JAMES D. LEWIN AND G. SIDNEY SMITH, SURVIVING TRUSTEES UNDER THE MARRIAGE SETTLEMENT OF MARTHA M. S. ROBERTSON..... } APPELLANTS;

AND

GEORGIANA WILSON, BENJAMIN LAWTON AND JAMES HARRIS... } RESPONDENTS.

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*Dec. 9.

ON APPEAL FROM THE SUPREME COURT IN EQUITY OF NEW BRUNSWICK.

Statutes of Limitations—Ch. 84, *sec.* 40, *and ch.* 85, *secs.* 1 & 6 *Con. Stats. N. B.—Covenant in mortgage deed—Payment by co-obligor.*

J. H. borrowed $4,000 from *M. C.* on the 27th of Sept., 1850, at which date *J. H.* & *J. W.* gave their joint and several bond to *M. C.* conditioned for the repayment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the $4,000, two separate mortgages were given: one by *J. H.* and wife on *H's* wife's property, and one by *J. W.* and wife, on *W.'s* property. Neither party executed the mortgage of the other. The mortgage from *J. W.* contained a provision that upon repayment of the sum of £1,000 and interest according to the condition of the bond by *J. W.* and *J. H.*, or either of them, their, or either of their, heirs, etc., then said mortgage should be void; a similar provision being inserted in the

*PRESENT.—Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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mortgage from *J. H.* The bond and mortgages were assigned to *L. et al.* (the appellants) in 1870, and the principal money has never been paid. *J. W.* died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above mentioned mortgage, to *G. W.* (one of the respondents) and others. *J. W.*, in his lifetime, was, and since his death the respondents have been, in possession of the premises so mortgaged by *J. W.* Neither *J. W.*, nor any person claiming by, through, or under him, ever paid any interest on said bond and mortgage, or gave any acknowledgment in writing of the title of *M. C.*, or her assigns. *J. H.*, the co-obligor, paid interest on the bond from its date to 27th March, 1870.

On 20th January, 1881, under Consolidated Statutes of *New Brunswick*, ch. 40, a suit of foreclosure and sale of the premises mortgaged by *J. W.* was commenced by the appellants in the Supreme Court of *New Brunswick* in equity, and the court gave judgment for the respondents. On appeal to the Supreme Court of *Canada*,

Held (affirming the judgment of the Court below, *Strong*, J., dissenting)—

1st. That all liability of *J. W.'s* personal representatives and of his heirs and devisees to any action whatever upon the bond was barred by secs. 1 and 6 of ch. 85 Consolidated Statutes of *New Brunswick*, although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute 3 and 4 *William IV.*, ch. 42.

2nd. That the right of foreclosure and sale of the lands included in the *J. W.* mortgage was barred by the Statute of Limitations in real actions, Cons. Stats. *N. B.*, ch. 84, sec. 40.

Per *Gwynne*, J.—The only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons, and that moneys paid by *J. H.* in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by *W's* mortgage.

APPEAL to the Supreme Court of *Canada* from the Supreme Court in Equity of *New Brunswick*, without any intermediate appeal to the Supreme Court of *New*

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Brunswick, sitting in appeal, from so much of the decree of the said Supreme Court in Equity, in a suit therein, wherein the present appellants were plaintiffs, and the present respondents and *John Howe*, *William Edwin Archdeacon* and *Elizabeth White Archdeacon* (his wife), *Louisa Catherine Hanford*, *Charles Edward Brown* and *Sarah Georgiana Brown* (his wife), *Arthur Wellesley Howe* and *Mary Elizabeth Howe* (his wife), *Joseph Howe*, *Charles Lawton* (the younger), *Charles Lawton*, *Sarah A. Lawton*, *Eliza Lawton*, the Reverend *William Armstrong*, *James Sterling*, *James Dunlop*, *James Duke*, *Edward Thorpe* and *James Davis* were defendants, as directed that the plaintiffs' bill of complaint should stand dismissed with costs against the said respondents.

The following is the case settled by the Judge in Equity of *New Brunswick*.

"1. This suit was commenced by summons issued out of the Supreme Court in Equity dated the twentieth day of January, A.D. 1881. The bill of complaint was a bill filed for the foreclosure and sale of certain mortgaged lands and premises comprised and described in a certain indenture of mortgage from *John Howe* and wife to *Margaret Cunningham*, dated the twenty-seventh day of September, A.D. 1850; and also certain mortgaged lands and premises comprised and described in a certain indenture of mortgage from *James White* and wife to the said *Margaret Cunningham*, of the same date; both mortgages and the assignments thereof being duly registered in the records of the city and county of *Saint John*.

"2. On the said twenty-seventh day of September, A.D. 1850, the said *John Howe* and *James White* executed a bond or obligation to the said *Margaret Cunningham* in the words and figures following, that is to say:—

"Know all men by these presents that we, *John Howe*, of the city of *Saint John*, in the county of *Saint John*,

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and province of *New Brunswick*, postmaster for said province, and *James White* of the same place, Esquire, are held and firmly bound unto *Margaret Cunningham* of the same place, spinster, in the penal sum of two thousand pounds of lawful money of the province aforesaid, to be paid to the said *Margaret Cunningham*, or to her certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves and each of us by himself, our and each of our heirs, executors and administrators firmly by these presents, sealed with our seals, and dated the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty.

"The condition of this obligation is such that if the above bounden *John Howe* and *James White*, or either of them, their or either of their heirs, executors or administrators, do and shall well and truly pay or cause to be paid unto the said *Margaret Cunningham*, or to her certain attorney, executors, administrators or assigns the just and full sum of one thousand pounds of lawful money of the province aforesaid, with lawful interest thereon, in manner and at the times following, that is to say: the said principal sum of one thousand pounds to be paid on the twenty-seventh day of September, which will be in the year of our Lord one thousand eight hundred and fifty-five, and lawful interest on the said principal sum to commence from the day of the date of these presents, to be paid quarterly on the twenty-seventh day of December, the twenty-seventh day of March, the twenty-seventh day of June, and the twenty-seventh day of September in each and every year until the said principal sum shall be paid and satisfied, then this obligation to be void, otherwise to remain in full force and virtue.

"Signed, sealed and delivered in "*J. Howe.* [L.S.]
"presence of *Geo. A. Lockhart.*" "*J. White.* [L.S.]

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"3. That to secure the amount of the said bond or obligation the two several mortgages, to foreclose which this suit was instituted, were severally given by the said *James White* and *John Howe*, the condition of the mortgage from the said *James White* being as follows, that is to say :—

"Provided always, nevertheless, and these presents "are upon this express condition, that if the said *James* "*White* and *John Howe* of the city aforesaid, postmaster "for *New Brunswick* aforesaid, or either of them, their "or either of their heirs, executors or administrators, do "and shall well and truly pay or cause to be paid unto "the said *Margaret Cunningham*, or to her certain attor- "ney, executors, administrators or assigns, the just and "full sum of one thousand pounds of lawful money of "the province aforesaid, with lawful interest for and "on the same, in manner and at the times following, "that is to say: the said principal sum of one thousand "pounds on the twenty-seventh day of September, "which will be in the year of our Lord one thousand "eight hundred and fifty-five, with lawful interest on "the said principal sum to commence from the date of "these presents, quarterly, on the 27th day of December, "the 27th day of March, the 27th day of June, and the "27th day of September in each and every year until "the said principal sum shall be paid and satisfied, "without fraud or delay, according to the condition of "a bond or obligation bearing even date herewith, and "made and given by said *John Howe* and *James White* "to said *Margaret Cunningham*, then these presents to "be void, otherwise to remain in full force and virtue."

