in the judgments given on this appeal. On the trial of the action of replevin judgment was given for the plaintiff against the defendant Francis, but the learned trial judge held that Bertrand, the official assignee, was not guilty of a conversion of the goods. On appeal to the full court the plaintiff had judgment against both defendants.

Ewart Q.C. for the appellants. Only the original members of the firm of Turner, McKeand & Co. could take advantage of the agreement and enforce it. *Dedrick* v. *Ashdown* (2); *Doe d. Stephens* v. *Lord* (3).

The Chief Justice at the trial held that there was no general conversion, and his finding should be upheld.

(1) 10 Man. L. R. 340.
(2) 15 Can. S.C.R. 227.
(3) 7 A. & E. 610.

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Replevin would not have lain in such a case as this at common law. Then as the property was in Francis he had a right to transfer it, and the statute law of Manitoba does not authorize this action.

Nicoll v. *Glennie* (1) is very similar to this case on the question of conversion.

Howell Q.C. and *Darby* for the respondents. If Turner did in fact form the opinion that Francis was incapacitated the court will not inquire as to the grounds on which it was based. *Allcroft* v. *The Bishop of London* (2).

As to plaintiffs' title to the property, see *Knights* v. *Wiffen* (3); *White* v. *Nelles* (4).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice King.

TASCHEREAU J.—I would dismiss the appeal for the reasons given in the courts below. The appellant took a new point before us under the third clause of the agreement, but he cannot be allowed to do so because, if that point had been taken in the court below, evidence might have been brought upon it. *Owners of Ship Tasmania* v. *Smith* (5).

GWYNNE J.—This action was instituted by a writ of replevin issued out of the Court of Queen's Bench for the province of Manitoba, upon the 22nd day of September, 1893, by the plaintiffs Turner and Naismith, trading under the name, style and firm of Turner, McKeand & Co. against the defendant Francis and the defendant Bertrand, the former of whom by an indenture bearing date and executed upon the 28th day of August, 1893,

(1) 1 M. & S. 588.
(2) 24 Q.B.D. 231 sub nom. *The Queen* v. *Bishop of London*; [1891] A.C. 678.
(3) L.R. 5 Q.B. 660.
(4) 11 Can. S.C.R. 587.
(5) 15 App. Cas. 223.

conveyed and assigned to the latter all the goods, chattels, credits and effects, which are the subject of this action, in trust for the benefit of the creditors of the defendant Francis.

The plaintiffs, as constituting now the firm of Turner, McKeand & Co., claim the said goods and chattels, credits and effects to be their property and to have been wrongfully taken from their possession by the defendants.

The plaintiffs in their statement of claim allege that the defendants took the goods of the plaintiffs, that is to say, all the stock in trade consisting of dry goods, &c., and general merchandise contained in the store or building, situate on the north side of the main highway at Headingly in Manitoba, lately occupied by F. H. Francis (the defendant of that name) and also a certain book of accounts called Journal No. 1, lately kept by the said F. H. Francis in his business as a retail trader and unjustly detained the same, &c., until, &c.

To this statement of claim the defendants have pleaded:

1st. That they did not take the said goods as alleged; and

2nd. That the said goods were the goods of the defendants and not of the plaintiffs.

The plaintiffs joined issue upon the pleas. As to the first of them it may be here observed, that if the goods were ever taken by any one from the possession of the plaintiffs, they were so taken, as indeed is the contention of the plaintiffs, on the 24th August, 1893, by the defendant Francis alone who by indenture upon the 28th of the same month, while the goods were in his actual possession as apparent owner, assigned them to the defendant Bertrand, in trust for the benefit of the creditors of Francis. Bertrand never in any manner

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took or was a party to any taking of the goods out of the possession of the plaintiffs.

This action was instituted in the form of an action of replevin instead of conversion for the purpose no doubt of the plaintiffs thereby obtaining possession of the book called the journal no. 1, which contained as they allege an assignment by Francis of his book debts to the plaintiffs for their exclusive benefit. Certainly, as was contended by the defendants in the court below, there was no joint taking, but that does not conclude the action, for the second plea of the defendants and upon which the plaintiffs have joined issue has raised the question of property in the goods, which issue, if found in the defendants' favour, entitled them to the goods. That plea admits a taking and the issue joined upon it is: Did the property in the goods which, it is not questioned, did originally belong to Francis, pass to the defendant Bertrand under the indenture of assignment for the benefit of the creditors of Francis, or, on the contrary, had the plaintiffs then, as they claim to have had, prior title to and property in the goods by title from Francis superior to the title professed to be passed by the deed of assignment to Bertrand, by reason whereof, as the plaintiffs contend, nothing passed to Bertrand, and that the goods, or the monies realized from the sale thereof (for they have been sold by arrangement between the parties to abide the result of this action) are the property of the plaintiffs.

The plaintiffs have produced in evidence an instrument bearing date the 10th Sept., 1891, executed under the hands and seals of the defendant Francis of the first part, and by the plaintiff Turner and one John Chetwood Martindale, then trading as wholesale grocers under the name, style and firm of Turner, McKeand & Co. of the second part, as the foundation of the title which the plaintiffs set up to maintain

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their assertion that the goods in question are their property. It is unnecessary to set out that instrument in full, though I shall have to refer to it and some of its provisions. For the purposes of this suit it is sufficient to say that we are concerned only with the instrument in so far as it relates to an old debt amounting to the sum of $5,259 due by Francis to Turner and Martindale, constituting the then firm of McKeand & Co., which that instrument was executed to secure; for although the instrument operated also as security for a further sum of $3,600 due by Francis to other persons for which sum Turner & Martindale became security, yet that sum has either been paid in full by Francis to the persons to whom it was due, or settled by compromise with them, so that, as I have said, we are concerned only with the old debt of $5,259, or as much thereof as still remains unpaid. Of this debt there remained due in 1893 the sum of about $4,800, for which sum, as the plaintiff Turner says in his evidence, judgment was entered against Francis in August of that year. The old firm was dissolved on the 30th June, 1893, by the retirement therefrom of Martindale. Upon this dissolution the plaintiff Turner entered into partnership with the plaintiff Naismith and they have been carrying on business together in partnership from the 1st July, 1893, under the name, style and firm of Turner, McKeand & Co.

I propose now to consider the construction and operation of the instrument as regards the old debt of $5,259, 1st, as if the old firm was still existing, and 2nd, if necessary, as to what effect if any the dissolution of the old firm and the formation of the new had upon it.

Now by the instrument it is witnessed and it is thereby covenanted and agreed by and between the parties thereto,

1. That in the event of the death of the said party of the first part, or in case the said party of the first part shall at any time, in the opinion

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of the said parties of the second part or of either of them, from any cause become incapable of attending to his business, then and in either of such cases the said sum of five thousand two hundred and fifty-nine dollars, or any part thereof which shall then remain unpaid, shall become due and payable by the party of the first part to the said parties of the second part notwithstanding that the first day of December 1892 shall not have arrived.

