ALEXANDER ROBLEE AND ANOTHER (DEFENDANTS)..... } APPELLANTS;

AND

ALEXANDER K. RANKIN (PLAINTIFF)..RESPONDENT.

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*Feb'y. 20.

*June 23.

ON APPEAL FROM SUPREME COURT OF PRINCE EDWARD ISLAND.

Appeal—Final judgment—Supreme and Exchequer Court Act, 1875, *Sec.* 25—*Supreme Court Amendment Act*, 1879, *Sec.* 9—*Promissory note overdue in hands of payee—Garnishee clauses, C. L. P. Act—Payment by drawer into court by order of a judge, effect of.*

An action was brought by respondent as endorsee of a promissory note made by appellants in favour of one J. A. and by him endorsed to respondent. The appellants pleaded that the amount of the note had been attached in their hands by one of A's judgment creditors and paid under the garnishee clauses of the Common Law Procedure Act of P. E. I., transcripts of secs. 60

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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to 67 inclusive, of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the Supreme Court gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the Supreme Court of Canada.

Held (reversing the judgment of the court below), that an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor under the C. L. P. Act, and that payment of the amount by the garnishee to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellant should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date; but,

Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court.

APPEAL from a judgment of the Supreme Court of Prince Edward Island.

This was an action to recover the amount of a promissory note made by defendants on 5th December, 1876, payable to Isaac Auld or order, for the sum of $200 twelve months after date, with interest at rate of 10 per cent. per annum until paid, and which note Auld endorsed to the plaintiff.

Defendants pleaded: that after the making of the said promissory note, and after the same became due and payable, and while the said Isaac Auld was the legal holder of the said note, and before the same was endorsed to the plaintiff, Alexander Strang and Jessie Strang, his wife, obtained a judgment in the Supreme Court of this island, at Charlottetown, for the sum of $1,500 damages, and $118.65 costs of suit, making in all $1,618.65, against the said Isaac Auld, and was a judgment creditor of

the said Isaac Auld within the meaning of the Common Law Procedure Act, 1873, for that amount; and afterwards, and while the said Isaac Auld was the legal holder of the said note, and after the same became due and payable, and before it was indorsed to the now plaintiff, the said Alexander Strang and Jessie Strang, his wife, in pursuance of the said Act, as such judgment creditors, made an *ex parte* application to Mr. Justice Hensley, one of the judges of the said court, upon affidavit by the said Alexander Strang, stating that such judgment had been recovered, and that it was still unsatisfied, and that the now defendants were indebted to the said Isaac Auld, and were within the jurisdiction of the said court, whereupon it was, in pursuance of the said Act, ordered by the said judge that all debts due and owing, or accruing due, from the now defendants to the said Isaac Auld, should be attached to answer the said judgment debt, and that the now defendants should appear before the said judge to show cause why they should not pay the said Alexander Strang and Jessie his wife the debt due from the now defendants to the said Isaac Auld, or so much thereof as might be sufficient to satisfy the said judgment debt; and the said order was duly served on the now defendants, and the now defendants did not forthwith pay into court the amount due from them to the said Isaac Auld, or any part thereof, and did not dispute the debt due from them to the said Isaac Auld, whereupon it was, in pursuance of the said statute, duly ordered by the honorable Edward Palmer, Chief Justice of the said Supreme Court, that the now defendants should forthwith pay the said Alexander Strang and Jessie Strang, his wife, judgment creditors as aforesaid, the said debt due from them to the said Isaac Auld, judgment debtor, and that in default thereof an execution should issue for the same,

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being the amount of the claim herein pleaded to, towards satisfaction of the said judgment debt, and the last mentioned order was duly served on the said defendants; and afterwards the defendants paid to the said Alexander Strang and Jessie Strang his wife, under such proceedings as aforesaid, the amount of the note and interest due thereon and herein pleaded to, and the said note was indorsed by the said Isaac Auld to plaintiff after it became due and after the payment by the now defendants to the said Alexander Strang and Jessie his wife, under the proceedings aforesaid.

