GEORGE McKEAN (DEFENDANT).....APPELLANT; 1890

AND *Nov. 3, 4.

THOMAS R. JONES (PLAINTIFF).....RESPONDENT. 1891

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *Nov. 16.

Practice—Parties to suit—Assignment of chose in action—Demurrer—Res judicata.

C. by instrument under seal assigned to defendant, as security for moneys due, his interest in certain policies of insurance on which he had actions pending. C. afterwards gave to B. & Co. an order on defendant for the balance of the insurance money that would remain after paying his debt to defendant. B. & Co. endorsed the order and delivered it to plaintiff by whom it was presented to defendant, who wrote his name across its face. B. & Co. afterwards delivered to plaintiff a document signed by them, stating that, having been informed that the endorsed order was not negotiable by endorsement, to perfect plaintiff's title and enable him to obtain the money in defendant's hands, they assigned and transferred their interest therein and appointed plaintiff their attorney, in their name, but for his own use and benefit, to collect the same.

The defendant having received the amounts due C. on the insurance policies informed plaintiff, on his demanding an account, that there were prior claims that would absorb it all. Plaintiff then filed a bill in equity for an account and payment of the amount found due him to which defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that an account between B. & Co. and C. being necessary to protect C.'s rights C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill.

Held, affirming the judgment of the court below, Strong and Patterson JJ. dissenting, that the question of want of parties was *res judicata* by the judgment on the demurrer and could not be raised again by the answer. Even if it could the judgment was right as C. was

*PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Patterson JJ.

1891

McKEAN v. JONES.

not a necessary party. As between plaintiff and defendant the order was an absolute transfer of the fund to be received by defendant, and was treated by all the parties as a negotiable instrument. Defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and plaintiff, but was bound to account to plaintiff in accordance with his undertaking as indicated by the acceptance of the order.

APPEAL from a decision of the Supreme Court of New Brunswick affirming a decree made by Mr. Justice Fraser sitting as a judge in equity.

One Chapman, by instrument under seal dated February 28, 1880, assigned to the appellant, as security for moneys due, his interest in certain policies of insurance on which actions were then pending in Chapman's name. Subsequently Chapman gave an order on defendant in favour of Belyea & Co. to whom he was indebted, in the following words:—

"LIVERPOOL, April 23, 1882.

"Please hold to the order of Messrs. Belyea & Co., to whom I have assigned it, any balance that remains of insurance money per 'Pretty Jemima' over and above the amount I owe, or may owe you, or to your firm of Carvill, McKean & Co., or Francis Carvill & Son, without making any further advances to me or on my account.

"J. H. CHAPMAN."

Belyea & Co., being indebted to the plaintiff Jones, endorsed this order and forwarded it to him, and in May, 1882, it was presented by Jones to defendant who wrote his name across the face of it. Belyea & Co. in October, 1882, delivered to the plaintiff the following document:—

"29 RED CROSS STREET,

"LIVERPOOL, 3rd October, 1882.

"Hon. Thomas R. Jones:

"Dear Sir,—Having endorsed to you the order drawn by J. H. Chapman upon George McKean, Esq., for

any balance of insurance moneys in his hands when collected in our favour, we are informed the instrument is not negotiable by endorsement, not being a bill of exchange, and, therefore, in order to perfect your title, and to enable you to obtain the amount that may be in Mr. McKean's hands, we hereby assign and transfer our interest therein, both legal and equitable, and appoint you our attorney, in our names, but for your own use and benefit, to collect the same.

"We are, dear sir,

"Yours truly,

"BELYEA & Co."

The actions on the policies of insurance were determined in favour of Chapman in 1885 and plaintiff then applied to defendant for an account of the moneys received therefor, and of amount due defendant under the assigment from Chapman. No statement was rendered, but plaintiff was informed that there were prior claims that would absorb all the money. Plaintiff then filed a bill for an account and payment of the amount found due him.

The defendant demurred to this bill alleging that C. and also B. & Co. were necessary parties. The demurrer was overruled and the defendant did not appeal from the judgment overruling it, but raised the same defence by his answer. At the hearing a decree was made as prayed in plaintiff's bill, which was affirmed by the full court from whose judgment the defendant appealed to the Supreme Court of Canada.

