CONRAD G. OLAND AND ETHELRED OLAND (PLAINTIFFS)..... } APPELLANTS;

AND

DANIEL McNEIL AND JAMES P. WALLACE (DEFENDANTS)..... } RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Conveyance absolute in form—Mortgage—Resulting trust—Notice to equitable owner—Estoppel—Inquiry.

The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners.

* PRESENT :—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr. Justice Gwynne was present at the hearing but died before judgment was delivered.]

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APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) allowing the appeal of the defendants against the decision at the trial by Mr. Justice Townshend and dismissing the cross-appeal of the plaintiffs with costs.

The plaintiffs by a written instrument, absolute on its face, transferred their interest in certain gold mining areas to McNeil, but subject, as found by the court below, to an unwritten trust to sell the mine and out of the proceeds to pay moneys due to McNeil and another creditor and then to account to them for the surplus, if any. McNeil sold to Wallace without notice to the plaintiffs.

The plaintiffs alleging that, at the time of the sale, Wallace had notice of the trust, brought the action for an account of the interest of Ethelred H. Oland, one of the plaintiffs, in the issues and profits of the mine to the extent of a one-third interest claimed by them, on the ground that the transfer to McNeil was in fact merely a mortgage and that the said interest could not be transferred without notice to the equitable owners. By their defences, McNeil denied the trust alleged and Wallace pleaded that he was a *bonâ fide* purchaser from the apparent owner and had acquired an absolute title.

The circumstances of the case and questions in issue on the appeal are more fully stated in the judgment of the court delivered by His Lordship Mr. Justice Sedgewick.

Borden K.C. for the appellants. Assuming the transfer to McNeil to have been made as security for McNeil's outlay and the debt of the McLaughlin Carriage Company, the making of the transfer for that purpose did not carry with it the power to sell without notice to the transferrors, or legal process. The

(1) 34 N. S. Rep. 453.

transfer to McNeil was only as security in an event which never happened. Wallace had notice of the equitable title of E. H. Oland, and was told by him that C. G. Oland and not McNeil had power to negotiate a sale on his behalf. Wallace was not a *bonâ fide* purchaser for value. Plaintiffs are entitled to an account of all gold mined from the areas since the transfer to McNeil, and, after McNeil's advances have been paid, to one-third of the proceeds of such gold. The mortgagee or pledgee cannot sell till after reasonable notice, or by judicial process. *In re Morritt* (1) per Cotton L. J. at page 232, and Fry L. J. at page 235; *France* v. *Clark* (2); *Pothonier* v. *Dawson* (3); *Pigot* v *Cubley* (4); *Donald* v. *Suckling* (5); *In re Richardson* (6); *Ex parte Hubbard* (7); *Jones* v. *Smith* (8); *Boursot* v. *Savage* (9).

If Wallace became a joint tenant with plaintiffs, they are entitled to recover as damages for ouster, or by means of an accounting, one-third of the value of the gold taken from the areas. Wallace, by purchasing plaintiffs' one third from McNeil, and therefore taking the whole proceeds of the mine, has ousted plaintiffs from their share. See Freeman on Co-Tenancy, secs. 223, 224, 235; *Kittredge* v. *Locks and Canals on Merrimack River* (10). The taking away of the gold is a destruction of the property, *pro tanto*, and of itselfs constitutes an ouster. *Wilkinson* v. *Haygarth* (11); *Dougall* v. *Foster* (12); *Goodenow* v *Farquhar* (13). It at all events gives an action of account; 4 & 5 Anne ch. 16, sec. 27; *Denys* v. *Shuckburgh* (14); *Bentley* v. *Bates* (15); *Jacobs* v. *Seward* (16); *Job* v. *Potton* (17).

