CIHM Microfiche Series (Monographs)

ICMH Collection de microfiches (monographies)

Canadian Institute for Historical Microreproductions/Institut canadien de microreproducticns historiques

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

- ☐ Coloured covers / Couverture de couleur
- ☐ Covers damaged / Couverture endommagée
- ☐ Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- ☐ Cover title missing / Le titre de couverture manque
- ☐ Coloured maps / Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- ☐ Bound with other material / Relié avec d'autres documents
- ☐ Only edition available / Seule édition disponible
- ☑ Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- ☐ Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☑ Additional comments / Commentaires supplémentaires: **Various pagings.**

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured pages / Pages de couleur
- ☐ Pages damaged / Pages endommagées
- ☐ Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- ☐ Pages detached / Pages détachées
- ☑ Showthrough / Transparence
- ☑ Quality of print varies / Qualité inégale de l'impression
- ☐ Includes supplementary material / Comprend du matériel supplémentaire
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.
- ☐ Opposing pages with varying colouration or discolourations are filmed twice to ensure the best possible image / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below / Ce document est filmé au taux de réduction indiqué ci-dessous.

10x	12x	14x	16x	18x	20x	22x	24x	26x	28x	30x	32x
						✓					

The copy filmed here has been reproduced thanks to the generosity of:

Supreme Court of Canada
Ottawa

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

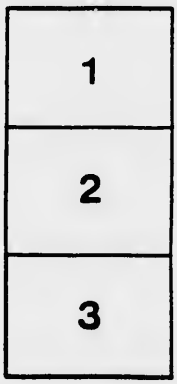
Cour suprême du Canada
Ottawa

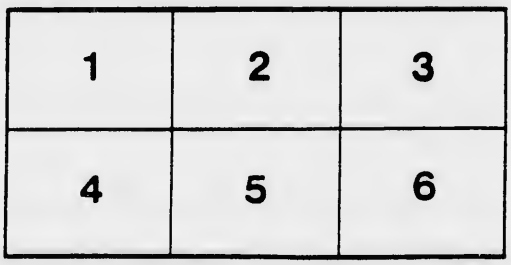
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

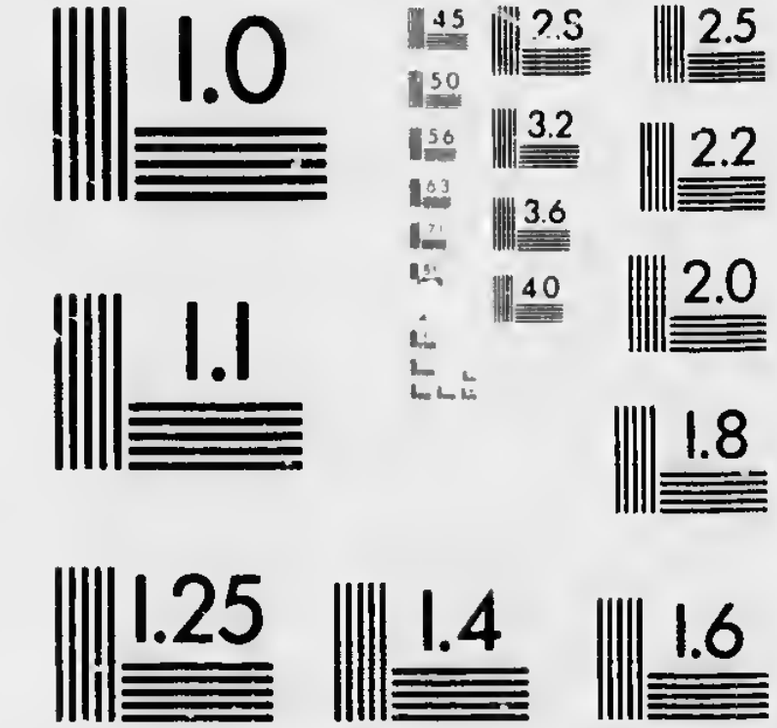
Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 Phone
(716) 288 - 5989 - Fax

R

COU

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1868.

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

VOLUME XV.

TORONTO:
HENRY ROWSELL,
KING STREET.

1869.

HENRY ROWSELL, LAW PRINTER, KING STREET, TORONTO.

THE H

"

"

"

THE HON. P. M. S. VAN KOUGHNET, *Chancellor.*

" J. GODFREY SPRAGGE, *Vice-Chancellor.*

" OLIVER MOWAT, *Vice-Chancellor.*

" JOHN S. MACDONALD, *Attorney-General.*

A.

B.

B.

B.

C.

D

D.

E.

E.

F.

G.

G.

H.

H.

I

J

K.

L

M.

M.

Mc

Mc.

Mc.

N.

O.

P.

R

R.

S

S.

T

T.

U.

W.

W.

Y.

A TABLE

OF

CASES CITED IN THIS VOLUME.

G.

H.

S.

T.

T.

U.

V.

W.

CASES CITED.

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING JULY, 1868.

DAVIDSON v. BOOMER.

Will, construction of—Void bequest—Parties—Mortmain.

A testator after bequeathing an annuity to his wife, proceeded:—"I also give and bequeath to my said wife all my household furniture, goods, and chattels, of what nature or kind soever, and wheresoever situate; to have and to hold to her my said wife, her heirs and assigns, for ever;" and in subsequent clauses devised certain real property to different persons, and for different estates, and also bequeathed a number of annuities to different persons, charging them on his estate generally, and disposed of his residuary real and personal estate.

Held, that the bequest to the wife, though large and comprehensive enough to pass the whole of the testator's personal estate, and though not inconsistent with the bequest to her of an annuity; yet, the subsequent bequests restricted the application of the bequest to personalty *ejusdem generis* with the particular description of property bequeathed; and the residuary bequest of personalty having failed through uncertainty as to the objects of the testator's bounty:—

Held, that the wife was not entitled to it under the words of the bequest to her.

Where property is bequeathed to executors on trusts which are too uncertain for execution, the executors are not beneficially entitled.

1868.

Davidson v. Boomer.

Where a sum of money was bequeathed for the erection of a parsonage *Held.* (first), that there was an implied authority to purchase land whereon to erect such parsonage; and (second), that in the absence of anything to shew that no portion of the fund was to be applied in the purchase of the land, the bequest was void under the Statutes of Mortmain.

To a bill either to establish or impeach the legality of certain charitable bequests, the Attorney General may be made a party

Hearing by way of motion for decree.

Mr. *Crooks*, Q. C., for the plaintiffs.

Mr. *Strong*, Q. C., and Mr. *Cross*, for the defendant *Harvey*.

Mr. *Blake*, Q. C., for the defendants *Boomer*.

Mr. *Crickmore*, for the Attorney General.

Mr. *F. Osler* and Mr. *Downey*, for the other defendants.

Judgment.

SPRAGGE, V. C.—*Absalom Shade* made his will on the 13th of March, 1862, and added a codicil on the following day; and died on the 15th of the same month.

By the second clause, after bequeathing to his widow an annuity of four thousand dollars to be paid out of his estate, he proceeds thus: "I also give and bequeath to my said wife all my household furniture, goods, and chattels of what nature or kind soever, and wheresoever situate. To have and to hold the same to her my said wife, her heirs and assigns for ever."

In subsequent clauses he devises certain real property to different persons, and for different estates; and bequeaths a number of annuities to different persons, charging them generally upon his estate: and his will

contains this residuary clause. "I give, devise, and bequeath all the rest, residue, and remainder of my real and personal property to my executrix and executors hereinafter named in trust to dispose thereof as to them may seem best, if not hereinafter provided for by a codicil or writing, to have and to hold the same to them, their heirs and assigns for ever." By a codicil the testator bequeathed a pecuniary legacy and some annuities. He made no other disposition of his residuary estate.

A point taken, though but little pressed on behalf of the executors was, whether they took a beneficial interest in the residue, or took it in trust. It is expressed to be in trust, though the objects of the trust are not defined. The point could scarcely admit of doubt, and the case of *Fowler* v. *Garlike* (*a*) is sufficient for its determination. In that case there was a residuary devise of real estate and bequest of personalty "upon trust to dispose of the same at such times and in such manner and for such uses and purposes as they (the executors) shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion." Sir *John Leach* held that this was a plain trust, but too uncertain for a Court to execute; and declared the next of kin entitled to the residuary estate.

Judgment.

This decision was before the Imperial Act (*b*) which changed the rule that had previously prevailed, where testators had omitted to make an express disposition of the residue of their personal estate. The previous rule is well explained by Lord *Cottenham* in *Mapp* v. *Elcock* (*c*). "The title to personalty not otherwise disposed of, did not arise from any gift of the testator but from the operation of law incident to the office,

(*a*) 1 R. & M. 232.
(*b*) 11 Geo. IV., 1 Wm. IV., C. 40.
(*c*) 2 Ph. 796.

1868

Davidson v. Boomer.

The law vested the property in the executor; and if the testator had not directly or indirectly, declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor; and he therefore retained such property for his own benefit." The Statute has changed this rule and gives what is not disposed of to the next of kin. I will only refer further (without quoting it) to the language of Lord *Truro* in *Briggs* v. *Penny* (*a*). I think it very clear that the executors in this case are not entitled beneficially: and it is only just to them to say that, as I understand, they have not claimed to be so. It is merely a point raised, among others, by counsel upon the construction of this will.

The point raised upon the second clause of the will may admit of more question; but I think the authorities upon it are pretty clear; and I think, too, that the rea-

Judgment.

son of the thing is manifestly with the authorities. The contention of the widow is that the second clause gives to her the whole of the personal estate. There are these difficulties in the way of her position. The previous part of the same clause, gives her an annuity out of the estate generally; subsequent clauses give annuities charged in like manner; and the residuary devise and bequest is in terms of real *and personal* estate.

It may be conceded that the words used in the second clause "all my household furniture, goods, and chattels of what nature or kind soever, and wheresoever situate," are large and comprehensive enough to pass the whole of the testator's personal estate, unless controlled, and their meaning and effect limited, by other parts of the will. The giving an annuity to the widow seems at first sight to militate against the construction she contends for; but then it is in lieu of dower, and so for

(*a*) 3 M. & G. 557.

1868.

Davidson v. Boomer.

valuable consideration, and to be preferred to all other bequests under the will, and for that reason, and because the testator may have intended, as suggested by Mr. *Jarman* (*a*), to place her in the favored position of a specific legatee *pro tanto*, the gift of the annuity cannot be said to be inconsistent with the subsequent bequest being of the whole estate.

The subsequent bequests of annuities create however a serious difficulty in the way of the position contended for by the wife. This was the case in *Rawlings* v. *Jennings* (*b*). The report of the case makes Sir *William Grant* rely for his decision upon the circumstance of an annuity, and specific legacy being also given to the wife. He may have thought that sufficient but there were in fact pecuniary legacies to other parties. In *Wrench* v. *Jutting* (*c*), Lord *Langdale* considered the general words sufficiently large to carry the whole personal estate, but, there being bequests to other parties, he held that the words must receive a limited interpretation. It was contended that the gift was of the whole personalty subject to the pecuniary legacies, but the Master of the Rolls thought otherwise. The legacies were payable out of a particular part of his estate, and that would in my mind give force to the contention that the general bequest would not be thereby controlled. But, said Lord *Langdale*, "when it is once shewn that he did not intend by the first words to give everything, they must then be in some way restricted."

Judgment.

There are certainly two ways, in which a will may be viewed, which first gives personalty to one person in some such terms as those employed in this will, and then gives legacies or annuities which are payable, primarily at least, out of the same personalty. The

(*a*) Vol. 1 716. (*b*) 13 Ves. 39. (*c*) 3 Beav. 521.

1868.

Davidson v. Foomer.

words do not *necessarily import* a gift of the whole personalty: all that can be said is that they are large enough standing by themselves to carry the whole. But by reason of there being other legacies or annuities the whole cannot pass, and the question arises whether the whole passes subject to these legacies or annuities, as the case may be; or whether the circumstance of there being bequests, throws light upon the intention of the testator and defines what he means by the words used. I think the latter is generally the correct view, I say "generally," because the words of the will may indicate an intention to give all, subject to certain bequests. But I see nothing in this will to indicate such intention. The general words used may as well read, as *ejusdem generis* with the particular description of personalty first spoken of, as to read, as comprehending all personalty: then we find other dispositions of personalty, necessarily inconsistent with the whole passing. Is it not a proper corollary therefrom, that they are inconsistent with its being the intention of the testator, that the whole should pass?

Judgment.

Then there is an express residuary bequest of personalty, as well as a devise of realty "all the rest, residue, and remainder of my real and personal property." In *Woolcomb* v. *Woolcomb* (*a*) and *Lamphier* v. *Despard* (*b*) there was, as in this case a bequest to one, large enough to cover the whole of the personalty, and a bequest of the residue to another, and in each case it was held that the general words in the bequest to the one, must be restricted to personalty *ejusdem generis* with the particular description of property first bequeathed. The reason given in the first case was the very plain one, that if the words were taken, in the larger sense contended for, it would frustrate and make void the gift of the *residuum*.

(*a*) 3 P. W. 112. (*b*) 2 D. & W. 59.

1868.

Davidson v. Boomer.

I cannot accede to Mr. *Blake's* contention, that the will should be construed differently because it deals throughout with a mixed fund of real and personal estate The construction he contends for would necessarily defeat the residuary bequest of personalty. But further, Mr. *Blake* contends that there is no bequest of personalty; that the testator dies intestate as to his residuary estate, and that the Court is asked to restrict the general terms of the gift of personal estate to the wife, not in order to give effect to the testator's disposition of the residue, but in order to make the testator die intestate, as to the personalty not comprised in the particular terms of the bequest to the wife by reason of the residuary clause being too indefinite to be efficacious. I think the answer to this is, that although true it is the testator did die intestate as to the residue, yet his intention was to make, and his belief was that he was making an effectual disposition of it, and a disposition of it inconsistent with the whole of it having been previously given to his wife; and we should therefore not the less do violence to his intention by holding the wife entitled to it, than we should if he had effectually disposed of the residue; his disposition of the residue is just as much an indication of intention, and an aid in the construction of the will, though it cannot be carried out, as if it had been ever so effectual.

Judgment.

Questions also arise upon this will, whether certain dispositions made by the testator of his property are not void under the Imperial Stat. 9 Geo. II. ch. 36, the Statute of Charitable Uses. It is conceded that the Statute is in force here: this was determined in *Doe Anderson* v. *Todd* (*a*) where a very learned and elaborate judgment was given by the late Chief Justice Sir *John Robinson*. It is also conceded that the devise

(*a*) 2 U. C. Q. B. 82.

1868.

Davidson v. Boomer.

of two lots of land in Galt for the benefit of Trinity Church is—as it certainly is—void under the Statute.

The will also contains this bequest, "also I give and bequeath the sum of fifteen hundred pounds for the erection of a parsonage for the clergyman of said Trinity Church, to be paid by my executrix and executors hereinafter named out of my estate whenever required so to do."

I can come to no other conclusion upon the authorities than that this bequest is void under the Statute. It contains no direction certainly that any portion of the money bequeathed should be laid out in the purchase of land; but it has been held in too many cases, and we have the expressed opinion of too many eminent Judges, to be at liberty to question now this position, that where money is directed to be laid out in the erec-

Judgment.

tion of a building, there is an implied direction to purchase the land upon which the building is to be erected. So long ago as the case of the *Attorney General* v. *Parsons* (*a*) Lord *Eldon* referred to late cases as establishing that the word "erect" must be taken to mean that land must be purchased. Sir *William Grant* expressed the same opinion in the *Attorney General* v. *Davis* (*b*) and upon that case coming before Lord *Eldon* in appeal, he said "whatever were the decisions formerly when charity, in this Court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that unless the testator distinctly points to some land already in mortmain the Court will understand him to mean that an interest in land is to be purchased and the gift is not good." The only qualification of this is, that the land need not be already in mortmain *Philpott* v. *St. George's Hospital* (*c*). I quote the language of Lord

(*a*) 8 Ves. 186. (*b*) 9 Ves. 145. (*c*) 6 H. L. C. 338.

Eldon for its enunciation of the rule of construction rather than for His Lordship's own opinion as to the propriety of the rule.

In *Pritchard* v. *Arbouin* (*a*) the Master of the Rolls laid it down as "the standard rule of construction that a direction to build is to be considered as including a direction to purchase land for the purpose of building unless the testator distinctly points to some land already in mortmain." The language "already in mortmain" requires the same qualification as the similar language of Lord *Eldon* in the last case.

In *Giblett* v. *Hobson* (*b*) the language of the bequest was the same in effect as in the will before me: "I give and bequeath to the Butcher's Charitable Institution the sum of £5000, towards building alms-houses, to the said institution;" upon this the language of Lord *Brougham* is "the first position which I am justified by the cases in laying down, nay, by the whole authorities together, called upon to lay down is this, that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself is within the Statute. This seems plainly the good sense of the thing; for when I give any one £1000 to build a house with, and say no more, it is plain I imply that he should lay it out in buying land and building upon that land." Judgment.

Lord *Brougham* repeated the same opinion in *Philpott* v. *St. George's Hospital*, and in the same case Lord *Cranworth* expressed himself to the same effect; and, not to multiply authorities, I will content myself with quoting two or three passages from the judgment of Lord *Wensleydale*, in the same case. His Lordship said, "It is perfectly well established that if a person directs money to be laid out in erecting a

(*a*) 3 Russ. 406.
(*b*) 3 M. & K. 510.

1868.

Davidson v. Boomer.

building, that is to be considered, as by implication, also directing the land to be procured upon which to erect the building, * * That point must therefore be regarded as settled, that a direction to build must be considered as implying also a direction to obtain land whereon to build. * * It is perfectly clear that if a man directs money to be laid out in building, he impliedly authorizes the money to be laid out in the purchase of land; and if he says no more, that bequest will fail."

It was suggested that *Trye* v. *The Corporation of Gloucester* (*a*), a comparatively late case and a very strong one for the application of the Statute was over-ruled by *Phillpott* v. *St. George's Hospital.* But the case in *Beavan* went much further than the point raised in this case. The principle affirmed in that case was not only that which I have referred to as established by the authorities, but beyond that, that if the tendency of any bequest was to bring other land into mortmain, *e. g.*, bequeathing money to build, provided a site were provided within a limited time, and so offering inducements for bringing land into mortmain, such bequest was void under the Statute; and it was this latter principle that was negatived in *Phillpott* v. *St. George's Hospital.* But all the learned Lords who gave judgment in that case affirmed the general principle established by the previous cases, with the single qualification that it was not necessary that the land for the erection of buildings, upon which the bequest was made, should be already in mortmain.

Judgment.

The bequest before me is plain and simple, falling clearly within the rule. If there is anything in the circumstances of the case to shew with sufficient distinctness that no part of the fund bequeathed was to be

(*a*) 14 Beav. 173.

1868.

Davidson v. Boomer.

applied in the purchase of land, it is for those interested in its application to the charitable use, to shew it. The onus is upon them. In the absence of anything to shew that no portion of the fund was to be applied in the purchase of land, I must hold the bequest void under the Statute.

The Attorney General is made a party defendant, and other defendants object that he is not a necessary or proper party, there being trustees to represent the charity, which the Attorney General, for the Queen as *parens patriæ*, is made a party to represent. And the distinction is taken by Mr. *Daniel*, in his book of Practice (*a*), between cases where trustees of the charity are appointed by the donor, and cases where no trustees are appointed, but there is a gift directly to charitable uses; in the latter case he says there can be no decree, unless the Attorney General be made a party, which is obvious, as there would be no one else to protect the gift, and the Attorney General is made a party *ex necessitate rei;* but it is otherwise where trustees are appointed by the donor, and he refers to a case before Lord *Macclesfield* (*b*), which bears out his position. There are however other cases which are somewhat in conflict with the case referred to, *which was a case for establishing a charity.* Mr. *Calvert's* position is that "in a suit to set aside a charitable trust, or in which the legality of it is called in question, the Attorney General is always a necessary party." And for this he cites *Cook* v. *Duckenfield* (*c*), and refers to *Baker* v. *Sutton* (*d*), and *Mann* v. *Burlingham* (*e*); in all of which cases there were trustees appointed by the donor. In the first case the bill was filed in the first instance against the trustees alone; and upon its coming before Lord *Hardwicke*, he directed the cause to stand over in order

Judgment.

(*a*) 4 Ed. 135.
(*b*) 4 Vin. Ab. 500: 2 Equity Ca. 1675.
(*c*) 2 Atk. 562.
(*d*) 1 Keene, 227.
(*e*) Ib. 235.

1868.

Davidson v. Boomer.

to the Attorney General being made a party. In the two cases reported in *Keene* the Attorney General was made a party as well as the trustees, and no objection was made; and in a case in this Court, before the late Vice Chancellor, upon a bill filed for the administration of an estate, and to declare a bequest for religious purposes void, the trustees only being made defendants, it was held that the Attorney General was a necessary party (*a*). In this state of the authorities, I cannot say that in this case, where the legality of the charitable bequest is brought distinctly into question, the plaintiff is wrong in making the Attorney General a party. All parties are entitled to their costs up to the decree.

(*a*) Long v, Wilmot, 26th June, 1860.

1868.

MALCOLM v. MALCOLM.

School law.

Where a Board of School Trustees passed a resolution professing to adopt a permanent site for the School and the resolution was confirmed at a special meeting of the ratepayers duly called, these proceedings were held not to prevent a change of site in a subsequent year.

Where School Trustees selected a new site for the School house, and at a special meeting of the ratepayers duly called, those present rejected the site so selected and chose another, but neither party named an arbitrator:

Held, that an arbitrator might be appointed by the ratepayers at a subsequent meeting.

The power of a County Council to change the site of a Grammar School is not lost by the union of the Grammar School with a Common School; though, if the new site is not also adopted by the means provided by law for the case of a Common School, the change may render necessary the separation of the Schools.

Where the Joint Board of a Grammar and Common School, after the site for the Grammar School had been changed by the County Council, wrongfully expended School money granted for a Grammar School building; and a bill was filed against the Trustees to restrain further expenditure, and to make them refund what had been expended, the defendants were ordered to pay the costs, but were allowed time to ascertain if all parties concerned would, under the special circumstances, adopt again the old site.

It is contrary to the rule of this Court, in dealing with persons who have not acted properly, to punish them more severely than justice to others renders necessary; and therefore, where School Trustees wrongfully expended money in building on a site which had been changed by competent authority, relief was only granted to a ratepayer who complained of the Act, subject to equitable terms and conditions.

Hearing at Brantford in the Spring of 1868.

Mr. *Hodgins*, for the plaintiff.

Mr. *S. H. Blake*, for the defendants.

MOWAT, V. C.—This is a suit by an assessed free- Judgment.
holder and householder of a certain Union School sec-

1868.

Malcolm v. Malcolm.

tion described in the bill, and which comprehends the Village of Scotland and some adjoining lots in the County of Brant. The bill is on behalf of the plaintiff and all the other assessed freeholders and householders of the section, and complains of the improper expenditure of a grant of $1000, made in 1856 by the County Council to the Trustees of the Grammar School in the village, and which had lain unexpended until last year. The defendants are, the Trustees as a corporate body, and the individual Trustees whose conduct is complained of. The case turns on a controversy in regard to the site of the School.

Judgment.

The County Council established the Grammar School in question on the 4th March, 1856 (*a*). The grant of the money is said in the bill to have been made on the 13th September, 1856. The money was received by the Trustees on the 13th December, 1856. The County Council did not until lately name the place in the village where the School should be held (*b*), leaving this, I presume, to be arranged by the Trustees. A union of the Grammar School with one of the Common Schools was effected (*c*), but at what date does not appear. Afterwards, viz., on the 4th May, 1864, it seems to have been determined to make use of the grant which had been received from the County Council so many years before; and with this view, the following resolution was passed by the Joint Board of the Grammar and Common Schools: "That the present site of the Grammar School house be selected as a permanent site for the new Grammar School building." The Board also resolved to call a special School section meeting for the 14th of the same month. "for the purpose of receiving a report of the Trustees on the selection of a site for the new Grammar School

(*a*) 16 Vic. ch. 186, sec. 14; Consol. U. C. ch. 63, sec. 17.
(*b*) 16 Vic. ch. 186, sec. 15. (*c*) Ib. sec. 27, pl. 7.

1868.

Malcolm v. Malcolm.

building." This meeting took place accordingly; and two resolutions were moved—first, that the meeting do adjourn until it should be ascertained whether more land could be purchased adjoining the present Grammar School; and, in amendment, "that the resolution adopted by the Trustees selecting the present Grammar School site for a permanent site, be adopted by this meeting." The latter resolution was carried.

It appears to have been subsequently ascertained that Mr. *A. Glover*, who owned the adjoining land, would not part with any of it; and the Board on the 16th August, 1865, resolved, "That a public meeting be called for the purpose of deciding whether the Board shall proceed to build upon the present site, or not; as Mr. *Glover* refuses at present to sell more land." This meeting took place accordingly, on the 23rd August, and a majority of the ratepayers then voted against building on the present site.

Judgment.

Afterwards Mr. *Henry Glover*, who owned a corner lot not far from the present site, having offered this lot to the Board on terms which were satisfactory, the Board on the 30th August, passed a resolution accepting his offer; and subsequently called a meeting of the ratepayers. The object of this meeting was stated in the official notice of the meeting to be, "for the purpose of considering the matter of selecting a new School site. The Trustees having chosen the lot owned by *Henry Glover*, known as the corner lot, as being the most central and eligible, and another lot having been offered near the grove, the ratepayers are requested to say which they prefer; and should both prove unacceptable to them, to make choice of some other." The meeting took place on the 13th September,—when a majority of the voters present voted against the choice of the Board, and in favor of a lot which the plaintiff had offered. Neither party appointed an arbitrator to settle

1868.

Malcolm v. Malcolm.

the difference which thus arose between the Board and the ratepayers (*a*). The resolution of the meeting was transmitted to the County Council: and on the 12th January, 1866, the Council passed a by-law, reciting the resolution, and a petition from the ratepayers founded upon it; and enacting and declaring the site so chosen to be, "the site to erect a County Grammar School thereon for the Scotland Grammar School." The Board do not appear to have taken any steps to complete the purchase of the land thus selected; and on the 13th March, 1867, they determined to build on the old site. On the 10th May, the plaintiff's solicitors wrote to the Board threatening a suit if this resolution was proceeded with; but the Board declined to desist; and on the 11th June this bill was filed, praying for an injunction against proceeding with the work; that the Trustees who were parties to the alleged wrong should refund what School money they had expended on the building; and for other relief. The building was begun in May, was finished in September or October, and has been occupied since December (1867).

Judgment

The by-law of the County Council fixing the site is not mentioned in the bill, and both the bill and the answer treat the case as if the School had been a Common School instead of a Union School, and as if the money had been granted for the erection of a Common School. This is not correct; but so viewing the case, it was contended on behalf of the defendants, on various grounds, that the proceedings were ineffectual to change the existing site. It was argued, that the existing site having been adopted in May, 1864, by the Board and by the ratepayers, it could not afterwards be changed. I think there is no ground whatever for that contention. In support of it reference was made to the case of

(*a*) 16 Vic. ch. 64, sec. 30.

1868.

Malcolm v. Malcolm.

Ryland v. *King* (*a*); but all that the Court of Common Pleas held there was, that after a difference of opinion between the Trustees and a meeting of ratepayers, the question between them must be decided by arbitration; and that a resolution passed at a subsequent meeting of ratepayers in the same year adopting the view of the Trustees was of no force. That decision was not concurred in by the Court of Queen's Bench in the subsequent case of *Vance* v. *King* (*b*); and whether it was a correct decision or not, it has no application to the present case.

Then it was argued, that the proceedings went for nothing, because the ratepayers did not appoint an arbitrator to decide the point of difference between the meeting and the Board. it was as much the duty of the Trustees to appoint their arbitrator as for the ratepayers to appoint one; and as the matter was overlooked by the ratepayers at the meeting in question, perhaps from assuming that the Board would acquiesce in the decision of the meeting, another meeting might have been called by the Trustees to have the omission supplied. Some other points that were urged, I expressed my opinion upon at the hearing.

Judgment.

The County Council has power to change the place of holding any Grammar School established since 1st January, 1854 (*c*); and I think this power is not destroyed by the union of the Grammar School with a Common School; though, if the change has not the sanction of the authority required in the case of the Common School, it may render necessary a separation of the Union. The defendants, therefore, had no right to expend this money for the building of a Grammar

(*a*) 12 U. C. C. P. 198. See also Williams v. The School Trustees of Plympton, 7 Ib. 559.

(*b*) 21 U. C. Q. B. 198.

(*c*) Consol. U. C. ch. 63, sec. 3.

1868.

Malcolm v. Malcolm.

School on the old site. But as the by-law of the Council was not mentioned in the bill, the defendants should have an opportunity of shewing by affidavit that they were prejudiced by the omission; and in that case I shall make such order as may seem just. Failing this, I think the defendants should pay the costs of the suit, as their proceedings appear to have been sharp, as well as wrong in point of law. But having reference to the evidence before me of the comparative convenience of the rival localities; to the division of opinion amongst the ratepayers, as testified by the votes on each side at the meetings which have taken place; to what occurred at the general meeting last January; and to the fact that the money has actually been expended,—I think that before ordering repayment of the money, I should give the Trustees an opportunity, if they desire it, of ascertaining whether under all the circumstances a majority of the ratepayers, at a special meeting properly called for the purpose, may not be disposed to adopt once more the old site, and to regard the costs of the suit as a sufficient punishment for the wrong which the defendants have committed. I presume the County Council in that case would pass the necessary by-law, as their only object has evidently been to adopt the site which the people of the locality prefer.

Judgment.

Should the selection of the plaintiff's lot be adhered to, he must do what is equitable towards the defendants, as the price of getting relief in this Court. Part of the consideration he was to receive for his lot is the old site of the School; and he should be content on getting it, either to pay the defendants for the building which they have put up, according to what it is worth, not for a School, but for any other purpose it may be useful for; or to allow the defendants to have the lot at its fair value exclusive of their building. But on this point I will hear the parties, in my Chambers

or otherwise, if necessary. Though the defendants have not acted properly, it would be contrary to the rule of this Court to punish them more severely than justice to others renders necessary.

The delay in filing the bill was relied on as a bar to relief; but I think no such delay occurred as had that effect.

It was also urged, that the bill was not such as a ratepayer could file. Many bills by ratepayers have been entertained. I have not thought it proper to delay my judgment for the purpose of considering whether the principle of those cases is strictly applicable to a case of this kind, in view of the various enactments in the School Acts, and of the numerous English and Canadian authorities on like questions; as the objection was not taken when the demurrer to the bill was argued before the Chancellor; and, though the objection was taken before me at Brantford, it was not argued, or any reference to authorities made.

Judgment.

1868.

McConnell v. McConnell.

Gifts, father to son.

A gift can only be upheld if clearly proved; and where evidence of loose, casual, and inconsistent admissions and statements was offered to prove a gift of all the donor's means, the evidence was held insufficient.

There is, ordinarily, no presumption of undue influence in the case of a gift from a father to a son, unless it is proved that the son occupied towards the father, at the time, a relation of confidence and influence; but if that is proved, the gift may need for its support the same evidence of due deliberation, explanation, and advice as a gift to any other person occupying such relation of confidence and influence.

Where there is no proof of *mala fides* or of an unfair exercise of influence, a gift of a trifling sum, as compared with the donor's property, does not stand in the same position as a gift of his whole property.

If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of his father's means, if large, may not be upheld without the evidence, required in other cases, of due deliberation, explanation, and advice, the gift of more than a trifling proportion may be sustainable without such evidence.

Hearing at Barrie, at the Spring sittings of 1868.

Mr. *Blain*, for the plaintiff.

Mr. *Strong*, Q.C., for the defendant.

Judgment. Mowat, V. C.—This is a suit by the administrator of *Sarah McConnell*, of West Gwillimbury, deceased, against *Arthur McConnell*, one of her sons. The plaintiff alleges, that the deceased was entitled to some property in Ireland; that she authorized the defendant to go there and sell it for her; that he did so; that he received the proceeds in 1862; that he returned with them to this country, but did not pay them over to the deceased, or render to her any account; that with

part of the money he purchased in his own name a farm, which is described in the bill; and that of the residue of the money he invested a portion in mortgages and other securities in his own name. The bill prays for an account; an injunction; and other relief. The defendant sets up, that the deceased, before the sale of the property in Ireland, conveyed it to the defendant absolutely, on condition of his supporting her for the rest of her life (she appears to have been then about eighty-one years old); and that the money produced by the sale was therefore his own, and not his mother's. There is no evidence of the alleged agreement for his mother's support (*a*); and the deed which she executed is, on production, found to be merely a deed of trust authorizing the defendant to sell, and requiring him to account to her for the proceeds. On the same day as the deed, it is proved, that there was also a power of attorney executed by the mother to the defendant to facilitate the sale. These instruments were in Ireland when the bill was filed, and have been obtained and produced by means of a commission issued at the instance of the plaintiff to examine witnesses there. How the defendant could so misstate their nature, it is difficult to imagine—unless he hoped that the plaintiff's poverty would prevent his ascertaining and establishing the truth, and would lead to his abandonment of the suit. The defendant, in his answer, relies altogether on the alleged deed, and an alleged confirmation of it on the part of the deceased, after the defendant's return to Canada, by acknowledging that she had given him all her estate, and by residing with the defendant, and being supported by him, thereafter until her death on the 6th June, 1865.

Judgment.

In argument, the learned counsel for the defendant

(*a*) Phillipson v. Kerry, 32 Beav. 635; Anderson v. Elsworth, 3 Giff. 69; and cases cited 13 Gr. 621, note.

1868.

McConnell v. McConnell.

was obliged to rely on these alleged acknowledgments as alone sufficient for the defence; for it was quite certain there was no deed, writing, or formal act of any kind by which the alleged gift was made. I was asked, however, to infer that, on some occasion of which nobody tells us anything, something or other passed, by word of mouth, between the defendant and his mother, which constituted a valid gift to him of some $10,000, being all his mother's means; and I was asked to draw this inference from some words which fell, or are said to have fallen, from her, in three or four loose casual conversations scattered over a period of three years. Three instances are sworn to by as many witnesses, in which the old lady spoke, or was understood as speaking, of having given all she had to the defendant. Another of the defendant's witnesses speaks of a conversation a few months before she died, in which she expressed an intention of giving all to the defendant—an expression inconsistent with the supposition that she had done so previously; and a fifth witness mentions a conversation in which she spoke of buying property for the defendant. So large a gift could only be upheld if very clearly proved; and loose, casual, inconsistent statements such as these would be very unsatisfactory ground for depriving the poor old lady of all her means. I say for depriving her of her means, for, if there was a valid gift, it would have been as binding against her in her lifetime, as against her administrator since her death; whether the controversy had been with the defendant himself or with creditors of the defendant. I do not recollect that the learned counsel relied much on what the witness *James Sloane* remembered and stated, as shewing the occasion of the supposed gift; his evidence is entirely insufficient to make out a valid gift on that occasion. But all the conversations which the defendant has put in evidence, are more than neutralized by abundant, reliable proof that, during

Judgment.

the period that these conversations are said to have occurred, the defendant stated and admitted all to be still his mother's.

As it is plain, therefore, that I must hold the alleged gift to be unproved as a fact, it is unnecessary to point out in how many respects such a gift would have been open to objection, or to remark at length on the argument, that in no case of a gift to a child is it necessary for the latter to shew that his parent acted freely, deliberately, knowingly, and with proper advice. If it was meant by this contention, merely that there is, ordinarily, no presumption of undue influence in the case of a gift by a father to a son, as (in the absence of evidence either way) there might be in the case of a gift by a son to his father, I entirely concur in the statement. But where, from a father's old age and decayed faculties, or from his inferior capacity, education and opportunities, or any other cause, he is proved to be dependent on one of his sons, and under his influence, it is manifest that for the father's safety and that of others, having claims upon his affection and bounty, the father, in any important transaction with the son, may need due protection against the son, even more than against a stranger or more distant relative. I proceeded on this view in *Mason* v. *Seney* (*a*), *Donaldson* v. *Donaldson* (*b*), and *Beeman* v. *Knapp* (*c*).

Judgment.

Reference was made by the learned counsel for the defendant to the doctrine, that where a purchaser takes a conveyance in the name of another, there is *primâ facie* no resulting trust to the purchaser if the grantee is his son, and there is a resulting trust if the grantee is a stranger. But in such a case the sole question is, what was the purchaser's intention at the time? and while the

(*a*) 11 Gr. 447; S. C. 12 Gr. 143. (*b*) 12 Gr. 431.
(*c*) 13 Gr. 398. See Pickering v. Pickering, 2 Beav. 31.

1868.

McConnell v. McConnell.

presumption, in the absence of express evidence either way, is as stated, that presumption may be rebutted by parol evidence. The doctrine has no analogy to that which governs gifts to persons proved to be standing in a fiduciary relation to the donor; for in these cases the question is not, what did the party intend? but "how the intention was produced?" (*a*) It has been held, however, that there is a resulting trust to a mother who purchases in the name of a child, though there may be no resulting trust where the purchaser is the father (*b*)

A widowed mother is much more apt to be under the influence of a son in a matter of business or property than a father is; but, where the evidence establishes a case of influence in regard to either, the doctrine invoked by the plaintiff is not without a just limitation; and the limitation commends itself to reason as much as the rule itself. In *Rhodes* v. *Bates* (*c*) Lord Justice *Turner* made these observations: "I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. * * The general principle, however, must, as it seems to me, admit of some limitation. It cannot, I think, be reasonably said, that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favor of such a person, ought to stand in the same position as a gift of a

Judgment.

(*a*) Per Lord Eldon, Huguenin v. Basely, 6 Ves. 266.

(*b*) Re De Visme, 2 DeG. J. & S. 17. See Soar v. Foster, 4 K. & J. 152; Tucker v. Burrow, 2 H. & M. 515.

(*c*) Law R. 1 App. 257.

man's whole property, or a liability involving it would stand in. To carry the principle to this extent would, I think, interfere too much with the rights of property and disposition, and would be repugnant to the feelings and practice of mankind. In these cases therefore, of merely trifling benefits, I think this Court would not interfere to set them aside upon the mere fact of the proof of a confidential relation and the absence of proof of competent and independent advice. In such cases the Court, before it would undo the benefit conferred, would, I think, require some further proof—proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence." On this ground, the Court upheld a transaction by which a lady, with a fortune somewhat less than £4000, became surety for her brother-in-law for the sum of £221, though there was no proof of independent advice.

Judgment.

On the same principle, where a son is proved to have occupied towards his father a relation of confidence and influence, a gift of more than a trifling proportion of the father's means may be sustainable without proof of anything more than the fact of the gift; though, doubtless, in such a case, a gift of the whole of the father's means, if large, could not be upheld without clear proof, also, of due deliberation, explanation, and advice.

In the present case, I think the defendant should have an opportunity, if he wishes, of endeavouring to make out that the money expended in the original purchase of the farm should be treated as such a gift, by way of advancement, as may be sustained, though the defendant has failed to establish his right to the rest of his mother's money. If, for this purpose, the purchase of the farm can be separated from the defendant's other dealings with his mother's money,—a point which the answer does not suggest,—it may, perhaps, be argued

1868.

McConnell v. McConnell.

from the evidence, as it now stands, that the deceased looked on the purchase as of a permanent home for the defendant, and was greatly pleased with it as such; that the price (£900) was less than half her means; that it left a sufficient margin for her support, and a considerable sum for the other members of her family who might have claims upon her consideration; that the defendant was her favorite child, and was without other means of his own; and that the plaintiff is the only other member of her family who, so far as the evidence shews, stood in need of assistance from her. There may be other facts material to be considered with reference to this farm, whether in the defendant's favour or against him; and, therefore, so far as relates to the farm, if the defendant desires, I shall merely declare, at present, that it was bought with the money of the deceased; shall direct the Master to take further evidence, at the instance of either party, of any circumstances affecting the defendant's claim to the farm, and to report either the evidence so taken or the facts thereby established, as may seem the more convenient course; and I shall reserve further directions as to this part of the case, and the costs incidental to the reference as to the same, until after the Master makes his report. Subject to these directions the Master will take the accounts as prayed. An injunction will go as prayed. The defendant must pay the costs of the suit.

Judgment.

1868.

BARR v. BARR.

Parol Evidence—Trusts.

A mortgagee, who was purchasing a prior mortgage, was advised by his solicitor to take the assignment to another person as trustee; and he took the assignment accordingly in the name of his son, not intending it as an advancement to the son:

Held, that parol evidence was admissible to prove the trust.

Having afterwards foreclosed all other incumbrancers, the same party was advised to release his interest to his son, so that the whole title might be in him as trustee. The deed did not mention any trust, but was retained by the father in his own possession, and was not communicated to the son, who knew nothing of it for more than five years, during all which time the father was receiving payments from the mortgagor to the father's own use, with the knowledge of the son, and without any claim by him:

Held, that parol evidence was admissible to prove these facts, and a conveyance to the father was decreed.

Examination of witnesses and hearing at Barrie, at the Spring sittings of 1868.

Mr. *McCarthy*, for the plaintiff, cited *Murless* v. *Franklin* (*a*), *Devoy* v. *Devoy* (*b*), *Scawin* v. *Scawin* (*c*), *Lewin*, a Trust, 4th ed. p. 125.

Mr. *Strong*, Q.C., for the defendants *John Barr* and *Thomas R. Ferguson*, referred to *Sidmouth* v. *Sidmouth* (*e*), *Grey* v. *Grey* (*f*), *Williams* v. *Williams* (*g*), *Bone* v. *Pollard* (*h*).

MOWAT, V.C.—One *James Dunlop*, now deceased, being owner of the property in question in this suit, executed three deeds affecting it; the first, a mortgage to one *Ross*, which was afterwards assigned to the plaintiff; the second, a mortgage to *Clementina Low*; and the third, a deed to the plaintiff, absolute in form, Judgment.

(*a*) 1 Swan. 12.
(*b*) 3 Sm. & Giff. 403.
(*c*) 1 Y. & C.C.C. 65.
(*d*) 2 Beav. 447.
(*e*) 2 Swan. 594.
(*f*) 32 Beav. 370.
(*g*) 24 Beav. 283.

1868.

Barr v. Barr.

but intended to operate as a mortgage. There were also other incumbrances on the property. Miss *Low* filed a bill to foreclose her mortgage, making *James Dunlop* one of the defendants; but by the decree the bill was dismissed against *Dunlop*, and the suit was thenceforward prosecuted as if the plaintiff was absolute owner of the equity of redemption. The plaintiff ultimately purchased Miss *Low's* mortgage, and the right of proceeding with the suit in her name; and his solicitor advised that the assignment should be taken in the name of a trustee for the plaintiff. The plaintiff's son, *John Barr*, then about thirty-two years of age, was named for the purpose; and on the 17th January, 1860, Miss *Low* executed a transfer to him. The son knew nothing whatever of the transaction, and the consideration was wholly paid by the plaintiff. Now the settled rule is, that where a purchase is made by a man in the name of a stranger, the presumption is, the purchase was intended for the benefit of the purchaser himself, by whom the money was paid, and there is, therefore, a resulting trust in his favor; but that where a purchase is made in the name of a son, the presumption is, it was intended for the son's advancement; and either presumption may be rebutted by parol evidence. It is clearly proved here that Miss *Low's* deed was taken to the son as a mere matter of supposed convenience to the father, and for the father's use, without any intention of its being a provision for the son. The evidence given is clearly admissible, and is quite sufficient to establish the trust.

Judgment.

The foreclosure suit was carried on at the plaintiff's expense; and, after all the other incumbrancers had been foreclosed, the plaintiff's solicitor advised the plaintiff to execute a release of all his interest to his son, as trustee for him, that the title might thereby be complete. The plaintiff assenting, a release was prepared accordingly, and was executed by the plaintiff on the 15th January,

1868.

Barr v. Barr.

1861. This deed does not mention any trust, and was not communicated to the son, but was retained by the plaintiff in h' own possession. The plaintiff continued to deal with the property as beneficially interested; and received the interest regularly from *Dunlop*, during the life of the latter, for the plaintiff's own use, with the knowledge of his son, and without any claim or interference by him. *Dunlop* died in September, 1866; since which time the plaintiff has been in possession of the property by his tenant. Shortly after *Dunlop's* death the son heard for the first time, through a third person, of the deeds which stood in his name; and having found at the Registry Office that the fact was so, he served notices in February, 1867, on the plaintiff's tenants, demanding possession. On the 2nd March, 1867, he conveyed the property to the defendant *Thomas R. Ferguson*, with covenants against his own acts only. *Ferguson* is said to have given some consideration for this conveyance, namely a piece of land; but he has given no evidence of the value of this consideration, and it was not contended that at the time of the transaction he had no notice of the plaintiff's claim. Indeed, but for this defendant's advice or purchase, it appears doubtful if the son (for whom his father had already made some provision) would have resisted the plaintiff's claim.

Judgment.

Now, if the plaintiff's deed to his son has the effect of giving to the latter the plaintiff's beneficial interest, that effect will be entirely different from what was intended; and, under all the circumstances, I think the defendants are not entitled to that advantage against the will of the plaintiff (*a*). On the argument, this deed was

(*a*) Childers v. Childers, 1 DeG. & J. 482, and cases there mentioned; Anon. cited in Woodman v. Morrel, 2 Freem. 33; Attorney General v. Poulden, 8 Sim. 172; Stone v. Godfrey, 5 DeG. Mc. N. & G. 76; Lincoln v. Wright, 4 DeG & J. 16; Barnhart v. Paterson, 1 Gr. 459; S.C. Priv. Coun. 5 ib 99.

1868. treated by both parties as standing or falling with the deed from Miss *Low*.

Barr v. Barr.

The decree will direct a conveyance by *Ferguson* (if the plaintiff prefers that course to a vesting order), with costs. The defendant *John Barr* by his answer disclaimed; but, being a wrongdoer, ought not to get costs. The plaintiff will pay the costs of the infant heir of *James Dunlop*, and add them to his own.

STUMP v. BRADLEY.

Fi. fa. against executor before probate—Injunction.

The title of an executor being derived from the will and not from the probate, the Court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate.

Motion for injunction.

Mr. *Roaf*, Q. C., for the plaintiff.

Mr. *G. D. Boulton*, for the defendant *Bradley*.

The cases cited are mentioned in the judgment

Judgment. MOWAT, V. C.—This was a motion to restrain the sale of certain land of *James Stump*, deceased, upon judgments by the defendant *William Henry Bradley* against *Daniel A. Cook*, an executor named in the will of the deceased. The testator directed his land to be sold, and the proceeds divided amongst his four children, of whom the plaintiff is one. The will has not been proved; and it was contended on behalf of the plaintiff, that a judgment against an executor who has not proved, is not more effectual, as respects lands, than a judgment against

1868.

Stump v. Bradley.

an executor *de son tort;* and that the land of a deceased debtor cannot be sold under an execution against an executor *de son tort.* The latter point has been determined in several cases (*a*), but no case has been decided that supports the former proposition. It is quite clear that the authority of an executor is not founded on the probate, but is derived altogether from the will itself. The probate is merely necessary as the proper evidence of the will so far as relates to the executor's title (*b*); and the acts of an executor, in selling goods and otherwise, are perfectly valid without probate, and though he should die without taking probate. But to prove before a Court a man's title as executor, probate to himself or a co-executor, or administration *cum testamento annexo* to some other person, must be taken out before the case comes on for trial or hearing, in order that the Court may have "the legal optics through which to look at" the will (*c*). It is to enable the Court to read the will, not to give the executor authority to act, that probate or administration is necessary; and a purchaser at Sheriff's sale may not care for this kind of proof, or it may be provided for him after the sale (*d*).

Judgment.

The grounds of the decisions in the case of an executor *de son tort* are thus inapplicable to an executor *de jure* who has merely omitted to prove. In stating those grounds in *McDade d. O'Connor* v. *Dafoe* (*e*), Chief Justice *Robinson* observed: "An executor *de son tort* has no legal control over the personal estate even, of the deceased, and has no authority to collect the effects. * * You can reach through him nothing but his own goods, or the goods of the estate which can be traced

(*a*) See McDade v. Dafoe, 15 U. C. Q. B. 386; Wrathwell v. Bates, ib. 391; Graham v. Nelson, 6 U. C. C. P. 280.

(*b*) See Robinson v. Coyne, 14 Gr. 561.

(*c*) Johnson v. Warwick, 17 Com. B. 561.

(*d*) Newton v. The Metropolitan R. W. Co., 1 Dr. & S. 583.

(*e*) 15 U. C. Q. B. 396.

1868.

Stump v. Bradley.

through his hands. * * (He) has no authority to collect the goods of the estate. * * (He) does not rightfully represent the testator, but is at most an (executor) in (his) own wrong, having no connexion with the assets of the estate, except such of them as (he) may be proved to have wrongfully intermeddled with." So, in *Graham* v. *Nelson* (*a*), where the Court of Common Pleas followed the decisions of the Court of Queen's Bench on this point, Chief Justice *Draper*, who then presided in the Common Pleas, observed: "An executor *de son tort* cannot be looked upon as representing the estate of a deceased debtor, any further than to hold him liable for his intromissions with such estate" (*b*). Not a word of these observations of the two learned Chief Justices applies to the condition before probate of an executor named by a testator, as will appear on a reference to the authorities collected by Mr. Justice *Williams* in his book on executors (*c*). In *McDade* v. *Dafoe*, the Chief Justice mentioned that an executor *de son tort* "cannot maintain an action in right of the deceased;" and this is the only reason given which can be said to be equally applicable to an executor named by the testator, who has not proved. Considering the reason for requiring a probate in order to maintaining an action, I think that, standing alone, the one circumstance of the will not having been proved constitutes no sufficient ground for sustaining the plaintiff's contention. If of any force, it would shew that an execution would be restrained as respects chattels not in the actual possession of the executor who had not proved, as well as against the testator's lands; and I apprehend such an injunction would be opposed to the well understood rights of creditors in such cases.

Judgment.

(*a*) 6 U. C. C. P. 280.

(*b*) See Yardley v. Arnold, Carr & Marsh, 434.

(*c*) Pt. 1, Bk. 4, sec. 2, p. 291, *et seq.* 6th ed.

1868.

Stump v. Bradley.

The plaintiff claims an injunction against one of *Bradley's* writs on another ground. *Bradley* has two writs in the Sheriff's hands against the lands of the deceased. One of these is founded on a judgment recovered against the deceased in a Division Court ($55), and revived against the executor; and to this writ the plaintiff's second contention does not apply. The other writ has been issued on a judgment recovered against the executor in the County Court of the County of Kent for £66 3s. 11d., damages and costs. One of the pleas in this action was *plene administravit;* to which there was a replication that the debtor at the time of his death was seised of divers lands in Kent, and devised the same to the defendant (the executor) for payment of his debts; and that these lands were assets in the hands of the defendant (the executor) for payment of the testator's debts, and were liable to payment of the demand of the plaintiff in the action. The executor took issue on this replication, and the jury found "that the defendant was seised of lands and tenements for payment of the debts of the testator." The learned counsel for the plaintiff in equity contended that the County Court had no jurisdiction to try the issue thus raised as to lands; and, on the other hand, the learned counsel for the defendant *Bradley* referred to *Mein* v. *Short* (*a*), in which it was said that a replication that the debtor died seised of lands was unnecessary, and that the issue on which the plaintiff's contention rests was therefore immaterial to enable *Bradley* to get at the lands. I think that no case for an injunction has been made out on this second ground put forward by the plaintiff; and that the plaintiff should be left to any other remedy that may be open to him.

Judgment.

The plaintiff admits that the debts for which *Bradley* is proceeding to sue are debts which were really owing by the deceased; and it is on technical grounds only

(*a*) 9 U. C. C. P. 244.

1868.

Stump v. Bradley.

that an injunction is asked for. My opinion on these points being against the plaintiff, and the amount of the debts not being large, I think the motion should be refused; and I do so without taking into consideration any of the special circumstances set forth in the defendant's affidavit.

LOUGHEAD v. KNOTT.

Will revoked by deed.

A testator devised 200 acres of his land to one of his sons, a minor, and the remainder (100 acres) to the testator's wife. The husband and wife afterwards agreed to live apart; that her 100 acres should be given to her at once; and that, in consideration of this, she should release her dower in the rest of his land. To effect this object, both joined in a deed of the 300 acres to a trustee; the trustee conveyed to the wife her 100 acres, and signed a declaration that he held the rest in trust to convey the same to any person whom the grantor should appoint:

Held, that the deed operated as a revocation of the will in equity, as well as at law:—the English statute (1 Victoria, chapter 26, sec. 23) not having yet been adopted in this country.

Hearing at Owen Sound, at the Spring sittings, 1868.

Mr. *Moss*, for the plaintiff.

Mr. *Snelling*, for the defendant, referred to *Whately* v. *Whately* (*a*), *Plowden* v. *Hyde* (*b*), *Sandford* v. *Little* (*c*), *Ford* v. *De Pontes* (*d*), *Jarman* on Wills, 2nd ed. p. 136, *et seq.* and the cases there cited.

Judgment.

MOWAT, V.C.—This is a suit by some of the children of *Hugh Loughead*, deceased, for the opinion of the

---

(*a*) 13 Gr. 436, since reversed on rehearing, 14 Gr. 430.
(*b*) 2 Sim. N. S. 171, S. C. 2 D. M. & G. 684).
(*c*) 2 J. & L. 613. (*d*) 30 Beav. 572.

Court as to the revocation of the deceased's will, and for the administration of his estate. 1868. Loughead v. Knott.

By his will, after charging all his estate with the payment of his debts, the deceased, amongst other things, devised to his infant son, the defendant *Jacob Loughead*, the west-half of lot No. 28 in the fifth concession, and the east-half of lot No. 28 in the sixth concession, of the township of Euphrasia; and to his wife the defendant *Sarah Loughead*, the east-half of 18 in the seventh concession, in lieu of dower, and of all other claims of any description she might have against the deceased or his estate. The will contained some other provisions in favor of his wife. To *William Loughead*, one of the plaintiffs, the testator gave the west-half of No. 18, in the sixth concession aforesaid.

After the making of this will, unhappy differences arising between the testator and his wife, a separation was agreed upon; and the deceased agreed to convey to his wife the half-lot he had devised to her; and his wife, on her part, in consideration of receiving this conveyance, agreed to release her dower in all her husband's lands, and all other claims she could have against him or his property. In order to carry out this arrangement, a deed was executed by both, bearing date the 26th February, 1867, purporting to be made between the deceased of the first part, his wife, of the second part, and the defendant *James Knott*, of the third part, whereby the husband conveyed all his lands (describing them) to *Knott* and his heirs, and the wife barred her dower therein; and *Knott* thereupon conveyed to the wife the 100 acres she was to have, and signed a declaration, as to the remainder of the lands, acknowledging that he held them in trust to convey the same to any person whom the deceased should appoint. I do not find either this document or the probate of the will among the papers which were handed to me for perusal, Judgment.

1868.

Loughead v. Knott.

and I have taken from the bill this statement of them. The widow disclaims all interest in the testator's estate, being content with the land conveyed to her.

Judgment.

The question is, whether the deed of the 26th February, 1867, is a revocation of the will? Previously to the act of 1834 (*a*), that, no doubt, would have been the effect of the deed (*b*). No one imagines that the testator in executing the deed had any intention of revoking his will: the contrary is admitted; and, as Lord *Mansfield* observed in *Doe* v. *Pott* (*c*): "All revocations which are not agreeable to the intention of the testator, are founded on artificial and absurd reasoning. The absurdity of Lord *Lincoln's* case [in which the rule had been applied] is shocking. However, it is now law." Most persons now-a-days concur with those "great authorities (who) have lamented that a will should be defeated by an act that does not necessarily mark that intention;" and all persons competent to form an opinion would probably agree, that the rule which makes a deed like that in question to operate as a revocation of the grantor's will, "depends on subtle reasoning; and that if it was entire, it would not now be decided; and it would be better if it never had been so decided" (*d*). The English Parliament has since, by express enactment, abolished the rule (*e*); and it never had any application where the testator's interest was leasehold instead of freehold (*f*), though the leasehold should be of 1000 years. The English enactment has not yet been adopted in this country; but from what I recollected of some of the cases in which the foundation of the rule is stated, I thought it right to defer my judgment until I should have an opportunity of considering, in view of the

---

(*a*) 4 Wm. IV. ch. 1, sec. 49, U. C. Consol. ch. 82, sec. 11, p. 831.

(*b*) Kenyon v. Sutton, 2 Ves. Jr. 601; Plowden v. Hyde, 2 Sim. N. S. 174; Jarman on Wills, ch. 7, sec. 3, 3rd ed. 136.

(*c*) Doug 722.

(*d*) See 2 Ves. Jr. 427.

(*e*) 1 Vic. ch. 26, sec. 23.

(*f*) Woodhouse v. O'Kill, 8 Sim. 122.

authorities, whether the rule should not be held to have been impliedly abrogated by the enactment rendering after-acquired freeholds devisable. My conclusion, after looking into the authorities, is, that I cannot so hold; and I shall state what has occurred to me on the point, that I may not hereafter be supposed to have overlooked it.

The terms of a deed may be so inconsistent with the provisions of a prior will that an intention to revoke may reasonably be inferred from the deed; and in such a case the deed is held to have that operation though the deed should be incapable of taking effect as a conveyance (*a*). But the rule obtains even where, as in the present instance, there cannot be said to be such an inconsistency; and in such cases the rule is often put on the ground, that the Statute of Wills authorized the devise of existing estates only (*b*). Thus Lord *Eldon* explained in *Harwood* v. *Oglander* (*c*): "By the mode of doing it he parts with the estate; and therefore *has* not the estate, in the terms of the Statute of Wills." The reasoning was more fully stated by Lord Chief Justice *Eyre*. "By a construction on the Statute of Wills, a will can only operate on those estates which the testator had at the time of making the will; and therefore, in pleading, it must be stated, that the party was seised, that he made his will and thereby devised the lands, and that he afterwards died so seised. If, therefore, the estate has been parted with after the making of the will, but comes back again to the testator with modifications of the whole interest in it, or if he should afterwards take the whole estate back again by purchase, the will could not operate on the new estate, independent of the law of revocation. The new

Judgment.

(*a*) 1 Jarman on Wills, ch. 3, sec. 4, p. 153. 3rd ed.
(*b*) See. Cave v. Holford, 3 Ves. 650, and the authorities there cited.
(*c*) 8 Ves. 126.

1868.

Loughead v. Knott.

modified estate, strictly speaking, is not the same estate; and the very same quantity of estate newly acquired, suppose it were a fee-simple, is not that fee-simple which the testator had at the time of making his will," &c., &c. (*a*).

But I cannot say that the rule is always put on this ground and no other. In *Parsons* v. *Freeman* (*b*), for example, Lord *Hardwicke* explained the doctrine thus: "Determinations in cases of revocations of wills have always been favorable to the heir-at-law. It is admitted on all hands, that, if the testator had had a legal fee, devised it, and afterwards suffered a recovery, it would have amounted to a revocation of his will; or, if the recovery had been declared to be to such uses as he should direct, and for default thereof, to the testator in fee, that this would also have amounted to a revocation; and it is as certain, likewise, that if a man seised in fee devises, and afterwards conveys the same away by any legal conveyance whatever, and takes back again a new estate, this would be a revocation of the devise. But there are cases which go further; for, if one seised in fee devises, and after levies a fine to his own use in fee, this has always been held a revocation, though the testator is in of the old use. This is a prodigious strong case. The reason is, that courts of justice, in favor of the heir, will presume that the testator had some intention to alter or revoke his will in favor of the heir, by such an act done after the will." Chief Justice *Wilmot*, in *Darley* v. *Darley* (*c*), stated the rule, and the principle of it, in the same way: "It seems to be clear, from the latest determinations on this subject, that if a man be seised in fee, makes his will and devises, and afterwards conveys by recovery, fine, feoffment, release, &c., and takes back the same or a different

Judgment.

(*a*) Goodtitle d. Cave v. Otway, 1 B. & P. 595.

(*b*) 1 Wilson, 310; S. C. 3 Atk. 747. (*c*) 3 Wils. 13.

estate, it shall amount to a revocation. The reason is, it must be presumed he intended to alter his will." I need not quote from other cases.

The rule is held to apply though by the conveyance there was no change of seisin (*a*); and though the estate of the testator was, and continued to be, equitable only (*b*), the rule having always been held to be binding on Courts of Equity, as well as Courts of Law (*c*), except in certain cases of mortgage and partition, not applicable to the present case.

I must therefore hold the deed to *Knott* to have revoked the will, so far as relates to the lands comprised in that deed. I hope that the anomaly which compels this decision may soon be removed by the Legislature.

No other point was discussed at the hearing. I think it was understood that the 175 acres now under lease were not to be sold, and that the sale should be confined to the other land. All parties are entitled to their costs. The widow's costs will be up to the hearing only, as she has no further interest in the suit. Judgment.

(*a*) Lord Langford v. Little, 2 J. & La. T. 632.

(*b*) The Earl of Lincoln's Case, Show. 154; 1 Eq. Ca. A. 411, pl. 11; Lock v. Foote, 5 S. 618.

(*c*) See Parsons v. Freeman, 1 Wils. 311; Brydges v. Duke of Chandos, 2 Ves. Jr. 417; Sparrow v. Hardcastle, 3 Atk. 802.

1868.

JONES v. JONES.

Sheriff's Sale—Construction of will—Partners.

A testator charged several legacies on his real estate, which, subject thereto, he devised, one-half to *R.*, and one-half to *G.*, his sons. Executions against the testator's lands, in the hands of his executor, to the amount of $131, and against the lands of the devisee *R.* to a larger amount, were placed in the hands of the Sheriff, and the Sheriff put up the half devised to *R.* under all these writs; it brought $1378; and the Sheriff, after paying the small executions, applied the balance to the executions against *R.*:

Held, that it was wrong to sell under the executions against the executor more than enough to pay those executions; that the effect of the Sheriff's course was to apply the property of the legatees to pay the debt of another person (*R.*); and that the sale did not deprive the legatees of their charge; but *R.* having assented to the sale, the same was not disturbed so far as it affected his interest.

The Sheriff, at a subsequent sale under another small execution against the executors, put up the whole farm, and the same was knocked down to the purchaser of the half at the former sale, at one-sixteenth of the value of the farm. Before conveyance, one of the legatees filed his bill to restrain the carrying out of this sale; and it was held he was entitled to the relief prayed.

A testator bequeathed to his wife maintenance or an annuity, at her option, to be furnished or paid by his sons *R.* and *G.*; and gave divers legacies, some of which he directed his executors to pay; and as to others, including the legacy to the plaintiff, he did not say how they should be paid; he then devised his farm to his sons *R.* and *G.*, subject to his wife's maintenance, and subject to the maintenance of his younger children, and subject also to the legacies and bequests thereinbefore contained:

Held that the plaintiff's legacy was a charge on the farm.

Statement. This cause came on for the examination of witnesses, and hearing before Vice Chancellor *Mowat*, at the Autumn sittings at Belleville, 1867.

The will, out of which this suit arose, was as follows:

"This is the last will and testament, &c.

"First.—I will and order that all my just debts, funeral, testamentary, and other expenses connected

with the settlement of my estate, be paid by my hereinafter-named executors, so soon after my decease as may be necessary or convenient. 1868. Jones v. Jones.

"Second.—I will, devise, and bequeath to my wife, *Harriet Jones*, the whole of my household furniture, including beds, bedding, linen, and wearing-apparel, to and for her sole use and benefit: I also devise and bequeath to my wife, *Harriet Jones*, the use of the west room in my house where I now reside, the keeping of a cow, and her maintenance and support while she remains my widow, to be furnished to her by my two elder sons, *Robert Jones* and *George Jones*, share and share alike; or should my said wife, *Harriet Jones*, wish or desire to have a certain yearly annuity in place of her support as above named, I will and order that she shall be paid the sum of twenty pounds yearly during her widowhood, by my sons, *Robert Jones* and *George Jones*, share and share alike, which said support or annuity shall be in lieu of all dower or right of thirds which she may be entitled to out of my estate. Statement.

"Third.—I will, devise, and bequeath to each of my daughters, namely, *Margaret Jane Jones*, *Phœbe Ann Jones*, *Nancy Jones*, and *Harriet Jones*, the sum of twenty-five pounds, to be paid to them by my hereinafter-named executors, when they respectively arrive at the age of twenty-one years; or should either of my said daughters marry before arriving at the age of twenty-one years, and my executors be in a positio nto pay them the above legacies at such times without any injury to my estate, my will is that they be paid the above legacies at the time of their marriage.

"Fourth.—I will, devise, and bequeath to my daughter, *Mary Ann Herrington*, the sum of fifty dollars, payable two years after my decease.

1868.

Jones v. Jones.

"Fifth.—I will, devise, and bequeath to my daughter, *Sarah Peastead*, the sum of fifty dollars, payable three years after my decease.

"Sixth.—I will, devise, and bequeath to my grandson, *James Jones White*, son of my daughter, *Elizabeth White*, the sum of fifty dollars, to be paid to him when he arrives at the age of twenty-one years.

"Seventh.—I will, devise, and bequeath to each of my sons, namely, *Amos Greer Jones*, *Francis Henry Jones*, and *James Harper Christopher Irwin Jones*, the sum of two hundred dollars, to be paid to them respectively when they arrive at the age of twenty-one years; and I do also give and devise to my sons their times, respectively, after my decease, till they arrive at the age of twenty-one years.

Statement.

"Eighth.—I will, devise, and bequeath to my sons *Robert Jones* and *George Jones*, the farm and homestead where I now reside, being the west-half of lot number eighty-two and lot number eighty-three in the sixth concession or Gore of Hillier, in the County of Prince Edward, and land adjoining in the fifth concession of Hillier, and to their heirs, executors, administrators, and assigns for ever; subject to the support and maintenance of my wife as above provided, and the support and education of my younger children, and subject also to the several legacies and bequests hereinbefore contained in this my last will and testament. The said farm and homestead to be divided as follows, that is to say:—To my son, *Robert Jones*, the west-half of said farm, the dividing line to be where the fence now stands, and in a straight line with the fence where there is no fence, except where the barn stands, the west-end of the barn to be the dividing line; also the west-half of that part of the said homestead lying and being in the fifth concession of said township of Hillier;

1868.

Jones v. Jones.

also to my son, *Robert Jones*, the undivided-half of the wood growing and being on the east-half of said lot, and free access thereto, till the share of the wood given to him is taken away. To my son, *George Jones*, the east-half of said homestead, subject to the boundary or dividing-line as above described; and also to my said son, *George Jones*, the undivided-half of all apples that may grow on the west-half of said lot for ten years after my decease, by which time, by proper care, he can have a bearing orchard on his part of my homestead.

"Ninth.—I will, devise, and bequeath to my sons, *Robert Jones* and *George Jones*, all my personal estate, not heretofore disposed of in this my last will and testament, share and share alike.

"Lastly.—I do hereby appoint my brother, *Francis B. Jones;* my brother, *Robert Jones;* and my son-in-law, *Thomas White*, executors of this my last will and testament, hereby revoking all former wills.

"In witness whereof," &c.

Mr. *Moss*, for the plaintiff.

Mr. *Hodgins*, for the defendant.

Judgment.

MOWAT V. C.—This suit is by one of the legatees named in the will of *James B. Jones*, now deceased; and the object of it is, to set aside certain Sheriff's sales, and to have the estate of the testator administered, in order that after payment of the debts the plaintiff and the other legatees may be paid their legacies. At the time of the testator's death all his children were minors. His will bears date 13th November, 1858, and thereby, amongst other things, he gave to his widow her maintenance, to be furnished to her by the testator's two elder sons, *Robert* and *George*, or, at her option, an annuity of £20

1868.

Jones v. Joner.

to be paid by them. To each of four daughters whom he named he gave £25, to be paid by his executors. To the plaintiff he gave $200; and he gave other legacies amounting to $550 to other persons, not saying, as to the legacies to the plaintiff and these other persons, who were to pay them. He then devised his farm to his sons *Robert* and *George Jones*, the west-half to *Robert*, and the east-half to *George*, subject to the support and maintenance of his wife as so provided, and to the support and education of his younger children, and "subject also to the several legacies and bequests hereinbefore contained." The residue of his personal estate was also given to the same two sons, *Robert* and *George*, equally. It was contended, on the part of some of the defendants, that the plaintiff's legacy was not charged on the real estate, and that he had therefore no right to file a bill as to the testator's lands. But I am clear that his legacy is a charge on the lands devised.

Judgment.

Three executors were named in the will, but one only, *Robert Jones* (not the devisee), took probate or acted. The inventory of the personal estate, filed and sworn to by the executor, shewed chattels appraised at $1,348; and a witness says that they were worth more. The defendant *Francis B. Jones*, one of the executors who did not prove, deposes that the testator's debts were from $700 to $900. He himself was a creditor, and sued the executor who had proved, for his debt, in the name of one *Henry McDonald*, and recovered judgment for $219,38, including costs. This judgment is impeached, but the plaintiff has failed to substantiate the objections made to it by his bill.

There were two Sheriff's sales of the devised lands, and at both the defendant *Richard J. Fitzgerald* was purchaser. The first sale took place on the 5th December, 1864, and was of the west-half of the testator's farm, being the part devised to *Robert Jones*. This sale was

under execution against the lands of *Robert* (the devisee) in respect of debts due by him, and under other executions against the lands of the testator in the hands of his executor. The former were numerous and for a considerable sum. There seem to have been but two executions against the executor, and these were for small sums; one was in favour of the defendants *Walter Ross* and *Donald Campbell*, on a judgment recovered for goods furnished after the testator's death, on which the balance due was $50.80, including interest and costs of writs; and the other execution was in favour of the defendant *Edward D. McMahon*, on which the amount due, including interest and costs of writs, was $89.27; and part of this judgment, also, appears to have been for supplies furnished after the testator's death. The property brought $1,378, and the purchase money, after satisfying these two small executions, was applied on the executions against *Robert Jones* the devisee. The Sheriff executed the deed to *Wm. Fitzgerald* the purchaser, on the 4th of May, 1866.

Judgment.

This sale is objected to on several grounds.

Mr. *Fitzgerald* had, before the sale, viz., on the 16th May, 1864, become the purchaser and assignee of *McMahon's* judgment against the executor, and of two judgments which *McMahon* had recovered against the devisee, *Robert Jones*, executions against whose lands upon these judgments were in the Sheriff's hands; and the Sheriff had been instructed by the attorney for the execution creditors "to receive instructions from Mr. *Fitzgerald*." Accordingly, the Sheriff deposes: "Mr. *Fitzgerald* gave me instructions for postponing the sale. It had been postponed from time to time, by his instructions." It is objected that Mr. *Fitzgerald*, having been thus allowed by the Sheriff to assume the conduct of the sale, was disqualified from becoming himself the purchaser. I know nothing of the cause of these postponements;

1868.

Jones v. Jones.

and they may or may not in this particular instance have prejudiced the sale. But it must be admitted that, if a party who takes the control of the sale, and postpones it from time to time at his discretion, is permitted afterwards to purchase, he has it in his power to postpone the sale till an opportunity occurs to buy the property at any price he chooses; and the habit of postponing Sheriff's sales from time to time is one of the causes why such sales seldom yield more than nominal prices. This sale was postponed nine times (*a*). Another objection was, that the estate of the deceased in the hands of his executor, and the estate of the devisee *Robert Jones*, were put up and sold under both writs, or both sets of writs, jointly. "There was not," the Sheriff tells us, "one set of bids for the interest of *Jones* the devisee, and another set for the interest of the deceased in the hands of the executor. There was no distinction in the bidding as to how much of the $1,378 was for the one interest, or how much for the other." This was wrong. The farm is sworn to have been worth $4,500, and the half sold would therefore be worth some $2,250. A very small part of this farm would have brought the amount of the executions against the executor; and no more than was necessary for this purpose should have been sold under these executions; for by selling more, the interest of the legatees who had charges on the property was sacrificed to pay the debts of the devisee *Robert Jones*, whose title to the property was subject to these legacies. It is clear that the sale was on this ground void as against the plaintiff and the other legatees. Other objections were made against the sale which I need not remark upon.

[Judgment]

But *Robert Jones*, the devisee, was present at the sale, and made no objection to it, and has not taken any proceedings to impeach it. He has put in no answer to

(*a*) See McDonald v. Cameron, 13 Grant, 84.

1868.

Jones v. Jones.

the defendant's bill. Mr. *Fitzgerald* claimed that the decree should therefore not disturb the sale so far as it affected the estate of *Robert Jones;* and in this view I concur. *Robert's* half appears by the bill to be subject to a mortgage, given by him to the Canada Agency Association before any of the executions were placed in the Sheriff's hands; and it is subject also to one-half the amount it may be found necessary to make good to the legatees out of the real estate, in aid of the personalty. On the other hand, Mr. *Fitzgerald* will be entitled to be repaid any amount he has satisfied of the *testator's* debts by having paid the executions against the executor under which the first sale was considered to be made. The balance will in effect be what he pays for the remaining interest of *Robert* the devisee.

Judgment.

The second Sheriff's sale took place on the 26th of May, 1866, and in consequence of its validity having been questioned Mr. *Fitzgerald* has deferred paying the purchase money or accepting the Sheriff's deed. At this sale the whole farm was put up and sold in one parcel—both the half previously sold, and the other half which had been devised to *George Jones;* and Mr. *Fitzgerald* became the purchaser at the merely nominal sum of $278, or about one-sixteenth part of the value of the farm. The sale was under a *fi. fa.*, not a *ven. ex.*, against the lands of the testator in the hands of his executor. The Sheriff said in his evidence with reference to this sale: "I took no means to ascertain what title I was selling on this occasion; I did not ascertain myself; I obtained no statement of the title from the plaintiff's attorney." Mr. *Fitzgerald* held at this time an invalid deed from the Sheriff, of one-half of the farm which the Sheriff professed to be selling; and, having reference to this fact, and to the gross inadequacy of the price at which the property was knocked down to the purchaser; and considering that the sale has not yet been carried out, and that the parties beneficially entitled to, or inter-

1868.

Jones v. Jones.

ested in, the property under the will were not parties to the suit at law, I think it is not fitting that its completion should be permitted. Such a sale by a trustee or an agent would be clearly invalid if promptly impeached; and the Sheriff, in sales under execution, occupies the position of a trustee for both parties.

The defendants, *Ross*, *Campbell*, and *McMahon*, ask the bill to be dismissed as against them with costs. I think there is no occasion for keeping them before the Court. No relief was asked against them at the bar; their executions have been satisfied; and it was not suggested that they have now any interest whatever. *Fitzgerald* is the assignee of *McMahon's* judgments; and the amount of *Ross* and *Campbell's* execution has been paid with *Fitzgerald's* money, so that they have no longer any interest in it; and, in the view I take of the case, *Fitzgerald* stands in their place in respect of the amount which his money satisfied. I think it will be proper, therefore, to dismiss the bill as against these three defendants, *Ross*, *Campbell*, and *McMahon*, with costs to be paid by the plaintiff, without prejudice to any question as to whether the plaintiff is entitled to have these costs over against any other party to the suit or out of the testator's estate.

Judgment.

It was contended on behalf of Mr. *Fitzgerald*, that *Henry McDonald*, who recovered the judgment as trustee for *Francis B. Jones*, was a necessary party to this suit. If *Francis B. Jones* had been suing, *McDonald* would have been a necessary party for the protection of the parties affected by the judgment, in order that the legal right might be bound. But if the opposite party, represented in this cause by the plaintiff, does not desire this protection, and sues the *cestui que trust* only, I do not perceive any object in holding that he must make the trustee a party; and I am not aware of any authority to

1868.

Jones v. Jones.

to that effect (*a*). *McDonald* was examined as a witness, and he admitted he had no beneficial interest in the judgment or execution.

I think *Francis B. Jones* should have his costs up to the hearing, as the plaintiff has failed to establish the charges made against this defendant in the bill. The payment by the plaintiff of these costs, like those of the other defendants, will be without prejudice to any question as to whether the plaintiff will be entitled to be recouped by any other party or out of the estate. The costs of the suit, as between the defendant *Fitzgerald* and the plaintiff or the testator's estate, can be disposed of on further directions more satisfactorily than now. An account will be taken of the amount really due by the testator's estate in respect of the executions paid or satisfied with Mr. *Fitzgerald's* purchase money, and of the execution of *Henry McDonald* (as trustee for *Francis B. Jones*). Also of all other debts of the testator; and of his legacies; and the accounts relating to the testator's real and personal estate which are usually directed in administration suits. Injunction restraining further proceedings on the judgments or writs against the executor. I reserve further directions and costs save as mentioned.

Judgment.

(*a*) See 1 Dan. Practice, 4th ed. 238, 239. This practice has now been changed by the Consolidated General Orders. See No. 58, rule 7.

1868.

RADWAY v. COLEMAN.

Injunction—Costs—Trade mark.

The plaintiffs filed a bill to restrain the use of a label which they alleged was an infringement of their trade-mark, or of any other label which resembled the same. The defendant admitted that the label he had used was an infringement, but he said that he had discontinued the use of it before suit on hearing that the plaintiffs complained of the label, and that after suit he informed the solicitors of the plaintiffs of this discontinuance, disclaimed all right of using the label, and was ready to account for the profits he had made and to pay the costs of the suit. The plaintiffs' solicitors declined to discontinue the suit; and, the defendant having put in his answer, the plaintiffs brought the cause on for hearing upon bill and answer. The defendant not disputing that his label was an imitation of the plaintiffs', or that he was aware of the plaintiffs' property in their label, an injunction was granted against using the label complained of, or any other label similar to or resembling the plaintiffs'; and the defendant was ordered to pay the costs of the suit.

Statement. This was a bill for an injunction, and the cause came on upon bill and answer.

The plaintiffs were the proprietors of a medicine or lotion called "Radway's Ready Relief," and of a trade-mark or label which they used therefor. The bill represented that the plaintiffs had expended large sums in making the article known in this Province and the United States; that their medicine was in consequence in great request and repute; that the defendant was manufacturing and selling a spurious imitation of this medicine; that on the bottles containing it he put a label resembling in several important particulars the plaintiffs' label, such as the prominent use of the three letters "R. R. R.," the name "Ready Relief," &c.; that the defendant's label was intended to deceive purchasers, and to make them believe the defendant's medicine to be that of the plaintiffs; and that the plaintiffs have been damnified thereby. The bill prayed

1868.

Radway v. Coleman.

for an injunction restraining the defendant "from manufacturing or selling any medicine or lotion called, or to be called 'R. R. R.', 'Ready Relief,' or by any other description or name similar to or resembling the same; and also from using the label or trade-mark then used by the defendant, and referred to in the bill of complaint, or any label or trade-mark similar to or resembling the same, or that of the plaintiffs hereinbefore set forth." The bill also prayed for an account; but no account was asked at the hearing.

Mr. *R. Sullivan*, for the plaintiffs.

Mr. *Hodgins*, *contra*.

MOWAT, V. C.—The defendant, by his answer, admits having used the label complained of, and he does not dispute that his label was an imitation of the plaintiffs'; or that its purpose was to make purchasers believe that the medicine which the defendant sold was the plaintiffs' medicine; and there can be no doubt, on a comparison of the two labels, that the defendant's label was contrived to imitate the plaintiffs' as closely as was supposed to be safe, with a view to promoting the sale of the defendant's article by means of the repute which the plaintiff's article had acquired. The defendant accordingly admits, "for the purposes of the suit," that his label was an infringement of the plaintiff's trade-mark or label; and the plaintiffs are, therefore, entitled to an injunction in the terms of the prayer of the bill. The only question argued was as to the costs of the suit. Judgment.

On behalf of the defendant it was contended, that either the plaintiffs should pay the costs, or the decree should be without costs; and this contention is based on two statements in the answer. The first is, that as soon as the defendant learned that the plaintiffs com-

1868.

Radway v. Coleman.

plained of his label, and before the filing of the bill, he desisted from using the label, and from selling any articles with this label upon them. But he does not say he gave notice of this change of conduct to the plaintiffs before suit, or that they were aware of it before suit; nor, indeed, does he say how long before suit he desisted from using his label—it may have been but a day or an hour. The defendant having given no notice to the plaintiffs before suit, that the conduct they complain of was abandoned, the plaintiffs were clearly justified in filing the bill.

The second statement in the answer on which the defendant relies on the question of costs is, that his solicitor, after suit, by the defendant's authority, informed the plaintiffs' solicitor, that the defendant had desisted from using the label; that he disclaimed all right to use it; and that he would account to the plaintiffs for the profits he had made; and would pay the costs up to that time. But the injunction to which the plaintiffs were entitled was something more than this offer provided for. The defendant should forego all attempt to imitate the plaintiffs' label; he should neither use the label which he had theretofore used, nor, as prayed by the bill, any other similar to the plaintiffs', or resembling it, or containing the letters and words in which the plaintiffs had obtained a property. The defendant has made one attempt, though an unsuccessful attempt, to imitate the plaintiffs' label without infringing on the plaintiffs' legal rights; no ignorance of the plaintiffs' property in their label is pretended; and the defendant's only error was, in supposing that he had hit upon a way of safely availing himself of the reputation of the plaintiffs' medicine to assist the sale of his own.

Judgment.

The plaintiffs had a right to protection against a renewal of the attempt; and the defendant's offer, there-

fore, did not include all that the plaintiffs had a right to obtain. Nor am I prepared to say that, even if all had been offered, the plaintiffs would not have been justified, after filing their bill, in incurring the additional moderate expense of a hearing on bill and answer, in order to obtain an injunction of the Court against any further infringement by a defendant who cannot be considered to have been an innocent wrong-doer. 1868. Radway v. Coleman.

The decree must be with costs.

MULHOLLAND v. HAMILTON.

Preferential assignment—Payment into Court.

In 1857 *A.* made an assignment for the benefit of his creditors, and thereby provided for the prefereutial payment of all sums which other persons were liable for, as sureties or indorsers for him:

Held, that the creditors to whom these secured sums were due, were entitled to the benefit of this provision, and would not lose it by executing the deed of assignment, though it contained a clause releasing the debtor.

Where there was a controversy as to whether a purchaser bought subject to, or free from, a mortgage which was on the property, and there was no suggestion of danger in respect of the purchase money, the Court in a very special case refused to order payment of the amount into Court pending proceedings, though a conveyance had been executed and the purchaser had gone into possession.

Statement.

This was an application by *David Morrow* and *Benjamin Walker Smith*, creditors and indorsers of *James Henry Smith*, who had made an assignment for the benefit of his creditors, and whose estate was in process of administration under the decree of this Court, for an order that the plaintiffs, the *City Bank of Montreal*, might, within a time to be limited by the Court, pay into Court the sum of £860 8s., or $3,441.60, being the balance of purchase money due from them for

1868.

Mulholland v. Hamilton.

lands purchased by them on the 9th day of February, 1859, and also interest on the said sum; or for such other order in the premises as to the Court might seem meet.

Mr. *Roaf*, Q. C., and Mr. *Snelling*, for the motion.

Mr. *Strong*, Q. C., and Mr. *R. Sullivan*, contra.

Judgment.

MOWAT, V. C.—On the 28th August, 1857, the defendant *James Henry Smith* executed an assignment to the defendants *Pollard* and *Hamilton*, for the benefit of his creditors. On the 31st October, 1857, he executed a second assignment to the same trustees, conveying (it is said) some additional property, and omitting some stipulations in the first deed which it was apprehended might render the assignment invalid. Neither deed contained any conveyance of the legal title to the lands transferred to the assignees. The second deed (which alone is among the papers put in) declared that the trustees, after paying their own charges and expenses, should hold the produce of the estate "subject to the payment of all such sums of money as shall be paid by any party or parties who have become indorsers or security in any way whatever for the said *James Henry Smith* and for his accommodation, as well as such sums as such sureties are liable to pay by reason of becoming such security as aforesaid;" and then in trust "for the payment of the claims of such of the creditors of the said *James Henry Smith* as shall subscribe these presents within four months after notice shall have been given to them of the same, in shares and proportions according to the claims by them respectively preferred and proved." The deed also contained a clause declaring, in the usual form, that the creditors executing the same released the assignor from all demands.

The plaintiffs were, respectively, at the dates of these

1868.

Mulholland v. Hamilton.

deeds, creditors of the assignor; and they subsequently obtained judgments for their debts, and issued executions against goods, and lands, respectively. In November, 1860, they filed their bill to set aside the first deed; or if it was valid, to be allowed the benefit of it. The bill made no reference to the second deed, but the defendants set it up by their answers, and alleged that the plaintiffs, the City Bank, had purchased some of the debtor's lands from the trustees under the deed. The cause came on to be heard before the Chancellor on the 8th of September, 1862, and he held the first deed to be invalid, and the second deed to be good; and, for reasons given in the judgment (*a*), he allowed the plaintiffs to come in under the second deed, notwithstanding their legal proceedings and the form of their bill. Accordingly, the decree as drawn up declared, that the plaintiffs, upon executing the deed, were entitled to the benefit of it, and to participate in the estate. This part of the decree has been acquiesced in by all interested; but the parties to the suit introduced into the decree some directions which the Chancellor had not given, and which were subsequently objected to by creditors who proved under the decree. Thus, after stating an agreement by the City Bank to accept a conveyance of certain real estate bought by them from the trustees, if the trustees could make a good title within the conditions of sale, it was ordered, by consent of counsel for said parties, that the Master should inquire and state whether the trustees could make such title; and if he found they could, a proper conveyance was to be made to the Bank, to be settled by the Master. The decree further stated, that it appeared the claims of the Bank were in respect of indorsed paper, forming the first preference charge under the said assignment, and the Bank was therefore ordered, upon such conveyance being made, to execute a release

Judgment.

(*a*) 10 Gr. 46.

1868.

Mulholland v. Hamilton.

of their claims against the estate to the amount of £860 8s.,—this sum being in the decree stated to be the amount of the purchase money agreed to be paid on the said sale (less the deposit which was thereby ordered to be paid by the auctioneer into Court); and it was directed, that the balance due the Bank should be ascertained, and paid out of the said estate. All these directions were inserted without the Chancellor's sanction. *David Morrow* and *Benjamin Walker Smith*, two creditors who proved claims in the Master's office under the decree, objected, as they had a clear right to do, to the priority given to the Bank by these unauthorized directions; and, at their instance, by an order dated 8th October, 1866, I varied the decree as drawn up, by striking out the unauthorized direction as to applying the purchase money in discharge of so much of the debt of the Bank; and by inserting directions for the Master to ascertain the priorities of the creditors according to the trusts of the deed, and for the plaintiffs to be paid in a due course of administration, ratably with other creditors having the same priority.

Judgment.

The conditions of the sale at which the Bank on the 9th February, 1859, purchased the property referred to, contained, with respect to one of the lots which the Bank purchased, the following stipulation: "The same is sold subject to a mortgage to one Mrs. *Darling* for £400." The Bank purchased two lots, this lot (No. 1) for £805 and another (No. 3) for £151, making together £956. The Bank appears to have paid to the auctioneer a deposit of ten per cent.; and the balance was to be paid on the 9th of May following. The purchase was not then carried out, however, in consequence of the trustees not having the legal estate; but the Bank paid the mortgagee what was due to her on lot No. 1; and an assignment of her mortgage was made to the Bank's Toronto manager, Mr. *Woodside*.

1868.

Mulholland v. Hamilton.

After the making of the original decree, the trustees executed a deed of the purchased property to the Bank, bearing date 13th March, 1863, such deed stating the purchase money of the one lot to be £805, less the sum of £400 due on Mrs. *Darling's* mortgage; that the Bank had paid £95 12s. by way of deposit; and that the two lots were taken by the Bank at the sum of £956, less the mortgage and the said payment, in part satisfaction of the amount due to them from the estate. This deed purported to be executed in pursuance of the decree, but had not been settled by the Master. The Master afterwards (13th March, 1866), and before the decree was varied, made his report upon the same view of the rights of the Bank as was taken by the deed; and he also certified that he had not inquired whether the trustees could make a good title within the conditions of sale, the Bank "having waived such inquiry, and accepted (the conveyance already mentioned) without such inquiry." The Master found the amount due to the plaintiff *Mulholland* to be $1,464.15; to the City Bank, $5,823.72 (after charging them with their purchase money); and to *David Morrow* (who was made a defendant in the Master's office), $4,330.91. The Master disallowed the claim of *Benjamin Walker Smith*, who had indorsed notes for the accommodation of the assignor but had not paid them. The assets were reported to be $2,135.81½, due from the trustee *Hamilton*; $78.39, due from the other trustee *Pollard;* the purchase money of the lots sold to the Bank, and which he had charged them with; and the purchase money of other lots sold to one *R. H. Smith*, at the same auction sale, for $376, but the purchase of which had not been carried out.

Judgment.

David Morrow and *Benjamin Walker Smith* appealed against the report, as respects the claim of the Bank, the disallowance of the claim of *Benjamin Walker Smith*, and the non-execution of the assignment by the

1868.