The only question raised by defendant in this appeal is that Chapman is a necessary party to the suit, alleging that the order in favour of Belyea & Co., though absolute on its face, was, in fact, only given as security and an account between Belyea & Co. and Chapman was necessary to protect the rights of Chap-

1891

McKEAN v. JONES.

man. This involved the subsidiary question: Was the action of McKean, in writing his name across the face of the order to Belyea & Co., such an acceptance of the order as to constitute a binding legal agreement between him and Jones to pay the money due thereunder?

Blair, Attorney-General for New Brunswick, and *Hazen* for the appellant. To treat the act of McKean as an acceptance would be to give the order the character of a bill of exchange. The order being a non-negotiable instrument the court can only treat the act of McKean as an acknowledgment that he has received notice of it.

Jones is only in the position of Belyea & Co., and is subject to all the equities which would attach to the order if still in Belyea & Co.'s hands.

McKean is not precluded by the judgment on the demurrer from raising this question of want of parties. Though the parties to the suit might be precluded the court is bound, before making a decree, to see that all necessary parties are before it, and could raise the question of its own motion.

The following authorities were cited:

Malcolm v. *Scott* (1); *Liversidge* v. *Broadbent* (2); *Burn* v. *Carvalho* (3).

Weldon Q.C. for the respondent referred to *In re Central Bank*; *Morton and Block's claim* (4); *Richer* v. *Voyer* (5); *Griffin* v. *Weatherby* (6).

SIR W. J. RITCHIE C.J.—There was a demurrer to the bill in this case on the express ground that Chapman was a necessary party. The learned judge decided this question and adjudged that it was not

(1) 5 Ex. 610.
(2) 4 H. & N. 603.
(3) 4 My. & C. 702.
(4) 17 O.R 574.
(5) L.R 5 P.C. 461.
(6) L.R. 3 Q.B. 758.

1891

McKEAN v. JONES.

Ritchie C.J.

necessary that Chapman should be made a party. This judgment was not appealed from and therefore became, in my opinion, *res judicata*, and it is not now open to the defendant again to raise the same objection, but if it is I think Chapman was not a necessary party and the court was right in so holding on the demurrer. It may be that the court might, on appeal, raise the question of the necessity of Chapman being a party, but I cannot think this is a case in which the court would, of its own motion, declare Chapman to be a necessary party because the defendant went into evidence as to the state of accounts between Chapman and Belyea & Co. Counsel for defendant cross-examined Belyea and examined their own witness Chapman. They went into the accounts as if Chapman had been a party to the suit, and the judge found that there was a large balance due from Chapman to Belyea & Co. So that, as affecting the result of this suit, it matters not even if the defendant's main contention is correct, that Jones took the assignment subject to the equities, the evidence shows and the judge finds that Chapman is argely indebted to Belyea & Co., and therefore there are no equities in his favour, although he had been party to the suit.

No one who reads the evidence could properly come to any other conclusion.

But independently of all this, however the transaction may have been between Chapman and Belyea, as between Belyea, or Jones representing Belyea, and McKean it was an absolute transfer of the fund in McKean's hands or to be received by him.

Though not a bill of exchange it is obvious that Chapman, Belyea & Co., Jones and McKean all understood it to be so and so treated it; this is evident from the form of Chapman's order, viz.: "hold" not to

1891

McKEAN v. JONES.

Ritchie C.J.

Belyea & Co., but "to the order of Belyea & Co. to whom I have assigned it," showing very clearly, it appears to me, that Chapman intended that Belyea & Co. could use it as a negotiable instrument; and, with reference to Belyea & Co. from the assigment and transfer of the 3rd of October, 1882, in which Belyea & Co. say in reference to the order, "we are informed the instrument is not negotiable by endorsement not being a bill of exchange, and, therefore, to perfect your title and to enable you to obtain the amount that may be in McKean's hands we hereby assign," etc. And I think there can be no reasonable doubt that McKean likewise so understood it; that is, to my mind, apparent when on presentation, as he says in his answer, he accepted the order.

> In answer to the third paragraph of the plaintiff's bill of complaint I say that somewhere about the month of May, A.D. 1882, said order or writing was presented to me and I thereupon accepted the same and wrote my name across the face of the said order,

thereby treating it as a bill of exchange, by which acceptance I think he clearly intended to intimate to the holder that he recognized his rights and would comply with the terms of the order and pay over to him the balance coming or to come to him, that is, after payment of his own claim and that of the estate of S. R. Thomson, which it was agreed by Jones should have priority over his.