(1) 18 Q. B. D. 222.
(2) 22 Ch. D. 830.
(3) Holt, N. P. 383.
(4) 15 C. B. N. S. 701.
(5) L. R. 1 Q. B. 585.
(6) 30 Ch. D. 396.
(7) 17 Q. B. D. 690.
(8) 1 Hare 43.
(9) L. R. 2 Eq. 134.
(10) 17 Pick. 246.
(11) 12 Q. B. 837.
(12) 4 Gr. 319.
(13) 19 Gr. 614.
(14) 4 Y. & C. 42.
(15) 4 Y. & C. 182.
(16) L. R. 5 H. L. 464.
(17) L. R. 20 Eq. 84.

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McNeil was trustee for plaintiffs, and, Wallace being a purchaser with notice, is, of course, in no better position than McNeil. *Christie* v. *Saunders* (1).

Where, in a mortgage to secure a pre-existing debt, no time is stipulated for payment, the mortgagees (even though they might sue or foreclose at once without demand), cannot, without demand or notice, destroy the right to redeem by exercising a power of sale unless there is an express agreement that such notice need not be given. *Moore* v. *Shelley* (2), at pages 289-291; Ashburner on Mortgages, pages 192, 193; 1 Robins on Mortgages, 236; Jones on Chattel Mortgages (4th ed.), 707; 2 Perry on Trusts (5th ed.), sec. 602 (*q*); Armour on Titles, 353, 357 359, 360; *Anon* (3).

A power of sale without notice is regarded as oppressive because it places the mortgagor at the mercy of the mortgagee. It will never be presumed in the absence of express agreement and in some cases is regarded as a ground for setting aside the contract of the mortgage.

No time was stipulated for the return of McNeil's advances (amounting to $60 or $70) made in the autumn of 1899. Indeed he was really a partner being interested in the profits. McNeil's subsequent advances did not become due before demand as Oland could not know of the payments made by McNeil to the Flawn estate or to Wallace. In the absence of express stipulation to the contrary in the agreement constituting the security the purchaser is bound to inquire as to default and as to notice, and inquiry of and statements by the mortgagee alone are not sufficient. 2 Robins on Mortgages, 893, 898 & 899; *Selwyn* v. *Garfitt* (4); *Re Thompson and Holt* (5). As

(1) 2 Gr. 670.
(2) 8 App. Cas. 285
(3) 6 Mad. 10.
(4) 38 Ch. D. 273.
(5) 44 Ch. D. 492.

to notice to Wallace, see *Severn* v. *McLennan* (1), at page 223; *McLennan* v. *McDonald* (2), at pages 509, 510; Lewin on Trusts (9 ed) 997 & 998; *Wigg* v. *Wigg* (3); *Saunders* v. *DeHew* (4); *Carter* v. *Carter* (5); Ashburner on Mortgages, 454 & 455. A sale of the properties by McNeil was not contemplated by the parties. Finally, the trial judge having found all the facts in plaintiffs' favour, the Court of Appeal should have sustained his judgment.

O'Connor for the respondent McNeil. McNeil had at the time of the sale to Wallace, a complete documentary title.

This is not a case where the trial judge has believed certain witnesses as against others. The decision on the trial turned upon the letter which is not reasonably capable of the meaning put upon it. *McNeil* v. *McDonald* (6); *Coghlan* v. *Cumberland* (7); *Home Life Association* v. *Randall* (8). If the reason is correct, and if the letter indicates inconsistency or contradiction in McNeil's defence, yet the appellants are attempting to cut down a title granted by themselves, and to oust the respondents from possession. The letter, if it states truth is fatal to the appellants' case, as it supports the theory either of an absolute sale to the McLaughlin Co. or to McNeil, or the existence in McNeil of a power of sale which he properly exercised. The trial judge has not made findings on contradictory testimony, and respondents being in possession with a clear legal title, the burden of proof on the appellants has not been satisfied, and this appeal should be dismissed. *Colonial Securities Trust Co.* v. *Massey* (9);

(1) 19 Gr. 220.
(2) 18 Gr. 502.
(3) 1 Atk. 382.
(4) 2 Vern. 271.
(5) 3 K. & J. 617.
(6) 25 N. S. Rep. 306.
(7) [1898] 1 Ch. 704.
(8) 30 Can. S. C. R. 97.
(9) [1896] 1 Q. B. 38.