And the condition in the mortgage from *John Howe* and wife being as follows, that is to say:

"Provided always, nevertheless, and these presents "are upon this express condition, that if the said *John* "*Howe* and *Mary E.*, his wife, or the said *James White*,

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"or either of them, or their, or either of their, heirs, "executors or administrators, do and shall well and "truly pay, or cause to be paid, to the said *Margaret* "*Cunningham*, or to her certain attorney, executors, "administrators or assigns the just and full sum of one "thousand pounds of lawful money of the Province of "*New Brunswick*, with lawful interest on the same, in "manner and at the times following, that is to say: "the said principal sum to be paid on the 27th day of "September, which will be in the year of our Lord one "thousand eight hundred and fifty-five, and lawful "interest on the said principal sum of one thousand "pounds, to be paid quarterly on the 27th day of De- "cember, the 27th day of March, the 27th day of June, "and the 27th day of September in each and every year "until the said principal sum shall be fully paid and "satisfied, such interest to commence from the date of "these presents, according to the condition of a certain "bond or obligation bearing even date with these pre- "sents, and given by the said *John Howe* and *James* "*White* to said *Margaret Cunningham*, then these pre- "sents to be void, otherwise to be and remain in full "force, virtue and effect."

"4. That the interest of the said *Margaret Cunning- ham* in the said bond and mortgages is now vested in the plaintiffs, and they are the assignees of the said bond and mortgages.

"5. That the said *James White* died in the year of our Lord one thousand eight hundred and fifty-eight, leaving a will appointing the said *John Howe* an executor thereof, and by his said will, after making certain specific devises, devised all his residuary real estate, including the lands and premises in his above mentioned mortgage, to his daughter, *Georgiana Witson*, the respondent, and his daugher *Mary E. Howe*, wife of the said *John Howe*.

"6. That in the year of our Lord one thousand eight hundred and eighty, a partition was made between the said respondent *Georgiana Wilson* and the said *Mary E. Howe*, the said *John Howe* being a party thereto, and the said *John Howe* and *Mary E. Howe* releasing to the said *Georgiana Wilson* their interest in the portion of the said mortgaged premises so devised by the said *James White*, which the appellants seek to have foreclosed and sold, but the said *John Howe* concealed from the said *Georgiana Wilson* the fact that the property had been encumbered by the said mortgage of the said *James White*, and that such mortgage was then in existence, and she took the property at full value in the division.

"7. That the said *James White* up to the time of his death was in possession of the said mortgaged premises described and set forth in the said indenture of mortgage given by him to the said *Margaret Cunningham*, and since the death of the said *James White* the said respondent *Georgiana Wilson* has been in possession thereof, except a portion of the same conveyed by her to *William A. Lawton*; and the said *William A. Lawton* and his assigns (the said *Benjamin Lawton* being now in possession) have been in possession of said portion so conveyed to the said *William A. Lawton* since the said conveyance; and the said respondent *James Harris* being a tenant to the said *Georgiana Wilson* of another portion thereof.

"8. That it was proved on the hearing, without objection, that the said *John Howe* admitted that the original debt was contracted for his benefit, and that he received all the money on said bond.

"9. That neither the said *James White* during his lifetime, nor any person claiming by, through or under him, did at any time pay the interest on the said bond and mortgages, nor has any payment of interest been made otherwise than as is hereinafter mentioned, nor

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did the said *James White*, nor any person claiming by, through or under, him ever give any acknowledgment in writing of the title of the said *Margaret Cunningham* or her assigns, either to the said *Margaret Cunningham* or to any person claiming under her.

"10. That the said *John Howe* from the date of the said bond paid the interest thereon to the said *Margaret Cunningham* and the assignees of the said bond and mortgages up to the twenty-seventh day of March, A.D. 1879, since which time no interest has been paid, and the principal sum due on the said bond and the interest from that date are now due to the appellants.

"11. The said *Georgiana Wilson* at the time of the partition above mentioned was not aware of the existence of the said mortgage, except the knowledge, if any, to be implied constructively from the registry thereof.

"12. That the respondent *James Harris* has placed valuable improvements upon the lot of land leased by him from the respondent *Georgiana Wilson*.

"13. The said *Margaret Cunningham* was not, nor were any of her assignees, ever in possession of the said mortgaged premises, or any part thereof, nor in receipt of any of the rents or profits thereof.

"14. That on the thirtieth of November, A. D. 1846, being previous to the date of said mortgage made by said *James White*, he the said *James White* leased to one *James McGregor* with covenants to pay for improvements or renew for a further term with like covenants, one of the parcels of land included in said mortgage called lot 18 (eighteen), which said lease was duly registered before the registry of said mortgage, and is referred to in said mortgage as having been given to said *McGregor*. That said lease was by several mesne assignments, all duly registered, surrendered, assigned and transferred to the said *Mary E. Howe* and *Georgiana Wilson*, the last transfer being dated 23rd December, 1858, and

registered the fourth day of April, A. D. 1860, in which year the partition deed hereinbefore referred to was executed and by which the said *Mary E. Howe* released to the said *Georgiana Wilson* all her interest in said lot number 18 (eighteen), and which said partition deed was registered March 1st, 1860. And the said *Georgiana Wilson* by deed conveyed by way of mortgage all her interest in the said land to secure the sum of seven hundred pounds to one *William A. Lawton*, and afterwards released all her interest in the equity of redemption in the said lot of land to the said *William A. Lawton*, all whose interest subsequently became vested in the said respondent *Benjamin Lawton*.

"15. The plaintiffs filed the bill in this suit to foreclose the said mortgages and have the mortgaged premises sold, to which the other defendants put in no answer, and the bill has been taken *pro confesso* against them.

"16. The respondents appeared by separate solicitors and filed separate answers to the said bill of complaint, insisting and claiming that the right of the appellants to have a foreclosure and sale of the lands and premises described and conveyed in the mortgage from *James White* to *Margaret Cunningham*, in which they are interested, was barred by the Statutes of Limitation in force in the province of *New Brunswick*.

"Question.—Whether the right of the plaintiffs to foreclose and sell the lands that were so partitioned to *Georgiana Wilson* and included in *White's* mortgage, are barred by the Statute of Limitations? and whether the right of foreclosure and sale exists against lot number eighteen, held by the said *Benjamin Lawton*."

Mr. *Weldon*, Q. C., for appellants.

Dr. *Tuck*, Q. C., and Mr. *Millidge*, for respondents.

The statutes and authorities relied on by counsel are commented on in the judgments hereinafter given.

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STRONG, J.,

This is an appeal from a decree made by the judge in Equity of the Supreme Court of *New Brunswick*, in a suit for the foreclosure of a mortgage. There is no dispute as to the facts, which are few and free from complication. For the purposes of the appeal to this Court, a case has been settled by a judge of the court below, in which all the facts are admitted, and the only question presented for decision is one of law, relating to the construction and application of section 40 of the English Statutes of Limitations, 3 and 4 *W.* 4, ch. 27, and 7 *W.* 4, and 1 *Vic.*, ch. 28, which have been adopted and re-enacted in *New Brunswick*, and are respectively sections 29 and 30, ch. 84, of the Consolidated Statutes of *New Brunswick*, entitled "An Act relating to the limitation of real actions."

The suit was commenced by summons issued out of the Supreme Court in Equity on the 20th January, 1881. The facts stated and admitted in the case are as follows:

On the 27th of September, 1850, *John Howe* and *James White*, executed a joint and several bond to *Margaret Cunningham* in the penal sum of two thousand pounds, conditioned for the payment by the obligors, or one of them, of one thousand pounds, on the 27th of September, 1855, with interest payable quarterly, on the 27th day of December, the 27th day of March, the 27th day of June, and the 27th day of September, in each and every year, until the principal sum should be paid and satisfied. The case contains the following statement as to the debt which this bond was given to secure. It says:—

That it was proved on the hearing without objection that the said *John Howe* admitted that the original debt was contracted for his benefit and that he received all the money on said bond.