Mulholland v. Hamilton.

plaintiffs before the allowance of their claims. On the 13th September, 1866, I made an order allowing the appeal, and referring the case back to the Master, who has not yet made his further report. On the 2nd of December, 1867, the Bank not having yet executed the assignment, an order was made in Chambers, on the application of the debtor, staying all proceedings in the cause on behalf of the plaintiffs till they should respectively have executed the deed of assignment, or a duplicate thereof. This appears to have been the first step which the debtor ever took in the cause, to obtain from the plaintiffs the release for which, by the deed of assignment, he had stipulated; and even this order seems to have been moved for at the instigation of the other creditors. The Court, on the original hearing, declared the plaintiffs entitled to the benefit of the deed on executing it, and would no doubt therefore have given a direction for the immediate execution of the deed by the plaintiffs, had the assignor asked for such a direction; but he appears to have been from the first indifferent to his strict rights in respect of this release. I presume that the creditors have not attempted to enforce their debts against him personally; that he was aware they were bound by their acceptance of the assignment, though they had not executed it; and that the want of a formal or legal release was of no consequence to him.

Judgment.

Morrow and *Smith* now move, that the City Bank be ordered to pay into Court the £860 8*s*., balance of their purchase money, and interest thereon from the 9th of February, 1859, the day of sale. In support of the motion, reference was made to the doctrine of the Court as to payment of money into Court in suits for specific performance; to the Bank not having yet executed the deed of assignment; to the great delay in obtaining the Master's report; and to the order made in Chambers on the 2nd of December, 1867, at the instance of

1868.

Mulholland v. Hamilton.

the assignor. In the course of the argument, several points were discussed, which, according to the practice, other proceedings would be necessary to dispose of, but, at my suggestion, to avoid further expense as far as possible, all parties agreed that objections of form should be waived, and that I should be at liberty, on the present application, to make any order for varying the decree and former orders, that either party should appear to me entitled to on proper application for the purpose; with this exception, that the creditors *Morrow* and *Smith* did not consent to my relieving the Bank from the mortgage, should the case at present seem to me in favour of such relief, these creditors having, it was said, evidence on the point to offer.

Judgment.

One of the questions argued was, whether the Bank is at liberty to execute the assignment with a reservation of their rights against the sureties. The reason the Bank desires to execute in this way is that the two opposing creditors contend that the effect of the Bank executing the deed will be to release the sureties, and put an end to any preferential claim in respect of the debts for which the sureties are liable. The case of *Jenkins* v. *Robertson* (*a*) was cited by Mr. *Strong* to shew that, the Bank having obtained judgments against the sureties, a release of the principal would not necessarily release the sureties; and that there is, therefore, no sound objection against allowing the Bank to execute with the special reservation desired. *Jenkins* v. *Robertson* was a case of giving time to the principal, not of releasing him, which Mr. *Roaf* contended was an essential difference; but, however that may be, I incline to think that, by the fair and reasonable construction of the deed, sums due to creditors, to whom at the date of the assignment third persons were liable as indorsers or sureties, are a preferential charge not-

(*a*) 2 Drew. 352.

1868.

Mulholland v. Hamilton.

withstanding the execution of the deed by such creditors. This construction is for the benefit of the assignor; and it is therefore extremely reasonable to infer that it was his intention in making this provision; for creditors holding security could not advisedly release the debtor, if thereby they were to lose, not only their claim on the sureties personally, but also the preference which the deed gave the sureties in respect of the claims of such creditors. This construction does not put any charge on the property beyond what other creditors, provided for by the deed, were reasonably bound to contemplate; and it was evidently the view of the rights of the Bank taken by all the parties to the suit when the original decree was settled. The creditors who now contend for a different construction, do not appear to have set it up by any proceeding in the suit until the cause came on upon further directions in May, 1866. From the state of the cause, the suit was not then disposed of on the further directions reserved.

Judgment.

The language of the deed is quite wide enough to admit of the construction contended for by the Bank. The deed provides for the preferential payment, not only of "such sums of money as shall be paid" by persons who had become sureties for the assignor, but also of "such sums as sureties are liable to pay." Why should not the full meaning be given to these words, whoever may profit by that construction? What right have I to say that the sole purpose of this provision was to indemnify the sureties? and that the provision is to be construed as if it was so expressed? Would not that be qualifying the language of the deed by the merest conjecture as to the intention of it? The indemnification of the sureties would be more satisfactorily effected by their liabilities being paid by the trustees, than by their having the right, in case they could not without payment free themselves from liability, to demand repayment from the trustees of what

1868.

Mulholland v. Hamilton.

they should be compelled to pay; and why should the mode of indemnification which is more satisfactory than any other, be excluded, at the cost of introducing unnecessary implied qualifications into the language or construction of the deed? Why, on the contrary, should not the literal interpretation of the provision be adopted, since a literal interpretation is more for the advantage of both the assignor and sureties, and might be so of the creditors also whose debts are thus provided for? By the terms of the deed, the trustees are not required merely to repay the sureties what the sureties may pay, but to pay also the sums the sureties were liable for, though the sureties themselves had not paid them. To whom is the payment of the latter sums to be made? Not, I apprehend, to the sureties, or not necessarily to the sureties, but to the creditors themselves, where the sureties have not themselves paid these creditors. Why, then, should I say, that the sureties who were liable, and not also the creditors to whom they were liable, are the *cestuis que trust*, under this provision of the deed? The deed is not between the debtor and the sureties; but between the debtor and trustees for whomsoever the deed may concern. The primary motive in introducing this particular provision may have been the indemnification of sureties. But why am I to assume that the debtor did not mean to accomplish this purpose by making the sums for which they had become liable a prior charge on his estate, and not merely making the indemnification of the sureties a prior charge?

Judgment

Something less than this might happen to prove sufficient for saving the sureties from loss; but, on the other hand, this method of paying the sums for which they were at the time of the execution of the deed liable, would accomplish the desired end in the simplest and most direct way, and would relieve the sureties and trustees from various questions which might otherwise arise between the sureties and the creditors, and between

1868.

Mulholland v. Hamilton.

the sureties and the estate. Why should the release of the debtor by the execution of the deed be held, impliedly, to release also, not only the sureties, but the liability of the estate to the preferential payment of the debts secured? The release of the debtor does not put an end to the debts of the releasing creditors for all purposes, as the creditors are entitled to share the residuary estate, notwithstanding the release; and if the release does not bar this claim, why should it be held to bar the claim to preferential payment of so much of their debt as sureties are responsible to them for? I perceive no solid ground for holding that the assumption on which the Bank represent themselves as having proceeded in accepting the assignment, and in foregoing the personal liability of their debtor and his sureties, was unwarranted and wrong. That assumption was justified by the language of the deed, and its error is maintained by nothing more reliable than unauthorized conjecture.

Judgment.

I think that, whether the plaintiffs execute with or without an express reservation of their rights against sureties, they will equally be entitled to a preferential payment.

As to the claim of the Bank to be relieved of the obligation to pay the full purchase money, I express no opinion either way. Relief in such a case can only be obtained on a petition of review, unless by consent of all parties. I understand the case of the Bank to be, that the intention of both parties to the sale was that Mrs. *Darling's* mortgage should be paid out of the purchase money; that the provision to the contrary in the conditions of sale was misunderstood or overlooked by both; that the price, if held to be an addition to the mortgage, was an excessive price for the property; that the consent stated in the decree was given on the supposition by both parties that, by the terms of sale,

1868.

Mulholland v. Hamilton.

the mortgage was to be paid out of the purchase money, the form of the conditions of sale on this point being still overlooked; that, but for this supposition, the consent would not have been given; and that the title was accepted, and the inquiry as to the same waived, and the conveyance accepted, on the same supposition. The petition should therefore state these and any other facts on which the Bank relies, and should pray the appropriate relief. The petition must by the General Orders (*a*) be verified by an affidavit, but ought not, in the present case, to be accompanied by the evidence on which it is to be ultimately supported; for the case does not seem a proper one for adjudication on affidavits, except by consent. The petition should be served promptly, say within a week; and the defendant's answer should be filed within another week. On the petition's coming on to be heard, if the Court is of opinion that the petition (if true) presents a sufficient case for relief, the Court will probably either direct the question to be tried at the next sittings, or refer it to the Master to ascertain the facts, and reserve further directions on the petition until after the report. (*b*)

Judgment.

Under all the circumstances, I do not think I should order the money into Court. The delay which has taken place is attributable to the other creditors as well as to the City Bank; while, in a few weeks, or at most a few months, the rights of all parties in respect of this money will have been ascertained and settled; and there is no suggestion of any danger of loss in the meantime.

I reserve the costs until the cause comes on upon further directions.

(*a*) General Orders, 3rd June, 1853, No. 9, sec. 18.
(*b*) Vide General Order, 9th May, 1862.

1868.

Mulholland v. Hamilton.

The parties differing as to the proper order to be drawn up for the purpose of giving effect to this judgment, the minutes were spoken to in Court, and the learned Judge gave the following supplementary judgment:—

V. C. MOWAT.—I had not intended when I wrote my judgment, that the order should contain any declarations of opinion, but merely the directions I mentioned. The names of the sureties were not disclosed to me on the argument; but I am now told that *Morrow* and *Smith* were the sureties. These parties being bound by the present suit I think they have a right to say that the order should not declare that the execution of the deed may be expressed to be without prejudice to the rights of the plaintiffs against them, as the assets are not, I am told, sufficient to pay the plaintiffs, and I had no idea of adjudicating on the present application that *Morrow* and *Smith* were accountable for the balance personally. I have no objection to the orders declaring that the plaintiffs have a preferential charge, since that is the opinion I have formed; and they may execute the deed of assignment with a reference to this order, but are not to qualify their execution as being without prejudice to their rights against the sureties. The plaintiffs should have an additional number of days to present a petition, corresponding with the number lost in consequence of speaking to the minutes in Court.

Judgment.

The City Bank afterwards presented a petition to be relieved from the payment of £400 of the purchase money, according to the leave given in the judgment. This petition came on to be heard on the 27th February, 1868, when Mr. *Sullivan* appeared for the City Bank; Mr. *Roaf*, Q. C., and Mr. *Snelling*, for the defendants and creditors.

The petition, after argument, was dismissed with costs, the allegations thereof being insufficient.

1868.

Mulholland v. Hamilton.

McLennan v. Grant.

Will—Provision in lieu of dower.

Quære, whether a provision for the maintenance of the testator's widow, charged on the real estate, is by implication in lieu of dower.

A testator devised his farm to his eldest son in tail, upon condition, amongst other things, that he should support the testator's widow during her life; that she should be mistress and have the control of the dwelling-house on the farm, and should have the proceeds of one-half the cows and sheep kept on the premises; that the farm should be a home for the testator's son *John*, so long as it might be necessary for him to remain, and for another son, *Donald*, should any misfortune happen to him:

Held, that the widow was not entitled to dower in addition to the provision made for her by the will.

This cause came on by way of motion for decree.

Statement.

The plaintiff, *Murdoch McLennan*, who owned a farm which he derives title to under the devisee of *John Grant*, deceased, claimed that certain provisions contained in *John Grant's* will in favor of the defendant, the testator's widow, were in equity, though not at law, in lieu of dower; that the defendant had elected to accept these; and that she had notwithstanding brought her action of dower. The bill prayed for a declaration of the rights of the parties; a perpetual injunction; and general relief.

The will as set forth in the bill, was in the following words:—

"In the name of God, Amen. I, *John Grant*, of the township of C[illegible]ottenburgh, in the County of

1868. McLennan v. Grant. Glengary, of the Province of Canada West, yeoman, do make and ordain this, my last will and testament, touching such worldly estate wherewith it hath pleased GOD to bless me in this life, I give, demise, and dispose of the same in the following manner and form following:—

"I give and bequeath to my eldest son, *Ranald Grant*, and to his heirs of his body intail for ever, the east-quarter of lot number fourteen, in the second concession of the said Township of Charlottenburgh, and also the west-half of lot number thirteen in the said second concession; to have and to hold the same to the said *Ranald Grant*, and his heirs of his body intail forever; on condition that the said *Ranald Grant* will support his mother *Jenny Grant*, during her natural life, and that his mother, the said *Jenny Grant*, shall be mistress, and have the control in my dwelling-house on the above mentioned property, and also that she is to have the proceeds of one-half of the cows, and one-half of the sheep kept on the aforesaid premises. And the further condition, that my two daughters, *Mary Grant* and *Christy Grant*, shall have their maintenance out of the above-mentioned during the period they shall remain unmarried; and when they are married, the said *Ranald Grant* shall furnish each of them with two cows, and two sheep, bed and bedding; and, also, the said *Ranald Grant* shall give, or cause to be given, to his brother, *John Grant*, common education; and it is also provided hereby, that the above property devised shall be a home for my son, the said *John Grant*, as long as it may be necessary to remain on it; likewise to be a home for my son *Donald Grant*, should any misfortune happen to him. And, lastly, the said *Ranald Grant* is to pay in cash or stock, the sum of fifteen pounds to each of his brothers, the said *Donald Grant* and *John Grant*, when convenient for him to do so. And I do hereby constitute and appoint my brother *Alexander*

Statement.

1868.

McLennan v. Grant.

Grant, and *Allan Roy McDonald*, both of the said Township of Charlottenburgh, executors of this my last will and testament.

"In witness," &c.

Mr. *McLennan*, for the plaintiff.

Mr. *McGregor* and Mr. *Deacon*, for the defendant.

Gibson v. *Gibson* (*a*), *Miall* v. *Brain* (*b*), *Roadley* v. *Dixon* (*c*), *Hall* v. *Hill* (*d*), *Parner* v. *Sowerby* (*e*), *Bending* v. *Bending* (*f*), were referred to.

MOWAT, V. C.—The only question argued was, whether the will put the plaintiff to her election. There are no express words in the will to this effect; and *Walton* v. *Hill* (*g*) was cited to shew that, though a widow may by express words be put to her election at law, between her dower and a gift conferred upon her by will, yet it is in equity only that her obligation to elect can be insisted upon if it is to be made out by implication. This was not denied to be the correct doctrine. Judgment.

This will directed the devisee of his real estate to support the devisee's mother during her natural life, The effect of this direction is to charge the real estate with such support; but in *Baker* v. *Baker* (*h*), it was held by the Court of Queen's Bench, that such a charge did not imply that it was intended to be in lieu of dower. The learned counsel for the plaintiff argued that the decision, being on a question of equity, was not binding on this Court. But I have not sufficiently con-

---

(*a*) 1 Drew. 42.
(*b*) 4 Madd. 114.
(*c*) 3 Russ. 192.
(*d*) 1 Dr. & W. 92.
(*e*) 1 Drew. 488.
(*f*) 3 K. & J. 257.
(*g*) 8 U. C. Q. B. 562, 565.
(*h*) 25 U. C. Q. B. 448.

1868.

McLennan v. Grant.

sidered the effect of such a devise to enable me to say, whether, in the absence of that case, I would not have decided the question in the same way; and I am of opinion that this will affords other grounds for a decree in favor of the plaintiff.

Dower is defined to be that estate which a widow acquires in a certain portion of her husband's real property after his death, for her support and maintenance (*a*). And a charge of her support and maintenance on the same land by the testator does not seem identical with the case of an annuity, given by will, of a fixed sum of money, which may be sufficient or insufficient as a provision for the widow; it having been held, that to make the right to dower depend on the sufficiency of a provision made for her by will "would be opening a door to a greater inconvenience than hitherto the Court has had to struggle with (*b*)." Accordingly, an annuity

Judgment.

is held not to imply that the testator meant it in lieu of dower, though learned Judges have intimated that if the question had been untouched by decision they would have arrived at an opposite conclusion even in the case of an annuity (*c*). There is no English case as to the effect of a provision for the widow's maintenance *eo nominê*. In the American Courts, it appears to have been held, that such a provision charged on the real estate should be construed to be in lieu of dower therein (*d*). The decision in *Baker* v. *Baker* treated such a case as analogous to the case of an annuity to the widow; and I am not prepared at present either to assent to this view or to dissent from it.

(*a*) 1 Cruise, 151. (*b*) Bending v. Bending, 3 K. & J. 257.

(*c*) Hall v. Hill, 1 Dr. & W. at p. 102; Baker v. Baker, 25 U. C. Q. B. at p. 453.

(*d*) White v. White, 1 Harrison, 202, 211; Duncan v. Duncan's Executors, 2 Yeats, 302; referred to in American notes to Streatfield v. Streatfield, 1 W. & T. L. Ca. in Equity, 286, 287. See also Becker v. Hammond, 12 Gr. 485.

1868.

McLennan v. Grant.

But it was argued, that this will shews the testator intended that his son and devisee should personally occupy his real estate; and it was contended that, according to the authorities, where this is so, the widow is not entitled to claim dower in addition to the provision which the will makes for her. That appears to be the rule. In *Miall* v. *Brain* (*a*) Sir *John Leach*, Master of the Rolls, observed: "The testator directs the trustees, to whom he devises his estates, to permit his daughter to use, occupy, and enjoy a certain freehold house for her life. I think the testator contemplated for his daughter the personal use, occupation and enjoyment of his house; and such personal use, occupation, and enjoyment, is inconsistent with the widow's right to dower out of that house." So, in *Butcher* v. *Kemp* (*b*), before the same learned Judge, we have the following remarks: "The testator's plain intention is, that the trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres; and this intention must be disappointed if the widow could have assigned to her a third part of this land. This case is within the principle of *Miall* v. *Brain*, which was lately before me, in which I held the claim of dower necessarily excluded by the gift of a house for the personal occupation and enjoyment of the testator's daughter" (*c*).

Judgment.

Now, does the will in question here shew an intention of personal use and occupation of this farm by the objects of the testator's bounty? The testator was a farmer. Up to the time of his death (6th of January, 1852), he had lived on the property in question with his family, and had no means except his farm and the stock

(*a*) 4 Madd. at p. 125. (*b*) 5 Madd. 61.

(*c*) Vide also Birmingham v. Kirwan, 2 S. & L. at p. 454; Roadley v. Dixon, 3 Russ, at 203; Hall v. Hill, 1 Dru. & W. at 106, 107.

1868.

McLennan v. Grant.

upon it. The farm consisted of about 150 acres, and had on it suitable farm buildings; its value is variously estimated at from £600 to £1,000 and upwards; and a fair annual rental for it is stated by different witnesses at from £25 to £50, and upwards. *Ranald*, the devisee, occupied and worked the farm from the time of his father's death until the 7th June, 1865, and his mother lived with him, and was supported by him; but, unfortunately, he went into other business some years after his father's death, got into debt, lost the farm, and was ejected by the defendant, the present owner, on the day last named. The will devised the property to the testator's eldest son, *Ranald*, and the heirs of his body, upon condition, amongst other things, that he should support his mother (the testator's widow) during her natural life; that she should be mistress, and have the control of the testator's dwelling house on the farm, and should have the proceeds of one-half the cows, and one-half the sheep kept on the premises; and on the further condition that the property should be a home to the testator's son *John*, as long as it might be necessary for him to remain on it; and also a home for the testator's son *Donald*, should any misfortune happen to him. These provisions demonstrate an intention of personal occupation by, and for the benefit of, the various objects of the testator's bounty; and brings the case within the principle laid down in the cases cited. My decree must, therefore, be in favour of the plaintiff.

Judgment.

Shortly after the family were ejected from the farm, the widow brought an action at law for the house, claiming to be entitled to it for life under her husband's will; but the Court of Common Pleas held (*a*) that the will gave her no title on which she could maintain ejectment. She then (31st July, 1866,) filed a bill, jointly with her daughter *Christy Ann Grant*, whose mainte-

(*a*) Grant v. McLennan, 16 U. C. C. P. 395.

nance while unmarried was also charged on the property, to enforce their rights under the will. This bill was resisted on various grounds. The widow subsequently commenced an action at law for her dower, and the defendant filed a supplemental answer to the bill in equity praying an injunction to restrain this action. The suit came on for hearing before me at Cornwall, on the 26th of October, 1866, when I held that the provisions of the will as to the house, the cows, and the sheep, could not be specifically enforced by decree; but was of opinion that the Master when fixing the amount to be allowed for maintenance, should have regard to the whole will. Not being prepared immediately to decide the question as to the widow's right to have her dower in addition to this provision, I thought it right to give the plaintiffs the option of taking an immediate decree for maintenance, without prejudice to any question as to dower, instead of delaying until I should determine that question, the widow being very old—about seventy-nine years of age—and having no other means of support. The plaintiffs availed themselves of this option, and the Master, in pursuance of the decree, has allowed to the widow the annual amount of seventy-five dollars for her maintenance under the will. The present bill has for its object to obtain an adjudication as to her right to dower in addition to this allowance. My judgment on this point being against the widow, what order should I, under all the circumstances, make as to costs?

Judgment.

The widow has had to pay the costs of her action of ejectment, and will have to pay the costs of her suit for dower. On the other hand, she has had against her opponent the costs of the former suit in this Court, partly on the ground that the suit was in the main successful, and partly that the costs of a litigation to decide the rights of parties under a will, should, by the practice, come out of the estate. I think the present decree should be without costs to either party.

1868.

McDonald v. Hime.

Mortgage—Loss of mortgage deed—Costs.

Where a mortgagee loses the mortgage deed, he is bound, at his own expense, to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property; and with an indemnity against any demand third persons may have acquired, by deposit of the deed or otherwise, to the money or any part thereof.

After the loss of a mortgage deed, the mortgagor offered to pay the over-due interest, on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults. The Court *held* that the plaintiffs must bear the expense of the proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit.

This was a suit to foreclose a mortgage executed by the defendant in favour of the plaintiffs, dated 12th April, 1864, securing $600, with interest, payable, the principal in five years, and the interest half-yearly in the mean time. The defendant on the 3rd of February, 1865, paid the interest which fell due on the 12th October previously, but paid nothing afterwards. The cause was brought on by way of motion for decree.

Mr. *J. A. Boyd*, for the plaintiffs.

Mr. *Edgar*, for the defendant.

Judgment. Mowat, V. C.—In answer to this motion an affidavit was produced to shew that the plaintiffs' solicitor, after amending his bill (4th July), had, on a flimsy pretext and in an ill-tempered way, refused to amend the defendant's office-copy. But the affidavit not having been filed within the time required by the General Order of 3rd June, 1853 (No. 16, sec. 1.), was not receivable.

1868.

McDonald v. Hime.

The learned counsel for the defendant then urged that, on a motion of this kind, the plaintiffs were bound to shew that they had complied with their duty as to amending the office-copy. But I do not think that the practice has been to require this. The defendant should have brought the conduct of the solicitor before the Court when the circumstance now relied on occurred, and anything improper would have been put right at the expense of the party in the wrong. Much unnecessary expense and delay would be the consequence of allowing the defendant to lie by until a motion for decree comes on, and then to take such an objection. The notice of the present motion was served on the 5th of November, and the motion came on upon the 26th of the same month.

It was then said on the part of the defendant that the plaintiffs had lost the mortgage deed; and it was urged that the defendant was entitled to an indemnity before paying, and to the costs of the suit.

Judgment.

The loss of the mortgage was admitted; but it is sworn to, and not disputed, that the defendant, in the year 1865, offered to Mr. *T. A. McLean*, who was acting for the plaintiffs, that if the plaintiffs made an affidavit that they had not parted with the mortgage, he, defendant, would pay up the interest. This proposal was communicated by Mr. *McLean* to the plaintiffs on the 17th October, and the required affidavit was made on the 24th October, and sent to the defendant; and was retained by him without objection until produced under the order for production of documents. I think that the defendant has thereby lost his right to insist on an indemnity before paying up the arrears of interest *then* due; but I think that the waiver of the rights which the loss of the mortgage deed gave him ought not to be construed as going beyond this.

1868.

McDonald v. Hime.

The defendant's answer makes several statements with a view to his being relieved of the costs of the suit.

The defendant alleges that he applied to the plaintiffs for the particulars of the mortgage, and of the amount of interest overdue, and offered, on receiving these particulars, to pay what was overdue. But having agreed to pay the arrears of interest on having the affidavit furnished to him, and this having been done, the defendant had no right to insist on any new condition before fulfilling his promise. He says he had no memorandum of the particulars he asked for, but he does not pretend he was ignorant of them; and I have no doubt that he was not. There does not appear to have ever been room for any question or doubt as to the amount due. The application appears from the correspondence to have been made by letter to the plaintiffs' solicitor on the 21st December, 1866. If the plaintiffs had had the mort-

Judgment.

gage, they would not have been bound to give the defendant a copy of it, or to allow him to inspect it (*a*). A memorial was registered at Toronto where the defendant resides; and the loss of the deed cannot entitle the mortgagor to what he would have had no right to demand if the mortgage was in the possession of the mortgagees.

The defendant further says, that he, on several occasions, offered to pay the whole principal and interest on his title deeds being returned, and his mortgage being produced and discharged. But he does not say when this occurred, or to whom the alleged offers were made: unless made to the plaintiffs or some agent for the plaintiffs before suit, the defendant's offers, whatever they were, are immaterial. No such offer as he mentions appears in the produced correspondence; no personal communi-

(*a*) Brown v. Lochart, 10 Sim. 420; Freeman v. Butler, 33 Beav. 289; Bentinck v. Willink, 2 Hare at p. 8.

1868.

McDonald v. Hime.

cation appears to have taken place between the defendant and the plaintiffs; the latter live in Ottawa; and it is not alleged that before suit the defendant ever asked for an indemnity, or that the subject of an indemnity was broached between him and the plaintiffs. The only thing the defendant did ask for, before the 21st December, 1866, was the affidavit, which was immediately furnished to him; and on the 21st December, 1866, he asked for what he was not entitled to demand, and what I cannot suppose that he needed information about.

I think the defendant is entitled to an indemnity against any demand which any one other than the plaintiffs may have acquired to the mortgage money or any part thereof,—though the risk of such a demand, which, even in the absence of a registry law, was pronounced by Sir *William Grant*, in *Stokoe* v. *Robson* (*a*), to be "very slight," is in this country still more slight, if not merely nominal; "but in such a case some security is taken in point of form." The defendant is also entitled to such proof of the loss as he would require to give a future vendee of the property (*b*). This proof, and the indemnity, must be given at the expense of the plaintiffs (*c*). With this exception, I think the plaintiffs should have the costs of the suit as in ordinary foreclosure cases, the defendant having, in consideration of the affidavit which was furnished, waived his right to object to pay the interest then due, and not having paid the same.

Judgment.

The defendant's Counsel made no claim to compensation for the loss; and the defendant seems entitled to none, beyond the costs which I allow him; compensation not being given "upon any speculation as to the damages which the title might suffer from the absence of the deed,

(*a*) 19 Ves. 385, 3 V. & B. 51.
(*b*) Vide Lord Middleton v. Eliot, 15 Sim. at p. 535.
(*c*) Shelmardine v. Harrop, 6 Madd. 38; 19 Ves. 385, 15 Sim. 531.

1868.

McDonald v. Hime.

upon a dealing with the property hereafter, as affecting the marketable value of the estate" (*a*), but only to cover the costs of the secondary evidence which the mortgagor must be provided with in future dealings with the property.

There being no question as to the amount due, the proper evidence of the loss may be produced to the Judges' Secretary, who will also settle the proper indemnity, if the parties differ about it. The form of the bond which was given in *Stokoe* v. *Robson* is printed in a note to *Shelmardine* v. *Harrop*, (*b*), though the elaborate recitals in that bond should be avoided: all that is necessary in the way of recitals in the present case may easily be compressed into a single folio. The

Judgment.

costs which I give the defendant will be set off against the amount which he has to pay. In other respects the decree will be in the usual form of foreclosure decrees.

In re Thorpe.

Foreign Administration—Bona Notabilia—Limited Administration.

A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him and a release by the heirs are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the Act for Quieting Titles.

Where a person, resident in a foreign country, dies possessed of mortgages on land, situate in the Province, the Surrogate Court, of the county within which the land lies, has jurisdiction to grant administration where the Surrogate Court of no other county has jurisdiction.

The Surrogate Courts of this Province have the same authority to grant limited administrations as the Probate Court in England has.

This was an appeal from the report of Mr. *Turner*,

(*a*) Brown v. Sewell, 11 Hare, at p. 54; Hornby v. Matcham, 16 Sim. 324.

(*b*) 6 Madd. 40

as Referee under the Act for Quieting Titles, refusing the applicant a certificate of title, on the grounds appearing in the judgment. 1868. In re Thorpe.

Mr. *C. S. Patterson*, for the applicant.

MOWAT, V. C.—Mr. *Turner*, to whom the petition in this matter was referred, has reported his opinion to be that a title free from incumbrances has not been shewn; and counsel for the petitioner contended before me that this opinion was wrong. The facts bearing on the point I understand to be these: A former owner of the property, a resident of Upper Canada, mortgaged it in fee to a person, also residing here; and the mortgage and mortgaged premises afterwards became vested by assignment in *Orville Brainard*, a resident of the State of New York. *Brainard* died in that State intestate, having in his possession there the mortgage in question. After his death, the petitioner, a resident of Upper Canada, who had become owner of the equity of redemption, voluntarily remitted the mortgage money to the persons who took out administration to *Brainard's* estate in New York, and these persons executed a release of the mortgage. No administration has been taken out in this Province; and the petitioner claims, that this release was sufficient to discharge the mortgage, and to transfer to the petitioner the legal estate in the property: the Referee thought otherwise. The sufficiency of this release is the point which I have to decide. Judgment.

The Upper Canada Act, respecting mortgages of real estate (*a*), gives a power to re-convey to any executor or administrator who is entitled to receive the money secured by a mortgage. Does this refer exclusively to an executor or administrator recognized or appointed by

(*a*) Ch. 87, sec. 5, p. 868.—*vide* also ch. 89, secs. 58 & 59, p. 895.

1868.

In re Thorpe.

a Surrogate Court of this country, or does a foreign administrator in a case like the present come within the meaning of the Act?

It was said at the bar that, specialty debts being *bona notabilia* wherever the instruments creating them happen to be at the time of the creditor's death, a foreign administrator must be entitled to receive payment of them if the instruments were in the foreign country when the creditor died. Is a mortgage like other specialty debts, on a question of *bona notabilia?* Is the locality of the instrument, or of the mortgaged property, the test in the case of a mortgage? I have found no English case on that point. Leases are held to be *bona notabilia* where the land lies, and not where the leases happen to be (*a*); and the same has been held in regard to an annuity for years out of a parsonage (*b*).

Judgment.

But if mortgages are on the same footing as specialty debts generally, does this determine the question as between a foreign and a domestic administration? I do not find it stated anywhere that it does; and it could hardly be so, for the administration granted by the Ordinary, within whose territory a specialty debt happened to be when the creditor died, was sufficient to sustain a suit for such a debt in any other part of England; but it is qite clear that a foreign administrator, under like circumstances, could not maintain a suit in England (*c*). Formerly, the Ordinaries were accustomed to administer the personal property of persons deceased, for the good of the soul; their

(*a*) *Vide* Attorney General v. Bouwens, 4 M. & W. 191; Danyel v. Walford, Dalison, 76.

(*b*) Notes to Daniel v. Luker, 4 Dyer, 305a.

(*c*) See Whyte v. Rose, 3 Q.B. 493, 507; Attorney General v. Bouwens, 4 M. & W. 193; Bond v. Grahame, 1 Hare. 482; Tyler v. Bell, 2 M. & C. 109; Silver v Stein, 1 Drew. 295; Story's Conf L., sec. 513 and notes.

1868.

In re Thorpe.

jurisdiction extended to all the personal estate which was within their reach and disposition; and the rules as to *bona notabilia* were established merely to prevent conflicting jurisdictions between different Ordinaries (*a*). Goods and chattels in a foreign country were necessarily beyond the jurisdiction of any domestic authority; and so were debts due by persons residing out of the kingdom, and not founded on instruments which could be disposed of in the kingdom. But mortgages on property within the diocese would, probably, not present any such difficulty though the mortgage deeds were elsewhere. Whatever power the ecclesiastical authorities then possessed in this respect, now belongs to an administrator duly appointed by the proper authority in the country.

It was admitted, on the argument, that no suit could have been brought by the foreign administrator to enforce in this country the mortgage in question.

Judgment.

In the State of Massachusetts it appears to have been expressly held, that mortgages can only be disposed of by administrators duly appointed in the State (*b*); and Mr. Justice *Story*, whose opinion is of great value on a question of this kind, evidently approves of the decision (*c*), though Chancellor *Kent* decided a similar point otherwise (*d*).

It was argued, that, if payment to and a release by a foreign administrator are not sufficient, the owner of the estate has no way of getting rid of the incumbrance, as no administration has been or (it was said) can be taken out in this Province. If there were any force in

(*a*) Vide Attorney General v. Bouwens, 4 M. & W. 191; Attorney General v. Hope, 1 Cr. M. & R. 543, 548, &c.

(*b*) Cutter v. Davenport, 1 Pick. 81.

(*c*) Story's Conf. L., secs. 514, 523.

(*d*) Doolittle v Lewis, 7 John. C. 45, 47.

1868.

In re Thorpe.

the argument addressed to me on this point, it would shew that there is no remedy whatever against debtors resident here and liable to a non-resident creditor, on sealed instruments which were in a foreign country at the creditor's death (*a*). But I am clear that administration in such a case can be taken in this Province. The 11th section of the Act respecting Surrogate Courts (*b*), provides, that if the testator or intestate has no fixed place of abode in, or resided out of, Upper Canada at the time of his death, such grant may be made by the Surrogate Court for any county in which the testator or intestate had personal or real estate at the time of his death. Debts by specialty due by debtors here are certainly in a sense personal estate *in* the county where the debtors happen to reside, though such debts may not technically be *bona notabilia* there; and I have no doubt that the Surrogate Court of that county has authority to grant administration, where the Surrogate Court of no other county has jurisdiction. I have no doubt, either, that mortgages may, if necessary, be regarded as personal estate, within the meaning of the Act, in the county where the mortgaged property lies, in case otherwise there would be a failure of jurisdiction.

Judgment.

The inconvenience of taking out general administration here was, I think, referred to on the argument. But a general administration is unnecessary. The Court of Probate in this country always exercised the same jurisdiction in granting limited administrations as was possessed by the Ecclesiastical Courts in England (*b*); and I see no reason to doubt that this was rightfully done (*c*), and that the Surrogate Courts have now a like authority.

(*a*) Vide Whyte v. Rose, 3 Q. B. 506; Story's Conf. L., secs. 512, 513, 523, 529, &c.

(*b*) Con. Stat. U. C. ch. 16, secs. 11, 33, 34.

(*c*) Williams on Exors., 6th ed. 497 to 504; U. C. Con. Stat. ch. 16, secs. 809, 17; Grant v. G. W. R. Co., 7 U. C. C. P. 438.

I think that the Referee's opinion was correct; and that a certificate of title can only be granted subject to the mortgage, unless the petitioner chooses to take the necessary steps for obtaining a release or re-conveyance from an administrator to be appointed here. 1868. In re Thorpe.

MOWAT, V. C.—After having given judgment in this case, I was referred by the learned counsel to what was said by *Tindal*, C. J., in *White* v. *Rose* (*a*), and by Chancellor *Kent* in *Cutter* v. *Davenport* (*b*), as shewing, though a foreign administrator may have no power under the Statute to execute an instrument that would vest the property in the petitioner, yet that payment to the foreign administrators was good, and a re-conveyance from the heirs of the deceased—which was more convenient than obtaining administration—would remove the difficulty. But the observation of Lord Chief Justice *Tindal*, which is relied on, was not a decision, but a *dictum* only, and had not reference to a mortgage, but to a bond. In the absence of any express and binding authority, I do not feel justified in holding the voluntary payment to the foreign administrators to be sufficient, for the purposes of the Act for Quieting Titles. The considerations in favour of an opposite view appear to me very strong. "Some of those which apply to any debt due by a debtor who at the death of the creditor is actually domiciled in, and owes the debt in, the country where no administration has been taken out"——— Judgment.

[redacted] are thus stated by Mr. Justice *Story* (*c*): "Suppose an administration should afterwards be granted in a foreign country [as Ontario is a foreign country to the New York administrators in the present

(*a*) 3 Q. B. 510. (*b*) 1 Pick.
(*c*) Conflict of Laws, 6th ed. sec. 515 *a*. See also secs 513, 514, &c.

1868.

In re Thorpe.

case]: would it be any bar to an action by the foreign [here in Ontario] administrator, against the debtor for the same debt, that the debtor had already paid it to another administrator, who had no right to demand it in virtue of his original administration, and who, therefore, might properly be deemed a stranger to the debt? Suppose a contest to arise between the original administrator and the foreign administrator in relation to the administration of the debts so recovered as assets of the deceased, could the original administrator retain it against the will of the foreign [Ontario] administrator; or thereby subject it to a different application, in the course of administration and marshalling assets, from that which would otherwise exist? It seems difficult to answer these questions in the affirmative, without shaking some of the best established principles of International Law on this subject." (*a*)

Judgment.

GOETLER v. ECKERSVILLE.

Pleading—Demurrer—Multifariousness.

An execution creditor of *A* filed a bill impeaching a conveyance made by the debtor to *B*, as fraudulent against creditors: alleging that to give colour to the impeached transaction, notes had been delivered by the grantee to the debtor's wife, for the pretended consideration of the conveyance; the parties falsely pretending that the property was hers. The bill prayed an injunction against the notes being paid or parted with until decree, and claimed a lien thereon in case the sale to *B* was not fraudulent. The debtor, his wife, and their grantee, were the defendants to the bill:

Held, that the bill was not multifarious.

Whether, in case the sale to *B* was upheld, the plaintiff was entitled to the alternative relief.—*Quære.*

Demurrer.

(*a*) See also Preston v. Mellville, 8 C. & F. 12, 14, &c.

The bill stated, in substance, that the plaintiff was a judgment creditor of the defendant *Joseph Eckersville*; that an execution against the defendant's lands, on this judgment, was in the hands of the Sheriff of Perth; that after the debt was contracted, and before the judgment was recovered, *Joseph Eckersville* owned the equity of redemption of certain land in that county, described in the bill; that, being in insolvent circumstances, and unable to pay his debts, and with intent and design to defeat and delay the plaintiff and his other creditors, by a conveyance, dated the 2nd April, 1866, and made between the said *Joseph Eckersville*, of the first part, the defendant *Mary Eckersville*, his wife, for the purpose of barring her dower only, of the second part, and the defendant *Michael Kastner*, of the third part, the said *Joseph Eckersville* conveyed the said land to the said *Michael Kastner*; that the consideration named in this conveyance was merely a pretended consideration, and was not paid or intended to be paid; that *Kastner* was well aware of this; that he took the conveyance with the intent and design aforesaid: and that he confederated with *Joseph Eckersville* to defraud the plaintiff by means of the said conveyance. Statement.

The bill charged, that if the sale was real and *bona fide*, and for valuable consideration, the purchase money had not been paid, and was bound by the plaintiff's execution.

The bill stated, that in order to give color to the pretended sale, or for the purpose of more effectually carrying out the same to the prejudice of the plaintiff and the other creditors, several promissory notes in respect of the purchase money, and for considerable amounts, were made by *Kastner*, in favor of the defendant *Mary Eckersville*, and were in her hands and unpaid; and that it was pretended that the land in question belonged to her, but this the plaintiff utterly denied.

1868.

Goetler v. Eckersville.

These were the principal statements of the bill; and the prayer was, that the conveyance to *Kastner* might be declared fraudulent and void against the plaintiff; that *Kastner* might be restrained until decree from paying the notes; that the payee *Mary Eckersville* might be restrained from parting with them; that the plaintiff might be paid the amount of his execution; or that, in default, the land might be sold under the decree of the Court, and the plaintiff paid out of the proceeds: or that the Court might declare the notes or purchase money to be subject to the plaintiff's execution; and that his execution might to be paid out of the same; and for further relief.

To this bill *Kastner* demurred for multifariousness.

Mr. *J. A. Boyd*, for the demurrer.

Mr. *J. A. Donovan*, *contra*.

Judgment.

MOWAT, V. C.—I see no ground for the objection of multifariousness. The bill has a double aspect; and a bill with a double aspect is not necessarily objectionable. The bill first seeks to set aside the conveyance for fraud; and to a bill for this purpose only, *Kastner* would clearly be a necessary party. In the event of failing to establish by evidence the case of fraud, the bill seeks, as an alternative, to obtain payment out of the purchase money; and if the plaintiff is entitled to this relief, *Kastner* seems a proper party to a bill seeking it. Whether, if there was no fraud, the plaintiff is entitled to be paid out of the purchase money; or whether, if so entitled, he can by the practice here obtain that relief on a bill impeaching the transaction or must file a new bill, it is unnecessary to say, as neither question has anything to do with the objection of multifariousness. A general demurrer for want of equity could only have been sustained if the plaintiff was entitled to no part of the relief sought.

1868.

Goetler v. Eckerseville.

The objection chiefly urged appeared to be, that the plaintiff had no right by the same bill to seek relief in respect of both the conveyance and the notes. But the relief is alternative only; and the conveyance and notes are so closely connected that a demurrer for multifariousness on the ground of such alternative relief being sought, is out of the question. It was argued that I should presume that the notes were the consideration for the dower only. This is impossible in view of the allegations which the bill contains; and if the bill had expressly alleged that the notes were given for the dower, the objection for multifariousness would not receive much aid from the allegation.

I think the demurrer must be overruled with costs.

THORPE v. SHILLINGTON.

Will, construction of—Undisposed of residue.

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shews that the testator intended they should take the residue beneficially.

Where money, mortgages, and promissory notes, were bequeathed to a legatee for life, it was held, that she was not entitled to the possession and disposition of the same, but to the income only; though of farming stock and implements given for life by the same clause she was to have the use in specie.

Statement.

This cause was heard on bill and answer. The plaintiff was the widow, and one of the legatees, of one *Samuel Kerfoot*, who died on the 20th March, 1867. The defendants were the executors and the plaintiff's husband, the plaintiff having married again. The bill prayed, that the trusts of the testator's will might be carried out; that the executors should account for their dealings with the estate; that the property and moneys

1868.

Thorpe v. Shillington.

to which the plaintiff was entitled under the will might be adjudged to be delivered over to her specifically; that her title to such as the testator had not disposed of should be declared and determined; and for an injunction; and all proper directions; and general relief.

The questions argued appear in the judgment.

Mr. *Hodgins*, for the plaintiff.

Mr. *Crooks*, Q. C., for the defendant.

Judgment.

MOWAT, V. C.—It is clear that the English Statute, 11 George IV. & 1 William IV. chapter 40, having been passed before 1837, is binding on this Court; and that executors must be deemed trustees for a testator's next of kin in respect of any residue not disposed of by his will, unless it expressly appears by the will that the testator meant his executors to take such residue beneficially. The executors in this case are not charged by the bill with having before suit claimed to be entitled beneficially; and they make no such claim by their answer, though counsel on their behalf raised the point at the hearing.

The plaintiff seeks to charge the executors with the costs of the suit; because, amongst other things, they have refused to give up to her the mortgages and promissory notes left by the testator; and this is the only ground entitled at present to consideration, as the statements of the bill, suggesting other grounds for charging the executors, are denied by their answer. The executors say, they have been advised by one lawyer, that the plaintiff is not entitled to the personal possession of the mortgages and notes; and by another, that she is; and they submit the point to the Court. I think their refusal to give the plaintiff the mortgages and notes was proper. The clause of the will, under

1868.

Thorpo v. Shillington.

which her claim is made, is this: "I give and bequeath unto my wife *Elizabeth Kerfoot*, should she survive me, all my chattels,—consisting of stock, household furniture, farming implements, money, mortgages, promissory notes, and all other property which I may die possessed of, or to which I may have any title either at law or equity at the time of my death,—to have and to hold the same for her sole use and benefit during the term of her natural life, subject to the payment of my funeral expenses, and all the legal claim and legacies or bequests hereunto made." The testator also gave a lot of land (100 acres) to the plaintiff for life, with remainder to the testator's nephew *Samuel Kerfoot Shillington*, in fee; and after the plaintiff's death this nephew was to have (in the words of the will) "one span of good horses, four good cows, and all the farming implements belonging to my farm at the time of the death of my wife, provided he lives on and cultivates my farm, and conducts himself to the satisfaction of my executors, till the time of the death of my wife; and should he fail to do so, he shall forfeit all claim to said horses, cows, and farming implements, and they shall be at the sole disposal of my wife." The testator also gave two legacies,—one of £100 to *John Henry Ward*, to be paid out of the personal property when he is of the age of twenty-one years, or sooner, if the testator's widow or executors should think it advisable: the other legacy was of $4. Of the residue of the estate the will made no disposition. The testator owed a few debts; less, it is said, than £100 in all.

Judgment

It appears from the answer of the executors, that they left in the widow's possessiom the chattels which the nephew is to have on her death, and also certain furniture; that with her consent they sold the rest of the testator's loose property, partly for cash and partly on credit; and that they paid over to the widow the money they received.

1868.

Thorpe v. Shillington.

As to so much of the testator's property, not required for other purposes, as consisted of mortgages, notes and money, I think the plaintiff is entitled to the annual income only. A bequest of government stock for life would clearly not entitle a legatee for life to a transfer of the stock into her own name; and a bequest of mortgages, notes and money must be in a like position A legatee for life is entitled to the possession of things bequeathed specifically where there is no other way of her having the use of them; but the use of public stock, mortgages, notes, money, and the like, for life, consists in having the income which they produce.

The particulars of what have been sold are not given, and it does not appear whether they included things *quæ ipso usu consumuntur*. Subject to any question there may be, under the will, as to things falling within that class, I think the widow is entitled to the income only of what has been sold by the executors with her consent. There was no discussion of the authorities bearing on the construction of the will, but many of them are collected in Williams on Executors. (*a*)

Judgment.

The widow is entitled to half the undisposed of residue of the personal property, if the testator died, as I presume he did, without children; and his next of kin are entitled to the other half. There must be the usual inquiries as to next of kin; and the accounts usually directed in administration suits must be taken. An inventory of the particulars left with the widow should be made and signed, if her right to the possession of them in specie is not questioned by the next of kin. Further directions and costs reserved.

(*a*) Vol. 1, 6th ed., notes at 1089 to 1095, 1294, 1296. Jarman on Wills, 3rd ed., 577 to 586. See Philips v. Beal, (No. 1) 32 Beav. 25; Morgan v. Morgan, 14 ib. 72, 84, &c.; Holgate v. Jennings, 24 Beav. 630.

(*b*) Seton on Decrees, Form 15, p. 172, 3rd ed.

1868.

DAVISON v. WELLS.

Equitable estate—Purchase for value without notice.

The owner of an equitable interest in lands under a contract of purchase made a conveyance thereof to the plaintiff his brother-in-law, and subsequently while still in possession of the land assigned the same property to third parties, in consideration of their giving him a lease of the premises, which was subsequently executed in the presence of, and witnessed by, the plaintiff after the deeds were completed. The plaintiff some time afterwards filed a bill impeaching the assignment and lease as fraudulent. The evidence tended to shew that the conveyance to the plaintiff was colorable only; and there not being any evidence of notice of the claim of the plaintiff—the Court dismissed the bill with costs.

Semble, the defence of purchase for value without notice is available to a party although the interest conveyed is an equitable one only.

Examination and hearing at Cobourg.

Mr. *Strong*, Q.C., and Mr. *W. Kerr*, for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *Armour*, for the defendants *Fluke* and *Hovey*.

The bill was *pro confesso* against the defendant *Wells*.

SPRAGGE, V. C.—There is a great deal to shew the conveyance from the defendant *Wells* to the plaintiff to have been merely colorable. There is no proof of the payment of any consideration from the plaintiff to *Wells*. The only piece of evidence in regard to consideration is that of *Mallory*, a witness to the deed, who says, "At the execution of the deed I saw Mrs. *Wells* pick up something and say, 'I suppose this belongs to me.' It was a parcel, but I could not tell what it was. This was the only consideration that I saw paid, or that passed in the way of consideration, if that was consideration." Then, the possession continued in *Wells* after this conveyance; and he was the party in possession and in Judgment.

1868.

Davison v. Wells.

apparent ownership at the time of his assignment to *Fluke* and *Hovey*. Another circumstance is, the contract of sale between *Wells* and *Moffatt* spoken of in the evidence of *Moffatt* and *McNaughton;* and the dealing with the land by *Wells* as owner in the negotiations for sale with the cognizance of the plaintiff. This seems to have excited no surprise in the mind of *McNaughton;* he says he knew that *Wells* was always in trouble; and did not think it extraordinary that he had made a deed to the plaintiff. The plaintiff and *Wells* were brothers-in-law. Again, upon the occasion of the making of the lease by *Fluke* and *Hovey* to *Wells*, the plaintiff was made aware that the land in question was being inserted in some shape in the document. That also is evidence of continued ownership in *Wells*, if it is not evidence also of notice to the plaintiff, of the purpose and intent with which it was so inserted. At the request of the person who drew the lease the plaintiff witnessed it. His attention was particularly drawn to the fact of this parcel of land as the land on which *Wells* lived, and by the number of the lot, being inserted in the document; and I think it a fair inference from all the circumstances, that he knew the purpose of its being so inserted.

Judgment.

I am of opinion also that *Fluke* and *Hovey* make out their defence of purchase for value without notice. *Wells'* interest was equitable under his contract of purchase. By the agreement at the foot of the lease, and which bears date 15th December, 1858, he agreed to assign that interest to the lessors; and by formal assignment dated the following day he did assign it to *Fluke* (*Fluke* being therein trustee for *Hovey*, as well as on his own behalf). As to the consideration it is expressed to be the lease of 15th December, and the covenants therein contained, and the nominal consideration of one dollar. The purpose of the assignment was expressed to be to secure the expenditure of $200

1868.

Davison v. Wells.

on the demised premises during the first year, and the payment of the rent during the residue of the term.

I think this makes out a complete defence. *Fluke* and *Hovey* were purchasers *pro tanto*, and they paid, *i.e.*, satisfied the whole consideration for the assignment. They made the lease: that was the consideration. As to covenants, the lease does in fact contain no covenants on the part of the lessors, unless it be the agreement to furnish 2000 feet of lumber towards the repairs, which were to be done by *Wells*. Taking that to be what was meant by the word "covenants" (though the word, probably, was merely inserted from a form) it was the lease and covenant, not the fulfilling of the covenant by furnishing the lumber, that was the consideration for the assignment.

Judgment.

Further, the conveyance was perfected. It did not rest in articles merely, but it was as complete as from the nature of the interest conveyed it was capable of being. I do not find any authority for the proposition contended for as I understood by plaintiff's counsel, that the vendor must have the legal estate or at least the right to get it in. *Wilkes* v. *Bodington* (*a*) was a case of purchase of an equitable estate. It is indeed necessary to this defence that it should be alleged and proved that the vendor was seized or pretended to be seized; in some of the cases it is said *in fee*, but it is evident from *Story* v. *Windsor* (*b*) that it need not be a seisin *in fee*, but that the rule holds good in regard to a less estate as well. In this case at any rate the allegation and proof are that the vendor represented himself to be entitled to an equitable estate in fee. The answer sets this up in so many words, and the allegation is fully sustained in evidence. The contract of purchase

(*a*) 2 Ver. 599.

(*b*) 2 Atk. 630.

1868.

Davison v. Wells.

is annexed to the indenture of assignment and is referred to in it, in express terms.

No notice of the conveyance to the plaintiff till long after this is proved, and I am of opinion that *Fluke* and *Hovey* could not be affected by subsequent notice, though given before they obtained the legal estate.

I incline to think that the plaintiff's case fails, and that his bill should be dismissed, even if the defendants had not sufficiently made out their defence of purchase for valuable consideration without notice. That defence is however in my judgment sufficiently made out.

The bill will be dismissed with costs.

McIntosh v. Wood.

Equitable dower—Parties.

The Act 4 William IV. chapter 1 giving dower out of equitable interests applies as well where the parties were married after as where they were married before the passing of the Act.

A mortgage was created by an absolute conveyance with a separate defeazance, and the mortgagor having died, his heir effected an arrangement with the mortgagee who conveyed to the heir, and accepted from him a deed of a portion of the land in discharge of the mortgage debt. The heir afterwards sold to a party who had notice of the several conveyances.

Held, that the widow of the mortgagor was entitled to dower in the portion so conveyed by the heir.

To a bill for equitable dower, the tenant in actual possession of the premises may be a proper, though not a necessary, party.

Examination and hearing at Cornwall.

Mr. *James Bethune*, for the plaintiff.

1868.

McIntosh v. Wood.

The *Attorney General* and Mr. *McLennan*, for the defendant.

SPRAGGE, V. C.—This is a bill for equitable dower.

On the 9th of August, 1848, the husband of the plaintiff being indebted to Mr. *J. S. Macdonald*, conveyed to him the west-half of lot letter B, in the fifth concession of Cornwall, for the expressed consideration of £42 9s. 3d., Mr. *Macdonald* giving a bond for reconveyance upon the payment of that sum within ten years from the date thereof. The husband died in October, 1849, and was at the time of his death beneficially entitled to the land, for an interest not entitling his widow to dower at law. He was in short a mortgagor, the defeazance being in a separate instrument instead of being, as in ordinary mortgages, in the same instrument, and his widow was entitled to dower under the Statute 4 William IV., chapter 1, section 13. The Act was passed 6th March, 1834, and it is probable from the age of her eldest son, that she was married before that date: but our Act, unlike the Imperial Act from which this provision was taken, does not limit the benefit of it to women married after it passed, but is general, so that the plaintiff is entitled to the benefit of it.

Judgment.

In January, 1854, the heir-at-law made an arrangement with the mortgagee for the discharge of the mortgage; the mortgagee accepting a portion of the land in satisfaction of the mortgage debt, this was carried out by the mortgagee conveying to the heir the whole of the mortgaged premises, and receiving from the heir a conveyance of so much as it was agreed should be accepted by him in satisfaction.

Upon this it was the right of the widow as between herself and the heir, to adopt this arrangement as regarded

1868.

McIntosh v. Wood.

her dower; and to have assigned to her, one-third of the land conveyed to the heir by the mortgagor, and retained by the heir.

Subsequently the heir sold to the defendant *John Wood*, the portion of the lot retained by him, conveying however to him by mistake the whole of the half-lot. This conveyance is dated 14th April, 1857. It lies upon the purchaser to shew that the dowress is not entitled to her dower as against him. His defence is that he was a purchaser for value without notice; and, his conveyance being registered, he claims the protection of the registry law.

Judgment.

It appears however upon the evidence that he had notice of the facts which constitute the plaintiff's equitable right to dower. The heir-at-law who was called as a witness says that he told him how Mr. *Macdonald* (the mortgagor) had the property, and that he was paid by getting part of it; that he told him this before the writings were drawn: and the purchaser himself in his examination before the local Master says, that he and the husband of the plaintiff were first cousins, and were intimate; that the husband was living on the place at the time of his death, and that he, the purchaser, knew it, and supposed that he owned the place; that he asked the heir about the place before he went to *Henree's*, the person who acted as conveyancer between them; that he knew he was the eldest son; and that his mother was on the place with him, in the same house in which she had lived with her husband; that he heard the people say that a widow woman had a dower in lands owned by her husband; that he thought that *Christie* (a person to whom the heir had mortgaged) had it, it was all right; that *Christie* assigned to him, and he supposed the plaintiff had "signed off her dower" to *Christie* or to *Christie* and *Macdonald*; that about the time that he redeemed *Christie*, he heard that *Macdonald* had had

the place and had given it back to the heir, *Macdonald* taking part of the land in payment of his debt; that the father had given the land to *Macdonald* to raise money, and had heard before his death that *Macdonald* had the place as security for money.

It is unfortunate that the plaintiff, knowing all this, should have advanced money to the heir. He appears to have made advances in the first place to pay off *Christie*, and then to have bargained with the heir for the purchase of the place. He chose to rely upon his own judgment or upon incompetent advice in regard to the widow's dower. He seems indeed to have had some idea that she might be entitled, but to have had confidence in the prudence and caution of *Christie*, and to have thought himself safe in making advances where *Christie* had done so, and safe in purchasing.

Judgment.

But knowing as he did that *Macdonald* was only a mortgagor, and that his mortgage was discharged by a portion of the land being conveyed and accepted as payment, and that the heir consequently held the residue discharged of the mortgage; he knew everything that entitled the widow to dower, and whatever might have been his idea of the law, it is impossible not to hold him affected with notice of the plaintiff's title.

Roger Wood is made a defendant as "tenant in actual possession of the land" he puts in an answer but does not say whether he is so or not, nor is there any evidence upon the point. He may, I think, properly be retained as defendant.

The decree will be with costs up to the hearing against the principal defendant, *John Wood*. Subsequent costs as usual.

1868.

Hatch v. Ross.

Bankruptcy—Petition of review.

A debtor made an assignment of certain real estate to B. a creditor, the deed being absolute in form, but intended as a security for the debt; and the debtor afterwards became bankrupt under the Statute 7 Victoria, chapter 10. Many years subsequently he filed a bill against the mortgagee's administrator for an account, &c. The administrator, being ignorant of the bankruptcy, consented to a decree, referring it to the Master to take the necessary accounts on the footing of the assignment being a security; but on afterwards discovering the fact of the bankruptcy, he filed a petition setting up the bankruptcy, and claiming relief against the decree:—

Held, that the consent to the decree was no bar to relief; and that the decree should be set aside, and the bill dismissed with costs, unless the assignee in bankruptcy was willing to adopt the suit and become bound by it.

The plaintiff swore that at the meeting of creditors B. refused to give up the property without receiving from the creditors payment in full of his debt; and that they refused to pay:

Held, that this did not put an end to their right to the property, or authorize the bankrupt to sue for it to his own use.

Statement. This was a petition in the nature of a bill of review. The facts appeared to be these. The plaintiff assigned certain property to *Douglass Prentiss*, who afterwards died. The defendant was his administrator. The assignment was in form absolute, but was alleged in the bill to have been intended as a security for the plaintiff's indebtedness to *Prentiss*. The property was afterwards sold, with the consent of the plaintiff; and the bill was for an account of the sums received by the deceased, and by the defendant his administrator, in respect of the premises; and for payment to the plaintiff of the balance that might be found due to him. At the hearing, the defendant did not dispute the material allegations of the bill; and a consent decree was made, referring it to the Master at Kingston to take the accounts; reserving further directions and costs. The defendant now applied upon petition, setting forth, amongst other things,

that after the execution of the assignment, the plaintiff became bankrupt under the Statute 7 Victoria, chapter 10; and that the defendant was not aware of this until after decree; and praying such relief as under these circumstances he might be entitled to. 1868. Hatch

Mr. *Moss*, for the petition.

Mr. *R. Walkem*, contra.

MOWAT, V. C.—At the close of the argument I stated my opinion to be, that the consent to the decree did not disentitle the defendant to relief on the petition. The money which the defendant is to pay under the decree does not belong to the plaintiff, but to his assignee in bankruptcy, for the benefit of his creditors; and the bill should have been filed by the assignee—to another suit by whom against the defendant, the present suit, or payment under it to the plaintiff, would be no bar. An affidavit by the plaintiff states, that, at the meeting of his creditors under the bankruptcy, *Prentiss* "refused to give up the property unless the claim due to him was paid by the creditors in full. The creditors refused to do this; and Mr. *Prentiss* and the property remained '*in statu quo*'. The learned counsel contended, that what is thus stated had put an end to the claim of the creditors. But it clearly had no such effect. It is not pretended that any document was executed releasing or abandoning the creditors' rights, or that any resolution was passed on the subject; and it seems to me quite clear that, notwithstanding what is said to have taken place at the meeting referred to, the creditors are still at liberty to insist on their rights. I may add, that the plaintiff's affidavit as to what passed at the meeting is not supported by any other evidence. Judgment.

On the argument, all that the administrator professed to desire was, that he should be free from liability to

1868.

Hatch v. Ross.

another suit; and probably, under all the circumstances, he is not entitled to any greater relief. I therefore offered to the plaintiff the choice (1), of the decree being set aside, and the defendant let in to set up the bankruptcy as a defence in the bill; or (2), of shewing that the plaintiff had a valid conveyance from the assignee—which was said at the bar to be the fact; or (3), of getting the assignee in bankruptcy to adopt the suit, and by some proper proceeding to become bound by it. The plaintiff's counsel accepted the first of these alternatives, in which case, I believe I said, that the plaintiff should pay the costs of the application. But on reflection, I think that, if the decree is not to be set aside, there is no occasion for the defendant to file an answer to the bill, setting up the bankruptcy; that the order I now make is in effect, and should be, a final disposition of the case; and that the plaintiff should therefore pay all the costs of the suit, and not merely the costs of the petition. I have adjudged the bankruptcy to be a valid defence to the plaintiff's claim; and I have held that the only answer which the plaintiff makes to this defence is insufficient even if true. There is no use, therefore, in putting the parties to any further expense in litigating the question. If I am wrong in the opinion I have expressed as to the effect of what passed at the meeting, the plaintiff may of course rehear the case on the petition, or may appeal from my order.

Judgment

Let no order be drawn up for a fortnight, to give the plaintiff's counsel an opportunity of considering again, whether he will accept either of the two other alternatives offered him, instead of a simple order setting aside the decree, and dismissing the plaintiff's bill, with costs.

1868.

TYLEE v. LANDES.

Practice—Vendor and purchaser—Rescission.

There is no fixed rule in England as to the time to be given by a decree for paying purchase money before the vendor is entitled to a rescission of the contract for the default.

Where the decree in a vendor's suit for specific performance directed payment in a month, the Court, on a subsequent application to rescind the contract, gave the defendant, under the circumstances, a further period of four weeks to pay after service of the order; and ordered on default a rescission.

This was a motion, on notice, to limit a time for payment of purchase money and interest found due to the plaintiff, or in default a rescission of the contract.

Mr. *Snelling*, for the plaintiff.

The defendant did not appear.

MOWAT, V. C.—This is a suit by a vendor for specific performance. The defendant did not answer the bill, which was taken *pro confesso;* and on the 8th January, 1867, a decree was made, declaring that the defendant had accepted the title, and directing the defendant to pay on the 8th of February the purchase money and interest, amounting at the date of the decree to $279.55, with $1 for the subsequent interest, and $58.65 for costs; in all $339.20. The defendant having made default, the plaintiff has moved, on notice, that the defendant should be ordered to pay within a limited time; and that, on default, the contract should be rescinded, and the interest of the defendant in the property foreclosed. The affidavits filed in support of the motion shew, amongst other things, that the defendant's improvements are worth about $50; and that the land on a sale for cash would bring about $300; and on a sale upon a credit of five years, about $350. The Judgment.

1865.

Tylee v. Landes.

plaintiff asked that the time to be specified shall be a a month. The defendant did not appear on the motion.

There appears to be no fixed period for such cases in England. In *Foligno* v. *Martin* (*a*), the decree was dated 2nd December, 1852, and ordered that the defendant should pay the money, £1650 and interest, on or before the 29th of January following. On the 18th of March, the plaintiff moved that the contract should be rescinded; and the Master of the Rolls expressed his opinion to be, that the plaintiff was entitled to get rid of the contract unless the defendant should pay the purchase money before the first day of the next term—which I believe would be the 15th of April. In *Sweet* v. *Meredith* (*b*) the subject of the sale was an advowson. On the 18th of March, 1862, a decree was made, ordering the payment of the purchase money on the execution of the conveyance. On the 4th of July the deeds were sent to the defendant for execution. Default having been made in paying the money, an order was made on the 9th of August for payment on the 16th of August, or within seven days after service of the order. On the 22nd of August, a writ of attachment was issued against the defendant, who it was said had gone to Ireland to avoid process; and on the 12th of January, 1863, the Court made an order for the rescission of the contract without giving a further day for payment.

Judgment.

Let the order give in the present case four weeks after service of the order to be made on this application.

Note.—See Foster v. Great Eastern Railway Co., per V. C. Stuart, April 18, 1868, *Weekly Notes* of May 8, 1868, p. 122.

(*a*) 16 Beav. 586. (*b*) 9 Jur. N. S. 569.

1868.

DALE v. MCGUINN.

Will, construction of—Failure of issue.

The testatrix devised land to *A.*, his heirs and assigns for ever, subject to certain legacies, and declared her will to be that, in case *A.* died without leaving lawful heirs, his widow should enjoy the property during her widowhood; and that on her marrying again the land should be sold, and the proceeds equally divided among such of the sons and daughters of the testatrix or their heirs as were living:

Held, That *A.* took an estate tail, and by means of a disentailing deed could give a good title to a purchaser of the fee.

The facts are stated in the judgment.

Mr. *Roaf*, Q. C., for the vendors.

Mr. *Tilt*, for the purchaser.

Judgment.

MOWAT, V. C.—A parcel of land devised by *Ann Parkin*, widow, to her son *Thomas*, a defendant, has been sold under the decree in this cause; and the question is, whether a good title can be made to the purchaser. This property was devised to *Thomas*, "to hold to him, his heirs and assigns forever." Other lots were devised in like terms to other sons, the devises being subject to the payment of certain legacies; and the following clause is that on which the question turns: "My will further is, that if any of my four sons *Thomas*, *William*, *James*, or *John*, should die without having lawful heirs, then, and in such case, their widow shall enjoy their within devised property while she remains his widow, or until she marry again, at which time such part shall be sold, and the proceeds be equally divided among such of my sons or daughters, or their heirs, as are living." *Thomas* is still living, and is a party to the suit, and the question whether he can make a good title to the purchaser depends on whether the estate he takes under the will is

1868.

Dale v. McGuinn.

an estate tail, or an estate in fee simple with an executory devise over in case he dies without issue living at his death:—in other words, whether those in remainder are entitled whenever the issue of *Thomas* fails, or in case only he has no issue at his death. In the one case, that is, if an indefinite failure of issue is the event which the testator was contemplating, *Thomas* took an estate tail, and by means of a disentailing deed he can convey an absolute title to a purchaser; but in the other case, the estate is not in tail, and the effect of *Thomas's* conveyance would depend on the contingency of his leaving or not leaving issue at his death. If he should leave issue, the purchaser's title would, on the death of *Thomas*, become absolute; and if he should leave no issue, the gift over would take effect at his death, and the purchaser's title would be at an end.

Judgment.

The late Vice Chancellor *Esten* had, in the unreported case of *McGuinn* v. *Parkin*, occasion to construe this will; and he held that each of the sons took an estate tail. In this construction I entirely concur. The rule is, that a gift over in default of issue is to be construed as referring to a failure of issue at any time—to an indefinite failure of issue, and, therefore, as giving an estate tail, unless the context shews the testator's meaning to be restricted to a failure at his death; and I perceive but two circumstances connected with this devise, that can be supposed so to restrict the construction. The first is, that if a son should die without leaving lawful heirs, his widow is to enjoy the devised property during her widowhood—a provision which may be supposed to indicate, to some extent, that the testatrix was contemplating only a failure of issue at the husband's death, and not a later and indefinite failure of issue. But it is well settled, that a gift over for life has not the effect of imposing the restricted construction on a prior devise; and whatever there is to distinguish this devise to the widow from a simple devise to *A.* for life, the distinction is too fine to demand a different construction.

1868.

Dale v. McGuinn.

The only other provision which may require remark is the direction that, at the termination of the widow's estate, the property is to be sold and the proceeds equally divided among such of the sons and daughters of the testatrix or their heirs as are living. But as the testatrix provides for the distribution of the proceeds, not merely among her sons and daughters living at the death of the first devisee, but also among their heirs, the clause affords no support to the restricted construction. In *Feakes* v. *Standley* (*a*), the testator directed that in case *Feakes*, the prior devisee, should die without issue, the lands should be sold by his executors, and the money be divided between the families nearest of kin to the testator and his wife; and the Master of the Rolls held, that *Feakes* took an estate tail, and said he "should have no difficulty in compelling a purchaser to take the title, on his executing a disentailing deed."

Judgment.

Declare, that *Thomas* took an estate tail, and can make a good title under the will.

WILSON v. PROUDFOOT.

Equitable execution—Compensation to trustees.

Equitable interests cannot be reached by an execution creditor unless he commences a suit or takes some other step for the purpose during the currency of the writ.

The old rule as to the compensation of trustees has only been abrogated by the Surrogate Act so far as relates to trusts under wills.

This cause originally came on before Vice Chancellor *Spragge*, when the cause was ordered to stand over for the purpose of making the personal representative of one *Oswald* a party (*b*).

(*a*) 24 Beav. 485.

(*b*) 14 Gr. 630.

1868.

Wilson v. Proudfoot.

This was done; and the cause afterwards came on before Vice Chancellor *Mowat*, at the sittings in Hamilton, in the Spring of 1868 to be disposed of. On this occasion the facts were admitted; and the defendant *Knox*, referred to in Vice Chancellor *Spragge's* judgment, now made no claim to the fund in dispute.

Mr. *E. Martin*, for the plaintiffs.

Mr. *Strong*, Q. C., for the defendant *Fisher*, executor of *Oswald*.

Mr. *Proudfoot*, in person.

Yale v. *Tollerton* (*a*), *Lee* v. *Gorrie* (*b*), *Neate* v. *The Duke of Marlborough* (*c*), *Burnham* v. *Dennistown* (*d*), *Brook* v. *The Bank of Upper Canada* (*e*), *Thorne* v. *Torrance* (*f*), *Foster* v. *Ridley* (*g*), *White* and *Tudor's* Leading Cases, vol. 1, p. 354 (Am. ed), were referred to by counsel.

Judgment.

MOWAT, V. C.—The plaintiffs are assignees in insolvency of *Robert Jarvis Hamilton*; and the question argued at the hearing was, whether they are entitled to certain securities and money now in the hands of the defendant *William Proudfoot* as trustee, or whether the defendant *James Fisher*, executor of *Oswald*, who was an execution creditor of *Hamilton's*, is entitled to them.

On the 25th August, 1864, *Hamilton* recovered judgment against *John C. Taylor* for $13,387.74; and on the 31st of the same month placed an execution against *Taylor's* goods in the hands of the Sheriff of Wentworth. On the same day, *Oswald* delivered to the Sheriff a *fi. fa.*

(*a*) 2 Chan. Cham. Rep. 50. (*b*) 1 U. C. L. J. N. S. 76.
(*c*) 3 M. & C. 487. (*d*) 11 Gr. 494.
(*e*) 4 U. C. L. J. 13. (*f*) 18 U. C. C. P. 29 (*g*) 4 New R. 417.

1868.

Wilson v. Proudfoot.

against the goods and chattels of *Hamilton* himself, indorsed to levy £2025 for damages, and interest, £4 13s. 5d. for taxed costs, besides costs of writ and Sheriff's fees. Several other *fi. fas.* against *Taylor's* goods were in the Sheriff's hands; and the Sheriff seized the lease, furniture, and stock of an hotel occupied by the debtor. There were disputes amongst the execution creditors of *Taylor* as to their priorities and other rights; litigation was thought necessary to determine these; and all the execution creditors of *Taylor* were satisfied that, unless some arrangement was made amongst them, this litigation would delay the sale until it was too late to sell advantageously. They therefore came to an agreement, that the sale should be proceeded with, without prejudice to their mutual rights; and that, when their mutual rights were determined, the proceeds of the sale, after certain prior payments (to which all agreed), should be applied according to the priorities of the creditors, as they stood before the making of the agreement; that the securities to be taken for the purchase money, and any balance of cash, should be delivered and paid to the defendant *William Proudfoot*, as trustee; that the cash and securities should become his property, in trust for the benefit of such one or more of the creditors as "should be eventually found and declared entitled thereto." *Oswald* was no party to this arrangement.

Judgment.

It is admitted that the agreement was entered into, and carried out, in good faith on the part of all concerned. Notes were accepted from the purchaser for part of the purchase money, and were handed over by the Sheriff to Mr. *Proudfoot* in September, 1864. On the 10th November, 1864, the plaintiffs were duly appointed assignees of *Hamilton's* estate under the Insolvent Act; and on the 13th, the Sheriff returned *Oswald's* writ *nulla bona*, except in respect of a sum levied from other property of *Hamilton's*. The Sheriff did not seize the notes in question under *Oswald's* exe-

1868.

Wilson v. Proudfoot.

cution, or attempt to seize them, but maintained that he was not bound to do so. In 1866, *Oswald* died. On the 13th February, 1867, *Fisher*, his executor, brought an action, which is still pending, against the Sheriff, for a false return, in consequence of the Sheriff's not having seized the notes under *Oswald's* writ. Neither he nor *Oswald* appears to have made any claim to the notes themselves until sometime after bringing the suit against the Sheriff.

It has been ascertained, and is now admitted, that *Hamilton's* execution was entitled to priority over the others. The amount due on it exceeds the amount of the notes and cash in Mr. *Proudfoot's* hands.

Judgment.

The learned counsel for the plaintiffs contended, that notes in the hands of a trustee and to which an execution debtor is not legally entitled, but equitably only, cannot be reached by an execution creditor. The contrary of this was held by the late Vice Chancellor *Esten*, in the *Bank of British North America* v. *Matthews* (*a*). The late case of *Horsely* v. *Cox* (*b*) seems the other way; and the point is expected to come before the Court of Appeal shortly in a case of *Gilbert* v. *Jarvis*. I shall assume for the present that the view of the late Vice Chancellor was correct.

But I think that the circumstance of no step having been taken by *Oswald* in respect of these notes during the currency of his writ, is a bar to the claim of his executor. It is only by virtue of his execution that such a creditor has any claim on his debtor's personal property; and, in case of chattels to which the debtor has a legal title, unless there is a seisure, or something equivalent to seisure, during the currency of the writ, there can be no seizure afterwards; the lien which the execution credi-

(*a*) 8 Grant, 492, 493. (*b*) Weekly Notes, 14 Dec. 1867, p. 292.

tor had by virtue of his writ is gone. I perceive no principle, and no authority was cited, on which I could hold that equitable interests are in a different position (*a*); that, though the chattels in which the execution debtor has a legal interest during the pendency of the writ, are only bound if seized during such pendency, the chattels then held by an equitable title only, are bound for ever, and may be laid hold of by the creditor at his leisure. On the contrary, every technical ground, and every ground of policy, on which the rule as to legal interests rests, applies equally to equitable interests. Filing a bill was held by the Chancellor to be equivalent (*b*) in equity to a seizure at law (*c*); and on the re-hearing of *Yale* v. *Tollerton* (*d*), the full Court held (affirming his Lordship's decision in Chambers) (*e*), that, a decree having been obtained during the currency of the writ against lands, it was not necessary thereafter to keep the writ alive by renewals. But where there has not only been no decree, but no bill, and nothing else done in respect of the debtor's equitable interests, until after the writ had spent its force at law, I think it clear that the creditor can found no claim upon the writ in equity (*f*). I apprehend that the principle on which Courts of Equity act in such cases was correctly stated by Sir *James Stuart* in *Gore* v. *Bowser* (*g*). "It seems to me," the Vice Chancellor said, "that an execution creditor who has sued out his execution at law, if he finds that the interest of his debtor in a term of years is an equitable interest * * is at least entitled, having sued out his writ of execution, to come into this Court, and to obtain his remedy *under his execution* here by the process of the Court. This Court can compel the trustee

1868.

Wilson v. Proudfoot.

Judgment.

(*a*) Shirley v. Watts, 3 Atk. 200.
(*b*) Darley v. Miller (unreported).
(*c*) Vide Doe Tiffany v. Miller, 6 U. C. Q. B. 448, *et seq.*
(*d*) 13 Gr. 302. (*e*) 2 C. Chamb. Rep. 49.
(*f*) See Payne v. Drewe, 4 East, 523. (*g*) 3 Sm. & Giff. 8.

1868. holding the property of the debtor to convey the legal estate to the debtor *so as to be available* at law. But the Court does not resort to that circuity. It gives a remedy, as I understand the law of the Court, to the execution creditor directly against that leasehold interest which he cannot recover at law."

Wilson v. Proudfit.

Reference was made to *Neate* v. *Duke of Marlborough* (*a*), as shewing that the issuing of the writ was all that was necessary to give this Court jurisdiction, and that the return or non-return of the writ was immaterial. But that was a case of lands: and lands are in England bound by the judgment. Lord *Cottenham* held an elegit to be necessary before a bill was filed respecting the debtor's equitable interests in freeholds, and that decision has, I believe, been ever since acquiesced in; but it is to be observed that Lord *Eldon* had held otherwise (*b*); and it is extremely difficult to answer the observations on the point which were made by the Lord Chancellor of Ireland in *Foster* v. *McMahon* (*c*). But, assuming that the issuing of a writ was technically necessary in order to reach a debtor's lands in equity, it might, notwithstanding, very well be considered that after the writ was once issued a return of even no lands (*d*) did not oust the jurisdiction, as lands were bound by the judgment without the writ. But what can be said in respect of interests which were not bound by the judgment, where the writ has been returned no goods before the suit in equity is brought? Nothing whatever that I can see.

Judgment.

(*a*) 3 M. & C. 407.

(*b*) See Doe dem McIntosh v. McDonell, 4 K. B. O. S. 214, *et seq.*; 1 & 2 Vic. ch. 110. Imp.

(*c*) Compare note (*b*) 3 M. & C. 110; Sug. Vendors, 14 ed. p. 521, note (*f*).

(*d*) 11 Ir. Eq. 296, 297.

(*e*) Lewis v. Lord Zouche, 2 Sim. 389; See Lord Dillon v. Plaskett, 2 Bli. N. S. 261.

1868.

Wilson v. Proudfoot.

My decree, therefore, must be for the plaintiffs.

The suit was originally against the trustee, the Sheriff, and some creditors, other than *Oswald* or *Fisher*, who disputed the plaintiffs' claim to the money. In this state of the pleadings, the case came on before my brother *Spragge*, and he dismissed the bill as against the Sheriff without costs; but, *Fisher's* claim to the notes having been disclosed in the course of the proceedings, my brother was of opinion he could not properly adjudicate on the plaintiffs' rights in *Fisher's* absence, and the cause was therefore ordered to stand over with liberty to the plaintiffs to amend by making *Fisher* a party. On the subsequent hearing, which took place before me, *Fisher* was the only defendant who set up any claim. Being of opinion that his claim is not sustainable, I think the plaintiffs are entitled against him to their costs since he was made a party to the suit, up to the hearing, including such party and party costs as have been incurred since by the trustee. Mr. *Proudfoot* is entitled to all his costs as between solicitor and client. He asked also for compensation for his services as trustee, contending that the provision in the Surrogate Court Act abrogated, in regard to all trustees, the former rule of the Court in regard to compensation, and not merely in regard to the "executor or trustee, or administrator, acting under will or letters of administration;" (*a*) but I do not think I can so hold. No costs were asked by or against the other defendants. The decree otherwise may be in substance as prayed, except that (I presume) no reference will be necessary.

Judgment.

(*a*) U. C. Consol. Stat. ch. 16, sec. 66.

1868.

NEIL v. NEIL.

State document—Motion for decree.

Where a defendant by his answer sets up a stated account, the plaintiff does not admit the defence by bringing on the cause by way of motion for decree; and the proper decree in such a case is a reference as to such alleged account.

This was a bill by the executrix of *James Neil* for an account of the partnership transactions between the deceased and the defendant, and for the administration of the estate of the deceased, The partnership was in existence up to the death of *James Neil*. The defendant, by his answer, set up a settled account between himself and the deceased at a date named, of all transactions between them up to that time, with certain specified exceptions. The plaintiff brought on the cause by way of motion for decree, and it was contended that the effect of this; under the Orders of 26th of June, 1861, was to admit the settled account.

Mr. *Barrett*, for the plaintiff.

Mr. *Ferguson*, for the defendant.

Judgment. MOWAT, V. C.—Under the old practice, where a defendant set up a stated account, and came to the hearing without having proved it, he was not held to be shut out from the defence; and the course was, in decreeing the necessary accounts, to direct that, if the Master found any account stated or settled between the parties, the same was not to be disturbed (*a*). Since, therefore, if the plaintiff had gone to a hearing under the Orders of the 28th of April, 1862, the defendant might have refrained from giving evidence as to the settled account,

(*a*) See Seton on Decrees, 108, 109, 1285, 3rd. ed.

1868.

Neil v. Neil.

and at the hearing claimed a reference to the Master with respect thereto, I think that the plaintiff was quite justified in bringing on the cause by way of motion for decree, and ought not to be considered as having admitted the account said to have been settled.

The plaintiff is not entitled to an administration of the estate of the deceased, but may take a decree respecting the partnership transactions in the usual form, with such a direction as I have mentioned in regard to the stated account.

Further directions and costs reserved.

Robson v. Wride.

Vendor and purchaser.

W. entered into a contract for the purchase of property, the price being payable by instalments; and, there being a mortgage on the property which was not due, the vendor was to give the vendee a bond of indemnity in respect of the mortgage. A decree was afterwards made at the suit of the vendor for specific performance, on his undertaking, recited in the decree, to procure a release of the mortgage; the overdue instalments were ordered to be paid into the Bank, subject to the further order of the Court. Part only was so paid, and, in consequence of the default as to the residue, the mortgage was not paid when due, and was foreclosed in a suit to which both the vendor and vendee were defendants. The purchaser then applied by petition to stay all proceedings in the specific performance suit, which (the plaintiff not objecting) was granted, and the money in Court was ordered to be paid to the vendor, in consideration of the loss he had sustained through the purchaser's default.

Statement.

The principal facts as to this case appear in former Reports.

The Trust and Loan Company having foreclosed their mortgage, the defendant, on the 21st of May, 1868,

1868.

Robson v. Wride.

filed his petition for stay of all proceedings, and for damages; for repayment of the sums the defendant had paid on his contract, including the money obtained by the plaintiff out of Court; and for other relief.

The plaintiff was willing that the contract should be rescinded, and all proceedings on his part stayed, without costs to either party, but objected to paying damages or costs. The defendant was said to have become insolvent.

Mr. *Hodgins*, for the petitioner.

Mr. *Blain*, *contra*.

Judgment.

MOWAT, V. C.—It is plain that the defendant has no desire that the contract should be specifically performed. The property has fallen so much in value that the foreclosure of the Company's mortgage has evidently been a relief to him. On the other hand, it is clear that the plaintiff will be a considerable loser by the defendant's non-performance of the contract, even though he should not have to pay any damages, and should retain the money he withdrew from the Court.

The defendant having been guilty of default, and not having taken possession of the property, he cannot possibly get damages for the non-performance of the contract by the plaintiff. But the money withdrawn from Court, under the circumstances explained by me on a former occasion (*a*), must be treated as if now in Court for the purposes of this application. No technical rule was referred to as determining how it should be disposed of in the event which has occurred; and no decided case was mentioned as affording any analogy which might assist me in disposing of the question.

(*a*) 13 Gr. 419, (11th June, 1867.)

1868.

Robson v. Wride.

Assuming, as I must do, that the contract was one which it was proper for the Court to have enforced against the defendant in the manner directed by the original decree and the decree on further directions (which decrees were pronounced by other Judges before I had the honor of a seat on this bench); and further assuming that, those decrees being just and proper, I have to determine the present question *ex æquo et bono*,—the proper conclusion appears to me, on the whole, to be, that the money which was in Court should go to the plaintiff, and may now be retained by him. I am satisfied that, except for the defendant's default in paying the purchase money agreeably to his contract, there would have been no difficulty with the Trust and Loan Company. The company were evidently willing to concur in any reasonable arrangement; and, besides, on the 9th of October, 1861, the Master reported the arrears due from the defendant to be £2537 14s. 6d., a sum which exceeded the mortgage debt. The mort- Judgment.
gage was not then due; nor does *Fisken*, the mortgagor, appear to have been in any default to the company until long afterwards. The defendant's counsel alleges, that under the reference which I ordered on the 14th of February, 1865 (*a*), a considerable sum would be deducted from this amount; but he has not chosen to get the Master's report under the order; and, this being the defendant's application, I can not assume in his favor that the report, if obtained, would have made a material variation.

A vendor has a right to rely on the purchase money as a means of paying off incumbrances on the property he sells; and the direction in the decree for payment of the money into Court would not have formed any serious obstacle to this being done in the present case. The defendant's default has, it is impossible for me to

(*a*) See 11 Gr. 245.

1868.

Robson v. Wride.

doubt, been the sole cause of the mortgage having been foreclosed, and of the plaintiff's losing the other property comprised in it, as well as the property sold to the plaintiff; and it would, therefore, on the assumptions upon which I am considering the case, be more just that money in Court, to which neither party can now, as a matter of strict legal right, claim to be entitled as against the other, should go to diminish the plaintiff's loss, than to order it to be paid over to the defendant, without whose default the plaintiff would have suffered no loss. If the present application had been by the plaintiff, there might have been insuperable technical difficulties in the way of the money being now ordered to be paid out to him; but I see no such difficulty in making the payment to the plaintiff a term of an order made for the relief of the defendant on the defendant's own application.

Judgment.

The plaintiff, however, must pay the costs of the order of 11th June, 1867, including the costs incurred in endeavouring to enforce it. All proceedings by either party will be stayed, except for the purpose of recovering these costs.

MARTIN v. LEYS.

Will, construction of—Vested interest.

A testator directed his real estate to be sold and the proceeds to be divided among his children; but the share of one of them (*James*) he directed to be placed at interest for his benefit, and the interest to be paid by the executors to *James* every six months, and the testator directed that at the death of *James* his share should be equally divided between *A.* and *S.*, two of the testator's other children:

Held, that the gift to *A.* and *S.* was vested, and not contingent, and that *A.* having assigned his interest and died before *James*, the interest of *A.* went to his assignee.

This cause was heard on bill and answers.

1868.

Martin v. Leys.

The plaintiffs were the executors and trustees under the will of *William Thompson*, deceased. By the will, the testator directed his real estate to be sold; and he devised the proceeds, after paying his debts and certain legacies, as follows:—"The remainder of the purchase money is to be divided equally between my sons *James Thompson*, *Alexander Thompson*, and *Francis Thompson*, and my daughters, *Jane Martin* and *Sarah Clements*. * * I also direct that my executors shall retain $1,000 out of said purchase money for the benefit of my son *James Thompson*,—which said sum of $1,000, together with his share of the purchase money, shall be placed at interest by my executors, for his benefit, the interest to be paid by my executors to my said son, *James Thompson*, every six months. Third, I direct that at the demise of my son *James Thompson*, his share of the purchase money shall be divided equally between my sons *Alexander Thompson* and my daughter *Sarah Clements*. Also, that the said sum of $1,000 shall be equally divided between all my surviving children."

Statement.

The executors fully administered the estate; set apart *James's* share; and paid him the interest during his life. On the 1st December, 1864, *Alexander Thompson* assigned his interest under the will to the defendant *John Leys;* and on the 19th February, 1865, became insolvent. The defendant *John Perryman Wheler* was appointed his assignee under the Insolvent Act. On the 21st of April, 1867, seven days afterwards, *James Thompson* died. A question then arising between *Leys* and the testator's next of kin, as to who was entitled to *James's* share of the purchase money, exclusive of the $1,000, the executors filed this bill for the opinion of the Court.

Mr. *Tilt*, for the plaintiffs.

Mr. *Roaf*, Q. C., for the defendant *Leys*.

1868.

Martin v. Leys.

Mr. *A. Hoskin*, for the defendants *Thompson* and *Clements*.

Mr. *R. Sullivan*, for the defendant *Wheler*.

MOWAT, V. C.—It is clear that the gift of the remainder to *Alexander* and *Sarah* was vested, and not contingent; and that *Alexander's* moiety goes to the defendant *Leys*, to whom *Alexander* in his lifetime assigned it (*a*).

The only other question is as to the costs of the suit; counsel for *Leys* contending that the costs of all parties should come out of the general estate; and counsel for the next of kin contending, that the costs of all parties should come out of *James's* share, which alone is in question.

Judgment.

The estate, however, has been distributed, with the exception of *James's* share. On behalf of the defendants it was suggested, that the executors should not have parted with the rest of the estate until the question raised in this suit had been decided. But I cannot say that the point was, on the authorities, sufficiently doubtful to demand this; and the dispute is not alleged to have arisen before the rest of the estate had been administered and paid over. The question being afterwards raised by the next of kin, all parties have treated the executors as right in asking the opinion of the Court; and as between the executors and Mr. *Leys* the suit is a friendly one, Mr. *Leys'* firm being in fact the plaintiffs' solicitors. On the whole, I think the executors should have, out of the fund in dispute, their costs as between solicitor and client; and the defendant *Wheler* his costs as between party and party; and that there should be no costs to any of the other parties.

(*a*) See cases collected in Williams on Executors, 6 ed. vol. 2, 1160, *et seq.*

1868.

BENNETT v. FOREMAN.

Mortgagee—Construction of inconsistent expressions—Costs.

A mortgagee has a right to file a bill of foreclosure the day after the mortgagor makes default; and, though such a course may be extremely sharp, he cannot be refused his costs.

A mortgage, dated 16th October, 1866, provided for the payment of the principal in three years from that date; and interest meanwhile at twelve per cent. half yearly, on the 16th of April and October in every year; and declared, that to secure prompt payment of said interest the mortgagee would take at the rate of ten per cent. if the interest was paid on the said 17th day of April and October respectively; it was *held*, that the first reference to the day being unequivocal must govern; that the interest was due on the 16th; and not having been paid then, that a bill on the 17th was not irregular.

Hearing at Brantford, at the Spring sittings of 1868.

Mr. *Van Norman*, for the plaintiff.

Mr. *Hodgins*, for the defendant.

