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*Feb'y. 5.

June 3.

THOMAS J. WALLACE.....APPELLANT;

AND

FREDERICK BOSSOM.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Plea of Insolvency—Discharge not pleaded—Judgment after certificate granted.

T. J. W. sued *F. B.*, and, on 9th June, 1873, *F. B.* assigned his property under the Insolvent Act of 1869. On 6th August, *F. B.*, became party to a deed of composition. On the 17th October *F. B.* pleaded *puis darrein continuance*, that since action commenced he duly assigned under the Act, and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 19th November, 1873, the Insolvent Court confirmed the deed of composition and *F. B's* discharge, but *F. B.* neglected to plead this confirmation. Judgment was given in favor of *T. J. W.* on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on the 28th June, 1876, a rule *nisi* to set aside proceedings was obtained and made absolute.

Held, reversing the judgment of the Supreme Court of *Nova Scotia*, that *F. B.*, having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. (*Strong*, J., dissenting, on the ground that the rule or order of the Court below was not one from which an appeal could be brought under the *Supreme and Exchequer Court Act.*)

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, delivered on the 26th March, 1877, making absolute an order to set aside an execution issued on a judgment rendered on the 3rd of January, 1874, by a Judge who, on that day, after a trial of the cause, in a summary way, gave a judgment for the Appellant.

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*PRESENT—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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The facts and pleadings sufficiently appear in the judgment as hereinafter given.

Mr. *Wallace*, the Appellant in person:

The order was taken out by Respondent to set aside the execution on the ground of his having been an insolvent and obtained his certificate of discharge. This certificate was obtained before the trial or judgment, and as he failed or neglected to plead his discharge, as he might have done, he was forever precluded and estopped from doing so, or deriving any benefit from it in this suit, and the Appellant had a right to issue and enforce the said execution. *Bump's* Bankrupt Law (1); *Bigelow* on Estoppel (2); *Rossi* v. *Bailey* (3); *Rev. Stat. N. S.*, 4th Series, c. 94, sec. 118.

No one appeared on behalf of the Respondent.

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RITCHIE, J.:—

Plaintiff, on 30th January, 1874, recovered judgment in the Supreme Court of *Nova Scotia* against Defendant for $59.19 debt or damage, and $7.57 costs of suit; and on 30th May, 1876, caused to be issued on such judgment an execution against the goods, &c., and for want of goods against the body of Defendant.

On June 20th, 1876, Defendant applied to the Chief Justice to set aside and to stay all proceedings under said execution and judgment, on the ground that the debt for which judgment was entered was discharged previous to issue of execution, and set forth that on the 6th August, 1873, by a deed of composition and discharge, between Defendant, of the one part; *C.A. Bossom*, of the second part; *B. H. Eaton*, of the third part, and

(1) P. 641. (2) P. 615.
(3) L. R. 3 Q. B. 621.

* The Chief Justice was absent when judgment was delivered.

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the creditors of *F. Bossom*, of the fourth part, after reciting that *Bossom* had made an assignment under the Insolvent Act of 1869, and being desirous of procuring a discharge from his creditors, and had agreed to pay a certain composition, the creditors of said *Bossom*, in consideration of the matters in said deed contained, discharged and released said *Bossom* from all his liabilities, in accordance with the terms and provisions of said Act, which discharge was duly confirmed in the Court of Probate and Insolvency, and the said *Bossom* was, by said Court, on the 19th November, 1873, forever freed and discharged of and from all debts and liabilities existing against him at the time of the making of his assignment under said Act, which was 9th June, A.D., 1873.

It appears that the Defendant pleaded to Plaintiff's action on the 23rd May, 1873,

1st. Never indebted.

2nd. That he did not make the note declared on.

3rd. That the note was not stamped as required by statute.

4th. No consideration for making note.

And on the 17th October, 1873, for further grounds of defence, that since commencement of suit, Defendant duly assigned under Insolvent Act of 1867 and Acts in amendment thereof, of which Plaintiff had notice, and by deed of composition and discharge duly executed by the creditors of the Defendant, under the provisions of the Act, Defendant had been discharged from all liability in respect of Plaintiff's claim.

On argument at Chambers, and afterwards before the full Court, it was ordered that the rule *nisi* to set aside the said execution be made absolute with costs.