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Coghlan v. *Cumberland* (1); *Home Life Association* v. *Randall* (2).

McNeil was entitled to succeed with costs, for two reasons:—(1) He was *quasi* in possession, entitled to raise every defence in argument without special plea, and he maintained that possession, succeeding upon the appellants' own evidence. (2) Appellants failed to prove their claim that they were entitled to a declaration that the mining areas should be retransferred to them. McNeil is unconcerned whether or not the testimony recognizing a power of sale in him, or of absolute sale by E. H. Oland to him, be accepted as true. In any event he is bound to account to his clients, the McLaughlin Carriage Co., and in either case, E. H. Oland will get the benefit.

Newcombe K.C. and *Drysdale K.C.* for the respondent, Wallace. The respondent Wallace was a *bonâ fide* purchaser from McNeil without notice and for value, and his title and position ought to be protected. The only information E. H. Oland gave Wallace was to state that he had transferred his interest to McNeil for the McLaughlin Carriage Co., and as he knew of Wallace's intention to purchase, and referred him to McNeil for that purpose, he is estopped from now setting up any claim as against Wallace under the contract of purchase made in good faith with McNeil. On the most favourable construction towards Oland the trust amounts to a trust for the benefit of creditors which would obviously carry with it an implied power of sale. 2 Perry on Trusts (5 ed.) sec. 602 (*g*), p. 179, note 4; sec. 766, p. 435; Burrill on Assignments (6 ed.) sec. 365, p. 505; *Wood* v. *White* (3); *Goodrich* v. *Proctor* (4). Wallace as the holder of the legal title and the *bonâ fide* owner of the whole equi-

(1) [1898] 1 Ch. 704.
(2) 30 Can. S. C. R. 97.
(3) 4 Myl. & Cr. 460.
(4) 1 Gray. (Mass.) 567.

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table title without notice of the claim now made or any claim inconsistent with his right to purchase, should not be made to suffer by reason of any equities existing between the Olands and McNeil. The absolute transfer to McNeil under and through which Wallace purchased should not in any case be cut down, or his title affected by any trust, unless on clear, cogent and unmistakable evidence of the existence of such a trust at the time, proving the terms in detail. The alleged trust now sought to be affixed is stated in contradictory terms, oral in existence only, denied by McNeil, and so uncertain and indefinite that no reasonable conclusion can be arrived at as to what the alleged trust really is. In any event no accounting can be had as against Wallace. The statement of claim makes no case for an accounting, contains no allegation of facts entitling the appellants to an account and there is no proof to justify any accounting against Wallace.

We refer to *Henderson* v. *Eason* (1); *Jacobs* v. *Seward* (2); McPherson & Clark on Mines, at pages 139 and 140, and the cases there collected. *Job* v. *Potton* (3); *Kennedy* v. *De Trafford* (4); *Denys* v. *Shuckburg* (5); *Rice* v. *Rice* (6); *Sharpe* v. *Foy* (8); *Rayne* v. *Baker* (9); *Robinson* v. *Lowator* (10); Lewin on Trusts (10 ed.) pp. 532, 533; *Cordwell* v. *Mackrill* (11), and note.

The judgment of the court was delivered by:

SEDGEWICK J.—On the 31st of August, 1899, the administratrix of the estate of one Flawn was the owner of nine gold areas in the Harrington Cove Gold District, and on that date gave to one John G. Bishop

(1) 17 Q. B. 701.
(2) L. R. 5 H. L. 464.
(3) L. R. 20 Eq. 84.
(4) [1897] A. C. 180.
(5) 4 Y. & C. 42.
(6) 2 Drew. 73.
(8) 4 Ch. App. 35.
(9) 1 Giff. 241.
(10) 17 Beav. 592.
(11) 2 Eden 344.