MOWAT, V. C.—This is a suit for foreclosure. The bill was filed on the 17th October, 1867. The defendant afterwards, but on the same day, tendered the amount due, exclusive of costs, refusing to pay the latter, and claiming that by the true construction of the mortgage, the money was not due until the 17th. The plaintiff insisted that it was due on the 16th. Unexplained, it seems extremely sharp to have filed a bill on the 17th, even if the money had been due the day before; but a mortgagee has, no doubt, a right to sue on the day after his money becomes due; and if he exercises this right, I am not aware of any authority that would warrant my holding that he can be refused the necessary costs of the suit. The cases to which the learned counsel for the defendant referred me on this point do not apply. Judgment.

1868.

Bennett v. Foreman.

The mortgage bears date the 16th October, 1866, and provides for payment of the principal with interest at twelve per cent. in three years from that date; "and the interest on the unpaid principal at the rate aforesaid, payable half yearly on the *sixteenth* day of the months of April and October in each and every year; but to secure the prompt payment of said interest, the said mortgagee hereby agrees to take and receive at the rate of ten per cent., providing the said interest is paid on the said *seventeenth* day of the months of April and October in each and every year." It was contended on behalf of the defendant, that the expression "said seventeenth" controls and corrects the previous part of the proviso where the day is stated to be the 16th. No authority was cited for this position; and the rule, I apprehend, is the other way. The first reference to the day is unequivocal, and must be taken to have been the day intended. Indeed, I perceive that the answer contains no averment that the parties meant the 17th, but only that such is, as the defendant submits, the proper construction of the instrument.

Judgment.

The plaintiff admits by his replication that the money was tendered on the 17th, and there was no reason why the cause should not have been heard by way of motion for decree. The plaintiff will therefore have no more costs than if that course had been taken. No reference will be necessary to compute the amount due.

1868.

BALDWIN v. THOMAS.

Trustees for creditors—Compounding debts.

A trust was created for the benefit of creditors *pro rata*, in consideration of their discharging the debtor; all the creditors, except the plaintiffs accepted from two creditors, who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands, in full; the estate yielded more: *Held*, that the plaintiffs had no right to the difference.

Trustees accepted $250 in discharge of a debt of $300, and gave no evidence to explain the reason of this: *Held*, that, in the absence of such evidence, the Master was right in charging the trustees with the loss.

This was a suit by certain creditors of one *Felix A. Lafferty*. The bill stated, that the defendants *Thomas* and *Thibeaudeau* had issued an attachment against *Lafferty* as an absconding debtor; that other creditors were about to issue like writs; that, to save costs and litigation, it was agreed amongst all parties, that the debtor should allow a judgment to be recovered against him for the joint benefit of all, in the name of the defendant *Denis Ouelette;* that *Thomas* and *Thibeaudeau* were the principal creditors, and had named *Ouelette* as trustee; that they had also agreed to become responsible for the due execution of the trusts reposed in him, and that what was realized from the debtor's estate should be divided *pro rata* amongst all the creditors; that the defendants had afterwards wrongfully disputed the agreement and the trust, so far as related to the plaintiffs, and refused, though frequently requested, to give the plaintiffs any account of their dealings with the estate. The prayer was for the relief to which these facts entitled the plaintiffs. Statement.

The bill was taken *pro confesso* against the defendants; and on the 16th of October, 1866, the Court made a decree referring it to the Master at Sandwich to take

1868.

Baldwin v. Thomas.

the accounts of the trust estate; and reserving further directions and costs. The Master made his report on the 20th of January, 1868; and the cause came on upon a motion by the defendants by way of appeal from the report, and for further directions.

Mr. *Blevins* for the plaintiff.

Mr. *Holmstead*, *contra*.

MOWAT, V. C.—The first ground of appeal is, in effect, that the Master should have reported that the plaintiffs had agreed to accept twenty-five cents in the dollar in full of their debts. Such a finding would have been inconsistent with the bill, which must now be read as confessed by the defendants; and would also have been inconsistent with the decree pronounced by my brother *Spragge* on the hearing of the cause. If there was a binding agreement to the effect alleged by the defendants, it is unfortunate that it was not set up by answer, and established at the original hearing; for the defendants can set up no such defence now; and the Master, therefore, properly omitted to report the alleged agreement.

Judgment.

The second ground of appeal arises from the Master's having charged the defendants with $50 more than they received in respect of a note of $300, payable in two years, with interest, for which they accepted $250 in full, and no evidence was given to explain or justify this. The rule is, that a trustee, under circumstances, may compound a debt; but he cannot without any reason accept from a debtor less than he owes; and if he does so, he is liable for the loss. The Master, therefore, could not have done otherwise than charge the defendants with the $50 complained of (*a*).

(*a*) See Lewin on Trusts, 5th ed. 423, and cases there cited; Williams on Executors, p. 1062, 6th ed.; Wiles v. Gresham, 5 D. M. & G. 770.

1868.

Baldwin v. Thomas.

The third ground of complaint is, that the Master has disallowed the defendants $30, being twenty-five cents in the dollar, which they paid to Messrs. *Gallineau* and *Roy*, creditors of the estate, in respect of their debt. *Felix A. Lafferty* says, in his evidence before the Master, that these parties were paid in full, having been fully secured by a mortgage; and that they took the mortgaged property in full for the debt. In view of this evidence, I do not think sufficient appears to have justified the Master in allowing the payment of $30; and the amount is so small that it is not worth while referring the item back to the Master for further investigation.

The fourth ground of appeal is, that the Master has disallowed the sum of $69.60 for travelling expenses of the defendants' clerks, whom they sent from Montreal to Windsor to make the necessary affidavits for an attachment against *Lafferty*. By the agreement set out in the bill, under which *Thomas* and *Thibeaudeau* are charged, it was expressly provided, that they should hold the proceeds of the goods seized under this writ "for the mutual benefit and behoof of the creditors, to be divided *pro rata*, after all expenses, costs and disbursements shall be deducted." It is not disputed that the expenses in question were incurred in good faith; and I think that the defendants were entitled to have allowed to them, under this stipulation, all expenses actually incurred in good faith, and not merely such as they may now be able to prove absolutely necessary or unavoidable (*a*).

Judgment.

The fifth ground of appeal is founded partly on those which precede, but not wholly. The Master has found a balance of $617 34, to be in the hands of *Thomas* and

(*a*) See Story on Agency, sec. 336, 337 Williams on Executors, 6th ed. 1710.

1868.

Baldwin v. Thomas.

Thibeaudeau, applicable to the claims of the plaintiffs—who, in the Master's view, are the only creditors remaining unpaid. This sum should be reduced by deducting the $69.60, referred to in the fourth ground of appeal, making the proper amount $547.74. But the whole of this reduced sum is not applicable to the claims of the plaintiffs; for I do not see that the plaintiffs are entitled to insist on the defendants' accepting twenty-five cents in the dollar from the estate, and on the plaintiffs themselves having the benefit of whatever amount remains after allowing this sum, and the dividend which the other creditors have chosen to accept from *Thomas* and *Thibeaudeau*. All the creditors were to share the whole estate *pro rata*:—that is the case set up in the bill:—and if some of the creditors chose to give *Thomas* and *Thibeaudeau* the benefit of the difference between twenty-five cents in the dollar, and the full dividend which the estate would yield, and if the debtor acquiesces, the plaintiffs can neither benefit nor be prejudiced by the transaction. An executor who buys at a discount debts due to or by an estate, is held to do so for the benefit of the parties interested in the estate; but if he buys at a discount, the interest of a residuary legatee, the other legatees have no claim to the profit of the transaction. I think the plaintiffs must be content with the dividend which the estate will yield, taking into account the total amount of debts due those who were entitled to participate in the estate. The defendants, however, should pay the plaintiffs interest thereon after, say, one year from the time all the proceeds of the estate were got in.

Judgment.

As to the costs, I think it is impossible to avoid charging the defendants with them—except the costs of the appeal so far as relates to the fourth and fifth grounds of appeal, and except any costs occasioned by the plaintiffs' setting up the claims to which these grounds

of appeal refer. I allow the fourth and fifth grounds of appeal without costs. 1868. Baldwin v. Thomas.

As the proceedings stand, I am obliged to assume that the suit was entirely occasioned by the defendants' denying any agreement or trust under which the plaintiffs had any claim, and by their refusing, though repeatedly requested by writing and otherwise, to render any account; that they had no defence to make to the plaintiffs' claim (*a*); that they never rendered any account until after decree; and that the account then rendered was not quite correct. Not much expense appears to have been incurred on the reference. The Court is often content with charging trustees with costs up to the hearing; but in the present case such a decree would not do what I am obliged to regard as justice to the plaintiffs. Against the costs to be charged the defendants, should be set off the costs occasioned them in the Master's office by the claims in regard to which the appeal has been successful. Judgment.

As soon as the amount of costs is ascertained, a decree will be drawn up giving effect to this judgment.

DRURY v. O'NEIL.

Disclaimer—Costs.

To a bill of foreclosure, an assignee in insolvency filed an answer and disclaimer, admitting the statements of the bill, and alleging that he was willing and offered before being served with the bill, to release his right to the property, but not alleging that he had made the offer to the plaintiff, or to whom he did make it:

Held, that the defendant was not entitled to costs

This was a suit against a mortgagor and his assignee

(*a*) See Le Targe v. De Tuyll, 3 Gr. 595; Wroe v. Seed, 4 Giff. 425.

1868. Drury v. O'Neil.

in insolvency, for the foreclosure of a mortgage. The bill was taken *pro confesso* against the mortgagor, and was brought on by way of motion for decree against the assignee.

Mr. *McCarthy*, for the plaintiff.

Mr. *Donovan*, the assignee, in person.

MOWAT, V. C.—The mortgagor was not a proper party after his insolvency; and the bill must be dismissed as against him.

The assignee, by his answer, admits the statements of the bill; alleges that he has no funds with which to pay the mortgage; and that before being served with the bill he "was willing and offered to join in any proper conveyance to release any right of redemption he might have on the lands in question." He disclaims all right and interest in the property, and asks for his costs.

Judgment.

The learned counsel for the plaintiff contended, amongst other things, that the English cases, which were cited to shew that an assignee in bankruptcy would under such circumstances be entitled to his costs, do not apply in this country; as in England a defendant must put in his answer to avoid an attachment, while here the only effect of not answering is to have the bill taken *pro confesso*. It must be admitted that there is much force in this argument. It is just, that if a defendant, who before suit offered to execute an instrument that would render the suit unnecessary, was, notwithstanding, compelled by the plaintiff to answer, he should get the costs of his answer and disclaimer. But if a defendant puts in an answer unnecessarily, and therefore voluntarily and uselessly incurs the costs which he asks for, on what principle are they to be allowed? I do not see that the assignee here could possibly have been damnified by not

answering. No personal decree was prayed against him. He might have been called upon to produce papers, &c.; and, perhaps, to prevent this and like possible inconveniencies, he had a right not to be retained as a defendant; but whether he should, as of course, have his costs on this account, may not be so certain.

The defendant says, that he offered to disclaim, but he does not say to whom or how the offer was made. Unless made to the plaintiffs, or their solicitor or authorized agent, such an offer is quite immaterial. In the cases cited by Mr. *Donovan*, the fact was distinctly stated in the answer. When not stated, I do not think I can assume what the defendant has not chosen to affirm; I am not sure that the omission was accidental, and that the defendant meant to swear that the offer was made to the plaintiffs, or to one acting by their authority.

Judgment.

On the whole, I think the decree must be without costs.

1868.

TOTTEN v. DOUGLAS.

Mortgages—Fraud on creditors—Assignee for value without notice.

An insolvent person executed to his son a mortgage for $1000, of which $600 was a sum fraudulently pretended to be due to the mortgagor's wife:

Held, that, even if the remaining sum was really due to the mortgagee, his concurrence in the fraud as to the $600 rendered the mortgage void *in toto*.

The assignee of a mortgage is entitled to set up the defence of a purchase for value without notice.

A party intending to purchase a mortgage should communicate with the mortgagor before purchasing; and if he refrains from doing so, his assignment is subject to all equities there were between the mortgagor and mortgagee, though the assignee may not have had actual notice of them.

The assignee of a mortgage, impeached as having been made without consideration and to defraud creditors, in setting up the defence of a purchase for value without notice, must deny notice that the mortgage was given without consideration; and a mere denial of notice of the claim of the impeaching creditor is insufficient.

Statement. This case had been set down for the examination of witnesses and hearing at the Autumn sittings of 1867, at Woodstock, but Vice Chancellor *Mowat*, who took the Western circuit, having been compelled, in consequence of the death of a relative, to leave Woodstock before the case was reached, it was agreed between the parties to take the evidence before the local Master, and to argue the case afterwards at Toronto—which was done.

The plaintiff *Totten* was the assignee (by an instrument dated February 13th, 1868,) of a judgment, recovered by the plaintiff *Baker* on the 31st October, 1864, against the defendant *Alexander Douglas*, on which a *fi. fa.* against the lands of *Douglas* was duly placed in the hands of the Sheriff. The bill alleged this writ to be still in full force.

1868.

Totten v. Douglas.

On the 18th June, 1864, before the recovery of this judgment but after the debt was contracted, the debtor executed a mortgage on his only real estate, in favor of his son *James Douglas*. This mortgage was, on the 2nd November in the same year, assigned by *James Douglas* to *Ephraim Cook;* and was, on the 13th October, 1865, assigned by *Cook* to the defendant *John W. Nesbitt*. The bill impeached the mortgage as fraudulent and void against the creditors of *Alexander Douglas*, and prayed for payment of the judgment debt out of the property mortgaged, in priority to *Nesbitt*, the holder of the mortgage.

Mr. *McLennan*, for the plaintiffs.

Mr. *J. A. Boyd*, for the defendant *John W. Nesbitt*.

Mr. *S. Blake*, for the defendant *Alexander Douglas*.

Judgment.

Mowat, V. C.—The defendants say that the mortgage in question in this case was given to secure $400 due to the son, and $600 due to the wife, of the mortgagor, though the interest of the wife was not mentioned in the mortgage. The wife, who is a defendant, has filed a separate answer, in which she makes this statement; but she proceeds to say that she has "no interest in the subject matter of the suit, and has been improperly made a party thereto," and she claims to be dismissed with costs. On this answer, as she does not allege that she ceased before suit to have or claim an interest, the bill should have been dismissed against her without costs (*a*), if the plaintiffs had not unnecessarily replied to her answer. I therefore dismiss the bill against her without costs, except the costs occasioned to her by the filing of the replication; and these excepted costs the plaintiffs must pay.

(*a*) Shuttleworth v. Roberts, 12 Gr. 237.

1868.

Totten v. Douglas.

The debtor, *Alexander Douglas*, is also a defendant, and not merely for conformity; for the bill alleges, that he made an assignment under the Insolvent Act to the defendant *Ignatius Cockshutt;* this assignment, for reasons set forth in the bill but not established by proof, the plaintiff alleges to be of doubtful validity: and the bill states, that either *Cockshutt* or *Douglas* is the owner of the equity of redemption—the plaintiff is doubtful which. It appears that a writ of attachment in Insolvency was issued against *Alexander Douglas*, under which he duly obtained his certificate of discharge long before the bill was filed. He was, therefore, not a proper party, except for conformity; and the plaintiff must pay his costs (*a*), as well as his wife's, subsequent to his answer, so far as his costs were occasioned by the plaintiffs' replying to his answer. Only one set of costs is to be allowed, however, to the husband and wife.

Judgment.

It was objected on the part of the defendants, that *James Douglas*, the mortgagee, and *Ephraim Cook*, are necessary parties to the suit, as the assignment by each contains a covenant that the mortgage debt is due; and each, therefore, will be liable to make good the loss of his assignee, if the mortgage should be successfully impeached on the ground that no debt was really due. I incline to think that the covenants have the effect suggested; and the authorities appear to shew that, where a defendant has a remedy over against another person, the latter should be a party to the suit (*b*). The General Orders have dispensed with parties (*c*) in some cases, but not in such a case as the present. This objection must

---

(*a*) Gilbert v. Lewis, 1 DeG. J. & S. 38; Wilson v. Chisholm, 11 Gr. 471.

(*b*) Ford v, Proudfoot, 9 Gr. 482; Greenwood v. Atkinson, 5 Sim. 419; Lesquire v. Lesquire, Rep. T. Finch, 134; Daniel's Prac. 4th ed., vol. i. page 271.

(*c*) See General Order, 3rd June, 1853, No. 6, Rule 8.

1868.

Totten v. Douglas.

therefore be allowed; but the plaintiffs must have leave to amend.

Though this objection was taken, the case was fully argued on the merits; and if I had perceived that the plaintiffs must fail ultimately, there would be no propriety in allowing new parties to be added; but I cannot say, on the materials before me, that the plaintiffs on a proper record, are not entitled to succeed. That portion of the mortgage money which is asserted to have belonged to the mortgagor's wife ($600) is made up of principal and interest alleged to have been due in respect of a sum of $106, which the wife is said to have received from some source shortly after her marriage, and to have lent to her husband, some thirty years ago: there was no written acknowledgement of the alleged debt by the husband then, or at any time before the mortgage was given. At the time of giving the mortgage, the husband appears to have been largely indebted to others, and hopelessly insolvent; and, without entering into further details, I must say that there is no room for a doubt as to the necessity, on the evidence now before me, of holding the mortgage fraudulent and void against creditors, so far as relates to this portion of it. In *The Commercial Bank* v. *Wilson* (*a*), the Court of Appeal held, where a judgment was made up, partly of a just debt, and partly of a sum not owing and which by mutual consent was included in order to defeat other creditors, that the judgment was void *in toto*. A mortgage must stand in this respect in the same position as a judgment; and it can make no difference whether it was agreed to treat the fraudulently included sum as a debt due to the mortgagee himself, or as a debt due to the mortgagor's wife or any other person.

Judgment.

In this view, it is unnecessary to say whether the re-

(*a*) 14 Gr. 473.

1868.

Totten v. Douglas.

maining sum of $400 was really due to the mortgagee himself or not; but I may observe that there is no other evidence of it except that of the mortgagor; that his evidence is entirely uncorroborated by any facts or circumstances; and is itself the reverse of satisfactory.

It was said on the part of the defendant, that the *fi. fa.* should have been renewed on the 7th instead of the 8th of November, 1865; that the date of issuing first written in the *teste* appears to have been the eighth of November, 1864; that the word "eighth" is cancelled therein, and the word "ninth" added; that the plaintiffs have given no evidence when this alteration was made; that, in the absence of such evidence, the true date should be taken to have been the eighth; and that a renewal on the 8th of November, 1865, would then be too late. No question on this point was raised by the answer; and I think that, as the evidence at present stands, I must assume that the writ was issued on the 9th (*a*).

Judgment.

The consideration paid to *James Douglas* for the assignment to *Cook* was, $400 cash, and $600 in promissory notes theretofore made by *Alexander Douglas*, and then held by *Cook*. What afterwards became of these notes does not clearly appear; but if the debt alleged to be due to *James Douglas*, was not really due, *Cook's* purchase, if sustained, will have enabled the father and son to commit a fraud on the father's creditors. The defendants allege, that *Cook* had no notice of the facts when he purchased; and, on the other hand, it was contended on behalf of the plaintiffs, that the defence of a purchase for value without notice, is not available to the purchaser of a mortgage—referring to the cases of *Parker* v. *Clarke* (*b*), and *McPherson* v.

(*a*) Taylor on Ev. sec. 1016. (*b*) 30 Beav. 54

1868.

Totten v. Douglas.

Dougan (*a*). These cases are founded on the principle, that it is the duty of such a purchaser to make known to the mortgagor his intention of purchasing, and to ascertain from the mortgagor whether there are any equities affecting the mortgage as between him and the mortgagee (*b*): if the purchaser fails to adopt this precaution, and is for that reason without notice of such equities, he takes notwithstanding subject to them. But, as it is clear that, if a debtor in fraud of his creditors conveys land absolutely, a purchaser from the grantee, without notice of the fraud, is not affected by the fraud,—I think the authorities would not warrant me in holding that the rule is different in the case of a mortgage, which is a conditional conveyance, by the debtor (*c*). So, it has been held, that the assignee for value of a voluntary bond, is entitled to rank with other creditors of the obligor, and not merely subsequent to them as would be the case with the obligee himself (*d*).

Judgment

It was argued on the part of the plaintiffs, that *Cook* had notice of the fraud. But, if notice by him at or before he purchased is material, I incline to think it is not sufficiently made out by the evidence so far, though it has not been without considerable hesitation that I have arrived at that conclusion.

The defendant *Nesbitt*, if not himself in the situation of a purchaser for value without notice, is entitled to the benefit of *Cook's* position in that respect; and the non-payment of the whole of his purchase money was admitted at the bar to make it essential for him to sustain *Cook's* purchase; though, to the extent of what

(*a*) 9 Gr. 258. (*b*) Mangles v. Dixon, 3 H. L. at p. 737.

(*c*) See George v. Millbank, 9 Ves. 190; Ford v. White, 16 Beav. 120; Case v. James, 29 Beav. 512.

(*d*) Payne v. Mortimer, 4 DeG. & J. 447. See Dawson v. Prince, 2 DeG. & J. 41. Part v. Elliason, 1 East. 92.

1868.

Totten v. Douglas.

is actually paid, Mr. *Dart* seems to think a purchaser in such a case entitled to a lien as against the adverse claimant (*a*). He cites, however, no authority for the opinion; and the reverse has been held in this country in *Graves* v. *Smith* (*b*), and other cases (*c*).

It was further contended on behalf of the plaintiffs, that the answer does not sufficiently set up the defence of a purchase for value without notice, as it does not deny notice of the circumstances charged in the bill as avoiding the mortgage. The denial is, of notice of "the alleged claim of the plaintiffs or either of them." But the plaintiffs' claim on the land did not arise until the *fi. fa.* was delivered to the Sheriff, which was not until after the assignment to *Cook;* and it is not material that *Cook* had no notice of the names of the mortgagor's debtors. To constitute any defence, what should have been denied was, notice that the mortgage was without consideration and executed to defraud creditors generally, according to the charges of the bill. Other objections were made to the mode in which the answer set up this defence, which it is unnecessary to consider.

Judgment.

The defendant *Nesbitt* must have leave to file a supplemental answer setting up this defence properly. The forms in *Beames* on Pleas, 341, and *Lewis* on Equity Drafting, 341, in connexion with the text of Lord *St. Leonard's* book (*d*), show all the requisites. As the Chancellor is said to have intimated an opinion that notice must be charged in the bill in order to let in evidence of it, the plaintiffs will have leave to amend

(*a*) 3rd ed., pp. 538, 539. See also Story's Eq. Pl. sec. 640, and American cases there cited.

(*b*) 8 Gr. 1.

(*c*) See Harvey v. Smith, 2 U. C. E. & A. 497; Henderson v. Graves, 2 U. C. E. & A. 91.

(*d*) Ch. 25; see Walwyn v. Lee, 9 Ves. 31, Story's Eq. Pl., sec. 805–807.

their bill by introducing the necessary charges in this respect, as well as to add parties. 1868. Totten v. Douglas.

The plaintiffs are to amend within a week, without prejudice to the bill standing *pro confesso* as respects *Cockshutt*. The plaintiffs are to undertake to go to a hearing at Woodstock at the next sittings there, if the further answer of *Nesbitt*, and the answers of the new defendants, are filed in time. Both parties are to be at liberty to use the present evidence if they think proper.

The objection for want of parties having been taken by the answer, the plaintiffs must pay the expense of the argument here; the remainder of the costs I reserve to be disposed of at the further hearing at Woodstock.

McMillan v. McSherry.

Manufacture of timber—Delivering possession.

To make valid against creditors of the vendor, a sale of timber to be cut down by the vendor, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual and continued change of possession as in the case of other chattels.

This was a motion for a new trial of an issue directed from this Court to the County Court of the County of York, to try the question of ownership of certain timber seized by the Sheriff of the County of Grey under an execution issued in this cause. Statement.

It appeared that the defendant *McSherry*, had entered into an agreement with the claimant, *Guy S. Baker*, to supply and manufacture and deliver certain timber for *Baker* which was not cut down at the time the contract was made, *Baker* agreeing to pay *McSherry* as the timber was manufactured and accepted by his

1868.

McMillan v. McSherry.

culler; the timber to be delivered on board the cars at Collingwood by *McSherry*, or if *Baker* chose he might take possession in the creek at the place where the timber was manufactured, or *Baker* might require it to be delivered at the mouth of the Beaver River. The acceptance and marking of the timber by *Baker's* culler to constitute "a partial delivery of the said timber." The timber was manufactured by *McSherry* and accepted and marked by *Baker's* culler, and paid for prior to the delivery of the writ to the Sheriff. Whilst *McSherry* was rafting the lumber to Collingwood, and whilst in the Beaver River, it was seized by the Sheriff under the exection.

Statement.

The issue came on for trial at the County Court in December, 1867, when the learned Judge of that Court charged the jury to return a verdict for the defendant in the issue, should they find that there was no full or actual delivery and continued change of possession of the timber in *Baker's* place: and the jury found for the defendant accordingly.

The claimant, *Baker*, now moved for a new trial on the ground that the verdict was contrary to law and evidence; in this, that by the operation of the contract proved at the trial, and the marking by the claimant's culler of all the timber thereunder before the delivery to the Sheriff of the writ of execution, and the payment of the full price or consideration by the claimant long before such delivery of the writ, the property in the timber absolutely passed to the claimant, and even though there might be no actual and continued change of possession, the claimant was by law entitled to a verdict, the property being his, and the Chattel Mortgage Act not applying to such a contract or such a case; and for misdirection in this, that the learned Judge ought to have directed the jury that the contract and the marking and acceptance of the timber by the culler

1868.

McMillan v. McSherry.

passed the property to the plaintiff; and that even if the jury should find no actual change of possession that the claimant was nevertheless entitled to a verdict because the property was his; but that the learned Judge refused so to direct. And in this that the learned Judge ought to have ruled and directed the jury that as a matter of law the marking of the timber was a delivery of possession under the contract, and the circumstances of the case: and in this, that the learned Judge ought not to have told the jury, as he did, that in his opinion there was no change of possession.

Mr. *James Paterson* and Mr. *Bain*, for the claimant.

Mr. *Hector Cameron*, for the defendant in the issue.

VANKOUGHNET, C.—The finding of the jury, that there had been no change in the possession of the timber at the time of the seizure, is not complained of; and is, I think, warranted by the evidence. The plaintiff, however, complains that the property in the timber had passed from *McSherry* to *Baker*, and that the question of the mere possession of it was therefore unimportant. According to the testimony of *McSherry*, I think, the property had passed to *Baker;* and if this was sufficient for the plaintiff's case, there should be a new trial that this evidence might be again submitted to the jury in that view. But I think section 4 of chapter 45, (Consol. Stat. U. C. p. 452), applies to the description of property in question here, however inconvenient such a construction of the Statute may be in cases like the present. Section 4 says "Every sale of goods and chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession shall be void against creditors," &c. Of course, this means a completed sale; and it is not pretended here that there was any such sale until the timber was prepared for market, measured and delivered, and paid for.

Judgment.

1868.

McMillan v. McSherry.

The contract was by the one party to sell and deliver to the other certain square timber, to be manufactured upon certain terms of payment and delivery. This timber was the property in the first instance of the contractor or vendor, and remained so until paid for and delivered to the vendee. Now, when this took place there need have been no difficulty in effecting an actual change of possession, as in the case of any other goods and chattels. The timber was goods as much as the oxen or horses that drew it. It was capable of delivery, and, according to the contention of the plaintiff, was delivered to him. If so, it could have been followed by an actual and continued change of possession; and this, the jury have found did not take place. I have no right to say that the Statute shall not apply to property of the nature and description of this property at the time of the Sheriff's seizure. It may be a very inconvenient application of the Statute for those engaged in the lumbering business; but they work at the risk. The policy of the law cannot be thwarted on that account. Timber got out and manufactured as this was, might be left in the woods, as it often is, for months, without any change of possession, and why should the Statute not apply in such a case? The purchaser must take care to change the possession actually and visibly, or register a written transfer under the Statute. I think the learned Judge's charge right. Marking would be no sufficient evidence of change of possession, for, by the contract, the timber was to be marked before delivery.

Judgment

Motion refused with costs.

1868.

ROE v. STANTON.

Practice — Varying decree.

An incumbrancer, made a party in the Master's office under the General Orders of the 6th of February, 1865, cannot, after the lapse of fourteen days from the service of the decree, file a petition to vary the decree, without first obtaining leave by an application in Chambers.

This was a foreclosure suit, and the usual decree had been made on *præcipe* (5th of March, 1867.) *Cyrenus Hall*, having a subsequent incumbrance, was made a party in the Master's office, and petitioned for a variation of the decree on the ground that the plaintiff's mortgage was to secure an annuity of £90, and not one sum of £500 as the bill alleged, and that the proper decree was for a sale on default. The plaintiff consented to the proposed variation.

Mr. *Proudfoot*, for the petitioner.

Mr. *Crombie*, contra.

MOWAT, V. C.—Counsel for the original defendants, the mortgagors, object that the petitioner's proper course was to rehear the cause, referring to *Mulholland* v. *Hamilton* (*a*); but there the contention was that the variation was proper on the pleadings, and the evidence which was before the Court at the hearing. Here the variation is sought on the ground that the bill did not state the facts truly; and if there was a rehearing, the Court would not have before it the facts ascertained in the Master's office, and which call for the variation desired. Judgment.

After the counsel for the petitioner had replied, another objection occurred to the learned counsel for the

(*a*) *Ante* p. 53.

1868.

Roe v. Stanton.

defendants, viz., that the application was not made within the fourteen days named in the notice served under the General Orders of 6th of February, 1858. I think that the omission to apply within the fourteen days is sufficiently accounted for in the affidavits, but after the lapse of the fourteen days, leave to apply for the variation must be obtained: and I think that I must hold the petition to be irregular in the absence of such leave.

The United States of North America v. Boyd.

International Law—Captured postage stamps—Purchase without notice.

On the determination of the Civil War in the United States, the Government at Washington became entitled to the property theretofore belonging to the Confederate Government.

During the war, United States postage stamps to the amount of $10,500 were taken by a Confederate ship from a United States vessel. There was no condemnation in a Prize Court; nor any transfer of the stamps to any person by the Confederate Government. After the war was over, these stamps, being in possession of an officer of the Confederate ship, were sold by him through a broker to the defendant in Liverpool at a large discount. The defendant alleged that he had bought without notice of any infirmity in the title; but the Court—being satisfied that he bought with knowledge of the facts, or with a strong suspicion of them and designedly avoided inquiry—ordered the stamps to be delivered up to the United States Government.

Hearing at Toronto Spring sittings, 1868.

Mr. *Hillyard Cameron*, Q. C., Mr. *Blake*, Q. C., and Mr. *Bain*, for the plaintiffs.

Mr. *Roof*, Q. C., and Mr. *McMurrich*, for the defendants.

1868.

U. States v. Boyd.

MOWAT, V. C.—This is a suit respecting certain United States postage stamps (350,000 three-cent, and some twelve-cent, making together about $10,500 worth) which the plaintiffs claim as theirs, and which are in the possession of the defendants, Messrs. *Boyd & Arthurs*, merchants of this city, as agents for their co-defendant *Arthur Woods*. The bill prays that these postage stamps may be declared to be the plaintiffs' property, and may be delivered up to them; that the defendants may be restrained meanwhile from selling or parting with the stamps; and for general relief.

The defendant *Woods* claims to have purchased the stamps without notice of the plaintiffs' right to them, from a broker in Liverpool who had them in his possession at the time, and was believed by the defendant to have power to sell them.

Judgment.

Subject to this defence, it is quite clear that the stamps are the property of the plaintiffs. The evidence satisfactorily establishes, that these stamps were despatched by the proper officers of the United States Government, in pursuance of their official duty, to certain postmasters in the State of Louisiana, by the ship "Electric Spark," which sailed from New York for New Orleans on the 9th July, 1864; that, on the day following, the "Electric Spark" was captured by the "Florida," a ship in the service of the Confederate States; and that these stamps, with the rest of the cargo, were taken possession of by the captors. There was no condemnation by a Prize Court; and if there had been, the property would still be the plaintiffs', there being no evidence whatever of its having been parted with by the Government of the Confederate States. The plaintiffs have regained their authority in those States; the Government for which the capture was made has ceased to exist; and it has been expressly decided in England that the plaintiffs are now entitled

1868. to all the property to which the Confederate Government during its existence had the right (*a*).

U. States v. Boyd.

The learned counsel for the defendants contended, that property of this kind is equivalent to money, and cannot be followed by the owner; but the reverse is clearly settled (*b*). He contended, also, that the plaintiffs' only remedy is at law; the authorities negative that view likewise (*c*).

But the defence chiefly relied upon was, the defendant *Woods'* alleged purchase without notice. The purchase took place in Liverpool (England), on the 21st September, 1865, which was some months after the Rebellion had come to an end. The purchase was made from one *Allan S. Hanckel*, a commission merchant in Liverpool, who was acting in the transaction for one *Richard Taylor*, an officer of the "Florida" at the time

Judgment. of the capture. The three-cent stamps were in seven packets of 50,000 each, and these (with, I presume, a packet containing the twelve-cent stamps) were delivered by *Hanckel* to the defendant *Woods*, at or about the time of the purchase; but the price agreed upon (£1,120 sterling) was not then paid. On or before the 27th of September, the defendant handed over the packets to Messrs. *Gillespie & Co.*, brokers in Liverpool, who had correspondents in America, to be sent to Toronto for sale; and the packets were accordingly forwarded by Messrs. *Gillespie & Co.* to the defendants *Boyd & Arthurs*, for that purpose. Afterwards the defendant *Woods* gave *Hanckel* the defendant's two promissory notes of £400 and £720, respectively, for the pur-

(*a*) United States v. Priolean, 11 Jur. N. S. 792.

(*b*) See Prentiss v. Brennan, 1 Gr. 489, *et seq.*; Miller v. Race, 1 Burr. 452; S. C. and notes, 1 W. & T. L. Cases, 450; Pennell v. Deffel, 4 D. G. McN. & G. 372, 388; Harford v. Lloyd, 20 Bea. 310; Case v. James, 29 Ib. 512.

(*c*) See cases, Kerr on Inj. 595.

chase money, payable on demand, with interest, and dated 1st October, 1865. A receipt from *Hanckel* for the purchase money is produced, dated 10th October, 1865; but nothing was actually paid until the following February. Meanwhile, viz., on the 30th of November, 1865, Messrs. *Gillespie & Co.* wrote to Messrs. *Boyd & Arthurs*, requesting them, if they had not yet succeeded in effecting a sale, to send the stamps to a certain firm in Hamilton, or to send them, packet by packet, as one was sold, to a gentleman in New York (whom they name) for sale on their account. Before receiving this letter, *Boyd & Arthurs* had been endeavouring to effect a sale, and the fact of their having in their possession this enormous amount of postage stamps, had in that way come to the knowledge of the United States authorities. The result was, that, after some ineffectual communications with Messrs. *Boyd & Arthurs*, a bill was filed in this Court against those gentlemen on the 9th of December, 1865, and an *ex parte* injunction was granted the same day, restraining the sale of the stamps until the further order of the Court. The defendants *Boyd & Arthurs* filed their answer on the 3rd of February, 1866, evidently after communicating with *Woods* on the subject of the suit. By this answer they disclosed the interest possessed or claimed by *Woods* in the stamps, and submitted that he was a necessary party to the suit. The plaintiffs, accordingly, on the 17th of March, filed an amended bill against *Woods* and the original defendants; and on the 25th of May the answer of *Woods* was filed. By this answer the defendant *Woods* alleged that the whole purchase money (£1,120) had been paid by him. It is now admitted that this was not the fact, and that the £720 note is not yet paid. No explanation is given of this discrepancy. It was contended on the part of the plaintiffs, that the defence of a purchase without notice is not available in case of such a purchase as the present, any more than in case of a purchase of land, unless the whole price was paid before notice of the

Judgment

1868.

U. States v. Boyd.

adverse claim. The defendant *Woods'* claims the stamps as legally his; and if they are legally his, he is entitled to succeed. Is actual payment of the whole price necessary at law to sustain such a claim? If *Hanckel* could not give a good title to the stamps, and the consideration therefore wholly failed, I presume *Woods* was not bound to pay the promissory notes, and any payment after notice of the adverse claim was in his own wrong (*a*). But it is unnecessary to decide that part of the case, as I am of opinion that the evidence sufficiently proves that, at the time of the defendant's purchase and of giving the notes, he either had notice of the facts on which the plaintiffs' right rests, or had "the means of knowing, to which he wilfully shut his eyes" (*b*), and is therefore to be treated as if he had knowledge. He himself denies notice, but, after the incorrect statement he has made as to having paid the whole price, I am not at liberty to attach much weight to the denial.

Judgment.

The defendant has been for upwards of twenty years carrying on business in Liverpool as a stock and share broker, and a dealer in all negotiable securities; but neither he nor any one else has heard of any sale of United States postage stamps in England, except the one in question, and except one other the amount of which no witness states. Indeed, postage stamps were not a kind of property that was dealt in anywhere, except for small sums. Even in the United States no private person has ever held any such amount as that in question. Statements to this effect are made by various witnesses, and, from the nature of the case, one could hardly have doubted that the fact was so, even had there been no express evidence of it. The purchase of such securities cannot, therefore, be said to have been

(*a*) Addison on Contracts, 5th ed. pp. 224, 225.

(*b*) May v. Chapman, 16 M. & W. 361.

in the usual course of business, but was on the contrary wholly out of the usual course of business.

1868.

U. States. v. Boyd.

Then, how could the seller of these stamps have been supposed by the defendant to have got so enormous a quantity? What did he get them for? The stamps are in sheets, and, as I understand, have on them the adhesive matter which fits them for their purpose as postage stamps; and they must have presented when bought by the defendant, as they still present, all the appearance of being in the original post office packages. What could they have been brought to England for? How could they have got there? A speculation and an investment were equally out of the question; and, in fact, the learned counsel for the defendants did not suggest any possible way in which a sane man, in the defendant *Woods'* position, could have imagined the possession to have been obtained honestly, unless by the very means by which the possession is proved by the witnesses to have been in fact obtained. The war, and the occasional capture of United States vessels, were facts which the defendant, a Liverpool broker, could not but have known and been familiar with.

Judgment.

Further, the defendant bought with a view to an immediate re-sale; but, instead of sending his property to the United States where the sale would manifestly be readiest and to the greatest advantage, he had it sent for sale to another foreign country (Canada), and he authorized the sale to be made there at a large discount to the buyer. This took place immediately after the defendant's purchase, and before he had paid any part of his purchase money or given his notes for it. A few weeks later, the consignees in Canada were instructed, in case the stamps remained unsold, to send them to New York, a packet at a time according as one was sold. What was the reason of that caution? Every step in their proceedings implies that both par-

1868.

U. States v. Boyd.

ties were well aware, or strongly apprehended, that there was an infirmity about the title, as respects the United States Government: the parties acted in a way that is unintelligible on any other supposition.

If the defendant did not know the facts, it is plain that he violently suspected them, and did not choose to avail himself of any means of knowledge. Confessedly, he made no inquiry about the name of the owner, or about the title; he made no inquiry of *Hanckel*, or of the United States Consul at Liverpool, or of any one else (*a*). Can I hesitate to say that he preferred being ignorant of what on such inquiry he might learn? Such a purchaser cannot protect himself as having bought *bonâ fide* without notice.

I think the plaintiffs are entitled to a decree for the stamps, with costs as against the defendant *Woods*, who should also pay the costs of his co-defendants (*b*).

Judgment.

(*a*) See the Mayor, &c., of Berwick on Tweed v. Murray, 7 DeG. M. & G. 417, 512, 513.

(*b*) Consolidated Orders, No. 319.

1868.

WOODSIDE v. LOGAN.

Will, construction of—Pleadings—Abandonment of part of prayer at hearing.

A will after giving several pecuniary legacies contained this direction: "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding: "In them I repose full confidence that they will act fair and consistent:"

Held, that all the testator's lands were to be sold; and that the executors had power to sell them, although they had not the legal estate.

The surplus was to be divided amongst the legatees in proportion to the other sums bequeathed to each. One legacy was of $200, and an annuity; and the legatee died within a year after the testator:

Held, that her personal representatives was entitled to a proportionate part of the annuity; and that her share of the surplus was to be based on the $200, plus this sum.

A bill was filed praying a declaration of the true construction of a will, and for an administration of the estate by the Court. The bill was taken *pro confesso* against some of the defendants. At the hearing, the plaintiff wished to abandon the prayer for an administration of the estate, but one of the defendants, who was a legatee, objected:

Held, that he was entitled to a decree for administration as prayed.

Statement.

This was a bill by a legatee under the will of *James Cæsar*, deceased, against the executors and some other legatees. The bill set forth the will at length which was as follows:—

"I, *James Cæsar*, of the Township of Cartwright, in the County of Durham, and Province of Canada, Esquire, do hereby make this my last will and testament in writing, having made no other will.

1. I give and bequeath unto Mrs. *Sarah Woodside*, formerly of the Township of Manvers, in the aforesaid county, one hundred and sixty dollars; and if she is dead or dies before this money is received by her, then her heirs are to get it, evenly divided between them.

1868.

Woodside v. Logan.

2. I give and bequeath unto my sister *Jane Kells* two hundred dollars, and one hundred dollars each year after during her natural life-time.

3. I give and bequeath unto *Catherine Deacon*, of Cartwright, two hundred dollars.

4. I give and bequeath unto *David Deacon's* four children one hundred dollars each, when they arrive at age; and in the event of any of them dying before coming of age, such shares may be paid to any other child or children of the said *David Deacon*, who may be born after the date of this will.

5. I give and bequeath unto *John Daniel*, of the Township of Fenelon, two hundred dollars.

6. I give and bequeath to Mrs. *Edward Bowers*, of Old Court, in the County of Kilkenny, in Ireland, the sum of five hundred dollars; and in the event of her dying before she gets this money, her children are to get it evenly divided between them; address her at Pilltown, P. O., County Kilkenny, Ireland.

Statement.

7. I give and bequeath unto *John Toronto*, our present bishop, or to his successor, for the benefit of the Church of England, that field or lot, number eleven, in the sixth concession of Cartwright, known as the graveyard, containing some six acres,—excepting a burying lot sold heretofore, being about twenty-six feet by twenty-nine feet, and where my mother and brothers are buried, and a new square for a burying place for my friends.

8. I give and bequeath unto the Rev. *William Logan*, of Cartwright, one hundred dollars.

9. I give and bequeath unto *Thomas M. Fairbairn*, barrister at Peterborough, the sum of one hundred dollars.

10. I give and bequeath unto *Thomas Perdue*, senior, *John Perdue*, *Daniel Perdue*, *Henry Perdue*, and *Michael Perdue* (all brothers), in the township of Chinguacousy, in the County of Peel, the sum of one hundred dollars each; and if any of these *Perdues* die before the money is paid, then the children of such

1868.

Woodside v. Logan.

person or persons shall get it, evenly divided between them.

11. I give and bequeath unto *James Cæsar*, *Matthew Cæsar*, *Henry Cæsar*, and *John Cæsar*, of the Township of Holland, in the County of Grey, and *Thomas Cæsar*, of the Township of Dorchester, in the County of Elgin, and to *Alice*, *Eliza*, *Margaret*, and *Mary*—all of those four last mentioned are sisters to the above named *Cæsars*—the three first mentioned in the list of the *Cæsars*, together with the three first of the women, live in the Township of Chinguacousy, in the County of Peel—I give unto each of them the sum of one hundred dollars; and in the event of any of them dying before the legacy is paid, then the one hundred dollars is to be evenly divided between the children of such person or persons as the case may be.

12. I also order and direct that there shall be tombstones erected over my brothers and mother's graves, and that spires equal to those erected over my brothers' graves be erected for me and my sister *Jane's* graves; also tombstones; and these graves are to be enclosed by iron railing or cast metal, to be placed on three stones which I have received from Kingston. There are nine of them. And when my lands are sold and all the legacies paid, the money remaining is to be divided between those who have received a legacy, according to the amount stated in my will, meaning that the surplus is to be divided in proportion to the amount the individuals received heretofore. Statement.

13. I also order that *John Forder* and his present wife shall occupy the land they now rent from me, during their natural lives, and their heirs or executors one year longer from the first day of April next after their death. The rent is to be one hundred pounds a year, above taxes, and no wood or straw to be taken from the farm. It is understood that an abatement of fifty dollars a year is to be allowed when the fall wheat sells for ninety cents a bushel.

1868.

Woodside v. Logan.

14. I give and bequeath unto *Thomas Cæsar*, of Cæsaræa, the sum of thirty dollars and no more.

15. I give and bequeath unto *James Cæsar* sixty dollars (he received forty dollars heretofore.)

16. I give and bequeath unto *Henry Cæsar* eighty dollars (he received twenty dollars heretofore.) They live near Blue Vale Post Office.

"I nominate *Thomas M. Fairbairn*, barrister of Peterborough, to be one of my executors, and the Rev. *William Logan*, of Cartwright; in them I repose full confidence that they will carry out my views, as far as may be consistent."

Statement.

The parties named in paragraphs three to eleven inclusive, were not parties to the bill. The persons mentioned in the fourteenth, fifteenth, and sixteenth paragraphs were defendants, and the bill as against them was taken *pro confesso*; they are not the same persons as the legatees of the same names mentioned in the eleventh paragraph. The bill also stated the death of the testator on the 22nd of September, 1866; alleged that the executors had proved the will; asserted that the true construction of the will was doubtful on certain points which the bill mentioned; and prayed, that the true construction of the will and the rights of the parties thereunder might be declared; that the trusts of the will might be carried out, and the estate administered and realized by, and under the direction and decree of the Court; that for these purposes all proper directions might be given, accounts taken, inquiries made; and for general relief; and the costs of the suit.

Jane Kells died after the testator, and *David Deacon* her devisee and executor, was a defendant.

The cause came on by way of motion for decree.

Mr. S. *Blake*, for the plaintiff.

1868.

Woodside v. Logan.

Mr. *Rae*, for the executors.

Mr. *Gwynne*, Q. C., for *David Deacon*.

MOWAT, V. C.—One of the questions, in regard to which the construction of the will in this cause is stated to be doubtful, is, whether the executors have power to sell and dispose of the testator's real estate, and to divide the proceeds; and in case my opinion on that point should be that the executors have the power, counsel for the plaintiff desired the decree to be confined to a declaration of the true construction of the will on this point, and the other points on which the meaning of the will is supposed to be doubtful; leaving the lands to be sold and the estate administered by the executor out of Court. Mr. *Gwynne*, however, on behalf of *David Deacon*, the devisee and executor of *Jane Kells*, one of the legatees, objected to this course, and argued that his client is entitled to an administration of the estate by the Court itself. This contention appears to be correct. The bill asks administration by the Court; and has been taken *pro confesso* against some of the defendants, who may be assumed to have allowed the bill to be taken *pro confesso* against them because they desired, or were willing, to have such a decree as is prayed; and had the present suit not been brought, a bill for the same purpose by *David Deacon*, on whose behalf the administration of the estate of the Court is demanded, would I presume, have been maintainable. Having reference to these circumstances, I do not think that the plaintiff has a right, against the will of one defendant who appears and without the consent of all the other defendants, to abandon so much of her bill as seeks for an administration by the Court, and to confine the decree to a mere declaration of the true construction of the will.

Judgment.

In view of the property being sold under the decree

1868.

Woodside v. Logan.

of the Court, the question of the power of the executors to sell is not material; but my opinion is, that the will gave to the executors that power, though not the legal estate in the lands to be sold. I think, also, that the testator intended all his lands to be sold, and the proceeds divided as his will provides; and that the rents meanwhile constitute part of the estate which is to be distributed agreeably to the will.

The next question suggested by the bill is, whether *Thomas Cæsar*, *James Cæsar*, and *Henry Cæsar* are entitled to a share of the residue, in addition to the sums named in the 14th, 15th, and 16th clauses of the will; and I am of opinion that all three are so entitled.

As to the proportion. The 12th clause directed the surplus "to be divided between those who have received a legacy, according to the amount stated in my will, meaning that the surplus is to be divided in proportion to the amount the individuals received heretofore." The testator bequeathed various sums to different legatees, and he gave $100 each to several of those who are named in the preceding paragraphs of the will. By the last three paragraphs, he gave to *Thomas Cæsar*, of Cæsarea, $80, adding "and no more;" to *James Cæsar* $60, adding he "received $40 heretofore;" and to *Henry Cæsar* $80, adding "he received $40 heretofore." I think the share of *Thomas* in the surplus is to be according to the proportion which $80 bears to the other legacies; and the shares of *James* and *Henry*, each, in the proportion which $100 bears to the others. I think it sufficiently appears that this is what the testator meant.

Judgment.

Then as to *Jane Kells*, I think her proportion is to be calculated on the basis of her legacy of $200, plus the value of the annuity given to her. Had she lived, the annuity would have to be valued for this purpose in

1868.

Woodside v. Boyd.

the usual way of valuing annuities, no other method of carrying out the will being practicable; but as the annuitant is dead, I think the actual value must be taken as ascertained by the event. She is said to have died within a year after the testator. In that case her estate is entitled to a proportionate part of the annuity, according to the English Statute, 4th William IV., chapter 22, section 2—that Statute having been passed before 1837, and being therefore in force in this Province as regards any annuities for which the remedy is in this Court, though the Act is not in force at law (*a*).

It was contended on behalf of *David Deacon*, that the proper time for declaring the construction of the will would be on further directions. But I see no objection to declaring now my opinion on the points I have mentioned, as they do not depend on the result of the reference, and the parties before the Court sufficiently represent those who are interested in resisting the views I have expressed. The decree will direct the usual accounts and inquiries, but no sale at present unless all parties desire a sale to be ordered at once. The Master will state special circumstances at the instance of any party. Further directions and costs will be reserved.

Judgment.

(*a*) Vide U. C. Consol. Stat. U. C. ch. 12, secs. 25, p. 50.

1868.

GRIER v. PLUNKET.

Municipal law—Bill by ratepayer.

Where a by-law was passed by a township council for raising a loan for a special purpose, it was *held* to be contrary to the duty of the township Treasurer to apply the money to any other corporate purpose.

But where, in such a case, the application had been actually made before the filing of a bill by a rate-payer complaining of the application, and such application had been made in good faith, in discharge of a legal liability of the township, and the township council approved of and adopted the payment, a bill by a rate-payer to compel the Treasurer to repay the amount and personally bear the loss, was dismissed.

The bill in this cause was filed on the 5th August, 1867, and was by a resident rate-payer of the Township of St. Vincent, on behalf of himself and the other rate-payers, against *Thomas Plunket* the Treasurer, and the *Corporation* of the township. The cause came on to be heard by way of motion for decree.

Mr. *McCarthy*, for the plaintiff.

Mr. *McMichael*, for the defendants.

Judgment. MOWAT, V. C.—Two by-laws were passed in the Township of St. Vincent, sanctioned by the vote of the rate-payers:—one, to raise $800, by way of loan, for the erection of a town hall; and the other, to raise in the same way $10,000, for the construction of a harbor. The collector, having made collections on account of the special rates required by these by-laws, for the years 1865 and 1866, paid the money over to the Treasurer, *Plunket;* and with reference to the money so paid, the bill alleges two grounds of complaint against the Treasurer. The first is, that it was, as the plaintiff contends, the duty of the Treasurer to keep two separate accounts for the debt created by each of these two by-laws, one

1868.

Grier v. Plunkett.

for the special rate, and the other for the sinking fund, in the manner specified in the 230th section of the Municipal Act of 1866 (*a*); which the Treasurer has not done. But what that section provides is, that the Council should in their books keep all these accounts. The 152nd section of the same Act makes it the duty of the clerk to keep the books and accounts of the Council; and the Council have, through their clerk, duly kept the accounts thus required, as the plaintiff was aware before he filed his bill. I was not referred to any clause of the Act which imposes the supposed duty on the Treasurer.

The second complaint which the bill makes is, that the Treasurer has not seen that the money collected under these by-laws was properly applied, as was his duty under the 207th and 213th sections of the Municipal Act of 1866 (*b*); and that, on the contrary, he has misapplied and misappropriated the money he so received. The facts as to this misapplication are ascertained from the answers of the defendants and the examination of Mr. *Plunkett* to be these. Through the defalcation of a collector, the township was in default to the county in respect of money collected in the township for the county for 1865; and the county threatened to take proceedings against the township to enforce payment. The Reeve of the township, hearing this, verbally directed the defendant, the township Treasurer, to forward to the Treasurer of the county whatever the defendant had in hand; and the latter thereupon (March 1867) forwarded the money in question. This was no doubt wrong: it was wrong to apply to any other object money received for specific purposes under by-laws voted for by the rate-payers, however convenient at the moment the irregular application may have been: and the direc-

Judgment.

(*a*) Page 210.

(*b*) 29 & 30 Victoria, chapter 51. See also Assessment Act, chapter 53, sec. 11, sub-sec. 1.

1868. Grier v. Plunkett.

tion of the Reeve was no justification of the Treasurer's illegal act.

After the suit was instituted the Council passed a by-law repealing the harbor by-law, under which part of the money had been levied, no loan having been obtained or other debt contracted under it; and by their answer the Council adopt the payment which their Treasurer made to the county, and declare that it had and has their sanction and authority. But this by-law has no effect until approved by the Governor in Council (*a*); and as to the money collected under the Town-hall by-law, it is not suggested that no debt had been contracted to which this money was applicable.

It was contended on behalf of the plaintiff, that no rate could be levied, to make good the amount due to the county, after the expiration of the year for which the amount was due. But I do not see any sufficient ground for this contention: money to be collected for the county stands on a peculiar footing (*b*).

Judgment.

The defendant *Plunkett* having thus, in good faith, with the approval of the Council, and probably in ignorance of the illegality of what he was doing, paid a debt of the Corporation, with money of the Corporation which had been raised for another corporate purpose,—if he is called on in this Court to make good to the latter fund the sum he irregularly withdrew from it, he is entitled to be recouped by the township, the township having had the benefit of the irregular payment (*c*). The plaintiff desires to make *Plunkett* personally restore the amount, and bear the loss of his payment to the

(*a*) 29 & 30 Victoria, chapter 51, section 234.

(*b*) 29 & 30 Victoria, chapter 53, secs. 77, 78, 192, 194.

(*c*) See cases collected, Lewin on Trusts, 5th ed., ch. 15, pl. 8, pp. 298, 299; ch. 27, sec. 3, pl. 23, 25, 26, pp. 654 to 656.

county; and I think the ratepayers are not entitled to that relief. The bill must, therefore, be dismissed with costs. The defendants have unnecessarily filed two long answers in nearly the same words; only one is to be allowed, and one set of costs generally.

1868.

Grier v. Plunkett.

MOFFATT v. WALKER.

Statute of Limitations.

The defendant acquired the legal title under a deed in December, 1842, in the portion allotted to him of the land in which the plaintiff and defendant as also one M., had previously been jointly interested; and the strip of land in question in this suit was erroneously included in this conveyance; and this fact was known, but the conveyance was executed notwithstanding. About the same time the plaintiff and defendant executed a document agreeing to leave this strip for their mutual benefit, the plaintiff to have the timber thereon. The defendant had not actual possession of the strip, but there was no separation between it and the other portion of the lot which he did occupy under his conveyance.

Held, that this document operated to prevent the defendant from acquiring a title to this strip under the Statute.

Examination of witnesses and hearing at Hamilton.

Mr. *Freeman*, Q.C., for the plaintiff.

Mr. *Fitzgerald*, for the defendant.

SPRAGGE, V. C.—I disposed of the case at the close of the argument, with the exception of one point, viz.: the question raised by the defendant upon the Statute of Limitations. Judgment.

By the conveyance of December, 1842, the defendant acquired the legal title in the portion allotted to him, of the land in which he, and the plaintiff, and *Mack*, had previously been jointly interested; the plaintiff

1868.

Moffatt v. Walker.

obtaining his legal title for his portion at the same time. The defendant's conveyance by mistake covered the strip of land in question in this suit; or rather, the strip of land should not have been included in the conveyance, and this was known; but the conveyance was executed notwithstanding. About the same time, and by way of compromise, the parties executed a document in the following terms:

"HAMILTON, December 14, 1842.

"*William Moffatt* and *James Walker* agree to leave the strip of land on the westerly limit of No. 34, in the sixth concession of Ancaster, as surveyed out for a road, for the mutual benefit of said *William Moffatt* and *James Walker;* the said *William Moffatt* is to have the timber of said land."

Judgment.

The defendant has not had actual possession of this strip of land, but he has actually possessed and occupied under his conveyance that part of lot 34, which abuts upon the strip; there is no division on the land between the strip and the other part of 34, conveyed; and he has as much possession of the strip as of the other part of the lot, not reduced into actual possession by clearing or fencing. The strip is uncleared.

The question is whether the document I have referred to, operates to prevent the defendant's general possession under his title from attaching upon the strip. I incline to think that it does. Having actual possession of the strip, or as it may be of the piece of land in question, called for convenience sake the strip, being out of the bounds of his actual possession, his possession of it would be imputed or constructive only; and if so may be rebutted: and I think it is rebutted by shewing that though he has the legal title, there is an equitable title with which such possession would be inconsistent. He has received his consideration for his execution of

the document, and I think his position is the same as if he had contracted to sell, and had been paid for, one half of his lot; but had made no conveyance; and had occupied the other half. I think that the contract of sale would rebut the presumption of possession of the half sold, arising from his having a legal title for the whole. 1868. Moffatt v. Walker.

I think, therefore, the plaintiff is entitled to a decree. but he has claimed more than he was entitled to. By his bill, and in the correspondence preliminary to the suit, the land itself is claimed, and in the prayer he asks for a conveyance. It is clear from the parol evidence as well as from the document of the 14th of December, that he was to have the timber only, and a right in common with the defendant to have the strip in question for a road.

I do not think it is a case in which costs should be given to either party. Judgment.

Irving v. Boyd.

Chose in action—Principal and surety—Equitable right.

A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where therefore a mortgagee filed his bill against the assignee of the equity of redemption to enforce by the means payment of the deficiency arising on a sale of the mortgaged promises, it was held that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached.

This was a bill by the representative of a mortgagee against the mortgagor and his assignee, seeking to compel the assignee to pay the deficiency which remained after a sale of the mortgaged premises in a

1868. Irving v. Boyd.

former suit; and for which a writ of sequestration had issued against the mortgagor. The assignee set up that the mortgagor had executed to him a release of any claim in respect of the mortgage. The mortgagor had allowed the bill to be taken *pro confesso* against him.

Mr. *Roaf*, Q. C., for the plaintiff.

Mr. *McLennan*, for *Boyd* the assignee.

The defendant *Francis*, the mortgagor did not appear.

SPRAGGE, V. C.—The plaintiff, surviving executor of a mortgagee, filed his bill against the mortgagor, the defendant *Francis*, and the assignee of the equity of redemption, the defendant *Boyd*, and a decree was made for a sale of the mortgaged premises, and for the payment by the mortgagor of the deficiency, if any. The sale took place, and the purchase money fell far short of the mortgage debt. To enforce payment of the deficiency, a sequestration was issued. As between the mortgagor and his assignee, the plaintiff's contention is, that the assignee was the party to pay off the mortgage debt, and this, I think, is clearly established in evidence. The assignee, then, as between him and the mortgagor, is the party primarily to pay the debt, for enforcing payment of which the sequestration issued, and the mortgagor stands in relation to that debt in the position of surety. The plaintiff in this suit is, as mortgagee, the creditor, and he seeks to have the benefit of the equity, which the mortgagor has, as surety, against the assignee, *Boyd*. He concedes, as he must, that there is no privity between him and the assignee, and that he cannot, by action at law or bill in equity, compel *Boyd* to pay to him that which *Francis* is bound to pay, and which, as between *Francis* and *Boyd*, *Boyd* is bound to pay. *Boyd* is the party to pay the money, and the plaintiff is the party to receive it. The diffi-

culty is the want of privity between them. The plaintiff's contention is, that by means of the process of sequestration, he can avail himself of the right which the surety has to compel payment, and this bill is filed for that purpose. 1868. Irving v. Boyd.

The books contain a good deal of old law as to the process of sequestration, and as to what may be taken under it. The earlier cases vary a good deal. I do not propose to review them, or to go into the distinctions between the writ, as used for *mesne*, and as used for final process. I think it may now be looked upon as established—what was for some time in dispute—that choses in action may be reached by sequestration. The difficulty which appears in several cases was *how* they were to be got at, by reason of the interest of a third party being necessarily drawn into the question; and it was held that the Court would make no order for payment, unless the third party—the party to pay—voluntarily submitted to the jurisdiction. But this plainly was only a question of *procedure*. The Court could not make the order to pay, even as to one who submitted as a mere stakeholder, to make payment to the party entitled, unless the sequestration had reached it, and had transferred the title to receive it from the original creditor to the sequestration creditor. Judgment.

In *Franklyn* v. *Colhoun* (*a*), the application was by motion. It was for an order that a sum of money due to the sequestration debtor, should be paid into Court. Lord *Eldon*, as I understand his judgment, hesitated only as to the mode by which it was to be got at. He said: "The true question is whether this chose in action * * * can be taken by the sequestration; or whether there must not be some proceeding in aid of the sequestration. Speaking with the caution which

(*a*) 3 [illegible] 276.

1868.
Irving v. Boyd.

befits one, of a process so unusual, I have supposed it to be clear that where there is tangible property, the Court will allow the sequestrators to lay their hands on it, whatever claims third persons may have, and will compel them to come in *pro interesse suo;* but a chose in action cannot be so taken; and the question arises, how are the rights of third parties to be decided? It is generally done by order; whether it can be done in a case in which the third person does not appear, may be another question." An order was afterwards made for the payment of the money into Court.

In *Johnson* v. *Chippendale* (*a*), decided some years later, the Vice Chancellor—Sir *Anthony Hart*, I believe—seemed to doubt whether a chose in action could be reached by sequestration; and, quoting from Lord *Eldon's* judgment in *Franklyn* v. *Colhoun* only the words, "But a chose in action cannot be so taken," added, "And in the absence of authority more cogent than I have referred to, this is sufficient to govern me." In an earlier part of his judgment he had, however, observed: "I find no instance in which the Court has compelled a third party to pay in a chose in action without a bill, where any resistance has been made by the holder of the chose in action. The old cases are collected in the notes to *Franklyn* v. *Colhoun;* but in none of them does it appear that any resistance was made." All this applies to the mode of procedure, not to the point whether a chose in action can be reached through the process of sequestration.

Judgment.

Upon that point, Lord *Langdale*, one of the best judicial authorities upon the practice of the Court, expressed, in *Wilson* v. *Metcalfe* (*b*), this opinion: "I have read the cases cited in the arguments and many others, and it appears to me that, in such a case as this,

(*a*) 2 Sim. 55. (*b*) 1 Beav. 263.

1868.

Irving v. Boyd.

a chose in action is subject to the process of sequestration; but how the sequestration is to be made effective in respect of choses in action may be a question requiring much consideration; in a clear and simple case it may be by order only, or a voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit, under the direction of the Court." Lord *Langdale* is made by the report to say, "in such a case as this, a chose in action," &c.; there was nothing, however, in the case of sequestration before him to make it an exceptional case.

In that case, as in the preceding cases to which I have referred, the course of procedure was the difficulty. I think the cases warrant the conclusion that a chose in action may be reached through the process of sequestration; and this case is clear of the difficulties that have arisen in some of the cases, as to how, when the writ was by way of *mesne* process, a chose in action should be dealt with, and is clear, also, as to the mode of procedure. The writ was in its nature a process of execution: and the proceeding is by bill. Judgment.

The real difficulty of the case lies in the nature of the thing which is sought to be affected by the sequestration. The writ commands the officer to whom it is directed, to collect and take into his hands the rents and profits of the real estate, and the goods, chattels, and personal estate of the sequestration debtor. The words in their primary sense imply something tangible; but the Court in holding that a chose in action may be reached, have got over any difficulty that may have existed on that score. The cases that I have met with in the books are cases where the chose in action was a debt due by a third person to the sequestration debtor. In the case before me there is no debt—it is an equitable right. It is, therefore, so far as I know, a case of first impression; and is to be decided upon principle.

1868.

Irving v. Boyd.

In the first place is it personal estate, and if so *primâ facie*, a thing to be reached under that name by the sequestration? I think it is personal estate. It is of the quality of personal estate, and would pass, I apprehend, to assignees in bankruptcy, to personal representatives, and by assignment. It could not, perhaps, pass or be assigned by itself; but it would pass with what is ordinarily called personal property; and where the whole of the personal property of a person passed, by death, by act of law, or by assignment, it would pass, I apprehend, as incident to the rest, and in the case of an assignment by a mortgagor of his equity of redemption, subject to mortgages, the mortgages to be paid off by the purchaser—as is the case here—I have no doubt that the equity of the mortgagor to compel his assignee to pay, would pass by express assignment to the mortgagee. It certainly would not fall within the mischief of *Prosser* v. *Edmunds*, and cases of that class. It would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay: it would create the privity which alone was wanting to make such a suit sustainable. If, indeed, the sequestration creditor were not, what he happens to be here, the mortgagee entitled to receive the money, payment of which it is the sequestration debtor's equity to compel, it would be of little or no value to the sequestration creditor, but it would be of value, more or less, to the mortgagee, and where as in this case nothing could be got from the mortgagor, such right would be of value commensurate with the amount of the mortgage money, and the ability of the assignee to pay it. I do not know that the *status* of this equity as a thing that may be reached by a Court of Equity is improved by its growing out of an implied contract (in this case an express agreement) between the principal debtor and the surety. It is thus put by Lord *Cowper* in *Hungerford* v. *Hungerford* (*a*), as re-

Judgment.

(*a*) Gilb. Eq. Rep. 69.

ported in *Gilbert*. "The Chancellor took a difference that where a person was security in a contract, there is a joint contract that the principal shall indemnify the security; and that the ground of equity is, that when the money is due the equity arises." 1868. Irving v. Boyd.

The cases establish, I think, and with great reason, that a chose in action may be reached by sequestration; and though in the cases in judgment the thing to be reached was a chose in law, there is no reason why by this process of a Court of Equity, a chose in equity should not be reached. It is hardly necessary to cite authorities to shew that a chose in action may be either legal or equitable, the words "in action" merely being used by way of distinction from a chose in possession. Mr. *Wharton*, in his Law Lexicon, puts it, I think correctly as a chose "in action, otherwise called a chose in suspense, a thing of which a man has not the possession or actual enjoyment, but has a right to demand by action or other proceeding," and he gives under that head instances of equitable as well as legal rights. Some familiar instances may be given: a right to a legacy is, where not assented to by the executor, an equitable right. The case put by Mr. *Roaf* of the right of a partner, after dissolution of the partnership, is a case of equitable right, and other instances might be added. In these, and such like cases, the right is a chose in action: it is personal property, and may, in my opinion, be reached through the process of sequestration. Judgment.

It must be granted, however, that this equitable right of a surety is not a property, at least not in the same sense as the instances of property to which I have referred; and it must be made out to be "personal property" to bring it within the reach of the process. So choses in action were only reached because those in question were personal property. But there may be choses in action at law which could not be

1868.

Irving v. Boyd.

so reached; for instance, rights arising *ex delicto*. And in like manner choses in action in equity; for instance, a right to set aside a conveyance, because in neither case is the chose in action of the nature of property.

The question then comes to this: what is the nature of the right or interest of a surety in regard to the money for the payment of which he is surety. He has not so much, property in it, as a right to see to its due application in order to his own exoneration. There is a debt, for the payment of which both he and the principal debtor are liable. Both have contracted to pay the creditor. And there is another contract which is between the two parties liable, and that is that the principal debtor, shall pay the debt. Is this property? Is it anything more than a potential equity? Is not the word property as used in the writ used, in the sense of "ownership?" I should be sorry to defeat the plaintiff's remedy by any mere technical reasoning; but on the other hand I must not further it, by straining words beyond their legitimate and proper signification; and I cannot come to the conclusion that the word property in the connexion in which it is used, can be applied to the equitable right in question. I should, I confess, have been very well pleased if I could see my way to a different conclusion, for the plaintiff fails in his remedy, as far at least as my judgment goes, from what I cannot but regard as a defective state of the law.

Judgment.

With regard to the costs, I have doubted whether I should not refuse the defendants their costs, as a punishment for their attempt to defeat the plaintiff by the release set up by the answer. The attempt was however to defeat a possible right, which, in my judgment, did not exist; and I think, upon consideration, it is not a sufficient ground for refusing costs.

The bill, therefore, must be dismissed with costs.

1865.

TREADWELL v. MORRIS.

Injunction against legal proceedings—Practice.

On an application for an injunction against an execution at law, the plaintiff in equity has not necessarily to satisfy the Court by evidence that the facts, if disputed, are as his bill and affidavits state; but only that there is a substantial equitable case which ought to be decided before execution goes.

Where a party who is wrongfully sued at law comes into equity promptly, so that, by means of our system of circuits, his equitable case can be tried within a few weeks of the time when a legal defence would be triable at law, if he verifies his bill, shewing a good equitable case that is only triable in this Court, he can seldom be refused an injunction to restrain any execution going until the equitable questions are disposed of.

There is no technical rule requiring the plaintiff's affidavit in support of a motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered.

If a defendant at law is guilty of delay in instituting his suit here, this may not be a bar to his application for an injunction; but the Court, for the security of the plaintiff at law, may require the payment of the money into Court, to abide the event; or may impose other terms which in case of a prompt application it might not be just or reasonable for the Court to exact. Or, the Court may, in the exercise of its discretion, refuse the motion altogether, notwithstanding the *primâ facie* case which the plaintiff's bill and affidavits present in his favour; and, in view of this discretion, it may be expedient for the plaintiff in such a case to fortify his own affidavit with other evidence, which in case of an earlier application might have been unnecessary.

A defendant at law unnecessarily delayed filing his bill for an injunction until it was too late to have the equitable case it set up heard for six months; there were executions to a large amount out against his lands at the suit of other persons; and the defendant in equity swore that, if delayed by an injunction, he believed he would probably lose his debt. This statement not being met by any counter affidavit, an injunction was refused, except upon the terms of paying the money into Court.

Statement.

This was a motion to stay execution at law, on the ground that the plaintiff had a good defence in equity

1868.

Treadwell v. Morris.

to the suit at law, but had no legal defence. The action was on a Lower Canada judgment, under which there had been a sale of lands in Lower Canada. The plaintiff alleged, that it was verbally agreed between him and the agent of his creditor that, in consideration of the plaintiff's inducing his friends not to bid at the sale, the execution creditor would allow the full value of the lands, instead of the sum at which he might be declared the purchaser by the Sheriff; that the value was about $1,400, and the nominal purchase money was $320 only; that the judgment had been satisfied by this and other means; and that the plaintiff could not prove this except in this Court. The defendant, on the other hand, denied the alleged agreement; denied that the lands he got were of the value alleged; or that the judgment had been satisfied.

The writ of summons was served on the 2nd July, 1868, and was specially indorsed for the full sum which would be due to the creditor if the plaintiff in equity were not entitled to the credits he claimed. The plaintiff did not file his bill until the 3rd September, nor serve his notice of motion for injunction until some days afterwards. The motion came on before Vice Chancellor *Mowat* on the 22nd September, the day after the sittings at Cornwall had begun.

Mr. *F. Osler*, for the motion.

Mr. *S. Blake*, contra.

Judgment.

MOWAT, V. C.—The learned counsel for the plaintiff stated that he would go to a hearing at Ottawa, where the Court sits on the 29th instant; but I cannot say that it would be just to the defendant, under the circumstances, to compel him to go to a hearing then, as the price of avoiding or getting rid of an injunction. He resides in Lower Canada; he has not yet been served

1868.

Treadwell v. Morris.

with the bill, though his attorney at law has been; his answer is not filed; and a defendant is ordinarily entitled to fourteen days' notice of hearing. The plaintiff might have filed and served his bill in July. He knew on the second of that month what the defendant was going for; and had he made his motion when the Court opened after the long vacation, it would have been reasonable, on proper terms, if he cannot defend himself at law, to prevent execution until he should have an opportunity in this Court of making good his claim; and the hearing in Equity would have taken place at the present Cornwall sittings, unless his opponent had desired delay. The tardiness of his application has made a hearing impossible before next spring.

As to the merits. On an interlocutory application to stay execution at law, the plaintiff in equity, in case the facts on which he relies are disputed, has not, necessarily, to satisfy the Court by sufficient evidence that the facts are as he s[illegible] up. In other words, to use the language of Lord *Cottenham* in *Glascott* v. *Lang* (*a*), "In looking through the pleadings and evidence, for the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the Court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a Court of Equity." What the plaintiff has to make out is (*b*), that there is a "real question between the parties; * * a substantial question to be decided. * * In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favor of the plaintiff." "If then," his Lordship said in *The Great Western R. W. Co.* v. *The Birmingham and*

Judgment.

(*a*) 3 M. & C. 455.

(*b*) Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co. 2 Ph. 603.

1868.

Treadwell v. Morris.

Oxford Junction R. W. Co. (*a*), "this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail." In *Powell* v. *Lloyd* (*b*) the Lord Chief Baron *Alexander* said: "I cannot admit the proposition, that the plaintiff, in order to continue the injunction, must shew a right to a specific performance. It is, in my opinion, enough to shew some colour of right; and the more so, as the Court is under the necessity of taking the facts as they are stated by the defendants themselves in their answer." But the rule was not substantially changed in this respect when affidavits became admissible in such cases, as Sir *R. T. Kindersley* explained in *Mangay* v. *Mines Royal Co.* (*c*). "It appears to me," the learned Vice-Chancellor there observed, "that the very intention of this alteration goes to this, that, in substance, what the Court has to determine on a motion of this sort is very much the same as what it had formerly to determine on shewing cause against dissolving; that is, whether on the merits, looking at the whole, there is a fair question to be reserved to the hearing; and if there is, then whether in the meantime an injunction should be granted, and on what terms." The injunction was granted there, though there was a conflict of evidence on which the Vice-Chancellor would express no opinion.

Judgment.

It certainly would be most unjust if a plaintiff at law were at liberty to take advantage of the circumstance that one class of defences is triable in this Court, and insist on enforcing his legal demand without his adversary's having any opportunity of setting up and proving here that the demand is unsustainable; and where a party who is wrongfully sued at law comes into equity promptly, so that, by means of our system of circuits, his equitable case can be tried here within a

(*a*) *Ibid.* (*b*) 1 Y. & J. 430. (*c*) 3 Drew. 134.

1868.

Treadwell v. Morris.

a few weeks of the time when a legal defence would be triable at law, and if he verifies his bill, shewing a good equitable case that is only triable in this Court, he can seldom be refused an injunction to restrain an execution from going at law until the equitable questions are disposed of. It was pointed out on behalf of the defendant, that the affidavit in support of the motion is by the plaintiff alone, and that its statements are not corroborated by any other evidence. There is no technical rule requiring such corroboration (*a*), though the circumstance may sometimes be material to be considered.

If a defendant at law is guilty of delay in instituting his suit here, this may not be a bar to his application for an injunction (*b*); but the Court, for the security of the plaintiff at law, may require the payment of the money into Court to abide the event (*c*), or may impose other terms, which, in case of a prompt application, it might not be just or reasonable for us to exact. Or, the Court, in the exercise of its discretion, may refuse the motion altogether (*d*), notwithstanding the *primâ facie* case which the plaintiff's bill and affidavits present in his favour. In view of this discretion, it may be expedient for the plaintiff in such a case to fortify his own affidavit with other evidence which, in case of an earlier application, might have been unnecessary.

Judgment.

Here, besides the delay, we have this circumstance: The defendant swears that a large quantity of lands belonging to the plaintiff are to be sold by the coroner,

---

(*a*) 1 Smith's Prac. 2nd ed. p. 595; 7th ed. 827. See Lovell v. Galloway, 17 Beav. 1.

(*b*) The South Eastern Railway Co v. Brogden, 3 McN. & G. 27.

(*c*) Taft v. Harrison, 10 Hare, 491; Anderson v. Noble, 1 Drew. 143; Mangay v. Mines Royal Co., 3 Drew. 134. See cases Kerr on Injunctions, p. 19, notes (*t*) and (*u*).

(*d*) North Eastern Railway Co. v. Martin, 2 Ph. 758.

1868.

Treadwell v. Morris.

at the Court House at L'Orignal (where the plaintiff resides), on the 12th of October next, as appears by the Ontario *Gazette*; and that he (the defendant) fears he will sustain loss, and believes that in all probability he will be defeated of his claim, if the injunction is granted. The plaintiff has filed no affidavit explaining the fact thus mentioned, or shewing or affirming the groundlessness of the apprehension which the defendant expresses. To meet this difficulty, the learned counsel for the plaintiff suggested that the injunction might leave the execution at law to be issued, and merely restrain any sale under it; but the law will not permit a sale of lands under the defendant's execution for a year, and that period will afford ample time for the plaintiff to make good the equitable case he sets up.

Judgment.

Assuming that the case set up by the bill is not a defence at law, the plaintiff might, under all the circumtances, be entitled to an injunction against execution at law, on terms of paying the money into Court to abide the further order of the Court; but not otherwise; but as I understood from the learned counsel for the plaintiff that an injunction on these terms would not suit the plaintiff, I must refuse his motion.

1868.

KINGSMILL v. MILLER.

Infants' money—Dominion stock—New trustees.

In consequence of the danger to which the fortunes of infants are often exposed in private hands, the Court, on the administration of an estate, takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee.

Since the establishment of a Government Dominion Stock, the investment of infants' money by the Court should, as a general rule, be in such stock, rather than, as formerly, in mortgages.

When new trustees are to be appointed, it is contrary to the course of the Court, without some very special reason, to sanction the appointment of one trustee in place of three.

This was an administration suit, and the cause now came on for further directions.

Mr. *Crooks*, Q. C., for the plaintiff.

Mr. *Strong*, Q. C., for the defendant *Miller*.

Mr. *Gwynne*, Q. C., Mr. *Moss*, and Mr. *Hoskin*, for other defendants.

MOWAT, V. C.—All parties in this case have consented to a decree. I did not allow the decree to go at once, because infants were concerned, and because it was proposed that, while the shares of the adult parties should be paid over to them, the shares of the infants should remain in the hands of the trustee. The trustee happens to be a professional gentleman, known to us all as wealthy, honorable, and in all respects a competent and proper person to manage the infants' shares, if anybody is. But, in consequence of the danger to which infants' fortunes are often exposed in private hands, the settled rule, as I understand it, is, that when an estate is administered in Chancery, the Court takes charge of the share which, on a division, goes t

Judgment.

1868.

Kingsmill v. Miller.

infants, until they become of age, or until it is required for their use. Here, the assets have been invested principally in mortgages; and the infants' share of them should be assigned to an officer of the Court; but I see no objection to the trustee receiving the interest as it falls due: perhaps, also, the principal sums, if this is thought to be for the interest of the infants, and the convenience of management. But the money, as received, will have to be paid into Court, and either invested in new mortgages or Dominion stock. In England, no new investment is made for infants in mortgages, though outstanding mortgages, if satisfactory, may not be called in; but investments, as a general rule, are made in Government stocks only; and, now that there is a convenient Government stock in which investments in this country can be made, it may be proper, and perhaps necessary, that new investments of infants' money in mortgages should not, as a general rule, be sanctioned by this Court, any more than in England. I perceive that under Mr. *Miller's* prudent management the estate has got eight per cent on the investments hitherto; the Government stock only yields six; but whether the gain of two per cent is, in the case of infants, a sufficient reason for preferring mortgages, I more than doubt. I refer to the cases I had occasion to cite in *Mitchell* v. *Richey* (*a*).

Judgment.

These observations apply only to the share now ready to be set apart to the infants at the contemplated division of part of the estate. As to what is reserved to meet contingencies, that, I presume, may remain in the hands of the trustee, such being the desire of the adult parties interested, no different arrangement being asked on the part of the infants, and the Court being satisfied not to interfere if the practice in such cases does not render it necessary to do so.

(*a*) 13 Gr. 450.

1868.

Kingsmill v. Miller.

I do not see, from the papers left with me, why there is but one trustee, the testator having named three, and it being contrary to the course of the Court to substitute one trustee for three without some very special reason (*a*). I refer to this, because I do not know if the change was brought to the attention of the Court when Mr. *Miller* was appointed, or was an oversight which may need correction.

The bank stock, notes, &c., cannot be assigned to the infants with a view to their retaining them. The bank stock must be sold, and the notes realized, and the proceeds divided.

CARROLL v. ROBERTSON.

Mortgages—Improvements by purchasers under void sales—Arrears of interest.

Improvements made by a defendant under the belief that he was absolute owner, are allowed more liberally than to a mortgagee who improves knowing that he is but a mortgagee.

A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside:

Held, that, as a condition of relief against him, he should be allowed for all the improvements he had made under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further; and that he was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee.

During the lifetime of a mortgagor, the mortgagee has no lien on the mortgaged property for more than six years' arrears of interest; though he may have a personal action on the covenant for more; but, in this country as well as in England, after the mortgagor's death the mortgagee to avoid circuity may, as against the heirs, tack to his debt all the interest recoverable on the covenant.

Statement.

This was an appeal by the plaintiff against the report of the Master at St. Catharines, dated 19th June, 1868.

(*a*) See the cases referred to in Proudfoot v. Tiffany, 11 Gr. 461.

1868.

Carroll v. Robertson.

The plaintiffs were the co-heirs of *Matthew Carroll*, who, on the 30th of March, 1847, mortgaged the south half of No. 23, in the 3rd concession of the Township of Bayham to one *Thomas Rae* to secure $800, with interest. The mortgage contained a power of sale by auction after giving certain notices; and, the mortgagor having made default, the mortgagee, on the 14th of May, 1852, sold and conveyed the property to the defendant *John Robertson*, who paid for it its full value; but the sale was not in accordance with the power, and was held by Vice Chancellor *Spragge*, on the hearing of the cause (23rd May, 1867), to be void; and the plaintiffs were let in to redeem. The mortgagor had died on the 11th of December, 1866, intestate.

In taking the account under the decree, the Master allowed interest on the mortgage debt from the date of the mortgage ($1,018. 56); and allowed the purchaser $814.34 for a house he had erected, and other improvements he had made on the property, and $242.16 for interest on this expenditure. The appeal was in respect of these allowances.

Mr. *Roaf*, Q. C., for the appeal, cited *Bosanquet* and *Darby* on the Statutes of Limitations, 140–151; *Richardson* v. *Hall* (*a*); *Vankoughnet* v. *Ross* (*b*).

Mr. *McGregor*, contra.

Judgment.

MOWAT, V. C.—As to the interest, the contention of the plaintiffs is, that only six years' arrears should have been allowed. The Master charged the defendant with an occupation rent of $50 a year, for more than six years, viz., from 1852, when he got possession; and the plaintiffs could not be allowed the rent if exempt from interest for the years in respect of which the rent is

(*a*) Drap. 304. (*b*) 7 U. C. Q. B. 248.

1868.

Carroll v. Robertson.

charged. But the interest appears to have been properly allowed. During the life of a mortgagor, the mortgagee can only claim a lien on the land for six years of overdue interest, but the mortgagor is liable on his covenant for twenty years' arrears; and after his death, the mortgagee, to avoid circuity, is permitted as against the heirs to tack to his debt the whole amount of interest recoverable on the covenant (*a*). Two cases were referred to (*b*) as shewing that in this country heirs cannot be sued on their ancestor's covenant; but no such doctrine was held in those cases; and the rule is clearly otherwise; though perhaps under our law the point is not for the present purpose material.

As to the defendant's improvements, it was said on behalf of the appellants, that a mortgagee is not entitled to charge for improvements, but for repairs only. That was stating the rule too strongly against mortgagees (*c*), though their right to charge for improvements is no doubt subject to important restrictions (*d*). But the improvements in the present case were made by *Robertson* under the belief that he was absolute owner. It is said to have been proved at the hearing, that they were also made with the knowledge of the mortgagor, and without objection by him: but the evidence as to this has not yet been handed in, and I have consequently been unable to verify the respondent's statements on the point. The mortgagor is not likely to have objected; for the mortgage debt was double the value of the property, and he had doubtless no intention

Judgment.

(*a*) See the cases, Fisher on Mortgages, 925, 926.

(*b*) Forsyth v. Hall, Draper's R. 291, 304; Vankoughnet v. Ross, 7 U. C. Q. B. 248.

(*c*) Powell v. Trotter, 1 Dr. & Sm. 389; 1 Seton Dec. 3rd ed. p. 367.

(*d*) Sandon v. Hooper, 6 Beav. 246; Jortin v. The South Eastern Railroad Company, 2 Sm. & Giff. 48, 73.

1868. of redeeming, though he never did any act to deprive himself or his heirs of the right to redeem.

Carroll v. Robertson.

Improvements made by a defendant under the belief that he was absolute owner, are allowed far more liberally than to a mortgagee who knew himself to be such when he was expending his money; and *Davey* v. *Durant* (*a*) is an express authority that improvements by persons in possession under an irregular exercise of of a power of sale in a mortgage fall within this rule. There the mortgagor was required, as a condition of relief, to allow the money expended in erecting a chapel and sanatorium. In *Ex parte Hughes* (*b*), where a purchase of a different kind was set aside, the purchaser's improvements were not disallowed, though they came to three times the value of the land. I refer also to *McKenzie* v. *The York Building Company* (*c*), mentioned by Lord *Eldon* in *Ex parte Hughes*, and to *Bevis* v. *Boulton* in this Court, where these two cases were observed upon (*d*).

Judgment.

The Master has not allowed for the defendant's improvements more than they cost, and necessarily cost; nor indeed so much; and if the property had been enhanced in value by the amount he has allowed, I would have had no hesitation in affirming his report. But, where improvements are claimed beyond those a mortgagee is ordinarily entitled to make, the rule appears to be, not to allow, in respect of these additional improvements, more than the increase in value which has been the result of the expenditure (*e*). This view does not appear to have been presented to the Master, or to have been in the mind of either party when pro-

(*a*) 1 D. & J. 534. (*b*) 6 Ves. 617, 625.
(*c*) 8 B. P. C. 42. (*d*) 7 Gr. 39.
(*e*) Mial v. Hill, 3 H. L. 869; see Smith v. Bonnisteel, 13 Gr. 35; Morley v. Matthews, 14 Gr. 555, 556; and other cases *supra*.

ducing evidence. The amount allowed by the report for improvements and interest is $1056.60; and the present value of the property, as improved, is sworn to be $10 an acre, cash, or from $12 to $15 on time; that is, $1000 cash, or somewhat more on time. The value when the defendant bought appears to have been $400, or thereabouts; and the only witness who speaks of the effect of the improvements on the present value of the property says, the property would have been as valuable to day in its primitive state as in its actual improved condition, with the exception of the new house. The Master has allowed $400 for this house. But no such rent, as the Master has charged the defendant with, would have been obtainable without the defendant's other improvements; and if he is not allowed for these improvements, he should not be charged with the enhanced rental which is owing to them. If I were to decide on the evidence before me, how much of the present value of the property is owing to the defendant's improvements, I would name $400 as the amount; and if I were on the present evidence to fix the rental which might have been proper without the improvements, other than the new house, I would name thirty dollars a year for the whole period as probably fair. But I think either party is entitled to a reference back on these points if desired. Otherwise, the account will stand thus:

Judgment.

Mortgage debt and interest to 19th of June, 1868	$1818 66	
Improvements	400 00	
Costs taxed to defendant.....	96 50	
		$2315 16
Less, sixteen years' occupation, rent at $30.....	$480 00	
Taxed costs up to hearing, which by the decree the plaintiffs were to have	115 59	
		595 59
Balance.....		$1719 57

1868.

Carroll v. Robertson

Brought forward	$1719 57
Six months subsequent interest on $800	24 00
Amount due 19th December, 1868, the day appointed by the Master for redeeming.....	$1743 57

If the property is worth no more than appears by the evidence, it would not seem worth while for the defendant to go back to the Master to increase this amount, as it considerably exceeds the value of the property; and, on the other hand, no reduction which I can imagine it possible for new evidence to effect would be sufficient to make it worth the plaintiffs' while redeeming the property.

Judgment.

There will be no costs of the appeal.

1868.

McDonald v. The Upper Canada Mining Company.

Incorporation—Ultra vires—Unauthorized parol agreement.

An arrangement with the plaintiff, such as was customary in carrying out objects like those defined in a Company's Incorporation Act, and as was conducive to the attainment of those objects, having been duly carried out:

Held, that the arrangement could not afterwards be declared to have been beyond the powers of the company or its directors, so as to entitle the company to keep for their own use, without compensation to the plaintiff, the whole benefit which the arrangement had afforded the company.

M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it. He made known this location to an incorporated mining company under an agreement that he should be compensated for the communication; but the mode of compensation was not determined. The communication having proved valuable to the company, it was held that *M.* was entitled to compensation in the manner usual in such cases.

The usual mode was proved to be, by receiving a share or partnership interest in the mine, when the patent is procured:

Held, that this mode was not *ultra vires* of the company or the directors.

The agreement was not under the corporate seal. The company received $5,500 for their claim to the property, by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors, to obtain secretly a grant of the property to himself personally. It was *held*, that the plaintiff was entitled to share this sum, and that the want of a seal was no defence.

