EZEKIEL McLEOD, ASSIGNEE OF JEWETT & CO. ..... } APPELLANT ; 1879 *June 2, 3.

AND

THE NEW BRUNSWICK RAILWAY COMPANY ..... } RESPONDENTS. 1880 *Feb'y. 3.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Construction of agreement—Property in lumber—Ownership and control of lumber until payment of draft given for stumpage under the agreement.*

The respondents, owners of timber lands in *New Brunswick*, granted to *C. & S.* a license to cut lumber on 25 square miles. By the license it was agreed *inter alia:*

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

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"Said stumpage to be paid in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes, or other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid.

"And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid.

"And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages."

For securing the stumpage payable to respondents under this license *C. & S.* gave to the respondents a draft upon *J. & Co.*, which was accepted by *J. & Co.*, and approved of by the respondents, but which was not paid at maturity. After giving the draft *C. & S.* sold the lumber to *J. & Co.*, who knew the lumber was cut on the plaintiff's land under the said agreement. *J. & Co.* failed, and appellant, their assignee, took possession of the lumber and sold it.

*Held*—Per *Strong*, *Taschereau* and *Gwynne*, J. J., (affirming the judgment of the court below,) *Ritchie*, C. J., and *Fournier* and *Henry*, J.J., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to *C. & S.* im-

mediately upon the receipt by the company of the accepted draft of *C. & S.* on *J. & Co.*, and that appellant was liable for the actual payment of the stumpage.

The court being equally divided, the judgment of the court below was affirmed.

THIS was an appeal from the Supreme Court of *New Brunswick* on a special case submitted to that Court, as follows:—

"The *New Brunswick Railway*, plaintiffs, and *Ezekiel McLeod*, assignee under the Insolvent Acts of 1869 and 1875 of the estate of *Edward D. Jewett* and *George K. Jewett*, insolvents, defendant. The plaintiffs, being the owners in fee of certain lands in the County of *Madawaska*, granted to *William H. Cunliffe* and *S. Walter Stephens* a license to cut lumber thereon, of which license a copy is hereunto annexed, marked "A."

"The said *Cunliffe* and *Stephens* under such license entered upon the lands of the said plaintiffs therein described, and cut thereon a large quantity of lumber, viz., 2,819,450 superficial feet of spruce logs, and 169,820 superficial feet of pine logs. That the quantity of such lumber was scaled by a person appointed by the said plaintiffs, and a return thereof duly made to them. That the correctness of such scaler's return was admitted by the said *Cunliffe* and *Stephens*. That the stumpage payable to the said plaintiffs for such lumber amounted to the sum of two thousand nine hundred and nine dollars and nine cents ($2,909 09), and for securing the payment of the same on the 15th day of July, 1875, in terms of the said license, the said *Cunliffe* and *Stephens* gave to the said plaintiffs a draft of date the 29th of April, 1875, in favor of *Alfred Whitehead*, Esq., the land agent of said plaintiffs, or order, upon the firm of *E. D. Jewett & Co.*, of *Saint John*, for the said sum of $2,909.09, of which draft a copy is hereunto annexed, marked "B."

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"That the said *E. D. Jewett & Co.*, upon whom the said draft was drawn, duly accepted the same. That the said *Alfred Whitehead*, land agent for the said plaintiffs, accepted and approved of the said security for the said plaintiffs, and endorsed the said draft to the *Bank of British North America, Saint John*, for the purpose of making collection of the amount of the said draft for the said plaintiffs. That on the 15th day of July, A. D. 1875, when the said draft became payable, it was duly presented for payment, and payment thereof was refused, the said draft dishonored, and notice of such dishonor duly given. That the said *E. D. Jewett & Co.* claim that, after their acceptance of the said draft of the 29th day of April, 1875, and prior to the 15th July, 1875, the said *Cunliffe* and *Stephens* made a sale and delivery to them, and the said *E. D. Jewett & Co.* paid for the same before the said draft (a copy of which is hereunto annexed, marked "B.") matured, the said *E. D. Jewett & Co.*, both at the time they accepted the said draft and got such delivery, being fully cognizant that the said lumber had been cut on the lands of the said plaintiffs under the said license, marked "A." That after the said sale and delivery of the said lumber to the said *E. D. Jewett & Co.*, and before the said draft matured, the said lumber, cut under the said license, was driven into the *Fredericton Boom*, so called, and was held by the *Fredericton Boom Company* for the said *E. D. Jewett & Co.*, until after the said 15th day of July, 1875, under an order given by the said *Cunliffe* and *Stephens*, dated the 18th day of June, 1875, a copy of which order is hereunto annexed, marked "C." That on the 13th day of October, A. D. 1875, the estate of the said *E. D. Jewett & Co.* was placed in compulsory liquidation under the Insolvent Acts of 1869 and 1875, and the defendant,

*Ezekiel McLeod*, was appointed by the creditors the assignee to the estate of the said insolvents. That the said lumber, cut under the said license, was taken possession of by the said defendant as part of the estate of the said insolvents, and has since been sold and disposed of absolutely by him as such assignee. That the proceeds of such sale are still in the hands of the said defendant, as such assignee, and amount to much more than will pay the said sum of $2,909.09 and interest. That the said plaintiffs have never been paid the said sum of $2,909.09, the amount of their said stumpage. That the said *Edward D. Jewett* and *George K. Jewett* constituted the members of the said firm of *E. D. Jewett & Co.*

"Upon the aforegoing facts the plaintiffs claim that the property and right of property in the said lumber has always remained in them the said plaintiffs, and that when the defendant, as such assignee, sold the said lumber, he converted the property of them the said plaintiffs. The defendant, as such assignee, denies, that under the aforegoing facts, the property in the said lumber remained in them the said plaintiffs, and contends that when the said draft of the 29th of April, 1875, was accepted by the said *E. D. Jewett & Co.*, the plaintiffs right of property in the said lumber was divested.

"Should the Court be of opinion that the plaintiffs' right of property in the said lumber would continue until payment of the said draft, given to secure the said stumpage, their judgment to be entered for the said plaintiffs, with costs and damages to be assessed at $2,909.09, with interest thereon from the 15th July, 1875, should the court be of opinion that the plaintiffs are entitled to the interest as damages. Should the Court be of opinion that, upon the acceptance of the

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said draft by the said *E. D. Jewett & Co.*, the plaintiffs were thereby divested of their right of property in the said lumber, then judgment to be entered for the defendant with costs."