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an option for the purchase of these areas for the sum of $1,500, $500 payable in four months from the date of the agreement, $500 within six months and the remaining $500 within eight months.

Between this and the 1st of January following (1900) Bishop's option or right of purchase had become the joint property in equal shares of himself, the appellant, E. H. Oland, and one George W. Gray, but no part of the proposed purchase money was then paid. E. H. Oland was then in financial distress owing $3000 or over to the McLaughlin Carriage Co., of St. John, N.B., to which company the appellant Conrad G. Oland had given his bond for $2000 in part security. An action was then pending in the Supreme Court to recover the amount of this bond, the respondent McNeill being the plaintiff's solicitor, and pressing in his client's interest for immediate payment. In the meantime (Sept. 18, 1899,) E. H. Oland had transferred, or purported to transfer, to his brother, Conrad, his one-third interest. From the statement of claim it appears that this was not intended to operate as a real transfer, but that E. H. Oland was to continue the beneficial owner. But both are parties (plaintiffs) here and we may assume without any detriment to them that up to this time either the one or the other or both had the interest referred to.

Towards the month of December, 1899, when the first instalment of $500 was becoming due to the Flawn estate, E. H. Oland approached the respondent McNeill with a view of raising money to pay the Oland proportion of that instalment. There were negotiations which resulted in a verbal agreement (the terms of which are a substantial matter in dispute here) and certain documents were written and transfers which were as follows: Conrad G. Oland writes McNeil:

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HALIFAX, N.S., Dec. 29, 1899.

MR. DANIEL MCNEIL, Barrister, Halifax.

DEAR SIR,—If you pay one third of the option of John G. Bishop for the purchase of nine gold areas at Harrington Cove, at present owned by the estate of the late George Flawn, I hereby agree to assign to you the entire interest of E. H. Oland and myself in said option and areas.

Yours truly,

(Sgd.) C. G. OLAND.

Mr. McNeil thereupon agreed (along with other things) to take over the interest of the Olands in the gold areas and paid one third of the purchase money then due, his transfer being in the words following:

In consideration of the payment of one third of the purchase price of the gold areas referred to in the foregoing instrument under a certain agreement made between John G. Bishop referred to in the said instrument and the personal representatives of G. L. Flawn, late of Halifax, deceased, made by Daniel McNeil, of Halifax, Barrister, I hereby assign all my interest in said areas to said Daniel McNeil, his executors, administrators and assigns, and all my interests in and under the foregoing instrument and all benefits to accrue from its provisions.

(Sgd.) C. G. OLAND.

E. H. Oland who had as above stated transferred his interest to his brother ratified and confirmed this instrument by giving McNeil the following document:

HALIFAX, January 4th, 1900.

I hereby acknowledge that the transfer of one-third interest in the gold areas of the estate of George L. Flawn, deceased, at Harrigan Cove, of which J. G. Bishop holds an option to purchase, made to Daniel McNeil today by him, conveys and assigns all interest and right I have in said areas.

E. H. OLAND.

The transfer from Bishop to McNeil here referred to being as follows:

HALIFAX, January 4th, 1900.

In consideration of certain payments made to me by Daniel McNeil, of Halifax, Barrister, under the above written instrument, I do hereby

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assign and transfer to the said Daniel McNeil, his executors, administrators and assigns, a one-third undivided interest in the areas enumerated in said instrument and in the profits and benefits thereof.

(Sgd.) J. G. BISHOP. (L.S.)

Witness—E. H. OLAND.

From the foregoing statement it will appear that on the 4th of January, 1900, McNeil became, so far as the documentary title showed, the absolute owner of all the interests which the Olands theretofore had in the areas in question, the title to the option or right of purchase being now vested in Bishop, Gray and McNeill. On the 28th of February McNeil paid $166.66 being the second instalment of his share of the purchase money.