The cause appears to have been duly tried and judgment entered on the 30th January, 1874. No defence appears to have been set up before or at the trial under the discharge of the 19th November, 1873; and, in the

judgment of the Court, it is stated, "it does not appear that that Act of the Insolvent Court was brought to the notice of the Court at the trial of the cause which took place under the plea of *puis darrein continuance*," nor does it appear that any available defence was brought to the notice of the Court, but the contrary must have been the case, otherwise judgment could not have been given for the Plaintiff. The judgment affirms that after hearing argument the rule must be made absolute with costs. "Sections 94, 98 and 100 of Insolvent Act of 1869, read in connection with section 101, necessitates such a judgment." But this, in my opinion, is by no means the case, assuming the facts stated to be true, that the deed was entered into and confirmed, as alleged; the Defendant had a good defence to the action when it was tried, had he properly pleaded and proved his discharge; and nothing has occurred since the trial and judgment in any way affecting Plaintiff's claim.

Now, it is abundantly clear, that a Defendant can avail himself of his discharge as a certificated bankrupt, or as insolvent debtor, only by a special plea, and if he obtains such discharge after plea and before verdict, if he does not plead and prove it and judgment is obtained against him, he loses the benefit of the discharge; he cannot even plead the certificate to an action on such judgment (1). If the deed discharged Defendant, he had pleaded it, and should have proved it, and there would have been an end of Plaintiff's case; if it did not, but the confirmation of the deed did, he should not have pleaded the deed, but should have waited till the confirmation, and then have pleaded it; and if he felt embarrassed by his plea already pleaded, he should have applied for leave to withdraw it, and for leave to plead the confirmation. Be this as it may, it

(1) *Todd* v. *Mansfield* 6 B. & C. 105.

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is clear that before trial and judgment he had a discharge which he could have made available, had he taken the proper steps at the proper time; not having done so, he has allowed the opportunity to pass and a judgment to be entered against him and execution issued thereon, with which the Court had, in my opinion, no right to interfere. Formerly, relief against a judgment could only be had through the instrumentality of the writ of *audita querela*, but now this writ has fallen into disuse, the Courts under their equitable jurisdiction, give in a summary manner the same relief as under the *audita querela*. In *Comyn's Digest* (1) it is said:—

> Where the party had time to take advantage of the matter which discharges him and neglects it, he cannot afterwards be helped by an *audita querela*.

And in *Bacon's* Abridgment (2) it is said:—

> An *audita querela* is a writ to be delivered against an unjust judgment or execution by setting them aside for some injustice of the party that obtained them, which could not be pleaded in Bar to the action, for if it could be pleaded it was the party's own fault, and, therefore, he should not be released, that proceedings may not be endless.

And 2 Sand, R. 147, note 1, is to the same effect.

The general rule of law, as was laid by *Channell*, B., in *Staffordshire Building Co.* v. *Emmott* (3), and adopted and relied upon by the Court in *Rossi* v. *Bailey* (4), is that the party who might have pleaded and prevented a judgment, and did not, is estopped from afterwards raising that defence. But the Court in *Nova Scotia* says that "Sections 94, 98 and 100 of the Insolvent Act of 1869, read in connection with section 101, necessitates such a judgment." I have read those sections and can come to no such conclusion. No doubt the legislature might have interfered with the general rule

(1) At *audita querela* C.
(2) At *audita querela* 510.
(3) L. R. 2 Ex. 208.
(4) L. R. 3 Q. B. 628.

of law and the doctrine of estoppel, but there is nothing in the sections referred to, or in any other part of the Act, that I can discover, shewing any such intention on the part of the legislature, and section 104 exhibits a contrary intention, as it provides how the discharge is to be proved when the Defendant seeks its protection; it enacts that:

> Until the Court or Judge, as the case may be, has confirmed such discharge, the burden of proof of the discharge being completely effected under the provisions of this Act shall be upon the insolvent, but the confirmation thereof, if not reversed in appeal, shall render the discharge thereby confirmed final and conclusive, and an authentic copy of the judgment confirming the same shall be sufficient evidence, as well of such discharge as the confirmation thereof.