I think, therefore, that Jones, as holder of this order and as assignee of the money in the hands of McKean, was clearly entitled to an account of the moneys which came into his hands; and whatever the equities existing between Chapman and Belyea, or between Belyea and Jones, may be, with these McKean had nothing to do, but was bound to account in accordance with his undertaking as indicated by his acceptance of the order on presentation, leaving Chapman and Belyea &

Co., or Belyea & Co. and Jones, to settle, or if need be litigate, any such matter between themselves; and in the meantime I can see no reason why McKean should refuse to account to Jones or retain the money in his hands.

As between Jones and McKean a complete decree can be made. The only account sought to be taken is the account between Jones and McKean. By accepting this order, absolute on its face, McKean undertook to account to the holder, and I cannot see why he should seek to encumber this simple suit against himself by requiring the taking of, possibly long and complicated, accounts of transactions between Chapman and Belyea & Co. and Belyea & Co. and Jones, with which he has nothing whatever to do. Should McKean account to Jones and afterwards be troubled by either Chapman or Belyea & Co., his answer is, to my mind, very simple. "I have accounted to the party to whom you absolutely assigned and transferred the fund at my disposal, and you must look to him and not to me."

In re Agra and Masterman's Bank; *Ex parte Asiatic Banking Corporation* (1).

Sir H. M. Cairns L.J.—

Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.

In re Northern Assam Tea Company; *Ex parte Universal Life Assurance Company* (2).

Lord Romilly M.R.—

This is a chose in action, and the assignment of a chose in action is taken subject to the equities; but any person may release those equities who is entitled to the benefit of them, and he may do so either positively, by words, or by writing, or by the whole course of

(1) 2 Ch. App. 397. (2) L.R. 10 Eq. 463.

1891

McKEAN v. JONES.

Ritchie C. J.

his conduct ; and the real question in this case is, whether the company have or not released these equities. Upon the whole I have come to the conclusion that the company have released them, and by the course of conduct they have pursued have determined that the holders of these debentures should not take them subject to any of the equities which they had against Higgs.

In re Blakely Ordnance Company ; Ex parte New Zealand Banking Corporation (1).

Sir John Rolt L.J.—

In *In re Agra and Masterman's Bank ; Ex parte Asiatic Banking Corporation* (2) it was held that the rule which makes assignments of choses in action subject to the equities existing between the original parties to the contract, must yield when a contrary intention appears from the nature or terms of the contract. I adopt that decision. I think it applicable, as above explained, to the facts of this case.

And I think it is equally applicable to the case we are now considering.—

So again, in *Walker* v. *Rostron* (3).

Lord Abinger C.B.—

This is a case of a party engaging himself to appropriate the proceeds of the goods according to certain directions of the owner, and appears to us to fall within that class of cases where, when an order has been given to a person who holds goods to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement.

And in *Griffin* v. *Weatherby* (4).

Blackburn J.—

The first question is, whether the circumstances are such as to entitle the plaintiffs to maintain an action against him for money had and received. Ever since the case of *Walker* v. *Rostron* (3) it has been considered as settled law, that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then

(1) 3 Ch. App. 160.
(2) 2 Ch. App. 391.
(3) 9 M. & W. 421.
(4) L.R. 3 Q.B. 758.

that which was merely an equitable right becomes a legal right in the transferee, founded on the promise ; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder.

If Chapman or Belyea & Co. have any equities as against Jones I do not think they should be enforced in this suit, but in proceedings to be taken by those parties or either of them against Jones ; and this defendant cannot set up claims which, if the finding of the learned judge is correct, so far at any rate as Chapman is concerned, are wholly imaginary as a bar to accounting for the money in or coming into his hands, as his acceptance of Chapman's order clearly indicated he would do. If he accounts to Jones and pays over the balance in his hands as the order directed him to do, and either Chapman or Belyea & Co. think they have an equitable claim against Jones, on proceedings properly taken by one or the other, or both, of those parties against Jones their respective rights will be duly investigated and determined, but with the investigation and determination of those rights I cannot discover that McKean has anything to do. He has nothing to do with the drawer of the order ; all he has to do is to transfer the fund he holds in obedience to the directions of the order and assignment of it.