Statement.

This cause came on to be heard before Vice Chancellor *Mowat*, on evidence taken, by consent of the parties and the authority of the Court, before an examiner, there being no dispute as to the facts.

From the pleadings and evidence it appeared that, for some years prior to 1860, the plaintiff had been acquainted with a valuable mining location in Batchewaning Bay on Lake Superior, and claimed whatever

1868.

McDonald v. U.C. Mining Co.

privileges belonged to the discoverer of such a location; and this claim was known to, and had always been respected by, other explorers in that region. The defendants were incorporated in 1847 (*a*); but before 1860, shares in the company had ceased to be of any marketable value; and the company was not in operation for any purpose. In that year, the plaintiff entered into an arrangement with the directors with a view to revive the company; and it was agreed, that he should join the company; that he should give the company the benefit of his knowledge of the mining country, and transfer to them whatever advantage his knowledge or discovery of the location on Batchewaning Bay might afford; and should receive due compensation for doing so. As to the mode of compensation, the bill stated that the plaintiff was to "have and receive, in accordance with the usual custom in mining adventures, a one-half interest in the said location, and the profits arising therefrom." In consequence of the agreement, whatever it was, the president of the company made a formal assignment to the plaintiff of some of his own shares in the company, the plaintiff agreeing to retransfer the same when requested; and the plaintiff was, in January, 1860, elected a director of the company. He then communicated his knowledge of the mining location in question to the other directors. The proceedings thereupon were set forth in resolutions of the directors, passed on the 29th April, 1861. The plaintiff recommended, that a location which the company had on the southern confines of the bay, and which was called the Ewart location, should be abandoned as comparatively worthless; and that the company should obtain the consent of the government to this abandonment, and to the substitution of the location pointed out by the plaintiff. The board, "confiding in the information communicated to them" by the plaintiff, acceded to

Statement.

(*a*) 10 & 11 Vic. ch. 73.

1868.

McDonald v. U.C. Min Co.

the proposal, and instructed Mr. *Begley* (another of the directors) to negotiate with the government for carrying into effect the proposed arrangement. Mr. *Begley* thereupon proceeded to Quebec, and effected the arrangement desired, but ultimately made the purchase from the government for himself. Upon this, the company filed a bill claiming that he was trustee of the land for the company. The suit was afterwards compromised, by a payment to the company of $5,500. The bill charged, that the company were about to distribute this sum among the shareholders, without paying any part to the plaintiff; and the prayer was, that it might be declared that the plaintiff and defendants were joint owners and partners in the said mining location; and were jointly interested therein in equal shares, and in all sums of money received in respect thereof; and that the defendants were trustees for the plaintiff as to one moiety thereof; that an account might be taken on this footing; and that the plaintiff might be paid his share; and for further relief.

Mr. *Hector Cameron* and Mr. *Smart*, for the plaintiff.

Mr. *Moss*, for the defendants.

Judgment.

MOWAT, V. C.—It was contended on behalf of the defendants, that there is no evidence of any agreement as to the mode in which the plaintiff was to be compensated; and there certainly is no direct or express evidence of it. That he was to be compensated, however, the defendants do not dispute; nor that he has not yet received or been offered anything by way of compensation. Even a resolution passed by the board after the compromise with Mr. *Begley*, viz., on the 29th of May, 1867,—"that the subject of (his) remuneration for having been the means of placing the Batchewaning location in the hands of the company,

1868.

McDonald v. U. C. Mining Co.

be referred to a committee consisting of the president and Mr. *Merritt* (a director), to consider the same, and report thereon at the next meeting of the board" —was at the next meeting (July 6) declared not to be confirmed, and was in effect rescinded. The plaintiff appears to have been the most active of the directors; and yet, except for the claim which he now sets up, he had no interest whatever in the company, or in its success, the stock he held having been assigned to him by the president *pro formâ* only, and the plaintiff having, it is admitted, no beneficial interest in it. The company do not dispute the value of the plaintiff's services; they did not pretend that they would have known anything of this location but for their arrangement with the plaintiff; nor do they deny that the receipt of the $5,500 is wholly owing to the plaintiffs having joined the company. He confessedly, performed fully his part of the contract; the company have had the benefit of the valuable knowledge he possessed, and of his services for years to make that knowledge available; they are now in possession of the sum in question through his means; and they claim to be entitled to appropriate this sum to their own use, without making to him any allowance whatever. The technical grounds by which this contention is supported were urged by the learned counsel for the defendants with great force; but the conclusion to which I have come, after much consideration, is, that the jurisdiction of this Court is not too narrow to afford the plaintiff a remedy. That his demand is just is quite clear.

Judgment.

I have said that the making this mine known to the company was not intended or supposed to be gratuitous on the plaintiff's part. That being so, I think that, as the mode or amount of compensation was either not agreed to, or if agreed to is incapable of being proved by the plaintiff, it must be presumed, or may fairly and lawfully be presumed, that he was to

have a reasonable remuneration, of such amount and nature as may be shewn to be customary in such cases. It is quite clear that the mere absence of any express agreement as to the mode or amount does not disentitle the plaintiff to compensation; and how except by a reference to what is usual and reasonable, can the proper remuneration be determined or ascertained? The usual way, both in the United States and Canada is proved to be by assigning to the person from whom the knowledge of the mining location is derived,—the explorer or discoverer or the like,—a certain share of the mine when the grant of it is obtained by the company to whom his information was imparted. The plaintiff was, with respect to the defendants, in this position as regards the mine in question; and the evidence shews that one-half is the least, on the recognized rule amongst persons having to do with such transactions, the plaintiff should be allowed. I think that this proportion, under all the circumstances, is either just and reasonable, or is less than what would be just and reasonable for the plaintiff to receive.

Judgment.

The learned counsel for the defendants contended, that such an agreement was one which the directors had no power to make. No authority was cited for this contention. The 7th section of the company's Act of Incorporation provides, "that it shall be lawful for the said corporation to engage in and follow the occupation and business of carrying on exploration for, and of finding and getting, copper and other ores, metals and minerals, and of manufacturing and disposing of the same for the benefit of the said corporation; and to do all things necessary for the purposes aforesaid, not inconsistent with the rights of any other parties, or with the conditions of any grants or other title under which the said corporation may hold the lands in which such things are to be done." The arrangement which the plaintiff sets up being proved to be such as is customary in carrying

1868.

McDonald v. U. C. Mining Co.

out objects like those which are thus defined, and being conducive to the attainment of those objects, and having been actually carried out, the arrangement cannot, I think, be held to have been beyond the powers of the company, or of its directors, so as to entitle the company to keep the whole of the proceeds (*a*).

It was next contended on behalf of the defendants, that such an agreement as is alleged would, as between private individuals, have to be in writing under the Statute of Frauds, and that, for that reason and other reasons, it needed the corporate seal to make it binding on the company. The want of a writing, or of the corporate seal, is not set up in the answer; but if the objection is, notwithstanding, open to the defendants—*Dale* v. *Hamilton* (*b*), if a correct decision, is an answer to so much of the argument as is founded on the Statute. There it was held by Vice-Chancellor *Wigram*, that an oral agreement for the purchase of land in partnership is binding. The opinion of Lord *Rosslyn* in *Foster* v. *Hale* (*c*) was to the same effect; and this view is sustained by those authorities which shew that, upon proof of agency, a trust attaches to land purchased by the agent, though he denies the agency, and there is no evidence of it in writing (*d*); as well as by other authorities commented on by the Vice-Chancellor in his able and elaborate judgment (*e*). *Dale* v. *Hamilton* has been often cited since, and I am not aware that any subsequent Judge has expressed dissent from the doctrine of the Vice-Chancellor. Lord *St. Leonards* cites the

Judgment.

(*a*) Taunton v. Royal Insurance Co. 2 H. & M. 135; Simpson v. Westminister Hotel Co. 8 H. L. 717.

(*b*) 5 Hare, 369.

(*c*) 5 Ves. 309.

(*d*) Lees v. Nuttal, 1 R. & M. 53; 2 M. & K. 819; Taylor v. Salmon, 4 M. & C. 134; Austin v. Chambers, 6 H. L. 1.

(*e*) See also Darby v. Darby, 3 Drew. 495; and head-note, Cowen v. Watts, 2 H. & Tw. 224.

1868.

McDonald v. U. C. Mining Co.

judgment without any query as to its correctness (*a*). Sir *James Wigram*, in giving judgment, spoke of the question as one of "no inconsiderable difficulty" (*b*); and the Lord Chancellor on the appeal (*c*) used similar language, and preferred affirming the decree on another ground. The subsequent case of *Caddick* v. *Skidmore* (*d*) is cited as having over-ruled Sir *James Wigram's* decision; but the Lord Chancellor in that case made no allusion to *Dale* v. *Hamilton*, though it had been cited on the argument; and the two cases seem to me distinguishable; as, for example, in the later case, the defendant had a lease of certain property, and the plaintiff set up a parol agreement afterwards entered into for giving him a partnership interest in it; while in the earlier case, the property was acquired after the agreement, and in pursuance of it; and some strong reasons for the validity of the unwritten contract in such a case do not apply to the case before Lord *Cranworth*. While, therefore, the Vice Chancellor's decision is certainly somewhat weakened by what occurred, as well on the appeal from it as in the subsequent case of *Caddick* v. *Skidmore*, it is impossible for me to say that the decision has been over-ruled; and I think it binding on me until its correctness is denied by a higher authority than mine.

Judgment.

Is the doctrine of that case necessary to holding the Statute of Frauds inapplicable to the present? The plaintiff is not seeking any interest in land. He had no legal or equitable estate in the property when he bargained with the company, and the company never acquired any interest in it. If the company never executed any instrument under seal shewing the bargain, neither did the plaintiff execute a written transfer of any

(*a*) Sug. V. & P. 14th ed. 699 note, &c.
(*b*) 5 Hare, at 382. See Papineau v. Gurd, 2 Grant, at 520.
(*c*) 2 Ph. 273. (*d*) 2 DeG. & J. 52.

1868.

McDonald v. U. C. Mining Co.

advantage his knowledge of the location gave him; and the agreement has been executed on the plaintiff's part, so that he cannot be placed in *statu quo*. Had he suspected in time that the company would endeavour to get free from their obligation to him, he would no doubt have taken steps to endeavour to secure his own interests; and, as both depended on the good will and justice of the Crown, I cannot assume that his endeavours would have been unsuccessful. But, relying on the company's good faith, he laid no claim before the Government on his own account, and lent every assistance to the company. The company, instead of prosecuting their chance of getting the land, accepted in lieu the sum of money in question; and, having reference to the authorities, how under the circumstances can the Statute of Frauds be a bar to the plaintiff's suit in equity for the recovery of his share of this sum? (*a*)

Judgment.

No writing being necessary under the Statute, and the contract having been executed, and the defendants being now in possession of its fruits, the plaintiff appears to be entitled to enforce his partnership rights in respect of them, notwithstanding the want of a corporate seal (*b*); and as partnership rights can only be enforced in this Court, a suit in equity seems the plaintiff's proper remedy.

Therefore: Declare the plaintiff entitled to one-half the sum received from *Begley*, with interest. Refer it

---

(*a*) And see Seaman v. Price, 1 Ry. & Mood. 195; Green v. Saddington, 7 Ell. & Bl. 503; Lavery v. Turley, 6 H. & N. 239.

(*b*) Brewster v. Canada Company, 4 Gr. 443; Buffalo and Lake Huron Railroad Company v. Whitehead, 8 Gr. 157; Laird v. The Birkenhead Railroad Company, Johns, 500; Stevens' Hospital v. Dyas, 15 Ir. Chan. 405; Nicholson v. Bradfield Union, Law Rep. 1 Q. B. 620; Wilson v. The West Hartlepool Railroad Company, 2 Dec. J. & S. 475; Pim v. Municipal Corporation of Ontario, 9 U. C. C. P. 304; Perry v. Corporation of Ottawa, 12 U. C. Q. B. 391.

to the Master to compute the amount due, after making all just allowances; the defendants to pay the same, with the costs up to decree. No costs subsequent to the decree. 1868. McDonald v. U. C. Mining Co.

The Attorney General v. The Toronto Street Railway Company.

Practice—Adjourned hearing—Evidence—Decree on information for nuisance.

Where after the evidence at the hearing of a cause was closed on both sides, the Court ordered the cause to stand over to add a party, further evidence between the original parties was held to be inadmissible at the adjourned hearing.

At the hearing of a cause evidence is not admissible by one defendant against another.

Where on an information by the Attorney General, the rails of a street railway were found by the Court not to conform to the requirements of the Statute authorising the railway, the Court granted a decree for the removal of the illegal rails; but directed that the decree should not go into effect for a specified period, so as to afford time to the Company, by proper alterations and repairs, to comply with the Statute.

Statement.

After the judgment was given as reported *ante* volume xiv. page 673, the City of Toronto were added as defendants, and the cause was again brought on for hearing before Vice Chancellor *Mowat*.

Mr. *Strong*, Q.C., Mr. *Blake*, Q.C., and Mr. *Morgan*, for the relators.

Mr. *Roaf*, Q. C., and Mr. *English*, for the Railway Company.

Mr. *Cooper*, for the Corporation of the City of Toronto.

1868.

Attorney General v. T. Street R. W. Co.

Judgment.

MOWAT, V. C.—Since my former judgment in this cause (*a*) the *City Corporation* have been made defendants; and, on the cause coming on to be heard last Wednesday, the city, with the concurrence of the *Attorney General*, consented to be bound by the evidence taken at the former hearing. The *Railway Company* wished to go into further evidence as between themselves and the *Attorney General*, which I held could not be done. The evidence as between the original parties was closed at the former hearing; and it was only to add the additional party that the cause stood over. The company then proposed to offer evidence as between themselves and the city, to shew that the city had not performed their part of the contract, and had approved of the work as done by the company. I was obliged to refuse this evidence, also, at the present stage of the cause, evidence between co-defendants not being admissible at the hearing. The propriety of a reference or cross-bill, with respect to the questions between the defendants, was discussed; but the company declined taking a reference, not perceiving, as was stated by their counsel, that a reference would be of any service to the company.

I was then asked, on behalf of the company, to appoint an engineer to direct the changes and repairs which should be made to put the road into the condition which the Statute requires; the company offering to comply with any directions which an engineer so appointed should choose to give; and the difficulty which the company would otherwise be under in putting themselves right, was mentioned, engineers and other witnesses being not unlikely to take different views of what as to some parts of the road should be done. This offer of the company appears to shew a *bona fide* desire to comply with their obligations; and I would be glad to find

(*a*) Reported 14 Gr. 673.

1868.

Attorney General v. T. Street R. W. Co.

that I could act upon it. Counsel for the informant, however, strongly objected to any engineer being named by the Court in advance of the work being done. No precedent for such a course was cited; and, without the concurrence of both parties, I am not able to see my way to accede to the company's request.

It was mutually arranged that the decree should not go into effect until the 1st of December, in order to afford the company, or the company and the city jointly, time, by proper alterations and repairs, to comply with the requirements of the Statute. Liberty to apply meantime. If the work is earnestly and promptly set about, and is completed before the day named, the company, on any application they may then make, should be fairly and reasonably dealt with, in view of the possible difficulty which the appointment of an engineer by the Court might have removed.

The *Attorney General* is entitled to his costs against the company, including the costs of the former hearing, but not the costs since incurred. No costs to the city. Judgment.

Grahame v. Anderson.

Mortgages—Suit to redeem and foreclose—Account.

A. and *B.* mortgaged to *C.*, and afterwards sold and conveyed the same property to *D.*, receiving back a mortgage for the purchase money, which exceeded the amount due *C.* *A.*, without *B's* authority, assigned this mortgage to *C.* by way of further security for the debt due to him by *A.* and *B.* On a bill by *B.* against all parties, it was *held* that the proper decree was the same as if the purchaser had been the original owner, and had executed a first mortgage to *C.* and a second mortgage to *A.* and *B.*

A bargain for extra interest made between a derivative mortgagee and a mortgagor inures to the benefit of the original mortgagee.

The defendant *William Anderson* was the owner of the property in question. On the 24th of April, 1854,

1868. Grahame v. Anderson.

he sold and conveyed to the plaintiff and his brother, *James Grahame* (since deceased); and they executed to *Anderson* a mortgage for part of the purchase money. The *Grahames* afterwards contracted for the sale of the property to the defendant *Laughlin McKinnon*, for a larger price; and, on the 27th of November, 1855, they executed a conveyance to him, receiving back a mortgage for part of the consideration. On the 10th of May, 1860, *James Grahame*, professing to have authority from the plaintiff, assigned this mortgage to *Anderson*, by way of further security for the money due by the *Grahames* to *Anderson* on the property. The bill impeached the assignment of *McKinnon's* mortgage as unauthorized and improper; offered to redeem *Anderson;* and prayed—relief in respect to the assignment; foreclosure as respected *McKinnon;* and general relief.

Statement.

On the 15th of January, 1868, a decree was made, referring it to the Accountant to find what was due on each of the mortgages, and reserving further directions and costs. The Accountant made his report; which was appealed against, and, on the 15th of October, 1867, was sent back to be reviewed. The Accountant made his subsequent report on the 14th of December, 1867, which was also appealed against; and an order, varying the report, was made on the 31st of January, 1868. The cause now came on for further directions. The questions argued were, as to the order of redemption; as to two per cent. extra interest which *Anderson* claimed against *McKinnon;* and as to the costs of the suit.

Mr. *Edgar*, for the plaintiff.

Mr. *Hodgins*, for the defendant *Anderson*.

Mr. *English*, for the defendant *McKinnon*.

No one appeared for the personal representati of *James Grahame*, (*Hime.*) 1868.

Graha
An

MOWAT, V. C.—*Anderson* had the first mortgage, and the *Grahames* the second. The subsequent assignment to *Anderson* of *McKinnon's* mortgage made no difference in the relative rights of the parties. The decree, therefore, should, I think, be the same, except as to costs, as if *McKinnon* were the original owner, and had executed both mortgages; that is, had executed, first, a mortgage to *Anderson* to secure the sum named in the mortgage by the *Grahames* to *Anderson*; and, afterwards, a mortgage to the *Grahames* for the balance of what is payable by *McKinnon* on his mortgage to them.

The Accountant states in his report that "*McKinnon*, by agreement in writing, agreed to and with the defendant *William Anderson*, to pay to the said *Anderson* interest upon the balance due upon the said mortgage made by said *McKinnon*, at the rate of eight per cent. per annum, whereas the said mortgage only calls for six per cent. per annum;" and the Accountant certifies, that he had not allowed the additional two per cent. This extra interest is claimed now on behalf of *Anderson*, notwithstanding the disallowance by the Accountant. The agreement between *McKinnon* and *Anderson* was said at the bar to have been in consideration of forbearance, but this is not stated in the report. The extra interest was not claimed by the bill, or by *Anderson's* answer; nothing of the agreement respecting it appeared at the hearing of the cause; and I know nothing of it now except what is stated in this extract from the report, and the decree did not direct any report of special circumstances; the plaintiff or *Hime* makes no claim against *McKinnon* for the two per cent.; and there has been no appeal by any party against the disallowance reported by the Accountant. I apprehend that any agreement of the kind mentioned must inure to

Judgment.

1868. Grahame v. Anderson.

the benefit of the *Grahames* (who do not claim it), and not to the individual benefit of *Anderson*. *Anderson* was a trustee of *McKinnon's* mortgage, and could not, I think, without the concurrence of the *Grahames*, bargain with their debtor for any private advantage to himself. Under all the circumstances, I think the Accountant's report disallowing the two per cent. must stand.

Anderson is entitled to add to his debt the costs of the cause generally, against all parties. If *Grahame* and *Hime* redeem *Anderson*, I think they should have no more of these costs or of their own costs than if the usuald ceree had been taken on *præcipe;* but I think the contention of the learned counsel for *McKinnon*, that *McKinnon* should get his costs up to the hearing, cannot prevail, as these costs seem to have been unnecessarily incurred. I observe nothing in the bill that required an answer from *McKinnon*; the matters he sets up in his answer, so far as they are material, are matters of account only—which the Accountant's office was the place for establishing.

Judgment.

Mills v. McKay.

Tax-sales—Parties.

After a sale of land for taxes for 1859 and following years, a subsequent sale for the taxes of 1858 was held invalid, and the purchaser under the first sale was held entitled to retain the land free from past taxes.

A municipal officer charged with some irregularities in the performance of his duty, but not guilty of any fraud or intentional wrong, is an improper party to a bill to set aside a tax-sale on the ground of such irregularities.

Examination and hearing at the Autumn sittings, 1868, at Woodstock.

1868.

Mills v. McKay.

Mr. *Strong*, Q. C., and Mr. *Richardson*, for plaintiff.

Mr. *Totten*, for *Angus McKay*.

Mr. *J. A. Boyd*, for two other defendants *McKay*, and for defendant *Mathison*.

Mr. *Bird*, for defendants *Hatch* and *Gurnett*.

MOWAT, V. C.—This is a suit impeaching a tax-sale of some unoccupied land in the Town of Woodstock. The impeached sale took place in 1866, for the taxes of 1858. In 1865 there had been a tax-sale of the same land for the taxes from 1859 to 1865, the taxes for 1858 having been overlooked; and at that sale, the plaintiff through his agent had become the purchaser. Amongst other objections to the sale in the following year, it was contended that the sale in 1865 precluded a future sale for the taxes of 1858; and I think this contention well founded. I do not think the Legislature intended to allow municipal corporations to make successive sales for parts of the taxes in arrear at one time. Such a practice would be extremely objectionable. In the present case, the plaintiff or his agent knew nothing of the non-payment of the taxes for 1858, and naturally supposed that the sale of 1865 was, as usual, for all arrears up to that time; and the plaintiff should not be prejudiced by the oversight of the municipal officers in reference to the year 1858, of which the plaintiff or his agent was not aware until after the property had become irredeemable under the subsequent sale. The property is sworn to have been worth $1500 in 1866, and it was sold for less than two per cent. of its value.

Judgment.

The Consolidated Assessment Act (*a*) was referred to as that which governed the case. By that Act, the County Treasurer was forbidden to receive less than the whole

(*a*) Ch. 55.

1868. Mills v. McKay.

arrears on any parcel of land (*a*); his warrant to the Sheriff was directed to be "for the arrears due thereon, with his costs" (*b*); and it was declared, that the deed executed to a purchaser at a tax-sale should "have the effect of vesting the land in the purchaser, * * free and clear of all claims and incumbrances thereon, except taxes accrued *since* those for the nonpayment whereof it was sold" (*c*). The plaintiff has not got his deed from the Sheriff, but he holds the Sheriff's certificate, which, by the express terms of the Statute, entitles him to a deed on demand (*d*). The invalidity of the second sale appears to me, therefore, very clear.

The learned counsel for the defendants referred me to the 107th section of the Consolidated Statute (*e*), and to the Statute 27 Victoria, chapter 19, as affording ground for a different view of the law; but I find nothing in those enactments to support the argument for the defence.

Now as to costs. The plaintiff is a mortgagee of the property. The mortgagor became insolvent before the filing of the bill, and had made an assignment under the Act. He was therefore an improper party to the suit, and the bill, as against him, must be dismissed with costs. It must be dismissed with costs as against the defendant *Gurnett* also, who was the collector; no charge of fraud or bad faith on his part having been made out in respect of the irregularities which he is said to have fallen into, and which constitute additional objections urged by the plaintiff to the sale of 1865. The defendant *Mathison* disclaimed by his answer, though not very distinctly. He holds a deed from the *McKays*, which appears to embrace part of the property in question, and which was sworn by a

(*a*) Sec. 113. (*b*) Sec. 124. (*c*) Sec. 150.
(*d*) Sec. 140. (*e*) Ch. 55.

witness to be part of it. Counsel insisted that the witness was under a mistake as to this, but as he has not given me any evidence on the point, I have no alternative but to assume that this defendant's deed does cover part of the property in question, and that he was properly made a party to the suit. He cannot therefore get costs; but there will be no costs against him.

1868.
Mills v. McKay.

There remain the costs of the *McKays*. There are three of them defendants. One alleges that he purchased for his wife; and both husband and wife, after suit but before answer, conveyed to their son, a minor. The wife did not disclaim by her answer, and counsel appeared on behalf of husband and wife, separately from the minor, and resisted the plaintiff's right to interfere with the sale of 1866. I think they should pay the plaintiff's costs of the suit, with the costs of the guardian appointed for the minor on the plaintiff's motion. I find the practice has not been uniform in regard to costs of suits like this against purchasers at tax sales. I think such costs should, as a general rule, follow the event, as in other cases; and *Knaggs* v. *Ledyard*, (*a*) where that view was acted upon, was affirmed in that respect, as well as other respects, by the Court of Appeal. The question between the parties was a legal question, tried here because the defendants are not in possession of the property.

Judgment.

(*a*) Gr.

1868.

RE THOMAS.

Insolvency—Assignee—Assets.

The other provisions of the Acts being complied with, a discharge cannot be refused to the Insolvent because of the neglect of the Assignee to give notice, as required by sec. 10, sub-sec. 1, of the Act of 1864, or that the Insolvent had no estate.

Appeal from an order of the Judge of the County Court of Prince Edward County, dated the thirteenth day of June, 1868, the material part of which was as follows: "I refuse absolutely to grant said discharge, upon the grounds that the Official Assignee, to whom said Insolvent made his assignment in this matter, did not call a meeting, by advertisement, of the creditors for the public examination of the Insolvent, as required by the first sub-section of section ten of the Insolvent Act of 1864; and that the Insolvent had no estate."

Mr. *J. C. Hamilton*, for the appellant, argued that the only grounds which any creditor could take on the application for discharge under section nine, sub-section ten, were those set forth in preceding sub-section six, which does not include the grounds acted on by the learned Judge. As to the second reason of the Judge, he argued that could not be valid under our law, which expressly applies, in Ontario, to all persons, whether traders or not, and that, consequently, the decisions under the English bankruptcy law, prior to 1862, could not apply. It is stated that this was expressly so held by the late Judge (The Hon. *S. B. Harrison*), in the case of *Robert H. Brett*, an Insolvent.

The following authorities were also cited: *Re Holt* and *Gray* (*a*), *Ex parte Glass* and *Elliott*, *Re Boswell* (*b*), *Re Parr* (*c*), *Ex parte Mitchell* (*d*), *Re Williams* (*e*).

(*a*) 13 Grant, 568. (*b*) L. P. Reps. N. S. Vol. 6, 407.
(*c*) U. C. C. P. Vol. 17, 621. (*d*) 1 DeGex Bankruptcy Cases, 257.
(*e*) L. T. N. S. Vol. 9, 358.

1868.

Re Thomas.

VanKoughnet, C.—I think the County Court Judge wrong in the reasons assigned by his order refusing the certificate of discharge. The assignee's neglect of duty is no reason for depriving the debtor of his discharge. Any of the creditors could have applied to the Assignee, or to the Judge, to compel the Assignee to call a meeting for the examination of the Insolvent; and, I apprehend, this can yet be done, if the Assignee or Judge thinks it proper.

The want of assets does not appear to me to be, in itself, a sufficient reason for refusing the discharge.

Order of Judge reversed, and matter remitted to him to deal with in accordance herewith.

Thompson v. Milliken.

Solicitor and client—Negligence—Postponing sale—Costs.

A client who had a mortgage of certain premises instructed his Solicitor to institute proceedings on the mortgage. The Solicitor omitted to make *J.*, the owner of the equity of redemption in a portion of the property, a party to the suit. The remaining portion having been sold under a decree in that suit, the client was benefitted to some extent by the proceedings therein, although his remedy against *J.* was gone. In proceeding afterwards to tax the Solicitor's bill under a common order obtained by the client, th Master allowed the costs of these proceedings; and on appeal to the Court such ruling of the Master was upheld.

Where a sale under a decree of the Court is put off, a note of such postponement at foot of the old advertisement will suffice, without incurring the expense of a fresh advertisement.

The Master, in proceeding to tax a Solicitor's bill, under the common order for taxation, has no authority to institute an inquiry as to loss sustained by the client through the alleged negligence of his Solicitor: and the costs of such inquiry cannot be charged to the Solicitor.

Statement.

This was an appeal by the plaintiff from the ruling

1868.

Thompson v. Milliken.

of the Master upon a taxation of the bills of costs of his Solicitor upon an order obtained by the plaintiff for that purpose. The grounds of appeal principally relied on by the plaintiff were (1) that the Master ought to have gone into the question, and determined upon the amount of damages or costs sustained by and to be allowed the plaintiff by reason of his Solicitors in the said suit or one or more of them neglecting to make one *William James* a party to the said suit at the commencement thereof or at the time or times in the year 1864 when such negligence was shewn by the plaintiff to the said Solicitors, on account of which the plaintiff's mortgage in question in the said suit was discharged and released as to twenty acres of land included therein and purchased by the said *William James;* (2) that the Master ought to have disallowed the whole of the bills of costs referred to him for taxation by the said orders mentioned in the said report; (3) that the Master ought to have disallowed to the said Solicitors the costs of the first sale, which was postponed on condition that the said *Milliken* should pay interest and costs; and as the said Solicitor did not exact payment thereof, and as the same were not paid, they should not be allowed the costs of the proceedings on both sales; (4) that the Master ought to have disallowed the costs of making, the unnecessary parties, parties to the said suit in his office. The Master having ruled that they were not necessary parties to the said suit and discharged his order so making them parties, that the said injury, damage, or loss sustained by the plaintiff is not a matter of unliquidated damages, and could be ascertained by a simple calculation from the accounts filed with the Master, and the Master had full power under the said orders and the general orders of this Court to take into account and consideration all matters connected with the said bills of costs; (5) that the Master ought to have disallowed the costs of the proceedings taken to compel the defen-

Statement.

dant *Norman Milliken* to pay the deficiency after deducting the amount realized on the sale of the lands in question in the said suit; and (6) that the Master ought to have disallowed the costs of and occasioned by the motion to compel payment into Court of the purchase money by the purchase of the said lands. 1868. Thompson v. Milliken.

There was also a cross appeal by the Solicitors, on the ground that the Master included in the costs of taxation allowed to the plaintiff all the costs of all the proceedings in his office, whereas the Master should only have allowed to the plaintiff the costs of the said taxation, and should have disallowed to him and should have allowed to the said Solicitors all the costs incurred in shewing that the said Solicitors were not guilty of negligence; and of all the matters considered in the said office, except the mere question of the amount of the said bills of costs.

Mr. *Blain*, for the plaintiff.

Mr. *S. Blake*, contra.

VanKoughnet, C.—This is an appeal from the Master's report or certificate in this cause on a taxation of costs between Solicitor and client. The client, *Thompson*, took out the common order for taxation. In the Master's office, on the taxation, he objected and insisted that the whole of his Solicitor's bill should be disallowed, or that the Master should, as a jury at law might, estimate the damages which he had sustained by reason of the alleged negligence of the Solicitor, and set off the amount to be so ascertained against the Solicitor's bill. The facts upon which this contention is based are shortly these: *Thompson* was the mortgagee of certain lands, the equity of redemption in which was subsequently sold, in two parcels, to one *Milliken* and one *James*. *Thompson* had, and has, also, the bond of Judgment.

1868.

Thompson v. Milliken.

one *Knaggs*, in security for the payment of the mortgage debt. Desiring to enforce payment of his debt, he instructed his Solicitor to proceed upon the mortgage to recover it. The mortgagor being anxious that *James* should not be attacked, urged upon *Thompson* that proceedings should be instituted against *Milliken* alone. It does not appear that *Thompson* consented to this. His Solicitor, however, did proceed against *Milliken* alone, and against the mortgagor. A decree for sale was obtained, and a personal order for payment of any deficiency against *Milliken*, the assignee. This latter order was of course improper, but *Milliken* has never moved against it. On the contrary, subsequently and after the sale, he became a party to an agreement with *Thompson* by which he may be considered as having ratified this decree. A sale of the portion of land owned by *Milliken* took place, but did not produce a sum sufficient to pay off the plaintiff. A conveyance was made to the purchaser, and it would seem, though this is disputed, that he purchased for *Thompson*, as immediately after he assigned his purchase to him. It is alleged that *Thompson* has re-sold the property for £1,000, which would nearly cover the debt. A question having subsequently arisen as to whether *Thompson* could proceed to sell the portion of the estate held by *James*, or retain any charge upon it, it was decided that he could not enforce his mortgage against it, because having already parted with, or caused to be disposed of under the sale in this cause, the portion of the mortgaged estate held by *Milliken*, and *James* being entitled to redeem the whole estate before the plaintiff could ask to foreclose him or sell his portion of it, the latter had lost this right by the act of the plaintiff in selling the other portion, and that the plaintiff's remedy against him was therefore gone.

Judgment.

The plaintiff contends that this result is the blunder of his Solicitor in not having made *James* a party to

1868.

Thompson v. Milliken.

the foreclosure suit and proceeded against his portion of the estate, as well as that of *Milliken*. The Solicitor says that the question was a doubtful one; at least, as to whether a sale of a portion of the mortgaged estate, and the parting with it entirely by the act of the mortgagee, would relieve the owner of the equity of redemption in another portion from the mortgage debt.

The plaintiff in response says that the law was clear, whatever doubts the Solicitor may have had, and that, at all events, without looking to consequences, or assuming the risk of them, the clear duty of the Solicitor was to have proceeded against all the owners of the equity of redemption, and seek payment out of the whole property, and not have trusted to one portion being sufficient to meet it, and thus run, at all events, the chance of being compelled to bring another suit.

Judgment.

No doubt, the obvious course for the Solicitor to have pursued was to proceed to make all the property covered by the mortgage subject to the payment of the debt, and to make, to the suit, all necessary parties for that purpose; and, had the Solicitor instituted a second suit upon the same mortgage in order to make *James's* property liable, he would doubtless have forfeited all claim to costs against his client in it; as, under the evidence, here, there could have been no reasonable excuse for two suits on the same mortgage. But this is not the question here. The Solicitor did bring the suit against *Milliken* to a successful termination. The plaintiff has secured the fruits of it. He has taken advantage of the proceedings under the decree to secure an absolute title in the property to himself; but he has not received all the advantages which his mortgage gave him a right to by suit in this Court. But, having derived from the suit as instituted and carried on certain benefits, can he say that the proceedings are so utterly worthless, and useless to him that the Solicitor is not entitled to any-

1868.

Thompson v. Milliken.

thing? If he could say this, it would seem from the case *In re Atkinson* (*a*), that the Master, under the common order for taxation, might properly find that nothing was coming to the Solicitor. But I think he cannot maintain this position, for he was benefited by the suit in the way already mentioned. The plaintiff, however, says that he has lost his recourse against *James's* portion of the estate; that the mortgagor is insolvent, and that *Knaggs*, the surety, is insolvent—(of this latter fact there is no evidence however); and he therefore claims that he is entitled to damages; that the Master can ascertain these by estimating the value of *James's* portion of the estate, which is now lost to the plaintiff through the negligence or ignorance of his Solicitor; and that he can deduct this from the amount of plaintiff's claim, and so ascertain accurately what he is entitled to; and that this is a matter of ordinary calculation of every day practice, and within the ordinary powers of the Master, who in such matters acts in this Court in the place of a jury at law. The first question to consider of course, if the Master had the powers attributed to him, would be whether the Solicitor was guilty of such negligence or ignorance as should make him liable to his client for the consequences of it; and I take it that this must be ignorance or neglect of those ordinary rules of practice and those plain principles of law which every man is supposed to make himself acquainted with before he ventures to subject the rights or business of others to them. It would seem that there was some doubt in the profession as to the effect of a sale in this Court at the instance of a mortgagee of a portion of the equity of redemption, or rather of the estate of an owner of the equity of redemption in part of the mortgaged property; and that the decisions in two cases which turned on their own special circumstances increased, if they did not create these doubts. It is very questionable whether

Judgment.

(*a*) 26 Beav. 151.

1868.

Thompson v. Milliken.

the Solicitor could be held responsible for his mistaken view of the law in this respect. It is answered, however, that there could be no doubt as to the propriety of his making all the owners of the equity of redemption parties to the one suit; and that in neglecting to observe this plain duty he took the risk of all consequences—a risk rarely run and without necessity, and contrary to all practice. It is difficult to find an answer to this argument (*a*).

However this may be, I do not find any authority which would justify me in saying that the Master should have made inquiry under the reference to him by the common order for taxation of the Solicitor's bill into any loss which the plaintiff may sustain by the release of *James's* property from the mortgage, through the conduct of the Solicitor.

Judgment.

In *Frankland* v. *Lucas* (*b*) it was expressly denied that this Court had any jurisdiction to award damages in such a case. In *Dixon* v. *Wilkinson* (*c*), Lord Justice *Turner* expresses an opinion that such a jurisdiction does exist in certain cases, but only very plain ones; for at page 523 of the report, he says "that the inquiry must generally be at law; certainly the jurisdiction, if it exists, would not be exercised incidentally as was sought to be done here; but only upon bill or petition, if at all." No doubt the Court may, and often does, order the Solicitor to pay the opposite party costs of proceedings improperly taken by him; and I can quite understand the Court ordering the Solicitor to reimburse his client costs exacted from the latter through some clear blunder of the Solicitor (*d*).

But it is quite another thing to entertain a substantive

(*a*) Stokes v. Trumper, 2 K. & J. 232.
(*b*) 4 Sim. 586. (*c*) 4 DeG. & J. 508.
(*d*) See Dickenson v. Jacobs, 10 W. R. 303.

1868.

Thompson v. Milliken.

claim either by way of bill or petition, or by way of set-off to a bill of costs for damages caused to the client by the Solicitor not having secured to him all the benefit he might have derived from his suit, or of having by reason of his bad management of it, caused him the loss of something which before suit he was entitled to. Here the plaintiff may succeed in recovering from *Knaggs*, the surety, the balance of his debt. The mortgagor may yet become able to pay him. The land sold under the decree may have gone at a very low price—and plaintiff, becoming the owner of it at that price, has sold it at a greatly enhanced price. These would all be considerations for a jury in estimating damages. It is said that the plaintiff's remedy at law is barred by the Statute of Limitations. That is his own fault in mistaking the proper forum. The same consideration was urged without avail in *Stainsbury* v. *Jones* (*a*).

Judgment.

That the whole bill of costs cannot be disallowed is evident enough from the statement already made. It cannot be said that the whole proceedings were useless, and bore no substantial fruits. (See cases in 2 *Foster & Finlayson*, p. 643, and in 3 *Foster & Finlayson*, p. 138).

I must dismiss this appeal with costs, merely directing that the Master inquire further, and re-consider the question as to the necessity for a second advertisement for sale. I am not satisfied as to this. When a sale is put off I do not think the expense and delay of a fresh advertisement should be incurred, but that a note at the foot of the old advertisement, stating the postponement, should suffice. This, I assume, would be far less expensive, and if so, the Master should disallow to the Solicitor the increased expense. I will not interfere

(*a*) 5 M. & Cr. p. 1.

with the Master's ruling on the other minor matters objected to.

1868.

Thompson v. Milliken.

The cross appeal must, I think, be allowed. The Master should not have charged the Solicitor with the costs of the inquiry as to negligence when he decided, as he rightly did, that he could not entertain such inquiry, but I make no order as to the costs of this appeal.

Gray v. Reesor.

Exchange of lands—Pleading—Costs.

The plaintiff and defendant agreed to an exchange of lands, the plaintiff conveying 100 acres in B., upon which there was a mortgage for $1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots—one in T. the other in S.—he should select: in the event of his selecting the latter it was to be assigned to him, subject to the payment of $150 in four equal annual instalments, with interest at seven per cent. The plaintiff selected the latter, but it appeared that the defendant had not yet obtained a title thereto, although he was in a position to call for a patent from the Crown on making certain payments, and which he procured the day the cause was heard. The Court, as the defendant had all along had a title to the lot, and was at the time in a position to carry out his part of the agreement, and submitted to do so, directed that the contract should be completed by conveyance of the lot in S., and that the time for payment of the $150 should date from the hearing; from which time also the interest should be computed.

The examination of witnesses in this cause had been had at the sittings at Toronto, before Vice Chancellor *Mowat*, and was again brought on for argument upon the same evidence before Vice Chancellor *Spragge*.

Mr. *Moss* and Mr. *Meyers*, for the plaintiff.

Mr. *S. Blake*, for the defendant.

Spragge, V.C.—The bill contains charges of undue influence exercised by the defendant upon the plaintiff; Judgment.

1868.

Gray v. Reesor.

of gross fraud practised by the one upon the other, the one being a shrewd crafty man: the other simple-minded, and weak both in body and mind. All this is reiterated again and again; there is scarcely a paragraph of the bill that does not impute fraud. It is but justice to the defendant to say that not only are these charges not proved, but that the evidence shews that the plaintiff had no reasonable ground for making them.

The ground upon which the bill proceeds is shortly this: that there was an exchange of lands, the plaintiff conveying to the defendant one hundred acres in Brock, upon which there was a mortgage for $1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots named, one in Tiny, the other in Sydenham, the plaintiff should elect to have; in the event of the plaintiff selecting the latter it was to be assigned to him, subject to the payment of $150 with interest at 7 per cent, to be paid in four equal annual instalments; the plaintiff to have four months to make his choice, and then to give reasonable notice to the defendant for its conveyance, (the agreement is dated 10th February, 1863); that the plaintiff selected the land in Sydenham, but that the defendant had no title to it whatever, nor to the land in Tiny; that he sold the land in Brock; and the plaintiff asks to be paid the difference between the gross purchase money and the mortgage.

Judgment.

It appears by the evidence that no patent had issued for the land in Sydenham; but it appears also that the plaintiff was aware of this, and that purchase money was still due to the Government, which would have to be paid before the patent could be obtained. It appears that the land had been sold originally to one *McKay* in March, 1854, and was resumed and advertised for sale in September, 1863, but not sold; that it was subsequently sold by the local agent to one *Young*, who abandoned the sale and took back his money, upon a

1868.

Gray v. Reesor.

claim being made by one *Carrie* as in occupation of the land. But for *Carrie's* claim the patent would have issued to *Young*. No exception was made to *Carrie's* claim except by the defendant who claimed as holding an assignment traced from the original purchaser. The defendant was subsequently allowed as the purchaser. No patent was however issued to him until the day of the hearing of the cause. He claims to have purchased from a Mr. *Kennedy* who purchased from *McKay*, and that his purchase was prior to his agreement with the plaintiff. The assignments filed in the Crown Lands Department will shew the date of his purchase, but I understood it to be admitted that it was before the agreement with the plaintiff. It appears that the Crown could have resumed in February, 1862, but would have allowed the purchaser to complete his purchase on performing settlement duties or compounding for them in money. No written communication was made to the defendant of the intention of the Crown to resume the land.

Judgment.

The defendant narrowly escaped losing the land. But assuming that he had acquired the title of the original purchaser before he agreed to sell to the plaintiff, there was no fraud nor any wrong in his agreeing to sell it. He was in default at the time, but trusted no doubt to the habitual leniency of the Crown, in dealing with purchasers, to accept the purchase money after default. At the same time it was his duty to the plaintiff to see that the land did not become forfeited through his default.

The matter then stands thus. There was no fraud or unfair dealing on the part of the defendant, the plaintiff knew perfectly well what he was purchasing, and it would appear from the evidence that the bargain was perfectly fair, and that the lot in Sydenham was fully equal in value to the lot in Brock, taking the mortgage

1868.

Gray v. Revsor.

upon it into account, and it is not shewn that the plaintiff has ever pressed or even asked for a conveyance of the Sydenham lot. It is not shewn at what time he made his selection except by the answer, which states it to have been "several months" after the agreement:—he was to have four months to make his selection, and to give reasonable notice of his desire for a conveyance.

The defendant by his answer says that he was always prepared, and was prepared then, to cause the patent to be issued to the plaintiff upon the terms of their agreement; and he submits that the plaintiff should be ordered to carry out his part of the agreement, within a limited time, and pay the sum payable upon the Sydenham lot; and he submits to convey that lot to the plaintiff, and to do what may be further required by this Court. This submission relieves the Court from any difficulty as to granting relief upon this bill, framed as it is, for relief in one shape only.

Judgment.

If the defendant had assumed to sell land to which, as put by the bill, he had no title whatever, or if he had forfeited, and lost his title, so as to be now incapable of making a conveyance, it would be for the Court to say whether it would grant relief upon this bill, or put the plaintiff to file another bill free from the gross charges contained in this. But I think from the evidence that the defendant had all along a title to the Sydenham lot, subject indeed to be lost, and which was very nearly lost, by his default, and he is now in a position to carry out his part of the agreement; and there is no reason from lapse of time or otherwise why it should not be carried out. As to the terms, it is only now that the defendant has been in a position to carry it out. He ought to have been in a position to carry it out at any time, and the plaintiff has suffered some detriment from his not having been so, for his son abandoned work which was to go towards payment of the Sydenham lot, upon being informed

1868.

Gray v. Reesor.

that the defendant had no title to it, this in all probability arising from the sale to *Young*, or the claim of *Carrie*. I think, therefore, that the time for payment of the $150 should date from the hearing, and that interest should be payable only from the same time. There is this further reason for the payment of interest not commencing earlier, that interest on purchase money to the vendor and perception of rents and profits by the purchaser are co-relative and the latter commences only now.

As to the costs. So lately as November of last year, after this bill had been filed, the defendant was not in a position to carry out his side of the bargain: in an interview with the plaintiff he said that he could get the land then, although a man was in possession; and upon the plaintiff asking him what he would do about the land, he offered land in Tiny: upon the same occasion there were negotiations for a compromise in money, which however fell through. He had long before this, some three years, sold the land he had received from the plaintiff. I cannot under these circumstances give him his costs. On the other hand I cannot upon such a bill as this is, give the plaintiff his costs. The decree will be without costs.

Judgment.

1868.

WALMSLEY v. BULL.

Maintenance—Dower—Election—Practice—Statute of Limitations.

Where the question as to whether the widow had elected to take an annuity in lieu of dower, arose in connection with a claim of the defendant for past maintenance and education of the plaintiff, and was a mere matter of inference, depending to a certain extent on the amount of moneys the widow had received—this point was reserved until after the Master had made his report.

The executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children, and on the eldest son coming of age in 1852 the executor pointed out to him the clause in the will directing a distribution of the personal estate, but the only estate the executor then had was some household furniture. In 1867, the widow having set up a claim for dower, rejecting an annuity provided for her by the will, the heir-at-law filed a bill against the executor for an account—*Held*, that the Statute of Limitations did not bar the relief: but, inasmuch as the executor had had reason to believe he would never be called on for an account, the Court thought the Master, in proceeding under the decree, should act liberally upon the rule of Court giving the Master a discretion as to the mode of vouching accounts in his office.

Examination of witnesses and hearing.

Mr. *Roaf*, Q.C., for the plaintiff.

Mr. *Spencer*, for the defendant.

Judgment. SPRAGGE, V. C.—I think the plaintiff is not disentitled, by laches or acquiescence, from maintaining this suit, whatever other effect the delay, which has been very considerable, may properly have. The Statute of Limitations clearly, I think, does not apply, by analogy or otherwise. A strong case against these grounds of defence is *Aspland* v. *Watt* (*a*).

With regard to the defendant's claim to be allowed a

(*a*) 20 Bea. 474.

1868.

Wamsley v. Bull.

proper sum for the maintenance and education of the plaintiff, the plaintiff objects that the sum of £25 a year was payable to the widow under the will, in lieu of her dower; and that, as the defendant permitted the widow to receive the personal estate, which ought to have been received and applied by him, in pursuance of the will, he must be in the same position as if it had come to his own hands, and he had so applied it; and that, in the taking of the accounts, the defendant must first be credited with moneys applied in the payment of debts; next with the payment of the annuity; and that the surplus should then be divided into equal portions, according to the will, and that the moneys expended in the plaintiff's maintenance should be charged against his share. The defendant contends that the surplus should be taken as divided without deducting the annuity; that it was competent to the widow to accept the annuity, or to insist upon her dower; that she has since, very recently, insisted upon her dower; and that there is no evidence of her having ever accepted the annuity.

Judgment.

The regular course for the executor to have taken, would no doubt have been to receive into his own hands the personal estate; and to have paid the debts; and to have paid or tendered the annuity. And, with regard to the maintenance of the children, an application should have been made to the Court. If an application for such maintenance had been made, even under the circumstances of the widow receiving and applying the whole personal estate, the question would necessarily have arisen in respect of the annuity, and an inquiry would, if necessary, have been directed, whether the widow elected to take the annuity or insisted upon her dower. That question would have been settled nearly twenty years ago, if the defendant had acted in pursuance of the will; and it would have been settled nearly as long ago, if an allowance for maintenance

1868.

Walmsley v. Bull.

had been asked of the Court then, when it was required, instead of now: and the plaintiff has some reason to complain that by the course taken by the widow, with the acquiescence of the executors, he is now exposed to the widow's claim of dower, and put to the alternative either of conceding it, or proving that some twenty years ago she elected to take the annuity.

The plaintiff, as I understand, desires me now to decide upon this question of maintenance, that the widow elected to take her annuity; that it must be inferred from the circumstances that she did; that the widow, having been permitted by the defendant to receive moneys applicable to the payment of her annuity, he must be in the same position as if he, the proper hand, had received them and paid them to her: but it appears to me that this question can be much better decided after the accounts are taken than it can be now. It can only be a matter of inference from the circumstances, that she elected to take the annuity, depending in no small degree upon the amounts of the moneys that came to her hands; and there may be other circumstances which may be found, upon the inquiries in the Master's office, that may help the Court to a sound conclusion upon the point. The Master should report specially any circumstance bearing upon the question. The point, I apprehend, only arises in connection with the claim for an allowance for maintenance. If that claim is made in the Master's office, against the plaintiff, or against any of the other children of the testator who may come into the Master's office, then these special circumstances, if any, may be inquired into: the direction to the Master will be to inquire what it will be proper to allow against the plaintiff, and against any other of the children who may come into the Master's office, for their respective maintenance, in the event of the defendant carrying in before the Master a claim in respect thereof.

Judgment.

1868.

Walmsley v. Bull.

I have said I think the plaintiff not disentitled by delay or acquiescence. I think, too, that what took place upon his coming of age ought not to bar him. The defendant, it is true, on that occasion pointed to the clause in the will, providing for a distribution upon his coming of age. But all that he then professed to divide among the children was the household furniture. It would be going very far to hold the plaintiff bound to take that as a division and settlement of the whole estate. No books or accounts were produced, nor was any statement made of what had been received, or how it had been applied. In *Aspland* v. *Watt*, there had been a release executed, and an actual distribution of assets; and yet, under the circumstances, the legatees were held not barred.

Judgment

On the other hand, what then took place, and the long delay since—it was about 1852, and the bill was not filed till 1867—should have their weight in the mode of taking and vouching the accounts. The plaintiff knew that his mother, not the defendant, had in fact administered the estate. It was probably understood, when the furniture was divided, that, whatever the defendant's liabilities might be, he had nothing in hand to distribute under the clause in the will to which he referred. During the fourteen or fifteen years that followed this, the plaintiff made no claim upon the estate or upon its representative, or upon his mother; and his mother made no claim upon him in respect of her dower. I think I should look upon this abstinence on his part to ask for an account as evidence only that he was content to forego it, or at least not to urge it, in the belief that his mother had accepted the annuity, and had paid herself out of the moneys that had come to her hands. If she were executrix, his altered position, through her claim of dower, would be a very good reason for his calling her to account. It is not so good a reason for calling this defendant to account: and it

1868.

Walmsley v. Bull.

is hard upon him, certainly, that the conduct of a third party should be the means of drawing him into litigation. But it was his own fault originally (I do not mean his intentional wrong), that has occasioned the difficulty: I mean the claim at this late day for dower, after the plaintiff had for some fifteen years rested in the belief that the widow had accepted the annuity. I cannot therefore hold him excused from accounting; but inasmuch as he had some reason to expect that he would not be called to account, I think the Master should act liberally, upon the rule of the Court that gives him a discretion as to the mode of vouching accounts in his office. I see no reason why the evidence of the widow should not be received. Costs to be reserved.

CHESLEY v. COUPE.

Registered judgment—Sheriff's deed.

Where a judgment was registered and a *fi. fa.* against lands was delivered to the Sheriff before the expiration of three years, but the sale did not take place until after the three years had elapsed and the judgment had not been re-registered,—

Held, that the Sheriff could only sell any land the debtor had at the time the *fi. fa.* was placed in his hands; and that a conveyance made by the debtor before the judgment was obtained but not registered till after the registration of the judgment, took precedence of the Sheriff's deed.

Statement.

The plaintiff in this case was the assignee of a mortgage from *John Goedike* to *Thomas G. Hurd*, dated 29th September, 1857, to secure $640. On the 16th November of the same year a judgment was recovered by a creditor against *Goedike*, and on the 18th the judgment and mortgage were both registered, but the mortgage was registered five minutes after the judgment. On the 27th January, 1860, a *fi. fa.* against the lands of the mortgagor was delivered to the Sheriff, and on

1868.

Chesley v. Coupe.

the 13th April, 1861, a writ of *venditioni exponas* was issued, under which the Sheriff sold the mortgaged property to one *Sherman Smith Halliday* for $75. Meanwhile and on the 26th November, 1859, the plaintiff filed his bill of foreclosure against the mortgagor and others, and on the 1st November, 1862, he obtained the final order without having made the Sheriff's vendee or his assignee a party to the suit. The defendants to the present bill were *Stephen Coupe* and *John Curran*, who at the time of filing the bill were the persons interested in the Sheriff's sale. The object of the bill is stated in the judgment.

Mr. *Hector*, Q. C., and Mr. *Moss*, for the plaintiff.

Mr. *C. S. Patterson*, for the defendant *Curran*.

Mr. *Hamilton*, for the defendant *Coupe*.

Argument.

The following cases were cited:—*Kerr* v. *Amsden* (*a*), *Heward* v. *Wolfenden* (*b*), *Thirkell* v. *Paterson* (*c*), *Wales* v. *Bullock* (*d*), *Bank of Montreal* v. *Thompson* (*e*), *Freeman* v. *Bank of Upper Canada* (*f*), *Doe dem Dougall* v. *Fanning* (*g*), *Doe Dempsey* v. *Boulton* (*h*), *Fraser* v. *Anderson* (*i*), *Bank of Montreal* v. *Woodcock* (*j*), *Gardner* v. *Juson* (*k*), *Warren* v. *Taylor* (*l*), *Brogden* v. *Collins* (*m*), *Hall* v. *Goslee et al.* (*n*), *Shuttleworth* v. *Roberts* (*o*), *Waring* v. *Hubbs* (*p*), *Commercial Bank* v. *Bank of Upper Canada* (*q*), *Morland* v. *Munro* (*r*), *Rowe* v. *Jarvis* (*s*).

(*a*) 2 U. C. E. & A. 446.
(*b*) 14 Gr. 194.
(*c*) 18 U. C. Q. B. 75.
(*d*) 10 U. C. C. P. 155.
(*e*) 9 Gr. 515.
(*f*) 2 U. C. E. & A. 362.
(*g*) 8 U. C. Q. B. 166.
(*h*) 8 U. C. Q. B. 532.
(*i*) 2 U. C. Q. B. 634.
(*j*) 9 Gr. 141.
(*k*) 2 H. C. E. & A. 188.
(*l*) 2 H. C. E. & A. 59.
(*m*) 7 U. C. C. P. 31.
(*n*) 15 U. C. C. P. 101.
(*o*) 11 Gr. 237.
(*p*) 12 Gr. 227.
(*q*) 21 U. C. Q. B. 91.
(*r*) 12 U. C. C. P. 232.
(*s*) U. C. Q. B.

1868.

Chesley v. Coupe.

MOWAT, V. C.—The only question argued in the cause was whether the mortgage or the Sheriff's deed had priority. The plaintiff's counsel contended for priority on various grounds, some of which have been before the Courts on other occasions, and there has not been a uniformity of opinion respecting them. Being of opinion that the want of re-registration of the judgment is fatal to the defence, I shall make no observation on any of the other points relied on.

More than three years elapsed after the judgment was registered before the Sheriff's sale took place. By the Statute 20 Victoria, chapter 57, section 19, being "the Common Law Procedure Act, 1857" (*a*), it is enacted, that "every judgment registered against land in any county, shall cease to be a lien or charge upon the land of the party against whom such judgment has been rendered, or any one claiming under him, in three years after such judgment has been registered * * unless before the expiration of the said period of three years * * such judgment shall be re-registered; and such lien or charge shall cease whenever the period of three years shall at any time be allowed to elapse without a further registry." This re-registration, required by a Statute relating to Common Law Procedure, no doubt is necessary for any common law purpose, as well as to continue the charge in equity (*b*). The *fi. fa.* was placed in the Sheriff's hands within the three years, and to such a case it was argued that the enactment does not apply; but the Statute not having made such a case an exception, it is impossible for the Court to make it one. The result seems clearly to be, that, if a Sheriff's deed, executed and registered after three years from the registration of a judgment, would have conveyed the estate which the debtor had at the time of

Judgment.

(*a*) Sec. 33. See Consol. U. C., ch. 89, sec. 64.
(*b*) Warren v. Taylor, 9 Gr. 59.

1868.

Cheeley v. Coupe.

the registration, and not merely at the time of the writ being delivered to the Sheriff, still, where the Sheriff's sale was after the expiration of the three years, nothing passed except what the debtor had when the writ was given to the Sheriff, as is the case now that the registration of judgments is abolished.

The bill alleges, that the defendants have been cutting the timber, and prays an injunction; and for the cancellation of the deed to *Curran* and his mortgage, as clouds on the plaintiff's title. But the plaintiff has given no evidence of the waste. On the other hand, the defendant *Curran* alleges, by his answer, that he is in possession of the property, and has made valuable improvements thereon; and these statements are also unproved. The defendant *Curran* alleges that the mortgage to *Hurd*, under which the plaintiff's title is derived, was fraudulently antedated—an allegation which has been disproved—and he prays that this mort- Judgment.
gage, the assignment to the plaintiff, and the certificate of foreclosure, which has been registered, may be cancelled as clouds on the defendant's title. No objection was made on either side to the jurisdiction of the Court to grant the relief prayed, according as the opinion I might form on the question of priority should be in favor of the one or the other party. The decree will, therefore, declare the Sheriff's sale to be invalid, and the deed to convey no interest in the property. Reference, if the defendant *Curran* desires, to take an account of his improvements, if any; just allowances in that case being made to both parties. No costs to either party.

The defendant *Curran's* claim to the land is derived under the defendant *Stephen Coupe*, who, after divers *mesne* conveyances became entitled in May, 1866, to the interest, if any, conveyed by the Sheriff's deed. On the sale by him to *Curran* (purchase money $250) he executed a conveyance, and took back a mortgage

1868.

Chesley v. Coupe.

for so much of the consideration as was unpaid. This mortgage was outstanding when the bill was filed, but was paid and discharged before *Coupe* filed his answer. The charge of waste would have subjected *Coupe* to a decree, if he had allowed the bill to be taken *pro confesso* against him; and as that charge has not been proved, and as *Coupe* by his answer disclaimed all interest in the property, he is entitled to his costs against the plaintiff.

DAVIDSON v. BOOMER.

Will, construction of—Extrinsic evidence—Statute of Mortmain.

In the interpretation of a will, extrinsic evidence of surrounding circumstances, to shew what a testator intended by his will is admissible; but declarations by the testator of what he intended by his will, will not be received for that purpose.

Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in mortmain whereon it was to be built, extrinsic evidence was given to shew that land for the site of a parsonage had already been given by a third person, and that the testator had on various occasions pointed it out as the site for a parsonage and had avoided building a school house upon it, lest doing so should interfere with its use for a parsonage:—such evidence was received to rebut the presumption that would otherwise arise from the generality of the bequest, that the money bequeathed was to be applied in the purchase of land for a site, as well as for the erection, of the building.

Statement.

After the judgment, which is reported *ante* page 1, had been given the defendants *The Churchwardens*, the parties interested in the bequest of the sum of £1,500 for the purpose of building a parsonage, availed themselves of the permission thereby given of adducing further evidence shewing that the money so bequeathed was intended wholly for the erection of the building, not that any portion of it was to be expended on the purchase of land whereon to build; and, by consent of

all parties interested, affidavits of the facts relied on were allowed to be used; the nature and effect of which are fully set forth in the head-note and judgment. 1868. Davidson v. Boomer.

Mr. *Crooks*. Q. C., for the plaintiff.

Mr. *Roaf*, Q. C., for *The Churchwardens*.

Mr. *Moss*, for the next of kin.

Sprague, V. C.—This case was before me some time since, upon several points which I disposed of, among others, upon a clause in the will of the testator in the following terms: "Also, I give and bequeath the sum of £1500 for the erection of a parsonage for the Clergyman of said Trinity Church, to be paid by my executrix and executors hereinafter named, out of my estate, whenever required so to do." The words of the will, and nothing more were before me; and I held the bequest void, under the Statute of Mortmain: adding, that if there was anything in the circumstances of the case to shew with sufficient distinctness, that no part of the sum bequeathed, was to be applied in the purchase of land, it was for those interested to shew it. Judgment.

The question has been again brought before me, upon several affidavits, it being agreed that affidavit evidence might be used, and the following facts are shewn, in order to prove the intention of the testator that no part of his bequest of £1500 should be applied in the purchase of land, but the whole in the erection of a building for a parsonage.

That ground adjoining the Church had some time before been given by the Honorable *Robert Dickson* for the site for a parsonage house. The fact of the gift of this land is not proved very regularly, but there appears to be no doubt of the fact, and of its being understood by the testator to have been so given.

1868.

Davidson v. Boomer.

That this land was referred to by the testator as the intended site for a parsonage; and that he built a school-house on the other side of the Church, on a site where it required considerable outlay of money to make it available, in order to leave the land given by Mr. *Dickson* free, for the site of a parsonage. That the testator while walking past the property with a Mr. *Davidson*, observed to him, "a house just like Mr. *Edward Adams's* in London, would be just the thing for a parsonage house in that corner," and Mr. *Davidson* states that he has since been informed by Mr. *Adams* that his house cost to build exactly £1500, the sum bequeathed by the testator. That the testator expressed his intention to Mr. *Davidson* to erect a parsonage upon the corner of the land given by Mr. *Dickson*.

Judgment.

The facts to which I have referred are in my judgment, admissible for one purpose only; that of shewing the circumstances existing when the will was made, in relation to that, which is the subject matter of the will. Sir *James Wigram* in his very excellent and instructive work on the admission of extrinsic evidence in aid of the interpretation of wills, explains with his usual clearness the purposes for which extrinsic evidence is, and is not admissible. *"Any evidence," he says, "is admissible which in its nature and effect simply explains what the testator has written; but no evidence can be admissible which in its nature or effect, is applicable to the purpose of shewing what he *intended* to have written. In other words the question in expounding a will is not, what the testator meant? as distinguished from what his words express, but simply what is the meaning of his words," and for this he quotes *Parke*, J., in *Doe Gwillim* v. *Gwillim* (*a*), and Lord *Denman* in *Rickman*

* Page 8.

(*a*) 5 B. & Ad. 127.

1868.

Davidson v. Boomer

v. *Carstairs* (*a*), to which may be added several more recent authorities to the same effect: and Sir *James Wigram* adds: "and extrinsic evidence in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue, which this question raises. The distinction," he continues, "involved in the last observation between evidence which is ancillary, to a right understanding of the words to which it is applied, and which is therefore simply explanatory of the words themselves, and evidence which is applicable to prove intention itself as an independent fact, is broad and palpable."

That the facts referred to are admissible for the purpose I have indicated, is abundantly clear. To quote again from the same learned author. *"It is upon the principle before adverted to, namely, that all writings tacitly refer to the existing circumstances under which they are made; that Courts of Law admit evidence of particular customs and usages in aid of the interpretation of written instruments, * * The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." Then refering to examples illustrative of his position, which he says might be multiplied without end, he adds: "They appear to justify the conclusion that every claimant under a will has a right to require that a Court of construction in the execution of its office shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare." And *Templeman* v. *Martin* (*b*), and *Gray* v. *Sharpe* (*c*), are referred to.

Judgment.

The clause of the testator's will now in question, seems to fall within Sir *James Wigram's* third proposi-

---

* Page 86.

(*a*) 5 B. & Ad. 663. (*b*) 1 N. & M. 524. (*c*) 1 M. & K. 602.

1868. Davidson v. Boomer.

tion that, *"where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a Court of Law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to those circumstances they are capable." And he adds further on, †"For if the strict and primary sense of a testator's words is to prevail in construction wherever the circumstances of the case admit of their being so construed, extrinsic evidence *must* be admissible to inform the Court whether this rule of law can be applied or not."

Judgment.

A case before Sir *John Leach* is referred to by the learned author, *Gill* v. *Shelley* (*a*). There was a devise among certain classes, it being added, "Amongst whom I include the children of the late *Mary Gladman*." There were in fact two children of *Mary Gladman*, but one of them was illegitimate, and the words of the will could not apply to her if read "in their strict and primary sense," but the fact being shewn by extrinsic evidence that there were only these two children, the words of the will were taken in a "popular or secondary sense," and the illegitimate child was held entitled.

The words of Lord *Eldon* in *The Attorney-General* v. *Davies* (*b*), "Unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased," implies certainly that the will must itself negative a direction to purchase land. This *dictum* of

---

* Page 56.
(*a*) 2 R. & M. 336.

† Page 60.
(*b*) 9 Ves. 544.

1868.

Davidson v. Boomer.

Lord *Eldon* has however been qualified in one point, that the land upon which the building is to be erected must be already in mortmain: and if we cannot by extrinsic evidence shew that land already in mortmain, or land to be acquired otherwise than by the fund bequeathed, was contemplated as the site of the building to be erected; then, wills containing bequests for the erection of buildings for charitable purposes must stand upon a different footing, as to construction, from other wills, which they certainly do not—*Tatham* v. *Drummond* (*a*), before Lord *Westbury;* and the Court must in such cases exclude the evidence of extrinsic circumstances to aid in their construction. Lord *Eldon* could only have meant that a direction to expend money in the erection of a building, is to be considered as by implication, as said by Lord *Wensleydale* in *Phillpott* v. *St. George's Hospital*, directing also the land to be purchased upon which to erect the building.

Judgment.

It is contended that this implication is a rule of construction which cannot be controverted. I do not accede to this. I agree that a direction to lay out money in the erection of a building must now, from the construction these words have long received, be taken in their strict and primary sense to include a direction to purchase land; but the words certainly do not, *ex vi termini* exclude their being read as directing the expenditure of the whole of the money bequeathed, in the erection of a building. Their being read in the latter sense is of course now, reading them, in a popular or secondary sense.

I have referred to the case of Lady *Hewley's Charities*, *Shore* v. *Wilson* (*b*), in which the admissibility of extrinsic evidence was very much discussed, and in which Sir *James Wigram's* work was referred to with high

(*a*) 10 Jur. N. S. 1087. (*b*) 9 Cl. & Fin. 355.

1868.

Davidson v. Boomer.

commendation. Seven of the Common Law Judges gave their opinions to the House of Lords, some giving their opinions as to what evidence of surrounding circumstances is admissible, in a more restricted, others in a more extended sense. The question was as to the objects of Lady *Hewley's* bounty, and the meaning of certain terms used by her in describing them, which would be more or less comprehensive according to certain circumstances: extrinsic evidence of circumstances was held to be admissible. I will only refer to a passage in the judgment of Lord *Cottenham*, which shews that his view of the law, in which the other Lords concurred, was substantially the same as that of Sir *James Wigram*. *"It was very clearly and shortly laid down by Mr. Baron *Gurney* that that part of the evidence which goes to shew the existence of a religious party, by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady *Hewley* was a member of that party, is admissible; that being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at the time."

Judgment.

There are three late cases in which the question was, whether a bequest of moneys to be laid out in the erection of buildings for charitable purposes—in two for the erection of parsonages, in the third for the erection of a chapel—is void under the Statute of Mortmain. In the first case, *Sewell* v. *Crewe-Read* (*a*), the bequest was in these terms: "I direct my executors to stand seised of the sum of £1,000, and to lay out or pay over the same in building the parsonage house at Chasely, in manner as I have already promised the same." The testator had induced the Dean and Chapter of Westminster to purchase the copyhold interest of certain

* Page 580.

(*a*) 3 L. R. Eq. 60.

land in the parish, of which they were lords, in order to its being dedicated as a site for a parsonage house. The land had not been conveyed, but the Dean and Chapter were willing to convey it on condition that the parsonage house should be erected out of the money bequeathed. There was, at the date of the will, glebe land belonging to the living, but no parsonage house. Lord *Romilly* held the bequest valid, saying, "that the testator by directing the money to be laid out in building the parsonage house, has distinctly indicated an intention that it was to be laid out, not in the purchase of land, but *in* building a house, either on the glebe land, or on the land which had been purchased by the Dean and Chapter of Westminster." Lord *Romilly* probably had in his mind the words of the testator, "in manner as I have already promised the same," as an indication of his intention. He incorporated his previous promise into his will, and evidence would, I apprehend, be receivable to shew what that previous promise was. Lord *Romilly* does not rely upon the surrounding circumstances, so that the case is scarcely an authority for the position of those interested in this parsonage.

1868.

Davidson v. Boomer.

Judgment.

In a subsequent case, however, before the same learned Judge, *Booth* v. *Carter* (*a*), he gave effect to a bequest which would have been void but for the surrounding circumstances. The bequest was "To the trustees of the Wesleyan Chapel in St. John's Street, Chester, the sum of £1,000, to be applied towards the erection of a new Wesleyan Chapel in Chester." The trustees at the date of the will were possessed of a piece of land in John Street, Chester, on part of which the chapel stood, and of other pieces of land in the same street, large enough, and suitable for the site of a chapel, which had been conveyed to the trustees in mortmain.

(*a*) 3 L. R. Eq. 757.

1868.

Davidson v. Boomer.

It appeared further that the trustees were, in 1864, in treaty for the purchase of land in another street in Chester, of which the testator was aware, and that they had come to the resolution, in which the testator, who was himself a trustee, had concurred to erect thereon a new chapel. This last circumstance created the difficulty, it being contended that it might be assumed that, as the testator was aware of, and concurred in, the intention to purchase the new land, that he intended the money bequeathed to be laid out in the purchase of that land. In the course of the argument, the Master of the Rolls observed that any evidence relating to the land vested in the trustees was receivable, and at the close of the case said: "The case, perhaps, goes a shade further than the other cases referred to; but as it was clear that there was land already duly conveyed to the trustees on which a new chapel might be built in substitution for the old one, the legacy must be upheld."

Judgment.

The case of *Creswell* v. *Creswell* (*a*), decided in April of the present year, was before Vice Chancellor *Giffard*. In that case the bequest was of £1,000 to be vested in trustees, "to be expended in building a parsonage in connection with that church." The question upon this is stated thus: "Whether, having regard to the fact that there had been no actual dedication of a site for such parsonage at the death of the testatrix, the bequest was valid" (9 Geo. II. ch. 36), and an inquiry upon this point had been directed, *i.e.*, as I suppose, an inquiry as to the facts connected with there being a site for a parsonage. The facts appeared to be that a piece of ground was conveyed to the commissioners for building new churches, upon a portion of which they caused a church to be built, and the residue, which was intended for a burial ground, was "properly levelled

(*a*) 6 L. R. Eq, 69.

1868.

Davidson v. Boomer.

and enclosed." By an act of consecration and dedication, the chapel was duly consecrated, and the residue was dedicated and consecrated as a burial ground. At that time there were no funds for the erection of a parsonage house; but the erection of one was always contemplated; and a certain portion of the ground, dedicated for the purposes of a burial ground, was never used for that purpose, but was, by the minister and churchwardens for the time being, reserved for the erection of a parsonage house, when there should be funds for the purpose, and that portion was used by the incumbent of the church for a garden. The substance of these facts, it appears, was known to the testatrix. The argument against the validity of the bequest did not take the ground that the will itself must point to some land not in mortmain; but that it was bad because no land had been appropriated for the purpose, and the trust could only be carried out by buying land, as the closing of the burial ground could give no right to use it as a site for a parsonage. On the other side it was contended that there was an appropriation. It appeared that the burial ground had for some years been closed by Act of Parliament; and, as the learned Vice Chancellor said, could be used for the purpose of building a parsonage, or for no purpose of any description. He stated the point for decision to be "whether the terms of the bequest, regard being had to the circumstances which existed at the time of the death of the testatrix, are such as to exclude a purchase of land by the trustees out of the bequest, or any part of it, for the purpose of building a parsonage in connection with the church." The question so put, admits the rule of construction to be as I held it in my former judgment. The learned Vice Chancellor proceeds: "The bequest points to a parsonage in connection with the church, and there having been at the death of the testatrix land appropriated for that purpose which could be lawfully so used, I am of opinion that the trustees would not

Judgment

1868.

Davidson v. Roomer.

have been justified in purchasing or attempting to purchase any other land for that purpose." It is to be observed that in this last case we have the opinion of two of the learned Judges of the Court, that it is not necessary that the will itself should point to land already in mortmain—the opinion, *i.e.*, of Sir *G. M. Giffard*, and that of the learned Judge who directed the inquiry contained in the decree: at the date of the decree, Sir *G. M. Giffard* had not been appointed to the Bench. Such an inquiry would have been obviously improper, unless, in case of there being an appropriation of land for the site of a parsonage, the bequest would be valid (*a*).

Judgment.

Upon comparing the facts in the case before me with the facts in the two cases to which I have last referred, it will be found that the facts in this case are at least as strong for shewing an appropriation of land for a site, as in either of the cases referred to; and the knowledge of the testator, and his approbation of the site, are shewn yet more clearly. I think that these cases do not contravene the general current of authority, and that they are sustainable in principle. It was to satisfy myself upon this point that I have gone at some length into the doctrine which is involved in the case. My conclusion is that the bequest is valid.

Upon this argument, as upon the former one, all parties are entitled to their costs, out of the estate.

(*a*) 2 M. & K. 569; 3 Hare, 33.

1868.

JAMES v. SNARR.

Principal and agent—Injunction—Discovery—Practice.

Ordinarily a bill for an account will not lie by an agent against a principal.

Although, since the Common Law Procedure Act, bills for discovery in aid of defences at law are rare, yet they will lie; but in such a case the plaintiff cannot move for an injunction to restrain the proceedings at law until he has filed interrogatories—under special circumstances, however, the Court directed the defendant to submit to an examination in aid of such motion, or in default ordered the injunction to go.

This was a motion for an injunction to restrain proceedings at law. Statement.

The bill alleged that the plaintiff had, for a length of time, been employed by, and acted for, the defendant as his agent in the collection of moneys, in the course of which, as well as in other ways, large and frequent dealings took place between them; that while acting as such agent, the plaintiff had signed and delivered to the defendant two promissory notes, upon a statement prepared by the defendant, shewing the plaintiff to be indebted to him in the amount of such notes upon a balance of accounts between them; that the notes were so signed and delivered without any examination by plaintiff into the state of the accounts between him and the defendant, and on the representation by the latter as to the balance due, and that the notes would be a great convenience to the defendant in his business; that they were so signed and given on the understanding that they were not to conclude the plaintiff if, on examining into the accounts, it should appear that he was not indebted to the defendant in such a sum, and that the real balance should be subsequently ascertained and settled between them. The bill further alleged that the plaintiff was not at all indebted to the defendant at the

1868. James v. Snarr.

time the said promissory notes were signed; but that, on the contrary, the defendant had been and then was indebted to the plaintiff in a large sum for commissions on collections, &c.; that the defendant refused to go beyond the notes, or into any statement of accounts prior thereto, with the plaintiff, with the view of ascertaining the true balance between them; but had commenced and was prosecuting an action at law against the plaintiff on the notes, in which action the plaintiff had pleaded the above circumstances as a legal defence thereto.

The prayer of the bill was for an account and an injunction to restrain the action at law.

Mr. *Scott*, in support of the motion.

Mr. *Moss*, contra.

Judgment.

SPRAGGE, V. C.—This bill so far as it is a bill for relief, and not a bill for discovery in aid of a defence at law, is in substance a bill by an agent against his principal for an account. Such a bill does not make a proper case for equitable relief—on these grounds shortly; that there is no duty on the part of the principal as there is on the part of the agent to keep an account of the dealings between them, and there is no confidence reposed by the agent in the principal, as there is by the principal in the agent. The existence of such duty and such confidence are grounds for a bill lying for an account by a principal against his agent, and their absence in the converse relation are given as reasons for a bill in such a case as this, not lying. *Philips* v. *Philips* (*a*), *Fluker* v. *Taylor* (*b*), *Smith* v. *Leveaux* (*c*).

But counsel for the plaintiff contended that conceding that this bill cannot be sustained as a bill for relief, still

(*a*) 9 Hare 471. (*b*) 3 Drew. 183.
(*c*) 2 D. J. & S. 1.

1868.

James v. Snarr.

that it is good as a bill for discovery in aid of his defence at law, and I am not prepared to say that he is not right. The bill was filed primarily for relief, but it does also ask for discovery in aid of a defence at law. The defendant has brought his action at law upon two promissory notes given by the plaintiff in equity. *James*, the plaintiff in equity, has pleaded as a *legal* defence to the action at law, the same matters substantially as he has alleged in his bill, and that necessarily so far as this is a bill for discovery, and it is conceeded that these matters if established in evidence, constitute a good defence at law.

Although, since the passing of the Common Law Procedure Act, bills for discovery have become rare, they will still lie. It is so held in England, and my brother *Mowat* intimated an opinion to the same effect in regard to such bills in this Court in *Hayball* v. *Shepherd* (*a*): and further, that the discovery should be obtained by means of interrogatories according to the practice existing before the Orders of 1853.

Judgment.

James has actually examined *Snarr viva voce* before the special examiner, but that I apprehend was intended as a cross-examination upon the affidavit filed by *Snarr*; and I do not know that I can deny him an injunction to stay proceedings at law until discovery, provided he comes regularly, and has not disentitled himself by delay or otherwise—delay is not objected, so I infer that he has come with reasonable promptitude.

The practice, according to the English authorities, requires that interrogatories should be filed before any application is made for an injunction. It was so assumed by Sir *W. Page Wood* in *Lloyd* v. *Adams* (*b*), and expressly decided by the same learned Judge in *Fuller*

(*a*) 12 Gr. 426. (*b*) 4 K. & J. 467.

1868.

James v. Smarr.

v. *Ingram* (*b*), and is stated to be the practice in Mr. *Smith's* book (*c*).

The objection was not taken, and therefore I do not feel called upon to dismiss the application, but at the same time I desire to take such a course as will not delay the trial of the action at law which I understand is to come on, unless enjoined in the course of next week. I shall require the plaintiff, therefore, to file and serve his interrogatories immediately, and to examine upon them; or, if the plaintiff at law will submit to be examined *viva voce*, that he so examine him—a day's notice or even a few hours' notice will be sufficient for this. I will only grant the injunction in the event of the plaintiff at law throwing any obstacle in the way of his examination by the plaintiff in this suit.

Judgment.

As to costs, I suppose, in strictness, they should be reserved, and they will be so, unless the parties consent that they shall abide the event of the action at law.

(*a*) 5 Jur. N. S. 510. (*b*) P. 1416.

1868.

BIGGAR v. DICKSON.

Executors, compensation to—Allowance by Surrogate Court Judge.

Since the passing of the Act authorizing the Judge of the Surrogate Court to allow compensation to executors and trustees, (22 Vic. ch. 93, sec. 47, Con. S. U. C. ch. 16, sec. 66,) it has been the settled practice of the Master here, in passing the accounts of executors to allow them compensation for their "care, pains, trouble, and time, expended in and about the executorship" without an order from the Surrogate Judge allowing the same:—Where, therefore, an executor, pending an account before the Master, obtained such an order from the Surrogate Judge, and the Master allowed the amount of compensation mentioned therein without exercising his own judgment as to its propriety or reasonableness; an appeal, on that ground, from the report of the Master by the creditors of the estate, was allowed and the executors ordered to pay the costs thereof.

Appeal from the report of the Master.

Mr. *Morphy*, for the plaintiff.

Mr. *Hector Cameron*, for *Patchin*, a creditor.

Mr. *Rae*, and Mr. *A. Hoskin*, for the executors.

SPRAGGE, V. C.—The appeal in this case is by certain creditors of the estate of the late *Charles Thompson*; and the ground of appeal is, that the Master has allowed to the executors in passing their accounts certain sums allowed to them by the Junior Judge of the County of York, under the Act which authorizes the Judge of any Surrogate Court to allow compensation to executors and trustees. Judgment.

The order of the Judge is dated 10th December, 1867, and appears to have been made upon the application of *Griffith*, one of the executors. At the date of the order this suit had been pending a considerable time. The Master had taken an account of the assets and liabi-

1868.

Biggar v. Dickson.

lities of the estate; a large portion of the real estate had been sold, under the direction of the Court; creditors had come in and proved their debts; and the Master had reported upon their priorities.

It has been the settled practice of this Court for several years, for the Master, in passing the accounts of executors, to allow them compensation for their "care, pains, and trouble and time, expended in and about the executorship," instead of putting the executors to procure an order for allowing such compensation from the Surrogate Judge; and the propriety of this is obvious. The Act establishes the principle that executors and trustees ought to be allowed such compensation. Under the law, before the passing of the Act, it was a principle of the Court that executors and trustees were not entitled to compensation for personal services. The Act established a new principle, and it became a matter of course that the principle under which the Court formerly acted was abrogated, and a new one substituted in its place; and that new principle necessarily became the law of the Court in place of the old one. The Court could not decline to adopt it and act upon it, and it became the duty of the Master, in taking accounts and making all just allowances, to make a just and proper allowance for compensation to executors and trustees. It would, moreover, have been very absurd to send the question of compensation and its amount from the Master, who, from the administration of the estate being before him, would know all about it, to the Surrogate Judge, who might, and probably would, know nothing about it.

Judgment.

This new principle was introduced into the law in the shape in which it is, viz., that the Judge of any Surrogate Court may allow compensation, from its finding a place in the Act respecting Surrogate Courts; but it is none the less a principle of the law, which this Court

1868.

Biggar v. Dickson.

cannot do otherwise than recognize and act upon, and, as I have observed, it has acted upon it for years, indeed ever since the passing of the Act which introduced it, and has given as its opinion that it was proper for its officers to allow such compensation.

This being the course and practice of the Court, the question of compensation would in this case necessarily come up before the Master upon his passing the accounts of the executors. His judgment upon the matter was intercepted by one of the executors leaving this Court, which had cognizance of the matter, and presenting a petition to the Surrogate Court, and then, presenting to the Master an order of the Surrogate Judge that certain sums should be allowed to the executors. Solicitors for creditors objected to this, but the Master, as appears by his Report, conceived that he had no authority without special directions from the Court, "to set aside," as he expresses it, the allowances made by the Surrogate Judge, and allowed to the executors the sums mentioned in the Judge's order. It appears that the Master did not exercise his own judgment as to the propriety and reasonableness of the allowance.

Judgment.

The great inconvenience of such a course being taken as was taken by one of the executors in this case, is apparent also from this, that the costs of the proceedings before the Surrogate Judge as taxed by the officer of that Court, amount to the sum of $212, incurred, as I must suppose, in the Judge of that Court being made acquainted with the care, pains, time, and trouble of the executors in their management of the estate; all which was known, and better known to the Master of this Court, and these costs are also under the order of the Surrogate Court Judge allowed to the executors, against the estate. There is altogether such an anomaly as well as inconvenience about the proceedings taken, that in my judgment makes it improper that they should be allowed to stand.

1868.

Biggar v. Dickson.

A question somewhat similar was before the Chancellor in June, 1862, in *Long* v. *Wilmot*, not reported. The Master reported that a sum of $240 had been allowed to executors by the Surrogate Judge of the County of Halton, upon their *ex parte* application, but which he, the Master, had disallowed. Upon this the Master was directed to review the certificate of the Surrogate Court Judge; and to make a reasonable allowance in place of the sum allowed by the certificate; and the Master reduced the allowance to $100. Whether the certificate of the Surrogate was given pending the suit in this Court does not appear from the papers before me. I do not think that the direction to review the certificate was any recognition of the propriety of any application in the matter to the Surrogate Judge. The note in the Chancellor's book is that the Master "is to inquire what will be a proper allowance to the executors for their trouble."

Judgment.

It is true as Mr. *Rae* says, that the order made was for the benefit of the executors, as the Master's report left them without any allowance: but it was referred to the Master, not left to the Surrogate Judge, to make the allowance.

Several other objections were taken to the order of the Surrogate Judge and the report of the Master, which it is not necessary to consider.

This appeal has been occasioned by the executors, and the costs of it must be borne by them.

I shall of course not be understood as expressing any opinion as to the sums to be allowed to the executors for compensation. The sums allowed by the Surrogate Judge may be reasonable. It will be for the Master to judge of that. It will be referred back to the Master to fix a fair and reasonable sum for compensation, and

I have no doubt that it will be done speedily, as the Master has the materials before him for forming his judgment.

1868.
Biggar v. Dickson.

WISHART v. COOK.

Investigation of title—Missing title deed—Title by possession.

Where there was no other proof of the execution of a conveyance, which constituted a link in the chain of title, than a memorial purporting to be executed by the grantee in such conveyance, the Court refused to force the title upon a purchaser.

In order to make a good title by possession it must be shewn that the *whole* of the land has been actually cleared or occupied for a period of at least twenty years.

A title by possession can only be made to so much of a parcel of land as has been actually cleared or occupied for twenty years.

This was a motion to compel the completion of a contract for the purchase of certain lands sold under the decree of the Court.

Mr. *George Murray*, for the plaintiff.

Mr. *Morgan*, for the defendants.

SPRAGGE, V. C.—The question raised before me is, whether a good title can be made to the purchaser of lands sold in this suit under a decree of the Court. Judgment.

The patent from the Crown dated 6th April, 1802, of lot 19, 3rd concession East Gwillimbury, was to *Abijah Howard*. The vendor then deduces title by an alleged conveyance in fee from *Howard* to *John A. Haight*, dated 7th January, 1805. There is no proof of this conveyance, unless a memorial upon which the same was registered,

1868.

Wishart v. Cook.

executed by the *grantee*, is proof. I have been referred to a learned and able discussion of the question, whether a memorial executed by a grantor is proof of the execution of conveyance, and also whether a memorial executed by a grantee is such proof. It is unnecessary upon the question before me to say more than that the Court ought not, in my opinion, to force upon a purchaser a title, one link in the chain of which has no other proof than a memorial executed by a grantee.

Conveyances, it may be assumed, and I believe it is not disputed, are proved from *Haight*, of the west-half of the lot—the half sold in this suit—to *Leopard;* and so by *mesne* conveyances to the present vendors. *Haight* was in possession; and possession appears to have since gone with the title. The land when granted to *Howard* was in a state of nature, and was so when conveyed by him to *Haight*. An affidavit is produced in regard to *Howard*, from which it appears that he was a native of the State of Connecticut, and lived all his life in the United States, and died there in 1840; that he was in the habit of coming to Canada many years ago, and of disposing of location tickets, but not of remaining more than one or two years at a time in the country.

Judgment.

The vendors, failing to deduce a title from the grantee of the Crown by conveyances, the next question is whether they have a title under 4 William IV., chapter 1, by possession. The exception created by section 17 (section 3 in the C. S. U. C.) created a difficulty until the passing of 28–29 Victoria, chapte 29, which creates an absolute bar after the lapse of forty years from possession taken. Here possession was taken more than forty years ago, and has continued in *Haight* and those claiming under him. But there is this difficulty in regard to a title by possession, that there would,

according to a recent decision in the Queen's Bench (*a*), be only a title by possession to so much of the half-lot in question as was actually cleared and occupied twenty years ago: there would be no constructive possession of the whole of the land (*b*).

The loss of the conveyance from *Howard* to *Haight* is very unfortunate. I suppose the parties have exhausted all the means of search. I think it used to be the practice when the owner of a lot of land sold half of it to retain the conveyance to himself; and in the event of his selling the other half to give that conveyance to the purchaser of the second half. *Haight* having sold the west-half to *Leopard*, may afterwards have sold the east-half to some one else, and have given him the missing conveyance, *i. e.*, supposing such a conveyance to have been made.

In the absence of any sufficient proof of such conveyance, and of title by possession, I cannot hold the purchaser bound to accept the title. Judgment.

McLaren v. Fraser.

Demurrer—Pleading.

The plaintiff, a second mortgagee, filed his bill against the equitable owner of a prior mortgage, impeaching an alleged sale of the lands comprised in the plaintiff's mortgage, under a power of sale contained in such prior mortgage, as also a Sheriff's sale of a portion of the mortgaged premises, and the purchasers thereat were made defendants. A demurrer by the equitable owner of the prior incumbrance, for want of equity and for multifariousness was over-ruled.

Demurrer, by defendant *Fraser*.

(*a*) Young v. Elliot, 25 U. C. 330.

(*b*) See upon the same point Low v. Morrison, *ante* vol. xiv. p. 192.

1868.

McLaren v. Fraser.

Mr. *J. A. Boyd*, for the demurrer.

Mr. *Roaf*, Q. C., contra.