Here it is necessary to observe that by a previous clause it had been recited that it had been agreed between the parties that the said sum of $5,259 should be due and payable in one year from the first day of December, 1891, subject to the proviso thereinafter contained, namely, the provision above recited from the instrument, which then proceeded as follows:

2. And if at any time it shall be the opinion of the said parties of the second part or either of them that the said party of the first part is so incapable of attending to his business, as aforesaid, a notice in writing signed by the firm name of the said parties of the second part stating that in their opinion the party of the first part is so incapable shall be served by them upon the said party of the first part or left at his usual place of abode, and such notice so served and the date of such service shall be and determine the date of such incapacity.

3. And it is further covenanted and agreed by and between the said parties hereto, that forthwith upon the death of the party of the first part, or upon the party of the first part becoming incapacitated from attending to his business as hereinbefore mentioned and provided, it shall be lawful for the parties of the second part, &c., to enter into and upon, and to take full and complete possession of, all the personal property, stock in trade, book debts, real estate, credits and effects in Manitoba of the said party of the first part, and to keep, hold and retain full and complete possession thereof, and to proceed with all reasonable despatch to sell and dispose of the said real estate, stock in trade, personal property, book debts, credits and effects of the said party of the first part, and to receive and hold the proceeds thereof and to apply the moneys which the said parties of the second part may receive from such sale or sales in payment first of the said sum of $5,259, or so much thereof as shall then remain unpaid, with interest at the rate of eight per cent per annum,

and secondly, in payment of all costs, charges and expenses incurred in carrying into effect the said purpose; and thirdly, to hand over to the party of the

first part all surplus moneys realized from the sale, and all property not sold.

Now the first question which suggests itself is: Can it possibly be held to have been the intent of the parties to this instrument that the provisions above contained in the paragraph numbered three, recited from the instrument and thereby purported to be given, should be unlimited in duration so long as the parties of the second part should suffer the old debt of $5,259, or any part thereof, to remain unpaid; and that at any time, however remote, the parties of the second part, by serving upon the party of the first part a notice to the effect stated in the above paragraph numbered two, might enter upon and take possession of and dispose of to their own use all the property subsequently, it may be, acquired by the party of the first part by purchase from other wholesale traders with whom he was dealing on terms of credit, while the parties of the second part, as the plaintiff Turner has stated the fact to be, only sold to him goods for cash, after the execution of the said instrument, and so cut out all the creditors who furnished the party of the first part with the property so to be taken and applied by the parties of the second part with eight per cent interest thereon? If the instrument invested the parties thereto of the second part with any such power, then if the party of the first part should carry on his business for twenty years and then die, while the parties of the second part should suffer the debt to remain unsatisfied, or if the parties of the second part could, while the party of the first part was still carrying on his business, at the expiration of such twenty years by serving a notice upon him, that in their opinion he was incapacitated from attending to his business and that therefore they would exercise the power now claimed, it must, I think, be admitted that if they could succeed in their contention

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a most ingenious device is after many years contrived which would have the effect of overriding and rendering nugatory all provisions of the law and all decisions of the courts relating to chattel mortgages, bills of sale, frauds upon creditors, and the rights of purchasers for value of chattel property from persons in the actual possession thereof as owners.

But whatever may be the power conferred by the instrument over the property it cannot in my opinion be construed as conferring any such power unlimited in its duration.

The provisions contained in the clause of the instrument above cited in the paragraph numbered 1, are plainly limited as to their duration.

The sole object of that clause appears from its contents to have been to expedite the time of payment of a debt before it should become payable, in the event of the death of the debtor, or of his becoming at any time, in the opinion of his creditors, the parties of the second part, incapable of attending to his business. Such being the sole effect of the death, in the event of its occurring, or of the debtor at any time becoming incapable, &c., which is provided for in the clause, the death therein referred to, and the event of the debtor becoming at any time incapable, &c., as provided for in the same clause, must be limited to their respectively occurring before the debt (the time of payment of which was to be expedited by their occurring), should become payable according to the time originally fixed for its payment, that is to say, the first of December, 1892.

Then the clause recited from the instrument as set out above in the paragraph numbered 2 plainly, as it appears to me, relates wholly to the expediting of the time of payment of the debt as provided for in the first

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clause and without which it is plain that the first clause would have been incomplete.

In the case of death, that event happening no doubt determined the incapacity of the deceased to attend to his business, and therefore the second paragraph says nothing as to the case of death; but the parties of the second part never could expedite the time of payment of the debt by forming an opinion as to the incapacity of the party of the first part to attend to his business if they should keep that opinion unexpressed, a creature of their own minds or of the mind of one of them; provision therefore is made in the second paragraph above, without which the first would be incomplete, for signifying the opinion so formed to the party of the first part by service of a notice upon him, and by providing that the incapacity, however long the opinion may have been entertained by the parties of the second part, should date only from the time of the serving of such notice. Until at least service of such notice the time of payment of the original debt could not be expedited for incapacity of the party of the first part to attend to his business, as contemplated by the first clause. The first clause was therefore incomplete without the second which must be taken and read with, and as forming part of, the first, and this appears to me to be the true literal construction of the second clause. The language is:

> If at any time it shall be the opinion of the parties of the second part, &c., that the party of the first part is so incapable of attending to his business as aforesaid.

Now the words "so" and "as aforesaid" as here used cannot be construed as equivalent or as substitution for "in the opinion of the parties of the second part," &c., for these latter words are themselves expressly used in the clause. The words "so" and "as aforesaid" as here used must, I think, be construed as

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referring to the party of the first part becoming incapable of attending to his business, "so as aforesaid" mentioned in the preceding clause and for which provision is therein made in the event of its occurring as therein contemplated, that is to say, at any time before the 1st December, 1892, when the debt would in due course become payable. The first clause of the agreement being thus incomplete without the second they must be read together, and being so read must clearly, in my opinion, be limited as to their operation to the time elapsing between the 10th September, 1891, and the 1st December, 1892. Then if these clauses be so limited, is there any reason why a more unlimited operation should be given to the third paragraph? Its language is:

> And it is further covenanted, &c., that forthwith upon the death of the said party of the first part, or upon the party of the first part becoming incapacitated from attending to his business as hereinbefore mentioned and provided, it shall be lawful for the parties of the second part," &c.

The language here used "it is further covenanted, &c." seems at the outset to show that what is provided for in the clause is something in connection with and in furtherance of what had gone before.