This is not the case of McKean having any equities as against the assignor which he seeks to set up against the assignee. As was said in *Phipps* v. *Lovegrove* (1) by Sir W. M. James L.J. :

> It is a rule and principle of this court and of every court, I believe, that where there is a chose in action, whether it is a debt or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor.

(1) L. R. 16 Eq. 88.

1891

McKEAN v. JONES.

Ritchie C.J.

But this is not that case. McKean does not claim to have any equities against Jones or any other person but is attempting to set up an equity in Chapman with which I cannot see that he has anything to do.

Under all these circumstances I think the judgment of the court below right and the appeal should be dismissed.

STRONG J.—This is a suit in equity instituted in the Supreme Court of New Brunswick by the respondent against the appellant, and the present appeal is from the order of the Supreme Court in banc pronounced on an appeal from the decree of the primary judge, Mr. Justice Fraser, whereby that decree was affirmed. The judgments of the two courts below are impugned principally on the ground that the suit is defective for want of parties, and this objection must be decided according to the established rules of equity pleading. The facts disclosed by the pleadings and evidence are as follows:

Joseph H. Chapman being interested in the proceeds of two policies of insurance effected on his shares in the barque "Pretty Jemima," which vessel had been lost, and being indebted to the appellant, on the 28th of February, 1880, by instrument under seal of that date assigned his interest in the policies mentioned by way of mortgage to the appellant as security for his debt.

On the 28th of April, 1882, Chapman being then indebted to Belyea & Co. made a further and second mortgage of the same fund to that firm as security for the debt then due as well as for what might thereafter become due to them. This security to Belyea & Co. was effected by an order addressed to the appellant, and on its presentation the appellant wrote his name across the face of the document in the manner usual in accepting a bill of exchange.

1891

McKEAN v. JONES.

Strong J.

On the 3rd of October, 1882, Belyea & Co., being indebted to the respondent, made a derivative or sub-mortgage of their security to him by an order or assignment bearing the last mentioned date. The respondent filed his bill to enforce his rights under the assigment to him and made the appellant the sole party defendant to the suit.

It was objected in the court below that both Chapman and the assignees of Belyea & Co. (who have since the assigment to the respondent become bankrupt) were necessary parties to the suit.

I am of opinion that these objections are insurmountable and ought to have prevailed. There can be no doubt or question that all the assignments were merely by way of security and were none of them intended to be absolute. This appears beyond dispute from the evidence in the cause. The right of the respondent is, therefore, to be paid out of the residue of the fund remaining after the satisfaction of the debt due by Chapman to the appellant so much of the debt which may be found due by Chapman to Belyea & Co. as may be requisite to satisfy the debt due to the respondent himself from Belyea & Co. as security for which the sub-mortgage to the respondent was created by Belyea & Co. The respondent's rights must, beyond question, be restricted to this, for upon the facts in evidence it is impossible that in a court of equity either the respondent or Belyea & Co. can be regarded as absolute assignees of the fund or otherwise than as mere mortgagees; and the respondent's rights being merely derivative from and subordinate to those of Belyea & Co. any ultimate residue which may remain after satisfying the debt due to the latter firm by Chapman belongs to Chapman and must be paid to him, even though the debt due to the respondent by

1891

McKEAN v. JONES.

Strong J.

Belyea & Co. should exceed the amount of such residue.

It is obvious that the decree to be made upon such a state of facts must be framed upon the same principles, although it may differ in some details, as that which a court of equity would make in the case of two successive mortgages of land where the suit was instituted for foreclosure and sale by a sub-mortgagee deriving his security from the second mortgagee. Any differences between the two cases arise merely from the accident that in the latter case the fund would have to be realised by a sale of the security, whereas in the present case the subject of the successive mortgages is money, a fund already realised.

Then it is obvious that the decree must of necessity involve the taking of three accounts. First an account of what is due to the first mortgagee, the appellant; secondly an account of what is due to the second mortgagee, Belyea & Co.; and thirdly an acccount of which is due to the respondent, the sub-mortgagee of Belyea & Co., by the latter. It is true that this latter account in no way concerns Chapman the mortgagor, and may be waived by the assignees of Belyea & Co. if they should admit that their debt to the respondent exceeds the residue of the insurance money remaining after satisfying the debt of the appellant. Then the indispensable parties to the taking of the first account, that between the mortgagor and the first mortgagees, are first Chapman the mortgagor, and the appellant the first mortgagee, next the assignees in bankruptcy, representing the second mortgagees, Belyea & Co., who are of course entitled to be present to see that the claim of the first mortgagee is kept within proper limits, and lastly the respondent. If Belyea & Co.'s representatives were parties and were to make the admission before mentioned, namely,

that the amount due to the respondent by Belyea & Co. was in excess of any amount which he could receive from the fund, their presence might be dispensed with, but they are not parties and have made no such admission. Therefore, for the purpose of taking this first account, both Chapman and Belyea & Co. are necessary and indispensable parties.

