1880 THE LONDON LIFE INSURANCE CO...APPELLANTS;
*Nov. 19.

AND

1881 JULIA ELIZABETH WRIGHT.....RESPONDENT.
*Feb'y. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

37 *Vic., ch.* 85, *Ont.—Insurance policy—Want of Seal—Fraud—Pleadings—Power of Courts of Equity.*

The seventh section of the statute incorporating the appellants (37 *Vic.* ch. 85, O.) after specifying the powers of the directors, enacts as follows: "but no contract shall be valid

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

(1) In this case the Judicial Committee of the Privy Council granted leave to appeal from the judgment of the Supreme Court, but the case was settled before coming on for argument.

1880

THE LONDON LIFE INS. CO. v. WRIGHT.

unless made under the seal of the company, and signed by the president or vice-president or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board."

J. E. W. brought an action to recover the amount of a policy issued by the appellants in favor of her father. The policy sued on was on a printed form and had the attestation: "In witness whereof, *The London Life Insurance Co., of London, Ont.*, have caused these presents to be signed by its president, and attested by its secretary and delivered at the head office in the city of *London*, &c."

To a plea that the policy sued on was not sealed, and therefore not binding upon the appellants, the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it.

Held, affirming the judgment of the Court of Appeal, that the setting up of "the want of a seal," as a defence, was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and therefore the respondent was entitled to the relief prayed as founded upon the facts alleged in her equitable replication.

[*Ritchie*, C.J., and *Taschereau*, J., dissenting.]

APPEAL from a judgment of the Court of Appeal for *Ontario*, dismissing appeals from the judgments of the Courts of Queen's Bench and Common Pleas, in this and eight similar cases.

The action was brought to recover the amount of an accident insurance policy upon the life of *John Wright*, the father of the respondent. The policy was issued on 8th September, 1875, and the death of the insured occurred on 7th December of that year.

The facts and pleadings are fully set out in the judgment of Mr. Justice *Gwynne* hereinafter given. See also reports of the case, 5 *Ont.* App. R. 218 and 29 U. C. C. P. 221.

1880

THE LONDON LIFE INS. CO. v. WRIGHT.

Mr. *Bethune*, Q. C., for appellants:

[The argument of counsel upon the question of fact whether the death had been accidental or not, was not entertained by the Court, and is therefore omitted.]

The alleged policies of the appellants' company do not purport to be under their seal.

The appellants are incorporated by Act of the Legislature of *Ontario* (37 *Vic.*, c. 85).

It is by section 7 of the said Act, amongst other things, enacted as follows: "No contract shall be valid unless made under the seal of the company, &c."

Mr. Justice *Patterson* in the court below gave his judgment upon the ground that this paper could be treated as an interim receipt. The other judges admitted that there was no evidence to go to the jury to show that this was a contract; but the Court of Common Pleas thought that an equitable replication of estoppel should be allowed to be pleaded, and the Court of Appeal were of opinion that a count in the nature of a bill for specific performance should be allowed to be added.

The appellants submit that both views were erroneous.

As to the interim receipt Mr. Justice *Patterson* seems to have been under the impression that no form of "interim receipt" used by the appellants had been used. This was erroneous, as may be seen by the case. Moreover, it was only to be a temporary contract.

The declaration in the case imported that the instrument upon which the plaintiff was suing was a sealed instrument. After trial, and after the verdict had been moved against, the Court of Common Pleas gave leave to the plaintiff to add an equitable replication, and it was only in the Court of Appeal that appellants got leave to plead to this equitable replication. I contend the Court of Common Pleas had no jurisdiction in such

a case, the Court of Chancery being the proper forum. The record in this case presents the anomaly of a plaintiff suing upon a policy of insurance, and the issues arising upon that action being tried, and all of them going to the whole cause of action, determined by a jury against the plaintiff, and then the Court of Appeal taking up a distinct and separate head of relief, upon evidence not taken before it but directed to a different end, usurping the function of a court of original jurisdiction, and decreeing in effect the specific performance of a contract.

The Court of Appeal did not try the other two issues itself apart from the findings of the jury, but while it discarded the findings of the jury upon one issue adopted their findings upon the other two issues.

There being no representation of a seal having been affixed the appellants submit that no estoppel could arise, in respect of which a Court of Equity could estop the appellants from pleading the want of a seal.

The statute is just as binding upon a Court of Equity as a Court of Law, and a Court of Equity could not decree specific performance of a contract against the appellants, unless that contract was entered into in the only way in which the defendants could contract.

The appellants are the creature of the legislature, and the same legislature has determined that the only way in which they can contract is under their seal.

What right has any court to say that they may contract otherwise?

The cases referred to by Mr. Justice *Patterson* in the Court of Appeal, it is submitted, are distinguishable. There was not, in any of these cases, an express prohibition against contracting except under seal. It may be quite true that in cases where the act of incorporation is silent as to the mode of contracting by the corporation, the courts may determine that trading corporations are

1880

THE LONDON LIFE INS. CO. v. WRIGHT.

bound by contracts made otherwise than under their corporate seal, but that must be so determined only because the courts do not assume that in such cases the legislature did not intend to allow contracts to be authenticated in that way solely, but where the legislature has expressly declared, as in this case, that the contract shall not be binding, except when under seal, the appellants submitt hat no Court of Equity can enforce a contract not so authenticated. *Hunt* v. *The Wimbledon Local Board of Health* (1); *Newd* v. *Dunnett* (2); *Brice* on *ultra vires* (3); *Montreal Ass. Co.* v. *McGillivray* (4); *Sumott* v. *London Dock Co.* (5); *Kelly* v. *The Isolated Risk* (6); *Hardcastle* on Statutes (7).

Mr. *Scott* for respondent:

If it was necessary that an amendment should be made in the pleadings by adding the equitable replication, the courts in term had ample power to make such amendment (8), and the Court of Appeal has similar powers (9).

The appellants object that an amendment should not be allowed when it raises a new issue, but every amendment necessarily does this, and courts are always entitled to amend, and then judge as to whether the amendment renders necessary a new trial. In this case no new issue was really raised, all the facts being either admitted or found by the jury, and the sole question was whether on those facts the respondent was entitled—the record being first put into a proper shape —to succeed. Both courts have power to take further evidence (10).

As to the defence for want of a seal, I don't think any

(1) 3 C. P. D. 208.
(2) 27 L. J. C. P. 314.
(3) Ch. 3, s. 2.
(4) 13 Moore P.C. 87, 122, 124.
(5) 8 E. & B. 347.
(6) 26 U. C. C. P. 299.
(7) P. 22.
(8) R. S. O. ch. 49, sec. 8.
(9) R. S. O. ch. 38, sec. 22.
(10) R. S. O. ch. 38, s. 22; 41 Vic. (Ont.) ch. 8, s. 7.

court of justice would sustain it. The instrument was produced at the trial, and the effect of the jury's verdict, I contend, is that the policy was delivered sealed.

The evidence before the jury was that, as a matter of law, the appellants could only issue policies under seal; that they issued and delivered to the assured this paper as a legal policy; that it purported to be an act not of the officers, but of the company; that they admitted, at a previous trial, that this paper was a policy binding on them; but that their inspector says that they did not seal their accident policies, and that his impression is that this particular policy is not sealed. No evidence was given that the appellants had any special common seal. Any seal affixed by the proper authority of a body corporate will suffice, and any impression would be sufficient (1).

And there was ample evidence to go to the jury. *Grellier* v. *Neale* (2); *Talbot* v. *Hodson* (3).

Then the evidence is also such as to amount to an estoppel *in pais* upon the question of sealing, and on that ground the jury were justified in finding a verdict for the respondent. All the requisites of an estoppel exist in this case, and corporations are bound by an estoppel in the same way as individuals, and can waive their rights. *Herman* on Estoppel (4); *Bigelow* on Estoppel (5); *Laird* v. *Birkenhead R. W. Co.* (6); *Steven's Hospital* v. *Dyas*, this was a case of a statute (7); *London & Birmingham R. W. Co.* v. *Winter* (8); *Wilson* v. *West Hartleford R. W. Co.* (9).

The cases relied upon by the appellants as to the

(1) Shep. Touchst. 57; 6 Viner's Abr. 307; *Reg.* v. *St. Paul's*, 7 Q. B. 232.
(2) Pea. 198.
(3) Pp. 509–512.
(4) P. 419.
(5) 29 L. J. N. S. Chy. 221.
(6) 7 Taunt. 250.
(7) 15 Jur. Ch. 405.
(8) 1 Cr. & Ph. 63.
(9) 2 DeG. J. & S. 475.

1880

THE LONDON LIFE INS. CO. v. WRIGHT.

necessity of a contract being under seal, do not apply here, as they all are cases where there never was any intention that a formal contract should be entered into by the corporations, and the contracts were, at the time they were attempted to be enforced, really incomplete. Here both parties intended to complete the contract, and, as a part of such completion, intended to do everything necessary to attain that end, and among these things to affix the seal.