The case then states:—

That to secure the amount of the said bond or obligation the two several indentures of mortgage, to foreclose which this suit was

instituted, were severally given by the said *James White* and *John Howe*, the proviso of the mortgage executed by the said *James White*, [and which is alone in question in this appeal] being as follows:— Provided always, nevertheless, and these presents are upon this express condition, that if the said *James White* and *John Howe* of the city aforesaid, or either of them, their, or either of their heirs, executors, administrators, or assigns, do and shall well and duly pay, or cause to be paid, unto the said *Margaret Cunningham*, or to her certain attorney, executors, administrators, or assigns, the just and full sum of one thousand pounds of lawful money of the Province aforesaid, with lawful interest for and on the same in manner and at the times following, that is to say, the said principal sum of one thousand pounds on the 27th day of September, which will be in the year 1855, with lawful interest on the said principal sum, to commence from the date of these presents, quarterly, on the 27th day of December, the 27th day of March, the 27th day of June, and the 27th day of September in each and every year, until the said principal sum shall be paid and satisfied, without fraud or delay, according to the condition of a bond or obligation bearing even date herewith and made and given by said *John Howe* and *James White* to the said *Margaret Cunningham*, then these presents to be void, otherwise to remain in full force, virtue and effect.

And the proviso contained in the mortgage deed executed by *Howe* was (*mutatis mutandis*) to the same effect. *Howe* was not a party to the mortgage now in question, and no covenant by him was contained in it. These mortgages were in fee and of lands of which the respective mortgagors were severally seised. The bond and mortgages were assigned to and are now vested in the plaintiffs, who are trustees under a marriage settlement. *White* remained in the possession of the mortgaged premises comprised in the mortgage executed by him, up to the date of his death in 1858, upon which the property, under the provisions of his will, became vested in his two daughters, the respondent *Georgiana Wilson* and Mrs. *Howe*, as tenants in common, and upon a partition the lands now in question were allotted to Mrs. *Wilson*, and she and the other respondents claiming under her have since remained in pos-

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session, and neither the original mortgagee, *Margaret Cunningham*, nor the plaintiffs, her assignees, nor any of them, were ever in possession of the whole or any part of the mortgaged premises. The joint and several bond and the mortgage given by *White* were executed by him as a surety for *Howe*, to whom the money advanced was lent by Mrs. *Cunningham*. The special case then contains these statements, which I extract *verbatim*:

> Neither the said *James White* during his lifetime, nor any person claiming by through or under him, did at any time pay the interest on the said bond and mortgage, nor has any payment of interest been made otherwise than as is hereinafter mentioned, nor did the said *James White*, nor any person claiming by, through, or under, him, ever give any acknowledgment in writing of the title of the said *Margaret Cunningham*, or her assigns, either to the said *Margaret Cunningham*, or to any person claiming under her. The said *John Howe*, from the date of the said bond, paid the interest thereon to said *Margaret Cunninghan* and the assignees of the said bond and mortgages up to the 27th day of March, 1879, since which time no interest has been paid, and the principal sum due on the said bond and the interest from that date are now due to the appellants.

To the bill for the foreclosure of the mortgages mentioned, which was filed in this suit, the respondents by their answers pleaded the statutes of limitations, and insisted and claimed that upon the foregoing state of facts the right of the appellants to foreclose the lands comprised in the mortgage from *White* to Mrs. *Cunningham* was barred.

The cause came on to be heard before the judge in equity, before whom evidence was taken, and who dismissed the plaintiff's bill, so far as it sought to foreclose the lands comprised in the mortgage executed by *White*. This decision proceeded upon the ground that the payment of interest made by *Howe* up to 1879 could not be considered as payments made by an agent for or on behalf of *White*.

The decision of this question must be governed en-

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tirely by the provisions contained in the English Statute of Limitations, 1 *Vic.*, ch. 28, which, in common with the provisions of the statutes 3 and 4 *W.* 4, ch. 27, and 3 and 4 *W.* 4, ch. 42, have been adopted and re-enacted in *New Brunswick*, and are, as before stated, included in ch. 84 of the consolidated statutes of that province, entitled "Limitation of Real Actions," and ch. 85 of the same consolidation, entitled "Limitation of Personal Actions." The English Statutes of Limitations have also been adopted and re-enacted in two other provinces of the dominion, *Nova Scotia* and *Ontario*. The question now presented for our adjudication is therefore of considerable general importance, more especially as in at least one of these provinces—*Ontario*—it is a common practice of loan companies and other lenders on mortgages to take, as in the present case, as collateral security, in addition to the mortgage of the borrower and principal debtor on his own lands, a mortgage of a surety on other lands. The enactment applicable to the present case, which must be regarded as a suit for the recovery of land, is the 30th sec of ch. 84 of the consolidated statutes, which is a literal transcript of the Imperial statute 7 *W.* 4, and 1 *Vic*, ch. 28, and is in the words following:

> It shall and may be lawful for any person entitled to, or claiming under, any mortgage of land, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, such payment being made within twenty years after the right of entry first accrued, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in this chapter to the contrary notwithstanding.

The cases of *Heath* v. *Pugh* (1) and *Harlock* v. *Ash-*

(1) 6 Q. B. D. 345, S. C. in App. 7 App. Cases, 235.

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berry (1) have decided that a suit for the foreclosure of a mortgage of land is a suit for the recovery of the land, and is therefore within secs. 3 and 4 of the 3 & 4 *W.* 4, ch. 27 (of which secs. 3 and 21 of ch. 84 of *New Brunswick* are re-enactments), and is barred at the end of twenty years after the accrual of the right, unless the party can bring himself within some of the savings contained in the original statute, or within the provision already stated of 1 *Vic.*, ch. 28, and these cases have determined that the right of a mortgagee to foreclosure does not depend upon the 40th sec of 3 and 4 *W.* 4, ch. 27 (*New Brunswick* statutes, ch. 84, sec. 29), which is applicable, not to a suit for a recovery of the land, but to an action or suit for the recovery of money charged on land, which a foreclosure is not considered to be, a point which was left in uncertainty by the previous case of *Chinnery* v. *Evans* (2), which was, however, not a foreclosure suit, but a proceeding to have a charge upon lands raised by a sale.

Nothing, however, depends upon this consideration, since the House of Lords in *Chinnery* v. *Evans*, as well as the Court of Appeal in *Harlock* vs. *Ashberry*, hold that the two enactments are to receive the same construction as regards the point now in question,—that as to the person by whom the payment of principal or interest requisite to take a case out of the bar of the statute is to be made. It is true that in the case of *Chinnery* v. *Evans* the Lord Chancellor read the words found in sec. 40, but not found in 1 Vic., ch. 28, "by whom the same shall be payable, or his agent," as applicable, not only to a written acknowledgment, but also to a payment of principal or interest, but in a subsequent part of his judgment he says:

I should have stated that the other statute, the 7 *W.* 4 and 1 *Vic.*,

(1) 19 Ch. Div. 539. (2) 11 H. L. C. 115.

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cap. 28, was passed for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands, the language of the 40th sec. of the former act being confined to cases of recovery of money. The same principle is applicable to both, and the same *ratio decidendi* will apply to both sections.