Now the first clause, for any beneficial purpose would have been as incomplete without the third clause as it would have been, as above shown, without the second; for if the first and second had stood alone without the third, the parties of the second part to the instrument would have had no means of recovering judgment of the debt, the time for payment of which was expedited by the first clause, except by action, which in the event of the death of the party of the first part or of his becoming incapable to attend to his business might have proved a very protracted mode of realizing what in those events might prove to be a very insufficient

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security. This third paragraph was therefore introduced for the purpose of providing a speedy mode of recovery of the debt the payment of which was so expedited by the occurrence of the death or such incapacity of the party of the first part. The powers professed to be conferred by the third paragraph—

forthwith upon the death of the party of the first part or upon his becoming incapacitated from attending to his business as hereinbefore mentioned and provided.

These latter words apply equally to the death of the party of the first part as to his becoming incapacitated &c.,—the death and the incapacity mentioned in the first clause of the instrument whereby it was provided that the time of payment of the debt should be expedited by the occurrence of either before the debt should become due by lapse of the time originally established for its becoming due; supplemented to this and as necessary to complete the benefit contemplated as conferred by the first paragraph, the third provides that forthwith upon the death of the party of the first part, that is the death before mentioned in the first paragraph, and forthwith upon the party of the first part becoming incapacitated from attending to his business as before mentioned and provided in the first and second paragraphs taken together, it shall be lawful for the parties of the second part, &c., to obtain satisfaction of the debt the time of payment of which was so expedited by the means mentioned in the third paragraph. Thus construed the whole three clauses are consistent and all are necessary to give efficacy and completeness to the first. What the parties were providing for, as I think, sufficiently appears upon the instrument, namely, the possibility of the death, or the incapacity of the party of the first part to attend to his business occurring before the sums mentioned in the instrument should mature due by the lapse of time appointed for

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that maturity. So the first clause provides that the debt made due to the parties of the second part upon the 1st of December, 1892, shall become due and payable by the party of the first part to the parties of the second part, notwithstanding that the said 1st day of December, 1892, shall not have arrived, in the event of the death of the said party of the first part or of his becoming incapable, in the opinion of the parties of the second part, of attending to his business; such death or incapacity must of necessity occur before the 1st December, 1892, but the first clause being incomplete as to the event of incapacity occurring, the second clause was introduced to remove such incompleteness, and as both first and second were incomplete without the third, it was inserted as indeed necessary to the completeness of the whole, and all three must be construed together as having relation to the expediting the time of payment of the debt as mentioned in the first paragraph. We thus give to the whole a natural and rational construction and avoid the extravagant contention urged on behalf of the plaintiffs that the instrument of the 10th September, 1891, gave to the parties thereto of the second part power unlimited in duration over all property the defendant Francis should ever thereafter acquire, so long as any part of the said debt of $5,259 should remain unpaid, which debt the parties of the second part might suffer to remain unsatisfied while they might be receiving interest thereon for the express purpose of enabling them, at their pleasure, to assert this extraordinary control which is now contended for over a person in business, trading with the rest of the world in ignorance of the peculiar power claimed to be enjoyed by these favoured creditors over the property of the common debtor.

The appeal should be allowed with costs, in my opinion, upon the above considerations alone, and judg-

ment be ordered to be entered for the defendants in the court below with costs, and for the delivery to them of the goods in question or payment of the proceeds arising from the sale thereof.

But assuming the power proposed to be conferred by the instrument of September, 1891, upon the parties thereto of the second part to be unlimited in duration, as now contended by the plaintiffs, the question remains: Did or did not the condition precedent arise which was necessary to arise before the powers proposed to be given by the instrument could come into force and be exercised?

In solving this question it is necessary to attach a definite meaning to the expressions used in the instrument, viz.:

> In case the said party of the first part shall, in the opinion of the parties of the second part, or of either, from any cause become incapable of attending to his business, &c., &c.

in the first paragraph, and the expression:

> Forthwith upon the party of the first part, becoming incapacitated from attending to his business as hereinbefore mentioned and provided it shall be lawful for the parties of the second part

&c., &c., as in the third paragraph.

From the terms of the instrument it is quite plain that it never was intended that the parties of the second part should have it in their power at any time they pleased, while Francis' debt to them remained unpaid, without any cause whatever but influenced by mere caprice at their own arbitrary will and pleasure, to declare the party of the first part to have become in their opinion incapable of attending to his business, and upon serving upon him a notice to that effect, that it should be lawful for them to take possession of his property and to dispose of it under the powers in the instrument, as the property of a person no longer capable of attending to his business

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It is obvious that when the instrument was executed Francis was deemed to be perfectly capable of attending to his business, and what was intended to be provided for was, the possible event of his falling into a condition different from that in which he then was, of such a nature as in the opinion of the parties to the instrument of the second part to render him incapacitated, that is, made by some cause or other incapable of attending any longer to his business. The only cause which could render a person, perfectly capable of attending to his business, incapacitated from doing so any longer must be a cause physical or mental, so that the incapacity contemplated by the instrument must be one arising from some physical or mental cause having such an effect upon the party of the first part as to render him, in the *bonâ fide* opinion of the parties of the second part, or of one of them, incapacitated from attending any longer to his business. The condition precedent was thus of a twofold character; 1st, that there should be shown to be some change in the condition or conduct of the party to the instrument of the first part, which, 2ndly, in the *bonâ fide* entertained opinion of the parties of the second part, or of one of them, had the effect of rendering the party of the first part incapacitated from any longer attending to his business. I have said "in the *bonâ fide* entertained opinion of the parties of the second part," for it is manifestly not the intent of the instrument that the parties thereto of the second part should acquire a right to exercise the powers mentioned in the instrument upon their merely serving a notice upon the party of the first part that they were of opinion that he had become incapacitated from attending to his business if they in fact and in truth did not entertain the opinion. Whether they did or did not in truth entertain the opinion within the meaning contemplated by the instrument raises a

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question not to be concluded by their simply serving a notice upon Francis stating that they entertained the opinion; the truth or falsehood of such a statement is a matter to be inquired into like any other question of fact and determined by the reasons which may be given in support of the opinion, and by the acts and dealings of the parties professing to entertain the opinion with the person incapacitated in their opinion from attending to his business.

If they can give no reason for their entertaining the opinion which should influence the judgment of rational men acting in good faith, or if their own dealings with the party are inconsistent with their entertaining the opinion, the natural inference to be drawn is that it is not true that they entertained the opinion the actual *bonâ fide* entertaining of which is an essential element in the condition precedent. An opinion to be entertained is, according to all dictionaries of the English language—

the judgment which the mind forms of the proposition, the truth or falsehood of which is supported by a degree of evidence which renders it probable but does not produce absolute knowledge or certainty.

If the parties professing to entertain the opinion that the defendant Francis had become incapacitated from carrying on his business cannot support the judgment they profess to have formed of such incapacity by some such probable evidence as should satisfy rational men of their sincerity in the judgment they profess to have formed, they must abide the natural consequence in such a case of a judgment being rendered to the effect that in truth and in fact they did not entertain the opinion, and that their conduct in the premises is attributable to a wholly different cause, and this is the judgment which, in my opinion, the evidence in this case warrants.