Then for the purposes of taking the second account, that of the amount due by Chapman the mortgagor to Belyea & Co. the second mortgagees, the former and the assignees of the latter are clearly necessary parties and on no principle that can be suggested can their presence be dispensed with.

It therefore appears plain that the suit is defective for want of parties, and that in order to remedy the imperfection in its constitution an order should have been pronounced at the hearing directing an amendment for the purpose of bringing the absent parties before the court.

It was contended on the argument of the appeal that inasmuch as the assignment by Chapman to Belyea & Co. was absolute in form, and as the appellant had accepted the order by which that assignment was effected, the suit might be regarded as one for enforcing an absolute equitable assignment of a debt. But it appears that there are two insurmountable objections to this. First, it would be impossible, in the face of the evidence which clearly establishes that the assignment to Belyea & Co. was by way of security merely, for a court of equity to give effect to the transaction according to its form disregarding the substance, and to derogate from the rights of Chapman to have the assignment to Belyea & Co. treated as, what in reality it was, a mere mortgage. This would clearly be the right of Chapman as against Belyea & Co. and the respondent, as assignee of a chose in action, can

1891

McKEAN v. JONES.

Strong J.

have no larger measure of right than his assignors Belyea & Co.

Next, if the assignment to Belyea & Co. was to be treated as an absolute equitable assignment, which the respondent in turn claiming under an absolute assignment from them was entitled to enforce, there would be no ground for suing in equity; the remedy would, in that case, be at law by an action in the names of Belyea & Co. or their assignees, for it is well established that the assignee of a chose in action can thus sue, and that he cannot maintain a bill in equity in his own name merely by reason of the assignment. The doctrine of Mr. Justice Story to the contrary (1), referred to in the judgments delivered in the court below, is not a correct statement of the law upon this head as appears from the case of *Hammond* v. *Messenger* (2), where this point arose and was decided by Vice Chancellor Shadwell, who held that the assignee of a chose in action had no right, by reason merely of his title being equitable, to sue in his own name in equity, and that in order to enable him to do so it was essential that it should appear that the assignor refused to allow his name to be used in an action at law, or that some other difficulty to his suing at law had been interposed. And in a recent case in Massachusetts, *Walker* v. *Brooks* (3), in which all the authorities are reviewed, the decision in *Hammond* v. *Messenger* (2) was followed as "being amply sustained by earlier authorities in England and in this country" and the position of Mr. Justice Story was denied to be law (4). Therefore it would be impossible to give relief on the principle contended for inasmuch as it would unjustly prejudice the rights of absent parties, or at least of an absent party (Chapman

(1) Eq. Jur. s. 1057*a* & Eq. Pl. s. 153.

(2) 9 Sim. 332.

(3) 125 Mass. 241.

(4) See also Heard on Eq. Pldg. p. 13.

the mortgagor), and also because so to treat the case would be to make the bill open to demurrer for want of equity.

If there was any procedure in New Brunswick which entitled a plaintiff in a suit in equity to bring parties who were interested in the account merely, and not in any other matters embraced in the suit, into the master's office without making them parties to the bill, a practice which prevails in some jurisdictions where law and equity are still kept separate, the defect in the suit as regards the assignees of Belyea & Co. might possibly be remedied by adopting such a course, but we have not been referred to any authority for such a mode of proceeding. As regards Chapman the mortgagor, however, he is an indispensable party to the bill.

The appeal must be allowed with costs and the decree pronounced in the court below discharged, and for it there should be substituted an order that the cause stand over with liberty to the plaintiff to amend by adding parties, and as the pleadings are very diffuse, and are otherwise not in a very satisfactory state, liberty to amend generally may well be added to this. The respondent must pay the costs of the appeal to the Supreme Court of New Brunswick, and also the costs of the day (*i. e.* the costs of the hearing only, not the general costs of the cause) before the primary judge in equity.