The replication is not equivalent to a bill for specific performance, but is more in the nature of a bill to restrain an inequitable defence, and if such a bill would lie prior to the Administration of Justice Act a replication is now proper. The respondent submits that such a bill clearly would lie, and that a Court of Equity would not allow the appellants to take advantage of their own fraud in neglecting to affix the seal and delivering a worthless piece of paper as a valid and binding policy. *Bond* v. *Hopkins* (1); *Hovinden* v. *Annesley* (2).

Mr. *Bethune*, Q. C., in reply:

The applicant was dealing with a corporation and it was his duty to enquire what the power of the directors of the corporation were, and the moment he did so he would have to enquire what the statute enacted. Then nothing short of a paper signed and *sealed* can be said to be a binding representation.

RITCHIE, C. J.:—

In this case it is beyond dispute that the instrument declared on as a policy of insurance was not under seal and was not declared on as being under seal, nor did it purport to have been sealed, and the simple question, in my opinion, is: Can the plaintiff, not producing a contract under seal, recover in this action?

(1) 1 Sch. & Lef. 413. (2) 2 Sch. & Lef. 607.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

The *Ontario* Act incorporating the *London Life Insurance Company*, 37 *Vic.*, c. 85, s. 7, declaring the powers of the directors, after specifying certain particulars, enacts: "And generally to transact all necessary matters and things connected with the business of the company, but *no contract shall be valid unless made under the seal of the company and signed by the President* or one of the directors, and countersigned by the manager, except the *interim receipt* of the company, which shall be binding upon the company on such conditions as may be thereon printed by direction of the Board."

The reason why interim receipts are thus excepted is very obvious, because practically they could not be sealed by the company, inasmuch as these interim receipts are issued by agents at a distance from the domicile of the company and transmitted to the company, and, as the name indicates, are subject to the acceptance or rejection by the company of the risk tendered to the agent, and to be in force for a certain number of days, or until, in the mean time, such acceptance or rejection by the company.

If accepted a policy issues, if rejected the insurance ceases; in either case the insurance, under the interim receipts, is at an end, and, if neither accepted nor rejected, is at an end at the expiration of the days named.

Here is the copy of the interim receipt of this company as in evidence:

LONDON LIFE INSURANCE CO'Y, OF LONDON, ONT.

AMOUNT, $... INTERIM RECEIPT.—ACCIDENT DEPARTMENT. PREMIUM, $...

Received from.....of.....

.....Dollars, for which I agree to furnish him an Accident Insurance Policy in the above-named Company within thirty days from date, provided the Application is accepted and the Policy written by the Company, or to return the same to him, or his order, on demand.

.....187.....*Agent.*

So far then as this company is concerned, it only obtains

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

power to contract by virtue of the statute, and that power is specially conferred, and the statute has in prohibitory language declared that no contract shall be valid unless in the mode pointed out, and the clear declared policy and object of the statute is that this company, the creature of the legislature, so far as language can declare it, shall not be bound, except by contracts under seal. We have no right to inquire into the reason or motive which prompted the legislature to require this formality; it is, I think, our duty to say that all formalities required by the statute must be punctually complied with, and to declare that neither this court nor any other court has any right or power to dispense with a regulation so imperatively prescribed by the statute in such prohibitory language. I do not think it is for me to question the policy or impolicy of this provision, or any hardship which giving effect to this provision would entail in this case. I consider this enactment quite as binding and obligatory on Courts of Equity as Courts of Law. I know of no principle on which courts can set the statute law of the country at defiance and say that an artificial body, owing its existence to a statutory enactment, can contract without seal, when the legislature, which created the body, declares it shall not, or to make a binding contract for such a body corporate that they have not made for themselves. The very exception of interim receipts proves, I think, that the legislature intended that the term contract should apply to every other insurance contract, and to say that the company could make a contract of insurance such as is contained in the policy declared on in this case without its being sealed is, in my opinion, simply to repeal the statute. It is my duty to read the Act as it is written. The language is clear, plain, positive, free from all ambiguity, admitting of no doubt: the words are "no contract shall be valid unless made

under the seal of the company." There must be a binding contract to enable the plaintiff to recover either in law or equity. There has been no contract under seal, how then can I judicially say there has been a binding, legal, valid contract, unless I am prepared to set at naught an express legislative enactment, and so override the law of the land? The legislature has been pleased to say "no contract shall be valid unless under seal." What right have I, sitting here to administer the law as it stands on the statute book, practically to repeal a provision so clear and unequivocal, and say that a contract shall be valid, which the legislature says in unmistakable language shall not be valid? The same difficulty exists as to specific performance or other relief in equity in this case as to a recovery at law.

The first point to be determined is to ascertain whether there is an agreement, for if no agreement the court cannot make one, and any bill filed must be dismissed, and how can there be any agreement when the Act expressly declares that these defendants shall not contract but in a particular manner? In other words, shall not make a contract of insurance, except by interim receipts, in any other manner than under seal. Therefore any contract, in order to lay the foundation of a suit at law or in equity, must be under seal. You cannot raise an equity without a contract, and you cannot get a contract without a seal.

Let us now see what the authorities say as to the contracts of corporations generally not under seal, when there is no prohibitory clause, and then as to the effect of express statutory requirement of a seal.

In relation to trading corporations, modern cases have engrafted numerous exceptions on the old rule, that a corporation cannot contract except under seal, which rule is thus stated by *Tindal*, C. J., in *Gibson* v. *East India Company* (1):

(1) 5 Bing. N. C. 269.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

The general rule of law is not denied on the part of the plaintiffs to be, that no action founded on contract can be maintained against a corporation aggregate, unless where such contract is under the seal of the corporation. Such, indeed, is the language of all the authorities beginning with those collected from *Year Books* in *Bro. Abr, tit. Corporations and Capacities*, down to the latest of the present day; the ground of that rule, as it is to be extracted from such authorities, being that as a corporation is a body politic and invisible, it can only act and speak by its common seal; or as it is said *arguendo*, in *Rex* v. *Briggs* (1), the common seal is the hand and mouth of the corporation.

But though, as said by *Tindal*, C. J., "On this general rule, both in ancient, and still more frequently and largely in modern times, have exceptions been grafted, so that it is now undoubted law, that in very many cases actions are maintainable in our courts upon contracts entered into, by and on behalf of corporations aggregate, though such contracts are not under seal," these exceptions have not abrogated the old rule, and had they done so this Act of incorporation prevents the engrafting of any exceptions with respect to contracts of insurance, except that named in the statute, and peremptorily prevents this company from effecting a valid contract of insurance except by instrument under seal.

The agreement, I think, must be considered as ranging itself, as was said by *Tindal*, C. J., in the same case, under that class of obligations which is described by jurists as imperfect obligations, obligations which want the *vinculum juris*, although binding in morals, equity and conscience, an agreement which the defendants, as was said there, "are bound *in foro conscientiae* to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law," and *Tindal*, C. J., concludes his judgment thus:

It is enough, however, to say, though the company undoubtedly

(1) 3 P. Wms. 423.

might, if they had thought proper, have made a grant under their common seal for the payment of this pension, by which they would have rendered themselves liable to an action in a court of law, yet they have not done so; and it appears to us that this grant, not under seal, does not fall within the reason or principle of the exception which has been above adverted to, and consequently that it must be governed by the general rule of law, that a corporation aggregate cannot be sued upon a contract not being under their common seal.

In *Lamprell* v. *Billericay Union* (1), an action for additional work, to which want of written directions from the architects was a complete answer so far as such claim depended on the deed, *Rolfe*, B., delivering the judgment of the Court, says:—

But it was suggested at the bar, that though for want of written instructions the plaintiff might have no remedy under the deed, yet, as the defendants had accepted the additional works, and so had the full benefit of them, the plaintiff had a right to be paid on a *quantum meruit* independently of the deed. The case of *Lucas* v. *Godwin* (2) was relied upon. But there the defendant was an individual capable of making a new contract by parol, as he might think fit, whereas here the defendants are a corporate body incapable of contracting otherwise than by deed. We adhere on this subject to the doctrine laid down by this court, in *The Mayor of Ludlow* v. *Charlton* (3), and subsequently acted on in the Common Pleas in *Arnold* v. *The Mayor of Poole* (4), and by the Court of Queen's Bench, in *Paine* v. *The Strand Union* (5). The principle of those cases clearly exempts the present defendants from all liability as to the matters in question in this action, except such as arose by instrument under their seal.

In *Diggle* v. *The London & Blackwall Railway Co.* (6), where all the cases were cited on the arguments, the marginal note is:

A railway company, duly incorporated by Act of Parliament, entered into an agreement *not under seal*, with a contractor that he should execute certain works upon their railway, for the purpose of changing the system of locomotion which they had employed, the rope and stationary engine system, to the ordinary locomotive principle. The contractor, in pursuance of the agreement,

(1) 3 Exch. 283.
(2) 3 Bing. N. C. 744.
(3) 6 M. & W. 815.
(4) 8 Q. B. 338.
(5) 4 M. & G. 860.
(6) 5 Exch, 442.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

entered upon the works and performed a portion of them, but before they were completed he was dismissed by the company: *Held*, that he could not recover the value of this work.