The facts disclosed in the evidence are that from the time of the execution of the instrument of Sep-

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tember, 1891, Francis proceeded with the carrying on of his business as before. He continued purchasing goods from the old firm of Turner, McKeand & Co., who, as the plaintiff Turner says, sold to him for cash only, and from other wholesale dealers upon terms of credit.. Three wholesale dealers who have dealt with him for ten, eleven and twelve years respectively, testify that during all that period there was no change whatever observable in his capacity for attending to his business, that he was a very careful, painstaking honourable, cautious and capable man.

Upon the 30th of June, 1893, however, the Commercial Bank of Manitoba failed. Upon that day the plaintiff Turner, as he himself testifies, went out to Headingly, where Francis carried on his business, to see him with regard to the failure of the bank, because, as he said, Francis had a big discount there and he was afraid that the failure of the bank might get Francis into trouble. He thought that the bank would go to work and crowd a great many people in the country, and that he, Turner, would be the first to move; accordingly, without communication with any of Francis' other creditors, he went out to Headingly, where, at Francis' store there, he heard that Francis was not feeling well; from there he went down to Francis' house and saw him, and "first told him that the bank had failed and asked for an assignment of book debts in the shape of notes or otherwise to cover the Turner, McKeand & Co. account." Turner says that Francis replied that he was not feeling well and that he asked Turner to come again another time, and that he would see him later. Francis, as to this interview, says that Turner came up to the house and asked him for an assignment of his book debts for the benefit of Turner, McKeand & Co. and also to sign a demand note which he had with him, and said:

I see you are a little rattled ; I will not bother you any more to-night,

and then left. Francis says that Turner found him not at all ill, but working at his books. Turner says that his next interview with Francis was on the 12th July, in Winnipeg, when he says he pressed Francis for the covering of the account, the old account, by notes or otherwise, and that after talking together for some little time they arranged that they should go out together the next day to Francis' place to get from him farmer's notes, book debts or whatever he had to cover the account; that they went out together the next morning, and upon arrival at Francis' place he refused to give an assignment of any debts at first. Being asked if he did not ask him for any reason why he had promised the night before, but refused the following morning, he answered :

No, I did not that I know of,

that he did not ask for any reason in direct words, that Francis argued about the thing a little and being asked—

what was the reason for his objecting as far as you could make out ?

he answered—

well I made out, I asked to let my clerk go out there and collect and he demurred to that and I think that was the reason he objected, and after a while we came to an understanding that we would appoint his Mr. Fowler.

Then he says that after a while Francis agreed to assign the book debts and produced his journal no. one—in which Turner wrote and Francis signed the following :—

Know all men by these presents that I, Frederick Henhurst Francis, of the Parish of Headingly, for valuable consideration given by James Louis Turner and Daniel Naismith trading as Turner, McKeand & Co. of the City of Winnipeg (the receipt whereof is hereby acknowledged) do hereby assign, transfer and set over all the accounts in journal number one used as a ledger since 1890, from page twenty-three to

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page four hundred, and do hereby grant and assign accounts and all causes of action now pending to the aforesaid James Louis Turner and Daniel Naismith trading as Turner, McKeand & Co.

and at the foot thereof Turner subscribed the following with the name of Turner, McKeand & Co..

We hereby authorise Mr. Alfred Fowler, of Headingly, our agent to collect above assigned accounts and also give him the right to appoint agents so to do.

At the same time as this was executed Turner says that it occurred to him that he would look after the other commercial creditors of Francis; accordingly that he suggested to Francis that he should give him such a note, and he got from Francis a list of the accounts due, and Francis signed a note prepared by Turner for the above purpose. Turner says that his idea in getting this demand note for the other creditors was that the commercial creditors should come in ahead in case judgment should go against Francis at the suit of the Commercial Bank or any one else. He said that though this is not quite usual, yet commercial men do this to help each other.

As to the above assignment of the book debts Turner says that "it was to be acted upon through Mr. Fowler in a quiet way." Mr. Fowler was to get out a detailed statement of account and appoint his own agent. Mr. Fowler he says "appointed Mr. Francis for the store."

Turner says that he gave Mr. Fowler the right to appoint any one, but that he would naturally infer that he Fowler would appoint Mr. Francis or his son.

He naturally inferred that Fowler would do so because he was an old friend of Francis and had formerly been in partnership with him. His, Turner's, intention was that Fowler should make out detailed statements. He thought he would appoint Mr. Francis, and he requested Mr. Fowler to get statements out as quickly as possible in detail, upon getting which it was Turner's intention, as he said, to send out a col-

lector to go over the country. This is the material substance of Turner's account of what took place on the 13th July when he left and, as he says, did not see Francis again until the 19th, or it may be the 18th August.

Now, with reference to the above assignment of debts, it is to be observed that it professes to proceed upon consideration proceeding from Turner and Naismith, the plaintiffs in this suit, and does not mention even the old debt to show that the assignment was made for the purpose of securing it. No trust purpose whatever is stated; it professes to be an absolute sale and assignment to Turner and Naismith for consideration paid by them. Yet it is perfectly clear that this was not the fact, and that it was executed for some trust purpose cannot be doubted. From Turner's evidence that he at the same time procured from Francis his promissory note for the amounts due to his creditors, other than the Commercial Bank, including the debt due to the old firm of Turner, McKeand & Co., the reasonable inference to be drawn is that these other creditors, equally with the old firm of Turner, McKeand & Co., were to share in the benefit of the assignment, and if they were, as no distinction is made in the assignment between the debts due to those creditors and the old debt due to Turner, McKeand & Co., they should all share alike in the benefit of the assignment. But it cannot be doubted that the assignment was executed upon some trust purpose, and as none is mentioned in the assignment we must collect by parol evidence dehors the instrument what that trust purpose was; we have seen Turner's evidence upon that subject. Now, the evidence of Francis as to what took place on the 12th and 13th July, is as follows: He says that the meeting between him and Turner on the 12th July took place in this wise; that feeling in

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difficulties he consulted with some of his creditors, who advised him to see Turner as one of the largest of his creditors, and talk over his affairs with him; that he accordingly went to see Turner and had a conversation with him at the Clarendon Hotel on the evening of the 12th, during which (to use Francis own language):

> Turner asked me how old my eldest son was? I said eighteen years of age, and he said I might appoint him to collect the accounts—it does not make any difference at all—only a matter of form—and he said, "who do you think would do?" And I said Mr. Fowler knows my affairs pretty well and has been associated with me in business—

The conversation resulted in Francis agreeing to give to Turner a demand note to cover the debts of all the commercial creditors and an assignment of the book debts for the benefit of all the creditors including the Commercial Bank. He said that the object of the demand note was that it might be used in the event of the Commercial Bank endeavouring to garnish any of Francis' debts. He said that they went out on the 13th to Headingly to complete the above arrangenent and that Francis then gave Turner a list of the commercial creditors whose accounts were to be covered by the demand note, the amount of which Turner filled in; and then in the presence of Fowler and his son who were in the store with him he signed the assignment in the journal which Turner himself wrote—and said that he would act as trustee for all the creditors. The journal with the assignment in it was left with Francis in the store. Being asked what understanding if any he had with Turner as to what Fowler was to do he replied—

> Mr. Turner said, to make out a list of the book debts from the journal and get them down to Winnipeg as soon as you can in order that the commercial men may have a list if they want it; and I said: What am I to do with the list? and he said: Who was appointed to look after your affairs? and I said Mr. Redmond and Mr. Whitla, and he said,

give it to Mr. Redmond and he can do with it according to the instructions he has received at the meeting of your creditors—

and Francis added that in accordance with the instructions so given by Mr. Turner the list was made out and given to Mr. Redmond. This is the substance of what took place up to and including the 13th July.

