ENGLISH REPORTS.

CHANCERY.

Re Kershaw's Trusts.

Will—Trustees—Advancement to husband.

A married woman being entitled to the income of a fund for her separate use, and the trustees of the will having power to advance a portion of the capital for her benefit, they were authorised by the Court, under the circumstances of the case, to make the advance for the purpose of setting up the husband in business.

[V. C. M. 16 W. R. 963.]

This was a petition for the advice of the Court under 22 & 23 Vict. c. 35, s. 30. The question turned upon the following clause in a will. After directing the residue of his personal estate to be divided between his daughters in equal shares, the income of each daughter's share to be paid to such daughter for her life, and during coverture for her separate use, and the capital to be held in trust for her children or other issue as she should appoint, with the usual clause as to maintenance and education, the testator proceeded; "And I also empower my trustees notwithstanding the trusts herinbefore declared of the share of each daughter of mine to apply at any period or periods of the life of each such daughter for her advancement or otherwise for her benefit any part or parts not exceeding in the whole one-half of the capital of her share." The husband of one of the daughters was offered a share in a profitable business in London, on condition of bringing £5,000 into the partnership, and it was the desire of himself and his wife that the money should be advanced out of the capital of his wife's share under the above will; but the trustees were advised that they could not safely consent without the sanction of the Court. It was represented that if the money were not advanced the husband would be obliged to return to his former employment in the East Indies, whither his wife and children would be unable to accompany him on account of the climate.

Osborne, Q. C., for the petitioners.

Cotton, Q. C., appeared to consent on behalf of all other parties interested, with the exception of three infant children residing out of the jurisdiction, whom it was not thought necessary to serve.

Malins, V. C., considered that, as a general rule, whatever was for the benefit or the husband was for the benefit of the wife, and therefore sanctioned the proposed arrangement.

IRISH REPORTS.

QUEEN'S BENCH.

Holland v. Eastwood.

Practice—Irregularity—Costs incurred by attorney's neglect.

Where the copy of a plant served was entitled "Court of Common Pleas," but was tested as of the "Court of Queen's Bench," the writ being in fact issued from and the plant being filed in the Queen's Bench, the Court set aside the judgment marked by default on the defendant's affidavit that he was misled, and that he had searched the Court of Common Pleas for a plaint, and had his defence thereto prepared and ready for filing.

As the defendant had let five days pass without giving plaintiff notice of the error, and at the end of that time had served notice of motion, no costs were given.

As the default on both sides was personal neglect of the attorneys, neither was permitted to charge the costs to his client.

[Q. B. (Ir.), May 4, 16 W. R. 934.]

P. Keogh applied on behalf of the defendant in this case to set aside the judgment marked against him. The copy of the summons and plaint served was entitled "Court of Common Pleas," but concluded "Witness the Lord Chief Justice and other Justices of the Court of Queen's Bench."

The action, which was for breach of promise of marriage, was, in fact, in the Court of Queen's Bench.

The plaintiff's attorney made an affidavit stating these facts, and also alleging that he and his counsel were misled by this mistake, and that he searched the Common Pleas, and found no plaint filed there, and that he had counsel instructed, and the defence ready for filing, and that in consequence no defence was lodged in the Queen's Bench.

The plaint bore date the 28th March, was served 31st March, filed 8th April, and judgment marked by default on the 14th April.

On the 22nd April the defendant was served with a notice to assess damages, which was the first he heard of judgment being marked against him, and the first time he noticed the error which misled him. Nothing was done by the defendant, however, till the 27th April, when he served notice of this motion.

The plaintiff withdrew his notice to assess damages on the 2nd May.

R. Ferguson, contra, submitted that the defendant was too late, as this was an irregularity which he might waive. He cited Chitty's Archbold, 11 Ed. 204, 976; *Woodroffe* v. *Dimsdale*, 5 Ir. Jur. 239; *Holmes* v. *Russell*, 9 Dowl. 487.

Whiteside, C. J.—The defendant naturally looks to the head of the document served to see what court it is in, and the plaintiff has no right to issue a writ likely to mislead. The defendant, however, on discovery of the error, says nothing, but waits for five days, and at the end of that time serves notice of this motion. The judgment must be set aside, but both sides must pay their own costs. Where a technical error has taken place, one professional man is bound to give the other notice at once; if that had been done here, the rule as to costs would take a different shape.

O'Brien, J., concurred.

Fitzgerald, J.—There were faults here on both sides, but it is our duty to encourage a fair and candid practice. The first notice the plaintiff got of the error was the notice of this motion, which is a most warlike motion, served five days after the discovery of the defendant, obviously for the purpose of making costs by taking advantage of the slip of the plaintiff. I concur that there should be no costs, but further suggest that it should be added to the rule that neither plaintiff's nor defendant's attorney should be permitted to charge his client the costs incurred by his neglect.

George, J., concurred.

Rule accordingly.