I should say therefore that if *Chinnery* v. *Evans* stood alone, that it established that the payment mentioned in the 1 *Vic.*, ch. 28, meant a payment by a party liable or entitled to pay, or by some person expressly or impliedly delegated to make the payment. But all doubt on this point is removed by the subsequent case of *Harlock* v. *Ashberry* in which the Master of the Rolls (Sir *George Jessel*), whilst doubting the verbal construction of the words of sec. 40, 3 and 4 *W.* 4, ch. 27, already mentioned, construes the word "payment," standing alone in 1 *Vic.*, sec. 28, as implying satisfaction by a person liable to pay, or by some one acting as his agent, or by his authority, or, as Lord Justice *Brett* expresses it: "by a person 'entitled' to make a payment," and held that it does not apply to money received by the mortgagee from a mere volunteer.

The question here is therefore reduced to this:—Was *Howe*, upon the facts stated, and having regard to the terms of the proviso in *White's* mortgage, and to the legal relation of principal and surety which existed between him and *White*, a person entitled to make a payment of principal and interest within the statute 1 *Vic.*, ch. 28 (*New Brunswick.* ch. 84, sec. 30)?

I should say that it was admitted on the argument at the bar, that the interest was regularly paid by *Howe* up to the 27th March, 1879, and that this fact was shown by the evidence or admissions at the hearing of the cause, and that the 10th paragraph of the case, framed for the purpose of this appeal, was to be taken as so stating, and it was not pretended that at any interval between the date of the mortgage deed and the

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27th of March, 1879, the interest was ever in arrear for twenty years.

I am of opinion that the payment of the interest by *Howe* was a payment by a person entitled to make it, and a payment on behalf of *White*, and this upon two distinct grounds; first, the proviso or condition of the mortgage deed executed by *White*, in the words "these presents are upon this express condition that if the said *James White* or *John Howe*, or either of them, do and shall well and duly pay or cause to be paid," is an express stipulation that *Howe* shall be entitled to make payments which shall enure to the benefit of the mortgagor; and secondly, that, if this proviso had been differently framed, and had made no mention of payments by *Howe*, but had been the usual condition for the avoidance of the mortgage upon payment by *White*, the mortgagor, alone, there would, from the established relationship between the parties—that of principal and surety—have been an implied authority to *Howe* to pay on behalf of *White*. Whatever may be said upon the point of law involved in the last of these grounds, it is to me difficult to see how there can be any doubt as to the effect of the proviso. *Primâ facie* if a mortgagor stipulates that the mortgage shall be avoided, not only by a payment made by himself, but also by a payment made by another person named, he stipulates that he shall have the benefit of a payment made by such named person, and if he stipulates that he shall have this benefit of the payment made by the third person, it would seem to require no demonstration to show that the third person is entitled to make the payment, and that the mortgagee cannot legally refuse to accept a payment tendered by such third person.

By the law of *England* a stranger to a contract for the payment of money cannot make a payment which will be good to discharge the debtor, though if the

creditor accepts the payment, and the debtor afterwards ratifies it, then, upon the general principle of the doctrine of ratification, the subsequent adoption is equivalent to a prior authority, and the payment is good; but I apprehend there is nothing to prevent the parties to a contract from providing by the contract itself that the obligation of the debtor may be discharged by a third person not a party to it, and where this is done the person whose payment is so agreed to be accepted by the creditor is not to be considered a mere agent of the debtor whose authority would be revoked by the death of the latter before the day of payment, but that his payment *ad diem* after the death of the original debtor, would also discharge the executor. Again, no reason can be suggested why, as in the present case, an estate upon condition such as a mortgage may not by the terms of the condition be made defeasible upon payment by a stranger to the deed, and if so, just as in the case of the personal contract, the third person so named would not be an agent whose agency would be revoked by the death of the mortgagor before payment, but as his payment would be the event upon which the condition was to be determined, he would be a person entitled to pay, and whose payment at the day named would, by force of the literal terms of the condition, have the effect at law of re-vesting the estate in the mortgagor. Therefore, if *White* had died before the 27th of September, 1855, the day named for the payment of the principal of the mortgage debt, and before any default in the payment of the interest at the stipulated terms, payment on that day by *Howe* would at once and irrespective of adoption or ratification have enured to the benefit of *White's* representatives, and the estate would have immediately become re-vested in the devisees.

By reason of this distinction between a mere agent

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and a person entitled to pay by the terms of the mortgage deed, *Littleton*, sec. 334, and Lord *Coke's* commentary upon it (l), where he says :

> But if any stranger in the name of the mortgagor or his heir (without his consent or privity) tender the money and the mortgagee accepts it this is a good satisfaction and the mortgagor or his heir agreeing thereunto may re-enter into the land —

are inapplicable so far as the assent of the heir is said to be requisite. And if such would have been the effect at law of a payment *ad diem*, it of course follows that a good equitable tender of the whole debt might have been made by *Howe* at any time, and that consequently he was a person entitled to make payments of interest accruing due subsequently to default in the payment of the principal at the day appointed by the mortgage deed.

I have made these observations, which may appear so elementary as scarcely to have been called for, not because I consider there is any real difficulty upon the point, but as affording an answer to the argument, which I understood to be urged at the hearing of the appeal, that *Howe* was a mere agent whose authority was revoked upon the death of his principal, *White*.

So far I have been considering the case with regard to the effect of the proviso only, and as if *Howe* had been a mere stranger in no way liable for the mortgage debt, but when we advert to the fact that whatever legal form may have been given to the transaction by making the parties jointly liable as bond-debtors and severally liable as mortgagors, its real nature was that *Howe* was the principal debtor and *White* a mere surety, whose mortgage was given as a collateral security for the debt of his principal, the conclusion is irresistible that *Howe* was under the terms of the proviso a person entitled to pay, notwithstanding *White's* death. The

(l) Coke, Litt., 207 b.

mortgagee must have had notice that *White* was a mere surety, for it is found as a fact that the loan was made to *Howe* alone. Then, is it not reasonable to consider this proviso, though very inartificially drawn, to have been framed as it is for the very purpose of making provision for the case of payment by *Howe* alone as the party primarily liable? I am of opinion that it is, and that when we find this form of proviso, coupled with the fact that the parties were from the beginning principal and surety, we must assume that it was intended for the purpose of giving expression to the right of *White* the surety and all claiming under him, to the benefit of payments made by *Howe*, the principal debtor, as being made in exoneration of *White's* estate.

These considerations make it impossible to say that *Howe* was a mere agent for payment whose authority was revoked by the death of his principal.

I have come to the conclusion therefore, that by the terms of the proviso *Howe* was entitled to make payments of interest in discharge of *White's* liability. And merely adverting to the principle upon which all these exceptions in statutes of limitations proceed, that a party is not to be considered in default unless he sleeps upon his rights, this appears to me to be not an unreasonable conclusion. On the contrary, would it not be most unreasonable to say that the mortgagees were neglecting to enforce their rights, when all the time they were receiving payments, sufficient to satisfy the requirements of the statute, according to the strict tenor of the agreement between the parties and from the person primarily liable to pay, and were thus, to the extent of these payments at least, under no necessity of enforcing their rights and disabled from doing so.