Now as to what took place under the assignment of debts, between the 13th July and the 19th August, Turner says that he knew nothing and made no inquiries, as to what Francis was doing about the book debts. Being asked why he went out again on the 19th August, his answer was that it was on the advice of his solicitor—that they had hunted round every place they could think of (whatever that meant) and his solicitor said it was the best thing to do, to drive out. Accordingly he went out to Headingly and took with him his solicitor and an employee named McLean. When they got to Francis' store they found Francis and Fowler there, and Turner demanded of Francis the book containing the assignment of the debts, and Francis at once peremptorily refused to give it up alleging as his reason that they had been assigned for the benefit of his creditors, whereas Turner was claiming it, and demanded it to be given up for his own benefit. Francis said that he had taken legal advice upon the subject and would not give up the book; in this Fowler supported Francis. The latter thereupon left his store saying that he was going to his house and would be back in three hours when, as Mr. Turner's solicitor understood, he would turn them out, if they should be there I suppose he meant. Then, and for the first time, appears to have been entertained the idea of trying to overcome Francis' persistent refusal to give up to Turner the book containing the assignment of debts, by invoking in aid the instrument of the 10th September, 1891, upon the

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ground or pretense that Francis had within the meaning of that instrument become incapacitated to attend to his business, for then and there the following notice was written out and signed by Mr. Turner and given to McLean to serve, who followed Francis to his house and served it on him there:

It is the opinion of this firm that you are incapacitated from properly attending to business within the meaning of the agreement between you and this firm, dated the 10th September, 1891, and we intend forthwith to take possession pursuant to the provisions of said agreement.

And take notice that our said firm now consists of James Louis Turner and Daniel Naismith jr.

And we hereby demand from you immediate payment of the sum of $4,600, more or less, due and payable to us under the said agreement.

Dated Headingly, Man., August 19, 1893.

TURNER, McKEAND & CO.

To F. H. FRANCIS, Esq., Headingly, Man.

Turner says, that this notice was then written out at Headingly, and being asked if he had had any idea of having it written out before he went out on that day, he replied that he had brought out the agreement of September 1st, 1891, with him intending to act under it "if there was any of this want of business going on," by which he said he meant: "If the business was not going on in a proper way," which he further explained by saying:

I mean to say that business was not run in a proper way if a party makes a big lot of book debts and do not return them and packs away the books and hides them.

Then the evidence of Mr. Turner's solicitor as to what took place on the 19th August after service of the notice on Francis, is very significant and is substantially as follows:

Francis came down to the store about half an hour after the notice was served. He did not say very much, except that he seemed to be indignant and said he was going away and would be back in three

hours ; and as I understood him, he was going to throw us out then. He then went down to his house.

Mr. Turner and his solicitor then went to their dinner at the hotel, and while they were at dinner Francis came and sat down and had a conversation with Turner, during which Turner said—

that he felt himself forced to take this step from the position Mr. Francis had taken about the book debts, and that he had brought a man to collect them ; that his principal object was to assist Mr. Francis and that he still hoped there was some way of Mr. Francis getting out of his difficulties.

They then left the table and walked for miles on the prairie, during which time Turner and Francis were, as he says "discussing the matter in the most friendly way." Francis said that he was afraid

that now, after all these years, the course Turner had taken was going to ruin him.

To which Turner replied,

that he had no wish to ruin him, but to assist him ; that if a man were put in to collect these he thought there might be enough to pay off Turner, McKeand & Co. and leave a surplus for the other creditors, and that he thought if that were done Francis' credit would be improved and that he could get out of his difficulties ultimately.

The solicitor then says :

It was suggested (he does not say by whom) that it might be hard to control the Commercial Bank ; now that it was in liquidation they might proceed to extremities, but Mr. Turner urged and I urged, that it would be much better to carry out the course we intended, which course was, in the first place, to collect the book debts.

After a lot of discussion they got to the store, without arriving at anything definite. Then the solicitor says :

I left Mr. Turner and Mr. Francis in conversation and walked out a little distance, when Mr. Turner came over to where I was, and in consequence of what he said I went back to Mr. Francis and said to him : Mr. Turner says that you would like for us to go out of possession until you can have an opportunity of seeing your creditors.

And the solicitor proposed to him that McLean should remain in possession "until such times

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as might be necessary"; to this Francis objected, it is unnecessary to state the reason alleged. The solicitor then suggested that Francis should take substitution from McLean and so that McLean and Francis should hold joint possession of the stock in trade both for himself (Francis) and for Turner McKeand & Co. The solicitor says:

> I told Mr. Turner in Mr. Francis' presence that I thought there might be some risk in giving up possession and leaving it in Mr. Francis' own possession, but Mr. Francis said no there would be none, that he would undertake that we would be in the same position as we were then on the following Thursday, that no change would be made in connection with the stock; and the book debts were particularly mentioned. Mr. Turner seemed satisfied with this.

Now the plain meaning of all this is that Francis agreed that upon Turner giving up what he called his rightful possession of Francis' premises and property, and which Francis insisted was wrongful, and giving Francis until Thursday the 24th to consult his creditors upon the matter, both parties should upon Thursday at 6 o'clock be in the same position in which they then were, which was nothing more than this that Turner should be in the position of claiming to be entitled to the book debts for his own use independently of the instrument of September 1891, and to be in possesssion of the whole of Francis' property under that instrument subject to the trusts thereof, all which Francis absolutely denied, repudiated and resisted, and that in the meantime Francis should consult his creditors, in whose hands he then was and by whose advice he would naturally act in the premises.

The mode adopted for carrying out this arrangement was that Mr. Turner's solicitor drew out on the back of Turner's appointment of McLean as his agent the appointment by McLean of Francis as his substitute which the solicitor procured Francis, who was without a solicitor present to advise him, to sign

as accepted by him. But notwithstanding such acceptance the fact remains that it was merely assented to for the purpose of securing the result agreed upon, namely, that upon Thursday the 24th August both parties, unless Francis should submit to Turner's demands or to some part thereof, should be in the same position as they then upon the 19th of August were, viz., Turner insisting that he was, as above, entitled to the book debts irrespective of the agreement of September, 1891, and also that he was in legal possession of Francis' property under the agreement of 1891, subject to the trusts thereof, and Francis denying that Turner had any such right, title or possession and asserting that on the contrary Turner was a trespasser upon Francis' premises and property.