SPRAGGE, V. C.—The bill is by a second mortgagee against the alleged equitable owner of a first mortgage, *Alexander Fraser*. The second mortgage comprises some, not all, of the land comprised in the first mortgage *Primâ facie* the right of the second mortgagee is to redeem the first; and upon redemption to have conveyed to him all the lands comprised in the first mortgage. The demurrer is by the alleged owner of the prior mortgage. He objects that he is not owner of the prior mortgage. The first mortgage, dated the 12th of November, 1855, was for a sum certain £650 6s. 5d., together with such other sum and sums of money as the mortgagor should, at the date the mortgage became payable, 1st November, 1856, owe to the mortgagees or the survivors of them. One of the mortgagees died in the year 1855, and appointed another of the mortgagees his executor. In this allegation the survivors are called surviving partners. On the 18th of May, 1858, the survivors,—as surviving partners, as the bill states,—recovered judgment against the mortgagor for £1035 9s. 10d. "in respect of the amount secured by the said mortgage;" made to the prior mortgagees, and caused a writ of *fieri facias* for the amount of the judgment to be issued and placed in the hands of the Sheriff. The next allegation is as follows: "The said defendant, *Alexander Fraser*, afterwards contracted with (the surviving first mortgagees) for the purchase of the said mortgage, and they agreed to assign the same to the said *Alexander Fraser*, who became and is the owner thereof, but no proper assignment of the said mortgage or of the said judgment was ever executed to the said *Alexander Fraser*." The only point made upon this is that it is not alleged that the judgment debt and the mortgage debt were identical. If they

Judgment.

were, it is conceded that *Fraser* became entitled to an assignment, as well of the mortgage as of the judgment, and so was equitable owner of the mortgage, the surviving mortgagees being bare trustees to assign to him the mortgage. As to the allegation of the identity of the mortgage debt and the judgment debt, it is sufficient, unless the fact of the mortgage being made to secure not only a sum certain named, but any further sum that might accrue due before the mortgage became payable, makes a difference. 1868. McLaren v. Fraser.

It is clear from the difference between the sum named in the mortgage, and the sum for which judgment was recovered—a difference of nearly £400—that the judgment was recovered for a debt subsequently accrued as contemplated by the mortgage, as well as for the sum named in the mortgage. The allegation is that the judgment was recovered "in respect of the amount secured by the mortgage." The words "in respect of" are used to point to the cause of action upon which the judgment was recovered. The words do not indeed in all cases necessarily comprehend the whole of the subject matter to which they refer, but used in the connection in which they are used in this allegation, I think they are equivalent to the word "for." I think they point with reasonable certainty to the amount due, not to a part of the amount. The intention of the pleader, at any rate, is not left in doubt; for he states that no proper assignment of the mortgage or of the judgment was made to *Fraser*. It is to be observed, too, that the judgment was recovered some eighteen months after the mortgage had become due, it being a security only for further debts accruing before it became due. The presumption would be that the judgment was recovered for the whole of the debt secured by the mortgage. Judgment.

The plaintiff's position, then—and, as I think, sufficiently alleged—is, that he is second mortgagee, and

1868.

McLaren v. Fraser.

Fraser, the demurring defendant in equity, the first mortgagee. In coming to redeem the prior mortgage the plaintiff in his bill states some circumstances, and anticipates also some objections which might be made to his suit. He states that a Sheriff's sale took place upon the judgment recovered by the surviving first mortgagees of certain lands comprised in the first mortgage, some of them being also comprised in the second, and that of some of these lands *Fraser* was a purchaser, and other parties, made defendants, purchasers of others —some only and not the whole of the lands comprised in the mortgages being so sold. The bill does not admit the validity of the sale, and claims that if valid it only passed an interest subject to be redeemed by the plaintiff. In a case lately before the Chancellor, *Heward* v. *Wolfenden* (*a*), it was held that a sale by a Sheriff of the equity of redemption of the execution debtor, in part only of the lands mortgaged is not within the Statute, and void. I must hold, following this decision, that the lands so sold are still redeemable; and if they were not, the unsold lands, of which *Fraser* is equitable mortgagee, would be redeemable by the plaintiff.

Judgment.

The bill also states, and impeaches, a sale under an alleged power of sale contained in the first mortgage of the lands comprised in the plaintiff's mortgage; on the ground that it was a mere pretended sale; that *Fraser* was in truth both vendor and purchaser; that the sale was only a contrivance between *Fraser* and a pretended purchaser to enable *Fraser* to become the owner of the lands: and I think a case for relief upon that head of equity is sufficiently alleged. It is alleged that the bill is multifarious. The demurring defendant can, of course, only object that it is multifarious as regards himself; that he is mixed up with other matters or other persons with which, or with whom, he is not concerned.

(*a*) 14 Grant, 188.

1868.

McLaren v. Fraser.

The only part of the bill which appears to me to be even apparently open to such an objection is that which states and impeaches the Sheriff's sale, and makes purchasers other than *Fraser* parties to the bill. But if it is the right of the plaintiff to redeem, it is to redeem the whole of the mortgaged lands; and if they have got into different hands he cannot do so without making parties all who are interested in the lands to be redeemed, and he certainly is not bound to institute separate suits against such different parties, nor indeed could he do so with any propriety. The rule upon this point is thus stated by Lord *Redesdale* (*a*): "A demurrer of this kind" (for multifariousness) "will hold only when the plaintiff claims several matters of different natures; but when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold."

Judgment.

As to the sale under the alleged power, that is necessarily impeached; for if effectual, the plaintiff would have no *locus standi* in Court. The Sheriff's sale is also properly stated, for whether valid or not it is a material fact in the case, and being impeached all the parties interested in sustaining it are proper parties. It is not necessary for me to determine now what may be the effect of that sale in regard to the moneys realized therefrom, in the event of the sale being declared void, whether they are applicable to the reduction of the mortgagor's debt: that is a question proper for the hearing. That the plaintiff by his bill seeks to redeem some land and to foreclose other land, or rather after redemption to foreclose the land redeemed as well as that mortgaged to himself, is only an incident to his position as a puisne incumbrancer.

The demurrer is overruled, with costs.

(*a*) Mitford, 182.

1868.

Foster v. Beall.

Mortgages—Priority—Notice—Pleading—Registration.

B., and wife, after executing a mortgage in favor of one *D.*, conveyed the premises comprised therein to J., subject to the mortgage, which was referred to in the conveyance as also in the memorial thereof registered. After the registration of this conveyance, J. and his wife executed a quit-claim deed of the premises to the wife of *B.* A mortgage was subsequently made in favor of *S.*, which was signed and sealed by *B.* and his wife, but she was the only granting party named therein, and the same was executed before the mortgage to *D.*

Held, that constructive notice of the mortgage to *D.* was the most that could have been imputed to *S.* which was insufficient to postpone a prior registration; not that his mortgage was wholly inoperative in consequence of *B.* not being named as a granting party therein.

Where a party alleges the legal operation and effect of an instrument, he is bound by such allegation.

Examination of witnesses and hearing at Whitby.

Mr. *Blake*, Q. C., and Mr. *Farewell*, for the plaintiffs.

Mr. *Fitzgerald*, for the defendant *Smith*.

Judgment. Sprague, V. C.—*William Beall*, and *Mary*, his wife, mortgaged to one *Dayman*, the party under whom the plaintiffs claim, 26th December, 1857; but that mortgage was not registered until after the mortgage to defendant *Smith*.

The mortgage to *Smith* came to be made in this way: On the 3rd of June, 1868, *William Beall* and wife conveyed the mortgaged premises to *James Beall;* a valuable consideration is expressed. This conveyance is in terms subject to the mortgage to *Dayman*. This is expressed after the description of premises, and before the *habendum*, and in the memorial registered it is expressed in the same terms. The conveyance was

registered 9th June, 1860. On the 8th April, 1865, *James Beall* and wife executed what purports to be a "quit-claim" of the same premises to *Mary Beall*, for the expressed consideration of $120: this was registered on the 30th of December, 1865. The document is not produced, and is said to have been lost. The memorial signed by the grantor is produced, and the operative words are, "did quit claim." By a mortgage dated 13th April, 1865, in which *Mary Beall*, wife of *William Beall*, is the party of the first part, and the defendant *Smith* of the second part, the same premises purport to be mortgaged to *Smith*, to secure the sum of $200. 1868. Foster v. Beall.

The question is one of priority. The plaintiffs seek to postpone *Smith's* mortgage, notwithstanding its prior registration, on several grounds.

1. That he is affected with notice of the plaintiff's mortgage by reason of one of the conveyances in his chain of title (the conveyance to *James Beall*) being made subject to it. Mr. *Blake's* contention is, that he has thereby actual notice—actual, though imputed only, and not proved. I doubt this: I incline to think it is constructive notice only, and that actual notice of a nature to affect his conscience is necessary in order to avoid the effect of *Smith's* prior registration. Judgment

2. It is objected that the conveyance from *James* and wife to *Mary*, being by way of release only, containing no operative words so far as appears other than quit claim, passed no interest. To this it is answered that there was already an estate in *Mary*, but, query: A further answer is, that the plaintiff, in the sixth paragraph of his bill, states the legal effect of the conveyance in question to be to transfer and release to *Mary Beall*, her heirs and assigns, for ever, all the estate, right, title, and interest of *James Beall* in and to the mort-

1868.

Foster v. Peall.

gaged premises in question. I do not see how he can now contend that the operation of this instrument is less than in his bill he has stated it to be. In truth, having stated it to be an effectual operative instrument, he now contends that it has no operation at all. I think it is not open to him to do so, at least unless he were to obtain leave to amend.

3. It is contended that the mortgage to *Smith* is void and inoperative. The instrument is signed and sealed by the husband, but the wife is the only granting party.

Judgment.

The Secretary has been good enough to refer me to a case in the Court of King's Bench in the Province of Upper Canada, *Doe Pratt* v. *Hodgkins* (*a*). The case is shortly stated thus: "A deed of bargain and sale was put in evidence for the plaintiff purporting to convey an undivided part of a lot of land, the estate of a married woman. The name of the husband was not mentioned in the indenture as a party thereto; but, as part of the description of the married woman, she was stated to be his wife: the deed, however, was signed and sealed by the husband. The Court held the deed absolutely void; the Chief Justice, the late Sir *John Robinson*, said: 'By the law of England she could not divest herself of her estate but by fine and recovery, in which her husband must join: our Statute enables her to convey by deed jointly with her husband, but certainly the husband is not a party to this deed; mere signing and sealing cannot make him so, when he is not expressly made a party in the deed itself;'" and his Lordship referred to a case of *Scudamore* v. *Vandenstone* (*b*), where a distinction was taken between "an indenture reciprocal between parties on the one side and parties on the other side," in which case "no bond, covenant, or grant, can be made to or with any that is not party

(*a*) 2 U. C. Jurist, O. S. 213. (*b*) 2 Inst. 673.

to the deed," and where the deed is not reciprocal, in which case it is not necessary that the party should be named. 1868. Foster v. Beall.

The result is, that nothing passed to *Smith;* the only remedy as to him is, that it be so declared, and that his mortgage is a cloud upon the plaintiff's title. The plaintiff is entitled to his costs against him, up to and inclusive of the decree. As to the defendants *Beall* and wife, there will be the usual decree against mortgagors. What is asked for is a sale, and nothing else.

Nash v. McKay.

Partition—Infant executor—Liability to account—Rents and profits.

In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will and had taken possession of the personal estate and who died a minor, it was claimed on behalf of infant legatees who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might be charged upon the land in question before partition—*Held*, that the executor having been a minor his estate was not liable to account therefor.

Where the plaintiff being one of the heirs of an intestate took upon herself to lease the lands in question, she was held liable to account for all the rents she had received, and for all that but for her wilful neglect and default she might have received, and in case it should appear on the inquiry before the Master that she had so dealt with the property as to make her properly liable both for rents and profits the Master was to report specially or separately. The costs of the account as to rents to fall upon the estate or be borne by the plaintiff, according to whether what was done by her was or was not beneficial to the estate.

Statement.

The plaintiff filed her bill for a partition of certain land formerly owned by one *Jacob McKay*, who died a minor. This *Jacob McKay* while under age had been

1868.

Nash v. McKay.

appointed executor of his father's will, under which some of the defendants were legatees; and by the answers it was alleged that *Jacob McKay* had obtained the personal estate of his late father and had not administered it according to the terms of the will; and they prayed that before partition his lands might be charged with the money due to them as such legatees. The cause was heard at Hamilton.

Mr. *Hodgins*, for the plaintiff, cited *Whitmore* v. *Weld* (*a*), *Hindmarsh* v. *Southgate* (*b*), *Wheeler* v. *Horne* (*c*), *McMahon* v. *Burchill* (*d*), *Stirton* v. *Richardson* (*e*), *Henderson* v. *Eason* (*f*), *Martin* v. *Knowllys* (*g*), *Petrie* v. *Taglor* (*h*), *Gregory* v. *Connolly* (*i*), *Sargent* v. *Parsons* (*j*), *Nelson* v. *Leake* (*k*), Statute 4 *Anne*, ch. 15.

Mr. *Proudfoot*, for the defendants.

Judgment.

SPRAGGE, V. C.—The bill is for partition.

It is filed by a sister of the whole-blood of *Jacob McKay*, who died unmarried, and under age, and whose father and mother are dead, against one brother and six sisters of the half-blood of the intestate, and the husbands of four of them. There was another sister of the whole-blood, *Margaret Carpenter*, a married woman, whom the bill alleges to have died in 1864, and the plaintiff claims as her devisee. The allegation of this devise does not state that the sister had no children and

---

(*a*) 1 Ver. 326.
(*b*) 3 Russ. 324.
(*c*) Willes, 208.
(*d*) 3 Hare, 97; 5 Hare, 322; 2 Phil. 127.
(*e*) 13 M. & W. 17.
(*f*) 15 Sim. 303; 2 Phil 308; 17 Q. B. 701; 1 H. & N. 144.
(*g*) 8 T. R. 146.
(*h*) 3 U. C. Q. B. 457.
(*i*) 7 U. C. Q. B. 457.
(*j*) 12 Mass. 148.
(*k*) 25 Miss. 199.

the devise itself is not proved. Two of the defendants are infants. 1868.

Nash v. McKay

The bill alleges that *Jacob McKay* obtained the land in question by conveyance from his father, *William McKay*, in which the wife of *William McKay* joined to bar dower. It is not stated whether the conveyance was by way of gift or for valuable consideration; or whether the defendants are of the half-blood by the father's or the mother's side: but the bill assumes them to be entitled as if of the whole-blood with the plaintiff and *Margaret Carpenter*. The infants raise this question. *Jacob McKay* was named as one of the executors in his father's will, the other being another son *Oliver*, and a daughter *Margaret* is named as executrix, and one of the infants is a specific legatee, the other a pecuniary legatee, and each of them a residuary legatee of personal estate; they allege that *Jacob* took possession of his father's personal estate, and that they have not been paid any portion of their legacies, and they pray that an account may be taken of the personal estate come to the hands of *Jacob*, and that their share thereof may be charged upon the land in question before partition. The allegation as to *Jacob's* interference with the estate is very slight; merely that, the infants are informed and believe, he took possession of the personal estate; not that he misapplied it, or even that he used it at all; *non constat* that he abandoned it, upon being advised perhaps, that, being an infant, he could not act. Judgment.

The main question, however, is whether being an infant he would be liable to account. The interference of an infant named as executor is spoken of in some of the cases as a wrong: but the weight of authority is against his being liable to account. In *Whitmore* v. *Weld* (*a*),

(*a*) 1 Ver. 326.

1868.

Nash v. McKay.

a testator appointed an infant son to be executor upon coming of age; appointing another person to be executor during his son's minority. The Lord Keeper observed, that though an infant at seventeen might administer (this was before the passing of 38 George III., chapter 87), yet he could not, till he came of age commit a *devastavit*. There is besides the more recent case of *Hindmarsh* v. *Southgate* (*a*), in which the point was expressly decided. Letters of administration were granted to the widow of the intestate, irregularly, she being under age. The letters were recalled: and after she came of age administration was again granted to her regularly. She had possessed herself of assets of the estate, as well before as after she came of age. The Vice Chancellor directed an account, distinguishing what came to her hands before, and what after she came of age. This he did, strangely enough, although he intimated that his opinion was that she could not be charged in respect of her receipts before she came of age. Lord *Eldon* agreed in the opinion of the Vice-Chancellor, but not in the course that he had taken, and dismissed so much of the plaintiff's bill as sought on inquiry as to the receipts of the widow before she came of age.

Judgment.

Another point is raised by the adult defendants, they allege in their answer that the plaintiff "took upon herself," to lease the land in question; and that she received rents: and an account is asked of rents and profits received, and of rents and profits, which, but for wilful neglect and default, might have been received. The plaintiff, in her replication, admits the defendant's allegation as to leasing the land in question.

In *Henderson* v. *Eason* (*b*) the case was, that there were two tenants in common of a farm, and that one

(*a*) 3 Russ. 324. (*b*) 15 Sim. 303.

permitted the other to occupy and cultivate it. The one who had occupied the farm died, and Sir *Launcelot Shadwell* directed an account of rents and profits. Upon appeal Lord *Cottenham*, it is said, doubted the propriety of this (*a*). In the argument Mr. *Wood* put the case of one tenant in common receiving rent, as clearly within the Statute of Anne; and this was not questioned by either the Court or counsel.

In the case before me there was more than a mere receiving of rent. The plaintiff leased the land of which she was a tenant in common, and that I apprehend amounted to an ouster of the other tenants in common. I think she is liable to account for all rents that she received, and for all that, but for her wilful neglect or default, she might have received, in consequence of her so taking upon herself to lease the land in question. I confine the inquiry to rents, for I do not see my way to directing an inquiry of rents and profits. It may, however, appear in the inquiry before the Master that she so dealt with the property as to make her properly liable for rents and profits; and in that case the Master can report specially and separately.

Judgment.

The infants pray an inquiry whether a partition or sale will be most for their benefit. The adult defendants pray a sale. There will be an inquiry as prayed by the infants.

The Master will inquire and report as to the alleged devise from *Margaret Carpenter* to the plaintiff: and as to any facts bearing upon the validity of the devise.

I should be glad to spare the estate the expense of further directions. If a sale should be found to be most for the benefit of the infants, which from the nature of

(*a*) 2 Ph. 308.

1868.

Nash v. McKay.

the estate is not improbable, I do not see its necessity. What the plaintiff will be chargeable with in respect of her leasing of the property, will be chargeable against her share; and as to costs, I see nothing to take them out of the ordinary rule, that is, so far as the suit is a suit for partition. The account as to rents may create a difficulty. They should fall upon the estate or be borne by the plaintiff, according to whether what was done by the plaintiff was or was not beneficial to the estate, and the Master can tax and allow them accordingly. In case the Master should be of opinion that a partition would be more for the benefit of the infants than a sale, I think further directions should be reserved, in order to the Court examining the same before confirmation. In any case, liberty to apply is to be reserved.

Judgment.

Baker v. Trainor.

Parties.

Where a bill seeks the destruction of trust estate, some or one of the *cestuis que trust* are necessary parties.

In order to the proper constitution of the suit the husband of a female married plaintiff must be made a defendant thereto.

Examination of witnesses and hearing at Hamilton.

Mr. *R. Martin*, for the plaintiff.

Mr. *E. Martin*, for the defendant *Trainor*.

Mr. *Freeman*, Q.C., for the defendant *Pilkie*.

Spragge, V. C.—Upon reading the pleadings and evidence it appears to me that I cannot properly dispose of the cause, in the absence of the *cestuis que*

1868.

Baker v. Trainor.

trust for whom the defendant *Trainor* became trustee. The bill seeks the destruction of that trust estate: and the defence of the trustee is rather in justification or excuse of his own acts and his dealings with the estate, than in support of the title of the *cestuis que trust*. He makes his support of their title, so far as he does support it, only an incident to his defence of himself. But even if he had supported their title ever so vigorously I understand the rule to be that where what is sought is the destruction of the trust estate, the presence of the *cestuis que trust* or some or one of them is necessary. I have not before me the bond given by the defendant *Trainor* upon the conveyance to him of the land in question, by which bond he constituted himself trustee; but as he describes it, he bound himself to convey fourteen acres to *Turner* and six acres to *Murray*, and to hold the residue, thirty acres, subject to the appointment of Mrs. *Turner*—how he was to hold it, if no appointment, is not shewn; if to her, she being dead, all her children would be entitled, and her husband as tenant by the courtesy; that is, unless she made a will under the Married Woman's Act. Supposing such to be the case, the husband and his children should be added as parties. It appears by the evidence that he is out of the Province; still, if he can readily be found he should be made a party, especially as his children are infants. If he cannot be found, I should myself be satisfied with his children being made parties: their guardian will, of course, be careful that their interests are carefully looked after. This point was not raised at the hearing.

Judgment.

Another question as to the proper constitution of the suit was raised at the hearing, viz., that the husband of the female married plaintiff should not be a co-plaintiff, but a defendant; and this is the settled rule founded upon this plain principle, that where husband and wife are co-plaintiffs the husband is *domini tis*, and the

1868.

Baker v. Trainor.

suit is no bar to a future suit by the wife; and the rule would be infringed, that no one shall be twice vexed for the same cause of action.

It will be necessary, therefore, that the cause stand over for the purpose of having the suit properly constituted, and as the points upon this head were raised by answer it can be only upon payment of costs.

I should be prepared to dispose of the case if the suit were ripe for it. It may save some litigation if I state how the rights of the parties as between those who are now parties to the suit appear to stand. I doubt whether notice is brought home to the defendant *Pilkie;* and it will be proper, if the plaintiffs desire to ask a remedy against *Trainor* in regard to the fourteen acres which *Pilkie* has acquired, that they should frame their bill for that purpose. As to the six acres conveyed to *Murray*, there is some evidence to shew that the purchase money of that portion of the land was applied in the payment to the Government of purchase money due upon the land, the personal estate of *Baker* having been applied in payment of interest or rent, and also in payment of purchase money. *Murray* has not been made a party, as *Pilkie* has, and I do not know whether the plaintiffs seek to make *Trainor* liable in respect of the six acres. The prayer applies to the whole land. If the plaintiffs have already had the benefit of the value of the six acres they should not have it again from *Trainor.*

Judgment.

With regard to the residue, the thirty acres, if I thought that the plaintiffs' case failed as against *Trainor*, I should dismiss the bill. In the absence of the *cestuis que trust* I cannot properly say more than that, upon the evidence before me, I incline to think, that as between the heirs of *Baker* and the defendant *Trainor*, the plaintiffs' case is made out. I may

add, that I think he intended no wrong; and, the widow having obtained a conveyance from *Blakesly*, he probably thought that he would be serving the children of *Baker* by intervening in the matter, as proposed by his widow. It is not a case in which I should charge *Trainor* with rents and profits.

The conduct of *Ambridge*, the Crown Lands' agent, may be open to explanation; but upon the evidence as it stands it would appear that the patent could not have been issued to *Trainor* if he had disclosed to the Government all that he knew in relation to the title of *Baker*.

I agree with the plaintiff that the *Attorney General* is not a necessary party.

Fairweather v. Archibald.

Will, interpretation of—Dower—Election.

Where a testator by his will made provision for his widow but did not express the same to be in lieu of dower. Evidence for the purpose of shewing that the testator intended such provision to be in lieu of dower was held inadmissible.

Where a testator by his will, after making a provision for his widow, directing certain of his real estate to be sold at the expiration of a lease thereof then existing, and the proceeds to be divided among his three daughters, and that in the meantime the rent was to be divided among them:

Held, that this latter expression was not inconsistent with the widow's claim to dower.

An intending purchaser of devised lands had some doubt whether a provision made by the testator for his widow was in lieu of dower, and asked the widow whether she had or claimed dower:

Held, that, if even her answer was in the negative, it afforded no ground for the purchaser afterwards applying to this Court to restrain an action for dower brought by the widow, on her being advised that, under the terms of the will, she was not put to her election.

Motion for injunction to stay proceedings at law.

1868.

Fairweather v. Archibald.

Mr. *A. Chadwick*, for the plaintiff.

Mr. *S. Blake*, contra.

Hall v. Hill (*a*), *Holdich* v. *Holdich* (*b*), were referred to.

SPRAGGE, V. C.—This suit is to restrain the defendant, the widow of *Robert Archibald*, from proceeding at law for the recovery of her dower. The plaintiff is a *mesne* purchaser from a devisee. The bill proceeds upon three grounds:—

1st. That the testator expressed his intention that the provision made for his wife by his will should be in lieu of dower; and that he and the person who drew the will, an unprofessional person, thought that by the terms of the will the widow could not claim both her dower and the provision made for her by the will.

Judgment.

2nd. That by the terms of the will she cannot have both, but is put to her election.

3rd. Representations made by the widow to the plaintiff when about to purchase.

Upon the first point, I held evidence clearly inadmissible. I had occasion to express my opinion upon it in *Davidson* v. *Boomer*, ante p. 1.

Upon the second point. The will contains a devise of a parcel of land to one of the testator's sons, a devise of another parcel to another son, *Edward*, under whom plaintiff claims title; less four acres of land with a tavern stand upon it devised to his widow for life; and proceeds thus "also my lot containing fifty acres, known

(*a*) 1 Dr. & W. 94. (*b*) 2 Y. & C. C. C. 18.

1868.

Fairweather v. Archibald

as the south-half of lot number 8, in the 11th concession, Township of Nichol, to be sold at the expiration of the present tenant's lease, and proceeds to be divided equally among my three daughters" (naming them), then after devising three village lots to his widow and the tavern stand in remainder, to a grandson, he gives "the rest of my fifty acres, in the Township of Nichol, to be divided equally among my three daughters" (whom he names), and he appoints his wife and two others executrix and executors.

It has long been settled law that a devise by a testator to his widow of part of the lands of which she is dowable, is not inconsistent with her claim to dower in the residue: also, that a devise upon trust to sell of lands of which a widow is dowable, is not inconsistent with her claim to dower in the same lands. The question in this case arises upon the provisions of the will that I have quoted which amount to this, that upon the expiry of a certain lease, the parcel of land leased should be sold, and the proceeds of sale divided among the testator's three daughters; and that in the meantime the rent should be divisible among them. Counsel read this as meaning the whole of the rent, not the rent after deducting the dowress's share in it; and, if this is to be so read, I agree that the widow must be put to her election; for the rule is, that, if a testator has so devised any part of his real estate that the widow's claim of dower is inconsistent with carrying into effect the testator's whole intention, as expressed in his will, she is put to her election. The point in question, however, has been decided by Sir *Richard Kindersley*, in *Gibson* v. *Gibson* (*a*). After holding, in accordance with previous decisions, that a devise in trust for sale has not the effect of putting a widow to her election, he considers the point made, upon the rents and profits being disposed of in the

Judgment

(*a*) 1 Drew. 42, 57.

1868.

Fairweather v. Archibald.

same way. "Now what," he asks, "are the rents and profits of which he (the testator) is speaking? Why, of course, the rents and profits of the land that he has devised for sale; and, in order to prove that the devise for sale is intended to be of the lands discharged of dower, the argument assumes that the rents here spoken of are the rents of the lands so discharged; this is an argument completely in a circle. Suppose a testator were to devise his freehold lands to his son, being an infant, in fee; assuredly that would not put the widow to her election. Suppose, then, he were to add, that, during the infancy of his son, the rents should be applied for his maintenance, would this mention of the rents put the widow to her election. Or, suppose a devise to trustees, in trust, for A., for life, with remainder over, clearly that would not put the widow to her election. Suppose, then, the devisee, for life, was a married woman, and the testator directed the rents to be applied for her separate use, would that make any difference? I confess I am quite at a loss, in this case, to see why the direction, that, until the sale, the rents are to be applied in the manner directed, should have the effect of putting the widow to her election." The point seems to have presented itself to the mind of Lord *St. Leonards*, in *Hall* v. *Hill* (*a*), in which a power of leasing was given, and which he held inconsistent with the widow's claim for dower. "One can understand, he said (*b*), "how the rents might be enjoyed, or the estate sold, subject to the claim for dower." I cannot hold, consistently with the authorities, that there is anything in this will to put the widow to her election.

Judgment.

With regard to the alleged representation: one *Hunter* purchased from *Edward Archibald* the parcel of land devised to him, and the plaintiff purchased from *Hunter;* and his case upon this point is, that the

(*a*) 1 D. & W. 94. (*b*) P. 107.

plaintiff, while in treaty with *Hunter*, with a view of ascertaining whether the widow was entitled to dower, called upon her and asked her if she had, or pretended to have, any claim or right in or to the land, or to any part thereof, and that she told him that she did not have, nor did she pretend to have, any right or claim thereto, and that all the plaintiff had to do was to see and get a good title from *Hunter*. In support of this is the plaintiff's affidavit only. He says that one *Patterson* was also present, but is now out of the country, and is not expected to return for some time. All this is explicitly denied by the defendant, who says that she, on the contrary, warned the plaintiff of her claim to dower, and that she intended to insist upon it; and this is confirmed by the affidavit of her daughter. The defendant was cross-examined upon other parts of her affidavit, but not upon this point; and the daughter was not cross-examined. Upon the fact, therefore, the weight of evidence is against the plaintiff.

Judgment.

I incline to think, also, that the representation is not of such a nature as would entitle the plaintiff to relief, if actually made. The plaintiff, of course, knew of the will, for he was a *mesne* purchaser from a devisee; and I must assume that he knew its contents, and I have no reason to doubt that he did. It is short, occupying about a page of foolscap. As a mere representation (supposing it made) it was of a fact not peculiarly within the knowledge of the defendant, the fact, *i. e.*, of the contents of the will; or, if it be regarded as an expression of opinion, that is no ground for binding a party expressing it. From its nature it must, I think, be regarded rather as an expression of opinion than anything else. The plaintiff would probably desire to put it as a promise, but there was no consideration, nor even any reason for a promise. If the plaintiff had been purchasing from the defendant's son, there might be room for contending that for his sake, in order to enable him to sell his land,

1868.

Fairweather v. Archibald.

she agreed to forego any claim to dower that she might have; but the plaintiff was purchasing from *Hunter*, not from the defendant's son. The true nature of the inquiry and answer I take to be evidently this: the plaintiff, doubtful whether the widow could or would claim dower, put the question to her. He does not ask her to forego her right, but inquires whether she has or claims any right. Suppose the plaintiff correctly to state her answer, it would really amount to no more than this, that she had no right to dower and would claim none, *i. e.*, that she would claim none because she had none: that would be no more than an expression of opinion upon a matter of law, and a declaration of intention in accordance with it, a matter of law upon which the plaintiff was just as well qualified as the defendant to form an opinion. If upon this he thought fit to purchase, it was his own fault or folly. *Story*, E. J., sec. 191; *Atwood* v. *Small* (*a*)

Judgment.

(*a*) 6 Cl. & Fin. 232.

1868.

WADDLE v. MCGINTY.

Fraud on creditors—Practice—Dismissal against one defendant at hearing without prejudice.

A married woman entered into a contract for the purchase of land: one of the terms being that the conveyance should be to herself. In payment of the principal part of the purchase money the husband assigned to the vendor a mortgage he held on other property, which, so far as appeared, was his only means. It did not appear that he was indebted at the time, but a month afterwards he indorsed a note for £40, which was not paid. The family, including the husband, went into possession of the land immediately after the purchase, and made improvements, but no deed was obtained, and a small balance of the purchase money remained unpaid for twelve years, when the money was raised by loan on the property, and the deed was taken to a son of the purchaser:

Held, that this deed was void as against the holder of the note.

A cause having been brought on to be heard, it was found that a *pro confesso* note against one of the defendants had been waived by amending the bill. The plaintiff thereupon moved to dismiss the bill as against such defendant, without the dismissal being equivalent to a dismissal on the merits; and the Court, under the circumstances, granted the motion, and made a decree saving the rights of the defendant.

Examination of witnesses and hearing at Goderich at the Autumn sittings, 1868.

Mr. *Blake*, Q.C., for the plaintiff.

Mr. *Moss* and Mr. *Macara*, for the defendants.

Judgment

MOWAT, V.C.—Some time in 1855, the wife of *Francis McGinty* entered into an agreement with one *Joseph Hoar* for the purchase of a lot of land in the Township of Ashfield, one of the terms of the bargain being that the conveyance should be made to the wife herself. She paid £30 down; and on the 4th January, 1865, *Francis McGinty* satisfied a further portion of the purchase money by assigning to *Hoar* a mortgage, on which the sum of £129 7s. was then due. It does not appear that

1868.

Waddle v. McGinty.

McGinty had any other means at this time, or owed any debts. The husband and wife and their children went into possession of the lot bought from *Hoar*, and improvements were made on it. A month after assigning the mortgage, viz., on the 23rd February, 1856, *McGinty* became a party, as surety, to a note for £40, on which the holder recovered judgment on the 18th April, 1857; and on the 30th of the same month he issued execution against goods, but he was unable to realize the money. In April, 1867, by an arrangement between the husband and wife, their eldest son *Hugh* (who had come of age), and the agent for the other defendants, these defendants made a loan to *Hugh*, out of which the balance due *Hoar* ($100) was paid, and *Hoar* thereupon conveyed to *Hugh*, and *Hugh* executed a mortgage to the lenders to secure the loan. In the same month the plaintiff, who is the assignee of the judgment, placed a writ against lands in the Sheriff's hands;

Judgment.

and the object of the plaintiff's bill is to get this execution paid out of this land, the bill alleging that the debtor, *Francis McGinty*, was the beneficial owner, and that the conveyance was made to his son *Hugh* to defraud creditors. The defendant *Hugh* claims to be entitled to hold the property against the plaintiff's execution.

There was no clear evidence that the debtor knew that the conveyance was, by the agreement, to be to his wife; and there was no evidence that he meant to make a gift to her of what he paid by means of the mortgage he assigned. If he did not mean the property for her at that time, the conveyance to *Hugh*, being after the debt now due to the plaintiff was created, is clearly unsustainable (*a*). If it was with the husband's concurrence that the original contract was to the effect mentioned, I still think the deed unsustainable against the plaintiff,

(*a*) Spirett v. Willow, 11 Jur. N. S. 70.

1868.

Waddle v. McGinty.

because of the debtor's having no other property; and being himself in possession, or apparent possession, of the lot in question; and of the absence of any notice to the creditor, by means of a registered deed or otherwise, that the property, which would naturally be supposed to belong to the head of the family, had been settled on his wife. Such circumstances have been held from a very early period sufficient to avoid a gift as against creditors.

I prefer giving judgment on this ground, rather than on the ground that the reason given by the wife to the vender for the deed being to her sufficiently shews such a fraudulent intention as avoided the deed as against subsequent creditors. What she said to him was, that her husband "was in the drinking line, and that if he got hold of the land he would squander it." After looking at the authorities, I am not prepared to say that, if a man of dissipated habits, having no debts, and not intending to incur any, or to defraud anybody, but knowing his infirmity, makes a voluntary settlement on his wife or family, such a settlement is necessarily void against future creditors who become such with a knowledge of the facts, or without any reasonable ground for supposing the property to be his. But, in the present case, the creditor had no ground for supposing the property not to be the supposed settlor's; and it would afford an easy means of defrauding creditors if a man could make a secret gift of his property to his wife and family, and thereby exempt it from liability for debts afterwards incurred by means of the credit which the apparent ownership of the property continued to give him.

Judgment.

At the time of the loan, the plaintiff's debt was known to the mortgagees' agent, and he was aware that the *McGintys* had determined not to pay it. It was admitted that the mortgagees had such notice of the other facts that they were in no better situation than *Hugh McGinty*, their mortgagor.

1868.

Waddle v McGinty.

Francis McGinty was a party to the bill, and the original bill had been noted *pro confesso* against him; but the plaintiff afterwards amended his bill without taking the precaution of obtaining an order that the amendment should be without prejudice to the note. The plaintiff's counsel therefore moved for leave to dismiss the bill against him with costs, if any, and asked that, under the circumstances, the dismissal should not be equivalent to a dismissal on the merits. No objection being made to this on the part of *Francis McGinty*, who was in Court, I thought the application reasonable, and granted it (*a*). I also held, under the authority of the Consolidated General Order No. 65, that the case was a proper one for proceeding in the absence of *Francis* as a party, saving his rights.

Judgment

The defendants say that nothing is due on the plaintiff's judgment. The decree will refer it to the Master to take an account. If nothing is due, the plaintiff will pay the defendants their costs, and that will be the end of the matter. If something is due, the deed will be declared void against the plaintiff, and the other creditors of *Francis*; the plaintiff will be entitled to his costs; and the decree otherwise will be as is usual in such cases. The defendants desired the decree in this alternative form to avoid further directions. They may have a declaration, if they wish, that they are entitled to priority in respect of so much of the loan as went to pay the vendor.

(*a*) Consolidated General Order No. 184.

THE CORPORATION OF THE COUNTY OF HURON v. KERR. 1868.

Statute of Frauds—Specific performance—Possession—Delay.

An undertaking as surety, must, to comply with the Statute of Frauds, name the person to whom it is given.

Where a guarantee did not sufficiently comply with the Statute of Frauds, but the transaction related to an interest in lands for one year, and the principal had gone into possession under the contract and retained possession:

Held, that the contract was binding on both principal and surety, on the ground of part performance.

In such a case, some of the sureties, some weeks after possession was taken, refused to sign a formal lease. No proceedings were taken to enforce their undertaking until the year had expired, and the principal had given up possession, a defaulter in respect of his rent:

Held, that the delay was no bar to the suit.

Hearing at Goderich, at the Autumn sittings, 1868.

Mr. *Blake*, Q.C., for the plaintiffs.

Mr. *Moss*, for the defendants.

MOWAT, V.C.—The plaintiffs are owners of the Seaforth and Wroxeter Gravel Road, and are in the habit of leasing the toll-gates thereon every year by auction, and of requiring the highest bidder, before a gate is knocked down to him at the auction, to shew who are willing to become his sureties. In consequence of this practice, *Edward Bennett*, before the auction for 1867, applied to the defendants to become his sureties, as he intended to bid, and they thereupon signed the following paper:—"We, the undersigned, freeholders in the County of Huron, do hereby engage to become security for *Edward Bennett*, in the event of his becoming the rentee of any one of the toll-gates on the Gravel Road between Wroxeter and Seaforth, for the year 1867. Judgment.

JAMES ARMSTRONG,
WILLIAM YOUNG,
WILLIAM ELLIOTT,
J. W. KERR."

1868.

Corporation of County of Huron v. Kerr.

The sale took place on 20th December, 1866, and *Bennett* was the highest bidder for toll-gate No. 14. He then produced the paper signed, as I have mentioned, to the persons who were attending to the sale on the plaintiffs' behalf, and, they being satisfied, the gate was knocked down to *Bennett* at the monthly rent of $120.92 for one year, viz., the year 1867. *Bennett* signed the usual lease the same day; and on the 1st January, agreeably to its terms and to the usual course, he took possession of the gate, and of the gate-keeper's house, and entered on the receipt of the tolls. The defendants were not present at the auction, and there having been nineteen gates let at the same time, and the sureties being scattered over the county, it was the 14th of January before the county surveyor, the officer entrusted with this duty by the plaintiffs, tendered this lease to the first of the sureties for execution by him. The defendant *Kerr*, the surety so applied to, refused to sign the lease tendered, alleging that the rent was too high. *Elliott* and *Young* subsequently declined also, and *Armstrong* was the only one of the sureties who executed the lease. The surveyor returned the lease to the County Treasurer about the middle of February, informing him that only one of the sureties would sign. *Bennett* continued in possession for the year, but left in default,—the plaintiffs say to the amount of $678.68, or thereabouts,—and is now somewhere in the United States. No communication appears to have passed between the plaintiffs and defendants after the refusal to execute until the year had expired. The plaintiffs then sued *Armstrong* at law on the lease; but the action failed because the other sureties had not executed. Thereupon, viz., on the 5th August, 1868, the bill in the present suit was filed.

Judgment.

I think that the guarantee on which the bill is founded is not a valid instrument at law, as it does not name the opposite party—which has been

1868.

Corporation of County of Huron v. Kerr.

held to constitute an essential part of the written agreement required by the Statute of Frauds in the case of sureties (*a*), or in relation to specific land (*b*), as well as in other cases. If I had come to the conclusion that the plaintiffs had an adequate remedy at law against the sureties, I think I would have found it necessary to hold that there was no remedy here, the term having expired (*c*). But as there is no remedy at law on the agreement, and as the agreement relates to an interest in land, and has been partly performed by possession having been taken under it, this Court seems bound to enforce the agreement against the sureties, as well as the principal. No reason was suggested for holding the law as to part performance applicable to principals only; and no authority to that effect was cited. The practice of the Court has not confined the doctrine of part performance to one clause of the Statute; and for me to exclude the clause as to sureties from its operation, where the contract relates to land, would be an arbitrary determination such as I have no right to make. Indeed, the learned counsel for the defendants did not contend for such a distinction, and I am satisfied none such can be made.

Judgment.

The defendants set up that, notwithstanding the undertaking they signed, and the lease to *Bennett*, and the possession which were given on the faith of their undertaking, they retained a right to refuse to become sureties; and one of the defendants says he offered, and was and is willing, to pay the amount for which, at the time of the refusal to execute the lease, *Bennett*, was liable "in respect of his non-fulfilment of the terms of his purchase." But I am clear that, if their undertaking was binding at

---

(*a*) Williams v. Lake, 6 Jur. N. S. 45.

(*b*) Warner v. Willington, 3 Drew. 523.

(*c*) See Fry on Specific Performance, p. 6, secs. 12 to 16, and notes. Clayton v. Illingworth, 10 Hare, 451.

1868.

Corporation of County of Huron v. Kerr.

all, the sureties had no such privilege as they thus claim. Effectually to repudiate the contract while their principal retained the possession of the property which was the subject of the contract, was impossible.

The continued possession is one answer (*a*), also, to the argument which was founded on the absence of any communication to the defendants or of any proceedings against them until after the year had expired; though, had the possession been tendered to the plaintiffs, I by no means say that they would have been bound to accept it. The bringing an action against *Armstrong* alone is another circumstance relied on by the other defendants as a waiver of the plaintiffs' rights against them; but Sir *William Grant's* observations in *Stackhouse* v. *Barnston* (*b*) shew that it had no such effect: "A waiver is nothing, unless it amount to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an intention not to insist upon the right, which in equity will not, without consideration, bar the right, any more than at law accord without satisfaction would be a plea." A supposed acquiesence from mere inaction against these defendants is something short of the kind of waiver which, in making these observations, the Master of the Rolls had in view. In suits for specific performance of contracts not executed either in whole or in part, circumstances like those relied upon may be material; but where possession has been taken and retained, they have, generally speaking, no force.

Judgment.

An account must be taken of what is due on the contract, unless the parties agree to the amount; and the

(*a*) Vide Clark v. Moare, 1 J. & LaT. 723; Sharp v. Milligan, 22 Beav. 606; Burk v. Smith, 3 J & LaT. 193; Ridgway v. Wharton, 6 H. L. 292; O'Keefe v. Taylor, 2 Gr. 95.

(*b*) 11 Ves. 466.

defendants must pay the same. The defendants other than *Armstrong* must pay the plaintiffs' costs of the suit No costs to or against *Armstrong*.

1868.

Corporation of County of Huron v. Kerr.

CLIPPERTON v. SPETTIGUE.

Accommodation indorsers—Contribution.

As between accommodation indorsers, the Court will enforce the right of contribution, the same as in cases of other co-sureties.

Where a firm of two or more persons indorse in the partnership name the liability as sureties is a joint liability, and not the several liability of each partner.

Hearing at the London sittings.

Judgment.

The Bill was filed against *Joseph J. Spettigue*, *John Spettigue*, and *T. W. Lawford*.

Lawford, in 1861, was indebted to the Gore Bank. The Bank demanded security, and *Lawford* requested *Joseph J. Spettigue* to indorse his notes for the amount. The *Spettigues* were in partnership as grocers, trading under the name of "*J. J.* and *J. Spettigue*." *Joseph* indorsed *Lawford's* notes in the name of the firm, and they were delivered to the Bank, and were renewed from time to time. In 1862 the Bank demanded further security, and the plaintiff then became a second indorser on the notes, which were again renewed. The plaintiff on one occasion indorsed the notes in blank, and afterwards discovered that they had been made payable to his order, and that "*J. J.* and *J. Spettigue*" had indorsed as second indorsers. He appeared annoyed at this, and said to *Lawford* "it is placing me in the foremost rank," but thereafter he indorsed the renewals as first indorser.

1868.

Clipperton v. Spettigue.

On one or two occasions *John Spettigue* had indorsed the name of the firm upon the notes.

The Bank of Upper Canada also held *Lawford's* notes, indorsed by "*J. J.* and *J. Spettigue*," as accommodation indorsers, and, demanding further security, the plaintiff became first indorser on these notes also, the firm of "*J. J.* and *J. Spettigue* being second.

All parties knew that the notes were indorsed for *Lawford's* accommodation, but nothing was said by the indorsers as to primary liability as between themselves.

The Banks recovered judgments at law against the indorsers, and plaintiff paid the whole amount prior to 1865.

In 1865, plaintiff bought cattle from *John Spettigue*, and gave him his promissory notes for the purchase money, on which he afterwards paid $200 on account. In 1867 he made further purchases from him, again giving his promissory notes for the purchase money. The amount due on all these notes was less than one-fourth of the amount paid by plaintiff on *Lawford's* notes.

Judgment.

Plaintiff asked that he and the two *Spettigues* might be declared to have been co-sureties for *Lawford;* for a declaration that he was entitled to contribution from each of them; that *John's* contribution money might be set off against the amount due on the notes; and that he might be restrained from transferring them.

Joseph Spettigue and *John Spettigue* answered, *John* denying all knowledge of the indorsements, contesting plaintiff's right to set off, and alleging that *Joseph* had no authority to indorse accommodation notes in the name of the firm. Both defendants disputed their liability to contribute, and insisted that plaintiff, as first indorser, was bound to indemnify them.

Mr. *Strong*, Q. C., and Mr. *Barker*, for the plaintiff, cited *Dering* v. Earl of *Winchelsea* (*a*), *Reynolds* v. *Wheeler* (*b*), *White* and *Tudor's* Leading Cases, vol. i., 78.

Mr. *Roaf*, Q. C., and Mr. *Glass*, for defendants, *Joseph J.* and *John Spettigue*.

The bill was *pro confesso* against *Lawford*.

VanKoughnet, C.—I think that the evidence establishes—and this in the face of *Joseph Spettigue's* evidence, if it be read—that plaintiff became joint surety with the *Spettigues* on *Lawford's* paper; that he became such surety because the Banks required further security than the names of the *Spettigues* afforded, and not because the *Spettigues* required plaintiff to stand between them and the holders of the paper; that both sets of indorsers understood this, and acted upon it; and that there was no contract or understanding between them that the one should remain or submit to be subject to his legal liability on the paper without reference to their relative positions as co-sureties; but, on the contrary, that they incurred the mere naked liability, as between themselves, of co-sureties, without any contract to vary it; that *John Spettigue* was aware of the indorsement by the firm, and actually indorsed some of the paper with his own hand. The case, in this respect, is different from the mere case of one indorser putting his name under that of the other, without any knowledge of the circumstances under which the first indorsement was made; or at the request of the prior indorser who held the paper, and wished to procure money on it, on the strength of the name of the subsequent indorser. It might be argued that as *Clipperton*, the plaintiff, was aware that the indorsation here was accommodation

Judgment.

(*a*) 1 Cox. 318.

(*b*) 10 Com. B. N. S. 561.

1868.

Clipperton v. Spettigue.

merely, he should have ascertained that both partners assented to it, and that it is not, therefore, the case of paper to be treated as ordinary business and indorsed paper of the firm. Here, however, I think the evidence shews that *John Spettigue* was aware of the transaction, and sanctioned it. It is my opinion that the defendants (the *Spettigues*) are liable to contribute, and that the mere fact of the plaintiff having dealt with them subsequently, in ignorance of his rights in this respect—rights which are here stoutly denied by counsel ever to have existed—should deprive him, now that he has been better advised, of insisting upon them. The doubt I now have is as to what proportion the defendants (the *Spettigues*) should bear, whether one-half or two-thirds. Whether the partnership alone or the two individuals composing it should be liable—or whether they should be jointly and separately liable; and whether the debts due by plaintiff to the partners separately should be cancelled, *pro tanto*, by the amount of contribution due from the firm, or by the share of that contribution due by each partner individually. Suppose the partners had individually signed a bond as sureties? If the signature of the partnership were on a note which is sufficient to bind them jointly and separately, is it less binding on each individual than if each had signed the note separately, as in the case of a bond? The plaintiff says that he elects to proceed against each partner individually, and not against the firm. The defendants, on the other hand, say that there is no implied authority in one partner, by the use of the partnership name, to bind each partner individually or separately, as upon a separate contract, so that each could be sued as if he had contracted alone. In answer to this it may be said that on a joint contract the partners are liable to the extent of both their joint and individual estates. That is so; but they must be sued jointly, as it is a common liability, though one for which each becomes answerable for the other. It is a principle of law, that if several persons

Judgment.

1868.

Clipperton v. Spettigue.

unite in a promise, it is a joint liability. To create a several liability, express words to that end must be used. Thinking the matter over, I am of opinion that the obligation here of the defendants was a joint one, and that their liability, in respect of it, is to be determined in the same way as if they had become jointly liable by express contract to share with the plaintiff the payment of the notes—that is, that they together should bear one-half, and the plaintiff the other half. In this view, their debt to plaintiff is a joint debt; though under the decree ordering them to pay the amount, their several as well as their joint properties are liable to process for enforcing it. It is in evidence here that the defendants are insolvent: that they have no joint property or separate property, in the shape of goods and chattels, as ordinarily understood. The plaintiff, however, alleges that certain notes are held by one of the parties against him.

Judgment.

Now, the Sheriff may, under execution, seize these notes; and I do not see why he may not seize them as well at plaintiff's suit as at that of a stranger. I think that the plaintiff is, at all events, as much entitled to them as a stranger would be. Of course a separate debt cannot be set off against a joint debt. But here the plaintiff is entitled to execution under which he may seize the property of either partner. These notes of the plaintiff in the hands of one of the partners are seizable under execution at law as well as here. Why, then, may they not be applied in payment of so much of the plaintiff's claim as if they had been seized under the execution? It may be all that the plaintiff can get.

I decree for the plaintiff, with costs, and an account of amount due him, and of amount of notes of his held by defendants, or either of them, and let these be applied in discharge of so much of the plaintiff's claim, and be cancelled.

1868.

The Merchants Express Co. v. Morton.

Following property wrongfully taken and disposed of—Practice—Affidavits sworn before a Notary Public—Affidavits not stating sources of information.

If the Court can trace money or property however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner by holding it to be his in equity, or by giving him a lien on it.

Accordingly, where money was stolen, the owner was held entitled to a leasehold, furniture and other chattels purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing.

Where on granting an interim injunction leave was reserved to the plaintiff to file an affidavit of B., an application to extend which, when made, was enlarged in consequence of the other business of the Court, and it was then agreed that no further affidavit should be filed, but the affidavit of B. was then in the plaintiff's hands ready to be used if the motion had not been adjourned, and was in fact filed and served the same afternoon:

Held, that plaintiff was entitled to read this affidavit.

Affidavits sworn to before a Notary Public in the United States, and "certified under his hand and official seal," can be used on a motion in this Court.

It is competent and proper for the Court in a proper case to relax the rule requiring a deponent to state his means of information: where therefore the deponent swore that such a disclosure would tend to defeat the ends of justice, the Court dispensed with such statement in an affidavit.

Where a robbery had been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property in this country; the Court granted an injunction to restrain the selling or incumbering thereof.

Statement. This was a motion to continue to the hearing an interim injunction which had been granted by the Chancellor restraining the defendants from selling or otherwise disposing of their interest in certain leasehold property and furniture in the City of Toronto, under the circumstances appearing in the judgment.

1868.

Merchants Express Co v. Morton.

Mr. *Crooks*, Q. C., and Mr. *Roaf*, Q. C., in support of the application.

Mr. *J. Hillyard Cameron*, Q. C., contra.

The Emperor of *Austria* v. *Kossuth* (*a*), The King of the two *Sicilies* v. *Wilcox* (*b*), *Willis* v. *Willis* (*c*), *Tench* v. *Tench* (*d*), *Wilkins* v. *Stevens* (*e*), *Simpson* v. *Hartman* (*f*), *Lewin* on Trusts, 645; *Addison* on Torts, 27, were referred to by counsel.

SPRAGGE, V. C.—The first point is whether the affidavit of *Brown* is receivable. When the hearing of this application was postponed from Monday to Tuesday, the full Court sitting in rehearing Term, it was said by the defendants' counsel and assented to by the Chancellor that no further affidavit should be filed. The plaintiff had leave reserved, upon the interim injunction being granted, to file the affidavit of *Brown*; and it appears that when on Monday the application was postponed, the affidavit of *Brown* was in Court in the hands of plaintiffs' counsel, ready for use if the application had then been proceeded with, and under the leave reserved the plaintiffs would have been entitled to use it. The affidavit was filed about one o'clock the same day, having been retained in the plaintiffs' hands for the purpose as it is said, of having a copy made for the defendants, which copy was served on the afternoon of the same day. I have conferred with the Chancellor as to the reception of this affidavit, and he thinks, and I agree with him, that under the circumstances it ought to be received.

Judgment.

It is then objected that the affidavit is not receivable, it not appearing to be regularly sworn. It purports to

(*a*) 2 Giff. 628.
(*b*) 1 Sim. N. S. 301.
(*c*) 2 Atk. 71,
(*d*) 10 Ves. 51.
(*e*) 1 Y. & C. C. C. 431.
(*f*) U. C. Q. B.

1868.

Merchants Express Co. v. Morton.

have been sworn in the United States, before a Notary Public, and to have the signature and notarial seal of the Notary, as the officer administering the oath to the deponent. This I apprehend is sufficient under the 3rd and 4th sections of 26 Victoria, chapter 41, and has been held sufficient by the Chancellor and the Chief Justice of the Common Pleas in the Heir and Devisee Commission. If any doubt could arise from the use of the words "certified under his hand and official seal" following the words "Notary Public" in section 3, it is removed by the 4th section, which enacts in substance (to apply it to this case) that the signature and official seal of a Notary Public purporting to be subscribed and impressed "in testimony" of an affidavit being sworn, shall be receivable without proof *aliunde*. It is hard to see what the Notary Public could certify except the fact that he is a Notary Public, and that the affidavit was sworn before him: and he does in effect state and declare both these facts when he appends his signature and official seal "in testimony" of an affidavit being sworn before him.

Judgment.

The affidavit of *George Henry Bangs* is objected to because he does not, in pursuance of one of the General Orders of the Court, state the grounds and reasons of what he swears to. He is a detective employed by the plaintiffs in the matter of the express robbery upon which the defendants with others have been arrested; and he states, by way of excuse as I understand, for not complying with the terms of the order, "that it is important that the source from which my information is derived should not at the present time be disclosed, as the said defendants would at once take advantage of any disclosure made, and the attempts to bring the said defendants to justice would thereby be materially affected, if not altogether defeated." I think the order as a general rule ought to be observed, and its observance enforced, but it is only directory, and it is proper, and it

1868.

Merchants Express Co. v. Morton.

is competent to the Court, to relax it in proper cases, that is, where serious mischief would result from its being insisted upon. The deponent in this affidavit swears that a disclosure of his sources of information would tend to defeat the ends of justice. The Court ought in such a case, I think, not to discard the affidavit, but to attach such value to the statements it contains as in its judgment they may be worth.

Upon the affidavits and depositions before the Court there is evidence of the following facts: that about the first of May last the defendants *Morton* and *Thompson* possessed themselves unlawfully of property then in charge of the plaintiffs as common carriers, to the amount of about $150,000, such property consisting of United States Bonds and Treasury Notes, Railway Bonds, currency of the National Bank of the United States, and gold coin: and that they possessed themselves of the property by robbery, taking the same out of a safe in an express car, of which safe and its contents *Brown*, the witness, was in charge: that in July last they purchased from *James Carson* what *Carson* describes as the premises, stock-in-trade, and furniture, held by him for his wife, consisting of a leasehold house known as the Turf Club Inn, in the City of Toronto, the fixtures, furniture, stock-in-trade, and good will: and that the defendants paid *Carson* therefor the sum of $4700 in Canada money; and thereupon the defendants were let into possession and continued in possession until they were arrested for the robbery about the middle of August, when *Carson* took charge of the premises for them, and afterwards on the 19th of the same month, the defendants for the consideration of $2,500 which was paid by the cheque of *Carson's* wife, assigned to *Carson's* wife what is described in the instrument produced as "all the household furniture, stock-in-trade, and fixtures of the house leased, to and lately occupied by us, on King Street, in Toronto, called the Turf Club Hotel," &c.:

Judgment.

1868.

Merchants Express Co. v. Morton.

and the instrument contains a proviso for redemption on payment within six months of $2500 with interest at ten per cent. *Carson*, judging from his evidence, seems to have supposed that the instrument of assignment from the defendants to his wife comprised the house as well as the furniture, stock, and fixtures, but the instrument does not include the house.

Bangs, the detective, states that he has learned in the course of his inquiries in regard to the alleged robbery, that before the robbery the defendants had very little means of their own, and were totally unable to purchase the Turf Club House: that *Morton* was in very needy circumstances, and pledged some jewellery in order to enable him to leave St. Catharines where he had been staying, and that *Thompson* also was in needy circumstances, and borrowed money shortly before the robbery.

Judgment.

No affidavits have been filed by the defendants or on their behalf.

Upon the law of the case, Mr. *Crooks* puts it upon the principle of a resulting trust arising from the purchase of property by one with the moneys of another, and upon the principle of the Court following moneys or other property; and fastening upon them in favour of the true owner. The latter principle has been usually applied to the case of trust moneys, but I incline to think that it is applicable to other moneys and other property, and that, if the Court can trace money or property however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his, in equity, or by giving him a lien upon it. To apply the principle to this case: If it is a just inference from the facts that these defendants unlawfully possessed themselves of the securities, and other valuable property which were in the express car in charge of *Brown*, whether by robbery or otherwise, and

converted them, or a portion of them, into what *Carson* calls Canadian money, and therewith purchased the Turf Club Hotel, with its fixtures, furniture, &c. I think it a proper case for the interference of this Court to fasten upon the thing purchased, because it represents, though in another shape, what the defendants unlawfully obtained from the plaintiffs, and to grant an injunction to prevent its being lost to the plaintiffs by falling into the hands of an innocent purchaser. I am satisfied, too, that the Court ought not to hold its hand until the conviction of the alleged robbers, and that on two grounds: one, that the offence, if there be an offence, was committed in a foreign country; in which case the reason of public policy upon which the rule is founded, that there must be prosecution to conviction or acquittal before a civil action can be maintained, does not seem to apply: the other that the Court could properly interfere in any case to preserve the property *in medio* pending criminal proceedings: and it would be particularly unreasonable for the Court to refuse its aid for such purpose, where, as in this case, the parties aggrieved appear to be prosecuting their case diligently in order to bring the offenders to justice.

1868.

Merchants Express Co. v. Morton.

Judgment.

I think there is nothing in the objection that the plaintiffs do not sufficiently describe the tenure by which the *Carsons*, and after them the defendants, held the premises called the Turf Club Hotel. In their assignment to Mrs. *Carson* they call it "the house leased to, and lately occupied by us." Whether the lease is for a long or short term, or whatever it may be, does not affect the plaintiffs' right. If they have any right to it at all, they have a right to it whatever it may happen to be. What it is, is a matter within their knowledge—it may or may not be in the knowledge of the plaintiffs and they may or may not be able to ascertain what it is. If the defendants mean to suggest that it is an interest which the Court will not interfere to protect, they

1868. should shew it to be so. In the meantime, the Court will not presume it to be so, and upon such presumption refuse to interfere.

Merchants Express Co. v. Morton.

I have already observed that the defendants have filed no affidavits. The Court has always regarded as a circumstance very unfavourable to a party who has to answer a case, that he has not denied upon affidavit the case made against him, and in the absence of such denial has taken to be true what might be considered as a weak *primâ facie* case (*i. e.*, weak in proof) made against him. It may be, as the defendants say, that they expected to have to meet only the affidavits of *Richardson* and *Bangs*—not the affidavit of *Brown;* but they had no right to reckon upon the absence of *Brown's* affidavit, for the plaintiffs had leave to produce it, and ultimately did obtain and produce it And even if the plaintiffs had no right to produce any further evidence beyond that of *Richardson* and *Bangs*, which it must be confessed was weak, still, with an interim injunction granted upon it, the Court might reasonably look for a denial upon oath—if such denial could be made—of the very grave charges upon which the plaintiffs' case was founded.

Judgment.

I think a sufficient case is made for continuing the injunction. But inasmuch as they may have come into Court in the belief that *Brown's* affidavit could not be read against them, I will give them leave to move to dissolve it.

Upon the papers produced the house seems to stand upon a different footing from the furniture, fixtures, &c., but the plaintiffs are entitled to an injunction as to both. The defendants appear to be absolute legal owners of the lease (whatever it may be) of the house, and to have a redeemable interest in the furniture, fixtures, &c. Both may be the subject of sale, and an interest in each

may be created in an innocent purchaser for value, which the plaintiffs may not be able to reach.

1868.

Merchants Express Co. v. Morton.

The Church Society v. McQueen.

Mortgage—Prior incumbrance—Foreclosure—Practice.

A purchaser of real estate executed a mortgage to the vendor securing a balance of purchase money on the understanding that the vendor was to remove an incumbrance existing at the time of the sale. This mortgage was assigned, and the assignee thereof, though unaware of the terms upon which the same was executed, had notice of the outstanding incumbrance; and it was not pretended that he supposed that the purchaser had bought subject thereto—Upon a bill by the assignee for the foreclosure of the mortgage:

Held, that the most he was entitled to, was, that having reduced the prior incumbrance to a sum not exceeding that secured by the mortgage held by him, the purchaser was bound to pay that amount into Court to be applied in clearing the title; or, in default, his interest should be foreclosed: unless it was shewn that the existence of this mortgage prevented the purchaser from raising money upon the security of the land, in which case the plaintiff was bound to remove that incumbrance out of the way of the purchaser who was declared entitled to three months after its being cleared off to procure the money: but that this protection was properly obtainable by an application in Chambers.

Examination of witnesses and hearing at Woodstock.

The facts are sufficiently stated in the head-note and judgment.

Mr. *J. Hillyard Cameron*, Q. C., and Mr. *Huson Murray*, for the plaintiffs.

Mr. *Strong*, Q. C., and Mr. *McLennan*, for the defendants.

VanKoughnet, C.—If this were a bill for specific performance by the vendor, he would be obliged to remove all outstanding incumbrances in order to convey Judgment.

1868.

The Church Society v. McQueen.

a clear title. The purchase money payable by the vendee would be applicable to this purpose, as far as it would go. Here, the mortgage was given by the vendee on the undertaking of the vendor to remove all outstanding incumbrances exceeding in amount that of the mortgage. The assignee of the mortgage had no notice of this agreement. Indeed, the mortgagor, who was apprised of the proposed transfer to him, concealed it, or at all events did not make it known, and in fact obtained from the assignee a promise that he would exhaust certain collateral securities which he held for the payment of the prior incumbrance before resorting to the land. The assignee, however, had notice of the prior outstanding incumbrance, and, as I understand, also had notice that the defendant's mortgage was given to secure the balance of purchase money due by him. It is not pretended that the assignee supposed that the mortgagor had purchased subject to this prior incumbrance, and was to pay it off. The assignee, then, had notice of all that was material; and the most that he can claim is, that he, reducing the prior incumbrance to the amount of defendant's mortgage, the latter shall pay in that amount to be applied in clearing the title, otherwise stand foreclosed. If, by reason of the existence of the prior incumbrance, even in its reduced amount, the mortgagor is unable to procure money on the security of the land to pay off the mortgage, and thus obtain a clear title, there will be good ground for application to the Court to extend the time for redemption till this difficulty in his way is removed. But I do not, and cannot know that the mortgagor will be driven to any such necessity; and, therefore, it seems to me at present, that the mere existence of this prior charge constitutes no defence to the bill for foreclosure. I think the proper decree will be the ordinary one for foreclosure, with liberty to apply—money to be paid into Court—plaintiffs to reconvey free from incumbrances by themselves or those under whom they claim.

Judgment.

1868.

The Church Society v. McQueen.

The defendant should have three months to procure the money, after the removal out of his way of the incumbrance, if he shew that it is in his way, and the plaintiffs must not interfere with his property in the meantime; but it seems to me that all this protection must be secured by application in Chambers, and not by decree. The plaintiffs can never be allowed to obtain foreclosure while the outstanding incumbrance stands in the way.

NEWTON v. THE ONTARIO BANK. (IN APPEAL*).

Insolvent Act—Advances on goods—Mortgages on real estate—Official assignees.

A Bank having cashed a bill of exchange, and taken by way of collateral security, a bill of sale of certain goods of the drawer, this transaction was held not invalidated by the drawer's insolvent circumstances at the time.

The Insolvent Act (1864) forbids mortgages of real estate to a creditor by way of preference.

But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so) and made a mortgage of real estate under pressure on the part of the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business and pay his liabilities in full, the mortgage was held valid as against his assignee in insolvency.

Official assignees cannot be appointed by unincorporated Boards of Trade formed after the passing of the Insolvent Act.

Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept and act upon the assignment: *Quære*, whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment.

Statement.

This was an appeal by the plaintiff from the decree of Vice Chancellor *Spragge* (reported ante vol. 13, page 652), on the following grounds:

---

* Before The Chancellor, The Chief Justice of the Common Pleas, Spragge, V.C., Morrison, A. Wilson, J. Wilson, JJ., and Mowat, V.C.

1868.

Newton v. The Ontario Bank.

(1.) That the several transactions in the pleadings mentioned between the insolvent *Hockin*, and the defendants *The Ontario Bank*, were fraudulent and void as against the plaintiff, as the assignee of the estate of the insolvent; (2) that the facts appearing in evidence brought the several transactions within section eight of the Insolvent Act of 1864; and by the true effect and operation of the sub-sections of the said section eight, applicable to such transactions respectively, the same were respectively fraudulent and void, as against the plaintiff as such assignee as aforesaid, and should have been so declared by the order and decree of the Court of Chancery; (3) that the defendants *The Ontario Bank*, in the several transactions referred to, obtained an unjust preference over the other creditors of the insolvent, and that such transactions being entered into under circumstances that bring them within the operation of the fourth sub-section of section eight of the Insolvent Act of 1864, were null and void as against the appellant as such assignee aforesaid; (4) that the presumptions, declared in and by the first and fourth sub-sections of the said section eight are legal presumptions and are not rebuttable by evidence; and (5) that upon the pleadings and evidence the Court of Chancery should have pronounced a decree in favour of the plaintiff, and should have declared each of the transactions aforesaid to be void as against the plaintiff as such assignee.

Statement.

The respondents contended that the decree was correct on the following, amongst other grounds:

(1.) That the grounds given in the judgment of the Court below were sufficient to sustain the decree; (2) that the appellant was not at the date of the first assignment to him, an official assignee within the meaning of the Act; (3) that the transactions in the pleadings mentioned were not fraudulent and void as against the appellant; (4) that the sections of the Insolvent Act in

the appellant's reasons mentioned, were not applicable to the said transactions, nor were the same void under the said sections; (5) that the presumptions in the said reasons referred to, did not arise; and if they did, yet they were rebuttable, and were in fact rebutted; and (6) that upon the pleadings and evidence, the bill ought to have been, as it was, dismissed with costs. 1865 Newton v. The Ontario Bank.

Mr. *Crooks*, Q, C., and Mr. *Hodgins*, for the appellant.

Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., for the respondents.

VanKoughnet, C.—I am inclined to agree with my brother *Spragge* in his construction and application of sub-sections 1, 2, 3, and 4, of section 8, of the Insolvent Act of 1864, and I think that the conveyances are not void, as having been voluntary, and as giving a fraudulent preference within the meaning of the Statute. I think that the conveyances were made under such circumstances as to relieve them from this accusation. Judgment.

It is not necessary to the decision of the case that we should express any opinion as to the powers of the Board of Trade by which the official assignee in this case was appointed, and I think, as a general rule, that it is more wise to abstain from expressing an opinion not required for the decision of a case, as it only serves to embarrass Courts and perplex suitors, and has no binding force; but if my brothers, or a majority of them, are prepared to announce as their judgment, any opinion, on the question presented in regard to the constitution of these Boards, then I think it desirable in the interest of debtors and creditors alike, that such an opinion should be expressed now. To this end, I will state my own opinion which is, that we should restrict the Act to Boards of Trade existing at the time the Act was

1868.

Newton v. The Ontario Bank

passed, or afterwards incorporated. The Legislature, by previous enactments of their own, knew at this time that there were Boards of Trade not incorporated, and which they had recognised; and I think, looking at the difficulties, the inconveniences, nay, almost the frauds which an unlimited extension of the Act would create or permit, we may assume, that acting in the same spirit as former Legislatures, they intended to recognise only those existing Boards, the constitution of which they could or did ascertain, and were satisfied with. To extend the Act further and say that the Legislature meant to recognise and confer powers upon any and every Board of Trade, however constituted, and upon any number of Boards of Trade in every county, that two or three individuals, in the humblest and smallest branch of trade, in a particular locality might, for any purpose—perhaps to secure the appointment of some friend as an official assignee—choose to organise, would be to charge the Legislature with a recklessness and want of fore-

Judgment.

thought which we at all events should not impute to it. Indeed, there might be a dozen Boards of Trade so called in a county, or even in one town; for there is no law regulating the creation or formation of such unincorporated Boards of Trade so as to give one precedence or recognition over the other. It would be impossible in such an event to make the Act work. The Judge could not tell which Board had the right to name an assignee. Everything would be confusion. Our duty in order to give effect to the Act of the Legislature, is to assign it limits within which it can be reasonably worked, and not to permit it to take so wide and wild a range as to endanger or destroy one of its essential provisions.

RICHARDS, C. J., was of opinion that mortgages of real estate by an insolvent were within the meaning of the 4th sub-section of the 8th section of the Insolvent Act of 1864, but that under the circumstances in which the mortgages in question were executed they were valid;

and that the decree should therefore be affirmed. He agreed with the Chancellor as to the Boards of Trade.

1868.

Newton v. The Ontario Bank.

SPRAGGE, V. C.—Adhered to the judgment given in the Court below, upon the construction of the Statute and its bearing upon this case; expressing doubt however whether the Statute applied to any Boards of Trade other than those then in existence.

MORRISON, J., concurred in the views expressed by the Chief Justice of the Common Pleas.

A. WILSON, J.—I think that the sub-sections of section 8, of the Insolvent Act, with the exception of the first part of sub-section 1, apply to creditors as well as to persons who are not creditors.

The first part of sub-section 1, does not apply to creditors, because a contract made between the debtor and his creditor, founded on the consideration of the debt, cannot with propriety be called a *gratuitous* contract. If the contract be not made with him *qua* creditor, it may in such case be gratuitous, as well as when made with one who is not a creditor.

Judgment.

The second part of the 1st sub-section, and sub-sections 2 and 3, do not, in express terms, apply to dealings between the debtor and creditor, as sub-section 4 does; but, reading these sub-sections in connection with the general provisions of the Act, it will be found that creditors as well as others must be held to be within their operation.

The second part of sub-section 1, declares that "all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, with a person knowing such inability, or having probable cause for believing such inability to exist, or after such inability is public and notorious, are presumed to be made with intent to defraud creditors."

1868.

Newton v. The Ontario Bank.

Judgment.

Now, bearing in mind that section 3, sub-section *c*, declares that if the debtor "assign any of his property with intent to defraud, defeat, or delay, his creditors, *or any of them*," it shall be an act of insolvency, and that sub-section *i* makes "any general conveyance or assignment by the debtor of his property for the benefit of his creditors *otherwise than in the manner prescribed by the Act*" an act of insolvency also; and bearing in mind that by sub-section 2, of the same section, "ceasing to meet his commercial liabilities generally as they become due" is also an act of insolvency: it is very difficult to understand why a contract under section 8, sub-section 2, by which creditors are injured, should not be deemed to be a contract within the prohibition or penalty of section 3, sub-sections *c* and *i*, and why also a contract made under the same branch of section 8, by a debtor unable to meet his engagements, should not be avoided by the operation of sub-section 2, of section 3.

A contract made with one creditor is just as prejudicial to the general body of creditors as a contract made with one who is not a creditor; both are alike against the policy of the Statute, and both should, if possible, be equally avoided: see the remarks of *Cockburn, C.J.*, in *Bills* v. *Smith* (*a*). It appears to me impossible to maintain a contract obnoxious to the express provisions of the Statute as a valid contract, merely because the section speaks of contracts by which *creditors* are injured, and does not contain the words *or any of them*, and to reason from that, that unless *all* creditors are injured, the section does not apply.

I have already shewn that section 3, sub-section *c*, does contain the words *or any of them;* and so also does sub-section 3, of section 8; and if the latter sub-section

(*a*) 11 Jur. N. S. 157.

applies, unquestionably the 1st and 2nd sub-sections of the same section apply also, to contracts with creditors.

Sub-section 4, which defeats fraudulent preferences, relates only to acts done by the debtor: for it is not a fraudulent preference unless the *debtor* means it to be so—that the *creditor* means the conveyance and understands it to be a fraudulent preference is of no consequence. Now, by construing the other sub-sections as I think they should be, acts done by the creditor, as well as when they are done by the debtor, will be avoided; for, while contrary to the spirit, they should be held to be contrary to the provisions of the Statute, if these provisions can be fairly so interpreted, and I think they can

I had occasion to consider this question in a case lately argued in the Common Pleas, in which judgment has been prepared but has not been pronounced, and in which many authorities were referred to in support of this opinion. There is one authority which was not referred to which shews that much less than will constitute bankruptcy in England, will constitute insolvency in this country—the case is *Pidgeon* v. *Sharp* (*a*). *Best*, J., said, "A man may be in difficulties and not stop payment: he may stop payment and not be insolvent: he may be insolvent and not be a bankrupt: it is by no means necessary to decide whether the contemplation of insolvency only, or of all the different degrees of difficulty from incipient embarrassment up to insolvency, will prevent a trader from giving a preference to one creditor over another."

Judgment.

To constitute insolvency in this particular case, it will be sufficient if there was an assignment made of any

(*a*) 5 Taunt. 539.

1868.

Newton v. The Ontario Bank.

of the debtor's property with intent to defraud, defeat, or delay his creditors, or any of them; or, if the debtor had ceased to meet his commercial liabilities as they became due, such stoppage not being temporary nor arising from insufficiency of assets, or by the combination of the two; or, if there was a contract by which creditors were injured, made by the debtor while he was unable to meet his engagements, and the Bank knew of such inability, or had probable cause for believing it, or after it was public and notorious; or, if there was a fraudulent preference.

What are the facts, then, relied on by the assignee as shewing that the debtor was unable to meet his engagements, or his commercial liabilities generally, as they became due without the excuses mentioned in the Statute for such stoppage of payment?

Judgment.

On the 20th December, 1866, the 27th of the same, and the 11th of January, 1867, the debtor made five different conveyances of land to the defendants, the respective considerations for which amounted to $9200. On the 19th November, 1866, the debtor transferred to the defendants two promissory notes, both dated the 17th of November, one for $1022.50, at one year, the other at two years for $1120, made by *Buchan* and *Hockin*. On the 17th of May, 1867, the debtor gave the defendants a bill of lading for 217 oil barrels, forwarded to *Springer & Kinleyside* by the debtor, along with a bill of exchange drawn by the debtor on *Springer & Kinleyside*. The explanation as to the oil barrels, is that the Bank actually cashed the draft which was drawn by *Hockin* for the price of them on *Springer & Kinleyside*; and therefore, they could properly take an assignment of the bill of lading of these barrels. This leaves the five conveyances and the two promissory notes still in question. The present account of *Hockin* with the Bank was opened in August, 1865. At that time the Bank, from

the estimate furnished by *Hockin*, considered he was worth $13,457 over his liabilities; *Hockin's* own statement of his means was very considerably more than the Bank estimate, it was about $35,000.

Hockin's debit account with the Bank was about as follows, at the end of the following months:

1866.	January	$13,772 30
"	February	14,942 72
"	March	17,645 54
"	April	16,958 76
"	June	19,299 98
"	August	14,962 00
"	September	13,056 38
"	October	16,416 37
"	November	19,773 48
"	December	16,968 69
1867.	January	18,892 79

Judgment.

Mr. *Morris*, the Bank agent, said he went specially to see Mr. *Fisher*, the Cashier at the head office, in December, 1866, and January, 1867, on *Hockin's* business, because the account was overdrawn, and his notes were coming due fast; his account was at that time unsatisfactory. Mr. *Fisher* said if *Hockin* gave security for his liability to the Bank, his account was to be continued and his paper discounted. Mr. *Morris* did not think *Hockin's* account a good one; it was overdrawn, and not nearly as active as it had been formerly.

In November and December, 1866, Mr. *Morris* remonstrated with *Hockin* for his heavy drafts. *Hockin* said his men had left him, and his shipments had fallen off in consequence; that from fifteen to twenty men had left him, and *that*, together with his outlay in the refineries, was the reason he was cramped; that in the beginning of January, 1867, he had again thirty-five men at work; and he shewed Mr. *Morris* a calculation that his production of barrels alone would come to $3200, for

1868.

Newton v. The Ontario Bank.

that month at a low estimate; he said to Mr. *Morris* he expected he could relieve himself in a few months; that his difficulty was temporary from the cause mentioned; that he had no doubt as to his being able to carry through; and Mr. *Morris* said he himself had no doubt in November that *Hockin's* statements were correct, and that he would get through as he expected; that his impression is, he told *Hockin* if he got notes for the balance due by *Buchan & Hockin* he (Mr. *Morris*) would take them as collateral for his account; he intended to continue *Hockin's* account; he told *Hockin* he would do what he could to help him along in the difficulty he explained. The securities of December were given on an understanding that the Bank would renew *Hockin's* accommodation paper, and that the business paper would be left to work out by discounting fresh paper, that he might thereby reduce his outside liabilities; that all the Bank wanted was to feel secure, and *Hockin* was perfectly satisfied with this assurance.

Judgment.

Mr. *Morris* also said that *Samuel Hockin* made explanations in January, 1867, to shew his means of meeting the paper which fell due that month; the three deeds were one transaction, Mr. *Morris* says, so far as he was concerned; and he thought, on receiving *Samuel Hockin's* explanations, that Mr. *Hockin* would be able to meet that month's paper. When he asked for the security in January, *Hockin* said he thought the Bank had security enough; but he gave the security. He said he had a large stock of raw material; he had never before had so heavy a stock at that season of the year. He seemed at that time to have no doubt he could carry through with the assistance promised him. Mr. *Morris* also said: "I had no idea that he was contemplating insolvency; he said nothing of the kind to me. The three deeds of December were given at my request: I asked for security and he gave me these deeds; the offer to give them did not come from him. From the

statements his son gave me, I became apprehensive he could not carry through, and wrote the letter of the 4th of January."

1868.

Newton v. The Ontario Bank.

Mr. *Guthrie* said: "I understood from Mr. *Hockin* that the deeds were required from him in consequence of a merely temporary difficulty. *Morris* brought *Hockin* to me before the deed of January was given: he demanded further security from *Hockin*. *Hockin* was unwilling to give it, but *Morris* was firm, and *Hockin* consented. The understanding on which the deed was given was, that Mr. *Morris* should hold over the accommodation paper, and that he should discount for *Hockin* his business paper, and give him the cash for it to meet his outside liabilities. I have no doubt *Hockin* believed he was worth $17,000, as he said."

Samuel Hockin said in his evidence: "Before the 20th of December we were prepared to meet our engagements: bills from different parties were coming in faster than we could meet them. I explained to Mr. *Morris* how we expected to meet them by shipments and otherwise. I never made a statement of my father's affairs which I did not believe to be true. My father appeared to consider himself solvent up to the assignment to *Newton*. I thought he was insolvent for some time before—for a month or more. I thought so when the first deed was made to the Bank, or that he would become insolvent. I did not think so when I made out the trial balance in the first or second week of January, I thought when I made the statement, my father would be able to carry through. I did not suppose he would go into insolvency; it was a surprise to me when he did so. In my explanation to Mr. *Morris* I represented my father as solvent; I spoke of him needing only temporary accommodation to carry him through. Mr. *Morris* said in the beginning of December, and all through that month: 'I really do not see, Mr. *Hockin*,

Judgment.

1868.

Newton v. The Ontario Bank.

how you can get through.' I thought in December that my father would become insolvent. I thought so from the day Mr. *Morris* was talking. I thought as long as Mr. *Morris* would keep him going there was no danger of his failing."

The correspondence material is the following: Letter, 2nd January, 1867, from Mr. *Morris* to Mr. *Fisher*. Mr. *Morris* says: "He (*Hockin*) has about $10,000 maturing this month. According to his own showing he will turn out from his factory about $7,000 to meet this amount; he may or he may not. * * *Hockin* says anything additional he might require would only be for a short time." On the 3rd of January, Mr. *Morris* also wrote to Mr. *Fisher*: "He (*Hockin*) speaks confidently of his ability to meet his liabilities, and says he will not require further advances unless against shipments." On the 4th of January he wrote to Mr. *Fisher*: "My suspicion of *Hockin's* position is now confirmed. I have at last got him to give me a statement of his liabilities, and I find them to be not less than $40,000. This amount includes mortgages. Early next week he will be prepared to give a full statement of his affairs, but it is, in my opinion, a question whether he should continue or not. He would require a further credit (he says not), but the amount he would require I am not at present able to name. I will not make any further advance to him, unless against shipments or collections, till I am in a position to form some opinion of his requirements. At present I do not see in what way he is to recover himself." Mr. *Morris* also said he got the statement of the 11th of January, 1867, from *Samuel Hockin*, "after the deeds were executed." This statement, so far as I can understand it, shews a profit to the first of January made by *Hockin* of $4,213.31, and that his assets, beyond his liabilities, were nearly $18,000. On the 18th of January Mr. *Morris* wrote to Mr. *Fisher*: "I regret to say that *Hockin* is about used up. I hoped

Judgment.

1868.

Newton v. The Ontario Bank.

he would be able to get through this month, but it is impossible. What the result will be I cannot say."

I think this evidence shews unquestionably that all the securities were given by *Hockin* at the request and by the pressure of Mr. *Morris*, and that, until the 4th of January at any rate, Mr. *Morris* had no idea of *Hockin* not being able to carry on his business. But it appears that on and after that day he had "his suspicions of *Hockin's* position confirmed," which seems to mean that these suspicions were against *Hockin's* solvency, or his being able to meet his engagements. However this may be, the weight of evidence—and perhaps I might say the whole evidence—(for what there is in *Samuel Hockin's* statement to the contrary is immediately neutralized by direct counter statements) shews, whatever Mr. *Morris* may have believed or suspected, that *Hockin* asserted and apparently believed, even until after the 11th of January, that he could still carry on his business, for he said "he expected he could relieve himself in a few months," and that his "difficulty was only temporary," and that, by the statement of the 11th of January, which was furnished *after* the deeds were executed, he shewed he could continue on his business, and he had no doubt he could carry through with the assistance promised him by the Bank, and that he thought himself solvent up to the time when he made the assignment to Mr. *Newton*; and *Samuel Hockin* declared that he also thought his father solvent when he made out the trial balance sheet of the 11th of January, and that he thought his father could still carry through, and that even when his father went into insolvency, on the 18th of January, it was a surprise to him.

Judgment.

It is clear, then, that the conveyances and transfers were not made *voluntarily* by *Hockin* the debtor, but that he was requested and pressed to give them, and gave them unwillingly.

1868.

Newton v. The Ontario Bank.

It is also directly proved that *Hockin* made these transfers, at the different times when they were made, believing himself to be solvent, and able to work through his difficulties—which he thought were only temporary—and with no view whatever of defeating his creditors, or of preferring the Bank, but with the object and purpose of continuing his business, by receiving continued assistance from the Bank, and by means of that assistance of paying off his liabilities, and that he did receive assistance accordingly. In my opinion, then, the *debtor* did not assign or dispose of his property in question to the Bank *with intent* to defraud, defeat, or delay his creditors, under section 3, sub-section *c*. Nor were the deeds, certainly not the December deeds, made by the debtor, *by which creditors were injured*, &c., and so made while the debtor was unable to meet his engagements with the Bank *knowing such inability, or having probable cause for believing it to exist*, or after it was public and notorious, under section 8, sub-section 1. And manifestly these transactions are not within section 8, sub-section 3, if they are not within the other sub-sections.

Judgment.

I am not quite satisfied that the deed of 11th of January was given at a time when the debtor was able to meet his engagements, nor that the Bank did not know of his inability, or had not probable cause for believing it to exist. Mr. *Morris's* letter of the 4th of January shews, I think, he had, at any rate, "probable cause for believing" *Hockin's* inability to meet his engagements; and I am disposed to think the conveyance of the 11th of January has been fairly impeached. Sub-section 2 does not apply to the December deeds, because they are not conveyances by which creditors were injured or obstructed within the meaning of the Statute; and whether it applies to the January deed depends on the fact whether the Bank had actual knowledge or only reason to believe in *Hockin's* inability to

meet his engagements when the deed was taken. If the Bank had only probable cause for believing in *Hockin's* inability when the January deed was taken, they might perhaps bring their claim in respect of this deed within the protection of the 2nd sub-section, as persons not knowing the inability of the debtor; and so it would be voidable only, and not void. It is not at all an easy matter to determine how the January deed should be disposed of, for neither *Hockin* nor his son then believed in *Hockin's* insolvency or inability to meet his engagements; and perhaps if he had then been proceeded against as an insolvent, he might have had the proceedings set aside under section 3, sub-section 3, by shewing that his stoppage (if a stoppage had been proved against him) was only for temporary causes, and was not occasioned by fraud or any insufficiency of assets; and yet it is manifest from what turned out on the 18th of January, as stated in Mr. *Morris's* letter of that date, "that *Hockin* was about used up," and had, in fact, actually made an assignment at that time. Upon the whole, I think this deed is voidable at any rate: I am not prepared to say it is void.

Judgment.

I do not wish to bind myself to an opinion whether the 4th sub-section of section 8 does or does not extend to lands. I should require strong authority to satisfy me that a Statute which should be beneficially expounded for the general creditors against the particular creditor, excluded so important a part of the debtor's estate by interpretation, [although there were other sections which included lands,] while there were words in the section capable of covering them.

This case does not come within the 4th sub-section, because the conveyances and transactions were not made by *Hockin* in contemplation of insolvency, or by way of giving an unjust preference, for *he* certainly gave nothing voluntarily, and did not at all believe he was

1868.

Newton v. The Ontario Bank.

insolvent until after all the transactions of the Bank were closed.

I may also add that I have no doubt an unincorporated Board of Trade can, in my opinion, as well as an incorporated Board of Trade, appoint official asignees under the Statute. Mr. *Hodgins* referred to many Statutes by which unincorporated Boards of Trade had been authorized to perform very important functions, of which the 4 & 5 Victoria, chapter 88, is an example, for under that Statute the Boards of Trade of Quebec, Montreal, Toronto, and Kingston, not one of which was then incorporated, were empowered to appoint a board of examiners of applicants for the office of inspector of beef and pork at these respective places.

Upon the whole, I think the appeal should be dismissed upon the merits, though I do not agree with the reasons on which the decree of the Court below is founded.

Judgment.

J. WILSON, J., concurred in the views expressed by Chief Justice *Richards*.

MOWAT, V. C.—I am of opinion that this bill was properly dismissed.

In England, independently of any statutory enactment, transfers by a debtor, in contemplation of bankruptcy were void; but this always meant contemplation by the debtor; and where he was induced to make the transfer by the pressure of the creditor, the transfer was good. I think the clause in question must be read in the light of these decisions. The bill states, that the impeached conveyances were obtained by the Bank by pressure, and were the reverse of voluntary and spontaneous on the part of the debtor. The evidence clearly proves the same thing. The evidence establishes,

1868.

Newton v. The Ontario Bank.

also, that the debtor did not contemplate insolvency when he made the conveyances, and that he considered he had assets far beyond his liabilities and would be able to surmount the temporary difficulties he laboured under. The Bank feared that he was mistaken; and to secure the Bank debt, its officers pressed for, and obtained the mortgages in question. I do not think that mortgages given under these circumstances are avoided by the Act.

So, also, I presume, that the 5th and 6th sub-sections of the same clause are not to be construed as applying to payments made and received, or to bills and notes indorsed over, in good faith, in the ordinary course of business; though thirty days afterwards a writ of attachment should issue, and though the party receiving such payment or bill had probable cause for believing or apprehending the insolvency of the other. I do not suppose that the Legislature intended to forbid ordinary transactions with an embarrassed trader in the regular course of affairs and *bona fide*.

Judgment.

I think that no sufficient case has been made out for relief in respect of the *Buchan* and *Hockin* notes, or of the refined-oil barrels.

In the view I have taken of the case, it is immaterial whether mortgages of real estate are within the fourth sub-section or not; or whether the assignment to the plaintiff is valid or not; but as these points are remarked upon in the judgment of the Court below, and were much discussed on this appeal, I have given to them my best consideration.