FOURNIER J.—I concur in the reasons advanced by the Chief Justice for dismissing this appeal.

TASCHEREAU J.—I would dismiss this appeal for the reasons given in the court appealed from. It would seem that, practically, this is an appeal only for costs.

PATTERSON J.—Chapman having a claim on some

1891
McKEAN
v.
JONES.
Patterson J.

policies of marine insurance which was in litigation in 1880, and which was not recovered until 1885, assigned the claim in 1880 to the appellant McKean as security for certain debts and liabilities. McKean received the insurance money in 1885, and after satisfying all his claims upon it a considerable sum remained in his hands. That sum would, of course, revert to Chapman, but Chapman had, in 1882, given to Belyea & Co. the following order which referred to the money in question :—

LIVERPOOL, 28th April, 1882.

Please hold to the order of Messrs. Belyea & Co., to whom I have assigned it, any balance that remains of insurance money pro "Pretty Jemima," over and above the amount I owe or may owe to you or to your firm of Carvill, McKean & Co. or Francis Carvill & Son, without making any further advances to me, or on my account.

(Sgd.) J. H. CHAPMAN.

To GEORGE McKEAN, Esq., Saint John.

That order was, about May, 1882, presented to the appellant who wrote his name across it by way of accepting the order. Later in the year 1882 Belyea & Co., by writing, assigned the order so accepted to the respondent on account of money which they owed him. It was not taken as payment of any specified sum but as thus explained by himself at the trial:

This was taken by you as a security for an indebtedness ?

For an indebtedness. I was to place it to his credit when collected. We had a running account between us and I was to credit whatever I got out of it when paid. It was passed over to me as an asset.

Chapman had given the order to Belyea & Co. as collateral security for transactions on which they held other securities, and Chapman alleges that they have been fully paid and that they have no right to any part of the fund in the hands of the appellant. He gave notice to that effect to the appellant, forbidding him to pay over any of the money on the Belyea order. The appellant accordingly refused to pay the

money to the respondent, who thereupon brought this suit in equity against the appellant praying that

An account may be taken of said claims and charges on the said fund prior to the said plaintiff's. And that the said defendant George McKean may be restrained by the injunction and order of this honourable court from applying or paying out, or causing to be received or paid out, any part of the said fund contrary to the terms of the said assignment and orders, and that such amount as may be found in the hands of the said defendant after payment of such prior claims may be ordered to be paid to the plaintiff, and also that the plaintiff may have such other relief in the premises as to this honourable court may seem meet.

The dispute is really between Chapman and the respondent, each claiming the fund from the appellant who is merely stake-holder and who has no direct interest in the quarrel. But Chapman is not a party to the action and the main question is whether or not it is necessary to make him a party.

That question was raised by demurrer in the court below and was decided against the appellant. That decision was, however, on pleadings which did not disclose the fact that the order given by Chapman to Belyea & Co. was not an absolute assignment of the fund. That fact and Chapman's contention that his debt to Belyea & Co. had been satisfied appeared by the answer and the evidence, entered into the contest at the trial, and were dealt with in the judgments now in review; they come properly before us in this appeal notwithstanding that the appellant did not appeal from the judgment on the demurrer, even if that judgment, which was not a final judgment in the action, could have been made the subject of appeal to this court.

Chapman's claim for the insurance money was a chose in action assignable only in equity and not at law. Therefore under the well established and familiar rule of equity Belyea & Co. took the order on

1891

McKEAN v. JONES.

Patterson J.

the appellant subject to Chapman's right to recall it in case the debt as security for which he gave the order was otherwise satisfied. The rule will be found stated and illustrated by decisions, to which we have been referred on the argument, in Pollock on Contracts (1), and in Lewin on Trusts (2).

Belyea & Co. could not transfer to the respondent any better right than they had themselves unless that effect followed from the direction to the appellant to pay the money *to the order* of Belyea & Co., which apparently indicated an intention that the document should be negotiable, and might, in case the other incidents essential to the creation of an estoppel concurred, estop Chapman from disputing its negotiability.