In *Homersham* v. *Wolverhampton Waterworks Co.* (1), this Court (Exchequer) again affirmed the principle that a corporation can contract only under seal, or if it is a body established under Act of Parliament, general or special, under the authority of the provision of such Act; and in *The Governor and Company of Copper Mines* v. *Fox and others* (2), the Court of Queen's Bench, per Lord *Campbell*, fully sustained the general principle that a corporation can contract only under seal, and said that "we regret very much that any technicality should interfere with the enforcement of a fair contract," but the law by which a corporation is not bound, unless the contract is under seal, can be altered only by the legislature.

In *Williams* v. *The Chester and Holyhead Railway Company* (3), *Martin*, B., delivering the judgment of the court, says:—

> We cannot conclude without calling attention to the extreme imprudence of persons dealing with railway or other companies upon letters or documents signed by the secretaries of such companies. There is no reason to suppose that any fraud was intended in this case, or that the mistake originated otherwise than in an unintentional oversight. But the consequences to him are the same as if the gross fraud had been practised upon him, of the directors authorizing one contract, and their secretary knowingly communicating one varying from it to him, &c., &c.
>
> Persons dealing with these companies should always bear in mind that such companies are a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials, and should insist upon these contracts being by deed under the seal of the company, or signed by directors in the manner prescribed by the Act of Parliament. There is no safety or security for any one dealing with such a body upon any other footing. The same obser-

(1) 6 Exch. 137.
(2) 16 Q. B. 298.
(3) 5 Jur. 828.

vation also applies in respect of any variation or alteration in a contract which has been made.

In *Cope* v. *The Thames Haven Dock and Railway Company* (1), the marginal note is:—

A railway company was incorporated by an Act of Parliament, one section of which enacted that the directors should have power to use the common seal on behalf of the company, and that all contracts relating to the affairs of the company, signed by three directors, in pursuance of a resolution of a court of directors, should be binding on the company. The following section enacted that the directors should have full power to employ all such managers, officers, agents, clerks, workmen and servants, as they should think proper.

By a resolution of the board of directors, signed by their chairman, the plaintiff was appointed agent to negotiate with another railway for the lease of the line.

Assumpsit for work and labour.

Held, that the contract was not binding on the company, it not having been sealed or executed with the required formalities.

Parke, B.:—

The rule must be absolute, on the ground that this is a contract by which the company cannot be bound, unless made in the form required by the 119th section, which gives a power of binding the company by an instrument under seal, or in writing signed by three directors, in pursuance of a resolution of the board. Neither of these requisites has been complied with. There is no doubt about the rule of law. We had occasion to consider it in the cases of *The Mayor of Ludlow* v. *Charlton* (2), and *Cox* v. *The Midland Railway Co.* (3). The reason why a corporation cannot be bound, except by their common seal, is satisfactorily explained by my brother *Rolfe* in the judgment in *The Mayor of Ludlow* v. *Charlton*, where it is shown that the doctrine was not, as suggested, a relic of ignorant times.

This language of *Rolfe*, B., in *Mayor of Ludlow* v. *Charlton*, was adopted by *Pollock*, B., in *Mayor of Kidderminster* v. *Hardwicke* (4).

In the *Mayor of Ludlow* v. *Charlton* (5), where it was held that a municipal corporation was not bound by a contract to pay money, although the consideration

(1) 5 Exch. 841.
(2) 6 M. & W. 815.
(3) 6 M. & W. 268.
(4) L. R. 9 Exch. 24.
(5) 6 M. & W. 815.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

had been executed, such contract not being made under their common seal, *Rolfe*, B., says:

Before dismissing this case, we feel ourselves called upon to say that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the Legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know that by such an act the body will be bound; but in other cases the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal or some substitute for a seal, which, by law, shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

In *Frend and another* v. *Dennett* (1), the marginal note is:—

By the 85th section of the Public Health Act, 11 and 12 *Vic.*, c. 63, it is amongst other things enacted that "the local board of health may enter into all such contracts as may be necessary for carrying the Act into execution; and every such contract, whereof the value or amount shall exceed £10, shall be in writing *and sealed with the seal of the local board*," &c., &c.: *Held*, that a contract which did not comply with this condition is not capable of being enforced. *Cockburn*, C. J., in strong terms expressed his reprehension of the turpitude of the defence.

(1) 4 C. B. N. S. 576.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

Cockburn, C. J.:—

This rule must be made absolute. I very much regret that we are compelled to come to that conclusion; but I see no alternative. It is sought to make the rates for the district liable upon this contract, by means of an action against the clerk to the local board. Now, the power given to the board to make contracts so as to bind the rates is the creature of the Act of Parliament; and that, by the very same clause which gives the board power to enter into contracts, amongst other things, expressly enacts that "every such contract, whereof the value or amount shall exceed £10 shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal." I think the local board had no power to contract so as to bind the rates, unless they did so in the manner pointed out by the statute.

Williams, J.:—

I am of the same opinion. I do not see how we can, consistently with the ordinary rules by which statutes are construed, hold this part of the 85th section to be directory. It is not like the case of a thing which is to be done by the board, where those dealing with them have no means of knowing whether or not it has been done in the manner required by the Act. Here, however, is a public Act which requires that all contracts to be entered into by the local board shall be entered into in a particular way, viz.: "In writing and sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof."

The plaintiff, therefore, must have been well aware that the board had no power to contract so as to bind the rates, except in the manner pointed out by the Act.

Willes, J.:—

I am of the same opinion. This case has been argued as if the 85th section of the Act had been a controlling section, and as if all the terms in which matters therein mentioned are required to be done were directory only. But it is that section which alone confers upon the local board the power of entering into contracts; and they must exercise that power in the terms in which it is by the act conferred upon them. I regret to be obliged to come to this conclusion; the more especially as this is not the first instance of fraud and oppression occasioned by this state of the law, within my own observation.

In Hunt v. *The Wimbledon Local Board* (1), the marginal note is:

(1) 3 C. P. D. 208.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

Section 85 of the Public Health Act, 1848, and section 174 of the Public Health Act, 1875, enact (without any words of prohibition) that "every contract made by a local board," or by an urban authority, whereof the value or amount exceeds [£10] £50, shall be in writing, and sealed with the common seal of such authority.

The defendants, a "local board," and an "urban authority" under the above mentioned Acts, verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to, and approved, and used by the defendants, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans; nor was there any resolution of the board authorizing their preparation :—

Held, that by reason of the non-compliance with the statutory requirements, the contract could not be enforced,—notwithstanding that the jury found that the board authorized their surveyor to procure the plans and ratified his act that new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of them.

Lindley, J.:—

In this case, however, I have to construe and apply a special Act of Parliament; and although some of the provisions of the above mentioned sections are not, in my opinion, applicable to such a contract as I have here to deal with, the provision requiring a seal where the contract is for more than £10 or £50, as the case may be, is, I think, applicable to it; and, having regard to the objects and terms of those sections, and to the case of *Frend* v. *Dennett* (1), I am unable to hold that the clause requiring a seal is a merely directory clause.

In *Nowell* v. *Mayor of Worcester* (2), other clauses requiring other things to be done by the board were held to be directory only, because the plaintiff could not ascertain whether they were done or not. This reason has no application to the clause requiring contracts to be sealed; and it appears to me that I should be depriving the ratepayers of the protection intended to be afforded them by the statutes with which I have to deal, if I held the defendants liable to pay for work done under a contract required by those Acts to be under seal, and not in that form.

The observations of Baron *Rolfe* in *Mayor of Ludlow* v. *Charlton* (3), are, in my opinion, very pertinent to cases of this description; and

(1) 4 C. B. N. S. 576; 27 L. J. C. P. 314; and in equity, 5 L. T. N. S. 73.
(2) 9 Ex. 457.
(3) 6 M. & W. 815.

thoroughly concurring, as I do, with those decisions which have relaxed the old rule as to the necessity for a seal to bind certain classes of corporations, I do not feel myself at liberty to depart from the plain words of the statutes by which this case is governed.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

Bramwell, J.:—

I am of opinion that the judgment of *Lindley*, J., was right, and ought to be affirmed. First, I think that s. 174 is applicable to cases other than those alluded to in it, and that it is not limited to them. The section is general, and refers to every class of contract, and there is no reason for limiting it. In the next place, I think the section is not merely directory but obligatory. It is not prohibitory so as to constitute the making of a contract, otherwise than in writing and under seal, an offence; but it is a mandatory direction that contracts shall be made in a particular way, that is to say, in writing and under seal. The enactment relates to a contract which is the act of both parties, and is applicable not to one of them alone, but to both of them. I do not mean to say that the section makes anything particularly necessary upon the part of the contractee, but it requires that the evidence of the obligation of the two parties must be in writing and sealed with their seals. In this particular case the section is of importance, as drawing a line between cases where the contract shall or shall not be under seal. If it rested at the common law there might be a discretionary power as to what contracts should be entered into by parol, and what contracts should be made under seal, such as contracts of small amount or acts of daily necessity, and some others which are said to be within the exception to the general rule that a corporation must contract under their corporate seal. If it were not for section 174 it might be contended that contracts to the amount of £5 or £20, or even £100, came within the rule. The legislatures, however, have drawn the line, and said that all contracts over £50 must be entered into under seal and contracts for a less amount may be made by parol. That being my opinion as to the effect of the statute, I think it clear that this is a contract, upon which, if after the order had been given it had been countermanded by the defendants, and defendants had said to the plaintiffs: "Do not go on with it, we shall not employ you," no action could have been maintained. Then it is said that this is not an executory contract, but an executed contract, of which the defendants have got the benefit, and for which they must pay. I will deal with that question presently. First, reliance is placed on the doctrine in equity as to contracts relating to land. It is said that a part performance by entering into possession of the land under a verbal contract for its purchase is sufficient to take it out of the statute of

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

frauds. I think that that doctrine has no analogy to the present case, and the ground on which that law rests has been clearly stated by the Master of the Rolls in *Ungley* v. *Ungley* (1). He says: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the statute of frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract, in order that justice may be done between the parties." That reason is not applicable to a case like the present.