Further, the authorities warrant the second proposition before stated, that, discarding altogether the pro-

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vision of the deed already considered, and treating the case as though there had been no express mention of payment by *Howe*, the legal relationship of principal and surety which existed between *Howe* and *White*, which is admitted in the case, made payments by *Howe* which enured to the benefit of *White*, payments by a person who, according to the expression of Lord Justice *Brett* in *Harlock* v. *Ashberry*, "was entitled to pay," which is all that is required to bring the case within the terms of 1 *Vic.*, ch. 28, (*New Brunswick* Statutes, ch. 84, sec. 30.) Upon this point, which in the view I take it is unnecessary to dwell upon, there are ample authorities. *Harlock* v. *Ashberry* is itself one of these authorities, but others can be produced. *Chinnery* v. *Evans*, if it establishes anything, establishes the proposition, that a person who has a right to require from the mortgagee the acceptance of his payment, whose offer of payment would be considered a good equitable, if not a good legal, tender, is a person entitled to pay within the meaning of the statute—unless, as in the case of the personal liability of joint contractors, some statutory provision is found to the contrary. If this be so, the payment of a principal debtor must be sufficient to keep alive the claim of the mortgagee against the mortgaged estate of the surety. But this very point was decided in a case before the Master of the Rolls in *Ireland*, which was cited in argument without disapprobation in the case of *Chinnery* v. *Evans*. The case I refer to is *Homan* v. *Andrews* (1). The facts there are very long and somewhat complicated, but may be stated shortly as follows; there being a charge (not a mortgage) upon certain lands, the owner of the lands sold them subject to the charge, and gave the purchasers, by way of indemnity

(1) 1 Ir. Chy. Rept. (N.S.) 106.

or collateral security against the charge, a lien or charge upon other lands; no payments were for upwards of twenty years made by the purchasers, the owners of the lands originally charged, but the owner of the indemnity lands, had made payments of interest, from time to time, within the statutory term, to the persons entitled to the money charged, and the Master of the Rolls held that such payments were sufficient to take the case out of the statute. It is true, that this case of *Homan* v. *Andrews* was considered to be within section 40 of 3 and 4 *W.* 4, ch. 27 (*New Brunswick* statutes ch. 84 sec. 29,) but that can make no difference, as the person entitled to make payments sufficient to save the statute is the same under both statutes, as is established by *Chinnery* v. *Evans* and *Harlock* v. *Ashberry*. This case of *Homan* v. *Andrews* is therefore a direct authority for the proposition I am now dealing with, and its authority, so far as I can ascertain, has never been impugned. Again, a case decided by the Chancellor of *Ontario*, *Slater* v. *Mosgrove* (1) is also an authority for the appellants. The interest on a mortgage debt being in arrear and overdue, the mortgagor gave the mortgagee his promissory note for the amount of the arrears, endorsed by his son as a surety, the surety subsequently paid the note, and the learned Chancellor held this sufficient to prevent the statute operating as a bar to the mortgagee's right of foreclosure. It is true that the learned Judge refers to Mr. Justice *Fry's* decision in *Harlock* v. *Ashberry*, which had not then been reversed, but it is obvious from the context of his judgment that he did not proceed upon that decision alone, but also upon the principle that the interest had been paid by a person entitled to make the payment, and whose money the mortgagee was legally bound to accept in payment.

(1) 29 Gr. 392.

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The case of *Toft* v. *Stephenson* (1) may also be added to these authorities (2).

The principle of all these cases appears to be that the payment is sufficient, if it is a payment on account of the identical mortgage debt itself, made directly on account of the debt, and not merely of a sum which the mortgagor would, according to the rules of a court of equity in taking a mortgage account, be bound to give credit for and also provided it is a payment by a person who could require the mortgagee to accept a payment of the whole amount due for principal and interest. The argument in support of this last proposition being obviously this, that a mortgagee should not be barred by the statute of limitations as long as his rights are recognised by a payment on account of interest from a person who has a right to call upon him to accept the principal and interest in full. For these reasons, I am of opinion that the appellants are clearly entitled to a reversal of the decree, and this conclusion is not in the least degree shaken by a consideration of the reasons for the contrary view given in the judgment below and also in that which will be delivered on behalf of the majority of this court, and which I have been permitted to read. As regards the argument which is founded on the bond which was executed as collateral to the mortgage, and which was the joint and several bond of *Howe* and *White*, and the effect of section 6 of chapter 85 of the consolidated statutes of *New Brunswick* upon the right to recover the bond debt, I see nothing in it to cause any doubt as to the correctness of the opinion already stated. The provisions of the statutes of limitations which would

(1) I. DeG. McN. and G. 28.

(2) See also *Forsyth* v. *Bristowe*, 8 Exch. 722; *Cann* v. *Taylor*, 1 F. & F. 651; *Dowling* v. *Ford*, 11 M. & W. 329.

apply in the case of this bond would not be those which I have been considering, 3 and 4 *W.* 4, c. 27, secs. 2 and 24, and 1 *Vic.*, ch. 28 (*New Brunswick*, ch. 84, secs. 3, 21 and 30), but 3 and 4 *W.* 4, ch. 27, sec. 40 (*New Brunswick*, ch. 84, sec. 29) which, as settled by cases very lately decided, *Sutton* v. *Sutton* (1), *Fearnside* v. *Flint* (2), applies to personal actions for the recovery of debts charged on lands. Section 6 of ch. 85, con. stats. *New Brunswick*, is in the following words:—

> No person jointly contracting, or liable, or his representative, shall be answerable for or by reason of, any payment, acknowledgment, or promise of his co-contractor, or debtor, or his representatives.

Although not exactly in the same words, this section is in substance a re-enactment of section 14 of the English statute, known as the Mercantile Law Amendment Act of 1856. The statute in which it is found, ch. 85 of consolidated statutes of *New Brunswick*, is confined to the "Limitation of Personal Actions," whilst the provisions corresponding to the English statute, 1 *Vic.*, ch. 28, and 3 and 4 *W.*, ch. 27, are included in the preceding chapter of the *New Brunswick* statutes ch. 84, which is entitled "Limitation of Real Actions."

It appears to me quite plain that this provision can have no application here, since this is not an action for the recovery of the money due upon the joint and several bond, but one for the recovery of the land, and that the payment relied on as preserving the right to maintain this suit or action is not a payment by a joint contractor, but a payment by a person entitled to pay on behalf of the mortgagor. It is, I think, for these reasons manifest that this provision can have no reference to a payment sufficient under 1 *Vic*, ch. 28 (*New Brunswick* ch. 84, sec. 30). Indeed, I should

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579.

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doubt if it could apply to sec. 40 of 3 & 4 *W. IV.*, ch 27, (*New Brunswick* ch. 84, sec. 29), but as that question does not arise here I need not stop to consider it.

The case of *Harlock* v. *Ashberry* is relied on as in favor of the respondents. So far from being so, it seems to me a clear authority for the appellants. The *ratio decidendi* of that case was that the payment of the rent by the tenant of one of several mortgaged parcels was not a payment of either principal or interest, that at most it was the payment of a sum which the mortgagee would be compelled to bring into account; and that no ratification by the mortgagor would make it a payment of principal or interest, since it was not originally made as such; the payment therefore only operated as a receipt of rent equivalent to a taking of possession of the particular parcel in the occupation of the tenant, and saved the statute as to that, but had no effect as to the other lands comprised in the same mortgage—a decision upon questions which obviously have no bearing upon the present case. But, on the other hand, the learned judges of the Court of Appeal all distinctly recognize, and state in the most explicit manner, the principle that a payment of interest by any party liable or even "entitled" to pay it, is sufficient to bring a case within 1 *Vic.*, ch. 28, (*New Brunswick* ch. 84, sec. 30,) which, as the court also decides, is the statute which exclusively regulates the saving of the rights of mortgagees from the operation of the statute by means of payment. As regards the case of *Bolding* v. *Lane* (1), it was a case, not of payment, but of written acknowledgment, it came under section 42 of 3 and 4 *W.* 4, ch. 27, and, as is shown by Lord *Westbury* in *Chinnery* v.

(1) 1 DeG. J. & S. 122.