The parts of the license referred to in the case which bear particularly on the questions raised, are as follows: After providing for the landing of the lumber in a suitable place, for scaling part thereof, and for hauling it, it is then to be taken to market as early as practicable, the first stream-driving or rafting season after being cut. In cutting and managing said lumber while in their possession, grantees will not, directly or indirectly, conceal from the scaler, or *dispose of* any of the timber, logs or lumber, of any kind, until all dues, stumpage and damages are paid *or secured, without the consent of the said company in writing*, otherwise they shall forfeit the whole of the lumber cut under this contract.

"It is hereby agreed that the said grantees shall pay the said company, at the time of executing this license, a mileage rate of ten dollars per square mile of the entire area of the land hereby licensed. It is also further agreed that the said grantees shall pay the said company as stumpage one dollar per thousand superficial feet for all the spruce logs and $2 per thousand superficial feet for the pine logs, and at the said company's scale of rates of stumpage for the present season for all such other lumber as they may cut on the said lands hereby licensed or permitted, said stumpage to be paid in the following manner: Said company shall first deduct, from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by him as aforesaid, and the whole of the remaider, if any, shall, not later than the 15th April next, be secured by good indorsed notes, or

other sufficient security, to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license *shall be settled and adjusted*, and all sums due or to become due, for stumpage or otherwise, *shall be fully paid*, and any and all damages for non-performance of this agreement, or stipulations herein expressed, *shall be liquidated and paid*. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be *paid or secured* in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of the said lumber, wherever or however situated, and to absolutely sell and dispose of the same, either at private or public sale, for cash, and after deducting reasonable expenses, commissions, and all sums which may then be due or may become due, from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages."

The paper marked B, which was annexed to the said special case, was as follows:

"*Middle St. Francis*, April 29th, 1875.

"$2,909.09.

"On twelfth day of July next, please pay *Alfred Whitehead*, or order, the sum of twenty-nine hundred and

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nine dollars and nine one-hundredths, and charge the same to account.

Yours truly,

"*Cunliffe & Stephens.*"

"To Messrs. *E. D. Jewett & Co.*,

"Indorsed,

*Saint John, N. B.*"

"Pay the Manager Bank of *British North America*, *St. John*, or order.

"*A. Whitehead.*"

The paper marked "C," annexed to the special case, was as follows:

"*St. John, N.B.*, June 18th, 1875.

"*W. H. S. Estey*,

"Dear Sir,—You will please raft and deliver to Messrs. *E. D. Jewett & Co.* all logs marked as usual, the lumber being their property, and oblige,

"Yours truly,

*Cunliffe & Stephens.*"

On this case the Supreme Court of *New Brunswick* held "that the respondent's right of property in the said lumber continued until payment of the draft given to secure the stumpage," and directed judgment to be entered for the respondents, with costs and damages to be assigned at $2,909.09, with interest thereon from the 15th July, 1875.

Mr. *Weldon*, Q. C., for appellant:

By the agreement set out in the special case, the payment for stumpage is to be in cash, or by security in one of the modes expressed in the agreement.

It is not claimed by the respondents that all matters and things appertaining to or connected with the license had not been settled and adjusted by the draft of $2,909.09 on the 29th day of April, 1875, and it is admitted that this sum was secured in one of the modes

expressed by the agreement, and the security was accepted and approved by the company. Now, the moment this sum was secured to the company, I contend the property in the logs passed to the grantees.

The clauses are all inconsistent when read separately, but if you read the whole agreement, it is clear the intention of the parties was that security approved was equivalent to payment. If stumpage is once secured it is immaterial to the company what became of the property, they got their security, and the *jus disponendi* was in the grantees. If otherwise, how inconsistent the agreement would be.

The plaintiffs having received in April security payable the fifteenth day of July passed that security beyond their control by endorsement to the *Bank of British North America.*

The grantees were to have power at any time after the dues were secured (*i. e.*, after the fifteenth day of April), to dispose of the lumber. But to make an effectual sale the note or acceptance must be first paid. Say a sale was made the first of June. How could the purchaser pay the company? The grantees owed the company nothing; they, after the endorsement, owed the *Bank of British North America.*

The company could not receive the payment and release the grantees from the claim of the *Bank of British North America.* The latter could not be compelled to receive payment until the fifteenth of July. Was the purchaser not the owner of the property? If not the owner, could he sell? could he transfer? could he ship the lumber?

If the company continued owner after the security was given, or held the lumber, why was the security required?

Or was it intended that if they got the logs to market early, they must remain idle till the 15th of July?

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No doubt there would be great force in the contention of the respondent if the clause retaining the ownership stood by itself, but by reading it in connection with the whole agreement there is no doubt the respondent's control over the property ceased after the 25th April, if the stumpage was then secured. The company had to approve of the security, and they could insist on undoubted security. The delay till July arises out of the fact of a note being taken, and cannot affect the *jus disponendi*.

Mr. *Thomson*, Q. C., followed:

This agreement must be read as a whole. *Cunliffe & Stephens* would have no object in moving this lumber before July if they had no power to dispose. At that time the acceptance of *Jewett & Co.* was equivalent to gold. What was the necessity of approving of the security, if it was not to be synonymous with *payment*. If they could not refuse the note then there would be force in arguing it was not a payment.

Moreover, the circumstances under which the company are to have power to take and sell, are expressly stated, and, upon the principle of *expressio unius exclusio alterius*, the express excludes an implied power, the express power is given only when the sums payable are not *paid* or *secured*, and this applies only to a time and as to such sums for which the licensee could require the company to accept security, but the licensee could not, when the endorsed note fell due, require the company to accept security for it, and therefore the express power could not be exercised on default of the payment of the said note.

Another point also is that the agreement set out in the special case, so far as it gives the exclusive right to cut, operates as a license; so far as trees are cut under the agreement it operates as a grant of and passes the property in the trees to the grantees, so soon as all

matters and things appertaining to or connected with the license are settled and adjusted, and all sums due for stumpage are fully paid, and any and all damages for non-performance of the agreement or stipulations therein expressed, are liquidated and paid.

Mr. *Wetmore* for respondents:

In construing this agreement we must bear this in mind, that the trees belonged to the company, the right of property could only be divested by their own consent, and whatever agreement they choose to make is a good agreement. Now, the right of property in any lumber cut under this license was to remain in the respondents, who were to retain full and complete ownership and control of the same wherever and however such lumber might be situated, until all matters and things appertaining to or connected with the license should be settled and adjusted, and all sums due or to become due for stumpage or otherwise should be fully paid, and any and all damages for non-performance of the agreements in the license or stipulations therein expressed should be liquidated and paid.

The draft upon *E. D. Jewett & Co.* was taken as security only: the license provided that it might be so taken: how then can the appellants, under the facts, claim that it was either given by *Cunliffe & Stephens* or accepted by the respondents as payment for the stumpage? There is nothing to support their contention in this respect.