Brett, L. J.:

The general rule is, that where the defendants are a corporation and the contract made with them is not under seal, the defendants are not liable. I think this case is within the general rule, and would not be within any of the recognized exceptions. It is not within the exception which is mentioned—if it can be called an exception—or within that doctrine of the Court of Chancery which is applicable to the statute of frauds. That doctrine of equity with regard to the statute of frauds is equally applicable, whether the defendant be a corporation, or whether the defendant be only an individual, and is founded upon the view that the statute of frauds only deals with a matter of evidence upon a suit or trial. In the case of the statute of frauds, the original contract is perfectly valid, and the only effect of the statute is, that in a contested suit no evidence can be given of that contract unless certain formalities have been observed. The Court of Chancery has held that in certain circumstances they will allow evidence to be given of the contract although the formalities of the statute have not been fulfilled. But that decision cannot have any reference or any application to a case where the contract originally, by a rule of law, is invalid. I think, also, that this case is not within any of the common law exceptions which have been suggested.

* * * * * *

Another exception is suggested. It is said that there is a rule that where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made, accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

(1) 5 Ch. D. 887.

I doubt very much whether there is any such rule, either in law or equity.

* * * * * *

But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than directory. It is what has been called mandatory. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this: The legislature knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what were small matters, and to say that contracts which the board would not otherwise be authorized to make might be made for amounts less than £50—that is to say, that if they were necessary and under £50, they should be brought within the recognized exception as to small matters; and that if they were over £50, the mere fact of their being over £50 would prevent their coming within the exception.

Cotton, L. J.:

The statute of frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was. But if a Court of equity finds an overt act, such as the possession of land, then the presumption of a contract is raised, and the court will in consequence of that overt act, allow parol evidence to be given for the purpose of ascertaining what the actual contract was. These are the cases in which the Courts of Equity have given an effect to contracts valid at common law, which could be enforced but for the statute of frauds. That is the ground on which these cases rest, and that it is not on the ground of fraud is shown by this, that the payment of the price to a vendor will not take the case out of the statute. But surely it is as great an injustice for a man to receive the price, and then say: "You cannot enforce the contract," as to repudiate the contract where possession has been given. When there is an overt act, a Court of Equity will receive parol evidence of the contract, but that is in cases of specific performance of contracts relating to land which are valid at common law.

Pollock, C. B.:—

The case, therefore, stands precisely in this position: That there was a contract under seal; that there was more work done than the plaintiff was bound to perform under that contract; but there was no evidence of the extra work having been either ordered by the

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Ritchie, C.J.

company, sanctioned by the company, or ratified, or adopted by the company. These clauses of restriction are of the same nature as the old common law distinction between a corporate body and a private individual, according to which the latter can in general be bound only by a contract under seal; and the rule is for the benefit of subscribers to works of this description, for the protection of their interests. We are, therefore, of opinion, that they can only contract either under seal, if they are a corporation; or, if they are a body established under any special or general Act of Parliament, they can only contract according to the terms by which the contract is authorized to be entered into by the clause of the special Act, or of the general Act by which they are controlled. In the present case there was no evidence of any contract which could be brought under either of these classes; and, therefore, we think the manner in which the case was disposed of at the trial was perfectly correct, and that there is no ground for granting a rule to show cause why a different result should not be obtained.

Mr. *Maxwell* in his work on statutes (1) says:—"It has frequently been held that a statute which prescribes the formalities to be observed by a corporate or public body constituted for a special purpose in executing contracts is imperative, and that a contract not executed in conformity with such provisions was of no binding effect on the body."

Citing many cases already referred to.

In the face of these authorities I cannot, by any forced construction or artificial reasoning, permit myself to set at defiance the declared will of the legislature so simply, so plainly, and so positively expressed.

The language of Mr. Justice *Maule* in *Freeman* v. *Tranah* (2) commends itself to my mind as being applicable to this case.

I agree that in this particular case, justice would be better administered by making the rule absolute, than by discharging it. But there is no court in *England* which is intrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times, and although instances are constantly occurring where the courts might profitably be employed in doing

(1) Page 336. (2) 12 C. B. 413.

simply justice between the parties, unrestrained by precedent or by any technical rule, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice. The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of law, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries; and it is probably more advantageous that it should be so, though at the expense of some occasional injustice. The only court in this country which is not so fettered, is the Supreme Court of the Legislature.

If I have any feeling in this matter I may be permitted to say that I am very glad that the majority of this court have been enabled to see their way clear to a conclusion the opposite of that at which I have felt myself constrained to arrive, for the language of Lord *Cockburn* in the case of *Frend* v. *Dennett* can hardly be held to be too strong to apply to this defence.

FOURNIER, J.:—

I am in favor of dismissing this appeal for the reasons statein the judgments of the Court of Appeal.

HENRY, J.:—

Were this a case at common law, and the action brought before a common law court, I would have no doubt in saying that the plaintiff could not recover. It is not necessary to explain why, but in courts of equity of late years a great number of additions have been grafted upon instruments of insurance. When companies are chartered for certain purposes, and they enter into ordinary dealings necessary to carry out the business for which they are chartered, I cannot admit that every thing should be under seal, in order to make good their contracts; in fact, trade could not be carried on if all their engagements were to be under seal.

Here is a company established for carrying on life insurance business, and doing business for a number of

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Henry, J.

years in a particular manner; and we find by the same Act which empowers them to do business in a certain way they are given power also to engage agents "and to appoint their duties, obligations and securities, and generally to transact all necessary business of the company;" also to appoint "agents in any town"—agents to transact business, "with such duties and powers as they may deem proper." Now, at the same time the legislature said this, they authorized them to make rules and regulations which would be binding in regard to the policies which they might issue; and among other provisions they can issue interim receipts without the necessity of affixing the seal. This policy was applied for at a local office, and an interim receipt was issued. Now, after the issue of this receipt, it was the duty of the company either to issue a proper policy or reject the application. They kept the money, and the party insured was killed by an accident. Then when sued upon the policy, they do not rely on defence that there is no seal, but set up six other issues, and a verdict for plaintiff is given. A new trial is then asked for and granted, and again a verdict is given in favor of the plaintiff, and it is only after this that the objection is raised for the first time. Had they raised this objection on the first trial, I doubt whether a new trial would have been granted otherwise than on the condition that the objection set up as to the seal would not be raised. The question here is whether the courts of equity of *Ontario* had the inherent power to award that the respondent was entitled to a good policy, and if not, to condemn appellants to pay damages, as if a good one had issued. Appellants rely on their act of incorporation to say that they are bound only by a document under seal, but I do not agree with them, for if they receive the premiums they are bound to give a valid policy. The business of the company is to issue

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Henry, J.

policies, and there is nothing in the Act to prevent local agents from receiving applications and forwarding them and if the company accept an application and keep the premiums, can it be said they are not bound by their contract. In such a case a Court of Equity has a right to interfere and say you have no right to set up a fraud, and more especially, as in this case, when the fraud is committed upon the court. My brother *Gwynne* has more fully gone into this matter, and I will only add that I concur with him.

TASCHEREAU, J. :—

Here also, as in *Nasmith* v. *Manning* (1), I have had some difficulty in forming an opinion. However, here I find myself in the minority, and must say that it is with a sense of relief that I see the judgment in the case not affected by the conclusion I have come to. The recent case of *Hunt* v. *Wimbledon Local Board* (2), cited by the Chief Justice, seems to me conclusive against the plaintiff not only at law, but also in equity, for there can be no doubt that under the Judicature Act in *England*, it was open to the plaintiff in that case to put his claim on equitable grounds, and it appears by the report that the court did not lose sight of this, and that he must be considered as having done so, and the court as having decided against him in equity as well as in law. The case of *Kirk* v. *Bromley* (3) seems to me also conclusive against the plaintiff on the equitable counts. I cannot understand by what sense of reasoning a court can say that there was no contract of insurance for want of the seal, but that in equity the company defendants can be bound to perform such contract. Is not that *petitio principii?* Is it not taking for granted that there was a contract, whilst that is the very question to

(1) 5 Can. S. C. R. 417. (2) 3 C. P. D. 208.
(3) 2 Phil. Ch. R. 640.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Taschereau, J.

be decided? How can we say: True, in law, there was no contract of insurance, but in equity the company will be obliged to fulfil the obligation of that contract. Nor can I see how it can be said that the company was guilty of fraud; as a corporation it was not guilty of fraud. Its officers may have committed a fraud, or an act of negligence, but the corporation did not do so. To hold the contrary is, it seems to me, taking away from this corporation the special protection that the *Ontario* legislature granted to it, in enacting that it could not contract except under seal. I cannot see that courts of justice—never mind under which system of jurisprudence—can thus override or set at naught the positive enactments of the legislative authority.