The plea relied on the discharge without confirmation; the obvious inference from the Court giving judgment on the trial in favor of the Plaintiff must be, that he neither made good the proof, the burden of which the law cast on him, nor did he allege and prove by the means pointed out in the Act, the confirmation thereof; and there certainly was ample time between the 19th November, 1873, the day on which the Court confirmed the deed and discharge, and the trial, on the 29th January, 1874, to plead the confirmation. The Defendant having then had a full opportunity of pleading and proving his ground of defence, which sets up the deed of composition, and also, of pleading and proving its confirmation, of all which he neglected to avail himself, though present at the trial by his Attorney and defending the action, and so not having relied on and taken advantage of his discharge and its confirmation, as he might, and should have done, and having thus missed the opportunity afforded him, and allowed a judgment to pass against him, and nothing having since occurred to interfere with the judgment, and Plaintiff's rights under it, he is now concluded, and the Plaintiff is entitled to

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the fruits of the adjudication in his favor, and the judgment of the Court staying or setting aside either the judgment or execution must be reversed with costs.

STRONG, J., gave an oral judgment dissenting, on the ground that the order appealed from was not a final judgment within the meaning of the 17th section of the *Supreme and Exchequer Court Act.*

RITCHIE, J.:—

What my learned brother has said has not raised any doubt in my mind; it was not raised by the parties in the Court, it was not argued before us, no one appearing on behalf of Respondent. I fully agree with my learned brother, that it is quite proper for a matter affecting jurisdiction to be raised by the Court, but, if so, I should have thought it just and right before determining that this appeal would not lie to allow the Appellant an opportunity to argue the question. This is the first I have heard of it. I do not at all agree as to the construction of the words "final judgment," because, I think, whatever argument might be plausibly drawn from the term "final judgment," is entirely negatived by the statute itself, and by the interpretation clause which has given a statutory definition to the term "final judgment." The clause says:—

> The word "judgment," when used with reference to the Court appealed from, includes any judgment, rule, order, decision, decree, decretal order, or sentence thereof; and, when used with reference to the Supreme Court, it includes any judgment or order of that Court.

It strikes me at the first blush of the case, that it would be a most dreadful conclusion to arrive at, if a Court could give judgment in favor of a party, and could next day wipe it out, and by a final order of that kind deprive him of the fruits of his judgment and such final order not be open to an appeal. I think the order

comes within the express wording of the statute which I have read. If I had any doubt raised in my mind by the very plausible argument of my learned brother, I should have thought it right to this Appellant, at any rate, to have stayed my hand in giving judgment against him, and to have given him an opportunity to have been heard before the Court. As at present advised, I think my original judgment was the correct one.

TASCHEREAU and FOURNIER, J.J., concurred with RITCHIE, J.

HENRY, J. :—

I entirely agree with the judgment given by brother *Ritchie*. I considered the case very fully, and having seen his judgment some time ago, considered it necessary to do little more than concur in it. As to the question of jurisdiction I am satisfied. It has not come before me for the first time now, because I have had occasion to consider the effect of the statute giving jurisdiction to this Court in some other cases some time ago. Supposing the judgment were for £5,000, and the party came and were told by the Court below that he has a good judgment, but the Court interferes by some assumed power to prevent his having the benefit of that judgment. To all intents and purposes, as far as the party is concerned, it is a final judgment. By such a decision his regular judgment is virtually set aside, and I consider it therefore to be a final judgment. We are not to suppose that the Court below will hereafter alter its dicision. They have virtually decided that the judgment shall not have any effect, and I think it is as much as if the Court had passed an order directly to avoid the judgment altogether, because if the power of the Court is taken away by its own act to award future process to recover the amount of the judgment, it is as waste

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paper. I think, therefore, an appeal from the decision of a Court which vacates the judgment is virtually an appeal from a final judgment, and, therefore, in respect to the definition clause referred to by my brother *Ritchie*, and regarding it as a final judgment, I think we must consider it one of the final judgments referred to in the Act. I think we have the jurisdiction; and if I had any doubt about it, and felt that the decision of the Court was likely to go against the Appellant, I should consider it but right, before delivering the judgment of the Court, to hear him upon the point. It was not raised, but, I take it, when a party does not come here to argue his case, or take the exception, he admits the right of the Court. It is true that we cannot usurp jurisdiction, and even in an undefended case, if we felt we had not jurisdiction, it would be our duty to say so. I have no doubt on this point, and, therefore, concur with the judgment, that the judgment of the Court below should be reversed, and the appeal allowed with costs.

Appeal allowed with costs.

Solicitor for Appellant: *James McDonald.*