The words are *due* or *become due*. Surely the money does not *become due* for stumpage until the 15th July, and is not the reservation of the right of property clear and unequivocal as words can make it? Until it is removed from the brows the right of property is held by virtue of a prior clause in the agreement. What is the sense of this clause, then, if, when the lumber is removed from the landings, which is only when the

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security is given, the absolute property vests in the licensees? Does it not clearly intend they shall hold their property until the security is paid?

The words "paid or secured" relied on by appellant in the first part of the contract are not to govern the rest of the contract, but are rather to be governed by the rest of the contract. The whole scope and intention of the license is this: If before either paying or giving security the lumber is disposed of, a forfeiture is worked. If the party instead of giving security, chooses to pay and the company to accept, there is an end to company's right of property. If security is given the company retains the right of property until it is paid, and any disposal that the licensee makes after that must be subject to such right of property. It cannot be successfully denied but that on reading the whole agreement this is the intention of the parties.

The special case, as Judge *Duff* puts it, recognizes that the note was given as security and not as payment, viz.: "That the stumpage shall be paid in the following manner, namely, by deducting a sum equal to the mileage already paid; and the whole of the remainder shall not, later than the 15th day of April, be secured by good endorsed notes or other sufficient security, payable on the 15th July next; and until the stumpage is so secured as aforesaid, the lumber cannot be removed from the brows.

The respondents also contend that the appellant, who must stand in the same, but who cannot stand in any better, situation than *E. D. Jewett & Co.*, of whose estate he is assignee, is bound by their knowledge that the draft accepted by them was for the stumpage of the lumber cut under the said license, of the terms of which license they were fully cognizant, and therefore, unless the taking of such draft as security was a virtual release of the respondents right of property in the lumber, they

cannot set up that they were purchasers without knowledge that under the license the respondents ownership of the lumber could not be divested until all sums to become due for stumpage should be fully paid, for they well knew that, until the draft for the amount of the stumpage accepted by them was paid, all sums to become due for stumpage could not be paid.

Mr. *Thomson*, Q. C., in reply.

RITCHIE, C. J.:

[After stating the special case, and reading the parts of the license above given, proceeded as follows:]

These provisions, which in the license are not in immediate consecutive order, but respectively at the beginning, in the middle, and at the end of the contract, must be read and reconciled as if in immediate connection one with the other, and from the whole read together, and not from either separately, must the intention of the parties be sought and discovered in respect to the settlement for and payment of the stumpage. Thus, immediately preceding the first reference to any satisfaction of the stumpage, we find that the lumber having been "cut and landed in a suitable place for scaling," and marked as provided, it is to be taken to market as early as practicable the first stream driving or rafting season after being cut, and we naturally ask why that provision should be made for getting it to market as early as practicable if it was not contemplated that when it reached the market it might, under the subsequent provisions of the license, be in a position to be disposed of when at the markets? That this was so, the provisions as to the "managing" or dealing with the lumber, while in the grantees' possession, would seem very distinctly to indicate, for they are not directly or indirectly to conceal from the scaler, *or dispose* of any of the timber, logs, or lumber of any kind,

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until all dues, stumpage and damages are paid *or secured*, without the consent of the company "in writing." Is not the irresistible inference from this language that if all dues, *stumpage* or damages are paid *or secured* they then might, without consent of the company, *dispose* of any of the property? If the right of the grantees to deal with the property rested on this clause of the contract, is there room for any, the slightest, doubt that when the dues, stumpage, or damages were either paid *or* secured, the disposing powers of the grantees accrued; let us then see if the exercise of their apparent right to dispose is controlled by the subsequent provisions of the license. The next reference to the stumpage is preceded by a provision for a payment of $10 per square mile at the time of the execution of the license, and as to stumpage, $1 per 1,000 superficial feet for spruce and $2 for pine, said stumpage to be *paid* in the following manner; the company to deduct from the amount of stumpage an amount equal to the mileage paid:—

> And the whole of the remainder, if any, shall be *secured* by good endorsed notes or other sufficient security to be approved of by the said company, and payable on the 15th July next, and the lumber is not to be removed from the brows or landings till the stumpage *is secured as aforesaid.*

Now, if this is read in connection with the clause before referred to, must not the words, "to be paid in the following manner," mean that the good approved endorsed notes are to be in payment and satisfaction of the stumpage? Otherwise, why would the words "secured in the following manner," not have been used instead of "paid in the following manner;" and if this is to be construed as a security only and not as vesting the property in the grantees, how can such a construction be reconciled with the provision, which, as we have seen so clearly contemplates a disposing power in the grantees on the stumpage being "paid *or secured.*"

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But it is contended that the subsequent provision for the reservation and retention of the ownership of the lumber, "until all matters and things appertaining to or connected with the license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages for non-performance of this agreement or stipulations herein expressed shall be liquidated and paid, prevents the property passing." To construe the whole agreement consistently, and give effect to every stipulation, the latter part of this provision must, I think, be read as nothing more than an elaboration of the first part and means substantially "until all matters appertaining to or connected with the license were settled and adjusted;" and this is, to my mind, very evident from the language which immediately follows, and which is, that "if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid *or secured* in some of the modes herein expressed within 10 days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wheresoever and howsoever situate, and to absolutely sell and dispose of the same," &c. Does not this clearly imply that if the stumpage has been paid *or secured* then there is no right to take possession or sell? and this brings us to just where we started from, and is consistent with the provision first referred to, which gives the disposing power over the lumber to the grantees when all dues, stumpage and damages are paid *or secured*, and to the second provision referred to, which provides how the stumpage shall be "paid," viz., by deducting the mileage, and the remainder being secured not later than 15th April by good approved indorsed notes, or other sufficient security, payable on 15th July. Read in this way, the different clauses appear to me quite reconcilable and consistent,

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I cannot think it was ever intended that the plaintiffs should have their stumpage secured to their satisfaction and approval apart from the logs, and at the same time hold the logs also. I think the giving the approved indorsed notes was to enable the grantees to avail themselves of the earliest market by dealing with and disposing of the logs so soon as they could be got to market to enable them to meet the notes when they should fall due on the 15th July, and respondents be enabled at any time after the 15th April, and before the 15th July, to realize on the notes, and so to make the lumber in the hands of the one, and the proceeds of the notes in the hands of the other, immediately available, and that it could not have been intended to place the grantors in a position to realize the stumpage while the lumber should be kept in the hands, and at the expense and risk of the grantees, locked up, entirely useless, for the time being, for any purpose.