The respondent, James P. Wallace, during the happening of these events was the owner of and engaged in developing and working certain areas adjoining and near to those in question here, and wishing to extend his operations and acquire the latter on the 4th of January purchased from Gray his one-third interest for the sum of $916.66. On the 11th of January he purchased Bishop's one-third interest for the sum of $100, and on the 14th of May following he agreed to purchase the remaining one-third interest from McNeill for the sum of $950. He then paid in cash $250, taking from McNeil the following receipt:

$250 HALIFAX, N.S., May 14, 1900.

Received from James P. Wallace $250 on account of purchase of my interest in nine Gold Mining areas at Harrington Cove at price of $950.

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Wallace thereupon obtained from the administratrix of the Flawn estate a transfer of the areas in question thereby making him, so far as the records in the mines office shewed, the absolute and unconditional owner of the areas in question. He then went into possession of the areas so purchased, and as stated by the appel-

lants, realised from the mine during the nine months preceding the trial, 1906 oz. of gold of the value of about $38,000.

So far as I have stated the case, there is no dispute, I think, between the parties. But a controversy has arisen as to the unwritten understanding between the Olands and McNeil when they gave him the transfer of their interests above set out, they contending that though absolute in terms, it was, by agreement with McNeil, subject to certain trusts or equities of which Wallace the final purchaser had notice, and that he having purchased knowing of and subject to these equities, had to account to them as being the co-owners with him to the extent of a one-third interest. Their contention to the alleged understanding is stated in the 7th and 8th paragraphs of the statement of claim as follows:

It was mutually agreed between the plaintiffs herein and the defendant Daniel McNeil that the latter should advance to the plaintiffs the sum of $166.66, and that plaintiffs herein should transfer to defendant McNeil all the interest of the said plaintiff Ethelred H. Oland in the said gold mining areas and that said defendant McNeil should hold the said transfer as security for the repayment of the amount so advanced or of any further amounts which might thereafter be advanced to plaintiffs by said defendant McNeil. It was also further agreed between the said plaintiffs and defendant McNeil that defendant McNeil should begin negotiations with his clients the McLaughlin Carriage Company with a view of making some arrangements for the payment of the debt of the plaintiffs to the said McLaughlin Carriage Company out of the profits of the said gold mining areas, but that if no arrangement could be effected with the McLaughlin Carriage Company, the said defendant McNeil should hold the said areas until he should be repaid the sums so advanced by him, and then he should re-transfer the said areas to plaintiffs.

8. In pursuance of the agreement set out in the preceding paragraph of this pleading, the plaintiffs, on the 4th day of January, 1900, executed a transfer to the said defendant McNeil of the plaintiff E. H. Oland's interest in the said gold mining areas.

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The defendant McNeil's contention, as stated in the 6th paragraph of his defence is as follows:

6. The said defendant McNeil denies all and singular the allegations set forth in paragraph 7 of said statement of claim, and avers that he purchased the said gold areas absolutely upon the distinct agreement with the plaintiff Ethelred H. Oland, that he, the said McNeil, was to receive an absolute transfer thereof, and that he was not to be accountable to any person or persons whomsoever. Thereupon the plaintiff Ethelred H. Oland got the other plaintiff Conrad G. Oland, to enter into an agreement in writing with the said McNeil, dated the 29th day of December, 1899, whereby the said Conrad G. Oland agreed to assign to the said McNeil the entire interest of the plaintiffs in the said gold areas in consideration of the said McNeil paying one-third of the purchase price of the same, held under option of purchase by one John G. Bishop and the said Conrad G. Oland afterwards, accordingly executed an assignment to the said McNeil of the said plaintiffs' interest in the said gold areas, which assignment is dated the 6th day of January, 1900.

The defendant Wallace pleaded that he was a *bonâ fide* purchaser from the apparent owner, and thereby became the absolute owner of the property subject to the balance of purchase money due McNeil, $700, which he paid into court.