The evidence of Francis as to what took place between the 13th July and the 19th August, and upon the latter day, is that he delivered to Mr. Redmond, as it had been agreed with Turner that he should, a list of his liabilities and that shortly afterwards he received a parcel of postal cards of which the following is a sample:

WINNIPEG, MAN., 13th July, 1893.

DEAR SIR,—We beg to notify you that Mr. F. H. Francis of Headingly, has assigned his account against you amounting to $ to us and that you are requested to make payment either to Mr. Alfred Fowler of Headingly, our agent, or his agent, at Mr. Francis' store at once.

TURNER, McKEAND & CO.

Upon receipt of these cards he took them into Winnipeg to consult with Mr. Redmond and Mr. Whitla, two of his creditors, who at a meeting of his creditors held prior to the 13th July were appointed a committee to interview the liquidator of the Commercial Bank and under whose advice he was acting. He was advised by his creditors not to distribute the post card circulars, for that if he did Turner might thereby obtain an advantage.

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Accordingly acting upon the advice of his creditors he did not distribute the post cards and he told Turner that he had not sent them out and did not intend to do so. This took place about three weeks after the 13th July.

Then he says that about a week before the 19th of August there was a meeting of his creditors at Mr. Whitla's office at which Mr. Turner was present; at that meeting Mr. Turner addressing the other creditors said:

> Perhaps gentlemen you don't know that I hold an assignment of Mr. Francis' book debts here in my pocket, and it is for Turner & McKeand.

Thereupon Mr. Bethune, a creditor, got up and said:

> Well, that is not what you told me about that Mr. Turner; you told me that it was for the benefit of all the creditors.

Mr. Bethune, who has been examined as a witness in the case, swore that Mr. Turner did inform him that he had got an assignment from Mr. Francis, and that he held it for the benefit of his, Francis', creditors; and he added that Turner said that his main object in taking the assignment was to protect the debts from garnishing proceedings, if such should be taken by the Commercial Bank.

Mr. Redmond was also sworn as a witness in the cause, and he stated that Mr. Turner informed him that he had taken the assignment of the book debts, but that he had taken it in trust for all the creditors outside of the Commercial Bank.

That he did so take it is in truth quite consistent with the form of the assignment, as already shown, which did not state for what trust purpose it was made; although written by Turner himself it did not state that it was taken for his benefit or for that of Turner, McKeand & Co. The purpose for which it was taken was left open to be established by evidence, and Turner's own admission of the purpose for which

it was made by Francis, and accepted by him, should be in itself conclusive against him, apart from the evidence of Francis.

Then Francis says that he saw Turner, in Winnipeg, on the afternoon of the 18th August, and that then, for the first time, Turner asked him for the book (by which I understand him to mean the book containing the assignment) "for the firm of Turner, McKeand & Co.," and he said he was going to send a man out to collect, whereupon Francis asked him what he was going to do with the proceeds, to which he replied:

I am going to collect them for Turner, McKeand & Co.

To which Francis answered:

If you send a man out in that way, you will force me to do a thing that all will regret.

By this, of course, he meant that he would make an assignment. To this Mr. Turner said:

Don't do anything to-night and I will come out on Saturday afternoon (the next day) and we will talk over affairs and come to a satisfactory arrangement all round.

And I, he says:

then agreed that I would not make an assignment until after he had a conversation with me on the 19th.

In the morning when he went to his store he found Mr. Turner and his solicitor there, they having come out the night before. Then Turner made a demand for the book and Francis refused to give it, and shortly afterwards the notice was served as already stated in the other evidence.

The evidence of the solicitor already given is abundantly sufficient in itself to show that in the arrangement made by him with Francis it was never intended or supposed, that by signing as "accepted" the paper signed by McKeand, Francis should be deemed to be departing in the slightest degree from the attitude of determined resistance to the action of Turner in his

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attempt to take possession of his premises and property; but it may be well in closing the evidence to give Francis' evidence upon this point as showing his understanding of the matter, and of the position in which he felt himself to be, unassisted as he was by any legal advice. Being asked why he did mark that paper as "accepted," he replied, that he did it to get them out of the store, that he was there perfectly helpless. That he told them he would eject them from the store, and that Mr. Darby, Turner's solicitor, said to him: "if you dare do that you will do so at your own risk, now I warn you." That it was Saturday afternoon, he added, and he had no chance of coming into Winnipeg to consult any one, because the lawyers would be away on Saturday afternoon, and he knew the other creditors' stores would be closed and he made up his mind that he would go and see the other creditors and his solicitor in connection with the seizure, and he said further, that he had a talk with Mr. Turner after the service of the notice upon him, and that he said to him that if he would give Francis his guarantee that he would act for the benefit of the creditors, he might take the book and the stock and his house and everything he owned, that he did not wish to keep anything for himself, that he was in the hands of his creditors and dared not give him, Turner, any preference if he wanted to. He wanted an opportunity to come down to Winnipeg to see his other creditors and a lawyer, and so he signed saying: "It does not prejudice me or prejudice you, we will all be in the same position if nothing is done in the meantime, because I will not dispose of the stock." So things remained in *statu quo*; he went into Winnipeg consulted the other creditors and his lawyer; and when Turner came on the 24th and demanded the books and said also that he had come under the agreement of September 1891, he told Turner that he had no books

to give him, and when closing his store at 6 o'clock in the evening he turned him out of the store and retained undisputed possession of his property until the 28th August when he made the assignment to Bertrand for the benefit of his creditors.

Now from all this evidence it is apparent that up to the last moment Turner was dealing with Francis as a person perfectly capable of attending to his business; and indeed it is impossible to avoid drawing from the evidence as given by Turner himself, the inference that it was because of Francis' capacity to attend to his business, and his persistent refusal to place Turner in a position which would enable him to claim the right of applying to his own benefit the assignment of the debts which Francis had made to Turner, McKeand & Co. upon the express agreement, as he insists, and as Turner himself admitted to Mr. Bethune and Mr. Redmond, that they would hold the assignment of the debts in trust for the benefit of his Francis' creditors, that induced Mr. Turner to have the notice served upon the 19th August, and not any *bonâ fide* belief in the assertion made therein that in the opinion of his firm Francis was incapacitated from attending to his business within the meaning of the instrument of September 1891.

