Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wallace v. *McSweeny, from Nova Scotia; delivered 3rd July*, 1868.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
THE LORD CHIEF BARON.

IN this case their Lordships are not called upon to pronounce any opinion upon the real merits of the cause. It appears that the Appellant and the Respondent, and another gentleman now deceased, were co-executors and trustees of a clergyman of the name of Dunphy, and various sums of money, part of the estate, having been collected, a portion of which were in the hands of the present Appellant, some dissatisfaction arose on the part of his co-executors. This led to a suit which was instituted, and in which no doubt the present Appellant would have been held liable for the various sums of money that he had received on account of the estate, and would have been called upon to account for those monies, and to pay them into Court, in order that the estate might be duly administered. But it seems before that suit was finally determined, the parties came together—the three executors—and they entered into an agreement, the substance of which is in effect this, that the now Appellant was, so far as he lawfully could, to cease to be an executor and trustee; that he was to pay over, not the whole monies which he had received, but, by way of compromise, the sum of 16,000 dollars or thereabouts to his two co-executors, and that they were to undertake to indemnify him. In fact, by the agreement itself (had it been executed by all the parties) they would

have covenanted to indemnify him against all claims, either by the next of kin or other parties beneficially interested, or creditors, or all other persons in any way connected with this estate. The agreement was duly executed by the Appellant, but he appears not to have paid over the sum of 16,000 dollars as contemplated by the agreement; but, either at the same time or within a day or two afterwards —certainly in the course of the same month of May —he appears to have executed and delivered the mortgage now in question. Unfortunately, this agreement does not appear to have been executed by the two other parties, the co-executors. They therefore received the mortgage. They had the agreement of the now Appellant, with his personal security and the instrument under seal itself, for the performance of his part of the contract; while he, on the other hand, had no security from them, except the mere fact that the other two parties had taken the benefit of this agreement, and had received not the money, but a mortgage to secure the payment of the money contracted for on the part of the now Appellant.

Such being the state of things, the Respondent, who had become sole assignee of this mortgage by a subsequent conveyance, brings this action for a foreclosure of the mortgage; and it appears that under the rules by which the proceedings of the Court in Nova Scotia are regulated, though a suit for a foreclosure, it is in the form of an action at law, and that consequently the Plaintiff puts in his declaration, called a writ of summons, to which the Defendant, the now Appellant, is in due time called upon to plead. It seems that he failed to appear within the number of days required by the rules of the Court, and there was a judgment by default against him. That judgment was set aside, and he was subsequently let in to plead. In due time he pleads several pleas, which are before us in this Record, and undoubtedly we feel bound to observe in relation to these pleas, that they are inconsistent, multifarious and highly embarrassing, and we cannot doubt that if an application had been made to the Court under the 62nd and 63rd sections of the clause relating to pleadings in the Laws of Nova Scotia, the Court would have ordered these pleas to be set aside, unless the

Defendant, the now Respondent, should have amended them so as to present his defence in a proper and intelligible form. But instead of that, it appears that the Respondent was advised to apply to the Court to set aside these pleas as false and frivolous, and the Court made an order that they should be set aside as false and frivolous, and either by the same order or by some order or decree immediately afterwards, decreed a foreclosure and the sale of the mortgaged premises.

Now the question is whether this proceeding on the part of the Court is to be sustained? Their Lordships feel bound to abstain from offering any opinion whatever upon the merits of this case. Their Lordships do not say what may be, or what ought to be, the ultimate decision of the Supreme Court, but they think that this rule ought to be set aside and the judgment of the Court reversed, and the cause be remitted to the Court without prejudice to the right of the Plaintiff — that is, of the now Respondent — if he shall be so advised, to call upon the Defendant, the now Appellant, by rule to reform and amend his pleas, or, failing to do so, that the pleas should be set aside. It is with liberty to him so to apply, and without prejudice to his right to do so, that their Lordships will advise Her Majesty to reverse this decree; to remit the matter back to the Court below, for it to proceed in due course of law; and with regard to the costs, their Lordships direct that the Appellant shall have the costs of this appeal, but that all other costs will be in the discretion or subject to the adjudication according to law of the Court below.