Mr. Justice *Fisher* in the court below takes very much the same view, for he says:

> By the device of taking a negotiable note, when the logs were removed from the immediate control of the plaintiffs, the stumpage was secured. The license requires that the stumpage should be secured by the 15th of April, and before the lumber was removed from the brows, and in computing the stumpage to be secured the mileage already paid was to be deducted. The licensees, *Cunliffe & Stephens*, were enabled to carry the lumber into the market *and have it in course of manufacture or sale before any actual payment was made.* The plaintiffs, the grantors, by the acceptance of the negotiable note would be enabled, if they required, to make it available for the purpose of their business before the 15th of July, the period fixed for the final payment of the stumpage.

Though it is true the same learned Judge decided in favor of the respondents, holding that "no change of property took place" until the stumpage was actually paid. How this could be and the grantees at the same time, on giving the notes, be enabled to carry their lumber into the market and have it in course of manufacture

or sale before any actual payment was made, I am at a loss to conjecture; if no change of property took place, what possible right could the grantees have to manufacture or sell the property; therefore while I appreciate the reasoning of the learned judge, it leads me to a conclusion the exact opposite of that at which he arrived (1).

There can be no doubt that in many cases the effect of giving a bill of exchange on account of a debt is only that of a conditional payment, and that the word payment as applicable to many transactions, even when used in a plea, does not mean payment in satisfaction, for, as said by Mr. Justice *Maule* (2):

> Payment is not a technical word, it has been imported into law proceedings from the exchange and not from law treatises. When you speak of paying in cash, that means in satisfaction, but when by bill that does not import satisfaction, unless the bill is ultimately taken up.

And as said by Lord *Campbell* in *Turner* v. *Dodwell* (3):—

> In mercantile transactions nothing is more usual than to stipulate for a payment by bills where there is no intention of their being taken in absolute satisfaction.

On the other hand it is equally well established that a bill of exchange may be given and accepted as an absolute payment in satisfaction, so as to be a discharge if the bill were dishonored. Thus on the counsel in *Turner* v. *Dodwell*, saying "anything taken in reduction of the debt is payment," and citing *Hooper* v. *Stevens* (4), and *Hart* v. *Nash* (5), *Erle*, J., replies:

> There can be no doubt of that, if the bill was taken in payment

(1) See *Turner* v. *Dodwell*, 3 E. & B. 140; *Belshaw* v. *Bush*, 11 C. B. O. S. 205; *Griffiths* v. *Owen*, 13 M. & W. 64; *James* v. *Williams*, 13 M. & W. 828, 833.

(2) See *Maillard* v. *The Duke of Argyle*, 6 M. & G. 40.

(3) *Ubi supra.*

(4) 4 A. & E. 71.

(5) 2 C. M. & R. 337.

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in the sense that it was accepted by the creditor as equivalent to so much money.

Mr. *Chitty* in his work on contracts (1), thus enunciates the principle:—

> Where a debtor delivers a negotiable bill or note to his creditor, and the latter at the time of receiving the same agrees to take it in *payment* of the debt, and to take upon himself the risk of the bill or note being paid, *or if from the conduct of the creditor, or the special circumstances of the case, such an agreement is to be implied, the effect of it will be to destroy the right of action for the debt, and to leave the creditor without remedy except upon the instrument* (2).

We must put the best construction upon this contract that we can to ascertain what the intention of the parties was, and I have, after a very careful consideration of this case, arrived at the conclusion that the words of the instrument import that on the giving of the approved bill the plaintiff was to look to it as constituting his remedy; that the approved bill was not taken simply on account of the stumpage, but so far as the stumpage was due under the contract in satisfaction and discharge thereof; that it was substituted in lieu of the security of the logs themselves, and all future liability rested on the bill, to which alone the grantors could look for actual payment; that the interest of the grantors in the logs thereupon ceased and the property vested in the licensees, and on their insolvency passed to the appellant, the assignee of their estate, for the benefit of their creditors generally; and I cannot avoid being strongly impressed with the conviction that the plaintiffs themselves, in the first instance, took this view of the contract. Otherwise, I cannot think they would, if they really believed they were the true owners of the property, have allowed their claim to

(1) P. 848.

(2) *Sayer* v. *Wagstaff*, 5 Beav. 415; *Sard* v. *Rhodes*, 1 M. & W. 153; *Brown* v. *Kewley*, 2 B. & P. 518; *Exp. Blackburn*, 10 Ves. 206; *Camidge* v. *Allenby*, 6 B. &. C. 381 2, 4. *Tempest* v. *Ord*, 1 Madd. 89.

have lain dormant from the 15th July till the 13th October, and, on the failure of *Jewett & Co.*, permitted defendant, their assignee, to take possession of this lumber as the property of the estate of these insolvents, and to sell and dispose of the same absolutely as such assignee, as the case alleges, without apparently any claim or remonstrance, and without any attempt to assert or enforce their rights till the bringing of this action.

I think the appeal should be allowed and judgment entered for the appellant, the defendant in the court below, with costs, and with the costs of this appeal.

STRONG, J. :—

Was of opinion that the judgment of the court below should be affirmed, and read a written judgment stating his reasons for that conclusion.

FOURNIER, J. :—

La question soulevée par les faits exposés dans le *cas spécial* soumis par les parties en cette cause, est, de savoir si le bois coupé par *Cunliffe* et *Stevens*, conformément aux conditions de la licence ou concession que l'intimée leur a consentie, en date du 15 octobre 1874, doit demeurer la propriété de cette dernière jusqu'au paiement de la traite tirée par *Cunliffe* et *Stevens* sur *E. D. Jewett et Cie* en faveur de l'intimée et acceptée par elle pour assurer le paiement de ses droits de coupe de bois, ou bien si le droit de propriété dans le bois coupé et manufacturé a cessé du moment de l'acceptation de cette traite.

La solution de cette question repose entièrement sur l'interprétation à donner aux stipulations contenues dans la licence afin de considérer la réserve du droit de propriété de l'intimée avec le pouvoir de *Cunliffe* et *Stevens* de disposer du bois fait dans les limites comprises dans leur " license " ou concession.

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Les principales stipulations concernant la question dont il s'agit, sont:

1o. *Said stumpage to be paid* in the following manner: Said Company shall first deduct from the amount of stumpage on the timber or lumber cut by Grantees on this license as aforesaid, an amount equal to the mileage paid by him as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, *be secured by good* indorsed Notes, or other *sufficient security*, to be approved of by the said *Company, and payable* on the 15th July next, and the lumber not to be removed *from the brows or landings* till the *stumpage is secured as aforesaid.*

2o. And the said Company reserves and retains full and *complete ownership* and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this License *shall be settled and adjusted, and all sums due or to become due* for stumpage or otherwise, shall be *fully paid*, and any and all damages for non-performance of this Agreement, or stipulations herein expressed, shall be liquidated and paid.