At the trial before Mr. Justice Townshend he found that the transfer to McNeil was not absolute, but in trust for securing the payment to McNeil of the moneys advanced by him for the purpose of keeping alive the Olands' interest. He directed an account to be taken of that amount and that upon payment to McNeil of the amount found due McNeil and Wallace should transfer the one-third interest in question to E. H. Oland. As to the defendant Wallace he found that he purchased with notice of Oland's rights, but that he was not liable to account for any part of the profits, not even for the one-third share which the Olands claimed. Both defendants appealed.

The appeal was heard before the Chief Justice and Weatherbe and Ritchie JJ., the two former holding

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that it was established by the evidence that the transfer of the plaintiffs' interest to McNeil was in trust, first, to pay McNeil's advances; second, to apply any balance remaining to the payment of the plaintiffs' debt to the McLaughlin Co., and that McNeil having acquired the legal title to the property for the purpose of carrying this intention into effect had the power of sale which he exercised in the transfer to Wallace. Mr. Justice Ritchie agreed with this, but thought that McNeil's appeal should be dismissed because he had failed in proving his defence. The court below has therefore found that both the plaintiffs and the defendant McNeil have failed to establish their respective claims and it is now for us to determine whether that conclusion is right, and what is the decree that should, under all the circumstances, be made.

I entirely agree with the views which all the learned judges have expressed as to the understanding upon which McNeil became the transferee from the Olands. The evidence conclusively establishes that there was a trust—not as the plaintiffs assert to hold the property as security until McNeil's debt as well as that of the McLaughlin's had been paid *out of the profits* of the mine and thereupon to retransfer it to the Olands, but a trust to *sell* the mine and from the proceeds to pay first the moneys due the trustee then those due the McLaughlin's with a resulting trust back to the Olands. And then the plaintiffs having failed to prove their case and it appearing that the trustee had not violated any right the plaintiffs might lawfully claim, the judgment given in refusing the relief claimed was the proper one.

Mr. Borden K.C. for the appellants, mainly based his right to relief upon the ground that assuming the transfer to McNeil to have been made as security for McNeil's outlay and the debt of the McLaughlin Car-

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riage Co., the making of the transfer for that purpose did not carry with it the power to sell without notice to the Olands, the transferors and curators of the trust.

I cannot agree with this contention. It is urged that the transfer to McNeil, though absolute in form, is in fact a mortgage or pledge in which case the subject of the transfer cannot be sold without notice to the equitable owner. That doubtless is true in the case of an instrument on its face of such a character. But the proposition does not apply where the instrument is absolute on its face and is made so for the very purpose of enabling the apparent legal owner to give to another the beneficial or equitable as well as the legal title. In the present case had the transfer to McNeil contained in express terms the trusts imposed upon the property by the verbal agreement of the parties no notice of sale would be necessary to transfer a perfect title. Does an assignee in bankruptcy or a trustee of property for the purpose of realising the assets and paying the insolvent's debts consult the insolvent before exercising his fiduciary duties? There, as here, there is a resulting trust back to the assignor after the objects of the transfer have been accomplished but in the absence of express agreement the law imposes no such duty upon the trustee.

In this view of the case it is immaterial whether Wallace the final purchaser had or had not notice of the trusts upon which McNeil held the property. As a matter of fact he was told in effect by E. H. Oland before he purchased that the person to give title was not either he nor his brother, but McNeil himself. The admissions in the statement of claim are conclusive that Ethelred and not Conrad was (if either of them was) the beneficial owner and this reference of his to McNeil as the proper person to deal with in the matter of the purchase conclusively estops both of

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them from now setting up McNeil's incapacity to sell.

One matter remains to be considered. Shortly after McNeil became the transferee of the property he wrote his clients, the McLaughlin Co.:

HALIFAX, January 8th, 1900.

THE MCLAUGHLIN CARRIAGE CO.,
St. John, N.B.

Re Olands.