The assignment of book debts which was made upon the 13th July 1893, was not made or asked to be made in virtue of that instrument. There can be no doubt entertained upon the evidence that, in point of fact, that assignment was made with intent that the assignees Turner, McKeand & Co. should hold it if not for the benefit of all the creditors alike as sworn by Francis and admitted by Turner himself to one of Francis' creditors, at least for the benefit of all outside of the Commercial Bank as stated by Turner to another of such creditors. To the last moment Turner was insist-

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ing however upon getting the book containing the assignment into his possession with the declared intention of using it for the exclusive benefit of his firm, although if Francis was really, in the *bonâ fide* opinion of the firm, incapacitated within the meaning of the instrument of September 1891, they would have been as much entitled to the book debts as to any other property belonging to Francis under that instrument.

The only possible conclusion to be drawn from the evidence and from Turner's own conduct in the premises throughout is that in point of fact he did not and that his firm did not upon the 19th August 1891, when the notice was served, or at any time, entertain within the meaning of the instrument of September 1891, the opinion that Francis was, within the meaning of that instrument, incapacitated from attending to his business; and that the notice was served in the hope and expectation, by the false pretence that Turner's firm did entertain the opinion therein expressed, to obtain thereby an undue advantage over the other creditors of Francis whose persistent resistance of which attempt, in the interest of his other creditors, was perfectly justifiable and commendable.

Assuming therefore the old firm of Turner, McKeand & Co. to be still in existence, and the powers conferred by the instrument of September 1891, to be unlimited in duration, there is nothing shown in evidence to displace the right of Bertrand to any part of the property expressed in the indenture of the 28th August 1893, to be assigned to him by Francis.

The appeal therefore must be allowed with costs and judgment be ordered to be entered for the defendants in the court below and for return to the defendant Bertrand of any of such property as may, if any does, remain unsold, and for payment to him of the moneys realised from the sale of such as has been sold.

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I have not thought it necessary to inquire whether the new firm of Turner, McKeand & Co., consisting of the plaintiff Turner and Naismith, have any interest whatever in the premises under the instrument of September 1891, although if it had been necessary I may say that I can see nothing in the evidence which shows that Martindale, one of the parties to that instrument, ever parted with, or that the new firm ever acquired, his interest in the old debt of $5,259, and yet the instrument of September 1891, provides, from a superabundant excess of caution, that the powers conferred thereby upon the old firm should not be vested in any new firm formed by substitution or addition unless such new firm shall have assumed the debt due by Francis. However, as already said, this is in my opinion, for the reasons above given, immaterial now.

SEDGEWICK J.—In concur in the judgment of Mr. Justice King.

KING J.—This is an appeal from a judgment of the Court of Queen's Bench for Manitoba in favour of the plaintiffs in an action of replevin. The case turns upon the right of plaintiffs to take possession, as security for a debt, of a stock of dry goods, etc., belonging to defendant Francis.

It appears that, in the year 1890, Francis became insolvent. Amongst his creditors was the firm of Turner, McKeand & Co. of Winnipeg, then composed of Turner and one Martindale, to which firm he owed, for goods sold, the sum of $5,259, upon promissory notes then overdue. An arrangement was then made, with assent of all creditors, to the effect that the creditors, other than Turner, McKeand & Co., should accept a compromise of their claims at about 50 per cent. to be secured by promissory notes of Francis, indorsed by

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Turner, McKeand & Co., and that the latter firm should be paid in full, but that the payment of their claim should be postponed until the 1st day of December, 1892. Accordingly, Turner, McKeand & Co. gave their indorsements, amounting in the aggregate to $3,631. In consideration of all this they were to have certain security, the character of which was expressed in an agreement under seal made on the 10th day of September, 1891. By this it was, *inter alia*, covenanted and agreed that, in the event of Francis' death, or in case he should at any time, in the opinion of the parties of the second part (Turner and Martindale), or either of them, from any cause become incapable of attending to his business, then, and in either of such cases, the said sum of $5,259 should become due, although the 1st of December, 1892, might not have arrived, and the amount of the indorsements should at once become payable, although the notes might not be due or might be in other hands.

It was also provided that in the event above referred to a notice in writing, signed by the firm name, stating that, in their opinion, Francis was so incapable, should be served upon him, or left at his usual place of abode, and that such notice so served, and the date of such service, should be and determine the date of such incapacity.

It was further agreed that forthwith, upon the death of Francis, or upon his becoming incapacitated from attending to his business as thereinbefore mentioned and provided, it should be lawful for Turner, McKeand & Co., their agents, etc., or either of them, to enter into and upon, and to take full and complete possession of, all the personal property, stock in trade, book debts, real estate, credits and effects of Francis, and to keep and hold possession, and proceed with all reasonable dispatch to sell and dispose of the same, and out of the

proceeds to satisfy the amounts due under the agreement, repaying to Francis any surplus, etc.

It was also agreed that, in case of a change in the firm of Turner, McKeand & Co., the agreement and security should enure to the benefit of the members of the firm as changed, provided that the latter firm should have assumed the liabilities of the old one as indorsers as aforesaid, and should also have taken over the indebtedness of Francis to the old firm.

After the completion of this transaction, Francis continued on in his business at Headingly, a place about 12 miles from Winnipeg, and from time to time reduced the aggregate amount of Turner, McKeand & Co.'s contingent liability upon the indorsed notes.

On the 1st December 1892, the amount due Turner, McKeand & Co. for goods sold became payable, but it was not paid, and it does not appear that they pressed for payment. By September following, the sum was reduced from its original amount of $5,259 to about $4,600.

On 30th June, 1893, Martindale retired from, and Naismith entered, the firm which continued on under the same name. It does not appear that the new firm became indorsers of the Francis notes, although the evidence leads to the inference that it took over the indebtedness of Francis to the old firm for goods sold.

About the same time a local bank with which Francis dealt, and to which he was indebted, went into liquidation, with the result that Francis was obliged to lay the state of his affairs before his creditors, when it was seen that he was in an embarrassed condition, and a couple of his creditors were appointed to advise with him. This was about the 13th July.

Before that time, and soon after the failure of the bank, Turner, McKeand & Co. apprehending that the bank might take proceedings for the recovery of its

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claim, persuaded Francis to assign the book debts to them. This was done or attempted by a memorandum entered in one of Francis' books of account. Turner, McKeand & Co. upon this, sent out to Francis printed forms of notice of assignment to be filled up and sent to the several debtors. Francis, fearing the effect of this upon his other creditors, under whose directions he was then acting, did not send out the notices, but notified his other creditors, and, on inquiry of Turner McKeand & Co., told them that he had delivered some of the notices, implying that he had delivered them to the debtors, but secretly having reference to the delivery to his creditors.

On 19th August Turner, accompanied by his solicitor and a clerk named McLean, went out to Headingly and demanded the book containing the assignment of the book debts. Francis refused, and then Turner caused the following notice to be served:

It is the opinion of this firm that you are incapacitated from properly attending to business within the meaning of the agreement made between you and this firm, dated the 10th September, 1891, and we intend forthwith to take possession pursuant to the provisions of said agreement. And take notice, that our said firm now consists of James Louis Turner and Daniel Naismith, jr., and we hereby demand from you immediate payment of the sum of $4,600 more or less due and payable to us under the said agreement.

