where one trustee only was originally appointed the Court will appoint one.—*Re Roberts*, 9 W.R. 758; *Re Reyneault*, 16 Jur. 238; and in *Re Tempest*, 1 L.R. Chy. Appeals, 485; S C. 35 L J. N.S. Chy. 632, it is said that "the Court will regard the wishes of a testator expressed or demonstrated" in regard to the appointment of trustees.

By consent of parties concerned, a trustee will be appointed without a reference—*In re Battersby's Trusts*, 16 Jur. 900; *Robinson's Trusts*, 15 Jur. 187; *In re Tunstall*, 15 Jur. 645, 981; S.C. 4 De G. & Sm. 421

The proposed trustee being a nominee of the testator, the Court in appointing him will be merely giving effect to the testator's wishes and intentions, and therefore he will take all the powers conferred by the will on the trustee thereof for the time being; the decisions in *Lyon* v. *Radenhurst*, 5 Gr. 544, and *Tripp* v. *Martin*, 9 Gr. 20, not being applicable to the present case.

Mowat, V. C.—I think the petition and affidavits make out a case for the appointment of new trustees, but not of one trustee. The testator had a right to appoint one if he chose; but when it becomes necessary to apply to this Court for an appointment in a case not provided for by the testator, it is only under very special circumstances that the Court of Chancery will be satisfied with one trustee. The circumstances here are not sufficient for this purpose. The petitioners must therefore procure another to be associated with Mr. Dillon, and, on proper affidavits of the fitness of the trustee so proposed, the two will be appointed.*

Upon a consent by another proposed trustee, and affidavits of fitness being filed, his Lordship afterwards granted a fiat for the order as prayed, appointing the two trustees proposed and vesting the trust estates in them.

## CHANCERY CHAMBERS.

(*Reported by* J. W. Fletcher, Esq., *Solicitor.*)

### Barker v. Pyne.

*Practice—Receivor—Infants—Setting up defence—Act pleaded by ancestor.*

Where, after a decree, infants have been made parties to a suit by order of revivor, they stand in the same position as their ancestor, the deceased defendant, with regard to the plaintiff, and cannot be let in to set up a defence to the suit which their ancestor has not pleaded, except where actual fraud or mistake have prevented the ancestor from pleading such defence, and not under any circumstances where the deceased debtor has been guilty of great laches.

[Chambers, 1867.]

This was a common mortgage suit in which the decree, on default in payment of the amount found due by the Master, ordered a sale of the mortgaged premises.

Default was made in payment by the defendants by bill. A sale was attempted, but proved abortive, for want of bidders.

The usual order after abortive sale, directing a subsequent account, and in default of payment, foreclosure, was made.

The time for payment under this order having expired, an application was made on behalf of the defendants by bill for an extension of the time for payment on the usual grounds. The extension was granted, but before the expiration thereof the suit abated by the death of the defendant William Pyne. The suit was revived in the names of his widow and children, and a guardian *ad litem* was appointed to the said children, all of whom were infants.

The amount found due by the Master's subsequent report not having been paid, although a considerable further extension of the time had been given for that purpose by the plaintiff's solicitors, this was an application on notice to a judge in Chambers for a final order of foreclosure against all the defendants, including the incumbrancers made parties in the Master's office, default having been made by all the defendants.

The bill had been taken *pro confesso* against all the defendants by bill.

*S. H. Blake*, for the plaintiffs.

The plaintiffs are beyond a doubt entitled to the order as against all the defendants except those added by revivor, and as to those last-named defendants it is submitted that they stood in the same position as the deceased defendant whom they represented in the suit, and that as he could have had no better rights than his co-defendants had he been living, having in common with them made default, the plaintiffs are therefore entitled to an order foreclosing all the defendants.

*Hector Cameron*, contra.

The widow claims a portion of the mortgaged premises in question as being her separate estate, and the infants have such an interest in the same as entitles them to some consideration. The Court favors infants, and it is submitted that the infant defendants in this suit ought to be let in to answer on the merits, and allowed to set up their rights in respect of the part of the equity of redemption in which they have an interest. At all events, under the circumstances, he submitted that the Court should give them an opportunity of redeeming, or extend the time still further for payment.

The Judge's Secretary.—The infants in this suit stand in no better position than the deceased defendant, their ancestor. I allow the bill to be taken *pro confesso* against him. Further time has been asked for by him in common with the other defendants. The widow had known her rights, if any, for years; the suit had been pending for some years; the plaintiffs had been lenient, and afforded the defendants every opportunity of redeeming. Unless actual fraud or mistake were clearly proved, it is too late now to set up merits. At all events the deceased defendant has been guilty of such gross laches that his representatives cannot be afforded any relief of the description asked.

I must grant the final order of foreclosure.

* See 2 Set. 824; *Re Tunstall*, 4 De G. & Sm. 421; S. C. 15 Jur. 645; *Re Dickinson's Trusts*, 1 Jur. N. S. 724.