3o. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be *paid or secured* in some of the *modes herein* expressed within ten days thereafter, then, in such case, said Company shall have full power and authority to take all or any part of said lumber *wherever or however* situated, and to absolutely sell and dispose of the same either at private or public sale, for cash.

D'après ces conditions il est évident que les *licensees* "concessionnaires" n'ont jusqu'au règlement de compte avec la compagnie du chemin de fer et le gouvernement fait en la manière convenue, que le droit de faire le bois dans l'étendue des limites concédées, en se conformant à cet égard aux conditions de la licence. Jusque-là ils n'ont pas même le droit d'enlever des jetées et de mettre à l'eau le bois manufacturé par eux. La conséquence logique de cette condition n'est-elle pas que, du moment que les droits de coupe ont été payés et les dommages pouvant résulter de l'inexécution de quelqu'une des conditions, liquidés et payés par l'un des modes convenus, la propriété cesse d'appartenir à la

compagnie et que les *licensees* (concessionnaires) en peuvent alors disposer.

D'après les faits du *special case* la traite tirée sur *E. D. Jewett et Cie* paraît avoir compris tout ce qui pourrait être dû à la compagnie pour les opérations de *Cunliffe* et *Stevens* pendant l'hiver

Ainsi dans ce règlement se trouverait compris le compte des droits de coupe de bois, déduction faite de la rente par chaque mille en superficie de l'étendue des limites, compte dont le paiement d'après la 1re condition doit être pas plus tard que le 15 avril, assuré par de bons billets avec endossement, ou par d'autres garanties suffisantes, le tout sujet à l'approbation de la compagnie.

Dans le montant de cette traite doit également se trouver compris le règlement de tous les dommages que la compagnie pourrait avoir à réclamer pour l'inexécution de quelques-unes des conditions de la licence. C'est un règlement complet et final, du moins la compagnie n'élève aucune prétention au contraire. Si l'acceptation de cette traite peut être considérée comme l'un des modes de paiement établis par la convention des parties, il s'en suivrait que *Cunliffe* et *Stevens* pouvaient disposer de ce bois comme ils ont fait, en le vendant à *Jewett et Cie.*

Si l'intention de la compagnie eût été de ne se départir de sa propriété que sur paiement comptant de ses droits de coupe de bois, elle n'aurait certainement pas donné à ses concessionnaires (*licensees*) l'alternative de payer ou d'offrir un billet négociable sujet à son approbation comme étant pour elle l'équivalent d'un paiement en espèces. Cette facilité de régler par billets était sans doute pour l'avantage commun des parties, et a dû être pris en considération dans la détermination du prix de la concession. La compagnie, certaine de n'accepter que des billets qui équivaudraient à un paiement en espèces, devait nécessairement comprendre

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que l'accomplissement de cette condition mettrait *Cunliffe* et *Stevens* non-seulement en position de transporter le bois au marché, mais qu'ils acquéraient aussi par ce moyen la propriété du bois et le pouvoir d'en disposer. Elle ne pouvait alors avoir l'idée qu'elle conserverait sur ce bois, acheté pour le commerce et qui devait en conséquence passer par un grand nombre de mains, un droit de propriété qui lui permettrait d'aller le revendiquer jusque sur le marché d'Angleterre. L'intention évidente des parties était de faire dépendre le transport de la propriété de l'une des deux conditions arrêtées entre elles, le paiement ou la remise d'effets négociables acceptés par la compagnie.

La 3ème condition confirme cette interprétation en stipulant dans quel cas la Cie exercera le droit de propriété qu'elle s'est réservé par la seconde. Il y est formellement déclaré que dans le cas où les réclamations de la Cie n'auront pas été réglées suivant l'un des modes convenus "*shall not be paid or secured in some of the modes herein expressed*" alors elle aura le pouvoir de s'emparer du bois, et elle pourra le vendre et en disposer par vente publique ou privée. Mais pour qu'elle puisse exercer ce droit, il faut nécessairement qu'il y ait eu négligence de régler de la manière convenue dans les dix jours qui suivent l'époque de l'exigibilité d'une réclamation. Cette clause exclut toute idée de l'exercice d'un semblable pouvoir dans le cas de règlement par billets approuvés. Elle est faite dans la vue de pourvoir au cas où la Cie n'a pas reçu les garanties qu'elle a stipulées. Ce serait certainement enfreindre la lettre et l'esprit de cette convention que de reconnaître à la Cie le droit d'en faire l'application lorsque les garanties convenues lui ont été données à sa satisfaction comme dans le cas actuel.

D'après le genre d'affaire dont il s'agit et la nature des conventions au sujet du paiement, la Cie me paraît

être convenue d'adopter comme un des modes de paiement la remise de bons billets endossés dont l'acceptation ou le rejet était laissé à son entière discrétion. Lorsqu'elle a accepté la traite en question, la solvabilité de *Jewett et Cie* était notoire et considérée comme égale à celle des banques. Personne n'avait de doute à cet égard. On doit considérer que dans les circonstances de cette cause, il y a eu, d'après le mode convenu, un paiement suffisant pour transférer le droit de propriété.

C'est en considérant ces diverses stipulations séparément et dans leur ensemble, conformément à la règle qui veut que "toutes les clauses des conventions s'in-"terprètent les unes par les autres, en donnant à chacune "le sens qui résulte de l'acte entier," que j'en suis venu à la conclusion que le droit de propriété de l'Intimée a été transféré à *Cunliffe* et *Stevens* par l'acceptation de la traite de *Jewett et Cie.*

HENRY, J. :—

The issue in this case turns upon the construction of the license to cut the timber given by the respondents to *Cunliffe & Stephens*, taken in connection with the subsequent acts and dealings of the parties.