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Evans, can have no bearing on the present question. The cases of *Fearnside* v. *Flint* and *Sutton* v. *Sutton* do not touch the present question; they merely decide that a debt arising on a bond given as collateral security to a mortgage, or for money otherwise charged on land, is within sec. 40 of 3 and 4 *W.* 4, ch. 27,(*New Brunswick* ch. 84 sec. 29) and was therefore subject to the shorter period of limitation of 12 years applied by the last statute to the recovery of money charged on land, and not to the provisions as to bond debts not charged on land, which are governed by 3 and 4 *W.* 4, ch 42, which makes 20 years only a bar to such debts. It may be remarked that these cases of *Fearnside* v. *Flint* and *Sutton* v. *Sutton*, also show that an action to enforce the personal liability on the bond in the present case would be subject to sec. 40 of 3 and 4 *W.* 4, ch. 27, (*New Brunswick* Consolidated Statutes ch. 84, sec. 29,) and not to the provision of sec. 6 ch. 85 of the last mentioned statutes. It appears to me, therefore, that none of the reasons upon which the majority of the court rely are sufficient to show that the conclusions I have above stated are erroneous, and I must adhere to them.

This appeal, as I have said, comes before us upon the case settled by the court below, pursuant to the 29th section of the Supreme Court Act, and the pleadings and evidence have not been printed, and are not before this court. In the case the suit is described as one for foreclosure, and I have so treated it. If, however, it had been one for a sale of the mortgaged lands instead of foreclosure, though it might not have been a suit for the recovery of land, and so within the *New Brunswick* enactment corresponding to the 1st *Vic.*, ch. 28, it would have been a suit for the recovery of money charged on land, and so within the *New Brunswick* re-enactment of sec. 40 of 3 and 4 *W.* 4, ch. 27, which, as already

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shewn, is to be construed in the same way as 1 *Vic.*, ch. 28, and I should, therefore, have been, in that case, also of opinion that the payments of interest by *Howe* were, for the reasons before stated, sufficient to prevent the bar of the statute.

I am of opinion that the plaintiffs are entitled to a decree of foreclosure, and that the appeal should be allowed.

FOURNIER, J., concurred with *Gwynne*, J.

HENRY, J.:—

The decision of this case depends, in my mind, wholly on the application to it of the provisions of section 6 of the 85th chapter of the Consolidated Statutes of *New Brunswick*.

That section provides as follows:

> No person, jointly contracting or liable, or his representatives, shall be answerable for or by reason of any payment, or acknowledgment, or promise, of his co-contractor, or debtor, or his representatives.

The circumstances of this case may be briefly stated as follows:

In 1850 *John Howe*, as principal, and *James White* became parties to a joint and several bond to a party, through whom the appellants claim, in £2,000 conditioned for the payment of £1,000 as therein mentioned. It would seem that *White* became a party to it as surety for *Howe*, although such does not appear by the bond. On the same day *Howe* and *White* executed two separate mortgages of different real properties to the obligee of the bond conditioned for the payment by *Howe* of the same £1,000 secured by the bond. The time provided for the payment thereof expired on the 27th September, 1855. *Howe* continued to make payments on the bond and mortgage up to 1879. *White* died in 1858, and it is

not shown that either he or any one authorized by him ever paid anything in the shape of principal or interest on the bond or mortgage executed by him, nor has any of his representatives, or any one authorized by law to bind them, done so. The statute of limitations, as to him, began to run in 1855, and if *White* and his representatives are not bound by the payments made by *Howe*, the claim as against the latter is barred by the statute.

Previous to the enactment I have quoted, there is no doubt that payment by a joint debtor by bond or otherwise would suspend the operation of the statute, and another joint debtor could not successfully set it up as a defence, but since the enactment of a similar provision in *England*, I can find no case to justify me in deciding that the payments made by *Howe* had any effect in suspending the operation of the statute as to the representatives of *White*.

As, therefore, no *payment*, *acknowledgment* or *promise* is shown to have been made by *White* or any one by him authorized—for *Howe* had no authority to bind him—or by any one of his representatives, I am of opinion the claim against the respondents was barred by the statute, and that the appeal should be dismissed with costs.

TASCHEREAU, J., concurred with *Gwynne*, J.

GWYNNE, J.:

This case, when thoroughly understood, appears to me to be free from difficulty and concluded by authority.

On the 27th September, 1850, *John Howe*, as principal, and *James White*, as his surety in fact, though not expressed so to be, executed in favor of one *Margaret Cunningham*, their joint and several bond or obligation, whereby they bound themselves, and each of

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them, himself, his heirs, executors and administrators, in the penal sum of £2000 money of *New Brunswick*, subject to a condition thereunder written that the said obligation should be void, if the said *John Howe* and *James White*, or either of them, or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said *Margaret Cunningham*, her executors, administrators, or assigns, the just and full sum of £1000 of lawful money of *New Brunswick*, with lawful interest thereon, as follows, that is to say, the said principal sum to be paid on the 27th day of September, A.D., 1855, and lawful interest on the said principal sum to be paid quarterly on the 27th day of December, March, June and September in each and every year.

On the same day, the said *John Howe* and *James White* severally executed to the said *Margaret Cunningham* two several indentures of mortgage conveying to her certain lands of which they were respectively seized in fee simple. The indenture of mortgage so executed by the said *James White*, conveying to the said *Margaret Cunningham*, her heirs and assigns, the lands of the said *James White* therein mentioned whereof he was seized in fee simple, was subject to a proviso in the words following:

Provided always, nevertheless, and these presents are upon this express condition, that if the said *James White* and *John Howe*, or either of them, their, or either of their heirs, executors or administrators do and shall, well and truly pay, or cause to be paid, unto the said *Margaret Cunningham*, her executors, administrators or assigns, the just and full sum of one thousand pounds of lawful money of the province aforesaid, with lawful interest for and on the same, in manner and at the times following, that is to say, the said principal sum of one thousand pounds on the 27th day of September, which will be in the year of our Lord, 1855, with lawful interest on the said principal sum to commence from the date of these presents quarterly on the 27th days of December, March, June and September in each and every year until the said principal sum shall be paid

and satisfied without fraud or delay according to the condition of a bond or obligation bearing even date herewith, and made and given by the said *John Howe* and *James White* to said *Margaret Cunningham*, then these presents to be void, otherwise to remain in full force and virtue.

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The indenture of mortgage executed by *John Howe* of the lands whereof he was seized in fee simple to his sole use, was subject to a like proviso for avoiding it.

It will be convenient here to draw attention to the difference between the mode of expression in the English statute and in that of the province of *New Brunswick* bearing upon the point in issue. In the Imperial statute 3 & 4 *W.* 4., ch. 42. by the 3rd section it is enacted that actions of debt upon any bond or other specialty shall be brought within 20 years after the cause of any such action or suits, and not after.

The 4th section makes provision for the case of infants, femmes covertes, &c., and the absence of defendants beyond seas.

Then comes the 5th section, which provides—

That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgments, at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be, and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may by way of replication, state such acknowledgment and that such action was brought within the time aforesaid in answer to a plea of this statute.

Now, if the present question arose under this statute

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the payments by *Howe* would have had the effect of preserving the original action in its integrity against *White* and his heirs and executors upon that bond. That point was decided by Lord Chancellor *Cranworth*, assisted by two common law judges, *Williams* and *Crowder*, JJ., after a most careful examination of the statute, in *Roddam* v. *Morley* (1). In the opinion delivered by the common law judges, they say that it never had been at all doubted, either at the bar or on the bench, but that the act extends as well to the case of a bond with several obligors as also to the case where the liability has been transferred by death to a representative of the party originally liable, and that if one of several obligors were to make the requisite acknowledgment, it had never been disputed that this would be an acknowledgment by the party liable, within the intention of the statute, and that it follows from thence, that the words: "The party liable or his "agent," are to be read as if they were "the party "or parties liable by virtue of the bond, &c, &c., or any "of them, or his, her, or their agents," and Lord Chancellor *Cranworth*, in giving judgment, says:

> I have come to the conclusion that when a part payment, or payment of interest, has been made which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other parties liable on the specialty.