The plaintiffs both joined issue and demurred as follows:

The plaintiff takes issue on the defendants' plea.

As to the defendants' plea, says that the same is bad in substance.

A matter of law intended to be argued is, that the order for attachment, and the order for payment of all debts due from the defendants to the said Isaac Auld, and the payment by the defendants of said moneys so due by them, is no defence to this action as against the present plaintiffs.

There was a joinder in demurrer.

The respondent subsequently obtained an order from one of the judges of the court below ordering the issues in law to be first disposed of.

The following were the plaintiff's points for argument on demurrer:

1—That the order for attachment and the order for payment and the payment thereunder, is no defence to this action, as against the present plaintiff.

2—That the promissory note, the subject of this action, is not a debt within the meaning of the Common Law Procedure Act of 1873, being a negotiable security.

3—That the payment under the orders for attachment herein is not such an equity, attaching to the

promissory note, the subject of this action as can be set up by the defendants against the plaintiff, the endorsee of the note, although it was endorsed after it was due.

4—That the payment made under the provisions of the Common Law Procedure Act, as alleged in plea, only amounts to a discharge as against the judgment debtor, and does not operate as a discharge as against third persons.

5—The pleas are bad because they do not plead the matters set out on equitable grounds.

6—The plea is bad as it does not show that the claim or debt of plaintiff was barred by the order of a judge.

The case came on for argument, and was heard before the full Supreme Court of the Province on the fifth day of February, A. D. 1883, and on a subsequent day judgment was given on said demurrer in favor of the plaintiff below by Peters and Hensley, JJ., two of the judges of the Supreme Court of this province, the chief justice dissenting.

On the 19th day of March last, the respondents obtained an order absolute, authorizing the prothonotary of the Supreme Court of this Province to ascertain or compute the amount of debt and damages for which final judgment was to be entered in said cause.

On the 24th day of March, A. D. 1883, the prothonotary computed the amount for which final judgment was to be entered in the said cause,

No rule for judgment on the demurrer or other rule except the rule to compute above set forth was taken out by the respondent, nor was any judgment signed until the second day of May, A. D. 1883, on which day judgment was signed for the plaintiff below.

The application to quash appeal for want of jurisdiction made on the ground that time for appeal should run from the date of the judgment on the

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demurrer and that the present appeal was too late, was dismissed.

L. H. Davies, Q.C., for appellant:

The garnishee clauses of the local statute, under which the proceedings in this cause were taken, are transcripts of the 60, 61, 62, 63, 64, 65, 66 and 67 sections of the English Common Law Procedure Act, 1854.

The effect of an order that all debts owing or accruing from the garnishee to the judgment debtor to answer the judgment debt is, when served, *In re Stanhope Silkstone Collieries Company* (1,) to bind the debt or debts, and prevent the creditor, *i.e.*, the judgment debtor, from receiving it or them. Per Cotton, L.J., *ex parte* Jocelyne, *In re* Watt (2); *Chatterton* v. *Watney* (3).

It is immaterial whether the attached debts are due and payable at the time of the service of the order *nisi*, because the effect of the order is to deprive the judgment debtor of the right to receive, leaving the garnishee to shew cause why he should not pay.

Further, the attachment is not of the note but of the debt, which the garnishee has by payment admitted did at one time exist between him and judgment debtor, and which was only suspended during the running of the note.

Taking the note only operated as a suspension of the original debt due from appellants to the judgment creditor, and on the note becoming due in the hands of that judgment debtor, the original debt revived and existed at the time of garnishment (4).