The respondents, owners of wilderness or timber lands in *New Brunswick*, agreed to sell to *Cunliffe & Stephens* all the pine and spruce logs they might cut on certain lots of the respondents' lands up to the first of April next following the date of an agreement entered into between them, dated the 15th of October, 1874. The document calls itself a "memorandum of agreement and conditional license." By its terms the grantees were to pay at the rate of one dollar for every thousand superficial feet of spruce logs, and two dollars for every thousand feet of pine logs. By it the grantees (for such they are called in the agreement) were required to pay the respondents at the date of the

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agreement at the rate of $10 for each square mile, amounting to $250 on account; but which sum was to be forfeited if the grantees failed to cut any of the logs. The agreement contained a clause by which the grantees were prohibited from moving the logs from the property upon which they were to be cut, or in any way disposing of them, without first paying or securing the payment of the stumpage as agreed upon. The legal result would be that the grantees became the owners of the logs subject to the lien of the respondents. The grantees were not to cut the logs *for the respondents* as *their contractors* or *employees* but *for themselves.* On the execution of the agreement and the payment of the $250, the grantees acquired a vested interest in the sole right of cutting and appropriating to their own use all the logs on the 25 square miles during the prescribed time. As each log was cut and deposited at the place for scaling it became, if not previously, the property of the grantees subject to the lien before mentioned, and the other conditions and provisions of the contract. It is not contended that any of the other conditions were broken or unfulfilled by the grantees. It appears to me that a different view has been taken of the rights as to the logs in question, and it has been considered that the respondents did not convey anything more than a naked right to cut the logs, and that the whole property always remained in the respondents. I cannot so consider it. The logs were to all intents and purposes *purchased*, and the property in them passed to the grantees subject to the respondents' lien. If the grantees, then, paid the balance due that lien was discharged, and the logs, relieved from it, would become the unencumbered property of the grantees.

The agreement contains three or four provisions necessary to be considered.

The first is:

The grantees will not directly or indirectly conceal from the scaler, or *dispose of*, any of the timber, logs, or lumber of any kind until all dues, stumpage, and damages are *paid* or *secured*, without the consent of the said company in writing. Otherwise they shall forfeit the whole lumber cut under this contract.

The second is:

It is hereby agreed that the said grantees shall pay to the said company at the time of executing this license, a mileage rate of ten dollars per square mile of the entire area of the land hereby licensed. It is also further agreed that the said grantees shall pay the said company as stumpage, one dollar per thousand superficial feet for all the spruce logs, and two dollars per thousand superficial feet for the pine logs, and at the company's scale of rates of stumpage for the present season for all such other lumber as they may cut on the said lands, hereby licensed or permitted, said stumpage to be *paid* in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by him as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes or other sufficient security to be approved of by the said company and payable on the 15th of July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid.

Had these been the only provisions for a lien, the grantees' logs would have been relieved from it, on one or other of the two things being done by the grantees—the one, making payment—the other, by securing the payment. On the 29th of April a draft was given by the grantees to the respondents through their agent, upon *Jewett & Co.* for the amount due, and accepted by the latter. Was this a payment or merely security? As to the clauses of the agreement under consideration, I consider it unimportant to decide that question, as, in either case, the lien was removed permanently. The grantees by the first clause were not (amongst other things) "to dispose of" the logs until the amount was paid or *secured*. If the respondents did not receive the draft in payment, they at least took it as security and

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abandoned their lien by giving up possession of the property. The result necessarily was that the grantees became the owners of the logs unencumbered, and might, in the terms of the clause, dispose of them. To be in a position to "dispose" of them they must have had the whole unencumbered property in them. The logs were taken possession of by the grantees on the acceptance of the draft, with the assent of the respondents, and a large sum, no doubt, expended in taking them to the boom, where they were subsequently sold and delivered to *Jewett & Co.*, and held by *Estey* for them. The rights of third parties here come up, and one of the learned judges in *New Brunswick* would have felt disposed, I think, from what he says, to have validated the transfer to *Jewett & Co.* as such third parties, but for the fact, that they must be presumed to have known the agreement under which the logs were obtained and the nature of the subsequent dealings as to the draft, &c. With every deference to the opinion of the learned judge I cannot see where the evidence is that would produce the conclusion that *Jewett & Co.* knew anything more than that the draft was given and accepted, and the logs delivered up to the grantees. They may or may not have known the peculiar terms of the agreement. I can see nothing according to the evidence to have prevented them from purchasing, any more than any other third party who would purchase in ignorance of the source from which the logs were obtained, and of the whole transaction. I take, however, the ground that a lien cannot exist contemporaneously with a security payable at a future day, whether such lien be implied or one created by express agreement, unless such continuing lien be expressly agreed for. If, when the draft was accepted, and before the logs were delivered or permitted to be taken from the "brows," a

further agreement was entered into, that in consideration of the respondents giving up the logs the lien should continue until payment of the draft, or if that result is plainly provided for in the agreement, and that the draft is not to be considered a payment, I will not say that such lien would not continue to attach to the logs in the meantime. I will hereafter consider both of these propositions.

It is elementary in the doctrine of liens, that the continuance of possession is indispensable to the exercise of the right of lien.

An abandonment of the custody of matters over which the right extends, necessarily frustrates any power to retain them and operates as an absolute waiver of the lien. The holder is in such case deemed to yield up the security he has upon the goods and trust to the responsibility of the owner (1).

At page 43, the same author says:

It has been well established by numerous authorities, that if security be taken for a debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone (2).

He proceeds:

This principle as to waiver of lien is not regulated by the usage of trade, nor consists in a mere rule of law that the special contract determines the implied one, but in the inconveniences which would result (the necessities of mankind requiring that the goods should be delivered for consumption) from the extension of the lien for the whole period which the security has to run, for it must be presumed, either that the lien is to continue with, and accompany, the security until payment, or that it is relinquished by the substitution of the security (3).

Reference to that case will show that the security was a note of hand of the party on whose goods the lien rested for a part of his debt and a judgment against him for the balance. The subject matter of the lien still

(1) Cross on the Law of Liens, p. 38.
(2) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755.
(3) Per Lord *Eldon* in *Cowell* v. *Simpson*, 16 Ves. Jun. 279.

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remained with the party who held it, but it was held that by taking the note and judgment the lien was removed. His lordship said :—

> The proposition that the lien can exist after such a special contract (referring to the note,) necessarily involves a contradiction to that contract. My opinion, therefore, is that where these special agreements are taken, the lien does not remain. And whether the securities are due or not, makes no difference.