I think the fourth sub-section does apply to mortgages of real estate, and not of personal estate only. In Lower Canada I presume the clause places real and personal estate on the same footing as regards transactions by way of security, as well as transactions by way of pay-

1868.

Newton v. The Ontario Bank

ment; for the word "goods" in the English version is "biens" in the French version of the Act; and the term "biens" includes, both in common parlance and in legal signification, lands as well as chattels, immovables as well as movables. It is an anomaly that on such a point we should have to hold that the same word as applied to Lower Canada should have one meaning, and as applied to Upper Canada a very different and much narrower meaning. I do not see that that can in this instance be wholly avoided; for I do not see how we can construe "goods" as embracing real estate; and there is certainly no more reason for doing so than there would be in Lower Canada for confining "biens" to personal estate. But I think we should not narrow the construction of the Statute unnecessarily, when to do so would increase the difference of construction in the two Provinces.

Judgment.

The three preceding sub-sections (*a*) are clearly applicable to real estate as well as personal. The first clause of the fourth sub-section is expressed in language broad enough, in the English version as well as in the French, to comprise real estate; and, in Upper Canada, if we must construe the second clause as relating to personal estate only, I see no sufficient reason for giving this limited construction to the first clause. Real estate was certainly not included in the former enactments against preferences by insolvents (*b*); but the consolidated Act respecting Insolvent Debtors' Courts (*c*), or the prior Acts on the same subject, made no distinction between real and personal estate in this respect; and none has ever been recognised in the bankrupt laws of England. If the simplicity and security of titles to real estate in this country afforded some reason for not rendering conveyances void on the ground of their having been

(*a*) Sec. 8. (*b*) 22 Vic. ch. 26, sec. 18.
(*c*) Ib. ch. 18, sec. 57.

executed by way of preference to particular creditors, this reason was not so strong with respect to mortgages of real estate as to absolute sales. The evil of requiring those who buy a mortgage to see to the circumstances under which it was given, may well have been thought less than the evil of allowing favoured creditors to be preferred by means of such mortgages; while, on the other hand, the evil of allowing such preferences was certainly, in 1859, thought to be less than the evil of subjecting every purchaser of real estate to the necessity of making inquiry into the circumstances of owners at the time they conveyed. The anomaly of allowing creditors to be preferred by way of absolute sales, and yet forbidding a preference by means of mortgages of real estate, seems to me less than the anomaly of allowing debtors, in contemplation of insolvency, to prefer creditors without restriction by means of real estate and yet forbidding such preferences by means of personal estate. If there is to be any exception to the enactments against preferences, I think that we should presume the Legislature to have intended the exception to be as limited in its operation as sound policy would permit; and that our interpretation of the language employed should be dictated by the same spirit. If the language is wide enough to forbid mortgages, by way of preference, of real estate as well as of personal, I think we should not refuse to hold that such mortgages are within the meaning of the Act.

1868.

Newton v. The Ontario Bank

Judgment

As to the other point, I am of opinion that the Boards of Trade referred to in the second section (*a*), are those in existence at the passing of the Act, or which should thereafter be incorporated or otherwise recognised by the Legislature; and that two or more persons after the passing of the Act could not, by voting themselves "Boards of Trade," clothe themselves with the important powers which the Act confers.

(*a*) Sub-sec. 4.

1868.

Newton v. The Ontario Bank.

But who can take advantage of the irregular appointment of the assignee to whom a debtor assigns? The creditors claiming under the provisions of the Insolvent Act, no doubt can; but if they accept the assignment and act upon it, I think the debtor cannot afterwards impeach it. The assignment is the debtor's own voluntary act. Independently of the Statute, he had a legal right to assign, for the benefit of his creditors, to any one he chose. The Act of 1865 (*a*) requires the assignment, to give it validity as between the debtor and his general creditors, to be to an official assignee appointed under the Act of 1864; but he has, in the assignment in question, treated the plaintiff as an official assignee, duly appointed and authorized under the Act to accept the assignment, and he is therefore not at liberty to deny the assignee's authority, after the creditors have acted on the instrument. In the same way, if a man, by holding out false colors, induces a Joint Stock Company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he is precluded from disputing the validity of the transfer, or from otherwise denying his character as a shareholder. So, it has been held that a person who has assumed to act as a sworn broker of the City of London, cannot, as against a party who has employed him, protect himself from discovering his dealings with such party, on the ground that his answer may expose him to penalties for having acted as a broker without being duly qualified. In like manner, the grantee of an annuity, whose duty it is to have the memorial properly enrolled, cannot take advantage of his own neglect and set up the want of enrolment, against the grantor, although the Statute relating to annuities declares that in case of nonenrolment the deed shall be void to all intents and purposes. There are numerous cases to the same effect in the books (*b*).

Judgment.

(*a*) 29 Vic. ch. 18, sec. 2.

(*b*) See cases collected, Taylor on Ev. 4th ed. sec. 773 to 778.

1868.

Newton v. The Ontario Bank.

Under the bankrupt laws, it is the settled doctrine of the English Courts, that, if a party has taken advantage of, or voluntarily acted under, these laws, he is not permitted, as against parties to the proceedings, to deny their regularity. This has been the effect of acts of the bankrupt far short of what the insolvent did here. Thus, a bankrupt is not allowed to dispute the bankruptcy in an action against the assignee, where he has gone to the different creditors to solicit them to vote for particular persons as assignees; or where he has taken a part in the sale of his own effects under the bankruptcy; or where he has obtained his discharge out of custody in an action by a Judge's order on the ground of his bankruptcy (*a*).

If after an assignment, *bona fide* made to an official assignee not duly appointed or authorized to act in the case, is accepted and acted upon by the creditors, the bankrupt cannot revoke or impeach it—which seems clear,—so, neither, I think, in case the creditors choose to waive any objection to the irregularity, can any one, claiming adversely to the assignment, set up the objection. Under the Act the creditors may choose any one they please as assignee; it is for their protection and benefit that the law restricts the insolvent as to the persons to whom he may voluntarily assign; and there appears to me no good reason for holding that persons claiming adversely to those who accept the assignment are at liberty to raise the objection that, through mistake, the assignment was made to a person not duly qualified.

Judgment.

Per curiam—Appeal dismissed with costs.

(*a*) See the cases collected Deacon's Bankruptcy, 3rd ed. pp. 748, 749.

1868.

THE ATTORNEY GENERAL v. PRICE.

Crown right to judgment recovered by trespassers for timber.

Where timber which was unlawfully taken from Crown property, was subsequently taken by force out of the possession of the first taker and the latter recovered a judgment against the trespassers, which included the value of the timber:

Held, that the Crown was entitled to claim so much of their payment as represented the value of the timber, exclusive of the labour and money expended upon it.

Hearing at Sandwich Autumn sittings, 1868.

Mr. *O'Connor*, for the plaintiff.

Mr. *Barker*, for the defendant.

MOWAT, V.C.—This was an information and bill. The plaintiffs and those under whom they claim have, for many years, been in possession of the Island of Point au Pelee, under an Indian lease alleged to have been made in 1788. In 1859 the Crown obtained a judgment against them on an information of intrusion, but did not appear to have enforced the judgment; and on the 9th of June, 1866, an order in Council was passed, waiving the judgment, and recommending that a Patent should issue to the claimants under the Indian title. Before this order was carried out, and on the 7th January, 1867, the defendant *Henry Price*, obtained a verdict against some of the plaintiffs in an action of trespass for (amongst other things) seizing and carrying away certain timber which *Price* had taken from what is called Middle Island, part of the property in question, and had removed to certain premises occupied by him. The verdict included the value of this timber, the defendants to the action having no legal title to it, and the possession of the plaintiff *Price* entitling him at law to the timber as against the persons who had taken it out of his possession. The verdict was for $635, being it is said, $600

Statement.

1868.

Attorney General v. Price.

as the value of the timber, and $35 for the trespasses. Judgment was entered on the 16th January, 1867. On the 25th February following, the present suit was commenced. The prayer was amongst other things for an injunction to restrain execution on the judgment so far as related to the $600; for an account of the value of the timber and other trees cut by *Price* on the Island; and that he might be decreed to make satisfaction therefor to Her Majesty, the Attorney General on behalf of Her Majesty, waiving all forfeitures and penalties incurred by *Price* in the matter. An interlocutory injunction was granted as prayed, and, *Price* having afterwards put in his answer, the cause came on for hearing before me at Sandwich, at the last Autumn sittings there.

The Indian lease gave no title to the land, and therefore none of the plaintiffs can claim here any more than at law, that they were owners of the timber for which the judgment was recovered. In this view it is unnecessary to consider the objections made on the part of *Price* to the proofs offered by the plaintiffs in support of their claim as such.

Judgment.

But the Attorney General, on behalf of the Crown, it appears, is desirous of affording relief as far as possible to the plaintiffs, and claims that if they are not entitled to relief in their own right, the Crown had a right to the timber, and has a right to the judgment recovered for it; and the Court is asked on the part of the Crown, to restrain execution on so much of the judgment as in equity the Crown is entitled to. No doubt, if the Crown can successfully claim part of the judgment for the purpose of enforcing it, the claim can be set up and maintained for any other purpose which the Crown chooses.

Now, it is a familiar doctrine of equity that, that where a fiduciary relation exists between parties, if

1868.

Attorney General v. Price.

the trustee tortiously disposes of any of the trust property for other property, the latter may be followed by the *cestui que trust* (*a*). The same principle is acted on at law in the case of factors, brokers, and the like (*b*). But it does not appear to be confined to cases where there is a fiduciary relationship. In *Gladstane* v. *Hadwen* (*c*) it was held, that the rule applied to Bank notes which were part of the proceeds of a bill obtained by a fraudulent misrepresentation, and discounted by the party who obtained it. In the case of *The Merchants' Union Express Co.* v. *Morton* (*d*) my brother Spragge applied the doctrine to property bought with stolen money, and expressed the opinion that the rule is "applicable to other moneys and other property," as well as to trust moneys; "and that, if the Court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien on it."

Judgment.

The rule applies though the money or property wrongfully obtained or used is mixed by the wrongdoer with money or property of his own (*e*); and though it passes into the form of a debt due to him. Where it forms part of a judgment recovered, the effect must be the same.

The timber here clearly belonged to the Crown. It was the property of the Crown before being cut or blown down, and continued so afterwards; and by the express enactments of the Legislature, the ownership was not affected by the preparation of the timber for market, by its removal from the land, or by its being mixed with other timber, so as to become undistinguishable (*f*).

(*a*) Lewin on Trusts, 5 ed. 645.
(*b*) See Prentiss v. Brennan, 1 Gr. 484.
(*c*) 1 M. & Sel. 517.
(*d*) Ante p. 274.
(*e*) See the cases Lewin on Trusts *ubi supra*.
(*f*) See Public Lands Act, Con. Stat. Can. ch. 23, ss. 7, 8.

1868.

Attorney General v. Price.

It seems clearly to follow from these considerations that the Crown is entitled to claim so much of the judgment recovered by the defendant as represents the value of the timber, not as it was when taken out of *Price's* possession, but as it was before his labor and money were expended on it. Its value was enhanced, I presume, by being cut down, and removed; and though the labour and money which the plaintiff expended upon it was forfeited to the Crown, it is not, I apprehend, for this Court, on an information like the present, to enforce the forfeiture; and the Attorney General, by the information, expressly and properly waives all penalties and forfeitures. The relief which should be given is, therefore, the same, I apprehend, as would be given to a subject under like circumstances; and the relief to a subject would be limited, I think, in the way I have suggested. This view renders it unnecessary for me to consider whether the evidence offered of the jury's several findings was such as, in a case of this kind, is admissible here.

Judgment.

It was objected that the bill is multifarious; but that is an objection which should be taken by demurrer, and cannot be insisted on at the hearing (*a*).

The injunction must therefore be continued. An account will be taken of the value of the timber, exclusive of the labour and money expended by *Price* upon it. *Price* will pay the Sheriff's costs (if any), and further directions and all other costs will be reserved until after the account is taken. If the parties can agree as to the value of the timber, the expense of the reference and further proceedings may be avoided, and I can dispose of the whole case and of the costs at once.

(*a*) See cases 1 Dan. Pr. 4 ed. 324.

1868.

MOORE v. THE BANK OF BRITISH NORTH AMERICA.

Registry law—Constructive notice.

In case of an unregistered interest of a date antecedent to the Registry Act of 1865, and not founded upon a deed or conveyance which was capable of registration, constructive notice is sufficient notice against a subsequent registered conveyance; and possession of the property by the party having such unregistered interest is sufficient constructive notice for this purpose.

The Court of Chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on, until the different doctrine lately held by V. C. Stuart in England, and Mr. Justice Lynch in Ireland, is adopted in Appeal either in England or here.

This cause was originally heard before the Chancellor, at Brantford, and came on for re-hearing before the two Vice-Chancellors, on the decree pronounced by his Lordship. The facts out of which the case arose are fully stated in the judgment.

Mr. *Blake*, Q. C., for the plaintiff.

Mr. *E. B. Wood* for the defendants.

The cases cited are, with others, mentioned in the judgment of the Court, which was delivered by

Judgment. MOWAT, V. C.—This cause was re-heard before my brother Spragge and myself, in the absence of the Chancellor, before my brother Spragge went to England in 1866, and the incessant pressure of new business since his return has prevented our disposing of the case until now (21st April, 1868.)

The plaintiff claims certain land, comprising fifty acres, under a parol contract made by the plaintiff for the purchase thereof from the defendant *Thomas Moore*. The

1868.

Moore v. Bank of British N. A.

facts are not disputed. The plaintiff came to this country, with his family, in the fall of 1850, and in September of that year agreed for the purchase of the land in question for $150, and some work which he was to do for the vendor on the adjoining lot. About half the land was cleared. The plaintiff paid the $150 by October, 1851. Immediately after the purchase the plaintiff went into possession, and has been in possession and has cultivated the land ever since. By the fall of 1855 he had cleared the greater part of what had been in wood when he bought; and in 1857 he built a house on the property, in which he and his family have ever since lived. He is described in the evidence as an illiterate man; as being able to read print, but not to read writing; and he is stated not to take a newspaper. The vendor was his brother. The vendor does not appear to have himself got a conveyance of the lot until 25th June, 1855. On the 13th April, 1857, he mortgaged the lot of which the fifty acres in question formed part to *John Haight Cornell* and *Samuel Palmer Cornell;* and they, on the 25th May, 1863, assigned this mortgage to the defendants *The Bank of British North America.*

Judgment.

The defendants were before this assignees of certain judgments recovered against *Thomas Moore;* and on the 19th of June, 1860, they filed a bill against him, and the mortgagees mentioned, and certain other judgment creditors of *Moore*, praying for liberty to redeem the prior incumbrances, and for a sale of the land in question, and of other lands of the debtor. Under this bill the *Bank* became the purchasers; and on the 14th July, 1863, *Thomas Moore* executed to them a conveyance in pursuance of the sale. Some time afterwards the Bank commenced an action of ejectment against the plaintiff; and on the 14th September, 1865, the plaintiff filed the present bill to restrain the action, and for the specific performance of his contract. The cause came on to be heard before the Chancellor, at Brantford, on the 6th

1868. November, 1865, when a decree was made, dismissing the plaintiff's bill.

Moore v. Bank of British N. A.

The following is the note made by his lordship of his judgment: "Whatever opinion I may have individually entertained on this question, I learned from both my brother Judges (*a*), shortly after entering upon my duties as Chancellor, that it was considered as settled law in this Court, that constructive notice—such as that by possession, &c.—did not avail against a registered title. My brother Spragge still considers that to be the view on which the Court has acted in such a case. This being so, I think I should dismiss the bill with costs, leaving it to the plaintiff to seek for a different declaration of the law either on rehearing or appeal."

It appears that the impression his lordship thus had at the moment, of what had theretofore been held, was not quite correct. It had theretofore been supposed that constructive notice of an unregistered deed which was capable of registration did not avail against a registered deed; but no such doctrine had been laid down where the unregistered claim was not founded on an instrument capable of registration. On the contrary, in that class of cases, it had been distinctly held in this country as well as in England, that the Registry Act did not apply, and that constructive notice was as effectual as in other cases; and this appears to have been his lordship's own view of what was the correct principle.

Judgment.

There was no express proof that at or before the time of the execution of the mortgage or the deed, the mortgees or the Bank had actual notice of the sale to the plaintiff; but as the plaintiff was in possession of the property, the mortgagees and the Bank, *prima facie*, took subject to the plaintiff's rights. On this point it is

(*a*) Esten and Spragge, V.CC.

1868.

Moore v. Bank of British N. A.

only necessary to refer to *Holmes* v. *Penny* (*a*) in Appeal, in which the rule was laid down by the Lord Justice *Knight Bruce* in these words: "I apprehend that, by the law of England, when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or cannot be heard to deny that he knows, another to be in the possession of certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title, or alleged title, under which, or in respect of which, the former is and claims to be in that possession." The same thing was held by my brother *Spragge* in *Gray* v. *Cowcher*. The consequence of this rule is, that persons dealing for land should ascertain whether the vendor or mortgagor is in possession, and if not, whether the person in possession has or claims any title; and this imposes no unreasonable burden. A purchaser or mortgagee may fairly be expected and required to make some examination of the property he bargains for; and possession being a fact patent to everybody, the danger of its being falsely asserted is greatly less than of actual and express notice of an unregistered claim being falsely alleged.

Judgment.

The Registry Act in force at the time of the plaintiff's purchase was 9th Victoria, chapter 34 (1846), the 6th section of which corresponds with the 44th section of the Act inthe Upper Canada Consolidated Statutes (*b*), and is that on which the contention of the defendants proceeds. By these enactments, as against a subsequent purchaser

(*a*) 8 D. M. & G. 580.

(*b*) Ch. 89, p. 891.

1868.

Moore v. Bank of British N. A.

or mortgagee who has registered a memorial of his deed or conveyance, every prior unregistered "deed or conveyance" was made void; and the settled construction of this enactment in England and in this country is, that it does not affect any equitable right or interest which cannot be registered, but renders void such deeds and conveyances only as are capable of registration. This, as Vice-Chancellor Sir *W. Page Wood* observed in *Neve* v. *Pennell* (*a*), "might, indeed, introduce the mischief intended to be remedied in another form; but it was one which the machinery furnished by the Act cannot meet; which is not the case where there exists a document capable of being placed on the register." In this country the mischief is prevented in future cases (*b*) by the Registry Act of 1865 (*c*), which provides broadly that no (unregistered) equitable interest shall be valid "against a registered instrument executed by the same party, his heirs, or assigns."

Judgment.

I have said that the settled construction of the enactment, as it previously stood, was, that it did not affect equitable rights which were incapable of registration. Thus, in *Sumpter* v. *Cooper* (*d*) Lord Tenterden, speaking for himself and the rest of the Court of Queen's Bench, used this language: "As to the Statute of Anne (*e*) we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered;" and when the point is referred to in the English Equity Reports, the only question is, whether the unregistered claim is under an instrument capable of registration (*f*).

(*a*) 2 H. & M. 187. (*b*) Macdonald v. Macdonald, 14 Gr. 133.
(*c*) 29 Vic. ch. 24, sec. 66. (*d*) 2 B & Ad. 226.
(*e*) 7 Anne, ch. 20, sec. 1.
(*f*) Sergeaston v. Quincey, 2 Ves. Sr. 413; Wright v. Stanfield, 27. Beav. 8; Moore v. Culverhouse, Ib. 639; Neve v. Pennell, 2 H. & M. 170; Holmes v. Penny, 8 D. M. & G. 572.

1868.

Moore v. Bank of British N. A.

In Ireland, the point does not appear to have been quite so well settled. In *Buckley* v. *Lanauze* (*a*), which was a case of a will, it was distinctly recognized, Lord *Plunkett* observing: "The Registry Act has no application, inasmuch as under the Irish Registry Act the registry of a will is not provided for, and it is not, therefore, a case between a registered and an unregistered title;" and "the ordinary rule of constructive notice is to be applied." In re *Driscoll's* estate (*b*), the learned Judge, in giving judgment, said: "A considerable portion of the argument before me was on the question, whether an equitable mortgage, by deposit of title deeds on a parol contract, is postponed to a subsequent registered actual mortgage. The first is manifestly incapable of registration; and, if such a transaction creates an equitable security, it would seem somewhat hard to hold that, while it is incapable of receiving aid or protection from the Registration Acts, it is liable to be defeated by their operation. To establish the priority of a security created by such deposit over a subsequent mortgage, could scarcely be considered a hardship on a puisne mortgagee who must take his security without obtaining the usual indicia of title. It is not necessary that I should now decide this point, for it does not arise on my previous ruling; but for a time it seemed to me to arise, and during the argument I intimated an opinion rather favourable to the view that the registry of the subsequent mortgage should not give it priority." In that case, the case in the Court of Queen's Bench (*c*) and that in the 13th Irish Common Law (*d*) were cited to the learned Judge; and also a case of *Rice* v. *O'Connor* (*e*), where it had been said that possession

Judgment.

(*a*) L. & G. t. Plunkett, 341; see also O'Connor v. Stephens, 13 Ir. C. L. 68.

(*b*) Irish Repts, 1 Eq. 288.

(*c*) Sumpter v. Cooper, 2 B. & Ad. 223.

(*d*) O'Connor v. Stephens, 13 Ir. C. L. 63.

(*e*) 11 Ir. Ch. 510; S. C. 12 Ib. 424.

1868.

Moore v. Bank of British N. A.

under a parol contract partly performed, was not notice as against a registered title. That view is directly opposed to *Holmes* v. *Penny* (*a*); but neither *Holmes* v. *Penny* nor any of the other cases I have referred to was cited to the Court; and the point, in the view taken in appeal of the other facts of the case (*b*), was not material.

In this Court the authorities are very clear. The very point was decided in *McMaster* v. *Phipps* (*c*). There, Chancellor *Blake*, speaking of the Registry Act then in force, observed: "It settles the priority between conflicting deeds or instruments (if that be the correct construction) which admit of registration, but it does not affect to deal with equitable rights which do not arise upon any deed or written instrument, and as to which, therefore, the provisions of the Registry laws are wholly inapplicable. The language and scope of the Act shew that equities of this sort were not in the contemplation of the Legislature; and indeed, as to them, legislative interference was wholly unnecessary, for a purchaser for value without notice was always protected, and I have already shewn that a purchase with notice is not within the Act at all." V. C. *Esten* said: "I think that equities of this nature are not extinguished by implication—they are certainly not expressly avoided—as against a registered title, by the Registry Act, and that the case of equitable mortgages is only mentioned *exempli gratia*" (*d*). This has been assumed to be the law ever since (*e*). In the *Bank of Montreal* v. *Baker* (*f*), the present Chancellor observed of the document there in question: "If by reason of its being treated merely as a parol instrument it could not be registered, then we are of opinion that

Judgment.

(*a*) 8 D. M. & G., 572. (*b*) 12 Ir. Ch. 424.

(*c*) 5 Gr. 258. (*d*) Ib. 261.

(*e*) See Burgess v. Howell, 8 Gr. 37. McQuestien v. Campbell, 8 Gr. 245. Cherry v. Morton, Ib. 407. McCrum v. Crawford, 9 Gr. 340. Robson v. Carpenter, 11 Gr. 293. Harrison v. Armour, Ib. 303.

(*f*) 9 Gr. 299.

the registered judgment could not prevail against it, as in such case the Registry Act as to it could have no application;" and his lordship referred to *McMaster* v. *Phipps*, and *Sumpter* v. *Cooper* as authorities for this statement of the law.

It was contended for the plaintiff, that the question I have been considering was not open to the defendants, as they had not shewn that the title prior to the plaintiff's contract was a registered title. This objection was not taken at the hearing before the Chancellor, and, on the contrary, it appears from the Chancellor's notes, to which we have referred, that the facts were admitted by the plaintiff, and that the effect of them alone was argued. I have therefore assumed that the defendants had a right to raise the point on the re-hearing.

If the plaintiff had claimed under an instrument capable of registration, the case would have been open to some difficulty, as the Court here, before the decision of the Lords Justices in *Holmes* v. *Penny* (*a*), had held that possession was not sufficient notice of such an instrument as against a registered deed (*b*); and there are decisions of the Irish Courts to the same effect (*c*). There are also general observations in the reports of this Court, to the effect that constructive notice of an instrument capable of registration is not sufficient against a registered deed (*d*)—which has not, in so many words, been held or said in any English case I have seen, though the doctrine, subject to the exceptions I shall mention,

Judgment.

(*a*) 8 D. M. & G. 572.

(*b*) Waters v. Shade, 2 Gr. 464. Ferrass v. McDonald, 6 Gr. 310. McCrum v. Crawford, 9 Gr. 340.

(*c*) In re Burmester, 9 Ir. Ch. 410; Clarke v. Armstrong, 10 Ir. Ch. 263; Rice v. O'Connor, 11 Ir. Ch. 510; 12 Ir. Ch. 437.

(*d*) Ferrass v. McDonald, 5 Gr. 312: Baldwin v. Duignan, 6 Gr. at p. 598; Graham v. Chalmers, 9 Gr. 241; McCrum v. Crawford, 9 Gr. 340.

1868.

Moore v. Bank of British N. A.

seemed implied in, or fairly inferrible from, the strong language, used in some early cases, as to the kind of notice necessary to sustain a claim against a registered deed. Thus, in *Hine* v. *Dodd* (*a*) it was said, that the "proof must be extremely clear;" that "apparent fraud, or clear and undoubted notice, would be a proper ground for relief, but suspicion of notice—though a strong suspicion—is not sufficient," &c. In *Jolland* v. *Stainbridge* (*b*) Lord *Alvanley* said: "It must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and, knowing that, registered in order to defraud them of that title he knew at the time was in them." In the later case of *Wyatt* v. *Barwell* (*c*), Sir *William Grant* stated the doctrine of the Court to have been this: "We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected. * * It is only by actual notice, clearly proved, that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose (*d*)."

Judgment.

On the other hand, in *Sheldon* v. *Cox* (*e*), which was a case under the Registry law, Lord *Nottingham* said: "There is no difference between personal and constructive notice, in its consequences, except as to guilt: if there was, it would be very inconvenient, and notice would be avoided in every case by employing an agent. The Statute of Queen Anne was intended only to protect purchasers against secret conveyances, but does not prevent their being affected with notice in

(*a*) 2 Atk. 275. (*b*) 3 Ves. 485. (*c*) 19 Ves. 439.
(*d*) See also Wallace v. The Marquis of Donegal, 1 Dr. & Wal. 488; Bushel v. Bushel, 1 Sch. & L., 100. (*e*) 2 Amb. 626.

1868.

Moore v. Bank of British N. A.

the same manner as if that Statute had not been made." The reporter has added a query, whether the case was well considered. Again, in *Ford* v. *White* (*a*), the strong language of the earlier cases was thus explained or modified: "I have been referred," said the Master of the Rolls, "to several cases to shew that there should be clear evidence of notice. That is so; but all that is meant is, that the notice proved, in this as in all other cases, must be sufficient to satisfy the Court, and then it must be acted on. If the evidence be doubtful, the Court will either order an enquiry or direct an issue to try the fact." It was held in the same case that a person claiming under the Registry law is affected by constructive notice of all that is on the Registry, and of all that what he finds there would put him upon inquiry respecting. The plaintiff was a mortgagee, and the question was as to his right to priority over a mortgage subsequently executed to one *Parkes*, but registered before the plaintiff's mortgage. This second mortgage was afterwards assigned to one *Paget* and others. The Master of the Rolls was satisfied that *Parkes*, at and before he got his mortgage, had actual notice of the plaintiff's mortgage; but there was no evidence that *Paget* and the others (who claimed under *Parkes*) were aware of this when they took their assignments. The Master of the Rolls held as follows: "If they relied on the register, I apprehend they must be taken to have notice of the whole register; and if so, they had notice that, two months after the date of *Parkes'* mortgage, a security was registered, purporting to be dated four years previous. This would put them upon enquiry whether *Parkes* had notice (*b*)." I may add that Lord *Romilly* is one of those Equity Judges who have expressed their regret as to the effect of the decisions which have qualified the Registry Act (*c*).

Judgment

(*a*) 16 Beav. 123.
(*b*) See Eyre v. Dolphin, 2 B. & B. 302.
(*c*) 16 Beav. 123.

1868.

Moore v. Bank of British N. A.

It was also held in *Le Neve* v. *Le Neve* (*a*), followed by other cases (*b*), that actual notice to a man's solicitor or agent is sufficient as against a registered deed, though there may have been no actual knowledge by the man himself.

These cases are law here as well as in England; but, in the late case of *Wormold* v. *Maitland* (*c*), after a full discussion of the English authorities, it was held by the Vice-Chancellor Sir *J. Stuart*, broadly, that constructive notice has the same effect as against a registered title as in other cases. In the course of his judgment his Honour observed: "I listened attentively to the defendant's counsel, who argued the case very elaborately, to hear if anything would fall from them to shew (there being no authority for the proposition) that there was anything in the way of principle, or anything which could be suggested, why there should be any difference in their effect between actual notice and constructive notice, and I heard nothing of the kind. No doubt there are cases, from *Hine* v. *Dodd* downwards, where the expression 'clear and undoubted notice' has been used; and that expression, it has been argued, means actual—as contrasted with constructive—notice. But I should do a very dangerous thing if I countenanced that notion, because constructive notice is notice; and, if notice, it is clear and distinct notice, according to the doctrine of this Court." The Irish cases were not cited to the learned Vice-Chancellor, but his decision appears to have been acquiesced in by the parties, and has since been expressly recognized and followed in *Re Allen's* estate (*d*).

Judgment.

The second of the two classes into which Sir *James*

(*a*) 3 Atk. 466; S. C. Amb. 646.

(*b*) Leuchan v. McCabe, 2 Ir. Eq. 351; Tunstal v. Trapper, 3 Sim. 301; Line v. Jackson, 20 Beav. 539.

(*c*) 35 L. J. ch. 69. (*d*) Irish Rep. 1 Eq. 455.

1868.

Mooro v. Bank of British N. A.

Wigram divided cases of constructive notice seems to fall within the same principle as cases of actual notice, viz., positive fraud. The class of cases referred to consists of those "in which the Court [is] satisfied, from the evidence before it, that the party charged had designedly abstained from enquiry, for the very purpose of avoiding notice" (*a*). And there is sometimes great difficulty in drawing the distinction between cases of fraud and mere cases of implied notice (*b*). In the second report of the Real Property Commissioners (*c*) it is observed: "Between actual notice and the highest degree of constructive notice there is no substantial difference; indeed the latter, as resting oftener on written evidence, is frequently more clear and satisfactory; and the deference to moral feeling, which affords, perhaps, the strongest reason for giving effect to actual notice, would be violated in no less degree by denying the same effect to a strong and clear case of constructive notice."

Judgment.

The characteristics of the second class of cases described by Sir James Wigram were probably not in the contemplation of the learned Judges of this Court when saying that constructive notice would not prevail against a registered deed; but to most cases of constructive notice, not falling within that class, or within the principle of *Le Neve* v. *Le Neve* or *Ford* v. *White*, the doctrine so often stated from this place as to the insufficiency of such notice against a registered title, must, in regard to rights in existence before the passing of the Registry Act of 1865, be held to continue to be the law of this Court, until either a contrary rule is asserted by the Court of Error and Appeal, or, at all events, until the broad doctrine laid down by Sir James Stuart receives the express sanction of a higher Court in England. The doctrine, however, as I have already pointed out, has no

(*a*) Jones v. Smith, 1 Hare 55. See Sug. V. & P. 14 ed. pp. 783, 784
(*b*) Benham v. Keane, 1 J. & H. 702. (*c*) 1830, p. 38.

1868.

Moore v. Bank of British N. A

application to the case of an unregistered title which is not founded on a deed or conveyance within the meaning of the Act.

The defendants also set up the plaintiff's delay as a bar to relief. But delay while the vendee is in possession is no defence to a bill for specific performance (*a*); and here the purchase money was duly paid, and all that remains unsatisfied of the consideration—if anything remains unsatisfied—is some work which the plaintiff was to do in clearing the adjoining lot, for which no time was fixed and with respect to which it does not appear that the vendor ever made a demand that the plaintiff did not comply with. These circumstances constitute an additional answer to the defence of delay.

The learned counsel for the defendants contended further, that the plaintiff had acquiesced in his vendor's subsequent dealings with the property. No such defence is set up in the answer, or, therefore, is open to the defendants now. But there is no evidence whatever of acquiescence. The plaintiff knew nothing of the mortgage until some time after it was given, when he was told of it by a friend; and he knew nothing of the Chancery sale until after it had taken place. He had heard of the suit, but was always assured by *Thomas* that he would make it all right; and the plaintiff thought his brother would protect him and save the property. It is manifest that these facts do not afford the slightest ground for the argument of there having been an acquiescence within the authorities on that subject.

Judgment.

I think there must be a decree for the specific performance of the contract. Reference to the Master to

(*a*) Sharp v. Milligan 22 Beav. 606. Clarke v. Moore, 1 J. & La T., 723; Burke v. Smyth, 3 Ib. 193; Crofton v. Ormsby, 2 Sch & Lef. 604; Ridgway v. Horten, 6 H. L. 292.

inquire whether the consideration has been fully paid; and if not, what is due to the plaintiff in respect thereof, and the master is to charge the plaintiff with the value, in money, of any work which the plaintiff has not performed, and is still liable to perform. Just allowances to all parties. Defendants the *Bank* to pay the costs of the plaintiff, less the amount (if anything) which the plaintiff is still liable for. Should the balance be in plaintiff's favour, or on payment of the balance if against him, conveyance to be executed.

1868.

Moore v. Bank of British N. A.

MERRITT v. SHAW.

Partition—Setting aside.

An unequal partition obtained in a County Court against a minor and *feme coverte* through the contrivance of the co-tenant, the gross laches of the guardian *ad litem*, and the misapprehension of the Referee (appointed under the 17th section of the Partition Act) as to the extent of his duty and power, was held not binding. The minor on coming of age filed a bill for a new partition, and a decree was made accordingly.

Hearing at Chatham at the Autumn Sittings of 1868.

Mr. *Woods*, for the plaintiff.

Mr. *Roaf*, Q.C., and Mr. *Macrea*, for the defendant *John Shaw*.

MOWAT, V. C.—This is a suit by one of the legatees and devisees of *Amos Shaw*, deceased, for an account of the testator's personal estate, and a partition of his real estate. The defendants are *John Shaw*, and the plaintiff's husband *James Merritt*. No relief as to the personal estate can be granted, as there is no personal representative of the deceased before the Court. Judgment.

1868. Merritt v. Shaw.

The defendant *Shaw* resists a decree for partition on the ground of certain proceedings at law.

The testator by his will, dated 4th August, 1852, devised his farm—the north-easterly part of lot number 24, 4th concession, Chatham, containing 144 acres—to his wife, and the plaintiff (his grand-daughter); and by a codicil, dated 2nd May, 1853, he directed that his son, *John Shaw*, should have the widow's undivided-half after her death. Soon afterwards the testator died, leaving his wife, son and grand-daughter, surviving him. They appear to have lived together on the farm from the testator's death until the plaintiff's marriage, which took place in 1860, she being at the time 14 years old. The widow died shortly afterwards, leaving *John Shaw* in sole possession. A verbal agreement was then made (1861) between the plaintiff's husband and *John Shaw* for the division of the property. It was accordingly divided into two parcels, supposed to be equal in quantity, but known to be unequal in value, the easterly half containing all the farm buildings and the larger clearing. The lowest estimate of the difference in value between the two halves is $500, and the highest $1000. A fair annual rent for the west-half is variously stated at from $25 to $50; and of the east half from $90 to $150. According to the defendant's evidence, *Merritt* had his choice of the two halves, and from generosity or good nature spontaneously chose the less valuable half. No writing was executed, but from the time of this division *Merritt* appears to have rented the west-half for his own benefit, and *Shaw* to have continued in the occupation of the east-half. It is admitted that the division was not binding on the plaintiff at the time, and did not become so by the circumstance of possession having been thereafter held in accordance with it (*a*).

Judgment.

(*a*) Ireland v. Kettle, 1 Atk. 541.

1868.

Merritt v. Shaw.

In December, 1863, *Shaw* took proceedings in the County Court of the County of Kent, for the partition of the farm. His petition did not mention the transaction of 1861, but it is plain, from the evidence before me, that the real object of the proceedings was, not to obtain a proper partition by the Court, but to use the machinery of the Court to give the form of law to the illegal and unequal division of 1861. The plaintiff was still a minor, and, on the 4th January, 1864, the Judge was induced to appoint as her guardian, *William A. Everitt*, who had assisted in making the partition of 1861—that is, had at that time, at the request of *Shaw* and *Merritt*, roughly marked out the line of division between the two halves. On the 7th January a consent was filed, agreeing that a partition should be made by *Augustus McDonell*, a surveyor. This consent was signed by *Shaw*, *Merritt*, and *Everett*. No order upon it was drawn up or applied for, but *Shaw* verbally informed Mr. *McDonell* that he wanted him to make a survey of the farm; and *McDonell* went to the farm for the purpose on the same day as the consent was filed. *McDonell* was a witness before me, and gave this account of what he did: "I divided the land into two equal portions. * * I merely divided the land into two equal portions—that is what I understood I was to do. They were to be equal in point of area. Nothing was said of value. I was told that *Shaw* was to have the east-half, and *Merritt* the west-half. I think both *Shaw* and *Everett* said so. I exercised no judgment as to value. I received no paper as to having been appointed to make the division. I had merely the verbal notice from *Shaw* that he wanted me to go there, and make the survey, so far as I remember. I did not understand that I was to act as arbitrator between the parties. * * If I had been told that I was to divide according to value, I would have examined the land—which I did not do, as the value was not brought in question. * * I thought I had nothing to do

Judgment.

1868.

Merritt v. Shaw.

but to run the line between the two halves—that the parties concerned had agreed about it. I understood my deed was to confirm what had been agreed to before. That is as nearly as I remember." The accuracy of these statements was confirmed by the other evidence, and was not disputed or questioned. After completing his survey, *McDonell* executed an instrument under his hand and seal, dated 19th February, 1864, purporting to allot and convey the one half to the plaintiff, and the other half to *Shaw*, each half containing 72 acres more or less, and being described in the instrument by metes and bounds. This document was filed in the County Court on the 27th March, 1865, and no further proceedings took place in the matter.

Judgment.

It was contended, that this deed is a bar to the plaintiff's suit for partition here; and that any objection to the validity of the partition made by the deed must be taken in the County Court. But the Statute under which the proceedings took place contains no provision for setting aside the division made by a Referee; and from what was said by the Court of Queen's Bench in *Re Knowles* (*a*), it is doubtful whether there is any jurisdiction in the County Court to entertain an application for that purpose. But the deed of the Referee is of the character of an award; and when an award is set up in a suit in equity, it is always competent for the opposite party to show that, on any ground of law or fact, the award is invalid.

If, so far as relates to the present objection, the deed were on the same footing as a decree or judgment of the Court, which is what the learned counsel for the defendant contended, I would still be of opinion that the deed is no defence to the present suit; without referring, either, to various legal objections urged to the deed, and to the proceedings which led to it.

(*a*) 24 U. C. Q. B. 311.

1868.

Merritt v. Shaw.

In *Gregory* v. *Molesworth* (*a*) Lord *Hardwicke* intimated that an infant might file a new bill to open a decree in another cause in which he was a plaintiff, where "gross laches, or fraud and collusion, appear in the *prochein ami*." Here, in reference to the plaintiff's interests, her guardian certainly was guilty of gross laches, and the unequal division was accomplished through his collusion. There was no moral fraud on his part, because he appears to have considered that *Merritt* had a right to agree to an unequal division, if, in his generosity or simplicity, he chose to do so. But what was done was a wrong to the plaintiff and a fraud on the statute; and, in such a case, the absence of conscious misconduct on the part of the guardian seems immaterial.

In the Earl of *Bandon* v. *Becher* (*b*) it was held, "that you may at all times, in a Court of competent jurisdiction—competent as to the subject matter of the suit itself—where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided that it was pronounced through fraud, contrivance, or not in a real suit; or if it was pronounced in a real and substantial suit, between parties who were really not in contest with each other" (*c*). If, therefore, the deed of the Referee is tantamount to a judgment of the Court, as was contended, it does not stand in the plaintiff's way; for, plainly, it was procured through deception and contrivance, and not in a real and substantial suit. The judgment of the Referee was not invoked or exercised; he gave no decision as to what would be a proper partition —nobody asked him to do so; the deed was obtained

Judgment.

(*a*) 3 Atk. 511. (*b*) 3 C. & F. 511.

(*c*) See also Bateman v. Willoe, 1 S. & L., 205; Kennedy v. Daley, Ib. 374; Gifford v. Hort, Ib. 395; Thornhill v. Glover, 3 D. & War. 214; Bargate v. Shortridge, 5 H. L., 297; Griffith v. Edwards, 2 Jur. N. S. 584.

1868.

Merritt v. Shaw

from him by leaving him in ignorance of the duty which his appointment imposed on him; and the co-tenant *Shaw*, as well as the plaintiff's husband and her guardian, were partners to the whole contrivance. (I may observe that there is no evidence that any of the solicitors employed knew that the partition was unequal.) The circumstances, that neither the husband nor guardian was to gain by the petitioner's success, but *Shaw* only; that the husband was willing that *Shaw* should have the advantage which he got; and that the plaintiff herself, a minor as well as *feme coverte*, did not object to it, seem entirely insufficient to give the proceedings validity. I may add that it does not appear the plaintiff was aware of her rights at the time that she is said to have concurred in what was doing.

Judgment.

It was urged that the plaintiff's delay in objecting to the partition disentitles her to raise any question now; but her infancy at the time is a sufficient answer to this argument. She did not become of age until the 18th of May. 1867, and her bill was filed on the 28th March following.

The deed of the Referee must be set aside, and the usual decree for partition made. The plaintiff is also entitled to an account of waste committed by the defendant *Shaw* (*a*), there being sufficient evidence for such a reference, if she desires it. I think the plaintiff should have her costs against *Shaw* up to the hearing, except so far as these have been incurred by the account sought of the personal estate. The costs incurred by *Shaw* in consequence of that part of the bill should be taxed, and deducted from the costs to which the plaintiff is entitled. The costs of the reference as to partition will be as usual. Costs of the reference as to waste, and further directions thereon, will be reserved.

(*a*) Stat. Westmr. 2nd, ch. 22.

1868.

GRAHAM v. POWELL.

Vendor and purchaser—Damages.

Where a person, falsely representing himself to be the agent for the owner of certain land, entered into a contract for the sale thereof, and received a deposit on account of the purchase money, but the vendee could not get a specific performance of the contract:

Held, that his remedy against the agent for the return of the deposit was at law, and that a bill for that purpose would not lie.

Examination of witnesses and hearing at Simcoe.

Mr. *Foley*, for the plaintiff.

Mr. *Spencer*, for the defendant.

VANKOUGHNET, C.—I think I must dismiss this bill, and with some costs. It is a bill against the agent—or the person assuming to act as agent—of the owners of the property, to recover back the moneys paid to him as such agent, on account of the purchase money, because he has failed to procure for the vendee a good title. The vendors, or owners of the property, are not before the Court. It is a bill, in this respect, of the first impression. The case most like it, and which decided that no such bill could be maintained, even against vendors and agents together, is that of *Sainsbury* v. *Jones*. (*a*). The plaintiff's remedy is clearly at law; and I shall very much regret if, by lapse of time, he has lost his remedy there. The same misfortune was represented to exist in *Sainsbury* v. *Jones*, but was not allowed, and of course it could not be allowed, to influence the judgment. Here, probably, the negotiations which took place between the parties may have preserved the plaintiff's remedy. I have considered the Statute of 1865, which empowers the Court to award compensation in

Judgment.

(*a*) 5 M. & Cr. 1.

1868. Graham v. Powell.

lieu of specific performance; but I do not think that provision of the Statute applicable to a case like the present, which does not seek for specific performance, but simply asks for a return of the deposit from the agent, and that in the absence of the principals, because the contract cannot be carried out. That Act was intended to enable the Court, in dealing between vendors and vendees, to do justice by way of damages when there was a failure of contract; but it never was intended by it to transfer the common law right of action against an agent acting fraudulently or without authority, to the jurisdiction of this Court. This decision could have been obtained on a demurrer to the bill. The evidence on either side has not helped it in one way or the other; and I, therefore, dismiss the bill, with £7 10s. costs to defendant. If he does not accept this, bill dismissed without costs. If plaintiff does not submit—bill dismissed with costs.

BAMBERGER v. MCKAY.

Tax Sale—Injunction.

Where an action of ejectment had been brought by the purchaser of lands alleged to have been illegally sold for taxes, the Court declined to interfere by injunction to restrain the action. The proper course in such a case, in the event of the sale being found invalid, is for the owner to tender a deed to the purchaser for execution, and on his refusal to execute such a deed to apply to this Court for relief.

Motion for injunction to restrain an action at law.

Mr. *Fenton*, for the plaintiff.

Mr. *Curran*, contra.

Judgment. VANKOUGHNET, C.—Injunction refused, without prejudice to its renewal. But I think as the defendant has brought his action at law, and as the matter is now

before that (the proper) tribunal to try the question of the legality or validity of tax sales, I should not interfere. If the sale be held illegal, then plaintiff can tender a deed for execution, that the cloud on his title may be removed; and if the defendant will not remove it, he can amend his bill, and come here for relief. 1868.

CARROLL v. MCDONALD.

Practice—Notice of setting down demurrer—Style of cause.

The notice of setting down a demurrer for argument must contain the full style of cause.

This was a demurrer which had been set down by the demurring defendant to be argued. On being called on

Mr. *Hodgins*, for the plaintiff, objected that the notice of setting down contained only the short style of cause, "*Carroll* v. *McDonald*," which was not sufficient, and that the full style of cause should have been given.

Mr. *Spencer*, contra, insisted that the short style was sufficient: in affidavits even it has been held in England that it is not necessary to give all the names of plaintiffs and defendants, the style of the cause so far as to include the parties by, or against whom, any application is made, is all that is required.

VANKOUGHNET, C.—If the full style of cause be required in any case it should be used in setting down a cause to be disposed of on demurrer, or on examination of witnesses and hearing—one proceeding is as formal as another—no more decisive step can be taken than the hearing of a cause either on questions of law or questions of fact. If a full style of cause be required at all, it must be in such a proceeding as this—and I am not Judgment.

1868. aware of any practice which dispenses with the full style of cause in any case. It is to be regretted that parties should embarrass themselves and perplex the Court by creating a difficulty so easily avoided. I give effect to the objection as I have done in Chambers on notices of motion similar in form to the present. See forms in *Taylor's* orders.

Case struck out with costs.

ENGLISH v. ENGLISH.

Trust—Heirs—Costs.

Where a party claimed on the ground of a parol trust to be entitled to a conveyance of land from the heirs of the legal owner, and they required him to establish the trust by a suit, which he did.

Held, that he was not entitled under the circumstances to the costs of the suit.

Examination of witnesses and hearing at Hamilton.

Mr. *Robertson* for the plaintiff.

Mr. *Blake*, Q. C., for defendants.

Judgment. VANKOUGHNET, C.—I do not find any authority which would warrant me to order payment by plaintiff of the costs of the adult contestant defendants. The plaintiff succeeds, and I give him no costs against them; because, instead of taking a deed from the ancestor in his lifetime, he chooses, for purposes of his own, to wait; and after the ancestor's death comes here to establish against his representatives a trust—on oral evidence—with the nature of which it could not be expected that these defendants were necessarily familiar. I think they might, if they chose, fairly call upon plaintiff to establish it; although there was much proved in the case which they probably knew, or might have satisfied themselves of before trial.

1868.

KOELLA v. MCKENZIE.

Executors—Award between executor and co-executors.

One of several executors being indebted to the estate, the matter was left by himself and his co-executors to arbitration, and the arbitrators awarded a large sum against him:

Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor as he had chosen to submit the matter to the arbitrators, and in a suit by the executors he was decreed to pay the amount.

Examination and hearing at Hamilton.

Mr. *Craigie*, for the plaintiff.

Mr. *Blake*, Q. C., for the defendant.

VANKOUGHNET, C.—An award between the estate of the deceased and one of the executors, an alleged debtor, finds the latter indebted to the estate in, say $3,000, and orders payment, and the present bill is filed to enforce it. Judgment.

McKenzie, in his answer, alleges that the award is for too much; and objects that it ought not to be enforced, as it cannot bind the beneficiaries, who may file a bill to-morrow and have the accounts taken over again. I think this objection does not lie in the mouth of *McKenzie*, who submitted to the arbitration. He, at least, owes this sum to the estate. If he owes more—and he says he does not, and does not owe anything—he ought to pay it, either voluntarily or by compulsion; though his co-executors cannot claim more from him than the award, and may themselves be liable to the estate for anything beyond the award that *McKenzie* may owe. I think the co-executors are bound to get in this asset, and would be culpable if they did not. There is no remedy at law. Therefore, decree payment and costs—defendant to pay costs of co-defendant *Wardell*.

1868.

LOUNT v. WALKINGTON.

Tax-sale.

Where there were two lots on a particular street with the same number one on the south-side and one on the north-side, and neither the assessment nor the Sheriff's deed on a tax-sale thereof distinguished the one from the other:—the sale was held void for the uncertainty.

Examination of witnesses and hearing.

Mr. *Moss*, for the plaintiff.

Mr. *J. C. Hamilton*, for the defendant.

VANKOUGHNET, C.—I think that the sale gave the defendant no title or claim in or to 13 on the south side of Huron Street, and he should not have registered the Sheriff's deed against it. It is impossible to say which of the lots 13 on Huron Street was in arrears for taxes, or was intended for sale—whether the lot on the north or that on the south side; the description is too uncertain (in the absence, at all events, of extrinsic evidence) for application to either of the lots in particular. Moreover, the taxes on the lot on the south side would seem to have been paid. Decree for plaintiff, with costs, and deed to be removed from Registry, as against 13 south side Huron Street—plaintiff to repay defendant the $1.46 and interest, as usual. Sheriff's sale, so far as it affects this lot, to be set aside.

Judgment.

HAMILTON v. MCILROY.

Partnership accounts.

Money borrowed by a partner, with the knowledge and assent of his co-partner, is not necessarily chargeable by the creditor against the latter. For that purpose, it must appear that the money was borrowed on partnership account, or used for partnership purposes.

Appeal from the report of the Master at Hamilton.

1868.

Hamilton v. McIlroy.

Mr. *Strong*, Q. C., and Mr. *Burton*, Q. C., for the appeal.

Mr. *Blake*, Q. C., and Mr. *Wells*, contra.

VANKOUGHNET, C.—On the day before the commencement of the long vacation, this case was argued on an appeal from the Master's Report. A few days afterwards I was requested to suspend judgment, as the appellant's counsel desired to furnish either more additional evidence or argument. As soon after vacation as I saw in Court one of the learned counsel for the appellant, I asked if the case was to be spoken to again, and I was informed that it was, and that a day would be arranged for the purpose. In the mean time came the work of the Court of Appeal and the ordinary business of the Court; when on the eve of leaving for my circuit, I was informed that nothing further would be offered by the appellant in the case, and I was asked for judgment. This I am now prepared to give.

Judgment.

I think the Master has proceeded on a wrong principle in taking the account between these partners. He seems to have assumed that any money which one or other of the partners may have borrowed or obtained with or without the knowledge or assent of the other, and whether or not for partnership purposes, must necessarily have gone into the partnership business. The Master should not have drawn any such inference or conclusion. One partner may, with the assent of the other, have procured a very large sum of money, intended to be put into the business and used on partnership account, but never so applied. The inquiry, in order to charge the co-partner, must go beyond this; and for the purpose of ascertaining whether the money was actually paid or used on partnership account. Now I do not find on the evidence or exhibits—all of which I have carefully examined—enough to justify the Master in charging the plaintiff with any of the moneys borrowed by the defendant

1868.

Hamilton v. McIlroy.

from *Hiram Clark*, with the exception of the sum plaintiff actually received, nor to charge him with anything more than simple interest on that sum; for I do not find that plaintiff in any way assented to the terms on which defendant procured the money from *Clark*. Dr. *Hamilton*, it seems, made sacrifices about this time, to raise money for the partnership, and he called upon the defendant to provide funds; but there is nothing to shew that he had anything to do with the arrangement by which defendant procured these. Each partner seems to have raised money betimes the best way he could.

These observations apply also to the defendant's transactions with Mrs. *Farr* and Mrs. *Smith*. I find no evidence that these moneys went into the partnership business, or were even intended for it. If items 62 and 63 represent the note given to Mrs. *Smith*, or the moneys obtained on that note, then they should be disallowed; and if not, then I do not find evidence to shew that the moneys to which they refer went into the partnership business.

Judgment.

As to the $1,000 note in the Bank, I think the defendant should be charged with, or rather disallowed, the sum of $260 (if that be the correct amount) forwarded by him to his brother *S. McIlroy*. This sum appears to have belonged to the partnership, and was transmitted to *S. McIlory*, to be applied in part payment of the note; but *S. McIlory*, notwithstanding his letters to plaintiff, in which he appears to acknowledge that he was to apply the money received from defendant to retire the note, credited defendant with it on another account existing between them. This, I think, they must settle between themselves; but the plaintiff should not lose by it, and therefore should have the benefit of this sum, or his proportion of it, as partnership money.

With regard to the subject of interest, the proper course is to allow to each partner simple interest on

his advances, unless it appears that the one, with the sanction of the other, borrowed money for partnership purposes at a higher rate. 1868. Hamilton v. McIlroy

Besides the absence of evidence as to the application of the moneys referred to, there is against these claims of the defendant the positive testimony of the plaintiff himself, which the defendant has read, and the absence from the defendant's accounts rendered to the plaintiff, of some, if not all, of the items now insisted on.

The fifth ground of appeal must also prevail.

I give no costs, as some of the grounds of appeal were abandoned and disallowed.

YOKHAM v. HALL.

Tax-sale.

A tax-sale of land for more than was due is not rendered valid by 27 Vic. ch. 19, sec. 4.

Where two half-lots were assessed separately, a sale of the whole lot for the total amount was held to be invalid, notwithstanding that statute.

Examination of witnesses and hearing at Owen Sound.

Mr. *Moss* and Mr. *Creasor*, for the plaintiff.

Mr. *Strong*, Q. C., for the defendant.

VANKOUGHNET, C.—It is clear that the Sheriff's sale for taxes is invalid, unless cured by section 4 of chapter 19, 27th Victoria. If the Treasurer was right in uniting the halves of the lot, and charging the taxes as upon one whole lot, he was wrong in not reducing the rate Judgment.

1868.

Yokham v Hall.

for statute labor, which is less when charged upon one whole lot than upon the two halves of it assessed separately. This he did not do, as he added the whole rates assessed upon the two half lots; and for this excessive tax, the Sheriff sold. If the Treasurer had no right to unite the assessments, the sale would be equally bad. Then, does the Statute of 27 Victoria cure this error? I think not. Section 4 evidently contemplates that the land shall be sold only for the taxes due. It speaks of a sale for the taxes, which must mean the legal taxes. It exonerates the Sheriff and Treasurer from making certain inquiries; and then declares the sale for the taxes which the preceding sections of the Statute, as well as the older assessment laws, say shall be taxes in arrear for five years, valid. One object of the Statute is to afford to the owner of the land all possible protection. Another object is to make the purchaser at the sale safe. But the Legislature, I think, did not mean to sacrifice one to the other—while providing for the security as far as possible of the owner, they could not have meant that his land might be sold for any amount of taxes the Treasurer chose to impose upon them. It might as well be contended that the sale would be valid when there was but one year's arrears. The amount of the excess can make no difference whether it is five shillings or five pounds. It is not to be assumed that the Treasurer or the Sheriff would have accepted a less amount than the tax claimed had the owner offered the true amount. I think that the fourth section was meant merely to relieve the Sheriff or Treasurer from certain inquiries as to the value and position of the land, which this Court had held it was his duty to make before sacrificing thousands of dollars worth of property to obtain payment of a trifling sum for taxes. I think the plaintiff must have his costs of this part of the case, and the defendant his costs of that part on which the plaintiff failed, and that the sale must be declared void.

Judgment.

1868.

Box v. The Provincial Insurance Co.

Fire insurance—Insurable interest.

Where a person bought from a wharfinger 3,500 bushels of wheat, part of a larger quantity, and paid for it, but the wheat bought had not been separated from the rest, it was held that he had no insurable interest in the wheat.

Examination of witnesses and hearing at Guelph.

Mr. *Blain* and Mr. *Harding*, for the plaintiffs.

Mr. *Moss* and Mr. *Meyers*, for the defendants.

VanKoughnet, C.—In this case I am of opinion that no property in the wheat insured passed to the plaintiffs. *Todd*, the vendor, was also a wharfinger, and he sold to the plaintiff 3500 bushels of spring wheat, forming part of a much larger bulk quantity then in store. These 3500 bushels, or any portion thereof, were not separated from the mass of which they formed part; or in any way ascertained as distinct from the rest before the fire, by which they, and more of the wheat in bulk were destroyed. *Stockdale* v. *Dunlop* (*a*), *Busk* v. *Davis* (*b*), *Aldridge* v. *Johnson* (*c*). The plaintiffs had paid *Todd* the full value of 3500 bushels of wheat before insurance, and I suppose he might maintain an action against *Todd* for non-delivery of that quantity. The questions are, had he an insurable interest in an ascertained quantity of 3500 bushels of wheat? and if he had, was it that interest which he insured? or did he insure as the owner of a specific quantity of 3500 bushels? and if so insuring, can he insist that under it, he has a right to protect himself to the extent of the insurance money for damages which he could have recovered from *Todd*, for the non-delivery of the wheat when called for? The wheat clearly remained at *Todd's* risk, as no

Judgment.

(*a*) 6 M. & W. 224. (*b*) 2 M. & Sel. at p. 401. (*c*) 7 Ell. & B. 885.

1868.

Box v. Provincial Insurance Co.

property in it had passed to plaintiff. Though he had paid for it *Todd* could doubtless have insured it for its full value—could the plaintiffs? What the plaintiffs did was to insure the 3500 bushels of wheat as their property. They had no such property, but they had a right to claim some, but still unascertained 3500 bushels of wheat from *Todd*, or damages in lieu of it. Have they covered, or could they cover this right by the insurance which the plaintiffs effected. A fire policy naturally means an indemnity against loss by the destruction of property which can be consumed by fire. Now, the plaintiffs had no property in anything which was consumed by the fire; they had at most, a right to damages for breach of contract: was that covered by their insurance against fire? I understand that their insurance was effected upon 3500 bushels of wheat as their property. They had no 3500 bushels of wheat or any part of it as their property; and it seems to me therefore, that the insurance which they effected fails and cannot be enforced. Had the wheat been set apart before the fire the case would be different, as there would have been something then for the policy to cover or fasten on, they having had an inchoate right, and thus an interest at the time of insurance. In the case in 6 *Meeson & Welsby*, as explained by *Sutherland* v. *Pratt* (*a*), the Court held that the vendee of goods under a verbal contract could not insure them, even though the vendor might have delivered them according to promise. The case here seems to me a still stronger one against the assured. I have to deal with the question here as a Court of Law would have dealt with it, had a duly executed policy issued. I dismiss the bill with costs.

Judgment.

(*a*) 11 M. & W. 296.

1868.

COUPLAND v. SCHOOL TRUSTEES OF NOTTAWASAGA.

School law—Arbitration between trustees and rate-payers.

A dissent by school trustees from a decision of the rate-payers as to a site for the school, should be intimated promptly, and if not announced till after the expiration of the current year it is too late.

Examination of witnesses and hearing at Barrie.

Mr. *Moss* and Mr. *D. Boulton*, for the plaintiff.

Mr. *Boys*, for the defendant.

VANKOUGHNET, C.—It seems to me that it was too late for the Trustees to dissent from the choice of the meeting, after the then current year had expired; and that "*Currie's* Site," as it is called, selected in November, 1866, is, and remains the proper site for the School House.

Judgment.

Indeed, section 30 of the School Act (Con. Stat. p. 737) contemplates, I think, that the Trustees should express their dissent at the meeting at which the selection of the site is made; for the same meeting, or the rate-payers at that same meeting, are the parties to select one arbitrator in case of such dissent;—which implies that the dissent must be expressed then and there; otherwise, no choice of arbitrator could be made by such meeting. The Legislature intended that these proceedings should be as speedy, as little burdensome and expensive, and as little formal as possible. The Trustees are a body corporate, and must, doubtless, act together as Trustees. Their duty is to be present at the meeting; and, being present, there can be no difficulty in their—or in a majority of them—declaring, as a body, their dissent. They appear there in their character as Trustees, and a memorandum in writing, if necessary, could be made on the spot, signed by the Trustees or the majority, expressing such dissent, and calling on the meeting to name an arbitra-

1868.

Coupland v. School Trustees of Nottawasaga

tor. I have no doubt that this was the intention of the Legislature—despatch and simplicity were intended to mark the working of the School Act. The rate-payers were not to be harassed with several meetings. In a small locality, such as a school section, the selection of the site would have been canvassed over and over again before the meeting took place. Every one would go, there, prepared to vote, and, if necessary, to select an arbitrator; and there is no reason why—so far as the rate-payers and Trustees are concerned—the whole matter should not be disposed of at once. There is no doubt that the Trustees very often discharge these duties without thanks, and are frequently subject to annoyance. This misfortune, to a greater or less degree, befalls everyone who undertakes a public duty. The Court should protect Trustees, as far as possible, in the honest discharge of their duties; and I regret that the Trustees should in this case be subjected to costs; but they have left me no alternative. The fault is entirely their own. They have deliberately and persistently set at naught the vote of the rate-payers; and I cannot make the latter—and still less the plaintiffs, who are not in fault—pay costs, or their own costs even.

Judgment.

Decree: That the defendants, the two Trustees, pay the costs of plaintiff; that they be restrained from proceeding with the erection of the new school-house, or expending any money thereon, or with the erection of a school-house on any other site than that on *Currie's* corner, in case the land required therefor can be obtained from *Currie* for $25, as agreed on—as to which inquiry.

1868.

CORRIGAN v. CORRIGAN.

Undue influence.

A person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice. A bill by his heir impeaching the deed was dismissed.

Examination of witnesses and hearing at Goderich.

Mr. *Moss* and Mr. *Toms*, for the plaintiff.

Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., for the defendants.

VANKOUGHNET, C.—This is not a case of influence or of confidential relation, or of fraud, in my view of the evidence. The whole question is, I think, narrowed down to these considerations. 1st: Was the deceased at the time of his executing the deed in such a state of intoxication that he did not know or understand what he was doing, and that advantage was taken of him in this state to procure the deed from him. 2nd: or had he by a long course of dissipation become so weakened in intellect that he had lost all mental capacity for business, and was incapable of volition; and so, at the mercy of any one who sought to extract anything from him. Judgment.

As to the first, I think I must find that the deceased was not in a state of actual intoxication at the time he executed the deed in question, though he had but just partially recovered from a debauch. For this finding I rely upon the evidence of Mr. *Rastall*, to which I give entire credence. I also think upon the same evidence that he knew what he was doing, and that no advantage or undue means were taken or used to obtain from him the deed. He had spoken long before of making a deed to his wife of the property. As to the second consideration, there can be no doubt that the deceased was the

1868.

Corrigan v. Corrigan.

victim of intemperance—a slave to strong drink—but like most other such slaves he had his moments of freedom from it; even down to the last day of his life: on which it seems he was able to understand and transact business. This appears from the witnesses of the plaintiff and defendant. On the occasion in question the evidence of plaintiff's witnesses shews that before he met the witness *Rastall*, he had been drinking hard, and that at times, when under the influence of drink, though he could understand and converse, he could not walk. He had sent up one *Pinkerton* to seek for him an interview with his wife, which was refused. Later in the day, having slept and become comparatively sober, he and his wife's brother are met by *Rastall*, whom the deceased immediately requests to accompany him to the house of his wife's father, where she was residing. Deceased had been long seeking for reconciliation with his wife. *Rastall* went with him there. For two hours deceased, his wife, and *Rastall*, talked over the difficulties between husband and wife. The husband retorted upon his wife at times, when she made accusations against him. Nothing was drank during this time. Deceased must have been getting more sober all the while. After a long conversation his wife asked him "How about the deed"? He said she might have had it long ago. He called for it. She warned him, and so did *Rastall* of the consequences of signing it—these were explained to him. He, in his senses, was a highly intelligent man, and accustomed to draw deeds. Everything was done to make the act his own deliberate voluntary act. He spoke of the deed afterwards—sought to get his wife back afterwards—but he had not reformed. There was nothing unnatural in his making a deed to his wife—nothing surprising under the circumstances; they had no children; but if he reformed and they lived together again, they might hope for a family—at all events he might think the property safer in his wife's hands than in his own—or that he owed

Judgment.

her reparation. Of the wisdom of the act it is not for me to judge. That, every man *compos mentis*, and not subject to improper exercise of influence, must judge of for himself. I cannot set aside this deed, but must dismiss the bill. 1868. Corrigan v. Corrigan.

As to the question of costs.—I have felt great difficulty in dealing with the costs in this case. As a general rule, costs should follow the result; and there is another general rule that a party charging fraud and failing to establish it must pay the costs. Here the plaintiff has failed—and in a case in which he charged fraud. The fraud charged was, however, this: that the defendant (*Doyle*), by using the influence he possessed over the plaintiff, induced him, when in a state of mind and body unfit for the transaction of business, to execute the deed impeached. There was a great deal of evidence to justify this charge, and I would have held it established but for the testimony of *Rastall*. It was proved that this defendant was very intimate with the deceased—his brother-in-law. It was proved that during the day (on the evening of which the deed was executed) the deceased was in a hopeless state of intoxication: that later on, towards evening, he was seen in the company of the defendant *Doyle;* that his wife had previously refused to see him. What had passed between him and defendant before *Rastall* found them we do not know. That deceased was more sober when he executed the deed than when he was seen with defendant in the street is evident, from the length of time which elapsed intermediately, and during which, it appears, he had not drunk liquor. The defendant was a solicitor. He took the deed to himself without any instructions from the deceased, or any one on his behalf; he called in no professional man to deceased's aid. It is true he afterwards executed a deed to his sister; but a few months later he took back a deed to himself from her, agreeing to pay her a very large annuity. She was in a dying state at the time, and lived Judgment.

1868.

Corrigan v. Corrigan.

but a short time. Now all this was calculated to rouse the suspicions of the family of the deceased—the defendant's own conduct and acts having contributed to this. It does not appear that the plaintiff ever knew or heard what *Rastall* could prove. I think there were just grounds for inquiry, which defendant might have averted had he pursued a more prudent course in the matter, and that it is not, therefore, a case in which I should give costs against the plaintiff.

Roe v. Smith.

Insolvent law.—Preference in foreign country.

An insolvent absconded to the United States, taking money with him He was followed there by the agent of a person in this country who had become surety for him, and, by the threats of criminal proceedings, induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs.

Examination and hearing at London.

Mr. *Roaf*, Q. C., for the plaintiff.

Mr. *Strong*, Q. C., for the defendant.

Judgment.

VanKoughnet, C.—This is an action by the official assignee in Insolvency to recover back from the defendant a sum of money received by him from the insolvent under the following circumstances: The defendant was indorser for the insolvent on a promissory note for about $1100, not yet due, and held by certain persons, a firm of merchants in Montreal. The defendant, in the month of December, 1866, hearing that the insolvent had absconded, or was about to abscond from the Province, caused him to be pursued across the Suspension Bridge at the Falls of Niagara, into the United States. There the defendant's agent met the insolvent, and fol-

1868.

Roe v. Smith.

lowing him into a private room of an hotel, threatened to institute criminal proceedings against him, and have him arrested unless he at once gave him a sum of money sufficient to meet the outstanding note then shortly to mature. The insolvent at first denied that he had any money, but on the agent insisting that he had, and that he must give him the requisite sum, the insolvent paid the latter $880, the sum sought to be recovered here. The agent swears that this money was never passed to defendant's credit at the Bank, but was retained by him, the agent, towards paying the note; and that when the note matured defendant wrote to the holders of it to draw upon him for the amount, which they did some days afterwards, when their draft was paid with this $880, and moneys of the defendant. The attachment in insolvency issued the 26th December, 1866. The defendant contends—1st: that he was not a creditor of the insolvent at the time that he received this $880, as his liability for the insolvent was only a contingent one, and that in fact he received the money to pay the holders of the note, and that he retained and applied it for that purpose, and that they, not he, were the creditors of the insolvent in the matter.

Judgment.

2nd. That the money was paid under pressure, and even duress, and is not, therefore, a payment rendered void by the Insolvency Acts.

3rd. That the payment to him was not one "whereby he obtained an unjust preference over the other creditors of the insolvent," inasmuch as the payment was made in a foreign country when the insolvent was beyond the reach of the insolvency laws, and in money which could not have been followed or got at there or here, and which the defendant by his superior diligence procured, and that the other creditors cannot be considered as having lost what they never had nor could get. There could be no doubt in this case of the insolvency of the

1869.

Poe v. Smith

maker of the note at the time he paid the money to the defendant or his agent, and that the defendant knew it. In the old Insolvency Act (in section 57, chapter 18, of the Consolidated Statutes of Upper Canada), the debtor, on the eve of insolvency, is prohibited from making a voluntary payment or assignment of property to a creditor or to a surety for him. In the Insolvent Act of 1864, nothing is said about the payment being voluntary, and it is the creditor only and not the surety who is inhibited from receiving payment or security for a debt; the Legislature have themselves made the distinction between surety and creditor in the two acts referred to. The surety is not a creditor till he pays the money. It is true, the mischief intended to be prevented by the Act may be the same. What is intended to be secured is the equal and rateable division of the insolvent's estate among all his creditors, and this would be interfered with if one creditor could, through the means or agency, or act of a surety, obtain from the debtor money to pay him in full. But then should not he be the person accountable and not the surety? In the older act the words are not merely payment to the creditor, but to any one in trust for him. I should think, however, that a payment to any one in trust for a creditor was a payment to the creditor, though the Legislature, from greater caution, have made use of the additional words. Subsection 5 of section 12 is referred to as interpreting a creditor to mean or rather include a surety. This, however, is not so, because the primary and secondary liability there referred to is that of the insolvent and not of the creditor. Sub-section 5 of section 8 was not referred to on the argument—it would seem to cover such a case as the present, for under the word "person" may be included a surety as well as a mere stranger. In my view of the case it is not, however, necessary to pronounce any opinion on this question; for I think that the payment here to the surety or the preference obtained by him was not in fraud of the Insolvency Laws,

Judgment.

1868.

Roe v. Smith.

as not being a payment whereby any other creditor was injured. The money which was handed over to the defendant was not within reach of our laws; it would not have formed any part of the insolvent's estate for distribution. It had been withdrawn from that estate, and was beyond the reach of any assignee of it, and could not have benefited the creditors. I think, therefore, that there was nothing unjust in the defendants having obtained it; that he secured no unjust preference by it, and that neither the policy nor the spirit, nor even the terms of the Insolvency Law were violated by it, there having been no pre-arrangement between the defendant and the insolvent for such payment, but, on the contrary, it having been made under pressure, amounting almost to duress.

Bill dismissed with costs.

DAVIDSON v. DOUGLAS.

Priority—Insolvency—22 Victoria—Solicitor's lien.

G. recovered a judgment against *D.*, and afterwards, though in insolvent circumstances, assigned the same by two assignments to his attorney, one for costs due him by *G.*, and the other for a debt due to *R.* by *G.* Afterwards, *C.* obtained a judgment against *G.*, and attached the debt so due to him by *D.*, and gave notice of the attachment to *D.* before the assignee of *G.* had given notice of his assignments. *D.* paid the moneys due to *G.* by himself to the Sheriff, under an execution issued at the instance of the assignee of *G.*

Held (1st), that the mere fact of *C.* having been the first to give notice could not entitle him to priority over the assignee of *G.*, but that, by reason of the insolvency of *G.*, the assignments were void under Statute 22 Victoria, chapter 96, section 9.

(2nd), That the solicitor of *G.* must be restricted to the costs incurred by him in the action brought by *G.* against *D.*, and that *R.* must stand as an ordinary creditor.

The facts of this case are ly set out in the report

1868. Davidson v. Douglas.

of the cause on the original hearing, *ante* volume xii. page 187.

The inquiry directed by that jndgment, as to the insolvency of *Gibb* at the date of the execution of the assignments of the debt to *Dunsford* and to *Ray*, having been proceeded with before the Master at Lindsay, he made his report to the effect that *Gibb* was then insolvent. From that report the defendants *Dunsford* and *Ray* appealed, which appeal was brought on at the same time as the hearing on further directions.

Mr. *Hector Cameron*, for the plaintiff.

Mr. *J. A. Boyd*, for defendants *Dunsford* and *Ray*.

Mr. *Bell*, Q. C., and Mr. *Crickmore*, for defendant *Douglas*.

Judgment.

SPRAGGE, V. C.—Upon the question of priority between *Dunsford* and *Ray* on the one hand, and *Douglas* on the other, the following are the material facts :

The verdict in *Gibb* v. *Davidson* was rendered early in March, 1863. On the 16th of March, 1863, *Gibb* assigned the moneys coming to him in his suit against *Davidson*, to *Dunsford*, by two assignments, one for the debt due to *Dunsford* himself, being for costs due to him as Solicitor for *Gibb*, the other for a debt due by *Gibb* to *Ray*.

In April, 1863, *Douglas*, having obtained a judgment against *Gibb*, attached the moneys due to him by *Davidson*, and gave notice of the attachment to *Davidson*. Notice was given 20th November, 1863, by *Dunsford* to *Davidson* of assignment by *Gibb* to *Dunsford* for his *Dunsford's* benefit.

1868.

Davidson v. Douglas.

The like notice, 1st December, 1863, of assignment to *Dunsford* for *Ray's* benefit. Judgment recovered, *Gibb* v. *Davidson*, December, 1863.

The attachment having been prosecuted by *Douglas* against *Davidson* as garnishee, an order was made on the 5th of February, 1864, for a writ to issue against *Davidson*, which writ must have issued shortly afterwards as *Davidson* communicated the order and writ to his Solicitor on the 1st of March, 1864.

In March, 1864, a writ was placed in the Sheriff's hands in *Gibb* v. *Davidson*, but proceedings were afterwards stayed until June following, and, on the 3rd of that month the Sheriff, having sent out a bailiff, *Davidson* went to the Sheriff's office and paid the money due on the execution, which money (less Sheriff's fees) was paid into the hands of *Dunsford*, he being plaintiff's attorney in the suit, on the same day.

Judgment.

On behalf of *Douglas*, priority is claimed for him over the assignment by reason of his having given notice to *Davidson* of his attachment, before notice was given by *Dunsford* to *Davidson* of his assignments. But this is attributing to the attaching order more weight than it is entitled to, in fact placing it upon the same footing as an assignment or a security. The effect of an attaching order by itself, and of notice to the garnishee before order for payment is decided to be not to give any lien or security, but to prevent the garnishee from paying his debt to the judgment debtor: *Hobson* v. *Totten* (*a*), *Holmes* v. *Hilton* (*b*), *Turner* v. *Jones* (*c*), *In re Jones* (*d*), *Ex parte Kelly* (*d*), *McGinnis* v. *Yorkville* (*e*). And this is quite in accordance with the principle established in *Beavan* v. *Lord Oxford* (*f*), and *Scott* v. *Lord*

(*a*) 5 E. & B. 77-8, 80-1.
(*b*) Ib. 65.
(*c*) 1 H. & N. 378.
(*d*) 7 C. P. U. C. 149.
(*e*) 21 Q. B. U. C. 163.
(*f*) 6 D. M. & G. 492.

1868.

Davidson v. Douglas.

Hastings (*a*). A judgment creditor, having a judgment, operating as a charge, or having a charging order, is not upon the same footing as an assignee; his judgment or charging order operating only upon what the judgment debtor has, and not upon what he has parted with, although, as in the last named case, the assignee has omitted to give notice. And, as one of the assignments in this case was in respect of costs, I may here mention two cases, *Haynes* v. *Cooper* (*b*) and *Lisdell* v. *Conyngham* (*c*), in which it was held that the lien of an attorney is not affected by proceedings in attachment.

It is not necessary to determine the effect of an order to pay, in garnishee proceedings, or what I take to be equivalent, an order that a writ may issue, because in this case, before the proceedings had reached that stage notice of the assignment was given by *Dunsford* to *Davidson*.

Judgment.

So far, therefore, as between the assignee and the attaching creditor, I should hold the assignee entitled. But, then it is objected that *Gibb*, the assignor, was insolvent, when he made the assignment; and that it is void under Statute 22 Victoria. Upon this, these questions present themselves. If *Gibb* was insolvent, have the assignees any rights independently of the assignment. One of the assignments was in respect of costs, and the assignee, *Dunsford*, claims that he is entitled out of the moneys due to his client from *Davidson*, to all the costs due to him; while *Douglas* seeks to restrict him to the costs in that particular suit. The question, therefore, stands thus: If *Gibb* was not in insolvent circumstances the assignments will stand good as to both *Kay* and *Dunsford*. If he was, the assignment in favor of *Ray* is void under the Statute, and as to the assignment in favor of

(*a*) 4 K. & J. 633. (*b*) 10 L. T. N. S. 38.
(*c*) 28 L. J. Ex. 213.

Dunsford, he may have rights independently of it, *i. e.*, either to all the costs due to him by his client *Gibb*, or only to his costs in the suit of *Gibb* v. *Davidson*. 1868. Davidson v. Douglas.

It becomes necessary to decide the question of insolvency, because, whatever may be the rights of *Dunsford*, *Ray* has no rights beyond any other creditor, outside of the assignment. I have no doubt that *Gibb* considered himself solvent, and it is very possible that if his creditors had forborne to press him, he might have been able to overcome his difficulties—"to work through" as it is called; but, in considering the question of the solvency or insolvency of a debtor, I do not think that we can properly look upon his position from a more favorable point of view than this, to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it will bring in the market at a forced sale; or at a sale when the seller cannot await his opportunities, but must sell; and I think the Master was right in making a deduction from the estimated value. The evidence of the Sheriff fully warranted the deduction of twenty per cent. which he made; he could not have deducted less; my doubt is whether he should not have deducted more. I will state shortly, what I consider proved as the value of the real and personal property of *Gibb*: Judgment.

His real estate		$11,500
Less 20 per cent., to be deducted as above		2,300
		9,200
Less mortgage on Fenelon lot		1,500
		7,700
Personal chattels, mortgage, and debt against *Davidson*		4,400
		$12,100

1868.

Davidson v. Douglas.

I have taken the personal chattels at the amount for which they sold at Sheriff's sale. His indebtedness without the claim of *Keenan*, I make about $1,246. *Keenan's* claim amounted to $900, and is disputed by *Gibb*. Some debt to *Keenan* I understand to have been included in the mortgage to the Bank of Upper Canada, but I do not understand this claim to have been so included; *Gibb* does not say it was, but on the contrary, that he considered that he owed *Keenan* nothing at that time; and it appears that the accounts between them have been the subject of an arbitration since, at which $136 was awarded as due to *Keenan*. *Gibb* says that since the assignment he paid *Keenan* $1,350, and assigned him a mortgage of $400: these sums with the sum awarded, amount to $1886, of which he only makes out that $620 accrued due since the assignment, this sum being for two years' rent; so that according to *Gibb's* own shewing, as I read his evidence, he must have owed *Keenan* $1,266 at the date of the assignment. The claim, however, is only $900, he does not say whether any of this was included in the mortgage to the Bank. If this $900 claim be added to *Gibb's* indebtedness, it would turn the scale greatly against him. But even without it there seems sufficient. The debts are set down without interest or costs. At the date of the assignment there were six writs of execution in the hands of the Sheriff amounting in the aggregate to over $6000, and a number of others followed at intervals. The costs in all these suits, and the interest, must have made the liabilities of *Gibb* very considerably exceed his assets, even without taking the *Keenan* claim into account against him. At the same time I do not mean to say that the *Keenan* claim ought to be discarded. I think it is impossible to say that the Master is wrong in his finding that *Gibb* was insolvent at the date of the assignment.

Judgment.

I think that to bring an assignment within the

1868.

Davidson v. Douglas.

Fraudulent Preference Act, 22 Vic., three things are requisite: that the assignor should at the time be in insolvent circumstances, or know himself to be on the eve of insolvency; that he should make the assignment with intent to defeat or delay creditors, or to give one or more a preference over the others; and that the thing assigned should be within the Act. There is no doubt as to the meaning of the words "in insolvent circumstances,"—that it is not necessary that the debtor should be either technically, a declared, insolvent; or openly and notoriously insolvent. The Statute has been acted upon in many cases where the debtor was neither the one nor the other; the words of the Act having been interpreted as they should be according to their plain ordinary grammatical meaning; and in that sense I concur with the Master's finding. As to the intent of *Gibb* in making this assignment: looking at his circumstances and the number and amount of executions against him, and the suits ripening into judgment and execution that must have been then pending, the intent to prefer *Dunsford* and *Ray* to other creditors is to be inferred. As to the thing assigned, I think it is clearly within the Act, which enumerates goods, chattels, or effects, bills, bonds, notes, or other security or property. The question then arises as to the rights of *Dunsford*, if any, in respect of costs due to him as solicitor, by *Gibb*. He was attorney for *Gibb* in the action against *Davidson*, and *Gibb* was also indebted to him otherwise for professional services. The question is, whether he is entitled out of the moneys recovered in *Gibb* v. *Davidson* to the costs incurred in that suit only, or to all that was due to him from *Gibb* for professional services.

Judgment.

In cases in which it has been necessary for a Solicitor to come to the Court to obtain his costs out of a fund, it has been held that he is only entitled to his costs in the cause in which judgment has been recovered; and

1868.

Davidson v. Douglas.

not to all costs due for professional services, though his right of retainer extend beyond this, *i. e.*, for all costs. This was the opinion of Sir *John Leach* in *Lower* v. *Church* (*a*); which was followed in *Hall* v. *Love* (*b*). The same point was decided in the same way in *Hough* v. *Edwards* (*c*), and in *Boyer* v. *Holland* (*d*), a ruling of Sir *Thomas Plumer* in *Worrall* v. *Johnson* (*e*), intimating a different opinion being disapproved of.

It has occurred to me, the money having actually reached the hands of *Dunsford*, whether that circumstance did not entitle him to retain out of it for the whole amount due to him for professional services. If these moneys had come properly to his hands, such would probably be his right. This was conceded by counsel, who argued against the Solicitor's right in *Worrell* v. *Johnson* ; and in *Hough* v. *Edwards* Mr. Baron *Martin* assumed that such was the right of the Solicitor. But in this case, at the time that these moneys came into the hands of *Dunsford*, his client had ceased to have a right to receive them. They had been intercepted by the garnishee proceedings ; and execution had issued against *Davidson* for not paying them to *Douglas*. Putting aside the assignments to *Dunsford*, they came into his hands wrongfully, and he cannot found any right upon the circumstance of their being in his hands. His position must be the same as if the moneys were still outstanding, a fund in Court, or in the hands of *Davidson*.

Judgment.

The short result is that the assignment to *Dunsford* cannot stand, being void by reason of the insolvency of *Gibb*, that *Ray* must stand as an ordinary creditor, and that *Dunsford* has no lien for costs beyond his costs in

(*a*) 4 Mad. 391.
(*b*) 1 Hare, 571.
(*c*) 1 H. & N. 173.
(*d*) 4 M. & C. 354.
(*e*) 2 J. & W. 214.

Gibb v. *Davidson*, and that *Douglas* or rather *John* and *Thomas Douglas* are entitled to the moneys recovered in *Gibb* v. *Davidson*, less the costs of *Dunsford* in that suit. The appeal from the Master must be overruled with costs, and the unsuccessful parties, *Dunsford* and *Ray* must pay the costs of the suit to the plaintiff, and to the defendants *Douglas*. I regret very much that there should have been so much litigation, when so small an amount was in question. It has all arisen out of the defect in our Statute law upon the subject of garnishee proceedings which I pointed out in my judgment upon the hearing, and which I took occasion to refer to in my judgment in *Farquhar* v. *The City of Toronto* (*a*.)

1868.

Davidson v. Douglas.

In Re Ponton.

Practice—Appeal from certificate of taxation.

The proper mode of appealing from the Master's certificate of taxation is by motion and not by petition.

Appeal from the Master's certificate.

Mr. *J. A. Boyd*, for the appeal.

Mr. *M. Crombie*, contra.

Mowat, V. C.—This was a motion by way of appeal from the Master's certificate of taxation of a solicitor's bill of costs. The motion was on the part of the solicitor. On its coming on, counsel for the client objected, that the appeal should have been by petition, according to the practice prevailing in England when a Court of Chancery was established in this country and it was said, that the Order of this Court (*b*) allowing

Judgment.

(*a*) 12 Grant, 186.

(*b*) G. O. 29th June, 1861, Cons. Ord. 1868, No. 253.

1868.

In re Pontor.

appeals by motion is in terms confined to reports, and does not apply to certificates like this; and that the Order was so construed by the late Vice-Chancellor *Esten* in an unreported case of the *Buffalo and Lake Huron Railway Co.* v. *Whitehead.* That it was intended by that Order to exclude from its operation certificates like this no one supposes. If for the more important matters for which the restriction would limit the order the simple procedure of a motion is sufficient, *a fortiori* should it be sufficient for the less important matters to which the cumbrous practice formerly prevailing is said to be still in force; and such a construction as was contended for can only be put upon the Order if it is susceptible of no other. Notwithstanding the unreported decision referred to, motions like the present appear to have been frequently made since without objection; and after conferring with the Chancellor and my brother *Spragge*, and looking into the authorities, we have all come to the conclusion that a motion is proper.

Judgment.

The argument for a different construction assumes that a certificate like this is not a report; is never, in our books, called a report. But that is a mistake. In *Grant's* Practice (*a*), it is said that "reports consist not only of the two principal classes of separate reports, and the Master's general report, but of others which are also called certificates, such as reports or certificates * * of costs," and other like matters which the author enumerates. In *Smith's* Practice (*b*) one class of "reports" is said to be those which do not require to be confirmed by the Court; and this class is said to include "certificates of costs" and other reports of a like nature, which in common parlance are usually called "certificates," to distinguish them from what are

(*a*) Ch. 54, pl. 2, 5th ed. p. 339.

(*b*) 2nd Ed. p. 357; see also pp. 389, 390.

1868.

In re Ponton

otherwise called "general reports," and "separate reports" (*a*). These statements of the text writers are in accordance with express decisions. In *Chennel* v. *Martin* (*b*), the Vice-Chancellor delivered an elaborate judgment reviewing the antecedent authorities as to the alleged distinction between reports and certificates; and the following are extracts from his judgment, which has been referred to as an authority ever since: "I am not aware of any distinction between a Master's report, and a Master's certificate. The Practical Registrar defines a certificate to be a matter in writing under the hands of officers of the Court, and defines a report to be a Master's certificate to the Court. Lord *Clarendon's* Orders, and the order of the 29th October, 1692, directing the filing of reports, speaks of certificates or reports as being the same things, and subject to the same rules. In the ninth of the New Orders, the language is: 'If an answer be *certified* sufficient, it shall be deemed to be so from the date of the *report*.'" After other references on the same point, the learned Judge said: "Though we apply the term 'report' to the more lengthened productions of a Master, and the term 'certificate' to his shorter statements, it is, I think, clear, that all his reports are certificates, and all his certificates are reports." Vice-Chancellor *Esten's* attention was not called to this case, or to any of the authorities to which it refers, or to the statements I have cited from the text books; and we are all agreed that his decision, under such circumstances, ought not to stand in the way of a correct interpretation of the Order now.

Judgment.

(*a*) See also 2 Daniel's Practice, ch. 25, sec. 8, p. 1475, Perkins's ed. from 2nd Eng. ed.

(*b*) 4 Sim. 340.

1868.

BIGGAR vs. ALLAN.

Amending bill at the hearing——Injunction to stay closing lights—Laches—Costs.

The plaintiff filed his bill to restrain certain of the defendants from closing windows which looked across a lane, of which plaintiff claimed to be owner, and on which the defendants had been erecting a building sometime before the commencement of the suit. It appeared in evidence that the plaintiff had no title to the lane, but that the former owner of it had given him to understand that the lane would never be built on. At the hearing the plaintiff was allowed to amend his bill, by striking out the part claiming title to the lane; and a perpetual injunction was granted, restraining the defendants from closing the lane—the delay in filing the bill having been satisfactorily accounted for,—with costs, less those occasioned by plaintiff's claiming title to the lane.

Statement.

The plaintiff was the owner of Lot No. 1, on the north side of Mill Street, in the village of Elora, on which was erected the Commercial Hotel. Several windows on the westerly end of this building overlooked a strip of land formerly used as a lane. This strip, as well as lot No. 1, were formerly owned by the late *Charles Allan*, who sold the lot to the plaintiff's predecessor, previously to the erection of the hotel. Early in the year 1867, the widow of Mr. *Allan*, claiming to own the lane, commenced to erect a building on it, which would completely close up the contiguous windows of the hotel. After some progress had been made with this building, the plaintiff filed his bill against Mrs. *Allan*, claiming that he was the owner of the lane, subject to a right of way over it by the representatives of Mr. *Charles Allan*, and praying an injunction against closing the lights in question.

