

The issues being closed the Respondent produced an evidence of his claim firstly the Trust Deed of the twenty-sixth day of March, one thousand eight hundred and fifty-one—secondly, the said deed of sale by the said Trustees represented by their Attorney A Workman (whose power of Attorney or authorization from the other Trustees is not however filed or proved to the Appellant,—thirdly, the said judgment of the Superior Court of the seventh day of June, one thousand eight hundred and fifty-seven,—fourthly a judgment of the Superior Court of the thirtieth day of September, one thousand eight hundred and fifty-seven,—and fifthly, an admission on the part of the Appellant that the property mentioned in the Plaintiff's declaration was sold by the said Trustees to the Appellant, was a part of the property assigned to them by the Respondent, and that the objects for which the said trust was created had been fulfilled.

The Appellant having adduced no evidence the judgment appealed from was rendered in favor of the Respondent on the first day of February, one thousand eight hundred and sixty.

From this statement appears that the Respondent bases his claim to the debt in question upon two grounds which are of course inconsistent with each other. In the first place he claims that the Trust Deed became effete by the fulfillment of the objects for which the said trust was created, and as a consequence that the said debt became vested in him by mere operation of law, and in the second place, that the debt in question became vested in him by virtue of the aforesaid judgments of the Superior Court, which operated as a reconveyance of the said debt from the said Trustees to him.

Taking the Respondent's first proposition as founded the said judgments of the Superior Court have absolutely no signification for then they would order the said Trustees to transfer to the Respondent that which was his already, and of which by hypothesis, they had been divested by mere operation of law. And vice versa, the authority of the said judgments of the Superior Court would destroy the Respondent's first proposition for they are both vitally founded upon the presumption that the surplus of the said estate not disposed of was still lawfully vested in the said Trustees.

In regard to the Respondent's first proposition, viz. That the debt in question became vested in him by mere operation of law upon the fulfillment by the Trustees of the objects for which the said trust was created, and as a portion of the surplus of the said estate not required to pay the Respondent's debts, the Appellant would submit that the said proposition is proved as unproved by law. It is also inconsistent with the said judgments which the Respondent obtained against the said Trustees, and which in contradiction with the nature and stipulations of the Trust Deed also referred to. For by the said Deed of Trust the Respondent absolutely conveyed all his property to the said Trustees, and all his legal and equitable interests therein, and, in consideration thereof, the Trustees agreed that should the said property conveyed to them be more than sufficient to pay the debts of the Respondent, they would execute such mortgages and conveyances as should be necessary to reinvest the surplus in the Respondent.

The Appellant would further submit that, admitting the legality of the said proposition, it was incumbent on the Respondent to prove that the debt in question formed a part of the said surplus of the estate, undivided or undisposed of by the said Trustees for the benefit of his creditors for this was a reasonable expectation to recover under any circumstances. But of this the proof was adduced, for was it a matter which could be proved in the said action, but one properly to be determined in a trial by the Respondent against the said Trustees.

In regard to the Respondent's claim to the debt in question, based upon the said judgment of the Superior Court the Appellant has only to refer the Court to the copies of the said judgments by which it will appear that they have no reference whatsoever to the debt claimed by the said Respondent from the Appellant. They refer only to real estate, debts, accounts, &c. which were in the hands of the said Trustees undisposed of and forming part of the surplus as conveyed to them by the Deed of Trust. Where is the debt claimed by the Respondent was never conveyed by him to the said Trustees, for it was created after the Deed of Trust, and there is no proof that any such surplus exists or ever did exist.

Under these circumstances, with the documents and proof of record, and in the absence of any proof that the debt claimed by the Respondent formed a part of the said surplus estate undisposed of and not applied by the Trustees, it is difficult to imagine what can be urged in favor of the said judgment in the Respondent's favor.

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