This case is much stronger. There the subject matter of the lien was not given up, and still it was held the taking of the securities destroyed the lien. Here the subject matter was given up to the grantees, and they, as I think they had a right to do, disposed of it as their own property. In this case there was a special reason why the grantees should get, not only the possession, but the exclusive right to the logs, so that they might make sale of them, and I have no doubt that was what the respondents fully intended and expected when they, on the acceptance of the draft, gave up the possession of the logs to the grantees. It was stated without contradiction at the argument that, at the time they did so, *Jewett & Co.* were generally considered a wealthy firm and their paper considered equal to that of a bank. Theirs was not considered a doubtful security, and the feeling of confidence in them may possibly account for the unconditional surrender of the logs to the grantees. Whether that was, or was not, the reason, all that is necessary for us to consider is that there was no agreement for a continuing lien. The lien created by those clauses, (and so far they are only what I am dealing with,) was to be operative up to a certain point. That is the respondents were to retain possession of and control over the logs until the balance of the stumpage, &c., was secured to their approval. That being done, by the acceptance of the draft, their right of stoppage ceased and the grantees became entitled to the possession. If, after they received the acceptance of the draft

they had refused to permit the grantees to take the logs, it would have raised the question of the right of the grantees to compel them to do so, or to submit to the legal consequences of their refusal, and, in that case, according to the ruling of Lord *Eldon*, in the case before mentioned, and since confirmed by numerous decisions, they would have had the law against them. But they themselves have by their own act of surrendering the logs settled the point, and virtually and effectually construed their own agreement and abandoned any lien they held.

It is, however, contended that by the provisions contained in subsequent clauses of the agreement, the delivery of the logs by the respondents was only to enable the grantees to remove them to a point where a market could be obtained for them, and not with the intention of cancelling their lien, but the only evidence adduced to establish that position is from those clauses themselves. It is necessary to consider them carefully and ascertain whether that is the result—taking those clauses in connection with those I have before referred to and the acts and dealings of the parties themselves.

Following two other clauses wherein the grantees undertook "to go upon the said premises in due and proper season and cut and *remove* lumber and pay the stumpage as aforesaid;" to faithfully perform the conditions and stipulations expressed in the license; to pay the company damages for violation or neglect of the same; to exercise diligence and precaution to prevent damages by fire, and to pay for any resulting from carelessness,—we find the clauses as follows:

And the company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages

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for non-performance of this agreement or stipulations herein expressed shall be liquidated and paid. And if any sum of money shall have become payable by anyone of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any of the said lumber, wherever or however situated, and to absolutely sell and dispose of the same, &c.

Here, then, are general provisions of the contract, and operating from the time of its execution. That they were intended to operate in connection with the previous clauses for the protection of the company's interest only up to a certain point, I have no doubt. If, indeed, the clause should be construed as giving the company a right to retain any "ownership" or "control" after all things had been "settled and adjusted," and the amount or balance due paid or *secured*, as mentioned in previous clause which provides for the lien, then the two clauses are antagonistic, and, if so, that which is the most favorable to the grantees is the one by which we must be governed. The provisions are those of the respondents, and if, by one of two antagonistic ones, the grantees are justified in doing an act, or entitled to retain the property, the other party cannot be permitted to set up the other. On the principle, too, that they are the words of the respondents, and taking the whole agreement together, if an ambiguity arises they, and not the grantees, are to take the consequences. By the two clauses first cited the grantees were to have possession of the property relieved from any lien on giving the required security, which was given and accepted and the logs given up. The agreement contains no provision that, *under such circumstances*, the lien should continue or remain upon the logs. It is true that in the former of the two last cited clauses we find it provided that the respondents *reserved* and *retained* the *ownership* and *control* until

(amongst other things) all sums due for stumpage, &c., should be fully *paid*. Independently of this antagonistic and, therefore, ambiguous provision, I have no difficulty in concluding that it could only consistently apply to circumstances and transactions up to the time of a settlement and adjustment of all matters and things connected with the license. The last clause cited shows clearly that such was the intention of the parties, for it provides that if any money shall have become payable "*by any of the stipulations* or *agreements herein* expressed" (which covers the whole ground), "and shall not be paid or *secured in some of the modes* herein expressed, the company shall have full power and authority to take all or any of the said lumber, &c." The plain and simple meaning of this latter clause is, that if the grantees either paid or secured the respondents, their power and authority to take or interfere in any way with the logs or timber was at an end. Here, then, we have another provision in opposition to that under which the respondents claim. In the license we have three several provisions against that one. The respondents claim, however they so intended. If so, why was not something said or done in regard to it when they gave up possession of the property. If they really so intended, their failure to communicate it to the grantees when acting in a manner to lead them to assume the opposite, was, under all the circumstances, I take it, a fraud, not only on the grantees, but a still greater one upon a third party who might purchase and pay for the logs. The property was given up in April, and the respondents did nothing to assert any claim to it until October. During the intervening seven months the logs might have been sold, changed owners several times and been converted into lumber or other manufactured articles. It might in the ordinary course of business in the hands of innocent purchasers have been shipped and sold in a

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foreign or domestic market, and we are asked to put a construction on that one antagonistic clause which would result in giving a right to the respondents to follow the property, it might be to *England*, or the *United States*, and take it from the innocent purchasers there. It is possible an agreement to produce such a result might have been secretly entered into between, and bind the immediate parties, but to have any effect, it should be in language the most plain and unmistakable and essentially different from that under consideration. Besides, had such an agreement been entered into privately, the fact that it is of that private and unusual character throws upon the party for whose security the provision was made the responsibility of acting consistently with the fact of his holding such a right. He must not act in a way to induce outsiders to believe he has no such secret claim. The respondents, by giving up the property unreservedly and enabling the grantees to act with the logs as if under no lien, put them in a position to hold themselves out as the unencumbered owners. I have no doubt that *Jewett & Co.*, when purchasing, and the grantees, when selling to them, considered the latter had full authority to sell and convey. It would be, I think, a serious question in such a case to say, whether or not the respondents would in the case of a third party not be estopped from setting up such a secret claim, when their overt acts and dealings were so inconsistent with it. What are the facts in the knowledge of *Jewett & Co.*? Why, that the grantees had settled with and secured the respondents, and thereupon that the latter gave up the possession to the former, who brought the logs at much expense to the boom where they were when purchased. They had, then, every right to assume, as they did, that the grantees had the property and the right to dispose of it. How could they be presumed to know of this ambi-

guous clause, and be expected to construe it as it has been since then, I think, erroneously done? Suppose another person had bought, knowing what *Jewett & Co* knew, or are presumed to have known, would it be right to permit the respondents to say: "True, we held on to the property till we got satisfactory security, upon which we surrendered it unconditionally at the time; true, we allowed the grantees to take possession and put them in a position to hold themselves out as the owners of the property, but still we had a clause in the private agreement with them which perhaps no one could have expected, but there it is; and although you have been induced in a great measure by our mode of dealing to feel yourself perfectly safe we will nevertheless take the property from you and hold it?" I think there would be neither law or equity in permitting them to do so.