I concur with the Chief Justice that the appeal should be allowed.

GWYNNE, J.—

The plaintiff in her declaration alleged that by a policy of accident insurance made by the defendants, signed by the president and attested by the secretary of the company, defendants, in consideration of the representations made in the application for the said policy, and of the payment of $7.50 it was declared that the defendants insured one *John Wright* in the principal sum of $1,250 for the term of 12 months, ending the 6th of September, 1876, at noon, the said sum, so insured, to be paid to the plaintiff, a daughter of the said insured, or to her legal representatives, within ninety days after sufficient proof that the insured at any time within the continuance of the policy should have sustained bodily injuries effected through external violent and accidental means, within the intent and meaning of the said contract and the conditions thereunto annexed, and such injuries alone should have occasion-

ed death within 90 days from the happening thereof. The declaration then set forth the conditions endorsed on the policy, and averred that while the policy of insurance remained in full force, to wit, on the 7th day of December, 1876, the said insured was killed by external violent and accidental means within the terms and meaning of the said policy, and that all conditions were fulfilled and all things had happened and all times had elapsed necessary to entitle the plaintiff to maintain this action, yet that the defendants had not paid the said sum of $1,250, but that the same is wholly due and unpaid.

The declaration also contained the common money count.

To this declaration the defendants pleaded, firstly to the first count, that they did not insure or promise as alleged, and nine other pleas which all were in confession and avoidance of the policy as set out in the first count.

To the common count they pleaded never indebted. Issue having been joined on these pleas the case went down for trial before a jury, when the defendants rested their defence wholly upon their 3rd, 4th, 5th, 6th, 7th and 8th pleas.

The 3rd plea was that the death of the said *John Wright* was caused by suicide.

The 4th. That the death of the said *John Wright* happened in consequence of the exposure of himself to unnecessary danger or peril.

The 5th. That he was killed by a railway train while he was walking on the track in violation of the by-laws of the company.

The 6th. That he was killed by a railway train while he was walking on the track in violation of the laws of the State of *Michigan* in which the railway was situate, and

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

The 7th. That he was killed by reason of his not using due diligence for his personal safety and protection in the walking on a railway track at night, by means whereof he fell into a cattle guard, and was killed by a passing train.

The 8th. That immediate notice of the injury or accident was not given to the defendants.

These defences were rested upon certain provisions contained in the conditions endorsed on the policy. The jury, when the case was first tried, found a verdict for the plaintiff upon all the issues. On an application for a new trial, the court in the exercise of its discretion granted a new trial, thinking it proper to take the opinion of a second jury upon the special pleas: no suggestion of any defect in the policy from the want of a seal had been made; if it had been, (as observed by the Chief Justice of the Court of Common Pleas, upon a motion to set aside the second verdict at the trial of which the objection was first taken,) the court in granting the new trial would have granted it only upon condition that no such defence should be set up, which it could have done by confining the second trial to all the issues except that which arose upon the first plea to the first count.

The second trial resulted as did the first, in a verdict for the plaintiff upon all the issues. Thereupon the defendants obtained a rule *nisi* to set aside this verdict, and for a new trial on the ground that the paper produced as a policy was not sealed with the seal of the defendants, and that there was no evidence to go to the jury in support of the contention that the policy was sealed, and that upon the issue as to the alleged policy of insurance the defendants were entitled to a verdict; on the ground also that the verdict was against law and evidence, and the weight of evidence; that upon the issue as to exposure to danger

on the part of the assured, the only evidence of how the deceased fell into the cattle-guard showed that he fell into the same while walking along the track of the railway, and that, having regard to the contract, that was such exposure to danger as avoided the policy, and that the learned judge at the trial misdirected the jury, in telling them that there was evidence to go to them of the death having resulted from an accident within the terms of the contract; and on the ground that under the terms of the contract it not being certain as to how the accident happened, the plaintiff cannot recover.

In disposing of this rule the court determined all the grounds of objection except that relating to the first plea against the defendants, thus supporting the finding of the jury upon all the issues to which they related, and as to the issue upon the first plea they gave leave to the plaintiff to file *nunc pro tunc*, such a replication as should justify the court in restraining the defendants from relying upon any such objection to the form of the policy.

That the court had the power to grant leave to file such a replication and to give effect to it when filed does not appear to have been doubted by the court. As I was one of the judges of that court at the time I can say with certainty that it was not, nor indeed, as I think, by the learned counsel for the defendants. In the report of the cases, (for there were others under somewhat similar circumstances argued at the same time) in *Wright* v. *Sun Mutual Life Insurance Co.* (1), we find the Chief Justice, when delivering judgment, saying:

> Under the old system a Court of Equity would, we consider, have compelled the defendants to seal the policies. We think this court, in the present state of the law, can effect the same end, and the

(1) 29 U. C. C. P., at p. 299.

1881

THE LONDON LIFE. INS. CO. v. WRIGHT.

Gwynne, J.

pleadings should be amended to meet the case. Mr. *Bethune*, in his very able defence, urged that this ought not now to be done, as the defendants may have and have an answer to any application to compel them to complete the contract. We do not think we can at this stage listen to this objection to the exercise of our statutory powers. * * * * * In the case of the *London* company, the attestation clause does not profess a sealing, but merely declares that *in witness whereof the company have caused these presents to be signed by their President and attested by their Secretary and delivered at their head office, &c.* Yet they now point to their charter which declares (sec. 7) that no contract shall be valid unless made under the seal of the company, &c., &c., &c. Having obtained this very special clause from the legislature, they adopt a printed form of policy, omitting all reference to a seal and (as it were) expressly directing and adopting an insufficient form of execution.

And at p. 236 I am thus reported :—

Upon the point arising under the plea of *non est factum and the general issue in the cases in which the policy is not declared upon as a deed*, I concur with the Chief Justice in thinking that, under the circumstances referred to by him, we should not permit this objection now made to prevail; and that we have power, under the Acts for the better administration of justice, to allow such an equitable replication to those pleas to be filed, as would justify us in restraining the defendants from relying upon those pleas. Mr. *Bethune* in his able argument for the defendants, admitted, as I understood him, that the court has sufficient power to authorize now such a replication, and that when allowed its undoubted effect would be to deprive the defendants of all benefit from the objection which they now rely upon arising from the want of seals to the policies; but he contends that when the replication should be filed as it raises an equitable consideration as against a legal plea, the case should be tried over again by a judge without a jury, and he says that if the case had been tried before a judge without a jury that objection would not have been raised. I do not think we can yield to this argument, or that allowing the replication, we should now order a new trial before a judge alone without a jury, inasmuch as we feel compelled to concur with the verdict of the jury upon all the other issues.

In pursuance of the leave thus granted, the plaintiff filed a replication on equitable grounds to the first plea, whereby she alleged :

That the policy declared on was delivered by the defendants to

the deceased *John Wright*, after payment of the premium to the defendants in that behalf *as a policy* duly executed binding upon the defendants, and the said policy was and is signed and countersigned by the proper officers of the defendants to make the same a valid policy, and as required by the defendants' act of incorporation, and nothing was omitted or required to be done by the defendants or the deceased to make the said policy valid and binding, except the mere affixing thereto of the defendants' corporate seal, and the deceased acted upon the faith of the said policy having been duly executed and binding on the defendants, and the defendants kept and retained the premium or consideration paid by the deceased for the risk assumed, and intended to be undertaken by the defendants under the said policy, and the plaintiff says that she is now entitled to have the said policy made complete and perfect by the affixing thereto by the defendants of their seal, or to have the defendants estopped and debarred from setting up the said defence, and enjoined against pleading the said first plea as a fraud upon the deceased, and the plaintiff prays that the said defendants may be ordered by the court to affix their corporate seal to the said policy, or that they may be declared to be estopped and debarred from setting up the defence that the said policy was not their deed, and enjoined against pleading the said first plea.

The authority for this pleading is contained in the *Ontario* Administration of Justice Act Revised Statutes ch. 49, by which it is enacted:—

For the more speedy convenient and inexpensive administration of justice in every case, the Courts of Law and Equity shall be as far as possible auxiliary to one another;

That:

Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiffs right to recover may be an equitable one only, and no plea demurrer or other objection on the ground that the plaintiff's proper remedy is in the Court of Chancery shall be allowed in such action;

And

For the purpose of carrying into effect the objects of this Act and for *causing complete and final justice to be done* in all matters in question in any action at law, the court or a judge thereof, *according to the circumstances of the case*, may at the trial *or at any other stage* of an action or other proceeding, pronounce such judgment, *or make such order or decree as the equitable rights of the parties respectively*

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

require, * * * * * *and may as fully dispose of the rights and matters in* question as a Court of Equity could. That no proceedings at law or in equity shall be defeated by any formal objection;

And finally that:

At any time during the progress of any action, suit, or other proceeding at law or in equity, the court or a judge may upon application of any of the parties or without any such application, *make all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud*—the determining of the rights and interests of the respective parties and of the real question in controversy between them, *and best calculated to secure the giving of judgment according to the very right and justice of the case.*

The defendants appealed from the rule of the Court of Common Pleas, which was issued in the terms following:

Upon reading the rule *nisi* made in this cause during the present term, the affidavit of service thereof and hearing counsel for the parties on both sides, it is ordered that the said rule be and the same is hereby discharged, the plaintiff to have leave to reply equitably and to join issue for the defendants.