The payment made by order of the judge to the judgment creditor, was in the eye of the law a payment

(1) 11 Ch. D. 160.
(2) 8 Ch. D. p. at 331.
(3) 17 Ch. D. p. 259.
(4) Byles on Bills, p. 335; *Tarleton* v. *Allhusen*, 2 A. & E. 32; *Belshaw* v. *Bush*, 11 C. B 191; *National Savings' Bank* v. *Tranah*, 36 L. J. C. P. 260; and see *Cohan* v. *Hale*, 3 Q. B. D. 371.

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to the judgment debtor. It was therefore, an equity attaching to the note when Auld, after that payment, endorsed it to respondent.

After payment a note loses all its validity, and is no longer negotiable. Story Prom. Notes (1).

The obvious reasons which may be urged for excluding current promissory notes from the operation of the garnishee clauses, viz., that they would destroy their negotiability, do not extend to overdue notes in hands of payee. See Drake on Attachment (2).

The arguments of the majority of the court below, that it would be very inconvenient to construe the statute as embracing debts secured by overdue promissory notes, are based upon an imaginary condition of things, and are not sound, and cannot over-ride the statute. In actual life, overdue promissory notes are not accepted as securities for large advances, as suggested in the judgment, and every mercantile man knows that in taking such an instrument he takes it at his peril, and subject to the chances of its having been paid, &c.

The appellants, having once been compelled to pay the notes, by order of a court of competent jurisdiction, will not be compelled to pay it a second time. *Wood* v. *Dunn* (3); *Westoby* v. *Day* (4).

A. Peters, for the respondents:

The real quesion in dispute raised by the demurrer is, "whether or not debts secured by promissory notes are attachable, under the garnishee clauses of the C. L. P. Act, 1873, when overdue."

My first point is, that debts secured by negotiable instruments are not attachable. The 258th section of the P. E. Island Common Law Procedure Act (English Act, 1854, section 65,) provides that payments made by the

(1) P. 197.
(2) Pp. 583 to 588.
(3) L. R. 2 Q. B. 73.
(4) 2 El. & B. 605.

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garnishee shall be a discharge as against the "judgment debtor." In order to support the appellant's construction, the statute should read as against those claiming through him, and I contend that the discharge given by the section is a discharge only against "the judgment debtor," and cannot be set up except by a person who comes strictly within the words of the section, and does not apply to an action brought by a third person; and this is obvious, for if it was intended that negotiable instruments could be attached, some machinery would have been provided for seizing the note itself, or, in case that could not be done, of indemnifying the person paying against the note, as is done in several of the states of the United States of America in the case of garnishment of negotiable paper. See Law of Mississippi and Iowa, cited in "Drake on Attachments (1), and analogous to the provision of the English law in case of plea of lost note pleaded.

Suppose the maker of a note is garnisheed, or attempted to be garnisheed, does he know whether the judgment debtor is then the holder of the note or not; and may he not be garnisheed when he actually believes that the note is in the hand of the judgment debtor, when as a matter of fact it has been endorsed away?

Again, the garnishee, if he is compelled to pay the note without any indemnity, and without getting his note, is left open to the risk and annoyance of having to defend an action brought against him by an indorsee claiming to be an indorsee before the attachment, when he, the garnishee, is not in a position to prove when the note was actually endorsed; the risk of paying costs that the garnishee might be compelled to run would, in such case, be very great and very unjust.

By the common law no person is required to pay a negotiable instrument unless the instrument is delivered

(1) Sec. 711, ss. 6.

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up to him at the time of payment. See *Hansard* v. *Robinson* (1); Byles on Bills (2).

I also contend that this statute should not be construed so as to alter the common law in so material a point unless the statute is express. See Maxwell on Statutes (3). Again, if the maker of a negotiable instrument can be attached, the same process might be applied against an indorser, which must lead to evident inconvenience. For instance, suppose a note made by "A" in favor of "B," or order indorsed by "B" to "C" and "C" to "D," a judgment is obtained against "D," and "C" is garnisheed and compelled to pay, "C" has no means of obtaining the note from "D" or of compelling him to give it to him (especially if "D" is in a foreign country). How is "C" to recover against the previous indorser or the maker ?