Although not necessary I may refer to the question of the draft as *payment*. I am free to admit that if a debt existed, the mere taking of a bill or note, even of a third party, would not necessarily amount to a payment, if nothing more was done, and that the result of taking such would but postpone the payment. If, however, it was taken as payment, it is otherwise. Here something more was done. The possession and control of the property was given up, and the legal conclusion, I think, is that in the absence of any special agreement to the contrary, the acceptance was received as payment. A mere *security* could have been given in a variety of ways by bond or otherwise, amounting to a guarantee. The words *paid* or *secured* are those used in the first clause. Those in the second are "*secured* by good endorsed notes or other sufficient security to be approved of by the said company." The latter clause, it is true, refers only to *security*, but the first and one of the two latter clauses uses the word "paid."

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The rule of law applicable to such cases was laid down by Lord *Langdale* in *Sayer* v. *Wagstaff* (1), and cited with approval *in re The London, Birmingham and South Staffo d Bank* (2). His lordship said: —

> The debt may be considered as actually paid if the creditor at the time of receiving the note has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if from the conduct of the creditor, or the special circumstances of the case, such an agreement is legally to be implied.

The point would, therefore, be one to be submitted to a jury under the evidence of the conduct of the respondents at the time, and the special circumstances of the case. As we are now dealing with a case prepared by the parties themselves, and in which we are not aided by the finding of a jury, we must necessarily place ourselves in the same position a jury would have occupied. Assuming that duty, I have no difficulty, from the whole evidence, in arriving at the conclusion that in taking the acceptance and handing over the property, the respondents received that acceptance as payment and relinquished all the lien they held upon the property in question.

For the reasons given (which on account of a difference of views entertained by my learned brethren, I have elaborated more than I would have otherwise considered necessary,) I think the appeal should be allowed and judgment given for the appellant with costs.

TASCHEREAU, J.:—

I am of opinion to dismiss this appeal.

It seems to me clear that by the license under which *Cunliffe & Co.* cut this lumber, they never thought for a moment, and it never came to the mind of any of the parties thereto, that they could pay the company the

(1) 5 Beav. 415. (2) 34 L. J. 420.

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amount of the stumpage on the 15th of April. Indeed, it appears to me plain by the said license that not one of the contracting parties ever thought it possible that *Cunliffe & Co.* could pay the stumpage before the lumber was taken down to market. But as it was expressly stipulated and agreed, and made obligatory upon *Cunliffe & Co.*, that the lumber should be taken down to market as early as practicable, the first stream driving or rafting season after being cut, that being about the fifteenth of April then next, it was agreed and stipulated that, not later than the said fifteenth of April, *Cunliffe & Co.* were to give sufficient security, by good indorsed notes or otherwise, that the amount due for stumpage would be paid on the 15th of July, the said lumber not to be removed from the brows or landing till the stumpage was so secured. And if the said security was not so given by *Cunliffe & Co.*, then the said company could, ten days after the 15th of April, take possession of the said lumber and absolutely dispose of the same; and if the stumpage was not duly paid on the 15th July, or within ten days after, then also the said company could take the said lumber, *wherever* it was, and dispose of the same. It was also agreed and stipulated as follows:

> And the said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, *wherever* and however it may be situated, until all matters or things appertaining to or connected with this license shall be settled and adjusted, and all sums due or *to become due*, for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid.

I am at a loss to know what language could more clearly say that the company retained the ownership of this lumber till the stumpage was actually paid. The security given on the 15th of April was so given for one purpose only, that of allowing the taking down

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of the lumber to market, the ownership remaining in the company till actual payment of the stumpage, and delay being given for such payment till the 15th of July. If, on the 15th of July, stumpage was not paid, or within ten days, the company was authorized to take the lumber and sell it. Surely, all this means that the ownership could never pass to *Cunliffe & Co.* till actual payment of the stumpage.

I think that the judgment entered for the plaintiffs in the court below is right, and that the defendant must fail in his appeal.

GWYNNE, J.:

The sole question, as it appears to me, which is presented to us upon this special case, is one of the construction of the instrument marked A, annexed to the special case, and is, whether, *by force of the terms of that instrument*, the absolute property in the logs in question did or not pass to *Cunliffe & Stephens immediately upon* the acceptance by *Jewett & Co.* of the draft of *Cunliffe & Stephens* of the 29th April, 1875?

We are not placed in the position of a jury, nor are we authorized to draw inferences of fact as they might. No question of fact is raised before us, whether the plaintiffs as against *Jewett & Co.*, and their assignee, by reason of their conduct in suffering the logs to remain in the possession of *Cunliffe & Stephens*, or rather of their assignees, *Jewett & Co.*, after the draft became due; or by the manner in which they dealt with the acceptance; or by any admission or conduct of theirs whatever subsequently to the receipt by them of the acceptance, should be held, as a matter of fact, to have adopted and taken, or to have agreed to adopt and take, the acceptance, notwithstanding the terms of the instrument? and whether they should or not, by reason of such or any circumstances, be estopped *in pais* from

asserting now that the property is theirs, is a question upon which we are not called upon, nor is it proper for us, to express an opinion.

The question before us being, as I have said, in my opinion, limited to the mere legal construction of the terms of the instrument, our judgment must, I think, be to dismiss the appeal, for otherwise we must, as it appears to me, eliminate from the contract of the parties that part wherein it is declared that their intention is that the plaintiffs' full and complete ownership of the timber shall be and is reserved and retained, wherever and however it may be situated, until all matters and things appertaining to or connected with the license shall be settled and adjusted, and all sums due, or to become due, for stumpage or otherwise, shall be fully paid, and any and all damages for non-performance of this agreement, or the stipulations therein expressed, shall be liquidated and paid. The clause seems to be inserted for the express purpose of reserving the ownership until *actual* payment. Upon a view of the whole instrument the parties, as it seems to me, have shewn that they understood, when entering into the contract, the difference between security for money to be paid at a future day and actual payment of such money, and that, however unreasonable the terms imposed by the vendor may have been, the parties agreed that the property should remain the property of the vendors until actual payment, notwithstanding that for a limited purpose the vendees might have possession before payment.

If I could see that the doctrine of lien applied to the case I should have no difficulty in holding that the plaintiffs, by parting with the possession, had lost any lien they may have had, but I cannot see that the doctrine of lien at all affects the case. The question is, in

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my opinion, one of property, not of lien, namely, whether, in virtue of the provisions of the instrument, the property in the timber had passed from the plaintiffs to *Cunliffe & Stephens, eo instanti* of the draft being accepted?

So viewing the case stated and the question submitted, I cannot hold that the property did pass then, without ignoring this clause.

*Appeal dismissed with costs.*

Solicitor for appellant: *Ezekiel McLeod.*

Solicitors for respondents: *Fraser, Wetmore & Winslow.*