Upon this appeal coming up in the Court of Appeal that court in its discretion thought fit to give leave to the plaintiff to file a new equitable replication, and to the defendants to rejoin and demur thereto, and the court directed that either party might adduce further evidence upon any issue to be raised upon such equitable replication.

The authority for this course of proceeding is to be found in "The Act respecting the Court of Appeal," Revised Statutes of *Ontario*, ch. 38, sec. 22, whereby it is enacted that:—

The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the court or judge from which or whom the appeal is had, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before any person whom the court may nominate.

Sec. 23. The court shall have power to dismiss an appeal, or give any judgment and make any decree or order, which ought to have been made, and to direct the issue of any process or the taking of any proceedings in the court below, or to award restitution and payment of costs, or to make such further or other order that the case may require.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

In pursuance of the leave thus given the plaintiff filed a second replication upon equitable grounds to the defendants' first plea, which is as follows :—

And the plaintiff for a second replication on equitable grounds to the defendants first plea says, that the said *John Wright* in the declaration mentioned being desirous of effecting an insurance against his death by accident for the sum of $1,250, to be paid to the plaintiff in case of such death, made an application to the agent of the defendants for the taking by the defendants, then being an insurance company doing business in the Province of *Ontario*, of the said risk and insurance for reward or premium to be paid to them, and the said application was delivered by the said agent to the defendants, and they accepted the said application and risk, and communicated the said acceptance to the said *John Wright*, and thereupon it became and was the intention of the said *John Wright* and the defendants to complete the contract for such insurance by the issue by the defendants of a policy therefor, and the defendants, for the purpose of completing the said contract as aforesaid, prepared the policy mentioned in the said declaration, which policy was prepared in the ordinary course of the business of the said defendants and was attested and signed by the President and Secretary of the defendants, being the officers of the said company duly authorized to execute policies and contracts in the name of the said company, and having the custody of the seal thereof, and by which said policy it was declared that the defendants had caused the same to be so signed and attested and delivered as the said policy, and the plaintiff says that the said officers of the said defendants omitted inadvertently and by mistake to actually affix the corporate seal of the defendants to the said policy, and the defendants delivered the said policy to the said *John Wright* in consideration of the payment of the premium or reward to the defendants for the assuming of the said risk and insurance as a policy duly executed by them and as their deed, and the said *John Wright* with the knowledge of the defendants accepted the said policy, acting on the faith of the said contract and the belief that the said policy was a duly executed policy of the defendants and their deed, and paid the said insurance premium or reward to the

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

defendants, and relying upon the said insurance *neglected to insure* elsewhere and complied with all the conditions of the said contract and policy, and the defendants accepted and kept and retained the premium or consideration for the risk intended to be assumed by the said defendants by their said contract and by their said policy, and never in any way repudiated the making of the said policy as their deed until after the bringing of this action; and the plaintiff avers that there was and is nothing to be done by the defendants or the said *John Wright* to make the said contract and policy a binding and valid contract and policy, except the affixing of the defendants corporate seal thereto, and the plaintiff avers that in all other respects the said policy was duly signed and executed, and that the plaintiff is now entitled to have the said contract completed, and the said policy made perfect and complete by the affixing of the defendants seal thereto, or to have the defendants estopped and debarred from setting up the said defence that the said policy is not their deed, and enjoined against pleading the said first plea, and the plaintiff prays that the said defendants may be ordered by the court to affix their corporate seal to the said policy, or that the defendants may be declared to be estopped from setting up the said defence and enjoined against pleading the said first plea.

The defendants filed a joinder in issue upon this replication, and they pleaded by way of second rejoinder thereto, that they did not accept the application or risk under their seal nor by their interim receipt; nor did they communicate such acceptance to the said *John Wright* under the seal nor by their interim receipt, nor did they enter into or make any contract with the said *John Wright* under their seal, nor by their interim receipt to execute or issue under their seal any such policy as alleged. They also demurred to this replication, alleging among other grounds that it is a departure from the declaration which alleged that this action was brought upon a valid policy of the defendants, while the replication admits that no valid policy was issued, and that the said replication shows no grounds upon which an injunction should be granted against the defendants as therein prayed, nor any contract binding upon the defendants to issue a policy or affix their seal.

The plaintiff thereupon demurred to the above second rejoinder as insufficient in law, and joined issue on the demurrer to their replication, and the defendants joined in the demurrer to their replication.

No further evidence was offered by either party, each relying upon the evidence already taken as supporting their respective views.

Now, before referring to the judgment of the Court of Appeal upon the record, it will be convenient to draw attention to the substance and effect of the issues joined upon these replications to the defendants first plea.

The first replication upon equitable grounds set up certain conduct of the defendants, which was relied upon as showing that the point urged by the defendants under their first plea would be a fraud upon the plaintiff, and it prayed that the defendants might be restrained by the exercise of the equitable jurisdiction of the court from committing that fraud, or that they should be decreed to make the policy perfect as they had represented it to be, by affixing the seal.

The second equitable replication set out more at large than the previous one had done the several matters of facts relied upon as showing that the non-affixing of the seal was a mere mistake relievable in equity, or that it was a designed fraud, of which the defendants should not under the circumstances be permitted to take advantage, and it prayed that they should be decreed either to affix their seal *nunc pro tunc*, and thus make the policy good, or that they should be restrained from relying upon their own fraud in not affixing the seal, as a defence to the action.

The joinder in issue upon these replications only put in issue the matters of fact alleged in the replications, and I presume there can be no doubt that the evidence taken does establish the matters so alleged to have been as pleaded, therefore upon the joinder in issue

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

upon the replications the plaintiff is clearly entitled to a verdict and judgment. The sufficiency or insufficiency of those facts to entitle the plaintiff to the relief prayed in respect thereof does not come up for judgment upon the joinder in issue; that question arises solely upon the demurrer to the second equitable replication.

Then, as to the special rejoinder to the second equitable replication, this rejoinder does not dispute any matter alleged in the replication; it must be treated as admitting all those allegations to be true, but insisting that certain of them were not under the seal of the defendants; in other words, the defendants admitting the matters and representations, acts and conduct set out in the replication, the existence of which is relied upon as making the objection of the want of a seal to the policy to be a fraud on the part of the defendants, from the commission of which they should be restained, claims exemption from liability as to the fraud so committed upon an allegation that some of the matters, representations, acts and conduct so relied upon by the plaintiff were not made or done under the seal of the company.

The sufficiency of this rejoinder as an answer to the matters alleged in the replication, and not denied by the rejoinder, comes up under the demurrer to the rejoinder.

The whole question, therefore, rests upon the demurrers to these respective pleadings.

Now, as to the objection raised to the second replication, that it is a departure from the declaration, it may be as well to dispose of this objection at once, by saying that in view of the provision in the Administration of Justice Act, that a plaintiff, in an action at law for a purely money demand, may recover, notwithstanding that his right to recover is purely equitable, and that for carrying into effect

the object of the Act, which was to do away with the distinction between legal and equitable claims, and for causing complete and final justice to be done in all matters in question in any action at law, the court or judge thereof, according to the circumstances of the case, may, at the trial, or at any other stage of an action or other proceeding, pronounce such judgment or make such order or decree as the equitable rights of the parties respectively require, and may as fully dispose of the rights and matters in question as a Court of Equity could, the objection of departure has no application to this case. Moreover, to terminate all controversy upon this point, the Court of Appeal in the exercise of the jurisdiction vested in it, has allowed a count to be added to the declaration, which has been accordingly added, asserting the same ground of equity in the declaration as is set up in the equitable replication. The sole question which remains, therefore, is simply are the matters alleged in the second equitable replication (admitted as they are to be true,) sufficient to entitle the plaintiff to relief in equity, either upon the ground of mistake or of fraud relievable against in equity?

The plaintiff, by the unanimous judgment of the Court of Appeal affirming the unanimous judgment of the Court of Common Pleas in *Ontario*, has been held to be entitled to the relief prayed as founded upon the facts alleged in her equitable replication, and which are admitted to be true.

In the argument before us it was contended that the force of the judgment of the Court of Appeal is weakened by what was contended to be the ground upon which Mr. Justice *Patterson* in that court rested *his* judgment, which was said to be that the instrument declared upon can be construed to be an interim receipt. It must be confessed that some of the observations

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

which fell from the Chief Justice and Mr. Justice *Morrison* give some color for this contention, but, with great deference to those learned judges, a careful perusal of Mr. Justice *Patterson's* judgment has satisfied me, not only that it is not fairly open to any such construction, but that so to construe it would be to do great injustice to that judgment.

