

C. of A.]

NOTES OF CASES.

[C. of A.]

*Held*, affirming the decree of Proudfoot, V. C., that the plaintiff was not entitled to a decree for specific performance against the representatives of R., as they had no power to convey, nor against A., because there was no priority between him and the plaintiff, and no equity to make him bound by the agreement.

*Held*, also, that the plaintiff was not entitled to a lien on the land for his improvements.

The *Attorney-General* and *Bethune*, Q.C., for appellants.

*Boyd*, Q.C., *W. Cassels*, *C. Atkinson*, and *Macfar*, for the respondents.

*Appeal dismissed.*

From Chy.]

[February 3.]

FISKEN V. BROOKE.

*Equitable execution.*

Under his father's will the defendant J. E. B. was entitled to certain real and personal estate, which was bequeathed to him upon the following trust "in the first place to and for the support and maintenance of his wife in a fit and suitable manner according to their rank and station, during their joint lives and during the life of the survivor of them; secondly for the support, education and maintenance of the children of the said J. E. B. and B. J. B., now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said J. E. D. and B. J. B.

Power was given to the defendant and his wife jointly during their lives, and to him, if he was the survivor, but not to her if she was the survivor, to sell the lands, mortgages and all other securities and to stand possessed of the proceeds upon the same trusts. Further power was given to them jointly and to the survivor to divide the real and personal estate or the proceeds thereof, or so much thereof as there remained unexpended and unappropriated in carrying out the trusts between the said children and their said heirs, if any, in such manner and in such proportion as to them might seem fit, or to exclude any of them entirely from any benefit or portion thereof if they should see fit, so to do or to convey

or make over to any of them by way of advancement any portion of the same to become theirs absolutely.

*Held*, (reversing the decree of Proudfoot, V. C.) that the gift was for the benefit of the defendant and his wife jointly, and that the defendant's interest could not be attached by an execution creditor.

*Dalton McCarthy*, Q.C., and *Hoskin*, Q.C., for the appellants.

*Boyd*, Q. C., for the respondent.

*Appeal allowed.*

From C. P.]

[Feb. 14.]

FOWLER V. VAIL.

*Foreign judgment—Pleading—23 Vic., c. 24, sec. 1; 39 Vic., c. 7, O.; 31 Vic., c. 1, sec. 34.*

To an action on a foreign judgment commenced previous to the repeal by 39 Vic., c. 7, O., of 23 Vic., c. 24, sec. 1, which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit, the defendant, after the passing of the repealing Act, pleaded several pleas setting up such defences.

*Held*, reversing the judgment of the Common Pleas, that they could be pleaded as the right to plead was an existing right within the meaning of section 34 of the Interpretation Act, 31 Vict., c. 1, O.

A further plea to the judgment averred that the defendant was not at the commencement of the action nor down to the judgment resident or domiciled in the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action or before the recovery of judgment have any notice or knowledge of any process or proceedings in the action, nor of any opportunity of defending himself therein.

*Held*, affirming the judgment of the Court of Common Pleas, that plea was bad for not averring that the defendant was not a subject of the foreign country.

*C. Robinson*, Q. C., (with him, *A. Bruce*) for the appellants.

*J. K. Kerr*, Q.C., (with him, *J. W. Jones*) for respondents.

*Appeal allowed without costs.*