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*Jan. 18.

*Mar. 8.

MARTHA A. ST JOHN *et al*.....APPELLANTS;

AND

JOHN CHARLES RYKERT.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Account—Payment under pressure—Imputation of payments—Appropriation by debtor—Statute of Limitations—Interest on judgment debt—Interest on covenant in mortgage—Evidence.

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between *St. J.*, the plaintiff, and *R.*, the defendant. The master found that $453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for $510, and interest thereon as barred by the Statute of Limitations; andreduced the interest on a sum of $3,000 advanced from twenty-four per cent. to six per cent. after judgment had been recovered. The note of $510 was dated 18th November, 1861, and was payable with interest at the rate of $10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into agreement with him in order to relieve him from the pressure of execution debts, paid him $2,000 on account of his indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870.

Held,—That the evidence shewed an appropriation by respondent of the $2,000 on account of the debts for which he was being pressed, and as the note for $510 was not included in such debts, the master was right in treating it as barred by the statute of limitations.

Another note dated 11th January, 1862, payable to and endorsed by one *S. H.*, was for $3,000 with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of

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

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$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.

Held,—That the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid.

APPEAL from two judgments of the Court of Appeal for *Ontario*, the first of such two judgments having been delivered on the 20th day of May, 1879, allowing (in part) the appeal of the above-named respondent from the judgment of the Hon. Vice-Chancellor *Proudfoot* dismissing an appeal by the said respondent from the report of the master at *St. Catharines*; and the second of such judgments having been delivered on the 28th day of November, 1881, dismissing the appeal of the above-named appellants, from an order made in chambers by the Hon. Mr. Justice *Patterson*, amending the certificate issued by the Registrar of the court pursuant to the above first recited judgment.

The facts and pleadings sufficiently appear in the judgment of *Strong*, J., hereinafter given.

Mr. *Dalton McCarthy*, Q.C., for appellants, and Mr. *James Bethune*, Q.C., for respondent.

In addition to the cases reviewed in the judgments hereinafter given the learned counsel cited and relied on the following cases:—*Morrison* v. *Robinson* (1); *Mills* v. *Fawkes* (2); *Simpson* v. *Ingham* (3); *Keene* v. *Keene* (4); *Howland* v. *Jennings* (5); *Dallby* v. *Humphrey* (6); *New Marsh* v. *Clay* (7); *Peters* v. *Anderson* (8).

(1) 19 Grant 480.
(2) 5 B. & C. 461.
(3) 2 B. & C. 65.
(4) 3 C. B. N. S. 144.
(5) 11 U. C. C. P. 272.
(6) 37 U. C. Q. B. 6 4.
(7) 14 East 239.
(8) 5 Taunt. 596.

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The judgment of the court was delivered by

STRONG, J.:—

This suit was originally instituted in the Court of Chancery for *Ontario* by the appellants' testator against the present respondent, *John Charles Rykert*, and *Thomas Burns*. The Bill alleged that the plaintiff had recovered a judgment against the respondent and had issued execution against lands thereon, and that certain lands which had been conveyed to *Burns* by one *Page* were so conveyed in trust for the respondent and in fraud of the plaintiff. It was declared by the decree that the lands in question were held by *Burns* as trustee for the respondent, subject only to the amount due by the respondent to *Burns* in respect of money advanced by him to the respondent for the purpose of the purchase of these lands, and that subject to that amount the lands were liable to a charge for the amount of the plaintiff's execution. The decree then directed an account to be taken of the sum due to *Burns* and for redemption by the respondent, and in default a sale to raise the amount found due, and also for an account of all the dealings between the plaintiff and the respondent, and for a sale of the lands in default of payment of any balance found due to the plaintiff. The sum found due to *Burns* has been paid off, and his rights are no longer in question. The Master proceeded to take the account directed by the decree between the plaintiff and the respondent, and found that the sum of $458.20 was, at the date of the report, (the 12th of November, 1877,) due to the respondent by the plaintiff. The accounts were complicated, and the Master's duty was rendered very difficult by the irregular and confused manner in which the accounts had been kept by the plaintiff. The report, however, is very full and clear, and is further elucidated by a judgment which the Master has appended to it.