The learned judge at p. 229 of vol. 5, Appeal Reports, starts with the assumption that the omission to set the seal to the instrument produced was merely a negligent omission and mistake, and not a designed fraud. He then enters upon a review of the state of the law affecting the contracts of trading corporations, and the exceptions which had become engrafted upon the general rule of the common law that corporations could only contract under their corporate seal. Then at p. 237 he shows what the contention of the defendants is (to combat which is the whole and sole object of his judgment). He says:

> The defendants insist that not only are they free from liability on the policy before us because no seal has been affixed to it, contrary to the doctrines now so universally established and settled, but that even the jurisdiction of chancery to compel execution of a policy is excluded unless a contract under the corporate seal can be shown.

And he adds:

> The high ground thus contended for must not be conceded without a careful examination of the basis on which it is claimed, as we cannot assume *a priori* any intention on the part of the legislature to create for this corporation a position so very exceptional and so capable of being used to the injury, in place of the advantage, of the public. The whole passage to be construed is in these words: "But no contract shall be valid unless made under the seal, &c., except the interim receipt of the company which shall be binding upon the company on such conditions as may be thereon printed by the direction of the Board."

And he adds:

> We are asked to give to the word "contract" (in this sentence,) its literal and unrestricted force, which will necessarily cover a policy

or contract of insurance, but will also include every such petty transaction as the hiring of clerks or servants, and not merely petty and every day engagements but everything which can be technically said to "sound in contract."

And he continues:

When we consider that in the practical business of life a formal contract like a policy of insurance, or an agreement to build a house according to plans and specifications, is rather the exception than the rule, and that contracts are more frequently made by an offer on one side and acceptance on the other; and more particularly when we bear in mind the general use in business of the telegraph as well as the post-office, the absolutely impracticable character of what the literal reading requires becomes very apparent; to carry on business under such a constitution would be a simple impossibility; and to hold that such a rule was enacted in the statute, and yet that the violation of it in all the daily concerns of the business was to be winked at would be a suggestion not to be entertained either by a legislative or judicial court.

He then analyses the expression "interim receipt of the company," and shows that it is a contract of insurance. It is true that in this connection, at p. 239, he makes use of the language which is the sole foundation for what appears to me to be a very unjust construction put upon his judgment, viz.:

We should thus have the statute declaring that there was one kind of contract of insurance which would bind the company without the seal, and finding before us a policy issued by the directors with numerous conditions printed upon it but without seal, it would be our duty *ut res magis valeat quam pereat* to treat this as the contract so authorized by the name of the interim receipt of the company.

Perhaps such a construction might be excusable and necessary, if there was no other mode of preventing the fraud attempted to be perpetrated by the defendants, but that the learned judge does not rest his judgment in whole or in part upon this foundation plainly appears from the sequel, whereby he goes on to show his argument to be that by reason of the use of this expression "interim receipt of the company," imbedded in the sentence in which appear the words "no contract shall

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

be valid, &c., &c., &c.," this word "contract," as so used in contrast with the insurance by interim receipt, must be read as referring to a contract of insurance by policy as the only contract of insurance which can be contrasted with insurance by interim receipt, and he continues to say:—

> It is impossible to believe that the legislature can have intended or consented to create in the case of this company a state of things so anomalous, so inconvenient, and so fraught with the means of deception and fraud, as that which would result from the literal and unrestricted rendering of the word "contract" on which the defendants rely. It is keeping sufficiently far behind the advance of modern law to require an insurance company to seal its policies, but to make a seal and other formalities essential in all matters which take the technical form of contracts, and as a consequence of the impossibility of so conducting its affairs, to enable a company to repudiate those common and every day engagements on the faith of which the poorer classes of the community depend for their living, would be a feat of legislation *not to be credited while any escape from belief in it is possible.*

He then suggests the way of escape in which he lays down the principle upon which he rests his judgment, and sums up with the conclusion to be deducted from the premises he lays down thus:—

> It is evident, therefore, and is shown by this exception in favor of the interim contract of insurance that the "contract" dealt with and understood and intended to be dealt with is contract of insurance only. We may, therefore, read the clause as declaring that *no contract of insurance* shall be valid without seal, except an interim receipt. By the same rule, *contract of insurance* must be taken as synonymous with *policy*, and the whole passage interpreted as enacting that while the company shall be bound *ad interim* by an agent's receipt, its policies must be sealed, signed, and countersigned as directed.

He then proceeds to show that the jurisdiction of a Court of Equity to afford redress in the case of mistake or fraud is not interfered with by the statute, and he illustrates his argument by the case of an instrument which since 8 and 9 *Vic.*, c. 106, s. 3, Imperial Statute,

to operate as a lease must be by deed, will, if not under seal, be construed and be held to be an agreement for a lease.

While I entirely concur in the conclusion arrived at by all the judges of all the courts, namely: that whether the omission of the seal to the instrument produced is to be attributed to mistake or fraud, the jurisdiction of equity is not affected by any thing in this Act, I incline to the opinion that the object and intent of the legislature, in inserting in the Act the clause under consideration, was not so much to impose the condition of the affixing of a seal to a contract of insurance as essential to its validity (for that was already sufficiently provided by the common law) as it was to provide that, although having a seal and so valid by the common law, such contracts should not be valid under the statute, even though sealed, unless they should be also signed by the president or vice-president, or one of the directors, and countersigned by the manager, which were provisions not required by the common law; the design of the company being in this private Act of their own preparation, for which they required the sanction of the legislature, to protect themselves against their own agents to a greater extent than they would be protected by the provisions of the common law. The clause is in the section which defines the powers of the directors, and enacts, among other things—that they shall have power to appoint officers and agents, and to approve their duties, obligations and securities, and generally to transact all necessary matters and things connected with the business of the company, but no contract shall be valid unless made under the seal of the company and signed by the president or vice-president, or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company upon

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

such conditions as may be thereon printed by direction of the board. The directors may also appoint local directors in any city or town in which the company transacts business, with such duties and powers as they may deem proper for the supervision of the business of the company in such places; and by the 8th section the board is empowered to fix the rates at, and the rules and conditions under, which the company's policies shall be issued. It is then competent, under the express provisions of the Act, for the directors to appoint officers and agents, and to prescribe their duties; to appoint local directors in cities and towns remote from the head office where the seal is kept, and to prescribe their powers and duties; to prescribe also the rules and conditions under which policies shall be issued. They may, therefore, authorize their agents and local directors to canvass persons to effect insurances with the company; to deliver to such persons forms of application to be subscribed by them containing warranties of divers matters; to receive such applications to be forwarded to the head office; to negotiate upon the terms of insurance; to receive the premiums to be agreed upon; to convey the applications to the head office and to communicate to the applicants the action of the board thereon, either by letter or orally, notwithstanding anything in the Act. There is nothing in the Act which expresses or implies that the company shall be exempt from liability for frauds committed by their authorized agents unless such frauds should be evidenced under seal; in fine, there is nothing in the Act to justify the contention that any equitable jurisdiction which existed in the Court of Chancery before the Act was passed, and which still exists in it as respects all other similar companies, shall have no existence as regards this company.

The power of the Court of Chancery to prevent

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

and redress fraud is not a power derived from an Act of Parliament. In the Province of *Ontario*, it is true that the court was constituted by an Act of Parliament, but by that Act it was invested with the like jurisdiction and powers as by the laws of *England* were on the 4th March, 1837, possessed by the Court of Chancery in *England* in all cases of fraud and accident; and by the laws of *England*, without any Act of Parliament, the jurisdiction of the Court of Chancery extends to the prevention and redress of all frauds. This power constitutes the chief vital organ of the court without which a Court of Equity can exist only in name; no Act of Parliament therefore, much less a private Act of this nature, could strip a Court of Equity of this power without divesting it of its vitality and reducing it to the condition of a Court of Equity only in name. It is impossible, therefore, from the terms of this Act, to attribute any such intention to the legislature.

But it is said that no reported case can be found in which the Court of Chancery has interfered in the manner in which the court has interfered here in a case and under circumstances similar to the present. I am not concerned to seek whether this be so or not. It may be so, but it is of little consequence that it should be so. It may, indeed, be that to the appellants is due the unenviable reputation of having been the first to design and contrive the peculiar phase of fraud which they rest upon as their defence to the plaintiff's claim, *crescit in orbe dolus*; but as fraud increases and extends its ramifications the remedial power of the Court of Chancery to prevent its consequences and to give ample and effectual redress extends also. It matters not how gigantic are its proportions or how new and uncommon the shape which it assumes, the remedial power of the court rises with, and becomes equal to, the occasion.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

It is, however, the duty of the court to adopt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which from the progress daily making in the affairs of men must continually arise, and not, from too strict an adherence to forms and rules established under different circumstances, decline to administer justice and to enforce the rights for which there is no other remedy. The jurisdiction of the court must not be narrowed to cases in which the jurisdiction has been exercised. The cases in which the jurisdiction has been exercised are merely examples, and must not be looked on as the measure of the jurisdiction (1).

Lord *Redesdale*, in his treatise upon the jurisdiction of the court, gives among other heads of jurisdiction the following:

Where the powers of the law are abused and exercised contrary to conscience, and where the law gives no right but the principles of complete justice require the interference of the court to prevent the recurrence of wrong.

