Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of Thomas Mitchell for special leave to appeal in formâ pauperis *to His Majesty in Council from a Judgment of the Supreme Court of New Zealand pronounced in the Matter of Thomas Mitchell (Plaintiff)* v. *The New Zealand Loan and Mercantile Agency Company, Limited, and Others (Defendants); delivered the 8th July* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ROBERTSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an application for special leave to appeal *in formâ pauperis* from a judgment of the Supreme Court of New Zealand sitting as a Court of First Instance.

The action was based on loose and general allegations of fraud, breach of trust, and conspiracy. After a trial before Edwards J., without a jury, which lasted 11 days, the learned Judge delivered a considered judgment non-suiting the Plaintiff or dismissing the action with costs. The Plaintiff then applied to the Full Court for leave to appeal *in formâ pauperis*. The application was accompanied by a certificate of the gentleman who had acted both as solicitor and counsel for the Plaintiff in the Court below. Leave was granted in the first instance, but afterwards recalled on the

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motion of the Respondents, and apparently upon the sole ground that the Plaintiff's application had not been supported by the certificate of an independent counsel.

From that Order there is no appeal to His Majesty in Council. Nor indeed could there be an appeal from such an Order. It is within the discretion of the Court to say upon what terms an appeal *in formâ pauperis* should be admitted, and the Court no doubt has power to require any special certificate which it may think necessary in any particular case. Inasmuch, however, as their Lordships are informed that in New Zealand there are no Rules of Court dealing with the matter, and that the Court there acts in analogy or supposed analogy to the practice in this country, it may perhaps be useful to explain what the practice of the Court of Appeal in England is. Their Lordships have been informed by the Senior Registrar of the Chancery Division that applications to appeal *in formâ pauperis* by persons not paupers in the Court below are extremely rare, that there is no instance known to him in which such an application has been refused on the ground that it was not supported by the certificate of an independent counsel or in which such a certificate has been called for, and that the practice may be taken to be that the certificate of counsel who argued the case in the Court below is accepted by the Court of Appeal.

Passing from this point, their Lordships have considered whether the case is one in which it would be proper for them to advise His Majesty to grant special leave to appeal *in formâ pauperis*. They have been furnished with the pleadings in the action, and with a copy of the judgment delivered by the learned Judge. The judgment is very full and clear, and it sets out in detail all the documents on which the Petitioner seems to

have relied. The learned Counsel for the Petitioner frankly admitted that he had no fault to find with the statement of facts contained in the judgment. His only quarrel was with the law there laid down. Their Lordships, therefore, are in a position to judge for themselves whether there is or is not a *primâ facie* ground for the Appeal.

The case is somewhat complicated, and, as the learned Judge observes, encumbered with a mass of irrelevant evidence. The substance of it, however, may be stated briefly. The Petitioner was the owner of freezing works and a butchery business in Wanganui. In the autumn of 1899 the Respondent Company became agents for the disposal of the produce of his works. They were not his agents for any other purpose. They were not his partners or his co-adventurers. Nor were they in any sense trustees for him except as regards the proceeds of sales coming to their hands. They took over the account of the New Zealand Bank, who had previously financed the Petitioner in his business with a result which was not satisfactory either to the Petitioner or to the Bank. The Bank had a guarantee from a person of the name of Reid. Reid himself held a mortgage or mortgages for 16,000*l.* upon the Petitioner's real estate. When the Company took over the Petitioner's account with the Bank, Reid gave them his guarantee for 8,000*l.* and one year's interest on that sum. Beyond that they had no security. They obtained no charge upon the Petitioner's real estate or upon the chattels and effects employed in the business.

It was part of the arrangement between the Company and the Petitioner that the Respondent Johnson, whose brother was in the employment of the Company, should be appointed to supervise and control the business in the interest of the Company and Reid. His salary was to be paid by the

Petitioner, but his duty was to keep the Company and Reid acquainted with the position of affairs from time to time.

