

is his act; and, inasmuch as it was his duty to have sold, any change of circumstances arising from depreciation of the property while in his hand ought to be borne by him rather than by the *cestuis que trust*.

The exact amount to be charged against the defendant has given much anxiety—\$3,125 is probably much more than would have been realised at an honest sale, but we cannot, on the evidence, reduce the “actual value” below that sum. . . .

We can see no reason upon which the judgment against Campbell can be upheld. True, he has lent himself to a fraud, but no profit has reached his hands. His position in this respect differs from that of McGoey. He was a necessary and proper party to the action, and should answer along with Casserley for the plaintiff's costs.

The judgment should be varied as indicated. The plaintiff recovers against Casserley and the estate of McGoey, \$320, and against Casserley alone the further sum of \$1,525. So far as the McGoey estate is concerned, having regard to the amount recovered, it should only be liable for half of the taxable costs of the action. Casserley and Campbell should be liable for the costs of the action.

In view of the part success of the appeal and of the fact that the amount of which Casserley is held liable may be more than would have been realised at a forced sale, justice will probably be done by giving no costs of the appeal.

The plaintiff will have a lien upon the amount recovered for his costs.

We do not deal with the rights of the defendants as between themselves.

Upon the hearing we expressed our concurrence with the rulings of the trial Judge refusing to admit in evidence, on behalf of the executors of McGoey, his depositions upon his examination for discovery, and refusing to compel the plaintiff to read an examination *de bene esse* taken at his instance, and which he did not desire to read. We think it fair to give the costs of the examination to the defendants, as it should be regarded as an unsuccessful experiment on the part of the plaintiff for which he should pay. These costs will be set off *pro tanto*.

SUTHERLAND, J.:—I agree.

MEREDITH, C.J., with some hesitation, on grounds stated in writing, agreed in the result.