

[Eng. Rep.]

BAIN V. SADLER.—FAZAKERLEY V. CULSHAW

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the testator which, after deducting certain sums allowed to him, left a balance in his hands; this he claimed to retain in part payment of a debt of much larger amount due him from the testator.

Part of the testator's real estate had, previously to the filing of the bill, been sold, and subsequently the residue was sold by order of the Court; the proceeds of these sales were received by the defendant, John Sadler, and out of them he claimed to be entitled to retain a sum sufficient to satisfy the balance of the debt due to him.

On a summons taken out for the payment of the proceeds of the real estate into court, the Vice-Chancellor Stuart decided in favour of the right of retainer, subject to the taking of certain accounts.

It was admitted that the defendant John Sadler was entitled to retain the balance of the personal estate as legal assets, and the question was now brought before the Court whether he had any right of retainer as executor over any part of the proceeds of the real estate, for the payment of which into court a summons had now been taken out.

Dickinson, Q. C., and W. C. Harvey.—This trustee has no right to retain anything out of equitable assets until the other creditors have been put on an equality with him. These are clearly equitable assets. *Lovegrove v. Cooper*, 2 Sm. & Giff 271, has often been commented upon as not being consistent with other authorities. They referred to *Silk v. Prime*, 1 Bro. C. C. 138; 2 L. C. in Eq. 123; *Cook v. Gregson*, 4 W. R. 581, 3 Drew. 547; *Wms. on Exrs.* 1555.

E. K. Karlake, Q. C., and Freeman.—*Hall v. Macdonald*, 14 Sim. 1, is an authority precisely in point. *Lovegrove v. Cooper* (*ubi sup.*) is perfectly good law. These assets are not equitable. The devisee in trust for sale cannot proceed against himself to have the property administered in a court of equity; he should proceed to sell and then satisfy his own debt.

Dickinson, Q. C., in reply.

WICKENS, V. C.—This case is one of some importance. There is a difficulty created by the case of *Hall v. Macdonald*, but I am bound to say that for a great many years I have thought that case was not law. I remember making a note against the case when it was first reported. I have no doubt whatever that the Vice-Chancellor Shadwell's decision was right, but I cannot help thinking that Mr. Simons has misconceived what was precisely the point of the case, and, in fact, he did not report the case for that point. It is mentioned incidentally, and I can easily conceive certain states of circumstances in which the decision would have been perfectly right, without that precise expression having been necessary, or having been used.

It seems to me that the case, in fact, is settled by principle, and the principle is so well established that I may venture to depart even from so great an authority as the Vice-Chancellor Shadwell in that case. There is no doubt as to the right of retainer as against legal assets on the part of an executor; and there is also, I think, such a preponderance of authority in favor of holding that assets like these are equitable; that, notwithstanding the decision in *Lovegrove v. Cooper*, I may so hold them.

The right of the heir under the statute is anomalous; I believe myself that that cannot be recon-

ciled with the principles of equity, but that it must be rested entirely upon decision, and upon the words of the statute. But I take it to be perfectly well settled that a trustee for sale who is not executor, has no right whatever analogous to a creditor. I take it as perfectly well settled that, if an estate is devised to a trustee for sale, or if it is conveyed to a trustee for sale for the purpose of paying debts, in neither case would there be any right analogous to the right of retainer. That being so, is it possible to say that the characters of trustee for sale and executor becoming united in one and the same person shall give to the trustee rights in his character of executor which in his character of trustee *per se* he could not have had? There would be a want of symmetry in that which almost makes it conclusive that it could not be the case.

Of course one might put cases which would lead to results more or less absurd; for instance, one might obviously put the case of an executor, who was not an original trustee, but a derivative trustee, as for instance an executor who was appointed trustee under a power before the sale; or you might put the case of a trustee for sale, who became personal representative, not having been so appointed, but by being executor of the original executor.

I do not see where you are to stop if you once say that the union of the two distinct offices of executor and trustee in the same person gives to the trustee rights analogous to those he would have as executor, but which he would in no way have as being merely trustee. Therefore I think the true view is to hold, as against assets like these, that his rights are precisely the same, whether he is executor *plus* trustee or not, and that therefore he has no right of retainer. The consequence will be, I take it, according to Mr. Dickinson's statement; that is to say, that equality must be established with respect to the equitable assets by paying the other creditors up to an equality with this executor, and then there will be a rateable distribution.

FAZAKERLEY V. CULSHAW.

Trustee—Real estate—Power to apply rents in repairing—Power to borrow.

A testatrix devised all her real estate to trustees upon certain trusts, and empowered them to lay out the rents thereof in repairing a certain dwelling-house (part of the real estate), and in erecting and making such alterations and additions thereto as they might think fit.

Held, that the trustees had no power to borrow money for repairing the house, and consequently that they should not be allowed interest on a sum which they had borrowed for that purpose.

[24 L. T. Rep. N. S. 773.]

This was an administration suit.

By her will, dated the 7th June, 1854, Agnes Culshaw, widow, gave and devised all her messuages, lands, tenements and hereditaments, situate and being in Ormskirk, in the county of Lancaster, and all other her real estate whatsoever, to Robert Neilson, his heirs and assigns, upon trust from time to time to pay the rents and profits thereof unto and equally amongst her grandchildren, Ellen Elizabeth Culshaw, Margaret Culshaw, Sarah Culshaw, and John Culshaw, as tenants in common during their respective lives, with divers remainders over for the benefit of the children and issue of all her said grandchildren.