And in *High* on Injunctions, an American work, it is said (2):

Courts of Equity in the exercise of their general jurisdiction for the prevention of fraud are often called upon to interfere by injunction where fraud constitutes the gravamen of the bill. The manifestations of fraud are so various that it is impossible to embrace all its varieties of form within the limits of a precise definition. Indeed the courts have generally avoided all attempts in this direction, and have reserved to themselves the liberty to deal with it in whatever aspect it may be presented by human ingenuity.

That the company is responsible for the fraud of its agents there can be no doubt. They are responsible for the tort of their agents, whether of violence or even of slander; and in *Kerr* on Fraud (1) as to the liability of company for fraudulent misrepresentions of the directors, it is said:

The general interests of society demand that as between an innocent company on the one hand, and an innocent individual defrauded by the company on the other, misrepresentations by the directors of a company shall bind the company, although the shareholders may be ignorant of the representations and of their falsehood.

(1) *Kerr*, on Injunctions, p. 4. (2) Ch. 1, sec. 24.
(3) P. 72.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

But in the case before us the fraud is in truth committed by the company itself, which must be responsible for everything done in the suit. It is committed and only perfected in the progress of the cause, and in such a manner as to constitute as it appears to me a fraud upon the court itself, which ought not to be overlooked.

The evidence establishes beyond all question that the company by their duly authorized agents received the application of *John Wright* for insurance; that they in like manner negotiated with and agreed upon the terms of the insurance; that they received the premium agreed upon as the consideration for a valid policy; it thereupon became their duty to deliver him a valid policy or to return him his money and enable him to insure elsewhere; that they elected to retain the money paid by him, and as for the consideration which he negotiated for, namely, a good and valid policy for the amount agreed upon, they delivered to him the instrument sued upon and produced with divers conditions thereon endorsed, subject to which the instrument, which was signed by the president and countersigned by the manager, was issued as and for a good valid policy of insurance; that when this instrument was declaed upon as such good policy, although the defendants pleaded a plea denying that they had insured the party named in the instrument as insured, a plea usually pleaded for the mere purpose of compelling the production of the instrument at the trial in order to show the conditions upon which it was granted, they filed therewith seven or eight other pleas, setting up in bar of the action divers matters alleged to avoid the policy in the terms of the conditions thereon endorsed; that when these issues went down to trial they did not dispute the validity of the policy, but relied wholly upon the pleas setting up the matters

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J

relied upon as avoiding the policy by reason of alleged breaches of the conditions, subject to which it was issued; that upon a verdict being rendered for the plaintiff on all these issues they moved the court for a new trial, and (here comes in the point which appears to me to amount to a fraud upon the court) suppressing all intention of opening the verdict upon the first plea for the purpose of setting up the defence subsequently relied upon thereunder, they permitted the court to grant a new trial under the impression that the sole defence relied upon was that appearing upon the special pleas. Now, if the defence subsequently relied upon under the first issue had never been set up, if the appellants had only asked for and had obtained a new trial of the issues joined upon the special pleas, no fraud would have been completed, the fraud which the appellants have committed was not perfected until at the second trial they set up the defence that there was no seal to the instrument so issued as a perfect policy; and that the setting up of that defence under the circumstances above detailed was a gross and flagrant fraud upon the plaintiff, and as it seems to me upon the court which under the above circumstances was induced to grant the new trial, cannot, as it seems to me, admit of a doubt, and that it is one which a Court of Equity could not refuse to interfere to prevent without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears.

It is said, however, that there are two cases which decide that in such a case a Court of Equity has no such jurisdiction as that which has been asserted, viz.: *Hunt* v. *Wimbledon Local Board* (1), in appeal, and *Crampton* v. *Varna Railway Co.* (2), but these cases, when properly understood, have no

(1) 4 C. P. D. 48. (2) L. R. 7 Ch. Ap. 562.

bearing upon the present case, or whatever bearing they may have, if any, is in support of the jurisdiction here asserted. In the former case the point arose out of the doctrine affecting the jurisdiction exercised by the Court of Chancery in decreeing specific performance of contracts relating to land not in writing, upon the ground of part performance, a totally distinct and very different head of jurisdiction from that relied upon here, as is shown by the judgment of Lord Justice *Cotton* in that case. He says there:

> The Statute of Frauds says that in certain cases no action shall be maintained unless there is evidence in writing to show what the contract was; but if a Court of Equity finds an overt act such as the possession of land, then the presumption of a contract is raised, and the Court will in consequence of that overt act allow parol evidence to be given for the purpose of ascertaining what the actual contract was.

This is the principle, as he explains it, upon which the Court proceeds in cases of specific performance of oral contracts relating to land partly performed and not upon the ground of fraud—that this principle does not affect the doctrine of the Court of Chancery as to giving relief in cases of mistake either is apparent, so that *Hunt* v. *Wimbledon Local Board* is no authority against the exercise of the jurisdiction which has been exercised in the present case. In *Crampton* v. *Varna Railway Co.*, it was merely held that a Court of Chancery has no jurisdiction to entertain a suit for a purely money demand. That is so in *England*, but not so in *Ontario*, where by statute a suit for a purely money demand may be instituted and determined in the Court of Chancery, and a suit may be brought in an action at law and recovery had in that suit upon the case appearing to be one of a purely equitable nature.

In giving judgment in that case, the Lord Chancellor, Lord *Hatherley*, says:

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

The truth is, that every one who deals with corporations like these must be taken to know what are their powers of contracting, and must take a contract accordingly, and when there is only a money demand. and there is no valid contract, then this Court cannot interfere in the matter.

This language is not used with the design of throwing any doubt upon the jurisdiction of the Court to interfere in cases of fraud, or even in cases of mistake, as plainly appears, if proof upon such a point could be required, by the succeeding paragraph in the judgment, wherein he says:

> I certainly was impressed with the consideration of the length to which these doctrines might be carried but I think that the arm of the court is always strong enough to deal properly with such cases. There might be a contract without seal under which the whole railway was made and of which the company would reap the profit, and yet it might be said that they were not liable to pay for the making of the line; when any such case comes to be considered, I think there will be two ways of meeting it. It may be, and perhaps is so in this case, that the contractor has his remedy against the individual with whom he entered into the contract although he may have no remedy against the company; or it may be that the Court, acting on well recognized principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment.

Now, it is some of those well recognized principles as precisely applicable to the circumstances of the present case, which are invoked to prevent and redress the fraud which the appellants, after failing upon all the defences upon the merits urged by them, persistently have been endeavouring to procure the sanction of a court of justice to aid them in perpetrating. Certain it is that the courts of the late Province of *Upper Canada*, now *Ontario*, never doubted that the arm of a Court of Equity was long enough and strong enough to prevent the attempt to commit such a fraud being successful. About 30 years ago, an action was brought against an insurance company to recover back the premium paid by an insurer upon the ground that the instrument

issued by the company as a policy was defective; *Perry* v. *Newcastle Mutual Fire Ins. Co.* (1). The defect was precisely similar to that in the present case. The Act of incorporation of the company enacted that any policy signed by the president and countersigned by the secretary, but not otherwise, should be deemed valid and binding on the company. The insertion here of the words "but not otherwise" makes the case identical with the present. The defect was, that although the policy issued was sealed with the company's seal and was signed by the secretary, it was not signed by the president. It was held that the plaintiffs could not recover back the premiums they had paid, although it was admitted that in case of loss they could not have recovered at law upon the policy as it stood, and that it was clearly invalid, but C. J. Sir *John Robinson*, delivering the judgment of the court, said:

> Thirdly, which indeed is of itself conclusive against this action, the plaintiffs cannot be said to have paid their money for nothing since the company were in fact bound to execute a policy having accepted the risk and received the money.

And again:

> I do not consider that the company could in this case have escaped from their liability after what has taken place, for if they were disposed to be dishonest they could surely be compelled to execute a valid policy of the proper date. In effect, therefore, the plaintiffs have been all the time insured, as they probably have considered themselves to be, notwithstanding the accidental omission of the president's name, which they have had no reason as it appears for apprehending would not be made right on their request at any time.

Here is an express assertion of the existence of the jurisdiction to relieve against mistake in a case, the circumstances of which are precisely similar to the present. *A fortiori* does the jurisdiction exist in a case of fraud, when, as here, the company having enjoyed the premium, upon the loss occurring, fraudulently set

(1) 4 U. C. Q. B. 363.

1881

THE LONDON LIFE INS. CO. v. WRIGHT.

Gwynne, J.

up their own wrongful neglect as a defence to the plaintiffs' action, after they had failed upon all the grounds of defence which were legitimately open to them to raise. If this court should now hold that a jurisdiction so long and so uniformly claimed and asserted by the courts of *Ontario*, which, until now, does not appear to have been questioned, does not exist, such a decision would, in my opinion, be greatly to be deplored, and would indeed be extremely mischievous as crippling the arm of the courts of that province in the exercise of one of their most wholesome weapons for the prevention of frauds and the due administration of justice.

The appeal in my judgment must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Harris, Magee & Co.*

Solicitor for respondents: *S. S. Macdonnell.*