The order could not be treated as equivalent to a bill of exchange, like the deposit receipts discussed by the Chancellor of Ontario in the case *Re Central Bank* (3) to which one of the learned judges in the court below refers, or like the order in question in *Griffin* v. *Weatherby* (3). The uncertainty of the amount is an insuperable obstacle to that view. Nor does the principle on which *Walker* v. *Rostron* (4) was decided, and which is affirmed in *Griffin* v. *Weatherby* (5), apply to the case. Those cases, on which some stress was laid in the court below, decide that an order to pay money, either money on hand or money yet to be received, constitutes, when accepted, an appropriation of the money which is binding on the giver and the acceptor of the order, and that an action at law for money received to the use of the payee of the order will lie against the acceptor of it.

They do not decide that either the giving of the order

(1) 5 ed. at page 212.
(2) 9 ed. at page 781.
(3) 17 O. R. 574.
(4) 9 M. & W. 411.
(5) L. R. 3 Q. B. 753.

or the acceptance of it precludes the giver from resisting the payment of the money on any valid ground of law or equity, though it is true that such an order, absolute on its face and accepted without expressed qualification, might be difficult to resist in the hands of one who took it for value and without notice of any equities affecting it. That is the position which the present respondent asserts for himself. He says, and he has given evidence to prove, that he took the accepted order from Belyea & Co. without notice that it was not absolute as between them and Chapman. They did not assume to transfer it to him as a negotiable instrument. They understood that it was not so, and they correctly informed the respondent by their letter of the third of October, 1882, which formally authorised him to collect the money in their names but for his own use.

29 RED CROSS STREET,
Liverpool, 3rd Oct., 1882.

Hon. THOMAS R. JONES :

DEAR SIR,—Having endorsed to you the order drawn by J. H. Chapman upon George McKean, Esq., for any balance of insurance moneys in his hands when collected in our favour, we are informed the instrument is not negotiable by endorsement, not being a bill of exchange, and therefore in order to perfect your title, and to enable you to obtain the amount that may be in Mr. McKean's hands, we hereby assign and transfer our interest therein both legal and equitable, and appoint you our attorney in our names but for your own use and benefit to collect the same.

We are, dear sir,
Yours truly,
(Sgd.) BELYEA & Co.

But when the respondent insists that he occupies a stronger position than his immediate assignors his case is, in my opinion, fatally weak in the fundamental requisite of his being a holder for value. I have already quoted a question and answer from his cross-examination. He was re-examined by his own counsel

1891

McKEAN
v.
JONES.

Patterson J.

and this is the whole of the re-examination as reported to us :—

You say that Belyea owed you, and he gave it to you to collect and to credit him? Yes.

Since then he failed and you got nothing, and you did not prove against the estate? No. I did not prove against the estate at all.

The Belyea failure and the prudence of the respondent in not going to the expense of proving against the estate are not said to have any connection with the Chapman order. The respondent gave nothing and gave up nothing for the order. The change of position by reason of reliance on the order or on any representation conveyed by it, which lies at the foundation of the doctrine of estoppel, is entirely absent.

I do not question the proposition that taking on account of an existing debt is a taking for value as well as purchasing by a payment of money, nor do I assert that, in the case of an existing debt, the value must necessarily consist in the satisfaction of any part of the debt, or that it may not take another form, as *e. g.* suspension or forbearance of proceedings, but here I do not find value in any shape.

If the respondent were properly held to have taken for value it might not follow, as of course, that he would have a right to the whole fund. The relief to which he was entitled would be adjudged upon equitable principles, and might be found to be not more extensive than a return of the value he gave. That was held to be the proper measure of relief in *re Romford Canal Co.* (1), which is one of the cases noticed by the Chancellor in the *Central Bank Case* (2) already referred to.

In my opinion the respondent stands merely in the shoes of Belyea & Co. and holds subject to the state of

(1) 24 Ch. D. 85. (2) 17 O. R. 577.

their accounts with Chapman, who is, therefore, a necessary party to this action.

I do not overlook the fact that the learned judge at the trial held, after hearing the evidence of both Mr. Belyea and Mr. Chapman, that the latter still owed as much money as the balance in the hands of the appellant, and that the court in banc declined to disturb that finding. Whether or not it may be considered necessary to take further evidence on those accounts I cannot assume to say, but the decision is not binding on Chapman, who is not a party, as against the appellant.

I think the appeal should be allowed with costs and the case sent back in order that Chapman may be made a party to the record.

Appeal dismissed with costs.

Solicitors for appellant: *Gilbert & Straton.*

Solicitors for respondent: *Weldon & McLean.*