The garnishee clauses apply to ordinary debts only, and not to those secured by negotiable securities, See *Holmes* v. *Tutton* (4) per Lord Campbell, where he says, the enactment under our consideration, extends the power of executing the judgment of mere ordinary debts, though not secured by bill or note followed in *Turner* v. *Jones* (5); *Mellish* v. *The Buffalo Ry. Co.* (6). Drake on attachments (7).

It is said that though negotiable instruments which are not due may not be attachable, still, that an attachment of an overdue note is an equity which would affect it in the hands of an indorsee who took it after it was due. I answer that it is not such an equity. The indorsee of overdue paper takes it subject to all the equities which attached to the bill in the hands of the holder at the time it became due, arising out of, or con-

(1) 7 B. & C. 90.
(2) 11th Ed. 375-376.
(3) P. 66.
(4) 5 E. & B. 65.
(5) 1 H. & N. 878.
(6) 2 U. C. P. R. 171.
(7) Sections 580, 583.

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nected with, the bill transaction itself, but not arising out of any collateral matter. *Burrough* v. *Moss* (1); *Oulds* v. *Harrison* (2); and see also per V. C. Malins *in re Overend* and *Gurney ex parte Swan* (3), where he says, "it is the equities which attach to the bill, not the equities of the parties; *Holmes* v. *Kidd* (4). See Story on Bills (5); Story on promissory notes (6) where he states that the law of France goes further and holds an attachment an equity; Byles on Bills (7); *Stein* v. *Yglesias* (8). A note does not lose its negotiability after it becomes due, but it is only then encumbered with the equities which legally attach to it and which are fully defined in the case above cited.

RITCHIE, C. J. :—

This is an appeal from the judgment of the Supreme Court of Prince Edward Island.

This action was brought by respondent as endorsee of a promissory note made by the appellants in favor of one Isaac Auld, and by him endorsed to respondent. The appellants pleaded that after the note fell due, and while Auld, the payee, held it, the amount was attached in their hands by one of Auld's judgment creditors, by whom they were summoned before one of the judges of the Supreme Court, who ordered them to pay the amount of the note to the judgment creditor, and that, in obedience to such order, they paid it, and that the note was after this, while long overdue, endorsed to respondent.

To this plea respondent demurred, and a majority of the court sustained the demurrer, holding that—

An overdue promissory note in the hands of the payee is not liable to be attached by a judgment creditor of

(1) 10 B. & C. 558.
(2) 10 Ex. 572.
(3) L. R. 6 Eq. 359.
(4) 3 H. & N. 891.
(5) Sec. 187.
(6) Sec. 179.
(7) P. 167, (11th Ed).
(8) 3 Dowl. 252.

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the payee, and that the garnishee clauses of the statute do not extend to promissory notes. From this judgment appellants appeal.

I have no doubt that a promissory note overdue, in the hands of the payee, is liable to be attached by a judgment creditor of the payee, the garnishee clauses of the Common Law Procedure Act, in my opinion, extending to overdue promissory notes, and that, irrespective of any question as to the right of a judgment creditor to attach an overdue promissory note, I think a payment into court by the drawer of the amount of such a note, in obedience to an order of a court of competent jurisdiction, discharges the drawer from any further liability on the note, and that the subsequent endorsement by payee to a third party gave such party no right of action against the drawer on the note.

Sec. 65 of C. L. P. Act, 1873, provides that—

> Payment made on execution upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him, as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed (1).

The case of *Allen* v. *Dundas* (2), clearly establishes that the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time which he has once paid under the sanction of a court having competent jurisdiction. This case has been often since referred to with approval.

See per Channell, B., in *Wood* v. *Dunn* (3), in which the question was as to the protection of a garnishee under an order of a court of competent authority, in which case Pigott, B., says:—

> The garnishee's duty is to obey the order; not to contest conflicting claims.

and in which case, Channell, B., considered it neces-

(1) See *Turner* v. *Jones*, 1 H. & N. 878, and *Lockwood* v. *Nash*, 18 C. B. 536.