Both the plaintiff and the respondent appealed to the Court of Chancery against this report. The respondent's grounds of appeal were all disallowed by the learned Vice Chancellor by whom the appeal was originally heard, and there was no further appeal from his decision in this respect, save as regards the respondent's first exception to the report. But upon this point, which related to the amount for which a mortgage for $3000 was to stand as security, the Court of Appeal confirmed the Master's finding, which, as mentioned, had been approved by the Vice Chancellor, and this last decision is not impugned upon the present appeal to this Court. The plaintiff's grounds of appeal were three in number and were as follows:—

(1.) Upon the ground that the Master should have allowed to the plaintiff the amount of the $510 note and interest thereon.

(2.) Because the Master should not have reduced the interest upon the $3000 advanced, to six per cent., after judgment had been recovered upon the note given as one of the securities therefor, but should have allowed interest at the rate of 24 per cent. upon such advance.

(3.) Because the Master should have allowed to the plaintiff the costs of the various actions brought by the plaintiff against the defendant *Rykert*.

The last of these grounds was disallowed by the Vice Chancellor, and his judgment in that respect was not appealed from. The first and second grounds of appeal were allowed, and against that decision the respondent appealed to the Court of Appeal, whose decision upon these points is the subject of the present appeal.

I will consider the questions thus raised in the order in which they have been stated. The promissory note for $510 was dated the 18th of November, 1861, and was payable with interest at the rate of $10 per week

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from the 23rd November, 1861. The Master found that this note was barred by the Statute of Limitations, and that the plaintiff failed to show that it was taken out of the operation of the statute by the application of part of a sum of $2,000 paid by the respondent to the plaintiff on the 6th March, 1867. The Vice-Chancellor held that the appropriation made by the plaintiff of a portion of the $2,000, as indicated by the plaintiff's books, to the payment of the note in question was a valid appropriation, and that the evidence was insufficient to establish a prior payment or satisfaction of the note, The Court of Appeal, though expressing no opinion upon the Statute of Limitations beyond an intimation favourable to the view taken by the master, determined that the circumstantial evidence sufficiently established a presumption of payment long before the payment of the $2,000 on the 6th March, 1867.

The circumstances which the court rely on as warranting this inference are that the note was evidently intended to be a short transaction from what appears on its face, that the interest was to begin to run five days after its date, thereby implying that it was to be paid in the five days, and also from the fact admitted by the plaintiff, that he had held a bundle of collateral securities for this note which he had given up to the respondent for the reason alleged by him that he considered them of little or no value, and from the keeping back the note, when all other demands held by the plaintiff were put in suit, as well as the plaintiff's silence regarding this note when the arrangement of the 6th March, 1867, was completed, and the omission of this note from the statement on which that agreement was based. I am far from saying that these circumstances are not sufficient to justify the conclusion which the court came to, that there had been a payment. I am of

opinion, however, that the Statute of Limitations is a much more satisfactory basis for the decision of this objection to the master's report. For I think with the master, and upon the authority of the cases referred to in his judgment, particularly that of *Shaw* v. *Picton* (1), that the proper conclusion from the evidence is that there was an appropriation by the respondent of the $2,000 to the payment of the judgments which excluded any right of the plaintiff to make another subsequent application. The law as to the imputation of payments is well settled to be that a debtor owing several debts has, in the first place, the option of ascribing a payment which he makes to any of the several debts as he may think fit, the rule being *solvitur in modum solventis*. This general rule is, however, subject to certain limitations, one of which is, that the appropriation by the debtor, must be made at the time of payment, and that he cannot make a subsequent appropriation as the creditor may. But the specific appropriation need not be shown by any express declaration, it may be inferred from facts and circumstances, and in such case it becomes a question of fact to be determined by a jury in the action at law, and in every case by the tribunal to which the decision of questions of fact is referred. In the present case it was therefore for the master to say upon the evidence whether the respondent, when he made the payment of the $2,000, on the 6th March, 1867, intended with the knowledge of the plaintiff to apply that payment to the judgments which the plaintiff had recovered against him, or whether he paid it on account of his general indebtedness to the plaintiff, as well demands in judgment as those not so included, leaving the plaintiff to make such specific application of it as he might think fit. The master has found that the respondent did intend an application of the payment

(1) 4 B. & C. 715.