DEAR SIRS,—We have in your interest thought it advisable, considering everything, to purchase the one-third of the Harrigan Cove gold areas. Our senior has taken the title to himself pending your decision as to whether you will take it or not. He is fully convinced that you will within a short time get sufficient out of this interest to pay off the claim against Oland. The other two-thirds have been sold for $1500 over the option price of the property. This we believe is a low price for the property, but the third our senior holds for you on account of Oland can be sold at least for $750 over its cost. Believing the acquisition of this property is the best in your interests, and that you will accept it, we have today drawn on you for the cash we have advanced. Please honour the draft. If you will not accept the property, our senior will refund the money and hold the property himself, paying you whatever price he and Oland can agree on for his interest. There is double the amount of the draft we have made on you to pay on this third interest on the option price. The next payment falls due on the end of February next, and the last payment in two months from that date. The party who has purchased the interest of Bishop and Gray, the other two-thirds owns about 120 areas adjoining the property referred to, known as the Flawn areas, and he sent word to us that he is going to call on us this week to make a proposition regarding the amalgamation of the interest we purchased with his interest in the latter areas and the 120 areas. Thus a large property is made and proportionately a larger price can be obtained. It is now established beyond doubt that the Harrington Cove gold areas are among the best in this province. Your Mr. Lawlor intimated in one of his letters that he expected to visit Halifax this month, and we will await his arrival before giving a final answer to the promised proposition.

In reference to Oland's assignment of life policy, it never was submitted to us. The agent of the company here says it was regularly assigned by Oland and his wife, but that the policy has since lapsed for non-payment of premiums. You had better send assmt. to us and we will endeavour to get it straight.

Yours truly,

McNEIL & CO.

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Afterwards the McLaughlin Co. wrote McNeil as follows:

HON. D. MCNEIL, Halifax, N.S.

DEAR SIR,—We are in receipt of your letter of the 9th instant in reference to the Harrigan Cove Gold Mining property, stating that you have an offer for the purchase of the same, and in reply we beg to state what we have previously told and written you, viz., that we will have nothing whatever to do with the Harrigan Cove Gold Mining property or any other mining properties of the Olands. We have no desire to put up money in connection with this property, and certainly will not do so. The writer feels it is the height of nonsense that propositions about such wild cat schemes should be allowed to delay our suit against Oland. We feel that all these parties are simply playing us for time, and we will have absolutely nothing to do with this property. We do not care whether you sell it or give it away, it is none of our business, and we will have nothing whatever to do with it.

Yours truly,
THE McLAUGHLIN CARRIAGE CO.
Eastern Branch,
Per pro J. W. V. LAWLOR, *Manager*.

There is the sum of $700 in court to be applied upon the trusts already referred to. After payment to McNeil of what is due him, a considerable balance may remain. It belongs either to the McLaughlin Carriage Co. or to E. H. Oland. The former were not made parties nor have they made any claim to the fund.

I think that notwithstanding their repudiation of what McNeil did on their behalf their title to the balance may be superior to that of the Olands. I express no opinion on the point, but it would seem fair that it should be a part of the final decree that the special referee before report should allow them to appear before him to assert and prove if they can their right to participate in the trust fund. In the event of their failure to appear after thirty days' notice, or in the event of their so appearing and not proving their

claim, the referee shall report accordingly. With this variation of the decree the appeal should be dismissed with costs.

With some hesitation I agree with the observations of the learned Chief Justice in the court below as to the disposition of the costs in regard to the respondent McNeil, but as the appeal has failed, and there is no appeal in the matter of costs alone, the costs must be disposed of in the usual way.

The money in court will be charged in the first place with the payment of the respondent's costs, the balance, if any, shall be payable as found by the master hereafter.

Appeal dismissed with costs.

Solicitor for the appellants: *C. P. Fullerton.*

Solicitor for the respondent, McNeil: *W. F. O'Connor.*

Solicitor for the respondent, Wallace: *W. H. Fulton.*