The Company was induced to enter into business relations with the Petitioner mainly by the representations of the Respondent Stevenson, who was in their employment, and who seems to have thought that, if the business were properly managed, it would prove highly remunerative. These expectations however were disappointed, and the indebtedness of the Petitioner to the Company kept increasing.

In August 1900 the Petitioner left New Zealand on a visit to England, having appointed his solicitor and his son and Johnson his attorneys. He did not return till some time in September 1901. During his absence things went on at first much as usual. In February 1901, however, errors were discovered in the accounts which alarmed the Company. The errors were serious, and the trade was not prospering. The Petitioner, when in England, with the knowledge and sanction of the Company, sought assistance from persons interested in the New Zealand meat trade. From time to time he sent hopeful and reassuring cablegrams to New Zealand, but he gave no definite information to the Company there. As time went on, they kept pressing him to return at once. He treated the matter in a very leisurely fashion, and the Respondents became more and more dissatisfied. In the course of an interview with the Petitioner's son in July 1901 Johnson obtained and copied a letter from the Petitioner to his son which the Petitioner evidently wished to be kept secret from the Company. The letter showed that the Petitioner was not making any provision to protect the interests of the Company. Their debt

was now about 20,000*l*., and they had no security but Reid's guarantee. So they determined to get Reid's securities into their own hands before the Petitioner's return, and without letting him know anything about their intentions. On the 7th of September 1901 they made an agreement with Reid which gave them the option of buying up Reid's securities on advantageous terms, and it was part of the arrangement that, if possible, steps should be taken to get rid of the Petitioner and that the Company and Reid, both of whom stood to lose heavily in the event of the failure of the business, should carry on the works in partnership or dispose of them for their mutual benefit. Reid's securities were afterwards transferred to Johnson as trustee for the Company.

This agreement with Reid is the first and principal ground of complaint on the part of the Petitioner. His case is that, somehow or other, the Company was in a fiduciary position towards him, and that they became and were trustees for him of the securities they purchased from Reid. Oddly enough, at the very same time the Petitioner maintains that Reid was more or less incapable of transacting business, and that he too was a victim of the Company's fraud. It is impossible to understand the supposed equity on which the Petitioner relies. The Company were clearly entitled to protect their interest as creditors notwithstanding their relations with the Petitioner, and they were under no legal obligation to disclose to the Petitioner the steps which they thought it necessary or expedient to take for their own protection. If Reid's securities were bought at an undervalue and under circumstances which gave him a right to complain, that is not a matter which concerns the Petitioner.

On the 30th of September 1901, shortly after the Petitioner's return to New Zealand under pressure which the Company brought to bear upon him, the Petitioner executed an assignment of all his property with certain exceptions to Johnson upon trust for his creditors. At this time the Petitioner was not aware of the Company's arrangement with Reid.

After a considerable interval, during which the Petitioner seems to have been afforded every opportunity of making arrangements with the view of retrieving his position, the Company entered into possession as mortgagees, and advertisements for sale were issued. Then the Petitioner learnt from Reid the arrangements which had been made between him and the Company. This action was commenced and an injunction was obtained, on some ground which does not appear, restraining the sale until the hearing.

The assignment of the 30th of September 1901 is the second ground of complaint. The answer to this part of the case however is that there was nothing illegal in the pressure which the Company as creditors brought to bear upon their debtor. Moreover, the transaction, as the learned Judge observes, was carried out under the advice of the Petitioner's own solicitor, and what was done was, as the learned Judge finds, the best thing for the Petitioner to do under the circumstances.

The charge of conspiracy against the Company, Johnson, and Stevenson, in respect of which the Petitioner claimed damages to the amount of 10,000*l.* seems absurd. The learned Judge has found as a fact that there was no conspiracy at all.

So far as their Lordships can judge from the materials before them, which in this case are remarkably ample and complete, there is absolutely no foundation for the superstructure

on which the Petitioner seeks to rest his claim to relief.

Their Lordships are of opinion that the learned Judge was quite right, and that there is no case for the Appeal. Their Lordships will therefore humbly advise His Majesty that the Petition ought to be dismissed, but that, in the circumstances, the Council Office fees ought to be remitted.