The case came on for examination of witnesses, and hearing at Guelph, at the Autumn circuit of 1867, before the Chancellor.

It appeared in evidence that Mr. *Charles Allan* had sold and conveyed lot No. 1, on the north side of Mill

1868.

Piggar v. Allan.

Street, to one *George Dolman*, under whom the plaintiff claimed; the conveyance referred for the boundaries of the lot, to the registered plan of part of the village of Elora. On referring to this plan, a line appeared to mark the westerly boundary of the lot, while another line seemed to shew the easterly boundary of the next lot on the west, as if the lane had been a reserve not covered by either lot. It further appeared that when the hotel was building, Mr. *George Allan* had given *Dolman* to understand that the lane should not be built upon opposite the adjacent houses.

Mr. *Drew*, for the plaintiff, contended that the deed to *Dolman* covered the lane, and that, under the circumstances, *Charles Allan's* representatives were estopped from closing the windows overlooking the lane, and that the plaintiff was entitled to have the interim injunction granted, in the cause made perpetual.

Mr. *McGregor* and Mr. *Guthrie*, for the defendants, contended that the lane was not covered by the plaintiff's deeds; that the evidence of Mr. *Charles Allan's* alleged representations was unsatisfactory, and that the plaintiff had been guilty of laches in not applying to the Court sooner.

Judgment.

VanKoughnet, C.—I think the plaintiff fails to make out that lot 1, sold to him, carried any more land, or went beyond the limits of the lot, as defined on the registered plan; and I allow the bill therefore to be amended in this respect. I do not think the defendant can be prejudiced by this amendment. The contest between the parties is as to the right of defendants to close up the lane, or piece of land in dispute. I do not think a case made out to shew that *Allan* had ever granted the use of this land as a lane, or a roadway to any one; and therefore I cannot decree in the plaintiff's favor in this respect. I think the evidence does shew that *Allan*

1868.

Biggar v. Allan.

intended, and expressed his intention, to keep this lane open but for his own use, merely—as a means of approach to his own residence. I think this appears, also, from the manner in which this parcel is described on the registered plan. It is there described, not as a lot, but as a vacant space. It lies between lots 1 and 2, and was not intended to be numbered as a village lot. I think this coupled with the statement in the lease, to *Fraser*, of the existence of this lane, and declarations of *Allan*, shew that it was intended to be kept open; but if so, does it appear that other parties who had no right to pass over it, as a way, or lane, have any intetest in keeping it open? It is said that they have, for the purpose of obtaining light; and it is proved that the windows of the buildings, on the sides bordering on the lane, were put up with the sanction and permission of *Allan*. This coupled with the evidence as to this piece of land being left open as a lane—which I have already adverted to—I think, shews that *Allan* sold to these

Judgment.

people on the understanding, that the light obtained through these windows should not be obstructed; or, at all events, that he sanctioned the buildings being put up with windows on this lane.

I do not think the plaintiff here debarred by the delay which occurred in filing the bill. Each party asserted and rested upon a claim of right. The defendant claims the right to shut out the light obtained through this lane. She was not deceived by any act or delay of the plaintiff. She persists in asserting that right, and must, I think, take the consequences and submit to the loss she has brought upon herself. On the question of costs, I may require to look at the affidavits on which the injunction was obtained. The plaintiff is to have so much of the costs of the suit against Mrs. *Allan*, including the motion for injunction as related to the right to have the light unobstructed by defendant; Mrs. *Allan*, defendant to have the costs of so much of

the suit as related to the claim for the use of the lane on injunction motion, as well as on the other proceedings. In other words, plaintiff to have the costs of the suit, less the costs created by his claim to the use of the lane as a passage way, which are to be deducted.

1868.

Biggar v. Allan.

McCargar v. McKinnon.

Executors, duties and liabilities of—Income, what it means—Married Women's Act, power under—Practice—Form of reports.

Executors should proceed with promptitude to realize the assets of the estate; and the law presumes that as a general rule a year should be sufficient for this purpose. They should exercise a reasonable discretion as to suing the debtors of the estate, and should preserve evidence of having done so in the case of uncollected debts, the onus of proof being on them, and not on the legatees. But where the result proves unfortunate they are not charged with the loss, though the Court should not concur in the propriety of the course which in the *bona fide* exercise of their discretion they took. A delay of ten months which resulted in the loss of a debt, was held to require explanation.

A charge on all the property and income of a company was held not to give a charge on debts, except so far as they represented income; and the term "income" was held in such a case to mean net earnings, after providing for current expenses.

Under the Married Women's Act, a *feme coverte* was held competent to bind her interest as residuary legatee by her written authority to executors, given and acted upon in good faith, to accept land in satisfaction of a debt due to the estate, without evidence of the husband's having concurred in giving the authority.

A report, like a decree in equity, or the entry of a judgment at law, should state results only, and should not set forth the evidence, arguments, or reasons on which the conclusions are arrived at. Where a decree directs the Master to state his reasons, they should be stated briefly. It is not proper, in an administration suit, to append to the report a copy of the will.

This was an appeal from the report of the Master at Brantford, dated 28th August, 1868, made under an

1868.

McCargar v. McKinnon.

order, dated 11th January, 1867, for the administration of the estate of *John Jackson*, who died in January, 1858. The appeal was argued on the 18th November, 1868.

The appeal related principally to certain debts which were due to the deceased, and with which the plaintiffs claimed that the Master should have charged the executors as having been lost through their neglect of duty. The debts referred to were the following:

(1). Balance of a promissory note of *John H. Rogers*, dated 1st March, 1856	$93 75
(2). A promissory note of *W. H. Lindsay* ...	38 90
(3). A debt against the Grand River Navigation Company, for which the executors obtained an award for.....	2368 85
(4). A debt of *John Turner's* for which the executors recovered a judgment for	4042 64

Mr. *E. B. Wood*, for the appeal, cited *Lett* v. *The Commercial Bank* (*a*), *The Royal Canadian Bank* v. *Mitchell* (*b*), *Chamberlain* v. *McDonald* (*c*), *Styles* v. *Grey* (*d*), *Chisholm* v. *Barnard* (*e*), *Hope* v. *Beard* (*f*), *Blain* v. *Terryberry* (*g*).

Mr. *Blake*, Q. C., contra.

Judgment.

MOWAT, V. C.—The Master has dealt with the items which are the subject of this appeal on the assumption that the burden was on the plaintiffs of proving against the executors that the debtors were solvent, and that if promptly sued the debts would have been recovered. That is not the rule. It is more easy for executors to

(*a*) 24 Q. B. U. C. 552.
(*b*) 14 Gr. 412.
(*c*) 14 Gr. 447.
(*d*) 16 Sim. 230.
(*e*) 10 G. R. 479.
(*f*) 8 Gr. 380.
(*g*) 11 Gr. 2866.

1868.

McCargar v. McKinnon.

preserve the evidence of those facts which induced them to sue or abstain from suing, than for legatees, infants perhaps at the time, to prove, years afterwards, the solvency or sufficiency of the various debtors of the estate; and the law accordingly puts the burden of proof on such questions, to a considerable extent, upon the executors. The Chancellor pointed this out in *Chisholm* v. *Barnard* (*a*), where another Master had fallen into the same error as the Master here has done. His Lordship there observed: "The Master appears to have acted under the impression that it was the duty of the guardian to make out that the executors could have realised every asset of the estate and wilfully made away with any portion of it which had disappeared; and that, unless this was done, he was bound to presume that they had acted rightly, and could not better have discharged their duty. This is not so. While the Court will not exact more from trustees than such conduct as a prudent man would pursue in the management of his own property, yet it requires from them full explanations of all their dealings, and of the causes why outstanding assets were not collected, or property of the estate has disappeared; and a trustee who cannot satisfactorily account for the one or the other will be chargeable with them." So, in *Styles* v. *Guy* (*b*) the Vice Chancellor of England laid down the general rule applicable to such cases in the following terms: "If a debt is due, the law always presumes, until the contrary is shewn, that the debtor can pay it. Insolvency cannot be presumed. * * If an executor is sued for a *devastavit* in not having recovered a debt due to his testator's estate, all that it is necessary for the plaintiff to shew is, that the debt existed, and that the executor took no steps to call it in. It might be a justification for the executor to prove that at the death of the testator the debtor was utterly insolvent; but, until that is proved, the law assumes the fact to be the other way." His

Judgment.

(*a*) 10 Gr. 481. (*b*) 16 Sim. 232.

1868.

McCargar v. McKinnon.

Honour accordingly charged the defendants with no less a sum than £12,981 5s. 4d., due by the debtor there, as the executors had not given evidence to shew that it would have been irrecoverable if sued for promptly; and his order was affirmed by the Lord Chancellor (*a*).

What an executor must establish to free himself from liability is thus stated by the Master of the Rolls in *Clack* v. *Holland* (*b*): "Where it is the duty of a trustee or executor to obtain payment of a sum of money, the trustee or executor is exonerated and never required to make good the loss, if he has done all he can to obtain payment, but his efforts have not proved successful. Nay more, if he has taken no steps at all to obtain payment, but it appears that, if he had done so, they would have been, or there is reasonable ground for believing that they would have been ineffectual, then he is exonerated from all liability" (*c*).

Judgment.

Further, it is the duty of executors to set about realizing the assets with promptitude after taking on themselves the administration of the estate; and the law presumes that, as a general rule, a year should be sufficient for winding up the estate of a deceased person (*d*). Accordingly, it is in a year after the death of an intestate that his estate is supposed to be ready for distribution (*e*); and in a year after a testator's death that his legacies begin to bear interest. In *Hughes* v. *Empson* (*f*), the testator died possessed of some Crystal Palace shares which were not sold until they had become greatly depreciated. The chief clerk charged the executor with the loss which would have been avoided if the executor had sold within two months after the tes-

(*a*) 1 McN. & G. 422. (*b*) 19 Beav. 271.

(*c*) See other cases, Williams on Executors, 6th ed. pp. 1058, 1066, &c.

(*d*) Williams on Executors, 6th ed. pp. 1286, 1410.

(*e*) 22 and 23 Ch. II., c. 10, sec. 8. (*f*) 22 B. 181.

1868.

McCargar v. McKinnon.

tator's death, and the Master of the Rolls was at first disposed to maintain the accuracy of that view; but ultimately he varied the certificate, by charging the executor with no more than the loss which would have been sustained if he had sold the shares at the end of a year; and he observed, that an executor has a reasonable discretion; that the time he may delay "depends on the particular nature of the property, and the evidence affecting it;" and that it was impossible to lay down a general rule fixing the time for all cases.

I have said that the Master has dealt with the items in question on the assumption that the burden was on the plaintiffs of proving that the debtors were solvent, or could have been made to pay if promptly sued; and after carefully reading the evidence, I cannot say that the Master who heard the evidence would or should have come to the same conclusions if he had been alive to the correct rule as to the onus of proof. As the evidence stands at present, there is considerable reason for believing that some of the debts in question, or part of them, might have been realised if the executors had taken prompt measures against the debtors. Indiscriminate, inconsiderate suing by executors is no part of their duty. It may, in regard to one debtor, be as clearly in proper to burden the estate with the costs of a suit against him, as it may, in reference to another debtor, be the executors' duty to sue him at once. They must exercise a reasonable discretion, and must preserve some evidence of their having done so; and in that case they are safe though the result should prove unfortunate, and though the Court may not concur altogether in the course which in the *bona fide* exercise of their discretion they determined upon. But in regard to the items in question, the delay appears on the present evidence to have been unfortunate, and does not seem to be at all explained. Was the delay really the result of a *bona fide* exercise of discretion? Or was it mere

Judgment.

1868.

McCargar v. McKinnon.

negligence? or an unwillingness to perform an unpleasant duty? Had these debtors other creditors besides those mentioned in the evidence? Did these other creditors hold their hands as the defendants did? Or, did the adult legatees know what the executors were doing and not doing? Such knowledge, in connection with other evidence, may be material in removing or lessening the liability of the executors.

The first item is *Rogers'* promissory note; and the evidence in regard to it is this. Rogers had some property at the time the testator died, and for two years afterwards; though he probably all this time owed more than he had means of paying. He was never sued by the executors. In January, 1860, he was "burnt out"; and soon afterwards what remained of his property was sold under execution. Two solicitors who knew him say, that nothing could have been recovered from him by execution for the last nine or ten years, but they do not give any facts that enable me to judge of the degree of weight to be attached to that opinion, as against the evidence on the other side. *Rogers* says, that if he had been sued shortly after the testator's death, he thinks that this debt could have been collected; and though, as the Master points out, *Rogers* does not specify what property he had, neither does he appear to have been asked; and if he was really burnt out in 1860, and there was some property left which was afterwards sold under execution, the impression of the solicitors must to some extent be erroneous. *Rogers* was applied to for the debt during the two years which appear to have elapsed before all his property was gone; but fruitless applications do not necessarily relieve executors from liability (*a*). Two years' delay resulting in the loss of a debt requires some further explanation.

Judgment.

(*a*) Styles v. Guy, 1 McN. & G. 429.

The next item is the debt of *Lindsay*, £9 13s. 4d., for which the executors recovered judgment in June 1860. *Lindsay*, like *Rogers*, was probably in failing circumstances when the testator died. It is proved that another creditor got judgment on the 22nd November 1858, ten months after the testator's death, and recovered several hundred dollars. It seems reasonably clear, therefore, on the present evidence, that if the executors had got judgment before that date, as I presume they might easily have done, for the small sum which *Lindsay* owed the estate, the debt would have been paid; and I could only hold the executors exonerated if nine months of entire and unexplained inactivity was by law allowed to executors in respect of the debts of the estate: and there is no such rule. This item, therefore, like the first, appears to require some further evidence on the part of the executors.

Judgment.

The third item is the debt due by the Grand River Navigation Co., $2368.85. The Master held the executors not chargeable because he was of opinion that everything the Company owned was charged with a debt to the Town of Brantford exceeding the value of the Company's property. A mortgage to the Town was spoken of, but none has been put in. The Act was referred to which provided for a loan to the Company (*a*). This Act gave to the debentures which the Town should issue for this purpose, the same effect as a mortgage on all the property and income of the Company, with the exception of certain village lots. These terms would not give a lien on debts which should thereafter become due to the Company, except as such debts represented income; and the term 'income' in the Act does not mean gross earnings or gross receipts of the Company, but only the net earnings after current expenses are provided for; and I understand that the debt in question was in whole or in

(*a*) 14 & 15 Vic. chap. 151.

1868.

McCargar v. McKinnon.

part for repairs necessary for the operations of the Company, and executed after the loan was effected. It appears that a suit was commenced against the Company on the 4th of April, 1859, to recover the debt; that the suit was referred to arbitration; that the plaintiffs make no objection to the award thereupon made; that the award was made, or judgment thereon entered (I am not sure which) on the 22nd of August, 1859; that the executors issued no execution on the judgment; that various debts were owing to the Company at the date mentioned and afterwards; and that the executors took no steps to garnish these debts. On the other hand, the debts of the Company appear to have been greater than they had the means of paying; the debt in question was reduced by various sums both before the award was made and afterwards: on the 19th of January, 1860, a receiver was ordered at the instance of the executors, in a suit by the town of Brantford against the Company (what became of the money collected by the receiver was not shewn); and under these circumstances it was contended on the appeal, that the executors exercised a reasonable discretion in not taking or attempting hostile proceedings against the Company beyond what were taken. I have not formed any opinion as to whether, in view of all these considerations, the executors have or have not discharged their duty with reference to this debt, as I desire first to have the Master's opinion on the point. The parties will have the opportunity of supplying him with additional evidence, if they think proper.

Judgment.

The fourth item with which the plaintiffs seek to charge the executors is, the amount of a judgment recovered against *John Turner*, $4042.64. For this debt the executors accepted land under the written authority of the residuary legatees. One of the legatees was a minor at the time, but has since come of age, and did not join in the appeal. Three other of the legatees were mar-

1868.

McCargar v. McKinnon.

ried women; and it was contended on their part, that they were not competent to give the authority on which the executors acted. I think there is sufficient circumstantial evidence to justify the conclusion that the authority was not given without the concurrence and approbation of their husbands; and if so, I think it was not contended that the legatees would not be bound. The Master was of opinion that the legatees were competent to give authority, even without their husbands' concurrence; and I do not dissent from that opinion. It was not contended before me, that the authority was given otherwise than voluntarily and deliberately: or that the executors were chargeable with any misconduct in connection with it; or that they had not acted on it in good faith; or that the land was not at the time equal or more than equal in point of value to the amount of the debt; or that the transaction did not at the time appear to all parties to be beneficial to the estate. Under these circumstances, and having reference to the language and various provisions of the Married Women's Act (*a*), the principles on which Acts of Parliament are construed, the decisions of Courts of Equity in regard to terms and provisions in wills and deeds, identical with the terms used and provisions adopted by Parliament in this Act, I do not see how a Court of Equity can hold the transaction to be otherwise than binding on the legatees, notwithstanding their coverture. Such a transaction seems to me to be free from most (if not all) of the objections which there may be to holding debts contracted by married women to be *ipso facto* a charge on their real estates—which was the point my brother Spragge dealt with in *The Royal Canadian Bank* v. *Mitchell* (*b*).

Judgment.

The Master has found "that the executors *Malcolm*

(*a*) U. C. Con. ch. 73.

(*b*, 14 Gr. 412. See Chamberlain v. McDonald, on rehearing, *Ib.* 449.

1868.

McCargar v. McKinnon.

McPherson and *Thomas Shaw* never acted beyond joining in taking probate of the testator's will, or in any manner interfered in or with the management of the affairs or the admistration of the estate;" and this finding is another ground of the appeal. The report appears to be, in this respect, correct in point of fact, and it would seem competent for the Master to report such a fact (*a*). But the Master adds this finding: "The executor *Ranald McKinnon* having assumed and taken upon himself the whole conduct and management thereof"—that is, of the estate. That statement may, perhaps, be construed to mean more than the evidence warrants, or the Master intended. It may imply that *McKinnon* agreed with his co-executors to assume the exclusive management with all its responsibilities, or excluded the others from the management. I shall therefore allow the appeal as respects this finding.

Judgment.

The appellants further urged, that the report is of unnecessary length, in consequence of setting forth with great fulness the reasons for the various findings of the report, and the evidence on which they rest; and in consequence of having appended to the report a copy of the will. The respondents did not defend the report in these respects. The report shews that the Master took great pains in considering the various points he had to decide under the reference; but a Master's report, like a decree in equity, or the entry of a judgment at law, should, generally speaking, be confined to results, unless the Master is directed by the decree to state his reasons, and then he should do so briefly. It was unnecessary to add to the report a copy of the will.

The notice of appeal, I perceive, embraces some other matters; but the questions I have remarked upon were, I think, the only ones argued.

(*a*) Con. Orders, No. 220, Sec. 6.

1868.

McCargar v. McKinnon.

On the whole case, I think the proper order will be to send the report back to be reviewed generally, so that the Master may have an opportunity of substituting a new report in proper form, embracing as well the matters which have not been the subject of appeal, as those to which the appeal referred. No costs.

McKay v. McKay.

Injunction.—Specific performance—Father and son.

On a motion for an injunction to stay an ejectment brought by the devisees of the plaintiff's father, the plaintiff 's case was, that his father had verbally agreed to give the plaintiff the land for work which, after coming of age, the plaintiff had done for his father; that two years afterwards the plaintiff on his marriage went into possession, with his father's permission, but subsequently to his father's having refused to give him a deed, or to part with the control of the property; and that the plaintiff remained in possession, to his own use, for eight years, when his father died, leaving a will by which he devised the property to the defendants:

Held, that the plaintiff could not enforce the alleged agreement; and an injunction was refused.

This was a motion for an injunction to restrain proceedings in ejectment under the circumstances stated in the head note and judgment.

Mr. *Crickmore*, for the motion, cited *Brown* v. *Carter* (*a*), *Doe* v. *Rusbane* (*b*), *Sug. Vend.* 14th ed. 714, 719.

Mr. *Wells*, contra, cited *Grant* v. *Brown*, (*c*) *Foster* v. *Emerson*, (*d*) *Fry* on Spec. Per. 188.

Judgment.

Mowat, V. C.—This was a motion to stay proceedings in ejectment brought by the defendants as devisees

---

(*a*) 5 Ves. 870.
(*b*) 17 Q. B. 723.
(*c*) 13 Gr. 256.
(*d*) 5 Gr. 535.

1868. of *Ranald McKay* deceased, the father of the plaintiff and defendants. These actions were to come on for trial at Whitby, on the 27th October last. The papers left with me do not shew when the action was commenced, or when the bill was filed, or when notice of the motion for injunction was served. The motion was argued on the 1st December.

McKay v. McKay.

The case set up by the bill is negatived to a considerable extent by the plaintiff's statements when cross-examined on his affidavit. He is an illiterate man, and probably did not understand the affidavit, for his deposition on cross-examination has an air of entire candour and truthfulness, and corresponds with the other evidence and with the undisputed facts of the case. He claims to be entitled to the land in question under an agreement with his father, that he should have the land for work done for his father after coming of age.

Judgment.

I have little doubt that the testator, long before making his will, had intended the land in question for the plaintiff, and meant to give it to him by deed or will; and that he had made known this intention to the plaintiff. It is admitted also, that the testator gave some assistance to the plaintiff in building a log barn on the place shortly before the plaintiff's marriage, which took place in 1860; and that from the time of the plaintiff's marriage until the testator's death in March, 1868, the testator allowed the plaintiff to occupy the property for his own use. A mere intention, though expressed, as to a future disposition of a man's property, creates no legal obligation upon him to carry out that intention; and until the intended gift is made, he may change his mind respecting it. But it is contended, that there was more than an intention; that there was an agreement; and an agreement followed by possession. The agreement is not claimed to have been in writing; and the possession was taken and held under the following cir-

1868.

McKay v. McKay.

cumstances, as stated by the plaintiff himself: "Before I put up the barn I asked for a deed. My father objected to give the deed, on account of the wife I was going to get. He was afraid that she would be extravagant, and get me into debt. He held the land in his own name for this reason. He said he would so hold it as long as he lived. I don't remember what was to become of it after his death." In another part of his examination he said: "The land was always assessed to my father. I wanted to have the land assessed in my name, in order to have a vote. He said that he wanted to have it assessed in his own name as long as he lived. He said he would not let it be assessed in my name for fear I should be claiming it. This was when I first went on the land." It is clear that possession taken under such circumstances can create no right to the property. The plaintiff took possession relying on his father's bounty, and expressly informed that his father, by allowing him to have possession, did not mean to part with his own control over the property —circumstances which were considered by the full Court in *Foster* v. *Emerson* (*a*) as sufficient to disentitle sons to relief in such a case, even though they had made large improvements; while this plaintiff's improvements have been very small.

Judgment.

The result is, that I must refuse the plaintiff's application for an injunction. I make no order as to costs, leaving the defendants' costs of the motion to be costs in the cause.

(*a*) 5 Gr. 535.

1868.

SMITH v. ROSS.

Pleadings—Trust.

In a bill to enforce a trust, it is not necessary to allege that there is any evidence in writing of the trust.

Demurrer to bill.

Mr. *McCarthy*, for the demurrer.

Mr. *S. H. Blake*, contra.

The following cases were referred to: *Davies* v. *Otley* (*a*), *Wood* v. *Madgley* (*b*), *Gerdein* v. *Bright* (*c*), *Barkworth* v. *Young* (*d*), *Lewis* on Eq. Plead., 59 b. *Lewin* on Trusts 45.

Judgment. MOWAT, V. C.—This is a bill to enforce an alleged trust relating to land. The defendant has demurred for want of equity; and, in support of the demurrer, it was contended that, as the bill does not say there is any writing shewing the trust, it must be assumed against the pleader that there is no such writing. It was further argued, that the facts alleged by the bill are not such as entitle the plaintiff to enforce the alleged trust without a writing. Both positions were contested on the part of the plaintiff. As I think the question of pleading mus be decided for the plaintiff, I have not to consider the other question argued.

As to the necessity of alleging in the bill that there is a writing, where proof of a writing is necessary by Statute to establish the case made, the English authorities are contradictory, and there is no reported decision in this country either way. The last decision cited was

(*a*) 33 Beav. 12 W. R. 896 app. (*b*) 2 S. & G. 115.
(*c*) 2 J. & H. 330. (*d*) 7 Drew. 1.

by the Master of the Rolls, and was against such necessity. I refer to *Davies* v. *Otty* (*a*). The demurring defendant then appealed to the Lords Justices, and the order of the Master of the Rolls was affirmed (*b*). If it is not clear that the Lord Justice *Knight Bruce* meant to affirm the view of Lord *Romilly* on the question of pleading referred to, it is quite certain that neither of the Lords Justices was prepared to decide the point the other way. The text writers to whose books I have had an opportunity of referring since the argument, appear to consider the rule now to be in accordance with the decision of the Master of the Rolls (*c*).

I therefore over-rule the demurrer with costs.

ARNOLD v. ALLINOR.

Injunction—Equitable plea.

A defendant pleaded an equitable defence as if it were a legal defence, omitting the words "for defence on equitable grounds;" the plaintiff replied and demurred; the issue in fact was first tried, and went to the jury on the merits; the verdict was for the defendants; and the demurrer was afterwards allowed. Judgment having been entered, the defendant filed a bill, setting up the facts stated in the plea, and praying for an injunction:

Held, that the proceedings at law were a bar to relief.

Examination of witnesses and hearing at Chatham.

Mr. *Roaf* and Mr. *Douglas*, for the plaintiff.

Mr. *S. Blake* and Mr. *Atkinson*, for the defendant *Allinor*.

(*a*) 33 Beav. 540. (*b*) 12 W. R. 896.

(*c*) Lewis on Pleading, 59, &c.; 1 Danl. Prac. 4 ed. 340, note *h*; Lewin on Trusts, 5 ed. 45.

1868.

Arnold v. Allinor.

MOWAT, V. C.—The plaintiff, *John Arnold*, alleges, that he joined in a promissory note to the defendant *Allinor*, as surety for the defendant *Oscar Arnold*; that *Allinor* was aware that the plaintiff was such surety; that *Allinor* contracted to give time to the principal debtor without the knowledge of the plaintiff; that after the time so given had expired, he sued the plaintiff on the note in the County Court of the County of Kent: that the plaintiff had no defence at law; and that *Allinor* consequently obtained a verdict against him. The plaintiff asks for a decree, declaring that by reason of the agreement for time he was released from the note, and restraining further proceedings in the action at law.

Judgment.

It appears from the judgment roll that the plaintiff *Arnold* pleaded at law the facts on which he is seeking relief in equity; that *Allinor* replied to the plea and also demurred to it; that the issue in fact was tried before the demurrer was argued; that the verdict was against *Arnold*; that the Court afterwards allowed the demurrer; and that judgment was thereupon entered for $417.27, damages and costs.

The defence is an equitable and not a legal defence. The Statute of 1866 for amending the Common Law Procedure Act contains an enactment applicable to such cases, but the enactment is declared not to affect existing suits (*a*), and the present suit was commenced previously. Before the Act, the general rule was, that where a defendant set up an equitable defence, by way of plea to an action, and went to trial on it, and the verdict was against him, it was then too late to bring his equitable defence into this Court by bill against the plaintiff at law (*b*). Here the bill was not filed until the day that the judgment at law was entered up, namely, the 15th July, 1868.

(*a*) 29 & 30 Vic. ch. 42, sec. 3. (*b*) Terrell v. Higgs, 1 DeG. & J. 388

1868.

Arnold v. Allinor.

It was said that the defence was not pleaded as an equitable defence, the words "for defence on equitable grounds" having been omitted (*a*). But it was not pretended that the omission had prevented the defence from going to the jury on its merits, or had prevented *Arnold* from getting a new trial; or that if he had been in other respects entitled to a new trial, the error of form could not have been corrected. I think such an error does not relieve the plaintiff from the effect of the verdict and judgment.

On this ground, therefore,—and without expressing any opinion on the contradictory evidence at the hearing, as to the agreement, or alleged agreement, to give time to the principal,—I must dismiss the bill with costs.

WIGGINS v. MELDRUM.

Legal estate outstanding—Assignor and assignee.

The plaintiff having assigned the land in question first to one C. and afterwards to one M., to secure certain advances, but at the time had no title thereto, the Crown having given effect to the assignment to C., and issued the patent to him, the plaintiff sought to get in the legal estate outstanding in C., but without paying M.

Held, under the maxim "He that comes into equity must do equity," that he was first bound to pay the advances made by M.

Examination of witnesses and hearing at Barrie.

Mr. *McCarthy*, for the plaintiff.

Mr. *Ardagh*, for the defendants.

SPRAGGE, V. C.—The first point made by the plaintiff is, that, inasmuch as he had no title at the date of Judgment.

(*a*) Com. Law Proc. Act, Consol. Stat. U. C. ch. 22, sec. 124.

1868.

Wiggins v. Meldrum.

his assignment to *Thomas Meldrum*, there was nothing for his assignment to operate upon—no estoppel—nothing to affect, in favor of the assignee, any independent title that the assignor might thereafter acquire. I agree that there was no estoppel, *i.e.*, no estoppel in the legal acceptation of the term, and if the patent had issued to *Wiggins* instead of to *Cundle*, there might be serious difficulties in the way of the assignee. But the Crown thought fit to give effect to *Wiggins'* assignment, and to issue the patent to his *mesne* assignee; and the bill is filed to get the legal title out of him.

As between *Wiggins* and *Cundle* only, there is no question. *Cundle's* only claim is for purchase moneys paid by him to the Crown, and his claim to be reimbursed is not disputed. It is the claim of Mrs. *Meldrum*, as assignee of *Thomas Meldrum*, that is in question. *Wiggins* assigned to *Thomas Meldrum* on the 9th of April, 1857, to secure certain advances, and Mrs. *Meldrum* claims that *Wiggins* is not entitled to get the legal estate out of *Cundle*, except upon payment of those advances; and the maxim, "He that comes into equity must do equity," is appealed to. Mr. Mc*Carthy*, for the plaintiff, contends that the maxim does not apply to a case where the plaintiff has an equitable estate, or an equity to get in, or to have relief in respect of a legal estate outstanding in a defendant. The maxim has its limitations certainly, but I do not understand them to be of the nature contended for; and certainly this Court has, in several cases, imposed terms upon parties who have established an equity against defendants having the legal estate. The maxim in question was a good deal discussed in the case of *Gibson* v. *Goldsmid* (*a*), before the Lords Justices; and in that case its application was denied, but upon grounds which do not apply to this case. The parties had been partners, and

Judgment.

(*a*) 5 D. M. & G. 787.

1868.

Wiggins v. Maldre...

the bill was filed for the specific performance of a covenant for further assurance in respect of the transfer to the plaintiff of certain shares in a joint stock company, which it was supposed had been effectually transferred by delivery; and the defendant set up a covenant by the plaintiff to indemnify him against certain partnership debts—which covenant the Court held to be an independent covenant; and held that the plaintiff's title to relief did not depend upon his performance of it. The Lord Justice *Knight Bruce*, in referring to the rule invoked, thus expressed himself: "A rule—perhaps sometimes misunderstood—the rule, namely, that a plaintiff coming for equity must do equity, is without application in the present instance, as I view the matter. That unity of subject, or connection between subjects, which calls it into operation, is here, I think, wanting." And Lord Justice *Turner*, referring to the same rule, says: "It is restricted in its operation, and the true meaning of it, I apprehend, is this, that those who ask for the assistance of the Court, must do justice as to the matters in respect of which that assistance is asked;" and he quotes the language of Lord *Hardwicke*, who, in *Hind* v. *Foster* (*a*), speaking of the same rule, says: "The rule does not hold throughout, so as to tack things together which are independent in their own nature;" and he, also, quotes Sir *John Leach*, who, he says, in *Whitaker* v. *Hall* (*b*), distinctly states that the rule applies only to equities arising out of the same transaction. The learned Lord Justice quotes also a long passage from the judgment of Sir *James Wigram* in *Hanson* v. *Keating* (*c*), a part only of which I will cite: "The argument in this case for the defendant, Mrs. *Keating*, was founded upon the well established rule of this Court that the plaintiff who would have equity must do equity,—a rule by which,

Judgment.

(*a*) 1 Ves. sen. 85. (*b*) 1 Gl. & Jam. 213.
(*c*) 4 Hare, 1.

1868.

Wiggins v. Meldrum.

properly understood, it is at all times satisfactory to me to be bound. * * It is only (I may observe as a general rule), to the one matter which is the subject of a given suit, that the rule applies (*Whitaker* v. *Hall*), and not to distinct matters pending between the same parties;" and the learned Vice-Chancellor proceeds to put several cases in illustration of the application of the rule; and there is much more than I have quoted in the principal case, *Gibson* v. *Goldsmid*, which may be profitably read.

It is to be observed that the learned Judges, in the cases I have referred to, were restricting the application of the rule, and were shewing to what cases only it could apply; and I think it will be found that the definition given by each, of cases where the rule does apply, covers such cases as the one before me. There is no hint of such a distinction as that contended for in this case. The plaintiff's position is, shortly, this; assuming that he pledged the land in question as security for certain advances, and in doing so made an assignment upon which the patent to *Cundle* issued, that he is entitled to have the land conveyed to him, without payment of those advances. I think that to such a case, the maxim, that he who comes into equity must do equity, applies.

Judgment.

McKelvey v. Rourke.

Specific performance—Trust estate—Trustees.

Where two of four trustees entered into an agreement for the lease of trust property, to the plaintiff, but without the knowledge or assent of the other two, to whom under the circumstances notice of the agreement could not be imputed, specific performance of the agreement was refused.

Examination of witnesses and hearing at Kingston.

1868.

McKelvey v. Rourke.

Mr. *Walkem*, for the plaintiff.

Mr. *G. Kirkpatrick*, for the defendants.

SPRAGGE, V. C.—At the close of the argument I stated at some length the view that I took of the case.

The letter from the *Rourkes*, in answer to the one written to them by the plaintiffs, was certainly not an acceptance of the terms proposed in the plaintiffs' letter. It was a counter proposal, differing in several material particulars from that of the plaintiffs. It lies upon the plaintiffs, therefore, to shew an acceptance by them of the proposal of the *Rourkes*. Even this, indeed, is not in accordance with the pleadings, which allege an acceptance by the trustees of the plaintiffs' proposal. The letters, however, are set out, and speak for themselves. As proof of acceptance by the plaintiffs of the counter proposal of the *Rourkes*, the plaintiffs give in evidence improvements made by them, and payment of the increased rent named by the *Rourkes* in their letter. The improvements are not necessarily referable to this, for the plaintiffs were already in possession for the unexpired term of *Fox's* lease, about fourteen months, and it might be worth their while, for the sake of their business, to expend the amount—about $150—even if they had no agreement for any term beyond it. Judgment.

With regard to the payment of rent after the expiry of the *Fox* term, if it were a dealing between individuals, or even if the *Rourkes* were the only trustees, it might be proper to hold this payment and acceptance of rent, evidence of an acceptance by the plaintiffs of all the terms proposed by the *Rourkes*, and so evidence of an agreement in pursuance of it. But I apprehend the plaintiffs must go further. There are four trustees, and the estate of which they are trustees

1868.

McKelvey v. Rourke.

has a right to the exercise of the judgment and discretion of all of them. Here the matter is in *fieri*; the plaintiffs seek to bind the estate by an alleged contract entered into by two of the four trustees. There is no direct evidence of the other two having assented to the contract alleged, or having any notice of it. If the plaintiffs succeed in their case, it must be by imputing notice to them, and that only by the payment of rent, and that must be done in this way: the other trustees must be taken to have known the amount of rent paid, and that it was paid upon a certain agreement for lease for the term, and upon the terms of the *Rourkes'* letter. The receipts for rent are signed by the *Rourkes* only. One of the other trustees is called by the plaintiffs, and says he took no part in the management of the estate, and knew nothing of the alleged agreement for lease with the plaintiffs; and counsel for the plaintiffs says he expects to prove by the other trustee that he, also, left the management of the estate to the *Rourkes*. Counsel for the defendants does not admit that the other trustee, Mr. *Kirkpatrick*, will state this; but suppose he does, Mr. *Walkem's* proposition is, that two of the four trustees having left the management of the estate to the other two, the Court will enforce an agreement entered into by those other two in a suit in which the whole four join in resisting performance of it. As a proposition of law, I cannot assent to this. Then, as to the assent of the whole four afterwards. It must rest upon the imputed knowledge and the imputed assent of the two, other than the *Rourkes*; assuming that they knew of the amount of rent paid by the plaintiffs, and their continued possession, the mere possession would, *prima facie*, be referable to a tenancy from year to year, and the rent, to the rent payable under such a tenancy. I do not think that such notice as the plaintiffs contend for can be imputed to the trustees, other than the *Rourkes;* and I am not sure that, even if it were, the Court ought to bind the estate by specific

Judgment.

performance. But I withheld my judgment for a time to enable Mr. *Walkem* to produce authorities upon the point. 1868. McKelvey v. Rourke.

It is not necessary to consider the alleged abandonment or repudiation by the plaintiffs, set up by the defendants, of the lease proposed by the *Rourkes*. The plaintiffs were willing to leave if they could procure another place suitable for their business, and made inquiries with that view; but this was by no means an admission that they were not entitled to the lease they now claim, but rather an assertion of right. Their saying they would leave if they could procure such other place may be regarded as involving such assertion. The occasion of their saying and doing what they did is also to be looked at; they were subjected to some inconveniences and annoyances, and rather than endure them they would seek elsewhere.

Judgment

My difficulty, however, is the absence of any concurrence on the part of two of the trustees in the alleged agreement.

I gave Mr. *Walkem* the opportunity to refer me to any authorities that he could find upon this point in his favor, and, as he has not done so, I presume that he has been unable to find any. The bill must be dismissed with costs.

1868.

THOMPSON v. FREEMAN.

Executors—Compensation, scale of.

The rate of compensation to executors or trustees should depend upon the amount of moneys passing through their hands, and the care, time, and labour, spent by them in the management of the estate. Where, therefore, the amounts received and expended by the executors were large, and it did not appear that there was any special difficulty or trouble in the management of the estate, and the Master had allowed the executors a commission of five per cent. on all moneys received and expended by them, and half that amount on the moneys received but not expended, an appeal from the Master's report on the ground of excessive allowance was allowed.

A testator authorized his executors in their discretion to continue the business of lumberer, miller, and merchant, which he had been carrying on, and which they elected to do, and carried on such business for some years through an agent, one of the executors visiting the place occasionally to supervise the business generally.

Held, that a commission on the moneys received from this source, was not a proper mode of compensating the executors, but that they were entitled to be compensated therefor; and that not illiberally.

This was an appeal by the plaintiff from the report of the Master at Hamilton, on the grounds stated in the head-note and judgment.

Mr. *Moss*, for the appeal.

Mr. *Blake*, Q. C., contra.

Judgment. SPRAGGE, V. C.—The first objection is, that the allowance made by the Master by way of compensation to the executors and trustees for their care, pains, trouble, and time, in administering the estate, is excessive. The Master has allowed five per cent. commission on moneys received and expended, and half that amount on moneys received and not expended; and has also allowed commission on a large item where no moneys were received or expended. I agree with the observation of the Chan-

1868.

Thompson v. Freeman.

cellor in *Chisholm* v. *Barnard* (*a*), that "five per cent. commission on moneys passing through the hands of executors or trustees, may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labor, anxiety, and time, spent in managing an estate, when five per cent. would be a very insufficient allowance." On the other hand, the amounts might be so large, and the duties of management so simple, that five per cent. would be more than a reasonable allowance.

In this case the estate is a large one; and the moneys passing through the hands of the executors—of one particularly, Mr. *Freeman*—very considerable. It was by Mr. *Freeman* that the investment of the moneys of the estate has been principally made. The will authorized investment in Government securities or in mortgages of real estate. The investments have been made on mortgage (with some exceptions, not by Mr. *Freeman*, where the directions of the will were not followed). The Master reports that personalty came to the hands of Mr. *Freeman*

Judgment.

To the amount of.....	$293,914 64
And rents and profits to the amount of	5,016 19
Together	$298,930 83

Of this sum the Master finds that Mr. *Freeman* disbursed the sum of $286,798.19, and upon this he has allowed him a commission of five per cent.; and he has allowed him a commission of two and a-half per cent. on the difference between that sum and the amount received. The commission on the larger sum is $14,339.19; on the smaller sum, $303.32. Commission has also been allowed on other items, which I will notice presently.

(*a*) 10 Grant, 481.

1868.

Thompson v. Freeman.

The testator died in February, 1851; the decree, which among other things directed the appointment of a Receiver, bears date 27th March, 1866. The estate was, therefore, in the hands of the executors somewhere about fifteen years.

The Master, in a schedule to his report, sets out the securities which came into the hands of the Receiver. They are, with very few exceptions, mortgages, taken for the most part for five years; some are for a longer, some for a shorter period. The schedule does not shew the amounts, but the estimated value of the securities, and these vary greatly. A very few are for small sums, two and three hundred dollars, others in various sums up to one thousand dollars, and others for two or more thousand dollars. Nearly all of these mortgages appear from their date to be re-investments—several of them, probably, investments of interest moneys. The amounts passing through the hands of Mr. *Freeman* under this head, averaged nearly $20,000 yearly, and the percentage allowed to him averages nearly $1,000 a year. The evidence does not shew that these investments occasioned any more than the usual amount of care and labor incident to such transactions. Of the mortgages passed into the hands of the Receiver, I find the investments made by Mr. *Freeman* to number as follows: in 1862, five; in 1863, fourteen; in 1864, eight; in 1865, three; in 1866, three; and in the years previous to 1862, twelve. So it appears that in the last five years Mr. *Freeman* made thirty-three investments—an average of between six and seven a year. There may have been some investments made since 1862 and paid off, which would increase the number somewhat, but not, I imagine to any considerable extent.

Judgment.

I have thought the matter over a good deal, and have conferred on the subject with the Chancellor, who has had the question of compensation to executors and trus-

1868.

Thompson v. Freeman.

tees before him in two or three cases. My brother *Mowat* has been absent on circuit. I think regard should be had to the *amounts* passing through the hands of executors and trustees. In fixing the poundage payable to Sheriffs on levying moneys upon execution, the Courts both of Common Law and Equity have considered the amounts a proper element of consideration, allowing the maximum percentage on small sums, and reducing the scale as the amount increases. I think, and his Lordship the Chancellor agrees with me, that this is a principle which may well be applied to compensation to executors and trustees. If the sums passing through the hands of Mr. *Freeman* had been one-fourth or one-tenth what they have been, the percentage would have been only five per cent.; when it is counted by a good many thousand dollars a year, and in the aggregate by hundreds of thousands, the same scale of compensation becomes excessive. The duty of the executors upon investments upon mortgage was simply to consider the value of the property offered in security, which, under the will, was to be three times the amount advanced upon its security: the money being in hand to pay it to the borrower: the examination into title, and the conveyancing charges, are not included; they are either done by a third person, or if done in Mr. *Freeman's* office, he is, I assume, compensated for such services separately and in addition. For the services rendered in the case of the smaller mortgages, say up to six hundred dollars, five per cent. is a reasonable compensation; for sums above that amount, I should say three per cent is sufficient—*i.e.*, five per cent. up to six hundred dollars, and three for the excess. This is a larger percentage than is allowed in the case of Sheriffs: and in the case of so large an estate as this, it is, I think, a sufficient compensation. The Act authorizes only a fair and reasonable allowance by way of compensation, and it is a compensation for the discharge of duties which up to the passing of the Act were performed gratuitously.

Judgment.

1868.

Thompson v. Freeman.

I have indicated what I think would be reasonable in this particular case; and in the absence of any evidence shewing that there was any particular trouble or difficulty in making the investments. It may be that the matter was not near so simple as I have assumed it to be, and there may be good reasons, not as yet shewn, why a larger scale of compensation should be allowed. It will be open to Mr. *Freeman* and to the other executors to shew this in the Master's office, and the Master will, in such case, make such increased allowance as may be reasonable.

I have considered particularly the case of Mr. *Freeman*. The amounts received by the other two acting executors, *Andrew* and *Archibald Thompson*, were much smaller, but still very considerable. The remarks that I have made will apply with some modification to them, and I think the same scale of allowance will be proper.

Judgment.

The allowance made by the Master to the three acting executors upon the conveyance to the plaintiff of land, upon a valuation, on account of what he is entitled to under the will, proceeds, in my judgment, upon an entirely erroneous principle. A number of parcels of land belonging to the estate, valued in the aggregate at $66,000, were conveyed by the executors and trustees in satisfaction, *pro tanto*, of what the plaintiff is entitled to. It is said that the executors might have sold this land, and have received the purchase money and paid it to the plaintiff; in which case they would have been entitled to a commission on the moneys so passing through their hands. But that is no good reason for compensating them by a commission—allowing them a scale of compensation for what they might have done, not for what they have done. In doing what they have, they have, as I have no doubt, acted for the best interest of the estate, and if they had done otherwise would not have served the estate as well, and so would not have

so well discharged their duties. I cannot suppose that they would have taken any other course because by so doing they would have obtained a commission. Indeed the Court would almost certainly have refused them a commission if they had taken that course, when they might have taken the course which they have done. The question simply is, what is a fair compensation for what has been actually done. I assume that they procured an estimate of value to be made by surveyors, real estate agents, or other experts. What was paid to them would be a disbursement, to be allowed as of course: beyond that, whatever would be a fair compensation for labor, care, pains, and time, should be allowed, and that on a fairly liberal scale; but it is not a case for compensation by commission.

1868.

Thompson v. Freeman.

The Master has allowed five per cent. to the acting executors—one-third to each of the three—on a sum of $27,445.73, which he reports to have been received by their paid agent at Indiana, Mr. *John Craigie*, and disbursed by him. The testator at his death was carrying on business at Indiana as a lumberer, miller, and merchant; and, by his will, authorized his executors in their discretion to continue the business. This they elected to do, and continued it for some years,—Mr. *Craigie* having the actual conduct of the business, as their agent; Mr. *Andrew Thompson* visiting the place occasionally, and exercising a general supervision over the business. The moneys upon which this commission is charged did not pass through the hands of the executors, and it does not appear to me that a percentage is a proper mode of compensation. Some compensation should be made; for it was the duty of the executors to see that the estate did not suffer detriment unnecessarily in the conduct of the business; and this would involve some labor, care, and anxiety, and for this they should be compensated, and that not illiberally. For the special supervision exercised by *Andrew Thompson*

Judgment.

1868.

Thompson v. Freeman.

he should be specially compensated; and this, I infer from the evidence, has been done. If not, it should be done.

A sum of $12,167.98 in the aggregate, was, as the Master finds, advanced by the executors to *John H. Rogers*, the husband of the testator's daughter, to assist him on entering upon, and in conducting the business of lumbering. These advances were not investments authorized by the will, but were made, nevertheless, in good faith, the executors stretching their authority in order to serve one of the beneficiaries of the estate. Mr. *Rogers* did not succeed in his business; but the moneys were secured by mortgage of real estate and otherwise. The mortgage has been foreclosed, and the Master reports that the estate has suffered, and can suffer, no loss. I do not know whether by this the Master means only that the money is safe, or that the transaction has been as profitable as if the directions of the will had been strictly followed. Unless he means the latter, no commission should be allowed; and even if it be so, it is with some hesitation that I sanction the allowance; and I do so principally upon this ground, that the transaction assumed a shape, that of mortgage, allowed by the will; a report of special circumstances may be proper to enable the Court to deal with it upon further directions.

Judgment.

There is only one other question, the allowance of an item of $240 to Mr. *Freeman*, being an amount paid to an accountant for preparing the accounts for the Master's office. It is agreed that it shall stand until the disposition of the question of costs.

The report is referred back to the Master, without costs.

1868.

MACDONELL v. MCKAY.

Timber limits—Parol contract—Statute of Frauds.

The plaintiff who was the licensee of the Crown of certain "timber limits" entered into an arrangement with *J. N. & Co.*, whereby they were to make advances to him to the extent of $6000, to enable him to get out timber during the then coming season, such timber to be consigned to them, and they were to be allowed a certain commission on sales, and interest on moneys advanced by them. And it was agreed that the plaintiff should transfer to them his interest in such timber limits, as a security for the payment of any balance arising on the said transaction; which was done. Afterwards the plaintiff and *J. N. & Co.*, continuing to deal on the like terms, it was agreed between them, verbally, that the transfer already made should stand as a security for advances to be made by them upon subsequent transactions.

Held, that the subject of the contract was such an interest in lands as came under the 4th section of the Statute of Frauds, and that any agreement respecting it must be in writing.

Examination and hearing at Cornwall.

Mr. *McLennan*, for the plaintiff and *The Attorney General.*

Mr. *J. A. Boyd*, for the defendants other than *The Attorney General.*

SPRAGGE, V. C.—The plaintiff was the Licensee of the Crown of certain "timber limits" called the Bonnechere or Round Lake timber limits, and by agreement dated 17th October, 1862, entered into an arrangement with Messrs. *Jeffrey Noad & Co.*, of Quebec, which was in substance that *Jeffrey Noad & Co.* should make advances to the plaintiff to the extent of $6000 towards enabling him to get out timber during the then coming season; and the plaintiff was to consign his timber to *Jeffrey Noad & Co.* at such cove in Quebec as they should designate, and in consideration of their advances and of "their attention to sales, &c.," *McDonell* was to allow to them a certain commission on sales, and interest on moneys Judgment

1868.

McDonald v. McKay.

advanced. It was further agreed that *McDonell* should transfer to *Jeffrey Noad & Co.* his interest in the timber limits, and that such transfer was made "as security to the said *Jeffrey Noad & Co.* for the payment of any balance arising on this transaction." The plaintiff made a transfer of his interest in the timber limits in pursuance of the agreement.

It is not disputed that this agreement related only to the timber to be got out by *McDonell* during the then coming season and to the advances to be made by *Jeffrey Noad & Co.* in respect of such timber, and not to the transactions of any future years; and this is clear from the terms of the agreement. And it is also not disputed that upon the result of the dealings to which the agreement relates, a considerable balance was in favor of the plaintiff.

Judgment.

Afterwards the plaintiff and *Jeffrey Noad & Co.* continued to deal upon the like terms: and it was agreed between them *verbally* that the transfer already made to *Jeffrey Noad & Co.* should stand as security for advances to be made upon such subsequent transactions. Upon these subsequent transactions the plaintiff became indebted to *Jeffrey Noad & Co.* The defendants claim under assignments made by that firm, and upon this the question arises whether the verbal agreement would bind the lands—whether the subject of the contract was not an interest in lands which under the fourth section of the Statute of Frauds, must be in writing.

What the plaintiff had, and what he transferred to *Jeffrey Noad & Co.* was a license to cut and carry away timber within certain limits up to a certain time, the 30th of April following, and to hold and occupy the "location," *i.e.* the land within those limits during that time; and, under the Crown Timber Regulations,

clause 8, made under the Statute in that behalf, he was entitled upon complying with the regulations, to renewals of his license. The interest that the plaintiff took under his license cannot, I apprehend, be placed lower than this that it was a sale to him of growing timber.

1868.

Macdonell v. McKay.

It was held in one or two of the older cases, that a sale of growing trees was not a sale of, or a contract for an interest in lands, and that the same might be by parol, and the same has been held more recently in some of the American Courts; but it is now settled by decisions in England, and in this country also, that a sale of growing trees is within the Statute. *Scorell* v. *Boxall* (*a*), *Rodwell* v. *Philips* (*b*), *Rhodes* v. *Baker* (*c*); and in this country, *Ellis* v. *Grubb* (*d*), *Ferguson* v. *Hill* (*e*), *Mitchell* v. *McGaffrey* (*f*). And there is besides the great authority of Lord *St. Leonards* in his work on Vendors and Purchasers.

Judgment.

A distinction has been taken in one of the Canadian, and in one of the American cases, where before the contract which is in question there had already been a sale of growing timber. The late Chief Justice Sir *John Robinson* said in *Ellis* v. *Grubb* (*g*), speaking of growing timber, "it may be severed from the inheritance by being expressly alienated to some other person by the owner of the estate, in which case it is as effectually severed and made a chattel in contemplation of law, as if it had been actually felled and severed from the soil." So far it is not necessary to dispute the proposition; but the learned Chief Justice proceeds to say, "after it has been severed from the freehold

(*a*) 1 Y. & Jer. 396.
(*b*) 9 M. & W. 501.
(*c*) 1 Ir. C. L. R. 438.
(*d*) 3 O. S. 611.
(*e*) 11 U. C. Q. B. 530.
(*f*) 6 Grant 361.
(*g*) Page 613.

1868.

Macdonell v. McKay.

in either manner," (by actual severance, or by alienation) "there is no doubt that thenceforward, it may be sold with as little formality as any other chattel, and being simply personal estate and no longer regarded as part of the land, if it be conveyed by deed or writing which it need not be," &c., the learned Chief Justice then proceeds to consider the effect of registering such a writing. No cases were cited by the Chief Justice for his proposition; but in a case before the Supreme Court of New York, *Warren* v. *Leland* (*a*), where the same doctrine seems to have been propounded, though less explicitly by *Paige*, *J.* some text writers and some cases are referred to. With one exception, that of Mr. *Roberts* in his treatise on the Statute of Frauds, they are all to this point, that after alienation, or contract to alienate, growing trees become in contemplation of law chattel property and pass as personal, not as real estate; and this is the first part of the proposition of the late Chief Justice, and from which, as I understand his language, he deduces the consequence that thenceforward growing timber may be sold with as little formality as any other chattel, and may be contracted for by parol. The proposition proves too much, for if by reason of the alienation, growing timber which was before an interest in land ceases to be so, and becomes in contemplation of law personalty, and because personalty, not within the Statute, the same doctrine must be applied *pari ratione* to land itself; and it would follow that after a contract for the sale of land, the Statute would not apply to any alleged after contract in regard to it by the Vendor; for it is as true of a contract for the sale of land itself as of a contract for the sale of timber growing upon it, that in contemplation of law the land becomes, thereupon, a part of the personal estate of the Vendor. The fault of the proposition in my humble judgment lies in this, in taking an

Judgment.

(*a*) 2 Barbour 618.

interest in lands as used in the Statute to be synonimous with real estate, in assuming that that branch of the Statute does not deal with personal as well as with real estate. It evidently deals with both. Its language is "any contract or sale of lands, tenements or hereditaments, or any interest in, or concerning them." And the words are thus interpreted by *Littledale*, *J.*, in *Evans* v. *Roberts* (*a*), "The words lands, tenements, and hereditaments, in that section appear to me to have been used by the Legislature to denote a fee simple, and the words, any interest in or concerning them, were used to denote a chattel interest, or some interest less than the fee simple." It is quite clear that the Statute deals with lands which are personal estate as well as lands that are real estate, and therefore the mere fact of land becoming personal estate in contemplation of law can be no reason for the Statute not applying to it. Mr. *Roberts* gives no authority for his opinion, nor any reason for it, except that upon sale of growing timber with a view to its severance, it becomes a mere chattel.

Judgment.

The point is material in the case before me in this way, the Crown sold the growing timber or so much as the plaintiff should cut within the prescribed time, and according to the doctrine I have been controverting, it became a chattel, and being a chattel, not within the Statute of Frauds. But if I am right in the view that I take of the law, the parol agreement that the timber limits should stand as a security for advances to be made in future years was not binding; any more than the like agreement would be in the case of a mortgage of lands. The defendants therefore, in my judgment, have no title, and the plaintiff must prevail. If he is satisfied with a decree giving him the future benefit of the limits he may take his decree at once, but if he asks an account of past profits, he must speak

(*a*) 5 B. & C. 539.

1868.

Macdonell v. McKay.

to that point. There is some evidence of his acquiescing in the Quebec Bank dealing with the land. This I have no doubt was in ignorance of his rights, but if he had then asserted them, the sale by the Bank and all subsequent complications might have been saved; and he succeeds now only upon a point of law; for he did agree (verbally) that the timber limits should stand as a security for future advances. I must observe, too, that his bill was filed as long ago as April, 1866, and was not brought to a hearing for two years afterwards. Upon the plaintiff taking a decree for the future benefit of the timber limits, he may take it with costs against all the defendants but *McKay* and *Burnet*. I might except *Noel* also, but I take it for granted that he will be protected by the Quebec Bank, whose officer and servant he was in the transaction. I give no costs either against or in favor of *McKay* and *Burnett*. With the view that I take of the question that I have discussed, it is unnecessary for me to consider the other points made in the case.

Judgment.

Bennet v. O'Meara.

Timber limits—Demurrer—Parties.

A bill was filed in respect of certain timber limits by two of the devisees and legatees of the original licensee thereof.

Held, that the suit ought to be by the personal representative, and a demurrer to the bill, on the ground that it was not so constituted, was allowed.

Wherever the result of a suit, whatever it may be, will not prejudice the Crown, and there is therefore no interest of the Crown to be protected, the Attorney General is not a necessary party.

Demurrer to the bill.

Mr. *Strong*, Q.C., and Mr. *Cattanach*, for the demurrer.

Mr. *Read*, Q.C., contra.

1868.

Bennet v. O'Mears.

SPRAGGE, V. C.—The subject in question in this suit, is what are called timber limits; the plaintiffs are the two children, being two of the devisees and legatees of the original licensee. It is objected that the suit should be by the personal representative of the licensee; and it is clear, and was indeed conceded in argument, that if the timber licenses in question were personal estate, the suit ought to be so constituted.

My brother *Mowat* granted an injunction in the cause: and that, it was contended, involved a decision that the timber limits in question were real estate, inasmuch as otherwise an injunction could not properly be granted in a suit constituted as this is. But my brother *Mowat* tells me that he did not intend so to decide; but that he granted the injunction upon the principle that the Court will restrain the commission of a wrong at the instance of parties interested, even in a suit not properly constituted. It was suggested, too, that the Chancellor had decided that timber limits are real property; but his Lordship informs me that he has, on the contrary, held them to be personal estate; and I apprehend there can be no doubt that they are personalty: they are a license for a term not exceeding a year. If, as put by Mr. *Strong*,, instead of a license, it were a lease for a year, without impeachment of waste, it would be clearly personalty, and a bare license cannot be more. In *Doe Hanley* v. *Wood*, (*a*) the question was, whether what was granted was a lease or a license only, to dig for and get minerals—the Court held it to be a license only—and Lord *Tenterden* after stating the terms of the agreement proceeded thus, "If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals ungot therein; but he had a right of property only, as to such part thereof as upon the liberties granted to

Judgment.

(*a*) 2 B. & A., 724.

1868.

Bennet v. O'Meara.

him should be dug and got, that is, no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges, granted for the purpose of obtaining it." There would be no point in such a grant being put as a mere right to a personal chattel, unless the grant itself were of personalty. But, apart from authority, the reason of the thing is entirely in favor of its being personalty. I must therefore allow the demurrer upon this ground.

With regard to the Attorney-General being a necessary party, I do not see that there is any interest of the Crown to be protected. If what is sought by this Bill would prejudice the Crown, the presence of the Attorney General would be necessary; but timber licenses are transferable, as appears by the form of the license given in the bill; the same being to the licensee his executors, administrators, or assigns, and it does not appear that

Judgment.

the assent of the Crown is necessary to the assignment. Where there is a contest between two claimants under the Crown, and the effect of the plaintiff's succeeding would be to substitute for a defendant in possession, paying a rent, or rendering a duty, another party paying a less rent, or rendering a duty less beneficial to the Crown, the Attorney General must be a party; and this was the case in *Hovenden* v. *Annesley* (*a*), which comes nearer to this case than any that I have seen. But in the case before me there is an interest assignable without restriction; and whichever party succeeds, the same dues are paid to the Crown: and so far as appears by the bill, it is a matter of indifference to the Crown which party succeeds: in such a case I have seen no authority, and I see no reason, for requiring that the Attorney General should be a party.

The demurrer is allowed upon the usual terms.

---

2 S. & L., 607, and see p. 617.

1868.

CASSEY v. CASSEY.

Dower—Jurisdiction to order sale (under Consol. Stat. U. C. ch. 86, sec. 31).

The Court has jurisdiction in a suit, as well as on a petition, to decree a sale of an inchoate right of dower.

Examination and hearing at Stratford

Mr. *Idington*, for the plaintiff.

Mr. *McCulloch*, for the defendants.

VANKOUGHNET, C.—Section 31 of ch. 86 Con. Stat. U. C. provides for the sale of an inchoate right of dower, upon petition to the Court under that Act. Now this Statute gives the Court the power to sell—and the petition is merely the procedure pointed out. I think the Court, having the power to sell, may exercise it under decree, upon bill filed—and so let it be done in this case; the value to be ascertained by the method mentioned in the Statute. Although the power to make allowances to Executors, Trustees, &c., is by Statute given to the Surrogate Judge alone, this Court assumes the right to exercise it in administration suits. The cases, in this respect, appear to be analogous. Judgment.

MCKENZIE v. BROWN.

Demurrer—Multifariousness—Parties.

The plaintiff filed his bill against M. and B., claiming to be entitled to certain mortgage moneys as against B. which were payable by M.; the only contest being between the plaintiff and B., an injunction was prayed to restrain M. from paying, and B. from receiving them and M. was made a party solely for this purpose. *Held*, that M. was a proper party to the suit, and a demurrer by him for multifariousness and want of equity was overruled.

Demurrer by defendant *McCracken*, for multifariousness—parties—and for want of equity.

1868.

McKenzie v. Brown.

Mr. *Bain*, for the demurrer.

Mr. *Moss*, contra.

SPRAGGE, V. C.—The case made by the bill as between the plaintiff and *Margaret Brown* is, that he, the plaintiff, and not *Margaret Brown*, is entitled to the mortgage money payable by *McCracken*. The facts stated in the bill, if true, shew that the plaintiff is so entitled; and *McCracken*, by his demurrer, admits it. That is the single case made by the bill. There may be a contest upon this point between *Margaret Brown* and the plaintiff. There is no contest as to the mortgage money being payable by *McCracken* to some one. The bill is filed against *Margaret Brown*, to prevent her from receiving it; and *McCracken* is made a party to prevent his paying it to her. He says he has nothing to do with the question who is entitled to the money; that he is a mere stakeholder, and ought not to be mixed up with a suit in which he has no interest. An injunction is prayed against *Margaret Brown* and against *McCracken*, to prevent the one from receiving, and the other from paying to her, the mortgage money past due and accruing due.

Judgment.

It is obvious that an injunction restraining *Margaret Brown* from receiving these moneys might be only a half protection to the plaintiff. He is entitled to have his right fully protected, and if it can be done most effectually by an injunction restraining *McCracken* from paying, he is entitled to such an injunction.

The objection is, that the bill is multifarious; that the plaintiff should first establish his case against *Margaret Brown*, and then, if necessary, file his bill against *McCracken;* but if he was put to do this, he would lose in the meantime the protection which would have been afforded him by an injunction preventing *McCracken* from paying the mortgage moneys to *Margaret Brown*.

1868.

McKenzie v. Brown.

The rule as to multifariousness is not so stringent as it is put by the demurring defendant. The bill is not multifarious, because *McCracken* has nothing to do with the question between the plaintiff and *Margaret Brown*, or, rather, has no interest in it. It is sufficient if his presence is necessary or proper in a suit in which that question is to be discussed. The language of Sir *John Leach*, approved by Lord *Cottenham* in *Parr* v. *The Attorney General* (*a*), is apposite to this case. After alluding to the difficulty of laying down any general rule, and observing that, however important it is to prevent one defendant from being exposed to the expense of litigation where it appears that he is only interested in part of it, yet that if that rule were to be strictly adhered to, it would frequently become impossible to agitate the whole case when some one defendant was interested only in part of it, he adds: "That was brought under the consideration of Sir *John Leach*, who laid down no general rule; but with the ability which belonged to him—probably more than to any other Judge—of stating with great precision the grounds upon which he conceived a particular rule ought to be adopted, in the case referred to, he puts it upon this, that if the case be an entire case as against one defendant, no other defendant then has a right to complain, although he is connected only with some portion of the whole case. The consequence of adopting a different rule would obviously be, that, in order to prevent an objection for multifariousness, you must split an entire case." In *Inman* v. *Waring* (*b*), Sir *James Knight Bruce* expressed his entire concurrence in these observations.

Judgment.

If the plaintiff is entitled to any relief, by injunction or otherwise, as regards *McCracken*, he must, upon the principle laid down by Sir *John Leach*, be entitled to it in this suit.

(*a*) 8 Cl. & F. at p. 434. (*b*) 3 DeG. & S. at p. 732.

1868.

McKenzie v. Brown.

This case is not governed by *Connor* v. *The Bank of Upper Canada* (*c*), which was described by his Lordship the Chancellor, who decided it, as "a bill presenting two distinct cases, the right to succeed in the one of which depends or is rested only on the failure of the other," with one of which the Bank had nothing to do. This case, on the contrary, is one entire case, resting upon one ground—a case made under the Statute 13 Elizabeth; and the only serious question that I see in it is, whether *McCracken* can properly be made a party to any suit; that would be a want of equity.

If the plaintiff would be in an equally good position by merely giving notice to *McCracken*, instead of making him a party to a bill, that would be a good ground for a demurrer for want of equity. But I think that his position would not be so good. A Receiver is asked for; and upon the principle that money is ordered into Court, pending litigation, for the safety of the fund, the plaintiff's position would be improved. Again, if *McCracken* were to pay the moneys in arrear to *Margaret Brown*, his remedy would be much more prompt against *McCracken* if he had an injunction than if he had only given notice.

Judgment.

Besides this, *McCracken* has really little or nothing to complain of in his being made a party. He would, properly, stand neutral in the contest between the plaintiff and *Margaret Brown*, and he would have the advantage of being protected against the legal right of *Margaret Brown* (exercised in the name of *William Brown*, the mortgagee); to protect himself against which he might otherwise find it necessary to file a bill of interpleader.

The demurrer must be overruled with costs.

(*c*) 12 Grant, 48.

1868.

THORPE v. RICHARDS.

Equitable estate—Dower.

A testator while married, purchased the equity of redemption in certain lands to which he afterwards died beneficially entitled. The widow claimed dower out of the whole property both legal and equitable, and that the surplus money produced by a sale of the premises after paying off the mortgage, being less than one-third of the whole sum for which the property sold, should be invested for her benefit, as her dower; but there being creditors and specific or pecuniary legatees under the will of the testator whose claims would more than exhaust the surplus:

Held, that the widow was only entitled to dower in the surplus money which represented the value of the equity of redemption.

In this case, the widow of the late *John Thorpe*, of Guelph, filed a bill, claiming dower out of the full value of certain land in the town of Guelph, which her deceased husband had purchased, subject to a mortgage made by the former owner, and which *Thorpe* agreed to pay. The land was afterwards sold by the mortgagee, under a power of sale contained in the mortgage, and a surplus of the purchase money was afterwards paid to the defendant *Richards*, the mortgagee's representative, from whom it was claimed by the widow and also by *McCrae*, *Thorpe's* executor, who was a defendant in the suit. Statement.

Mr. *Roaf*, Q. C., for the widow, claimed that she was entitled to full dower, and that consequently she should have the value of it, calculated according to the principles of life annuities.

Mr. *McGregor*, for *Thorpe's* executors, contended that the widow, at the most, could only claim dower, on the above principles, out of the surplus in the hands of *Richards*.

Mr. *W. Sidney Smith*, for defendant *Richards*, submitted to such order as the Court might make.

1868.

Thorpe v. Richards.

VanKoughnet, C.—In this case the testator, *Thorpe*, while married to the plaintiff, purchased the equity of redemption in certain property; and, to secure an extension of time for payment of the money then over due, on the outstanding mortgage in fee, covenanted with the holder of the mortgage to pay it off, at an increased rate of interest, in a period of five years. *Thorpe* died beneficially entitled to this equity of redemption. It would be more correct to say that he owned at the time of his death the whole estate, subject to this mortgage, which he had undertaken personally to pay off. In this respect the case differs from *Sheppard* v. *Sheppard* (*a*), where the husband, during the marriage, owned the entire estate, legal and equitable, and in which the wife had barred her dower, by a release of it contained in a deed of mortgage executed by the husband for his own purposes. I am not sure that I may not have gone too far in that case in giving the wife the value of her dower in the entire estate, as against the creditors of the husband. I perhaps did not sufficiently consider this, as the case was not argued on the ground on which my judgment proceeded. But that case is not the present, for here the husband never owned the legal estate in the land, and all he had at his death was the equity of redemption, in which the wife was dowable, by virtue of the Real Property Act She claims that she is, entitled to dower out of the whole property, legal and equitable, and that the surplus money produced by the sale of the mortgaged premises, after paying off the mortgage, being less than one-third of the whole sum for which the property sold, should be invested for her benefit, as her dower. But, as I understand that there are creditors; and specific or pecuniary legatees, under the will of the testator, which I have not seen, whose claims will more than exhaust the surplus, I cannot grant to her this right at their expense. The most she can have is dower in this surplus money, which represents

Judgment.

(*a*) 14 Gr. 174.

the value of the equity of redemption: see *Rider* v. *Wager* (*a*), *Bartholomew* v. *May* (*b*), *Galton* v. *Hancock* (*c*). She has claimed too much by her bill; and, as the general rule is not to give to the plaintiff the costs of a suit to have dower set apart, she cannot have costs, here, unless some authority be cited to me to warrant it. 1868. Thorpe v. Richards.

The other parties to have their costs out of the fund.

ANDERSON v. DOUGALL.

Will, Construction of—Legacy to executors—Annuity payable out of corpus.

Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand.

Where the testator directed his executors to invest in good securities such a sum as would pay an annuity thereby bequeathed, and the income of the fund was insufficient to pay the annuity:

Held, that the annuitant was entitled to be paid the deficiency out of the corpus or capital.

Statement.

The decree in this case was pronounced by the Chancellor, whose judgment is reported ante volume XIII., page 164. The Master made his report in pursuance of the decree, on the 10th September, 1867; and the cause came on for further directions before Vice Chancellor Mowat on the 23rd December, 1868.

A deficiency of assets applicable to the payment of legacies being apprehended, two questions were argued: (1) Whether the legacies given to the executors for their trouble, should abate with the other legacies; and (2), Whether the annuity given to the plaintiff

(*a*) 2 P. W. 328, (*b*) 1 Atk. 487. (*c*) 2 Atk. 430.

1868.

Anderson v. Dougall.

should be paid out of the corpus, the income being insufficient for the purpose.

Mr. *Holmstead*, for the plaintiffs and the next of kin.

Mr. *Moss*, for the executors.

Wroughton v. *Colquhoun* (*a*), *Long* v. *Hughes* (*b*), *Carr* v. *Ingleby* (*c*), *Forbes* v. *Richardson* (*d*), *Pepper* v. *Bloomfield* (*e*), *Harley* v. *Moon* (*f*), *Elwes* v. *Causton* (*g*), were referred to.

MOWAT, V. C.—Upon the first question argued, one contention on behalf of the creditors was, that, executors being in this country entitled to compensation for their services, a legacy to them by way of compensation has priority over legacies which are mere bounties. I think that contention is well founded. The general rule is, that in case of a deficiency of assets, legacies for which there is some valuable consideration are entitled to a preference of payment over those which are mere bounties (*g*). This will bears date in 1857, but the testator made a codicil to his will on the 22nd September, 1860, which had the effect of a republication of the will (*h*); and at that date, an executor was by law entitled to "a fair and reasonable allowance for his pains, care, and trouble, and his time expended in or about the executorship," &c. (*i*). The gift to the executors is in these terms: "I give and bequeath to my executors, each, the sum of £125, as compensa-

Judgment.

(*a*) 1 DeG. & S. 357; S. C. p. 36. (*b*) 1 DeG. & S. 364.
(*c*) 1b. 362. (*d*) 11 Hare 354.
(*e*) 3 Dr. & W. 499. (*f*) 31 L. J. Ch. 140.
(*g*) 30 Beav. 554.
(*g*) See the cases collected, 2 Wms. Executors, 6th ed., part 3, bk. 3, ch. 4, sec. 2, p. 1265.
(*h*) 1b. 204. (*i*) Consol. U. C. 22 Vic. ch. 16, sec. 66.

1868.

Anderson v. Dougall.

tion for their trouble in the administration of my will." I think such a legacy does not abate with the other legacies. It is true that the amount is, confessedly, somewhat greater than the executors would be allowed under the Statute; but it was held in *Davenhill* v. *Fletcher* (*a*) that such a circumstance made no difference; and I am not aware of any authority the other way. I may assume that the testator considered the sum he named to be a fair and reasonable compensation; and that he was as capable of forming a correct opinion on that point as a Master or Court is.

As to the second question—the right of the plaintiff to be paid her annuity out of the corpus or capital, the clause on which the question arises gives to the testator's executors all the rest of his estate, real and personal, in trust to sell and realize the same, and to hold the moneys coming to their hands on the following trusts: "In trust to pay my debts, funeral expenses, and legacies; and in the further trust, to invest in good securities, in their discretion, such a sum or sums as will pay the annuity hereby given to my sister during her natural life; and to pay over the balance of the money to be received from all these sources" to certain charitable objects which the will specifies. Having looked into the authorities cited, and others, I am clear that under this provision the plaintiff is entitled to have her annuity paid out of the corpus or capital.

Judgment.

I believe that there is no difference between the parties as to any other question to be provided for on further directions.

(*a*) Amb. 244.

1868.

In Re McRae.

Insolvency—Composition.

By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the Insolvent Act:

Held, that the stipulation as to the whole debt was not illegal, and that there having been default before the insolvency, the creditor was entitled to prove for the whole debt.

Statement

This was a petition of appeal by Messrs. *Young, Law & Co.*, creditors of an insolvent, against an order of the Judge of the County Court of Wentworth, allowing Messrs. *Buchanan, Hope & Co.* to rank on the estate for $55,187.97, being the amount of the indebtedness of the insolvent to Messrs. *Buchanan, Hope & Co.* on the 31st July, 1867, less certain sums afterwards paid by the insolvent in respect thereof under a certain agreement between them, and less so much of the balance as had been proved against the estate by certain Banks, who held certain promissory notes of the insolvent which had been given conditionally by way of composition for the debt.

The agreement was dated March 1st, 1867. It recited that the insolvent was indebted to *Buchanan, Hope & Co.* in the sum of $71,158.17, as cash at 31st July, 1867; and that, being unable to pay the same, he was desirous of effecting a settlement thereof by way of composition, and in consideration of the agreement hereinafter contained, it was agreed as follows:

First—The insolvent covenanted that a certain statement he had prepared was a true and correct account, to

the best of his knowledge and belief, of all his real and personal property, amounting to the sum of $25,000; 1868. In re McRae.

Second—*Buchanan, Hope & Co.*, agreed to accept, and *McRae* agreed to pay, the sum of $24,000, in full satisfaction of *McRae's* indebtedness to *Buchanan, Hope & Co.*, by sundry promissory notes bearing even date with the agreement, and payable at 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34 and 36 months, respectively, with interest with each instalment as represented by these notes;

Third—*McRae* also agreed to give his promissory note for the full amount of his debt, on the express understanding that this note was to be returned to him cancelled, on payment of all the composition notes, but that in default of paying any of the composition notes, *Buchanan, Hope & Co.* should be entitled to rank on *McRae's* estate for the full amount of his note for $71,158.17, less any sum paid on account of the composition notes; Statement.

Fourth, and lastly—It was stated that this settlement had been made on the basis of the insolvent's statement of his assets being correct, and without fraud or concealment in any way, and it was agreed that in case thereafter the same should appear otherwise, *Buchanan, Hope & Co.* were to be entitled to recover from *McRae* the full amount of his said debt of $71,158.17, less any payments made on account of the composition notes.

The certified statement was not with the papers on the appeal. It was said to shew that the amount of assets named in the agreement was over and above all the insolvent's other liabilities; but no evidence of this was put in.

The assignee had disallowed the proof for more than

1868.

In re McRae.

the composition, considering the stipulation for ranking on the estate for the whole debt, to be illegal. The Judge of the County Court reversed this decision, and the present appeal was from the Judge's order thereon.

Mr. *Moss* for the appeal.

Mr. *Proudfoot*, contra.

The principal cases cited are mentioned in the judgment.

Judgment.

MOWAT, V. C.—I think *Re Vere* fully supports the judgment of the learned Judge against whose order this appeal was brought. That case was cited from 19 *Vesey* 93. It is also reported 1 *Rose*, 281. The subsequent case of *Ex parte Peele* (*a*) was cited for the appellant; but if in the present case there was, as I understand the fact to be, a default before the bankruptcy, the cases are clearly distinguishable, for the Lord Chancellor in deciding *Ex parte Peele*, expressly said that, "if there had been any default whatever before the bankruptcy, however small," he would have allowed the proof, but that "at the bankruptcy nothing whatever was due."

In case of default in paying any of the composition notes, I think it clear that the agreement did not preclude *Buchanan, Hope & Co.* from suing on the note for $71,158.17; that the provision in the agreement as to ranking on the estate for the whole debt in case of default in paying the composition notes, did not by implication prevent a personal action against the debtor on that note; that before the insolvency the whole amount had thus become a debt against the insolvent; and that the effect or intention of the whole transaction was not,

(*a*) 1 Rose 435.

as Mr. *Moss* contended, to confine *Buchanan & Co's* remedy, if any, in respect of the residue uncovered by the composition notes, to proof thereof against the debtor's estate—the debtor was to be liable for the whole personally, should he not become bankrupt. The fourth clause of the agreement must be read in connection, not only with the third clause, but also with the promissory note given to the debtor at the same time for the whole debt. In this view the respondent's contention is supported, not only by *Re Vere*, but also by *Ex parte Bateson* (*a*), *Ex parte Wood* (*b*), *Ex parte Rae* (*c*), and other cases, referred to on the argument. 1868. In re McRae.

I think the appeal must be dismissed with costs.

Parsons v. The Bank of Montreal.

Pleading—Mortgages—Demurrer.

A third mortgagee filed his bill for redemption against the two prior incumbrancers and the mortgagor, but did not allege either that his own mortgage or that of the second mortgagee was past due: a demurrer on these grounds by the second mortgagee was allowed.

Demurrer to bill.

Mr. *Gwynne*, Q. C., for the demurrer.

Mr. *Osler*, contra.

Spragge, V. C.—The bill is filed by a third mortgagee against the first and second mortgagees, and the mortgagor. The demurrer is by the second mortgagee: and there are two grounds on which I think the bill is demurrable. Judgment.

(*a*) 1 M. D. & D., 289. (*b*) 2 D. & C. 508.
(*c*) 4 D. & C. 525.

1868.

Parsons v. Bank of Montreal.

The plaintiffs must shew that their own mortgage is past due otherwise they have no *locus standi* in Court; they must shew also that the mortgages of those whom they come into Court to redeem, are also past due. I think they do not sufficiently allege either that the mortgage to themselves is past due, or that the mortgage to the demurring mortgagee is past due: they certainly do not allege either fact in express terms. Their allegation that only so much is due upon the second mortgage, is an allegation as to the amount only; and is not an allegation of its being due in the sense of being payable.

But it is suggested that the terms in which these mortgages are stated, shew them to be past due. It happens that neither of them is a mortgage for the payment of money simply. The mortgage to the plaintiff is stated in general terms to be for the benefit of creditors, other than the first and second mortgagees. It is probable that there may be no future day of payment mentioned in this mortgage, *i. e.*, of payment by the mortgagor to the creditors, in default of which the mortgagor is to be foreclosed. But it is quite consistent with the mortgage being for the benefit of creditors, that a day not elapsed at the filing of the bill is named in the mortgage for the payment of the creditors. This is not negatived, and no default is alleged.

Judgment.

The second mortgage is alleged to have been given to secure the second mortgagees against liability in respect of a certain guarantee to the extent of $30,000 given by the mortgagees in order to obtain a Bank credit for the mortgagor. It is consistent with this that there has been no default by the mortgagor. The terms of the mortgage may be that the mortgagees should guarantee for a certain number of years which have not elapsed; and that the mortgagor has fulfilled all the terms, on his part to be performed; and no de-

fault is alleged. The bill alleges further, that the mortgagor has by deed charged the mortgage premises to secure the payment of advances made or to be made by the second mortgagees to the mortgagor: but it is not alleged that any advances are past due; or even that any advances were made; and there is in this, as in the other instance, the absence of any allegation of default being made.

1868.

Parsons v. Bank of Montreal.

The plaintiffs, therefore, have not sufficiently alleged either that they have a mortgage which entitles them to redeem prior incumbrancers and foreclose the mortgagor, or that the mortgagees who demur have a mortgage, which is in a position that entitles any one to redeem them. The demurrer therefore must be allowed, upon the usual terms.

WIGHT v. CHURCH.

Will, construction of—Distribution, period of—Vested interests.

A testator devised all his real estate to his two daughters and a granddaughter "during their lives or the lives of any one of them for their support; and in the case of the marriage of any then to those above-named remaining unmarried," and after their decease the property was to be sold for the benefit of all his grandchildren. At the time of his death all were living and unmarried; subsequently one of the daughters married but became a widow, the other daughter died unmarried and intestate and the granddaughter afterwards married (in 1864:)

Held (1) that the estate which became vested under the will in the granddaughter, was not defeasible upon her marriage.

(2) That the sale and distribution of the estate was not to take place until after the death of the granddaughter; and

(3) That the grandchildren, the devisees over, took vested interests, and that all grandchildren born before the period of distribution were entitled and took *per capita* and not *per stirpes*.

Statement.

The bill in this cause was filed for the purpose of obtaining a construction of the will of the testator *John Wight*.

1868.

Wight v. Church.

Mr. *Crooks*, Q. C., for the plaintiffs.

Mr. *S. Blake*, contra.

SPRAGGE, V. C.—The surviving executors and trustees of the will of the late *John Wight* ask for a construction of the will of the testator and a declaration of the rights of the parties. The will is dated 8th of December, 1862, and the testator died in the month of December, in the following year. The devise upon which a construction is asked is in the following terms: "I give, devise and bequeath all my real estate to and for the use and benefit of my two daughters, *Mary Wight*, *Isabella Wight* and my grand daughter *Mary Jane*, the daughter of the aforesaid *Isabella*, during their lives, or the live of any one of them, for their support; and in the case of the marriage of any, then to those above-named remaining unmarried, and after the death of the above-named persons to whom the same is left, then I desire that the same may be sold, and the proceeds of such sale be equally divided among all my grandchildren, share and share alike without distinction of sex or otherwise."

Judgment

At the death of the testator the two daughters and the granddaughter, named in the will, were living and unmarried: and as the bill states had never been married. *Mary* subsequently intermarried with one *Dowser* and is now a widow; *Isabella* died unmarried and intestate, *Mary Jane*, the granddaughter married, in 1864, one *Milo Church*. *Mary*, *Mary Jane* and her husband, and the administratix of the estate of *Isabella*, are made defendants. *William Wight*, a grandson, born before the death of the testator is also made a defendant, and is the only defendant who has answered; the others have allowed the bill to be taken *pro confesso* against them. There are a large number of grandchildren living, some born before and others after the death of the testator

and three of the grand-children are dead, two intestate and unmarried and one intestate and leaving two children. 1868. Wight v. Church.

It is suggested by counsel for the plaintiffs, and assented to by counsel for the defendants, that the land became divisible upon either the death or marriage of the last of the three immediate devisees, that in the words preceding the direction to sell, the words "after the death of the above named persons" should be read "after the death or *marriage* of the above-named persons." *Brainbridge* v. *Cream* (*a*), is referred to upon this point. In that case there was a devise by husband to his wife of certain freeholds and leaseholds, with a revocation in case she married again; then followed a direction for the sale of a leasehold messuage in case of the death or second marriage of the wife, whichever should first happen, and the testator directed the proceeds of the sale to be divided among nephews and nieces, or such of them as should be living, at the death of his wife. The widow married again and thereupon the trustees sold the property. And the question was whether the proceeds were presently divisible, or would not be divisible until the death of the widow. The Master of the Rolls held the fund divisible, without waiting for the death of the widow. Judgment.

There are some points of difference between that case and the case before me. There was an express revocation in the event of marriage, and the sale was to take place immediately after death or marriage, whichever should first happen, the division of the proceeds was the only thing remaining, and in terms, that was to be among those living at the death of the wife. In the case before me there is no revocation in terms, and the sale and division of the proceeds are directed to be after the death of the devisees. There may be a purpose in

(*a*) 16 Beav. 25.

1868.

Wight v. Church.

this, viz.: that the estate might be enjoyed during widowhood by one or more of the devisees, but the devise over among the three may make a difficulty in the way of so construing the will; the practical working of the devise would be this: one of the three marries, and her share goes to the other two, upon her becoming a widow it would not be divested and revest in her; notwithstanding her widowhood she would still be without it: and so in the event of a second marrying and becoming a widow, as to any but the last of the three, the devise would be absolutely gone; and if the last could retain it notwithstanding her marriage the devise would want that equality which upon the face of it would appear to be the aim of the testator.

Judgment.

But again, on the other hand, the devise in the first place is for life, "during their lives or the lives of any of them for their support." The words "any of them" are explained by the devise over among themselves in the event of the marriage of any of them, and of one of them remaining unmarried. There is no revocation in the event of marriage, as in *Brainbridge* v. *Cream*, nor any forfeiture, but in case of marriage "then to those above-named remaining unmarried." The contingency that has happened is that upon the marriage of the granddaughter there was no one to take a devise over. But for her marriage she would have a life-estate. In fact the devise is of a life-estate; subject indeed to be defeated, but upon the happening of what event? It is said in the event of her marriage; but that is not the language of the will. It is simply a devise over to a person or persons filling a particular character. There being no person filling that character, is there anything to defeat her life-estate? Upon this construction of the will, the provision that follows is correct and consistent with the rest of the will. It makes the *death* of the immediate devisees, *i.e.*, of all of them, or in other words, the death of the survivor of them, the period for sale and distribution.

1868.

Wight v. Church.

This construction, it is true, would give the benefit of the devise to one, who in the contemplation of the testator might need it less than the other objects of his bounty, as between those married and unmarried he looked upon the unmarried as those requiring support. It turns out that of the two survivors the one first married (as I understand) is a widow, while the granddaughter is still a married woman; and upon this construction the married woman, not the widow, would have the benefit of the devise. But the will proceeds upon this, that upon marriage and thenceforth the devise over is to take effect, at any rate if there is any one to take the devise over. The contingency of the widowhood of any of the three first takers does not seem to have been contemplated by the testator: he has not at any rate, made any provision for it: and this certainly might have happened under the will; there might have been two widows and one unmarried woman, the latter enjoying the whole devise, to the exclusion of the former. We often see wills which lead us to think that if certain contingencies had occurred to the testator's mind he would have provided for them, but we must still gather the meaning of the testator from the language that is used by him.

Judgment.

In the will before me, after some fluctuation of opinion I think the proper construction is that the life estate which existed in the granddaughter, was defeasible only upon a double contingency, her own marriage, and there being an unmarried woman to take the estate, upon her marriage.

The granddaughter herself and her husband have probably been otherwise advised, as they have not appeared to urge this view upon me. And the plaintiffs and *William Wight* appear also to have been otherwise advised. *William Wight* indeed is interested in the other construction. The plaintiff *John Wight* is a

1868.

Wight v. Church.

son of the testator, he may have children who are interested in the same construction, but he himself takes no interest under the will. The grandchildren are interested, inasmuch as my construction postpones the sale and distribution of the estate to the death of a devisee of the same generation as themselves. The point is a nice one, and I should be very well pleased to see it argued before the full Court, or upon appeal.

Judgment.

Upon the other points raised I agree with the learned counsel who argued the case before me. In the first place that the grandchildren, the devisees over, took a vested interest; and next that all of the class coming into being before the period of distribution are entitled, and that they are entitled *per capita* and not *per stirpes*. The personal representatives of those dying before the period of distribution to be entitled to the share of the grandchild who has died. The costs of the suit to be paid out of the estate.

1868.

GRAY v. COUCHER.

Mortgagees—Possession notice of title—Registration—Evidence—Costs.

The rule that possession is notice of the title of the party so in possession considered and acted on.

The plaintiff purchased the land in question from *J.*, who had purchased from *G.*, no conveyance having been made to *J.* by *G.*, who afterwards conveyed the same land to *T.*, a son of the plaintiff, who mortgaged it and represented the property as his own; the plaintiff being all the while in possession. The title was not a registered one:

Held, that the mortgagees were affected with notice of the plaintiff's title by reason of his possession, although there was no pretence of actual notice to them; and they having omitted to set up the registry laws as a defence, liberty was given them to apply for leave to do so, if so advised.

A person having a paper title to land of which he was not the actual owner, created a mortgage thereon, to a person not a party to a suit, by the party beneficially interested, to get rid of another mortgage created on the estate, was asked if he had given notice of the claim of the real owner at the time of the alleged execution of the first mortgage, which he asserted he had given, and also denied having made such mortgage; evidence was called to contradict him.

Held, that this could not be deemed a collateral issue, and therefore such evidence was admissible.

The beneficial owner of land omitted to have the paper title thereto in his own name, and thus enabled his son who held such title to mislead parties into accepting a mortgage thereon from the son: the Court, though unable to refuse him relief, in a suit brought to set aside such mortgage, under the circumstances, refused him his costs.