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to the judgments, and I think there is ample evidence to support his finding. The arrangement for giving the respondent time, of which the payment of this $2,000 formed part, was made with Mr. *Currie*, the attorney of the plaintiff, in the actions on which the judgments had been recovered. Mr. *Currie* knew nothing of this note for $510; it had not been put in his hands for collection by the plaintiff, and was not mentioned to him by the plaintiff in the course of the negotiations which led to the agreement of the 6th March, 1867. The respondent is proved to have applied to Mr. *Currie* for a statement of the plaintiff's claims, and Mr. *Currie* accordingly gave him the memorandum, exhibit H, which specifies certain claims, all of which had passed into judgment. Mr. *Rykert* swears that he supposed this note was paid, and although he may have been wrong as to the fact, there is nothing to induce the supposition that he considered the note was then an existing debt, which is sufficient for the present purpose. When therefore Mr. *Rykert*, in the words of the agreement of the 6th March, 1867, "paid the plaintiff the sum of $2,000 on account of his indebtedness," it is a fair assumption, and an inference which a jury would be justified in making, and I have no doubt would make, that the indebtedness referred to was that stated in Mr. *Currie's* memorandum, exhibit H, save the judgment against Mrs. *Rykert*, and the costs which were to be paid to Mr. *Currie*, and were expressly excepted from the agreement. I think this conclusion is also confirmed by the agreement itself, which provides that if any of the instalments shall not be paid on the day the same becomes due, all the indebtedness in arrear may at once be "enforced." The word "enforced," thus used, implies a reference to debts upon which judgment had already been recovered, rather than to general liabilities never put in suit. In the case of *Shaw* v.

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Picton (1), Messrs. *Howard & Gibbs*, solicitors, having themselves large demands against Lord *Alvanley* upon bill transactions with himself, and also as agents for several other persons to whom Lord *Alvanley* had granted annuities, for which Lord *Foley* was surety, caused an application to be made to Lord *Alvanley* and Lord *Foley* on behalf of the annuitants, and Lord *Alvanley* in consequence of that application paid to *Howard & Gibbs* certain sums of money without making any express appropriation of them at the time of payment. It was held by the Court of King's Bench that Lord *Alvanley* ought to be considered as having appropriated the payment on account of the annuitants. The principle of that decision may be generalized by saying, that where there are several debts and in consequence of pressure in respect of one of them the debtor makes a payment, without expressing any specific appropriation, he will be implied to intend an application of the payment to the debt for which he was being pressed. And applying the principle so extracted from the case of *Shaw* v. *Picton* to the facts of the present case, it seems very clear that the respondent making the agreement of the 6th March, 1867, and the payment of the $2,000 in pursuance of its terms, in order to relieve himself from the pressure of execution debts, must be taken to have intended that payment to be applied to those debts, and not to a debt which was not brought to his attention, which he swears he believed to have been paid, and for the payment of which the plaintiff made no demand, and which he had not even instructed the attorney who acted for him to seek payment of. Therefore, even assuming that this note for $510 had not been paid previously to the 6th March, 1867, a point upon which I express no opinion varying from the conclusion arrived at by the

(1) 4 B. & C. 715.

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Court of Appeal, I am of opinion that there never was any partial payment on account to take it out of the Statute of Limitations, and that the master was consequently quite right in treating it as barred by that statute.

The remaining question which we are called upon to decide is that raised by the plaintiff's second objection to the report, upon his appeal to the Court of Chancery, relating to the rate of interest to be allowed upon a promissory note for $3,000, upon the judgment recovered on that note, or upon a collateral covenant of the same tenor as the note. The note in question was dated the 11th January, 1862, was payable to and endorsed by one *Sheldon Hawley*, and is for $3,000 "with interest at the rate of 2 per cent. per month, until paid." The covenant for payment contained in the mortgage deed of the same date given by Mr. *Rykert* as collateral security for the payment of the same amount, is for payment of "the said sum of $3,000 on the 11th day of July, 1862, with interest thereon at the rate of 24 per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed the plaintiff for interest in respect of this debt, 6 per cent. only from the date of the recovery of the judgment. The Vice-Chancellor held that the plaintiff was entitled to interest on the judgment at the rate of 24 per cent. and directed the report to be varied accordingly. The Court of Appeal, however, determined that this was incorrect, and upon the authority of *Cook* v. *Fowler* (1), held that upon the judgment the plaintiff must be restricted to the statutory rate of interest from the date of signing judgment. If the true construction of the contract as to interest embodied in this promissory note was, that interest should be paid at the rate of 24 per cent. after the date

(1) L. R. 7 H. L. 27.

of payment fixed in the instrument itself and up to the date of actual payment, it may, upon the authority of *Popple* v. *Sylvester* (1), decided since the judgment of the Court of Appeal, be doubted if *Cook* v. *Fowler* authorised such a decision, for according to this case of *Popple* v. *Sylvester* it would seem that the recovery of the judgment only merged the principal and interest due at the date of the judgment, leaving the contract to pay interest at the larger rate still operative as to subsequently accruing interest. This, however, is a point which I merely notice in passing, for it does not call for any determination in the view which I take of the proper constructions of the terms of both the note and covenant as to the payment of interest at the rate of 24 per cent. The question as to the rate of interest recoverable on the covenant was not originally before the Court of Appeal at all. The master's report was final as to all matters of account between the parties, and it had not been objected to by the plaintiff, as one of his grounds of appeal, that the master had omitted to bring this covenant into account.