It was held in that case, that where a tenant for life of devised real estate had for many years, and up to the time of his death regularly paid interest on a bond of his devisor, in which the heirs were bound, such payment of interest by the tenant for life was an acknowledgment within the meaning of the proviso of 3 & 4 *William IV.*, ch. 42, sec. 5, and kept the bond alive in its integrity as against the devisee in remainder. The

(1) 1 DeG. & J. 15, & 3 Jur. N. S. 449.

provision of the *New Brunswick* statute upon this point is very different. By the 85th chapter of the Consolidated Statutes of *New Brunswick*, sec. 1, it is enacted that no action upon any judgment, recognisance, bond or other specialty shall be brought but within twenty years after the cause of action. By sec. 5:

No acknowledgment or promise shall be evidence of a new and continuing contract or liability whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be in writing signed by the party chargeable thereby, but a payment made on account of any such debt shall have the effect of such acknowledgment or promise.

And by section 6—

No person, jointly contracting or liable, or his representatives, shall be answerable for or by reason of any payment, acknowledgment or promise of his co-contractor or debtor, or his representatives.

Now, upon the execution of the several instruments above mentioned, *Margaret Cunningham* held, as security for the moneys due to her, the joint and several bond or obligation of *John Howe* and *James White*, which was enforceable against them jointly and severally and against their several and respective personal representatives, and also against their respective heirs, and devisees as to lands descended or devised, by an action brought upon the bond in pursuance of the statute 3 *W. & M.* ch. 14. She also held special separate security upon the respective real estates of them, the said *John Howe* and *James White*, conveyed by the several mortgages by them respectively executed. Upon the 27th September, 1855, the principal secured by the bond became due, and from that day the statute of Limitations began to run. The regular payment of interest by *Howe* until the 27th March, 1879 (it may be admitted) deprived *Howe* and his real as well as personal representatives, of all benefit of the statute of Limitations as a defence to an action upon the bond,

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but it had no effect in stopping the running of the statute of Limitations as a defence by *White* and his real and personal representatives to any action upon the bond. While the statute was so running in favor of *White* and his representatives, *White* died in the year 1858, having by his will made *Howe* his executor. It is admitted, however, that all payments of interest made by *Howe* since the death of *White* were, as had been those made by him before *White's* death, made by him on his own individual liability, and not in the capacity of *White's* executor, so that, on and from the 25th September, 1875, all liability of *White's* personal representatives, and of his heirs and devisees as to lands descended or devised, to any action whatever upon the bond, became extinguished by force of the provisions of the 1st and 6th sections of the 85th chapter of the consolidated statutes of *New Brunswick*, although such a payment by a co-obligor would have maintained the action alive in its integrity, under the English statute, equally against the other obligor not paying as against the one making the payments; and the sole question remaining is whether, during all the time that the statute was thus running so as to mature into a complete discharge of *White's* personal representatives, and of his heirs and devisees as to lands descended or devised, on any action being instituted on the bond, it was or not running at all in favor of *White's* devisee of the real estate mentioned in the mortgage, the contention of the plaintiffs being that it was not—or, in other words, that the act of *White's* co-obligor which could not keep alive *White's* liability or that of his real or personal representatives under the bond, could nevertheless keep alive his liability and that of his real representatives under the mortgage, or that an act which was insufficient to prevent the completion of the discharge of *White* and his real and personal repre-

sentatives from all liability in respect of the principal obligation, is sufficient to keep alive his liability, if living, and that of his real representatives, he being dead, in respect of a property conveyed only as a security collateral to, and for securing payment of such principal obligation.

The *New Brunswick* statute directly bearing upon this point, namely, the 27th section of ch. 84 of the Consolidated Statutes of *New Brunswick*, is identical in its terms with the English statute, 3rd and 4th *William IV.*, ch. 27, sec. 40, and is as follows:—

No action or suit or other proceeding shall be brought to recover any sum of money, secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land at law or in equity, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same (unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent,) to the person entitled thereto or his agent, and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one were given.

The whole point in the case lies in the proper solution of this question, namely, who is the person designated by the expression in the act:—

Unless in the meantime some part of the principal money or some interest thereon shall have been paid by the person by whom the same shall be payable or his agent?

The connection of the words "or some acknowledgment of the right thereto, shall have been given in writing, signed," after the words "unless in the meantime some part of the principal money, or some interest thereon shall have been paid," and before the words "by the person by whom the same shall be payable," seems to indicate, I think, very plainly, that the statute contemplates that the person competent to make a pay-

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ment so as to stay the continuance of the running of the statute and to keep the mortgage alive, and the person competent to keep it alive by a written acknowledgment of a right thereto, that is, to payment, must be one and the same person, and that such person must be either the mortgagor or some person interested in the estate mortgaged by title derived from him. Money handed over to the mortgagee by a person not a party to or affected by the contract contained in the mortgage, could not be a payment in discharge of, or in acknowledgment of, a liability existing in virtue of the mortgage, so as to have the effect of keeping it alive. As the section is dealing with respect to the rights of the mortgagor and mortgagee and those claiming under them the lands held in mortgage, and to the money secured thereby, it appears to me to be equally clear that the principal money, the payment of some part of which, or of some interest thereon, is to have the effect of staying the operation of the statute of limitations and of keeping alive the liability created by the mortgage, must be the principal money as secured by the mortgage, and not as secured by some other instrument. Upon the execution of the mortgage, the principal money for which the bond, which constituted the principal obligation, had been given, was made payable out of, and charged upon, *White's* land comprised in the mortgage. Upon *White's* death, in 1858, all *White's* estate and interest in that land passed to his devisee, in whose hands it remained subject to the liability to pay the money secured by the mortgage, or in default to lose the land; coupled, however, with a right to come upon *White's* personal estate for indemnity if compelled to pay the debt so secured by mortgage, in order to release the mortgaged lands. The statute is to be read, as it appears to me, as providing that no action shall be brought to recover any sum of money secured upon

and payable out of any land, but within 20 years next after a present right to receive the money so made payable out of the land mortgaged, shall have accrued, unless, in the meantime, some part of the principal money, that is, as secured by the mortgage, or some interest thereon, shall have been paid by some person by whom the same, that is, the money secured by the mortgage, shall be payable under and by force of the mortgage. The language of the section appears to me to point very distinctly to the mortgagor as the person primarily referred to in the sentence as the person by whom the same shall be payable, and, secondarily all persons claiming through him any estate or interest in the lands out of which the money secured by the mortgage is thereby made payable. There could be no sense, as it appears to me, in holding that any person could by any act of his deprive *White's* devisee of the benefit of the Statute of Limitations continuing to run to maturity so as to free the land devised to such devisee from all liability under the mortgage other than such devisee as the owner of the equity of redemption in the land mortgaged, or his or her agent. No act of *White's* personal representatives, who are strangers to the devisee of the land mortgaged, and to any estate in such lands could, as it appears to me, have such effect, and if no act of *White's* personal representatives could have the effect, *a fortiori* a person who, by the statute ch. 85 of the Consolidated Statutes of *New Brunswick*, could not by any act of his subject *White's* personal representatives to any liability under the bond, could not by any act of his prejudice the estate and interest of *White's* devisee in the land devised. And this view is consistent with the construction which the act has received in the English courts.