(2) 3 T. R. 128.

(3) L. R. 2 Q. B. 80.

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sary to examine the decided cases, and see whether there was anything in them to induce the judge's sitting in a court of error to decide "in opposition," as he expresses it, "to the broad principle of protecting honest payments made under competent authority;" and taking the first case of a payment being made under the order without any notice of an assignment, then, he says:—

We think we ought to hold that the payment has been made under the sanction of a court of competent authority, and that it ought to be protected.

And on the whole case he concludes thus:—

We think that it sufficiently appears in this plea, that the payment was made in obedience to the order of a competent authority, and is, therefore, protected, and the judgment of the court of Queen's Bench should be reversed.

Payment into court by a garnishee, under a judge's order, is a payment within this section, and discharges the garnishee.

In *Culverhouse* v. *Wickens* (1), Willes, J. says:—

It is clear that if the garnishee pays the money into court under a garnishee order instead of disputing the debt, it is, under sec. 65 of the Common Law Procedure Act, 1854, equivalent to a payment to the judgment creditor, and it should seem to be the same if money is subsequently paid into court by the garnishee, by order of a judge.

Bovill, C.J.:—

With respect to the sum of £25 that has been paid into court I see no reason for granting the rule. Under the 63rd sec. of the Common Law Procedure Act, 1854, the garnishee may pay into court the money he acknowledges to be due from him, and by the effect of that and the 65th section such a payment would undoubtedly discharge the garnishee. In this case the money was paid in under the order of a judge, but it was paid in as an acknowledgment of the debt, and I think the effect was the same as if it had been paid in in pursuance of the section above alluded to.

Willes, J.:—

(1) L. R. 3 C. P. 295.

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The 65th section of that Act must refer, I think, to all payments by the garnishee into court, whether made under the 63rd section as an acknowledgment of the debt, or subsequently under a judge's order, to be held for the creditor if he proves his claim to be just. The latter is, in fact, a payment to him if his claim is just, because it is payment into court in trust for him.

In *Sampson* v. *Seaton Railway Co.* (1), Lush, J. says:—

The right to attach a debt owing to the judgment debtor by a third party is a species of execution against the property of the judgment debtor. For the purpose of this new remedy given by the Common Law Procedure Acts, the debt is made equally available to the judgment creditor as property seizable under a fi. fa., and his rights are as ample in the one case as in the other. The machinery provided for determining questions of disputed liability has reference solely to cases where the garnishee disputes his liability to the judgment debtor. And although we have no doubt that the state of accounts between the garnishee and the judgment debtor may and ought to be gone into, so that the garnishee may not be in a worse position than if he had been sued for his debt by the judgment debtor, the case is different as between him and the judgment creditor. There is no place for the discussion of cross claims between the garnishee and the judgment creditor. If it had been intended to let in such claims, some mode of adjusting them in case of dispute would have been also provided. But there is none. The words of sec. 63 of the Act of 1854 appear to us clearly to define what is the right of the judgment creditor: "If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due, or claimed to be due, from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt." All that the judge has to do is to decide whether the circumstances are such as to make it right and just that the garnishee should pay and that the judgment creditor should have execution against him. Having decided against the garnishee, the judge cannot go on to settle the accounts between him and the judgment creditor, nor to impose, as a condition of granting the remedy to which the statute entitles him, that he shall pay what he may owe to the garnishee.

(1) L. R. 10 Q. B. 30.

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The case of *Wood* v. *Dunn* (1), is also referred to.

In re Stanhope Silkstone Collieries Company (2), shows that the order of attachment, or the writ of attachment, (which James, L. J., says, in his opinion, are the same thing), does not prevail until it has been executed by being served on the debtor, and then, at the time, as an execution against goods actually executed.

I am of opinion to allow this appeal.