But upon the court determining that the plaintiff was only entitled to 6 per cent. interest on his judgment, it was suggested by counsel, that he was at all events entitled to 24 per cent. in respect of the collateral covenant contained in the mortgage which had never passed into judgment, and upon this the court, at the request of the parties, and in order to make a final disposition of this long pending litigation, and assuming (erroneously, I think,) that the plaintiff's claim on the covenant was not concluded by the report, undertook the decision of the question of the rate of interest recoverable under the covenant, and held that upon the covenant the plaintiff was entitled to receive 24 per cent. until actual payment. I am not able to

(1) 22 Ch. Div. 98.

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agree with the Court of Appeal in the construction which they place upon the stipulation as to interest contained in this covenant. It appears to me that the proper construction of the words in which that provision is expressed, "The said sum of $3,000 on the 11th day of July, 1862, with interest at the rate of 24 per cent. per annum until paid," is that interest, at the specified rate, is to be paid up to the 11th day of July, 1862, the day fixed for payment by the terms of the covenant, and that it is not to be interpreted as a covenant for payment of interest at the rate of 24 per cent. after the 11th day of July, 1862, if the principal should then remain unpaid. I should have arrived at this conclusion without authority, for I take it that in the absence of express words showing that the parties contemplated payment, not *ad diem* but *post diem*, we ought not to presume that they intended to make provision for a breach of the covenant, and I should have thought that a proper and salutary construction, requiring as it does parties who stipulate for a larger amount of interest than the usual and legal rate to make clear by precise and unambiguous language what their intention was. The point, however, seems to be covered by direct authority. In the case of the *European Central Railway Co.*, the Court of Appeal (1), speaking through *Bramwell*, L. J., determined that a debenture by which a joint stock company covenanted for the payment of the principal on the 11th of October, 1865, and the interest (at the rate of 6 per cent) to be payable in the meantime half yearly at the several dates, "expressed in the interest warrants thereunto annexed until the repayment thereof," meant interest at the rate of 6 per cent. until the day fixed for payment of the principal, and was not to be construed as a covenant for the payment of interest at that rate after a default in

(1) 4 Ch. D. 33.

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the payment of principal at the day named. So far as I can see, this decision did not proceed either upon the expression "in the meantime" or upon the reference to the interest warrants attached to the debenture, but determined broadly that the words "until the repayment thereof" meant payment at the day fixed. That this is the true exposition of the case referred to is, however, conclusively shown by Mr. Justice *Fry* in the late case of *Popple* v. *Sylvester* (1) (which was cited for the plaintiff upon the point that interest was recoverable upon the note notwithstanding the recovery of judgment), for in that case the learned judge distinguishing the case of the *European Central Railway Co.* from that before him, where he held that a covenant very differently worded was sufficiently comprehensive to embrace subsequent interest, says:—

> I ought, perhaps, to make a remark upon the case of the *European Central Railway Co.* (2). There the covenant being to pay the principal sum, with interest, "until repayment thereof," the court held that these words meant "until the day fixed for payment," and therefore they held that there was no covenant to pay beyond the day fixed for repayment of the principal. Here I have held that there is an express covenant to continue the payment of interest so long as the security should continue.

Then applying the decision in the *European Central Railway Co.*, as explained by *Fry*, J., to the present case, we must come to the same conclusion, for it is impossible to found any argument upon any difference or distinction between the words "until repayment thereof," which were those of the covenant then under consideration, and the words "until paid," which are those of the covenant before us in the present case. The result is that all the objections taken by the plaintiff to the master's report on the appeal to the Court of Chancery ought to have been disallowed and the order of the Court of Chancery of the 29th day of June, 1878, and

(1) 22 Ch. Div. 98. (2) 4 Ch. D. 33.

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the certificate of the Court of Appeal must both be varied accordingly.