In *Bolding* v. *Lane* (1) the question arose as to the

(1) 1 DeG. J. & S. 122 & 9 Jur. N. S. 506.

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right to recover more than six years arrears of interest on money decreed by mortgage under the 42nd section of 3rd and 4th *William IV.*, ch. 27, in which similar words to those in the 40th section, viz., "the person by whom the same was payable," occur. The question was whether an acknowledgment in writing signed by a mortgagor to the effect that the arrears for more than six years were due would enable the first mortgagee to recover the whole amount of the arrears out of the land as against the second and subsequent mortgagees, and it was held that it would not. V. C. *Stuart* had held the words, "the person by whom the same was payable" meant the person who was liable to pay the interest under the contract, *i. e.*, the mortgage contract, namely, the mortgagor or his representative, and he accordingly held that the acknowledgment by the mortgagor was sufficient, but upon appeal this decision was reversed, Lord *Westbury* holding that the acknowledgment signed by the mortgagor was not binding on the second and subsequent mortgagees. The words of the statute appear, he says, to have been selected as a description capable of including not only every person liable to be sued at law, *i.e.*, under the mortgage, but every person who, having an interest in the land sought to be charged, might be properly sued as a defendant in a suit in equity brought to enforce payment of the principal and interest out of such land, and it follows, he says, as a necessary consequence, that it was not the intention, nor is it the effect of the section, to give to the mortgagor, or other person who is by law compellable to pay the interest, a statutory power to deprive, by his acknowledgment given to a prior incumbrancer, the subsequent incumbrancers of the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no

person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing signed by such person, or by some former owner from whom his interest is derived, *i.e.*, as the context shows, signed by some former owner before the interest, derived from him and existing when the acknowledgment was given, was created.

That rule, as it appears to me, applies precisely to the present case in which the payment relied upon as keeping the mortgage alive notwithstanding the currency of the statute of limitations was not made by the mortgagor or by any person liable to pay by force of the mortgage, but by a person an utter stranger thereto, and to any interest whatever in the land mortgaged, which is sought to be charged with the liability originally and solely created thereby.

In *Chinnery* v. *Evans* (1), where a mortgage had been made of estates A, B and C, situate in three different counties, and by an order made, on the petition of the mortgagee under the provisions of a statute in that behalf, a receiver was appointed who entered into possession of estate A only, and out of the rents received in respect thereof, paid the interest upon the mortgage, the equity of redemption in estates B and C was sold and conveyed by the mortgagor without the mortgagee being made a party to the conveyance to a purchaser, it was held that payment by the receiver out of the rents of estate A, was a payment "by a person by whom the sum was payable or his agent," within the meaning of the section so as to preserve the mortgagee's rights against estates B and C also, and *Bolding* v. *Lane* (2) having been cited as an authority to the effect that payment by such receiver was not sufficient for that purpose, Lord

(1) 11 H. L. C. 45. (2) 2 *Ubi supra.*

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Westbury, while insisting upon the correctness of the decision in *Bolding* v. *Lane*, points out the distinction between it and *Chinnery* v. *Evans*, that the former was a case of several incumbrancers ranking in a series one after another, in which case payment, although made by the mortgagor, could not keep alive the right of a first mortgagee to arrears of interest as against a second mortgagee, whereas in *Chinnery* v. *Evans*, the payment by the receiver being, as it was held to be, the same as payment by the mortgagor himself to the mortgagee, of the three estates included in one mortgage, and out of the rents derived from one of them, the mortgagee could not be deprived of his right to resort to any estate comprised in his mortgage, so long as that mortgage is legally and regularly kept alive, as it was in that case kept alive by payment of interest accruing due upon it by the mortgagor, whom the receiver represented within the meaning of the statute. In this case it was also held that the same principle and *ratio decidendi* are to be applied to the English Act 7th *William IV.*, and 1st *Vic.*, ch. 28, which is identical with ch. 84 of the Consolidated Statutes of *New Brunswick*, sec. 30, as are to be applied to 3rd and 4th *William IV.*, ch. 27, sec. 40, which is identical with sec. 29 of the above ch. 84 of the *New Brunswick* Statutes, the Act 7th *William IV.*, and 1st *Vic.*, ch. 28, having been passed merely to remove doubts and to secure to mortgagees the same right to recover the lands held in mortgage as by 3rd and 4th *William IV.*, ch. 27, sec. 40, they are given to recover the monies secured thereby.

As remarked by Sir *George Jessel*, M. R, in the Court of Appeal from the Chancery Division of the High Court of Justice in *Knatchbull* v. *Hallett* (1), it is the establishment of some principle to assist a judge in deciding

(1) 13 Ch. D. 712.

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future cases arising, that the chief use of authorities consists. Now, the principle to be derived from *Chinnery* v. *Evans*, and *Bolding* v. *Lane*, appears to me to be that whether the action, suit or proceeding, be for recovering the mortgaged lands, or for enforcing payment of the moneys secured by the mortgage, the only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the statute of limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons. Now, the payments by *Howe* were not made in discharge of any contract of *White* contained in the mortgage; in making those payments, which *Howe* made in discharge of his own liability under his own bond and mortgage, he was as much a stranger to *White's* mortgage and the liability incurred thereby as any other person could have been. Money paid by *Howe* in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by *White's* mortgage, and consequently could not in reason be held to have the effect of staying the progress of the statute of limitations to the point of liberating the lands comprised in the mortgage from the liability created thereby.

In *Toft* v. *Stephenson* (1), it was held in 1852 that the person competent to make the payment which should keep alive the mortgage must mean a person, who, unless he paid, must lose *his* land. That decision is referred to as good law in 1871 in *Pears* v. *Laing* (2). The principle which is established by *Harlock* v. *Ash-*

(1) 1 DeG. M. & G. 28. (2) L. R. 12 Eq. 54.

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berry (1) in the Court of Appeal, I take to be also, that payment to keep alive a mortgage against the operation of the statute of limitations must be a payment by a party affected by the mortgage or his agent—that the payment to prevent the barring by the statute the mortgagee's title to the lands mortgaged must be equivalent to an acknowledgment by the party making it of *his* liability under the mortgage, and an admission of the title of the mortgagee to the benefit of the mortgage and to the mortgaged lands, and this principle, appears to me, to carry with it the sanction of sound sense and wholly independently of authority recommends itself to the understanding. The payments made by *Howe*, who is an utter stranger to the mortgage, and made by him in discharge of his own liability under his bond and mortgage, can never amount to such an acknowledgment by *White* or his devisee.

Upon principle, therefore, and upon authority, I am of opinion that an act of a person wholly inadequate and incompetent to preserve the liability of *White* and his representatives under the principal obligation involved in his bond can not preserve his liability and that of his devisee under the mortgage, which is but a collateral security to the principal obligation, and that, therefore, this appeal must be dismissed with costs.

Since writing the above, the April number of the current volume of the Chy. Div., vol. 22, has come to hand containing two cases, which confirm me, in my view, *Sutton* v. *Sutton* (2) and *Fearnside* v. *Flint* (3). These cases arose under 37 and 38 *Vic.* ch. 57, which reduced the period of prescription from 20 to 12 years, but they equally apply to the present case. They decide that where the remedy against the land is barred by lapse

(1) 19 Chy. Div. 539.

(2) P. 511.

(3) P. 579.

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of time, the personal remedy, whether that personal remedy consists in an action upon the covenant contained in the mortgage deed, or an action upon a collateral bond, is barred also, the debt secured by the real and personal obligation being one. The same principle applies to the converse of this proposition.

Appeal dimissed with costs.

Solicitor for appellants: *G Sidney Simith.*

Solictors for respondents: *Harrington & Millidge, W. B. Wallace & C. A. Palmer.*