STRONG, J.:—

It has been decided by an Irish case—*Pyne* v. *Kinna* (3)—that a promissory note held by the judgment debtor as payee or endorser, not yet due, is not liable to attachment, for the reason that it may be endorsed to a *bonâ fide* holder for value without notice before it became due, but this reason is obviously inapplicable to an overdue promissory note, as the plea alleges this to have been when the attaching order was made. It would seem therefore, that as every subsequent endorsee would take the note subject to the equities to which the payee was liable, and as it was, beyond all question, by force of the express enactment of the provincial statute, corresponding to Common Law Procedure Act (Eng.), 1854, sec. 65, to be considered paid so soon as payment was made to the judgment creditor according to the exigency of the order, that it stands on the same footing as a bond. Sec. 65 of the English Common Law Procedure Act, 1854, is as follows:—

> Payment made on execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the debtor, liable under a judgment to the amount paid or levied, although such proceeding may be set aside or the judgment order reversed.

So that, even granting that the order ought not to have been made, the statute makes the payment under

(1) L. R. 2 Q. B. 80. (2) 11 Ch. Div. 160.
(3) 11 Ir. L. Rep. (C. L.), 40.

it good, and the plaintiff must therefore, on the averments of this plea, be considered as the endorsee of an overdue note which had been paid and satisfied before it was endorsed to him.

I venture to suggest, however, that in order to prevent frauds such as that practised in the present case, it would be a prudent and proper precaution if the court were to order the judgment debtor, on payment by the garnishee to the creditor, to deliver up the note to the latter, an order which the court, under its general equitable jurisdiction, has clearly power to make.

The judgment must be reversed, and judgment on demurrer entered for the defendant, and the appellant must have his costs of the appeal.

FOURNIER, J., concurred.

HENRY, J.:—

This is an action on a promissory note by the endorsee of the payee. The record shows, that after the note fell due, proceedings were taken by a judgment creditor of the payee, under the provisions of the Garnishee Act of Prince Edward Island, against the drawers of it. That Act is the same as the English Act on the same subject. The drawers appeared and admitted the debt due by them to the payee, and subsequently paid the amount of the note to the judgment creditor, under an order duly made by a judge in that behalf; the note, however, remaining in the possession of the payee. The drawers, being unable to deny the existence of the debt due by the note to the payee, were not only justified but compelled to admit it, as a contest on that point would be not only useless but expensive, and having so admitted such debt, were obliged to pay the same, as otherwise an execution for the amount might, and no doubt would, have been issued against them to enforce the payment thereof.

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The words of the statute are: "all debts owing by the garnishee to the judgment debtor shall be attached to answer the judgment recovered against them." Can it be for a moment contended that a debt is any the less a debt because it is secured and evidenced by a promissory note overdue? It is not hard to appreciate the difference in such a case between a current note and one overdue. In respect of the former, there is really no debt due by the maker to the payee, and if endorsed to a third party while current, he, or some other holder would become the creditor therefor of the drawer. A current note cannot therefore, be attached, or if the garnishee, as such, should be called upon to pay the amount, such payment would be no defence to an action at the suit of an endorsee, or any subsequent holder, at all events, if the note were endorsed before falling due.

The note in question was what is termed a "stale note" before it was endorsed to the respondent, and by well understood rules, his position in regard to it is no better than that of the payee who endorsed it to him, which would not have been the case if the indorsement had been made while the note was current. The endorsee here, it must be held, took the note on the credit of the endorser, and not of the drawer, and any defence available in an action by the payee is, as to all matters antecedent to the endorsement, equally available in an action by the endorsee. This note is shown to have been paid after maturity, and not only so, but its payment was enforced by legal means. The drawers had no option but to pay the amount of the note, and it would, in my opinion, evidence a most unsatisfactory state of the law, if a third party, claiming through the payee whose judgment debt the amount was appropriated to liquidate, could enforce the payment of it a second time.