Dated Headingly, Man., Aug. 19, 1893.

(Sgd.) TURNER, McKEAND & CO.

To F. H. FRANCIS, Esq.,
Headingly, Man.

Turner forthwith took possession of the premises and of the stock of goods, etc., and placed McLean in charge. Francis protested, but apparently did not raise the question of his alleged incapacity, and afterwards, upon the same day, with the assent of Turner, accepted possession from McLean under an appointment in writing (accepted in writing by Francis), by which Francis was to act as a substitute of McLean under

Turner, McKeand & Co., and to hold jointly with McLean until the 24th August, up to the hour of 6 p.m.

Turner and his party, including McLean, then returned to Winnipeg, and on the 24th August went back again to Headingly to resume personal possession. Francis, however, disputed his right, and with aid of superior force ejected Turner. Two days afterwards he made an assignment to Bertrand, the official assignee, in trust for the benefit of all his creditors. Bertrand went into possession and so remained until 22nd September, when the proceedings in replevin were begun, and in a few days afterwards an agreement was come to, under which Bertrand sold the property for benefit of whom it might concern.

Upon trial of the action before Taylor C.J. judgment was given against Francis, but in favour of Bertrand. On appeal plaintiffs were held entitled to recover against both.

The contention on the part of Bertrand was that there was no evidence of a joint conversion. On this point the reasons of the learned judges in appeal satisfactorily show that, if there was a conversion at all, Bertrand is jointly liable with Francis.

Upon the main point, viz., as to plaintiffs' right to the goods, the chief contention of appellants is that the event had not arisen warranting the plaintiffs to take possession, because that, as contended, the alleged opinion as to Francis' incapacity to attend to his business was not a real, but merely a pretended opinion; and further, that the notice was not such as the agreement provided for, inasmuch as it purported to be the opinion of Turner and Naismith, while the latter had in the circumstances no power to act in the matter.

It was argued that the language used in the agreement in authorizing the taking possession, required that there should be incapacity in point of fact, but

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the words of reference "as hereinbefore mentioned and provided," bring down and incorporate the qualification that the incapacity is to be determined by the opinion of Turner, McKeand & Co. Of course this means an honest opinion, one that is real and not pretended. But if honest it governs, even although mistaken in point of law or fact, illogical or inconclusive. The essential thing is that there shall be an honest determination of the thing to be determined. And the right to judge extends to everything that enters into the formation of the honest judgment. In language quoted by Mr. Justice Killam from *Allcroft* v. *Bishop of London* (1), Lord Bramwell says:

> If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him.

In a fair sense a man may be said to be incapable of attending to his business when he is not able to give to it the attention that it reasonably requires. This may arise from a number of causes differing in kind, *e.g.*, from illness affecting mind or body, from state of health not amounting to illness, from physical restraint or absence, from intemperate habits, from undue attention to outside matters taking the mind unduly from the particular business, or from any cause operating upon the individual materially impairing his efficiency as a business man. The agreement extends to incapacity however caused, and therefore covers different degrees of incapacity, for the nature and degree of incapacity varies with the cause. The plaintiffs had assumed large obligations for Francis, and while they seemed content with his personal responsibility, so long as he appeared to them able to apply himself efficiently to his business they sought to protect themselves from loss in case, at any time, he should, in their opinion, from whatever cause become

(1) [1891] A.C. 666.

inefficient or incapable. But, however caused, the incapacity must be such as to materially affect efficiency and injure the business, or be calculated to do so.

Then, did plaintiffs come to an honest and real opinion as expressed in their notice of August 19th? The learned Chief Justice has found that they did, and the Court of Queen's Bench has unanimously agreed that the finding ought not to be disturbed.

There would not appear to be much doubt that Turner was moved to give the notice because of his failure to get the books from Francis. This is the conclusion upon the whole evidence, and is also established by the evidence of his solicitor, Mr. Darby, who says that, in the conversation that took place with Francis after the seizure, Mr. Turner said that he had felt himself forced to take this step from the position that Mr. Francis had taken about the book debts; that he expected to get the book debts and that he had brought a man up to collect them. But strictly this merely means that he would not have resorted to extreme rights of seizure, etc., if he had received certain security.

The learned counsel for defendants properly pressed Turner closely for the grounds of his opinion that Francis was incapable. And indeed it was to have been expected that one who was authorized to form an opinion and did claim to have formed it, and who certainly acted as having done so, should have been able to give some reasonable ground for his alleged opinion, if it was a real opinion.

Disengaged from irrelevant matter, what he says is about as follows, and in his own language:

I think he is incapacitated from properly attending to his business and was so for some time. * * * His business ways lately to me were not satisfactory in many ways. * * * Both in the way he was worrying himself in not getting enough of goods, and his neglect

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of business matters. * * * Not only in the way of not paying notes, but in not collecting properly from his customers, and from the talk of others I judged that I had better look after myself. * * * He wasted too much time coming into Winnipeg. * * * I thought it was to buy a small jag of goods.

The following questions and answers are then put and given:

Q. These are the only objections you had to him? A. I haven't got any more to say about it.

Q. So that it was as much his financial incapacity that you objected to as anything else? A. No, it was the way the man is worn down by worry. He is generally unfit for business.

If Turner is to be believed in this, and if he, rightly or wrongly, honestly thought that Francis was worn down by worry, and generally unfit for business, of which his (in Turner's opinion) loose business methods, waste of time over small matters, financial embarrassment, and the placing of himself in the hands of his creditors and accepting their direction, may be thought to be signs, it cannot be said that Turner had so little ground for his conclusion that Francis' efficiency as a business man had become materially impaired, that we cannot suppose him to have been honest in the conclusion he professes to have reached.

The following passage from the judgment of Mr. Justice Killam appears to put the case very concisely:

Bad judgment or improper management would not constitute incapacity, but to a business man having the opportunity of observing the party they might not unreasonably, according to circumstances, indicate that the party was incapable, to a serious extent, of attending to the business. Mental worry, due to business troubles or to other causes, might easily affect a business man so as to make his attention to business fitful and partial, so as to prevent his bringing to bear upon his business his full mental and physical powers.

Next, as to the notice; the agreement authorized either of the original members of the firm to form the opinion and give the notice. Turner clearly formed the opinion, (if one was formed at all), and the notice

manifestly purports to express and convey it to Francis. There could have been no question in Francis' mind at the time, that Turner was an active promoter of what was being done.

For these reasons, which are substantially those given below, the conclusion of the Chief Justice at the trial ought not to be set aside, except as varied by the Court of Queen's Bench, and this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *W. F. McCreary.*

Solicitor for the respondents: *J. W. E. Darby.*