The point which arose before the Court of Appeal on the motion to vary the certificate, and on the appeal from the order on that motion as to the credit to the respondent for the $912.70 and the interest on it, does not in this disposition of the appeal arise, and need only be noticed for the purpose of pointing out that all question as to it, must be considered as now concluded by the master's report, and I do this only to prevent any future misunderstanding and further delay in ending this long, protracted litigation. The question as to this $912.70 only became incidentally of importance upon the adjudication of the Court of Appeal, that the plaintiff was entitled to 24 per cent upon the covenant until payment. It appeared that the master had given credit to the respondent for a sum of $912.70, as having been received by the plaintiff, on the 20th May, 1862, being the balance of a mortgage made by one *Servos* to the respondent, and by the respondent transferred to the plaintiff as collateral security for a less sum than was secured by the original mortgage by *Servos*, that this balance was the surplus remaining in the plaintiff's hands after he had realized the mortgage, and paid himself out of the proceeds the debt which it was given to secure. In other words, and in the language of the judgment of the Chief Justice in the Court of Appeal, this amount of $912.70 should, in fact, be treated as a payment made by the respondent on the 20th May, 1862, and applicable as such upon his mortgage to the plaintiff for $3,000. It further appeared that the master instead of making a rest at this date of 20th May, 1862, and deducting this credit of $912.70 from the amount of principal then due, in respect of the $3,000 debt, carried on the interest account at 6 per cent. on the full amount of the latter debt, and also calculated

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interest at 6 per cent. on the payment of $912.70. There was no appeal against the report in respect of this disposition of this surplus of the *Servos* mortgage, and the report in respect of it, and as regards the date at which the master gave the credit, stands confirmed. When, however, the Court of Appeal altered the report as to the rate of interest to be calculated on the debt secured by the note and covenant from 6 to 24 per cent., upon the submission of the parties already noticed, it became a matter of justice to the respondent and properly incidental to this variation of the report in that respect, that in order to give the respondent the benefit of the master's finding of the payment of this amount at the date named, that they should direct an equivalent rate of interest, (at 24 per cent.,) to be calculated on this payment, and this was done by an order made in chambers by Mr. Justice *Patterson* to that effect, which was subsequently affirmed on appeal to the full court. In the view which I have stated as to the construction of the covenant and the plaintiff's right to interest under it at 24 per cent., no necessity arises for varying the report by calculating interest at 24 per cent. on this credit of $912.70.

The conclusion is that, in my opinion, the report should stand in all respects confirmed, and that for the reasons given by the learned master.

The orders of both courts below should be varied in the manner already indicated, and the plaintiff's appeal from the report should be dismissed with costs in the Court of Chancery, and the respondent should also have his costs of the appeals both in the Court of Appeal and in this court.

HENRY, J. :—

This is an appeal from two judgments of the Court of Appeal for *Ontario*—the first of such two judgments

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having been delivered on the 20th day of May, 1879, allowing (in part) the appeal of the above named respondent from the judgment of the Hon. Vice-Chancellor *Proudfoot*, dismissing an appeal by the said respondent from the report of the master at *St. Catharines*, and the second of such judgments having been delivered on the 28th day of November, 1881, dismissing the appeal of the above named appellants, from an order made in chambers by the Hon. Mr. Justice *Patterson*, amending the certificate issued by the registrar of the court pursuant to the above firstly recited judgment.

The matter in controversy in the suit having been referred to a master, he gave a judgment which was appealed from by both parties, and a judgment was subsequently given by Vice-Chancellor *Proudfoot*. From that judgment both parties appealed, and after argument the Court of Appeal for *Ontario* passed judgment, as appears by the following certificate of the registrar of that court:—

This is to certify that after hearing counsel on the thirteenth day of May, 1879, as well for the appellant as for the respondent, upon the petition and appeal of the above-named appellant complaining of an order of the Court of Chancery of *Ontario*, bearing date the twenty-ninth day of June, 1878, and praying the same might be reversed or varied, or that such other order in the premises might be made as to this court should seem meet; whereupon and upon hearing read the reasons of appeal filed by the appellant, as also the reasons against such appeal filed by the respondent, this court was pleased to direct that the matter of the said petition and appeal should stand over for judgment; and the same having come on this day for judgment it was ordered and adjudged by the said court that the said petition and appeal should be and the same were allowed as to the five hundred and ten dollars ($510) note mentioned in the fourth reason of appeal put in by the said appellant. And this court doth declare that the said note was paid by appellant, and this court doth dismiss all the other grounds of appeal mentioned in the said reasons of appeal, but declares and directs that the sum of nine hundred and twelve dollars and seventy cents (912.70), being the amount received by the respondent in respect of the *Servos*

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mortgage as stated and shown in the master's report, be applied in reduction of the three thousand dollar ($3,000) loan in the master's report mentioned and interest thereon, and be credited to the said appellant upon the said mortgage as and when the same was received by the respondent, and with these declarations and directions this court doth refer the said cause back to the Master of the said Court of Chancery at *St. Catharines*, to review his said report as directed by the order appealed from. And this court doth not see fit to give to either party any costs of or in respect of this appeal.