It is contended, on the part of the respondent, that the appellants might have successfully r sisted an order in favor of the judgment creditor until the note was produced. That point, however, it is unnecessary, I think, to discuss. The debt due by the note was paid, and, I think, legally paid. The question as to possession of the note was not at the time raised. The garnishee ran the risk as to the then holder of it, and, if it was then held by the judgment debtor as payee thereof, the payment under the garnishee proceedings was an extinguishment of the debt, and a legal payment of the note.

I am, for the foregoing reasons, of the opinion that the appeal herein should be allowed, and judgment given in favor of the appellants with costs.

GWYNNE, J.—I am of opinion that a debt secured by a promissory note overdue in the hands of the payee, who, while the holder thereof, became a judgment debtor to another person, is, while in the hands of such judgment debtor as the legal holder thereof, a debt owing to him by the maker and attachable at the suit of the judgment creditor of the payee. The statute of the province of Prince Edward Island is identical on this point with the English Common Law Procedure Act, and its provision therefore is, that in the case of a judgment recovered by one person against another remaining unsatisfied, all debts owing by, or accruing from, any third person to the judgment debtor may be attached to answer the judgment, and that service upon such third person of an order, that debts due or accruing due to the judgment debtor shall

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be attached, shall bind such debts in his hands, and that by the same or any subsequent order, it may be ordered that such third person (in the statute called the garnishee) shall appear before a judge or some officer of the court, to be specially named by the judge, to show cause why he should not pay the judgment creditor the amount due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt, and that if the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, and does not dispute the debt, execution may issue to levy the amount due from such garnishee.

Now the reason why a debt, secured and made payable by a promissory note, is not attachable to satisfy a judgment recovered against the payee while the note is still current—not yet arrived at maturity—is because the amount made payable by such a note is not, before maturity, either a debt owing by, or accruing due from, the maker to the payee within the words of the statute.

The amount secured by the note, until maturity, is not a debt owing by the maker and due to the payee or to any one. By the custom of merchants, which governs promissory notes, it is accruing due to the person who shall be the holder thereof at maturity, and therefore cannot be said to be accruing due to the payee, the judment debtor, within the words of the statute.

No such reason however, exists for holding that a debt secured by a promissory note, when overdue and still in the hands of the payee, cannot be attached to satisfy a judgment recovered against the payee, for in that case the amount does constitute a debt owing by the maker, and due and payable to the judgment debtor; and in case the maker does not dispute the debt there can be no reason why such a debt (whether the promissory note was given to secure an antecedent debt, or one

which was incurred only at the time of the making of the note) should not come within the comprehensive words of the statute "all debts owing by the garnishee to the judgment debtor shall be attached to answer the judgment recovered against him."

The plea here avers not only that at the time of the order *nisi* being served upon the defendant, the maker of the note sued upon, the note was overdue, but that it was then in the hands of the payee, judgment debtor, as the legal holder thereof, and that the maker did not dispute the debt; and further, that he had, in fact, paid the amount of the note to the judgment creditor in obedience to a judge's order to that effect, granted under the circumstances authorized by the statute before ever the note was transferred by the payee to the present plaintiff; all which being admitted by the demurrer, the defendant has, in my opinion, shown a good bar to the present action, for the statute expressly provides that payment by the garnishee, in pursuance of a judge's order granted under the circumstances stated in the plea, shall be a valid discharge as against the judgment debtor, and being so, it must be a good defence to an action, brought by a person who admits on the record that his sole claim to, and property, in the note was acquired from the person whose interest in the note and in the amount secured thereby was extinguished by a good and valid payment after the note had become due, and before ever the present plaintiff had received a transfer of the note or had acquired any interest therein.

The appeal should be allowed with costs and judgment be ordered to be entered for the defendants in the court below with costs.

Appeal allowed with costs.

Solicitor for appellants: *L. H. Davies.*

Solicitor for respondent: *Arthur Peters.*