On an application of the respondent to correct the foregoing certificate made to Mr. Justice *Patterson*, he, after hearing counsel for both parties, made the following order:—

Upon the application of the above-named appellant, upon reading the notice of motion served herein on the ninth day of November, A.D., 1880, for an order correcting the certificate, signed by the registrar of this court, setting forth the judgment of this court upon this appeal. Upon reading the said certificate and the various proceedings in connection with this appeal, and upon hearing counsel for the parties;

It is ordered that the certificate signed by the registrar of this court, setting forth the judgment of this court upon this appeal be amended by substituting the words "of the twentieth day of May, A.D. 1862," for the words "and when the same was received by the respondent."

Dated this 20th day of November, 1880.

An appeal was taken from that order and after argument the court gave judgment against the appellant, as will appear by the following certificate:—

Monday, the twenty-eighth day of November, 1881.

This is to certify that after hearing Counsel on the twenty-first day of December, 1880, as well for the appellant as the respondents, upon the application of the above named respondents by way of appeal from the order made herein in Chambers by the Hon. Mr. Justice *Patterson*, on the twentieth day of November, 1880, directing the amendment in certain particulars of the Certificate signed by the Registrar of this Court, setting forth the judgment of this Court upon this appeal, whereupon and upon hearing read the notice of this application and the various proceedings had and taken in connection with this appeal, this Court was pleased to direct that the matter of

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the said application by way of appeal as aforesaid, should stand over for judgment and the same having come on this day for judgment,—

It was ordered and adjudged by the said Court that the said application by way of appeal as aforesaid should be, and the same was, dismissed with costs to be paid by the respondents to the appellant forthwith after taxation thereof.

The appeal to this Court is therefore from these two judgments.

The first of the judgments disposed of the claim of the appellant on the note for $510 of the respondent declaring that the same was paid. It also declared that $912.70, being the amount received by the (then) respondent, the present appellant, in respect of the *Servos* mortgage, as shown and stated in the master's report, be applied in reduction of the $3,000 loan in the master's report mentioned and interest thereon, and to be credited to the appellant (now respondent) upon the said mortgage, as and when the same was received by respondent (now appellant,) and the cause was referred back to the master to review his report as directed by the order appealed from.

There was no appeal from that judgment, and I think it must stand, under any circumstances, as respects the question of the $510. The present appellants, or rather the original plaintiff, submitted to that judgment, and but for the motion on the part of the respondent to amend the certificate the cause would have been immediately remitted back to the master. It appears, therefore, that the only question open is the one raised by the appeal from the order of Mr. Justice *Patterson*.

Before considering that matter I may say that the real merits of the controversy as to the $510 are not easily ascertained, and if the question were open, I would incline to sustain the judgment. A plaintiff to recover should prove his claim in such a manner as to leave no reasonable doubts as to right to recover, and that has not been done in this case.

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I consider the matter opened up by the appeal in this case is but the question of the date from which the present respondent should be allowed interest on the $912.70 before mentioned. The judgment that he was to be so allowed from the time "when the same was received by the respondent," (now appellant,) was not appealed from by the appellant, and is not therefore open for consideration. Is then the judgment to amend the certificate or formal judgment within the power of the court? It seems that the certificate in question was not in accordance with the view of the Court as to the point in question, and the amendment was made to bring them into harmony. It was, as I understand it, a mistake of the Registrar in certifying the judgment of the Court of Appeal to the court below, and if he made a mistake in stating the judgment, I am of opinion for the reasons given in the judgment of Mr. Justice *Patterson* and that of Mr. Justice *Burton* for the full Court, that the amendment is justifiable.

We are then to consider the matter as if the certificate had been originally right, and as there was no appeal from the judgment, but merely from the judgment as to the amendment, there is nothing further in my opinion to be considered. I think, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs

Solicitors for appellants: *St. John & O'Connor.*

Solicitors for respondent: *Rykert & Ingersoll.*