Examination of witnesses and hearing at Hamilton.

Mr. *Strong*, Q. C., and Mr. *Barrett*, for the plaintiff.

Mr. *Blake*, Q. C., for defendants *Burton* and *Sadlier* and Mrs. *Coucher*.

The defendant *Thomas Gray* had allowed the bill to be taken *pro confesso* against him.

1868.

Gray v. Coucher.

SPRAGGE, V. C.—I take it to be proved that the plaintiff was the original purchaser of the land in question in September, 1845, from *William Jackson*, *Jackson* himself having purchased from one *John Gamble*, and no conveyance having been made from *Gamble* to *Jackson*. We find a bond dated 22nd January, 1843, by *Gamble*, reciting that *Thomas Gray* (a son of the plaintiff) was the purchaser; and conditioned for the conveyance to *Thomas Gray* of the same land upon payment of certain purchase money therein mentioned: and, following this, a conveyance dated 8th January, 1851, from *Gamble* to *Thomas Gray*. The conveyance to *Thomas Gray* seems to have been brought about by the procurement of his mother. The explanation indeed is not very satisfactory. The father, the plaintiff, has however always had possession, and has made improvements upon the place. The plaintiff asserts his equity as purchaser, and having possession against *Burton* and *Sadlier* mortgagees of *Thomas Gray* of the property, under mortgage dated 17th March, 1858, registered the 24th of the same month, and against a Mrs. *Coucher* assignee of that mortgage by assignment, dated 18th March, 1858, registered 20th March, 1860, and to which assignment *Thomas Gray* was a party. *Burton* and *Sadlier* were solicitors of Mrs. *Coucher*.

Judgment.

The plaintiff alleges actual notice to *Burton* and *Sadlier* that the plaintiff, not *Thomas*, *Gray* was the owner of the land mortgaged, and *Thomas Gray* gives evidence of actual notice to *Sadlier* of such ownership. I do not think it would be safe to hold the fact of notice established by the evidence of *Thomas Gray*: his demeanour in the witness box impressed me unfavourably; he answered some questions evasively; and appeared to hesitate before answering in order to see the bearing of the questions and the effect of his answers upon the interest of the parties. He exhibited, I thought, a strong bias for the plaintiff, from a desire, as

1868.

Gray v. Coucher.

I thought probable, to save his father from the consequences of his act. He did not seem to me entirely reliable. Then he is contradicted in regard to his previous dealing with the same property. He admitted that he had mortgaged it to a Mrs. *Woods;* but denied that he had mortgaged it or pledged it to *McLaren & Co.* He says that the mortgage to *Woods*, and the one to *Burton* and *Sadlier*, and the assignment which he calls a mortgage to Mrs. *Coucher*, were the only incumbrances that he ever made upon the place; he says he refused to give it to *McLaren* as security: that he told Mr. *Adam Brown*, *McLaren's* partner, the reason why he could not assign, viz., that he did not own the property; that he had put it in jeopardy once, and did not intend to do it again; that he did not assign the property to *McLaren;* that if contained in the mortgage to *McLaren* it was contrary to his desire; that he is positive that he refused to pledge the property to *McLaren's* firm. All this was in answer to questions put to him as to an alleged mortgage, or other pledge of the property to *McLaren & Co.* before the mortgage to *Burton* and *Sadlier*. Mr. *Adam Brown* was then called, and his evidence is in contradiction to that of *Gray*. He says that *Gray* deposited with him some title deeds. "The deed from *Gamble* to him of the farm in question being one, these were pledged until he should give us other security." He adds that *Gray* did not tell them that the farm was his father's; that he stated that it was his farm, that if they had supposed it was not, they would not have had anything to do with it; that they did not ask *Gray* for security on the farm, and there was no refusal on his part to give it; that it was his own proposition. I thought that much more weight was due to the evidence of *Adam Brown* than to that of *Thomas Gray*. It was not objected that this contradiction of the evidence of *Thomas Gray* was a contradiction upon a collateral issue, and so inadmissible. It occurred to me to doubt

Judgment.

1868.

Gray v. Coucher.

whether it might not be open to that objection; but I think it is not. I incline to think it would not be so even if there were no connection between the security to *McLaren & Co.* and the security to *Burton* and *Sadlier*, but the fact was that the latter was in a great measure a substitution for the former, and it would be a fair argument that if *Thomas Gray* had given the land in question as a security to *McLaren & Co.* without notifying that firm that it was the property of his father, not of himself, he probably gave it as security to *Burton* and *Sadlier* without giving them notice either, and if so he was properly asked if he had pledged the property to *McLaren & Co.*, and if he had given them such notice; and upon his denying that he had so pledged it, evidence to contradict him was admissible, and the evidence of *Adam Brown* is therefore material in two aspects, as discrediting *Thomas Gray* the only witness to prove actual notice, and as shewing the improbability of his story.

Judgment.

The story of *Thomas Gray* appears to me improbable upon another ground. He says that he thought that the instrument which he signed to which Mrs. *Coucher* was a party, was a mortgage to her as a substitution for the one he had given to *Burton* and *Sadlier*, which he understood was lost; yet he made what he considered as such a mortgage; and gave her no notice that his father was owner of the land. He supposed, as he said, that *Burton* and *Sadlier* were indebted to Mrs. *Coucher*, and that the mortgage was given to secure such debt. He places himself in this dilemma. He either supposed that Mrs. *Coucher* would be affected with the notice which he says he had given to *Sadlier*, or that she would not. If he supposed she would, he would be confederating with *Burton* and *Sadlier*—or *Sadlier*—in imposing upon Mrs. *Coucher* a worthless security; or, if he supposed she would not be affected, he omitted that protection to his father which he says

1868.

Gray v. Coucher.

he had taken care to afford in the case of *McLaren & Co.*, and of *Burton* and *Sadlier*. I repeat that it would not be safe to hold notice to be established by such evidence. The alleged notice is denied by the answer of *Burton* and *Sadlier* each for himself. There is no pretence of any actual notice to *Burton*, or to Mrs. *Coucher*.

Then it is contended that the defendants are affected with notice by reason of the possession of the plaintiff, and *Holmes* v. *Powell* (*a*) decides that possession, and that without actual notice of possession, affects a purchaser with notice, if he makes no inquiry, as to the title of the person in possession. The land in question in that case was in Yorkshire, one of the Registry Counties; but no point was made as to whether possession would be notice as against a registered title. This decision was in 1856, and Lord *St. Leonards*, in the fourteenth edition of his work on Vendors and Purchasers, published in 1862, lays down the law as to the kind of notice necessary to affect a purchaser for value having a registered title in the terms in which it has always been understood in this Court, that "it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situations of the persons having the prior deed; and knowing that, registered in order to defraud them of that title he knew at the time was in them." It is unnecessary however to pursue this point further as the title to this land was not a registered title under the law as it stood before 1850; and the instrument which the plaintiff has omitted to register was made long before 1st January, 1851. The defendants have not indeed set up the registry laws in their answers. If they should be advised to do so, or if they should be advised that their case comes within the Registry Act of 1865,

Judgment.

(*a*) 8 D. M. & G. 572.

1868.

Gray v. Coucher.

sections 65, 66, they may apply for leave to do so. I express no opinion upon the point.

In case the defendants are not entitled to the protection of the registry laws, the case of *Holmes* v. *Powell* would seem to apply. The language of the Lord Justice *Knight Bruce* is sufficiently explicit: "I apprehend that by the law of England when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title, under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country as I understand it, that a man who knows, or cannot be heard to deny that he knows, another to be in possession of a certain property, cannot for any civil purpose as against him, at least, be heard to deny having thereby notice of the title or alleged title under which, or in respect of which, the former is and claims to be in that possession." And the Lord Justice quotes the authority of Lord *Eldon* for the doctrine, whose language in *Allan* v. *Anthony* (*a*) was, "It is so far settled as not to be disputed that a person purchasing when there is a tenant in possession, if he neglects to inquire into the title must take subject to such rights as the tenant may have." There was another point in the case, but the judgment, in which Lord Justice *Turner* concurred, proceeded upon the ground that possession is itself notice.

Judgment.

The possession in this case was clearly proved to be in the plaintiff, and I can see my way to no other conclusion than that the plaintiff must succeed. I regret to be obliged to come to this conclusion. As to costs

(*a*) 1 Mer. 282-4.

1868.

Gray v. Coucher.

I think this is a case in which costs should not be given to the successful party. He allowed the paper title, as it is called, to stand in his son's name, and thereby enabled his son to impose himself upon others as the owner of the property. It is true that if inquiry as to the possession and title of the property had been made, of the party in possession, the mortgagees would not have been misled, but I believe as a matter of practice in this country such inquiry is very often not made, and it does not appear to have been made in this case. I infer from the bill and the evidence that it was not made. The matter then stands thus, with care, more care than is often exercised in this country, the parties dealt with by the son would not have been misled, but the omission of the father to have the paper title in his own name, enabled the son to mislead them. This is not sufficient, in my opinion to deny him relief, but it is I think a sufficient ground for refusing him his costs.

Judgment.

JACKSON v. GARDNER.

Practice—Appeal from Chambers—Time for.

A motion by way of appeal from an order made in Chambers, must be actually made within the fourteen days limited by the Consolidated Orders: and it is not sufficient to give the *notice* within the fourteen days. *Aliter* in the case of an appeal from a Master's report.

This was an appeal from an order made on an application argued before the Secretary in Chambers.

Two points were discussed. The first was, as to the day from which the fourteen days allowed for the appeal motion should count; the second question was, whether it was sufficient that notice should be given within the fourteen days, or whether the motion must actually be made within the fourteen days.

1868.

Jackson v. Gardner.

Mr. *S. Blake* for the respondents referred to *Re Miller* (*a*).

Mr. *Bain*, contra, relied on the analogy of the practice in the case of appeals from the report of a Master. The Consolidated Orders Nos. 253, 324, 329, 392, and 408 were referred to.

MOWAT, V. C. (after conferring with *Spragge*, V. C.) held that such a motion must be made within the fourteen days; and it being admitted that in that case the appeal was too late, whichever day the fourteen days should be reckoned from, the motion was dismissed with costs.

FOSTER v. PATTERSON.

Will—Construction of—Trustees—Cestui que trust—Marrying with approval of trustees.

A testator devised his property in trust, amongst other things, to pay his son an annuity of £100 and in case of his marrying with the approbation of the trustees, then they were to hold certain specified property or to convey the same for the separate use of the wife during her life, subject if the trustees thought best to the payment of such annuity to the son, and after the death of the wife then to the use of the children of the marriage or their issue, with a proviso "that the trusts in favor of such wife and children shall not arise nor shall the approbation of my said trustees of such marriage be presumed or proveable unless my said trustees shall by deed declare the said trusts in favor of such wife and children." The son married, but no declaration of trust in accordance with this proviso was made:

Held, that a declaration by deed was necessary to give the wife or children a *locus standi* in Court, and that evidence of conduct on the part of the trustees tending to shew their approbation of the marriage was insufficient.

Statement.

This was a suit instituted by the wife and children of the son of the late *William Foster*, claiming to be inter-

---

(*a*) 12 Gr. 72.

1868.

Foster v. Patterson.

ested in certain lands mentioned in the will of the testator; and a motion was made for the appointment of a Receiver of the rents and profits of those lands, on the grounds appearing in the head note and judgment. It was objected that it was optional with the trustees to make a declaration of trust or not; and that no declaration had been made as provided for by the will, and that the trustees had never approved of the marriage.

To this it was answered, that the trustees, who were the husbands of the two daughters of the testator, had never objected to the marriage of the parties; and that in particular *Patterson* had evinced his approval thereof by meeting the parties when on their wedding trip, and inviting them to spend some time at his house, and which invitation they had availed themselves of.

Mr. *Fitzgerald* and Mr. *A. Hoskin*, for the plaintiffs.

Mr. *Roaf*, Q. C., and Mr. *George Murray*, contra.

Judgment.

Spragge, V.C.—*William Foster*, late of the City of Toronto, died in 1862, leaving one son and two married daughters. By his will, dated 17th January, in that year, he devised a number of parcels of real estate to trustees, the husbands of his daughters. The trusts, so far as they are material to the case before me, are, to receive the rents of certain parcels first devised, and to grant leases; to pay a small annuity to a brother in Ireland, and to pay an annuity of £100 a year by quarterly payments to his son, and to deposit the surplus at interest in the Bank of British North America. The testator gives a reason for naming only £100 for his son's annuity in these terms, "which amount I limit to the said sum of £100 because of the unsteady and irregular life which my said son has for some time past, led." He then empowers the trustees in the event of his son improving in his

1868.

Foster v. Patterson.

habits to increase his allowance in their discretion, and again to reduce it to £100 in case the son should not in the judgment of the trustees continue to merit the increased allowance; and he declares that his trustees shall at all times be "the judges both as to the propriety of making such increased allowance and as to the amount thereof."

The testator then provides for the contingency of his son's marrying, in these terms, "and if my said son shall marry with the approbation of my said trustees, then my said trustees are to hold the said houses and premises, and the moneys deposited as aforesaid, or to convey the same to trustees, for the separate use of the wife of my said son during her life, subject if they shall so think it best, to the payment of the said sum of £100 a year to my said son, and after the death of such wife, then to the use of the children of such marriage" or their issue, with power of appointment among children if the trustees should think such a power desirable. Then follows this proviso, upon the construction of which the case at present turns, "Provided always that the trusts in favor of such wife and children shall not arise, nor shall the approbation of my said trustees of such marriage be presumed or proveable unless my said trustees shall by deed declare the said trusts in favor of such wife and children." There has been no deed declaring such trusts, but some evidence has been given to shew that the trustees did by their conduct shew their approbation of the son's marriage. He married on the 30th October, 1862, and issue have been born of the marriage. The plaintiffs' counsel rely upon the terms of the trust following the above proviso, "and if my said son shall die unmarried, or if my trustees shall not by deed declare the last mentioned trusts, or if there shall be no children, or their issue in whose favour such trusts shall have been declared surviving their mother the wife of my said son, then my said trustees or

Judgment.

1868.

Foster v. Patterson.

the trustees in whom at the time the said trust premises shall be vested, are to hold the same to the use of my right heirs." Plaintiffs' counsel read the words, "the last mentioned trusts," as referring to the trust in favor of children, issue of the marriage, after the death of their mother.

I have read these clauses of the will repeatedly to see if they will at all reasonably bear this construction, and I think that they will not. The words are too plain for doubt. There are not separate trusts, some in favor of the wife, others in favor of the children, in any sense in which the latter could be referred to as the last mentioned; they are twice coupled together in the proviso; and in the last place in which they are referred to, before being referred to as "the last mentioned trusts," they are referred to as "the said trusts in favor of such wife and children." To read this as meaning "the trusts in favor of such children," would be putting a most strained construction upon the language of the will, and would moreover make the testator make a very absurd distinction. He evidently apprehended that his son might make an unsuitable match, and he vests large discretion in his executors in relation to it; but this construction would defeat his object, making his carefully stringent provision in regard to the marriage apply, not to what might be the objectionable wife, but to the innocent children. The language of the will is indeed too plain for any reasonable doubt.

Judgment.

I have examined the authorities to which I have been referred, and some others. None of them go the length that it would be necessary to go in this case, in order to give the plaintiffs a *locus standi* in this Court. The testator has thought fit to prescribe a particular mode, as he had an undoubted right to do, in which, if his trustees should approve of the marriage of his son, they should signify their approbation, that is, by declaring by

1868.

Foster v. Patterson.

deed certain trusts in favor of his wife and children; and he has put this in very emphatic terms, that the trusts in their favor shall not arise, nor the approbation by his trustees of such marriage be presumed or proveable except by such deed. The Court is now asked to declare that such trusts have arisen without such deed; and that the approbation of the trustees to the marriage is proveable by parol; in fact as to one of them that it is to be presumed from conduct, conduct, too, which may have meant approbation, or may have been meant as mere courtesy. There is, I apprehend, nothing in the will to prevent the trustees from yet declaring trusts under it in favor of the son's wife and children, if, in their judgment honestly exercised, the marriage is one to be approved of. I cannot say that there has been *mala fides* in the trustees having as yet withheld their approbation in the mode prescribed by the will, nor am I called upon to express an opinion upon the effect of *mala fides*, if *mala fides* were shewn. The circumstance that the trustees, are the husbands of the right heirs of the testator, and entitled to take what would go to the son's wife and children, if trusts in their favor are declared—the right heirs being entitled in the event of their not being declared, may induce them not to refuse, upon light grounds, to express their approbation in the mode prescribed by the will, rather than lay themselves open to the suspicion of withholding their approbation from unworthy motives. My opinion is that the plaintiffs have no *locus standi* in Court; and that I must deny their application, and with costs.

Judgment.

1868.

MUNRO v. MUNRO.

Alimony—Custody of children.

On a bill by a wife for alimony and the custody of children who are under twelve years of age, the Court has jurisdiction to grant the latter relief without a petition.

This was a suit for alimony, the prayer of the bill in which asked also that the custody of the children, who were under twelve years of age, should be committed to the mother, the plaintiff. The bill had been taken *pro confesso*.

Mr. *Sampson* for the plaintiff.

The defendant did not appear.

MOWAT, V. C.—On looking at the statute relating to the custody of infants (*a*)—observed, that it provided for the jurisdiction being exercised on petition; but that a bill might, he presumed, be regarded as a petition for the purposes of the Act, referring to *Cassey* v. *Cassey* (*b*) beforo the Chancellor. His Honor gave relief accordingly. Judgment.

BUSH v. BUSH.

Injunction to stay execution.

A rule *nisi* in a County Court for staying an execution on the ground that the execution had been satisfied, having been discharged:
Held, no bar to an interlocutory injunction in this Court on the same ground.

This was an application, on notice, by Mr. *Moss*, for an injunction against issuing execution on a judgment

(*a*) Con. St. U. C., 22 Vic. ch. 74, sec. 5. (*b*) Ante p. 395.

1868.

Bush v. Bush.

in the County Court, on the ground that the same had been in effect satisfied by a subsequent transaction between the parties.

Mr. *Bain*, *contra*, opposed the motion on the ground (amongst others) that the plaintiff had applied to the County Court on the same facts, and that a rule *nisi* which was granted had been discharged on the merits. But

MOWAT, V. C., granted the injunction, referring to *Paton* v. The *Ontario Bank*, (*a*) and *Williams* v. *Roberts* (*b*.)

McSWEENEY v. KAY.

Specific performance—Time essence of contract—Tender of payment when not essential.

Where the agreement was that the defendant should advance money on the purchase of land, and that the plaintiff should have the right to repurchase the same by a certain day, upon repayment of the amount so advanced, and interest, together with what was paid by the defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract—

Held, that, although the Court, as a general rule, will hold a party to perform such a contract within the time limited, yet it is not ousted of its jurisdiction, but will admit him to shew a good and valid reason for its non-performance within such time, and in that case may order specific performance.

The defendant having neglected to furnish a statement of his claim in respect of the advances made by him in pursuance of the agreement between the parties, and in consequence thereof the plaintiff was unable to tender the proper amount due the defendant, it was considered that the plaintiff was exonerated from making any tender.

Examination of witnesses and hearing at Guelph.

(*a*) 13 Gr. 107. (*b*) 8 Hare 315.

1868.

McSweeney v. Kay.

Mr. *Blake*, Q. C., for the plaintiff.

Mr. *Roaf*, Q. C., for the defendant.

SPRAGGE, V. C.—The written agreement seems to express the true agreement between the parties. Though put into the shape of a purchase from the defendant by the plaintiff, still the clause under which the plaintiff gave his notice was agreed to by both parties. It was indeed introduced at the instance of the plaintiff, the "stringent" clause being added by the conveyancer, but seems not to be unreasonable. The real nature of the transaction considering the position of the parties, and what passed before the sale, was that *Kay* was to purchase, in a sense, on behalf of *McSweeney*, inasmuch as he was not upon becoming a purchaser to have the absolute dominion and control of the purchased property, but to hold it subject to a trust in favor of *McSweeney*. It was one agreement, that he should purchase, and that upon his purchase *McSweeney* should have the right of re-purchase from him; this is clear from the evidence of Mr. *Peterson*. The answer of the defendant ignores this previous agreement. The bill states the previous agreement substantially as it is proved in evidence, whether however the proposal came from *McSweeney* or from *Kay* is not proved, nor is it material, but it is clear that there was an agreement that *Kay* should purchase and that upon his purchase he should become a trustee for *McSweeney*.

Judgment.

It was in substance an agreement for an advance of money upon certain terms; but it was of course competent to the parties to agree upon such terms as they might think fit, unless they were of such an oppressive nature as the Court will not permit. They chose to make the terms different from those upon an ordinary advance of money. *McSweeney* had the option to repay the money advanced with interest and bonuses, but he was

1868.

McSweeney v. Kay.

under no obligation to do so; a time was named for the payment and it was stipulated in express terms that time should be of the essence of the contract between the parties; and to be more explicit and to put it in language intelligible to any ordinary layman, it is added that unless the purchase money should be paid on or before the 1st of March, 1868, *Kay* should not be bound by the agreement either in law or in equity or otherwise howsoever. Stipulations of this nature are sometimes introduced into ordinary sales of land; and effect is given them by the Courts. If introduced into a mortgage or other ordinary transaction for the loan of money, the Court, I apprehend, would disregard them. This was a loan or advance of money in substance, but with the unusual feature that the person for whom the advance was made, was not bound to repay it.

Judgment.

The stipulation which has occasioned this suit is in these terms: "It is hereby further understood that if said *McSweeney* desires to purchase before 1st March, 1868, (the day fixed for payment,) he shall give three months previous notice in writing and shall pay interest at the rate aforesaid up to the expiry of said notice." This so far at the instance of *McSweeney*; and the Conveyancer acting for *Kay* added as part of the same provision the following: "and if having give such notice he fails to pay at or before the expiry of three months from the giving thereof, he shall not be entitled to purchase the said land hereunder, nor shall the said *Kay* be further bound hereby." The reason for this I suppose may be taken to be, that upon receiving such notice *Kay* would look out for another investment for the money which he was notified would be paid in; still it was a stringent provision, for there was no obligation to pay in pursuance of the notice any more than at the expiry of the time given by the agreement, 1st March, 1868.

McSweeney did act, or intend to act under this pro-

1868.
McSweeney v. Kay.

vision, and on the 7th September, 1867, he gave a notice, which in its terms, I incline to think, was sufficient, if otherwise regular. It was however dated 7th August, and notified *Kay* that he would be paid within three months from its date. It was therefore in fact only a two months, instead of a three months notice, and *Kay* would not be bound to accept his money under it, and he did not inform *McSweeney* that he would accept it. I incline to think that it was ineffectual for any purpose, to bind *McSweeney* any more than *Kay*; and there is this further difficulty in the way of *McSweeney* being bound by it, that in August of the same year he had asked *Kay* for a statement of the improvements that he had made (and which under the agreement were to be allowed to *Kay*), and this statement *Kay* refused to give, and it appears never did give to *McSweeney*.

Judgment.

Another notice dated November, 1867, is put in by *Kay*. It is strangely signed "*John Sweeneney*," but is nevertheless, I believe the signature of *McSweeney*, and a witness *Thorpe* swears that it is so. It appears that he was as often called and as often signed his name *Sweeney* as *McSweeney*. This signature contains an "ne" too much, but it is the signature of an illiterate man and such a mistake is quite possible. This notice would expire on the 6th or 7th of February 1868. It is denied that *McSweeney* ever sent this notice, but I will assume against him for the present, that he did. It is produced from the custody of *Kay*, and if signed by *McSweeney* it is a proper inference, I conceive, that it reached Mr. *Kay* regularly by being served upon him, and so served at the time it bears date. But the question again arises as to the improvements; and also as to other charges which under the agreement *Kay* was entitled to make against the property. He was to be chargeable for the nett amount of rent received by him. and to be allowed for his actual outlay for repairs, and permanent or other improvements, and for insurance. The

1868.

McSweeney v. Kay.

nearest approach to information that *McSweeney* appears to have obtained upon this head, was being informed by *James Philip*, agent for a Loan Company, of the gross amount claimed by *Kay* for repairs, and this was in October, November, or December, 1867, and in the latter month the Firm of *Lemon & Peterson* on behalf of *McSweeney* sent a letter to *Kay* which he received, desiring to be informed of the amount of his claim upon the property. To this no answer was sent, nor was the desired information ever furnished.

On the 29th November, twenty-three days after the date of the notice last referred to, *McSweeney* sent another notice which was, that he would be prepared to pay *Kay* in full on the 1st of March, 1868. This was the day on which the money was payable under the agreement, independently of the provision for earlier payment upon notice. A notice for this payment was

Judgment.

unnecessary but it was a notification of *McSweeney's* intention to pay on the 1st of March instead of the 6th of February, and so was a countermand of the notice—supposing it to have been given—of the intention to pay on the last named day. The agreement it is true does not authorize a countermand, but it would be holding the party to pay, very strictly to the letter of his agreement, if after giving such notice he were held to have forfeited his right to the land by non-payment in pursuance of the previous notice. He seems not to have understood, or at least not to have appreciated the consequence of giving a notice, and not acting upon it, thinking that he would still have the right to pay on the 1st of March, 1868.

That day fell on a Sunday. On the previous day *McSweeney* made an attempt to pay *Kay*. He went with one *Garrett Moore* on that day to the house of *Kay* in the village of Fergus, taking with him $2,370 to pay or tender to *Kay*. They were unable to find

1868.

McSweeney v. Kay.

Kay or to gain admittance to his house. *Kay* left home on the morning of that day and did not return till after dark. One week later *McSweeney* and *Moore* again went to Fergus and found *Kay* at home. *McSweeney*, having first asked for a statement of the amount due in order to pay *Kay*, produced a large bundle of Bank bills which he tendered to *Kay* and which *Kay* refused to receive; *Kay* said he had nothing to do with him, that he would not accept of his money, that the property was his. *McSweeney* pressed him to take the money which *Kay* still refused. It is said that $2,370 was considerably less than was really due to *Kay*. It may be so and probably was, but I have no reason to doubt that there was a *bona fide* desire, and endeavour on the part of *McSweeney* to pay *Kay* all that was due to him, and if the whole amount due to *Kay* was not paid or tendered to him, it was because of his own default in not informing the plaintiff what was the amount really due. Without such information it was impossible for the plaintiff to know how much the defendant had expended upon improvements, how much for insurance, and on the other hand how much he had *actually* received, for it was only with actual receipts that he was chargeable for rent. In August, 1867, he refused to inform the plaintiff how much he had expended in improvements, and Mr. *Peterson's* letter of December, 1867, asking for information as to the amount due, remained unanswered.

Judgment.

I cannot agree that under these circumstances it lay upon the plaintiff *at his peril to* tender a sufficient sum. Information from the defendant of the true amount due was essential to the plaintiff, to enable him to tender the true amount. This information may in equity be looked upon as a condition precedent to his right to receive the money; and I am inclined to think that an actual tender of money was not necessary. The common law doctrine as to conditions precedent will illustrate this.

1868.

McSweeney v. Kay.

In *Hotham* v. *The East India Company* (*a*) a certificate as to tonnage was to be obtained by the plaintiff but could only be obtained through the *Company's* agents, and the Court observed "granting it to be a condition precedent, yet the plaintiff having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the *Company's* agents, which the jury have found to be the case, it is equal to performance," which as the Court justly adds, is evident from common sense.

The defendant insists by his answer that the plaintiff lost his right to re-purchase by not paying the amount due in pursuance of his first notice; and again by not paying in pursuance of his second notice; and again by not paying by the 1st of March: he insists upon each as a forfeiture of the plaintiff's right, and he says that until the plaintiff lost his option of purchasing by reason of his default "I was always ready and willing to sell him the said property under the terms of the said agreement, and for that purpose to render such statements of my claim as the plaintiff might reasonably require."

Judgment

This may be taken as the defendant's reason for not furnishing a statement of his claim when he was asked to do so in December, that the plaintiff had lost his right to purchase; until he had lost his right to purchase he was willing to furnish such statement—afterwards, not. It is indeed a tacit admission of the propriety if not the necessity of his furnishing a statement of his claim, and the same reason that induced him to refuse this, would as a matter of reason and consistency induce him to refuse to accept payment. That being the case it was not necessary for the plaintiff I apprehend to make a tender, and Sir *James Wigram*,

(*a*) 1 T. R. 645.

ruled upon that principle in *Hunter* v. *Daniel* (*a*). There were certain instalments of purchase money remaining to be paid by the plaintiff and it was insisted that the making of every payment was a condition precedent to the right of the plaintiff to call for specific performance, the question arose upon demurrer, and, as Sir *James Wigram* said "it was argued that the bill could not properly be filed, before the plaintiff had out of Court fully performed his agreement," and the Vice Chancellor proceeds, "the general rule in equity certainly is not of that strict character. A party filing a bill submits to do everything that is required of him, and the practice of the Court is not to require the party to make a formal tender, where, as in this case, from the facts stated in the bill or from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money. The defendants according to the allegation in the bill insist that the agreement is altogether void" in this case the defendant insists that it is at an end, "and the plaintiff therefore is at liberty to contend that the tender would have been useless."

Judgment.

The defendant's position in this case seemed to me to be founded upon what is, in my judgment, some misapprehension as to the effect in a Court of Equity of time being made of the essence of a contract. Such a provision does not oust the Court of its jurisdiction, or make it impossible for the Court to grant specific performance after the expiry of the time stipulated for. The Court will certainly, as a general rule, hold a party to such a contract, bound to perform it, within the time limited for its performance, but it will admit him to shew a good and valid reason for its non-performance at the time; as for instance that he did all that in him lay, in order to its performance, and especially will he be ad-

(*a*) 4 Hare, 420.

1868.

McSweeney v. Kay.

mitted to shew that it was the fault of the other party that it was not performed within the time. This was the case in *Morse* v. *Merest* (*a*). It was the case of a contract to sell at a valuation to be made by third persons; the vendor refused to allow the valuators to come upon the land, and the time elapsed. Sir *John Leach* decreed specific performance notwithstanding, observing that in such a case time was as essential in equity as at law, but that in equity a defendant was not permitted to set up a legal defence which grew out of his own misconduct; and that this agreement was now to be acted upon as if no time were limited, or the time was not passed.

Judgment.

I am of opinion, as I have said, that the plaintiff was in time if he paid by the first of March. He endeavored to ascertain from the defendant what sum he was to pay, a fact known to the defendant and not known to the plaintiff, and which the plaintiff could not get at by computation, but which depended upon facts peculiarly within the knowledge of the defendant. The defendant failed to give the required information, and that advisedly, as appears by his answer, his position being that the plaintiff's right to purchase was gone. I think that upon this the plaintiff stood excused from making any tender. He did, however, endeavor to make a substantial tender, in good faith, in order to the repurchase of the land. If the sum was too small it was the defendant's own fault by his neglect to inform him of the proper amount. This endeavor of the plaintiff was frustrated by the absence of the defendant, an absence which, from the evidence of the toll-keeper, I judge was a designed absence in order to prevent a tender by the plaintiff; whether it was so or not is not very material. A week afterwards the plaintiff again endeavors to pay the purchase money, and is met by an

(*a*) 6 Mad. 25.

absolute refusal on the part of the defendant to receive it. I think that the plaintiff did all that he could do to place himself in a proper position, and that he is *rectus in curia*. 1868. McSweeney v. Kay.

The law of this Court, to which I have adverted, where time is made of the essence of the contract, would not be founded on equity or good sense, if it were so rigid as to exclude from relief a party who in good faith and with diligence has striven to perform his part of the contract. The decree will declare the plaintiff entitled to specific performance, with costs up to decree. Subsequent costs may for the present be reserved, but in my judgment the plaintiff will be entitled to those costs also, unless he makes a vexatious opposition to the defendant's claim. There will be a reference to the Master at Guelph to take an account of the amount due, but the parties may probably be able to agree upon the amount, out of Court. Judgment.

In re Beard.

Insolvency—Attachment to Sheriff in Quebec.

Where a trader in Ontario becomes insolvent, and an attachment in insolvency is issued to the Sheriff of the County in which he resides, the County Court Judge has jurisdiction to issue another attachment to the Sheriff of any County in Ontario, or of any district in Quebec, in which the insolvent has property.

This was an appeal from an order of the Judge of the County of York, refusing to issue an attachment to the Sheriff of the District of Montreal, on the ground that he had not jurisdiction to do so. The insolvents were residents of the County of York, and an attachment to the Sheriff of that County had been issued; but there being property of insolvents in the District of

1868. In re Beard.

Montreal, the creditors desired a writ to that District also.

Mr. *Roaf*, Q. C., for the creditors, referred to the Insolvent Act of 1864, sec. 3, sub-sec. 10, sec. 7, sub-secs. 2 & 6; and to the 6 & 15 sections of the Act of 1865; and contended that, as the jurisdiction of the County Court Judge to issue an attachment was not confined to his own County, neither was it restricted to the Province of Ontario.

No one appeared against the appeal.

Judgment.

MOWAT, V. C., allowed the appeal, and granted an order for the attachment to Montreal.

MCKENZIE v. MCDONNEL.

Practice—Order of revivor—Insolvency.

Persons who acquired an interest in the subject of the suit before the suit was commenced, cannot be made parties by an order of revivor.

Where a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void; but, on the fact being brought before the Court, such order will be made as may be just.

Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the Court made an order, at the instance of the defendants, staying proceedings until all proper parties should be brought before the Court.

This was a motion to set aside the decree and other proceedings, including an order of revivor which had been obtained by *Isaac Buchanan* since the decree.

1868.

McKenzie v. McDonnel.

Mr. *Moss*, for the motion.

Mr. *S. Blake*, contra.

MOWAT, V. C.—It was admitted that the order of revivor must be set aside (*a*), Mr. *Buchanan's* interest in the subject of the suit having arisen before the suit was commenced—a case to which an order of revivor is not applicable—(*b*), and his interest being an interest in common with that of his partners—who are not named in the order.

The application to set aside the decree and prior proceedings was resisted; but no objection was taken to the circumstance of the application being by motion: and I believe that decrees have sometimes been set aside in this Court on motion where the objection was not taken at the bar. But the English rule is against the practice, and the case is not within any of the Consolidated Orders which authorize a motion. Judgment.

The bill was filed on the 16th April, 1867. On the 23rd December following, the plaintiff made an assignment to *Hugh Innis*, under the Insolvent Acts; but the cause proceeded without the assignee being made a party, and was heard at Hamilton, on the 29th April, 1868; the assignee *Innis* was examined as a witness for the plaintiff; and a decree was pronounced in the plaintiff's favor. This decree was carried into the Master's office on the 21st November, 1868; on the 28th of the same month, the Master gave directions as to the mode of prosecuting the reference which the decree provided for; but no further proceeding has been taken except obtaining the order of revivor. The defendants have lately become aware for the first time of the plaintiff's insolvency. Now, as a general rule, a

(*a*) Cons. Ord. 339. (*b*) Ib. 337.

1868.

McKenzie v. McKay.

suit in Chancery is not abated by the plaintiff's bankruptcy, but becomes defective only. To cure the defect the assignee should become a party (*a*); but, if, through oversight, the suit proceeds without his being made a party, the proceedings do not appear to be wholly void (*b*), as they might be in the case of an abatement (*c*): the Court makes such an order as the justice of the case requires. At law, suits commenced by a bankrupt were always allowed to be carried on in his name for the benefit of his estate without the assignee becoming a party (*d*); and the rule was the same on the equity side of the Court of Exchequer (*e*).

Judgment.

It appears, however, that before the filing of the bill, viz., on the 20th June, 1863, the plaintiff had entered into an agreement with Messrs. *Buchanan, Harris, & Co*, for the transfer to them of his assets, in effect as a security for what he owed them; and that this also was unknown to the defendants or to their solicitors until lately. No formal transfer was executed in pursuance of the agreement. The amount which the plaintiff owed Messrs. *Buchanan, Harris, & Co.* exceeded the amount of the assets to be transferred; and the suit was brought by the plaintiff at the instance of the firm and for their benefit, as trustee for them. It was not improper to bring the suit in the plaintiff's name, but *Buchanan, Harris, & Co.* should have been parties, either as co-plaintiffs or otherwise. The omission of their names, however, did not avoid all the proceedings

(*a*) Story's Eq. Pl. Sec. 329, 331; Randall v. Mumford, 18 Ves. 424; Anon. 1 Atk. 263.

(*b*) Binks v. Binks, 2 Bli. 593; Rylands v. Latouche, ib. 566; Freeman v. Pennington, 3 Dg. F. & J. 296. See Hatch v. Ross, 15 Gr. 96.

(*c*) See Smith v. Horsfall, 24 Beav. 331.

(*d*) Bebbes v. Mantel, 2 Wils, 358; Hewit v. Mantel, ib. 373; Kretchman v. Beyer, 1 T. R. 463; Waugh v. Austin, 3 T. R. 437; Andrews v. Palmer, 4 B. & Ald. 252.

(*e*) Randall v. Mumford, 18 Ves. 424.

1868.

McKenzie v. McKay.

in the suit; but the defendants were entitled, on learning the interest of *Buchanan, Harris, & Co.*, and that the suit was being prosecuted for their benefit, to have them made parties. On the other hand, those creditors had a right, with the plaintiff's concurrence, to introduce themselves into the suit as parties, by amendment or otherwise, at any time before decree (*a*); and after decree to make themselves parties by supplemental bill—according to the old practice (*b*), and by petition—according to the simpler method now provided for by the general orders (*c*). The insolvency did not take away this right, but the assignee must be served with the petition. If *Buchanan, Harris, & Co.* could not have examined the assignee as a witness had they been plaintiffs and he a defendant at the time of the hearing, the defendants will be entitled to have the cause re-heard, excluding his evidence, and to any other relief that may be just; and provision for this purpose will be made on the hearing of the petition.

Judgment.

My order on the present application will be, to set aside the order of revivor only; and to stay further proceedings by the plaintiff under the decree until all the proper parties are brought before the Court. In case *Buchanan, Harris, & Co.* do not take proceedings for this purpose, I do not see that the defendants can get rid of the decree without a petition by themselves, setting forth such facts as entitle them to whatever relief their petition prays for. They are entitled to the costs of this motion.

(*a*) Consol, Ord, 344.
(*b*) St. Eq. Pl. 338; Lys v. Lee, 4 D. McN. & G. 219.
(*c*) Consol. Ord. 330.

1868.

LINDSAY v. JOHNSTON.

Mortgage.

J. being the owner of certain lands, conveyed the same in fee to *L.* The latter afterwards conveyed them to *J.'s* wife. She and her husband then executed a mortgage of the lands to *J.*; but the wife was never separately examined. *L.* then filed his bill, alleging that the mortgage was to be taken to secure part of the purchase-money, and that *J.'s* wife refused to be examined. By the decree it was referred to the Master at Guelph to ascertain the consideration for the original deeds. The Master reported, that the original deeds were given by *J.* to *L.* without consideration, and to enable *J.* to defeat his creditors. From this report the plaintiff appealed; but the appeal was dismissed. The defendants then heard the cause on further directions; but the plaintiff did not appear.

Held, that, under the circumstances, the plaintiff was entitled to have the mortgage completed, or the deeds to *J.'s* wife given up to be cancelled. But as the plaintiff did not appear, he did not get a decree, though the defendants were refused any relief.

This case was heard on further directions on the report of the Master at Guelph.

The facts of the case sufficiently appear by the head note, and the judgment of the Court.

Mr. *Hector Cameron*, appeared for the defendants, and asked that the plaintiff's bill be dismissed, with costs. The plaintiff did not appear.

Judgment. SPRAGGE, V. C.—The course which this case has taken is unusual and peculiar.

The case was before me on an appeal by the plaintiff from the Master's finding upon a reference to him as to the consideration of certain conveyances, and, upon my suggestion, it was agreed that the cause should be heard before me, as upon further directions, as well as upon the appeal from the Master. Upon the hearing of the appeal it appeared to me that there was a view of the

1868.

Lindsay v. Johnston.

case which had not been discussed; and which if in the plaintiff's favor, would render the facts respecting which the inquiry before the Master was directed, immaterial, and I suggested this point—whether the plaintiff was not entitled to either a reconveyance, or the giving of an effectual and valid mortgage, inasmuch as the conveyance from the plaintiff, and the mortgage to him were intended to be contemporaneous. If this point had been considered and disposed of by the learned Judge who directed the inquiry I should not have mooted the point; but upon referring to his notes I do not find that he considered it. This being the case, I thought it better not to dispose of the case then, upon further directions; but only of the question of fact raised upon the appeal: which question I decided against the appellant, and this would, it was conceded, entitle the defendant, to a dismissal of the bill, unless the point that I suggested would entitle the plaintiff to relief. I therefore directed that the case should stand for further directions; expecting that counsel would appear for the plaintiff and argue the point that I had suggested. But upon the case now coming on, only counsel for the defendants appeared, and he asked for a dismissal of the bill, and said that he had been informed by the learned counsel who had appeared for the plaintiff on the appeal that he was not instructed.

Judgment.

I do not see how I can dismiss the plaintiff's bill if in my judgment as a matter of law, upon facts proved in evidence the plaintiff is entitled to relief. I came to the conclusion upon the evidence that the conveyance and mortgage were intended to be and were agreed to be contemporaneous; that there was one contract, and that the conveyance made by the plaintiff to the defendants was made upon the faith of a mortgage being made to him by the defendants: and such being the fact I did not see, how it could be open to the defendants to raise the objection that the title, had upon a

1868.

Lindsay v. Johnston.

former occasion got into the hands of the plaintiff without consideration.

If the defendants had been right in their contention upon the fact that it was not the agreement that the married female should be examined so as to make a valid transfer of her interest, the case would be different; but I came to a different conclusion from the evidence, viz.: that it was agreed that she should be examined, and that the plaintiff executed the conveyance upon the faith that this should be done, so as to make the mortgage to himself a valid instrument: and the answer does not, as I read it, set up that the agreement was otherwise.

Judgment.

The bill asks for a re-conveyance, or that the defendants give the plaintiff a valid and effectual mortgage: in other words, that they either carry out the agreement or place him in *statu quo:* and I think him entitled to this. I think his position on the record as plaintiff makes no difference. It is, in my judgment, a fraud on the part of the defendants to retain the benefit of the conveyance without giving the stipulated equivalent. If such was their intention beforehand; or if it was an afterthought, it was a mere trick; and the Court should not allow them any advantage from it such as they desire in this case, and do obtain, if they can put the plaintiff upon proof of the consideration of a former conveyance. My idea is that the Court should listen to nothing from the defendants until they have repaired what I cannot but regard as a gross breach of faith. It can hardly be necessary, I think, to quote authorities for this. It is a principle that has been acted upon in our own Court in at least one case; and I find that it was acted upon at Common Law in our Court of Queen's Bench, in the case of *Doe Miller* v. *Tiffany* (*a*), where a purchaser

(*a*) 5 U. C. Q. B. 78, 87.

at Sheriff's sale upon execution, obtained possession, by collusion with the tenant of the execution debtor: and the Court gave judgment against him upon that ground, Sir *John Robinson* observing: "If in order to avoid this (the taking of legal proceedings to obtain possession) he contrived by any collusion with *Scott* to get into possession without *Miller's* knowledge, then I think the rule is clear, that he can gain nothing by any step of that kind. He must first give up the possession thus acquired from *Miller's* tenant before he can be allowed to set up any title in himself, however sufficient his title may be, and however honestly acquired." This doctrine is essentially equitable: it is satisfactory to see it so clearly enunciated, and practically applied, in a Court of Law.

1868.

Lindsay v. Johnston.

It may be urged with some plausibility that conceding I am right in holding that the defendants should not have been allowed to go into the question of the consideration of a former conveyance, still it has been gone into, and the fact is before us that there was no consideration, and the plaintiff therefore ought not to have the aid of this Court. There is a fallacy in presenting the case in this view. The plaintiff does not come for the aid of this Court in regard to the conveyance, which appears to be without consideration: that must stand upon its own merits when we get at it. What he asks for is to be restored to a position of which he has been deprived by the bad faith of the defendants. The same ground might have been taken in *Doe Miller* v. *Tiffany*. It might have been said, "true, the purchaser got possession surreptitiously, but after all he was entitled to possession:" but the language of the Court lends no countenance to such a position. He must first give up possession, "however sufficient his title may be and however honestly acquired": and that appears to me to be the true doctrine; to apply it to this case the defendants must first give up what they have surrep-

Judgment.

1868.

Lindsay v. Johnston.

titiously obtained or else do what they engaged to do, before they can set up any independent equities of their own.

With this view of the case I cannot dismiss the plaintiff's bill. The plaintiff, however, does not appear, to ask for a decree, and I therefore merely refuse what the defendants ask.

Boulton v. The Church Society of the Diocese of Toronto.—[In Appeal.]*

Pleading—Parties—Interest of Judges.

A Bill will lie by a member of the Corporation of the Church Society of the Diocese Toronto, on behalf of himself and all other members of the Society, to correct and prevent alleged breaches of trust by the Corporation; and to such a Bill the Attorney General is not a necessary party.

Three of the Judges in Appeal being members of the Church Society they held themselves disqualified to sit as Judges except *ex necessitate*, though no objection to their sitting was taken at the bar; but there not being a quorum without them, they heard the case with the other Judges in order that a judgment, legal in point of form, might be given by the Court.

Statement.

This was an appeal by the defendants from an order of Vice Chancellor *Mowat* over-ruling a demurrer to the bill. (1) On the grounds that the bill shewed no right or title in the plaintiff to the relief prayed for therein; (2) that the plaintiff did not by representation or otherwise, properly or sufficiently represent the several interests in respect of which relief is sought in and by his bill; (3) that the plaintiff's bill shewed no equity in respect of which the plaintiff was entitled to any relief;

---

*Present—Draper, C. J. Q. B., VanKoughnet, C., Richards, C. J. C. P., Spragge, V. C., Morrison, J., A. Wilson, J., and Mowat, V. C.

1868.

Boulton v. The Church Society.

(4) that the proceedings, if any, in respect of the matters alleged in the bill should have been by way of information filed by Her Majesty's Attorney General; (5) that Her Majesty's Attorney General was a necessary party to the bill, and (6) that the several *cestuis que trustent* of the Clergy Reserve Commutation Fund in the said bill mentioned, should have been made parties to the the bill, and were necessary parties thereto.

The plaintiff contended (1) that the bill shewed a sufficient case for the relief sought thereby, or some part thereof; (2) that the plaintiff sufficiently represented for the purposes of the suit, the interests sought to be affected thereby; (3) that though an information by Her Majesty's Attorney General would lie for the attainment of the relief sought, yet a bill will also lie; and (4) that neither Her Majesty's Attorney General, nor the persons beneficially interested in the trust funds in the bill mentioned, were necessary parties thereto.

On the appeal coming on for argument, *Draper*, C. J. *VanKoughnet*, C., and *Spragge*, V. C., mentioned that they were members of the Church Society and therefore disqualified to sit.

Neither party to the cause made any objection to their sitting.

For the appellant some of the authorities were referred to which are mentioned in the written opinions pronounced by the learned Judges after taking time to consider.

Judgment.

DRAPER, C. J.—We have considered the cases cited as well as the more important of the authorities therein referred to, especially the case in the Year Book, 8 Henry VI. folio, 19 B., and the collection of cases in Rolles' abridgement.

1868.

Boulton v. The Church Society.

In my opinion (apart from the question of necessity, and to avoid a failure of justice by rendering it, if not impossible, very difficult to carry the case further, under our Statute regulating proceedings in Error and Appeal,) the Judges of this Court who, as members of the Church Society have an interest in the suit, ought not to take any part in deciding it.

But as this Court requires the presence of seven of its ten members, and as there are only eight at present in the Province it is obvious, that, if three of them are considered as absolutely disqualified from sitting, neither party can obtain a judgment of this Court; while judgment is, according to the 58th section of the Consolidated Statutes of Upper Canada, respecting the Court of Error and Appeal, a necessary preliminary to the case being carried before Her Majesty in Her Privy Council. Whilst therefore this brings the case within the principle of necessity as stated, and relied upon by

Judgment.

Parke, B., in giving the answer to the Judges to the questions propounded to them by the House of Lords in *Dimes* v. *The Grand Junction Canal Company* (*a*), against which principle the objection of interest cannot prevail. In that case the decree could not be appealed against unless enrolled, and enrollment could not take place without the signature of the Lord Chancellor. It was held that he was right in signing and that this Act was valid.

I am therefore of opinion that all the members of the Court now present may properly hear the case. Those to whom the objection of disqualification would, but for the necessity of the case, apply sitting only to secure that a judgment legal in point of form may be given, so as to afford the unsuccessful party the right to appeal.

(*a*) 3 H. of L. Ca. 759.

I refer to *Broom's* Legal Maxims, 3rd edition 111 where the authorities are collected.

SPRAGGE, V. C.—I feel no interest in the result of this suit, by reason of my being a member of the Church Society, beyond what I feel as a member of the Church of England; and I regret that I cannot consistently with principle take part in adjudicating upon the questions raised by this appeal. The plaintiff files his bill as an incorporated member of the Church Society on behalf of himself and all other members of the Society; and he is adjudged by the order appealed from to have a *locus standi* in this Court, for this reason, principally, that as such member of the Church Society, he is responsible for the right application of the funds, the proper application of which is brought in question by this suit. If the plaintiff is right, all incorporated members of the Society are so responsible if he is so, and I also am responsible; and I have a direct pecuniary interest, is the legal conclusion in this suit being, that such responsibility does not exist, and so in adjudging that the plaintiff has no *locus standi* in this Court, by reason of such alleged and supposed responsibility. I have not only an interest in its being determined as a matter of law, that under the circumstances stated in this bill no legal liability attaches to the members of the Church Society: but I have a direct interest in the result of this suit, because if the plaintiff is right it may properly be directed in some stage of this suit that the members of the Church Society shall make good the moneys, the improper application of which is complained of by the plaintiff's bill. I repeat that this assumed responsibility does not make me feel any interest in the result of this suit; and it cannot therefore bias the judgment which I might give upon the questions raised; but, so it was in the case before Lord *Cottenham*. The Court felt satisfied beyond a shadow of doubt that his judgment was not in the slightest degree affected by the interest

1868.

Boulton v. The Church Society.

that he had in the result of the suit. Yet, so jealously does the law in such cases guard against even the appearance of evil, and so carefully does it preserve the principle that a Judge shall not adjudge upon a case in the result of which he has an interest, that his judgment was for that reason, and for that reason only, set aside.

The rule, therefore, is, that a Judge must not sit and adjudge upon a case in the result of which he has an interest. An exception to the rule exists where there will be a failure of justice unless the Judge does sit upon the case; but this exception I apprehend is limited to the necessity of preventing a failure of justice; anything beyond that would be an infraction, and an unnecessary infraction, of the rule; and the case referred to well exemplifies the rule, and the exception. Lord *Cottenham* allowed the enrolment—an act involving the exercise of judicial discretion; but inasmuch as that act was necessary in order to enable a party to appeal from the Vice Chancellor, and therefore necessary in order to prevent a failure of justice, the act was held proper, and was upheld, notwithstanding his interest in the suit; while his adjudication upon the appeal from the Vice Chancellor was set aside, because it was not necessary in order to prevent a failure of justice; an appeal lying direct to the House of Lords from the judgment of the Vice Chancellor.

Judgment.

I think that our course is plain. Whatever acts may be necessary in order to the cause being carried further upon appeal, the Judges who are members of the Church Society ought to do; but they ought to do nothing that is not necessary to the attainment of that object. There can be no appeal to the Privy Council without a judgment of this Court, or at least we have reason to believe that an appeal would not be entertained in the Privy Council without such judgment. A judgment *pro forma*

1868.

Boulton v. The Church Society.

will enable the parties to appeal to the Privy Council. It was suggested that if we can properly sit and form part of a Court of Appeal in order to enable a formal judgment to be given, we can properly sit and adjudicate upon the appeal. I do not think so. We infringe a rule which is rightly considered of paramount importance in the administration of justice, if we adjudicate upon a case in which we are interested. An exception is allowable where a failure of justice would be the consequence of a rigid observance of the rule, *ex necessitate rei*, as the lesser of the two evils, and only for that reason: and it follows, I think, that we should not be warranted in pushing the exception beyond the necessity for it. To do so would be illogical: it would be taking this position; that because an exception to the rule is necessary and proper, a total infraction of the rule is therefore proper.

Judgment.

The argument of the case was thereupon proceeded with.

Mr. *Crooks*, Q. C., and Mr. *Blake*, Q. C., for the appeal.

The bill does not allege that plaintiff in any way contributed to the funds of which he seeks an account, neither is it shewn that the plaintiff or any individual member of the Society is liable to contribute to make good any loss sustained by the fund; nor does the plaintiff allege that the funds are in any peril, or ask for a reference as to them, or charge any mismanagement of them.

Mr. *McLennan*, contra. The bill charges mismanagement of the funds and property of the Society, generally; and as a member of the Society he has a right to inquire into this.

1868.

Boulton v. The Church Society.

Dimes v. *The Grand Junction Canal* (*a*); *Equitable Reversionary Interest Society* v. *Fuller* (*b*); *Lang* v. *Purvis* (*c*); *Evans* v. *The Corporation of Avon* (*d*); *The Vestry of Bermondsey* v. *Brown* (*e*); *Smith's Case* (*f*) *Lewin* on Trusts, pp. 20, 665: *Smith's* Practice, p. 13, were referred to.

After taking time to consider, the judgment of RICHARDS, C. J., MORRISON and A. WILSON, JJ., and MOWAT, V. C., was delivered by

Judgment.

A WILSON, J., to the effect that in their opinion a bill by the plaintiff would lie; and that the suit was properly constituted as to parties, both as regards the plaintiff suing and the defendants.

DRAPER, C. J., VANKOUGHNET, C., and SPRAGGE, V. C. concurred *pro forma*.

CONNOR v. DOUGLAS.—[IN APPEAL.]*

Tax Sale—Advertisement.

Where a Tax Sale was advertized in the *Canada Gazette* for thirteen successive weeks before sale, but such thirteen weeks did not amount to three calendar months from the date of the first publication, it was held that the irregularity did not invalidate the sale.

This was a proceeding under the Act for Quieting Titles.

The Referee, on the 2nd May, 1866, reported that *George A. Douglas*, of the Township of Enniskillen,

---

(*a*) 3 H. L. Ca. 759. (*b*) 1 J. & H. 379.
(*c*) 8 Jur. N. S. 524. (*d*) 29 Beav. 144.
(*e*) 33 Beav. 67. (*f*) 1 L. R. Eq. 204.
(*g*) 2 L. R. Ch. App. 604.

*PRESENT.—Draper, C. J. Q. B., VanKoughnet, C., Richards, C. J. C. P., Hagarty, A. Wilson, and J. Wilson, JJ., and Mowat, V. C.

1868.

Connor v. Douglas.

Esq., did, on the 6th January, then last, present his petition claiming to be the absolute owner of the east half of lot number thirteen in the eighth concession of the Township of Enniskillen, and praying that the petitioner's title to the said lands might be investigated and declared; that on or about the 21st April, *Eliza Connor*, of the City of Toronto, presented a claim in the said matter insisting that she was the owner of the said lands, in manner therein mentiontioned; that the matter coming on to be heard before the said Referee in the presence of counsel for both parties, upon hearing read the said petition and claim in this matter, found that the petitioner claimed title under a Sheriff's sale for taxes, which took place on the 3rd November, 1857, and that the said lands were advertised for sale in the *Canada Gazette* from the 1st August to the 24th October, in the year last aforesaid, being thirteen weeks and no longer; and the Referee was of opinion that according to the Act of Parliament passed in the sixteenth year of the reign of Her Majesty, to render valid sales of lands for taxes by the Sheriff, it required at all periods of the year in which the month of February does not occur, fourteen weekly insertions in the *Gazette*, to constitute an advertisement of three months, and that therefore the said sale by the sheriff was void; and that the said petitioner was not entitled to obtain a certificate under the authority of the said Act that he is the legal and beneficial owner, in fee simple, in possession of the lands in this matter, and in the said petition set forth; and the said petition was therefore dismissed with costs, to be paid by the pretitioner to the said claimant, *Eliza Connor*.

Statement.

On the 4th September, 1866, the matter was heard before the Chancellor by way of appeal from the report.

Mr. *Leith*, for the appeal.

Mr. *S. M. Jarvis*, contra.

1868.

Connor v. Douglas.

VANKOUGHNET, C.—In this case the question is whether a sale for taxes can be upheld, the Sheriff's advertisement not having been inserted in the *Canada Gazette* for three months prior to the day of sale; falling short of that time on one construction by a week, on another construction by one day, or in other, words there being only thirteen instead of fourteen weekly insertions.

I understand that the almost uniform practice of the Sheriffs has been to give such advertisement only thirteen insertions, which would generally fall short of the three months. The words of the statute are peremptory, that the land "shall be" advertised. Is the omission by the Sheriff to comply with this provision fatal to the title which the vendee claims under the deed made upon such sale?

Judgment.

On the one hand it is argued, that the municipality and its officers have only power to sell on complying with certain conditions prescribed by statute, one of which is an advertisement for a certain time, and that this can no more be dispensed with than in the case of a sale by a mortgagee under a power of sale requiring a certain number of previous advertisements, and that the law enforcing payment of taxes requires at least as strict observance as does a power of sale for procuring payment of an ordinary debt. On the other hand it is contended that the statute in this respect is merely directory, and the act to be done purely ministerial and executive, and that it never could have been intended that a purchaser at Sheriff's sale for taxes must search the *Canada Gazette* for every week of the three months to be satisfied that the advertisements were regularly inserted.

Whatever my own opinion might be were the matter *res integra*, I think that it will be in accordance with

1868.

Connor v. Douglas.

the course of decisions both in *Banc* and at *Nisi Prius*, during many years past, to hold, that the omission here of the one additional advertisement for sale does not render the sale for taxes void, and the title of the Sheriff's vendee invalid. I can speak from personal knowledge of the rulings of the late Sir *J. B. Robinson*, C. J., at *Nisi Prius* on this and similar objections in the mode of carrying out sales by sheriffs; and I think it has generally been considered by the profession and accepted as law that such an error or omission as that relied on here was a mere irregularity on the part of the sheriff, subjecting him to an action, if the owner of the land sustained any damage by reason of it, but not invalidating the sale itself. It is of course difficult to say that if thirteen insertions will suffice, six or ten will not; though a very gross neglect of the statute in this respect might be treated differently. But I think, for the reasons I have given, I must reverse the decision of the Referee in this case, leaving it to a higher authority to make a different declaration of the law. I think the party failing must pay all costs.

Judgment.

From this decision the contestant appealed on the ground that the judgment was erroneous in deciding that the omission by the Sheriff to advertise in the *Canada Gazet e* for three months, did not render the sale for taxes had by him void.

The claimant contended that the decree ought to be sustained upon the following, amongst other, grounds:

(1.) That the advertisements for the sale of the land in question by the Sheriff, were sufficient under the Statute 16 Victoria, chapter 182, section 57, and that he complied with the Act in regard thereto. That, assuming the advertisement to have been insufficient, such insufficiency was not a ground upon which the sale ought to be pronounced void, the said 57th clause and the

1868.

Connor v. Douglas.

statute generally as to the duties of the Sheriff being directory only; (2.) that acquiescence in the sale since the 3rd day of November, 1857, was sufficient laches on the part of the contestant to deprive her of any right to object to the sale now on the grounds upon which the said sale was reported against, even supposing she ever had such right; (3.) that a sale to a *bona fide* purchaser under the act for value ought not to be set aside upon the ground stated in the report of the Referee; (4.) that under the true construction of the act it is not incumbent on a purchaser to prove that the proceedings of the Sheriff and other officials were done and taken in conformity with the requirements thereof; (5.) assuming that such sale should have been set aside as against the original purchaser thereat, it would be inequitable to do so against the respondent, when, owing to the lapse of time and increased value of the land in question, he would lose more than the land was ever worth when owned and claimed by the persons through whom the appellant claims, and which circumstance ought to have been inquired into.

Judgment.

Mr. *Leith*, for the appellant.

Mr. *S. M. Jarvis*, contra.

In re Coe and *The Corporation of Pickering* (*a*), *Rex* v. *Lonsdale* (*b*), *Doe d. Bell* v. *Reamoure* (*c*), *Doe d. Mountcashel* v. *Grover* (*d*), *Doe d. Bell* v. *Orr* (*e*), *Williams* v. *Taylor* (*f*), *Paterson* v. *Todd* (*g*), *Acocks* v. *Phillips* (*h*), *Davison* v. *Gill* (*i*), *Anon.* (*j*), *Henry* v. *Burness* (*k*), *Morgan* v. *Parry* (*l*), *Osborne* v.

(*a*) 24 U. C. Q. B. 439.
(*b*) 1 Burr 445.
(*c*) 3 O. S. 243.
(*d*) 4 U. C. Q. B. 23.
(*e*) 5 U. C. Q. B. 436.
(*f*) 13 U. C. C. P. 219.
(*g*) 24 Ib. 296.
(*h*) 5 H. & N. 183.
(*i*) 1 Ed. 64.
(*j*) 6 Madd. 10.
(*k*) 8 Gr. 345.
(*l*) 17 C. B. 334.

Kerr (*a*), *Schofield* v. *Dickinson* (*b*). *Dwarris* on Statutes, 646, were, with other authorities, referred to. 1868. Connor v. Douglas.

The judgment of the Court was delivered by

RICHARDS, C. J.—The only question raised by this appeal is whether the sale for taxes of lot number 13, in the 8th concession of the Township of Enniskillen, in the county of Lambton, by the Sheriff of that County, on the 3rd of November, 1867, is legal or not, on the ground that the notice of the sale was not properly advertised. The notice of the sale of the land by the Sheriff was inserted in the *Canada Gazette* from the 1st of August to the 24th of October, being thirteen weeks and no longer. The Referee of Titles in the Court of Chancery, held that to render sales valid under the Act of 16 Victoria, cap. 182, it required at all periods of the year in which the month of February did not occur, fourteen weekly insertions in the *Gazette*, to constitute an advertisement of three months under the statute, and that therefore the sale was void. Judgment.

On appeal the decision of the Referee of Titles was reversed with costs, by the Court of Chancery. That decision is now appealed against.

I am of opinion that the decree is right, and that this appeal ought to be dismissed. My brother *Adam Wilson*, in a recent case in the Common Pleas has collected all the decided cases from our own Reports on the subject of tax sales of land, and I shall make use of that judgment to a large extent in the observations I have to make.

As to advertisements the following points have been decided :

(*a*) 17 U. C. Q. B. 134. (*b*) 10 Gr. 225.

1868.

Connor v. Douglas.

The omission to advertise the intended sale of lands in the county local papers, the advertisement being regularly published in the official *Gazette* does not invalidate the sale; it does not on common law principles avoid a sale of lands under execution: *Jarvis* v. *Brooke* (*a*).

In *Williams* v. *Taylor* (*b*) it was decided that the omission to advertise lands, which had been sold, in the local paper under 16 Victoria, cap. 182, section 78, was fatal. The Chief Justice said that the omission of either of the advertisements interposes an insuperable obstacle to the application of the remedial portion of the statute in favor of purchasers at such sales. The sales referred to in that case were clearly void as the law stood, and the object of the 8th and 9th sections of the statute was to make those sales good, but to do so required certain things to be done, amongst others, advertising in the *Gazette* and local paper for one month a list of all lands so sold but not redeemed, and on payment by the owner within a year after the first publication of the advertisement of the money therein mentioned and interest. The certificate of such payment annulled any prior conveyance by the sheriff of the land sold for non-payment of taxes, and in the event of the money not being paid within the year the prior sale was confirmed. The effect of that statute was clearly to declare the land which would otherwise be the property of the former owner the property of the purchaser under the illegal sale by the Sheriff, and in that view it seems to me the Court were quite right in holding that the requirements of the statute must be strictly carried out.

Judgment.

The observations of the learned Chief Justice of Upper Canada in *Hall* v. *Hill* (*c*), no doubt suggest that

(*a*) 11 U. C. Q. B. 299. (*b*) 13 U. C. C. P. 219.
(*c*) 22 U. C. Q. B. 578.

1868.

Connor v. Douglas.

the section of the Statute of George IV.—which declared that no sales should be held void for defects in notices, &c.—being excluded from the subsequent statutes required a different rule of interpretation, and that any defect in these advertisements ought to render the sale void. But the case itself was not decided on the question of the defective advertisement, and I do not think there is any decided case expressly over-ruling *Jarvis* v. *Brooke*. I do not think the reference to *Doe* v. *Reamoure* necessarily applies to such of the provisions of the statute as are in their nature merely directory, such as those to which the 22nd section of 6 George IV. cap. 7, would apply; for that particular section expressly declared that no sales should be invalidated for the omission of any direction contained in the act relative to notices, or forms of proceedings previous to any sale. I apprehend *Doe* v. *Reamoure* was decided under the provisions of the 7 George IV., and the Judges could not intend their language to apply to a mere defective or informal advertising of the lands for sale. The language referred to, viz., "to support a sale made under such circumstances it must, in my opinion, be shewn that those facts exist which are alleged to have created the forfeiture, and which are necessary to warrant the sale; for a clerical error, or the wilful or negligent omission of a ministerial officer, shall not deprive a man of his estate." This language may well apply to all those matters creating a charge on the property, fixing as it were the burthen on it, and rendering it liable to be sold. When the charge has once been fixed on the land, and the period has elapsed after which it may be sold, then the subsequent matters as to how it may be sold, the manner of selling, advertising, &c., to a certain extent cease to be mandatory, and are in fact but the mode pointed out by the statute how the property is to be sold, which by all the requirements of law, before the officer was directed to sell it, had been made liable to sale.

Judgment.

1868.

Connor v. Douglas.

In *Hall* v. *Hill*, in the Court of Appeal (*a*), I expressed my views at some length on the subject of what are mandatory and what are directory provisions in Statutes, and I still think the views there expressed are correct, and do not in any way conflict with the opinions now enunciated. But rather shew that sales which take place after the preliminary steps have been regularly taken, and the warrant has been regularly and properly issued to the Sheriff are valid, and that the subsequent proceedings by that officer are to be considered as directory under the Statute rather than mandatory.

I think the language used by my brother *Adam Wilson* in the case of *Cotter* v. *Sutherland* (*b*), in the Common Pleas, is correct, and may properly be applied and laid down as the rule in these cases, viz., "We should require strict proof that the tax has been lawfully made, but in promoting its collection we should not surround the procedure with too unnecessary or unreasonable rigour.

Judgment.

We should see that the law is honestly and fairly carried out, and that no injustice is done to the owner nor to the public; and that the claims of purchasers are properly maintained.

A substantial rather than a literal compliance with the provisions of the Statute, will more equally, and quite fairly, protect all parties." (*c*)

I would refer to the language used by the learned Judge from Pages 405 to 408 inclusive. The conclusion aimed at is, that:

"Under these acts there are certain things which must be strictly adopted, otherwise the whole proceedings following them must be void."

(*a*) 2 E. & App. cases 569. (*b*) 4 VanK. 357.
(*c*) At page 390.

1868.

Connor v. Douglas.

"There must have been an assessment in fact and made by the properly authorized body; the writ must be directed to the Sheriff and be returnable at the time named. The sale must not be made in less than six months after the delivery of the writ to the Sheriff; it must be by public auction, and the amount of arrears must be declared at the time of sale.

"These are essential elements in the constitution of any valid tax title. There must be a charge rightly created on the land. There must be a power rightly conferred on the Sheriff to sell it. The sale must not be without some reasonable and sufficient notice, nor sooner than he is authorized to sell, nor otherwise than by public auction."

I concur generally in the language I have just quoted, but wish to guard myself from being supposed to hold that there may not be in some instances some other ingredients required than what is stated to make the sale valid. I proceed to quote from the judgment:—

Judgment.

"I do not forget that *shall* is to be construed as imperative. I think this is a case in which 'there is something in the context or other provisions of the act indicating a different meaning, or calling for a different construction.

"The cases of the *Queen* v. *The Mayor of Rochester* (*a*), and *Hunt* v. *Hibbs* (*b*), shew how far the Courts will proceed to enforce the performance of public duties where the act is required to be done for the public good, and a serious inconvenience will arise from its not being done. The like principle requires that these public tax sales should be supported if it can reasonably be done.

"The rule in the United States is that the statutes under which these sales are made are to be construed

(*a*) 7 E. & B. 910, affirmed E. B. & E. 1524. (*b*) 5 H. & N. 123.

1868.

Connor v. Douglas.

very strictly, and the sales will be void unless the publications are fully and strictly made, for they are there considered to be 'indispensable preliminaries to a valid sale.' *Thatcher* v. *Powell* (*a*). I do not think the objection to the alleged imperfect advertisement should be judged with greater strictness than in cases of sales by execution."

In the several ingenious modes of putting the case before us, some of the views suggested that the defect of the advertisement could be reduced to a single days' insertion, and at most it was one insertion in a weekly paper, and that insertion the last week prior to the sale, so that the commencement was long enough before the sale, but the dropping it the week before the sale was the defect. It is not pretended the sale itself was too soon. I think as no practical injury has been, or can be suggested, as arising to the owner of the land from this mistake of the Sheriff we ought not to give effect to the objection. There is no case expressly deciding the point against the sale; there is an express decision on the point in favor of it, and the analogy to sales of real estates under execution is in favor of the validity of the sale against the objection urged.

Judgment.

DRAPER, C. J.—The claimant's (the now respondent) title is derived from one *McCall*, to whom the Sheriff of Lambton conveyed the lands under a sale for taxes.

The appellant sets up a title derived from *Joseph B. Spragge*, deceased, who was the owner of the lands in question in fee, prior to the sheriff's sale.

The sale for taxes took place on the 3rd of November, 1857. The lands in question were advertised for sale in the *Canada Gazette* from the 1st August to the 24th

(*a*) 6 Wheaton, 119; see also Kellog v. McLaughlin, 8 Ohio R., and Blackwell on Tax Titles *passim*.

October, 1857, being thirteen weeks and no longer. And on this ground the Referee of titles decided that the time of advertising being too short rendered the sale void. 1868. Connor v. Douglas.

The Court of Chancery reversed the decision and against this order of reversal the present appeal is made.

The Statute which authorized and regulated the sale of lands for taxes at the date of this sale was the 16th Victoria, chapter 182, afterwards (in 1859) consolidated in chapter 55, Consolidated Statutes of Upper Canada.

The 57th section of that Statute enacts, that immediately on the receipt of the Treasurer's warrant the Sheriff shall prepare a list of all the lands included therein, and the amount of arrears due on each parcel, and shall cause the same to be published "for the space of three months in the Government Official *Gazette*," giving notice thereby of the day of sale, which day shall be more than three months after the first publication of the advertisement. He is also to publish a similar advertisement in a local newspaper, and to post a notice similar to the advertisement so published in some convenient and public place at the Court House of his county. In this as well as in the acts subsequently passed to supply its place, the provision contained in the 22nd section of the 6th George IV. chapter 7, that no omission of any direction contained in the act relative to notices or forms of proceeding previous to any sale should render the sale invalid, but the person guilty of such omission should be liable to punishment therefor, and should be answerable in damages to the party injured, has not been re-enacted. Judgment.

The late act (29–30 Vic. ch. 53,) I think affords an indication of the meaning and intention of the previous statutes. The duty of selling lands for taxes is trans-

1868.

Connor v. Douglas.

ferred from the Sheriff to the Treasurer; the warrant for the sale is to be issued by the Warden. The Treasurer's duties are pointed out by the word "shall" which under the existing interpretation act, makes the enactment imperative. He *shall* prepare a copy of the list of lands to be sold; he *shall* cause such list to be published four weeks in the Official *Gazette* and once a week for thirteen weeks in some local newspaper. I think that it is intended that there shall be an insertion of the advertisement in the local newspaper for thirteen consecutive weeks, though I must admit it might have been more clearly expressed. As to the four weeks in the *Gazette*, there is nothing from which to determine, whether the first or last, or any intermediate four weeks in the currency of the thirteen insertions in the local newspaper should be preferred. But the first publication of the advertisement is the date after which more than ninety days must elapse before the sale can be made.

Judgment.

And the Consolidated Act, using the word "*shall*," as it was used in the 16th Victoria, chapter 182, nevertheless by force of subsection 2 of section 18 of the Upper Canada Interpretation Act in the Consolidated Statutes, makes that term imperative, and as appears to me fastens an imperative construction on the same word in the 16th Victoria. And if this be so it appears to me also that when it was enacted that the list should be published for three calendar months, the meaning was, that in every *Gazette* published in the three months next after the first publication of such advertisement, the publication should be repeated. In this case the first publication was on Saturday the 1st of August, the last day of the three months was Saturday, the 31st October. On that day the advertisement was not published, the last insertion was on the preceding Saturday, the 24th.

I conclude therefore that under the Act, 16 Victoria, chapter 182, the Sheriff's *duty* was to publish the list

1868.

Connor v. Douglas.

of lands to be sold for taxes, together with (and as a part of the same advertisement) a notification of the day of sale—a day expressly required to be more than three months after the first publication—in each weekly number of the Official *Gazette* which should be issued within three months from the first publication.

The Statute said nothing of mentioning the place of sale in the advertisement, nor did the Consolidated Statute. The 29–30 Victoria provides for this.

I feel fortified in this conclusion by the Statute 23 Victoria, chapter 97, which recites that in the United Counties of Peterborough and Victoria the Treasurer issued his warrant to the Sheriff to sell certain lands for non-payment of taxes, and that the Sheriff advertised the lands for three months in the local paper, and by an inadvertency the same were advertised in the Canada *Gazette* for only thirteen weeks, that doubts had arisen as to the sufficiency of the latter notice and it was expedient to set them at rest, and it enacts that the notice in the Canada *Gazette* shall be held and taken to be a sufficient notice, and the sales made under it valid, any law to the contrary notwithstanding.

Judgment.

The case stated in this recital and that now in judgment are, in essentials, identical. The statute amounts as I understand it to a legislative admission or declaration that an advertisement for thirteen weeks in the *Gazette* was not a compliance with the requirements of the Act. If the advertisement had been sufficient, they would not have recited that it was inserted by *inadvertency* only for thirteen weeks. If however doubts were entertained as to the meaning of the enactment though the advertising for thirteen weeks was deemed all that was imperatively necessary, such doubts would, or at least ought to have been set at rest by a simple declaration expounding the words "three months in the Official

1868. Connor v. Douglas.

Gazette," to mean a publication therein for thirteen successive weeks.

But the enacting clause does not declare the meaning of the prior act at all, nor profess to give the true construction of its language. It sets at rest the doubts by enacting that in this particular case the notice shall be held and taken to be (not that it was) sufficient, and the sales made under it valid. I view this as practically amounting to a recognition, that the provisions of the prior statute had "by inadvertency" been disregarded; that the proceedings were not according to law, and for remedy making the sales valid. It may be observed that the Treasurer's warrant in that case bore date on the 24th September, 1859, and that the Act was passed on the 19th May, 1860. The year within which the owners of the lands sold might redeem, had not expired.

Judgment.

As a pertinent illustration of the difference between a declaratory act, and one only providing a remedy for a particular exigency, Mr. *Leith* referred to *Doe* v. *Grover* (*a*), in which the statute 8 Victoria, chapter 22, was under consideration. The recital to that statute states in substance that a new district had been formed which included part of two adjoining districts. It was assumed that taxes might have accrued on some of the lands included in the new district prior to its formation, and doubts existed under what law such taxes could be collected. Provision was made for this special exigency. And another section was added reciting that a similar difficulty might arise, and it was *declared* and enacted, that, &c., (providing the same method as for the special case). The Court held the Act declaratory and retrospective as well as prospective.

The cases on Sheriff's sales of lands, decided in our

(*a*) 4 U. C. Q. B. 23.

1868.

Connor v. Douglas.

Courts, may at first view appear somewhat inconsistent. Less so, however, when this distinction is noticed that one class of them relates to sales upon executions, the other to sales for taxes.

Jarvis v. *Brooke* (*a*), was decided under 13 and 14 Victoria, chapter 67, under which statute the owner had three years to redeem, a consideration which had some influence on the judgment of the Court. There was then no clause in the interpretation act making the word "*shall*" imperative. The decision is professedly based "on general principles," deduced apparently from the cases in respect to executions, and the statute was then treated as only directory.

In *Patterson* v. *Todd* (*b*) *Jarvis* v. *Brooke* was referred to as shewing *a fortiori* that sales of lands on execution should not be avoided, taking into consideration the practice that had prevailed for upwards of forty years, under the statute 2 George IV., chapter 1, 2nd Session. The Court of Queen's Bench had already in *Hall* v. *Hill* (*c*), referred to the fact that no assessment act passed since the 2 George IV. contained the provision that no omission as to notices or forms of proceedings should vitiate a tax sale, and it was also pointed out that *Jarvis* v. *Brooke*, strictly speaking, did not involve the point now before us; and the language of that Court in *Doe* v. *Reaumore* was cited as meeting with more ready concurrence than the apparent inclination of the Court in *Jarvis* v. *Brooke;* I think this is, if not unaffected by former decisions, entirely an open question in this Court.

Judgment.

In *Doe* v. *Reaumore* and *Doe* v. *Orr* (*d*), the tax sale acts are treated as penal in their character; as leading to forfeiture, and therefore as properly to be

(*a*) 11 U. C. Q. B. 299.
(*b*) 24 U. C. Q. B. 296.
(*c*) 22 U. C. Q. B. 578.
(*d*) 5 Old Series, 433.

1868.

O'Connor v. Douglas.

construed strictly. The leaning of authorities is clearly this way, and the case of *Acocks* v. *Phillips* (*a*), may be referred to as a late decision affirming that view.

Coe v. *The Corporation of Pickering* (*b*), although on a different statute is a decision in favor of the conclusion at which I have arrived, and which may be thus stated:—

1. That the statutes which subject lands to be sold for non-payment of taxes are in their nature penal, leading to forfeiture, and should therefore be strictly construed.

2. That the directions contained therein for the performance of the duties imposed upon the Sheriff as to selling are imperative.

Judgment.

3. That in the present case the publication of the list of lands liable to be sold, and of the notification of the time of sale was not made, and continued a sufficient time in the *Gazette* according to the provisions of the statute 16 Victoria, chapter 182, and that the Sheriff was guilty of a breach of duty as prescribed by the statute.

But so far as the lands were concerned, the different steps and proceedings necessary to authorize a sale—in other words to incur a forfeiture of some or of all the land—appear to have been taken. There is no question raised as to the validity of the rate—as to the taxes being in arrear; as to the lot being returned as in arrear in reference to these taxes, and as to the proper warrant having been duly placed in the Sheriff's hands to levy them. The defect lies in the execution of that warrant which gave him the power to sell. Does the non-observance of the statutory direction of the procedure under the warrant avoid a sale by the Sheriff and the conveyance executed by him? I think it does.

(*a*) 5 H. & N. 183. (*b*) 24 Q. B. 439.

1868.

Connor v. Kay Dougla

I feel the force of these considerations s ably advan d by the learned Chief Justice of the C non Pleas, I am extremely reluctant to differ from them; but I think it better to explain the grounds of my difference in a matter of so much practical importance, than (as is often properly done) simply to express my inability to concur. The necessity of Legislative interference in reference to tax sales has been very conclusively pointed out in an able judgment recently delivered in the Court of Common Pleas. Other questions connected with the same subject have from time to time arisen, and it is not too much to hope that the subject of tax sales may at no distant time occupy the attention of the Legislature of this Province.

Judgment.

MOWAT, V. C., concurred with the Chief Justice.

Per Curiam—Appeal dismissed with costs. [DRAPER, C. J., and MOWAT, V. C., dissenting.]

SMITH v. RATTÉ.—[IN APPEAL.]*

Ferry between Upper Canada and Lower Canada, Licence of.

The Crown has a right to grant a License of Ferry across the Ottawa between the Provinces of Ontario and Quebec, free from the restrictions contained in the Consolidated Statute of Upper Canada, chapter 46; that Statute not applying to such a case.

The plaintiff, *Joseph Smith*, filed his bill in the Court below against *Antoine Ratté*, complaining of a disturbance of his ferry across the river Ottawa, between the city of Ottawa and Haycock's Point, in the Township of Hull, (L. C.,) to extend to the shores of the city on one

* *Present.*—Draper, C. J. Q. B., VanKoughnet, C., Richards, C. J. C.P., Spragge, V. C., Morrison, J., A. Wilson, J., and Mowat, V. C.

1868.

Smith v. Ratté.

side, and to one mile above and one mile below Haycock's Point on the other side of the river, for the term of ten years, on condition that plaintiff should during the term keep and use a common ferry, and pay rent. The plaintiff claimed this ferry by virtue of Letters Patent under the Great Seal, dated 19th October, 1866, asserting that thereby he became exclusively entitled to the use of the ferry across the river within the specified limits: and he complained that the defendant about and since June, 1867, had established and continued an opposition ferry, carrying passengers for hire.

The bill further stated that plaintiff had complained against defendant to the Police Magistrate at Ottawa, and defendant was fined; that he persevered in carrying passengers and was fined again: but that he still persisted and was realizing great profits therefrom.

Statement.

The bill prayed an injunction; an inquiry as to the amount of damages sustained by the plaintiff owing to the unlawful acts of the defendant; that accounts might be taken, and for further relief.

The defendant demurred for want of equity.

The Chancellor over-ruled the demurrer as reported ante volume 13, page 696.

From this decision the defendant appealed on the following, amongst other, grounds:

(1) That admitting respondent's Letters Patent or Lease were valid, which appellant denied, there is no legal infringement of respondent's rights disclosed by his Bill of Complaint, nor does the Bill allege any specific acts of infringement of respondent's rights by the appellant; (2) that the Bill is uncertain or multifarious and bad, inasmuch as while it shows that respondent claims title under Letters Patent or Lease of two

ferries, one on the side of the city of Ottawa in Upper Canada, and the other on the side of the Township of Hull in Lower Canada, it does not pray for any specific relief as to either, and if it sought relief as to that in Lower Canada alone it could not be maintained; (3) that the Bill does not allege that the ferry in Upper Canada was granted to the city of Ottawa (which is to a certain extent on the Northern frontier or boundary of Upper Canada) as required by Section one of Chapter forty-six of the Consolidated Statutes of Upper Canada; (4) that to assume that the words "frontier line of Upper Canada" mentioned in section one of the act are confined to the line between Upper Canada and the United States, would be assuming a matter of fact in respondent's favor, which is not warranted by authority, as there is no allegation in the Bill that the ferries, or either of them, are not on the said frontier line; (5) that the words "frontier line of Upper Canada" may be disregarded in construing the act, as Upper Canada had no frontier of its own at the time the act was passed, though it was that part of the late Province of Canada which had formerly constituted Upper Canada; (6) that there is no allegation in the Bill that any of the things were done which section three of the act requires should be done before a license of ferry is granted; (7) that the Bill alleges that the Letters Patent or lease were granted to the respondent for ten years, while they could only be legally granted to him for seven years as provided by section three of the act; and on that ground alone the demurrer should have been allowed, as, whatever view is taken of the first section, no license of ferry in Upper Canada can be granted to persons save as provided by the third section; (8) that the respondent substantially alleges by his Bill that the Letters Patent or lease were granted according to the provisions of the act, inasmuch as he shows that he caused the appellant to be fined thereunder

Statement.

1868.

Smith v. Ratté

before the Police Magistrate of the city of Ottawa for alleged violations of his rights; and therefore it must be held that the Letters Patent or lease were intended to be issued in pursuance of the act, and in fact the Bill is framed under the act; (9) that the Bill does not expressly allege that the remedy provided by the statute is inadequate; and (10) that upon the whole the ferry in Upper Canada was granted by the Crown *ultra vires*, and the demurrer should have been allowed.

In support of the order over-ruling the demurrer the plaintiff contended that the Bill of Complaint shews that the plaintiff is by law exclusively entitled to the use of the ferry therein mentioned, and that the defendant is violating and infringing upon such right; that the nature of the infringement by the defendant is stated with as much particularity as the rules of pleading require, and the demurrer is simply for want of equity; that it appears by the bill that the Crown had power to grant the Letters Patent therein mentioned; and that the plaintiff's rights were wholy unaffected by the Act of Parliament referred to, and the case did not come within the provisions thereof.

Statement.

Mr. *J. A. Boyd*, for the appellant.

Mr. *Moss*, for the repondent.

Giles v. *Groves* (*a*), *The Elsebe* (*b*), *Beckford* v. *Hood* (*c*), *Cory* v. *The Yarmouth & Norwich Railway* (*d*) *Letton* v. *Goodden* (*e*), *The Earl of Rutland's Case* (*f*), *The People* v. *Babcock* (*g*), *Kerby* v. *Lewis* (*h*). *Chitty's* Prerog. pp. 119, 232, 386, were amongst other authorities referred to.

(*a*) 12 Q. B. 721.
(*b*) 5 C. Rob. 173.
(*c*) 7 T. R. 620.
(*d*) 3 Hare 593.
(*e*) L. R. 2 Eq. 123.
(*f*) 8 Co. 55*a*.
(*g*) 11 Wend. 586.
(*h*) 5 O. S. 207.

1868.

Smith v. Ratté.

The judgment of the Court was delivered by

DRAPER, C. J.—[After stating the facts as above set forth.]—The question in dispute arises upon the Consolidated Statute of Upper Canada, chapter 46. By section 1, "No license of ferry in Upper Canada shall in future be granted to any person or body corporate beyond the limits thereof, and all grants of ferry on the frontier line of Upper Canada shall be issued to the municipality within the limits of which such ferry exists, and in the case of the establishment of any additional ferry on such frontier then to the municipality in which such additional ferry is established, and shall be so construed as to extend and apply to all such ferries on the Provincial frontier, the circumstances of which do not permit or warrant the peremptory use of steamboats."

Section 2. Such license may be granted for any period not exceeding fifty years.

Judgment.

The first section is not clear. The words "beyond the limits thereof" may apply to the ferry itself, and so prohibit what no one I apprehend ever ventured to assert, viz., the granting a ferry *in* Upper Canada which was beyond its territorial limits; or the meaning may be to restrict the granting a license of ferry to persons or bodies corporate being within the limits of Upper Canada. The latter part of this section is also obscure. What is to be so construed as to extend to all such ferries on the Provincial frontier? Can it be "all grants of ferry on the frontier line," which sentence seems the only nominative to "shall be construed." Possibly the words "this act," or "this section" have been inadvertently omitted. As to the circumstances "which do not permit or warrant the *peremptory* use of steamboats," we are not called upon to express any opinion. The Statute 22 Victoria, chapter 31, (1859), alone affords any help.

1868.

Smith v. Ratté.

Section 10 imposes a penalty on any person who unlawfully interferes with the rights of any licensed ferryman by taking, carrying or conveying at any such ferry across the river or stream on which the ferry is situate, any person, cattle, &c., for hire or reward, &c., or who unlawfully does anything to lessen the tolls and profits of any lessee of the Crown, the amount being payable "to the party aggrieved," except where he has been examined in proof of the offence.

It is objected that this section gives the plaintiff a remedy, of which he has since availed himself, and that he is limited to the remedy so given.

It may, for the purpose of this case, be conceded that where an Act of Parliament confers a new right, and also imposes a penalty both for the protection and benefit of the grantee of that right, upon any one who infringes on it, no other remedy at law can be resorted to than that which the Statute gives.

Judgment.

But this Statute neither creates nor confers any new right. "A ferry is *publici juris*. It is a franchise that no one can erect without license from the Crown. * * If a second is erected without a license, the Crown has a remedy by a *quo warrauto*, and the former grantee has a remedy by action. In case of erecting a new market or ferry to my nuisance I may have an assize of nuisance or an action on the case"—*Blisset* v. *Hart* (*a*). The Consolidated Statute under consideration confers no new power or right *quoad* ferries, but only regulates the mode of granting licenses, the power to grant having been immemorially exercised by the Crown, and the grantee's duties and obligations do not arise from this Statute, but from his becoming a lessee, and his remedies for obstruction existed also be-

(*a*) Willes 512, note *a*.

1868.

Smith v. Ratté.

fore. Lord *Holt* says, "If a ferry be granted at this day he that accepts such grant is bound to keep a boat for the public good." (*a*) It rests upon this, that the grant of the franchise is good in law, being for a sufficient consideration to the subject who as he receives a benefit may have by the grant a corresponding obligation imposed upon him, and if another without legal authority interrupts the grantee by withdrawing a part of those profits which he has in a manner purchased by his corresponding liability, the disturber is subject to an action for the injury. In *Chapman* v. *Pickersgill* (*b*) *Wilmot*, C. J., says, "It is further said that the Statute, 5 George II. (Bankrupt Act) "has given a remedy," (where the commission was taken out fradulently or maliciously) "and therefore this action will not lie, but we are all of opinion that in this case the plaintiff would have been entitled to this remedy by action at Common Law if this Act had never been made, and that the Statute being in the affirmative hath not taken away the remedy at law." I think that in the present case the plaintiff might maintain his action on the case, and that he may come into Chancery for an injunction. [See *Letton* v. *Goodden* (*c*), *Huzzey* v. *Field* (*d*), *Cory* v. *Yarmouth and Norwich Railway Company* (*e*).]

Judgment.

The Statute 37 George III. chapter 10, provided that the Justices of the Peace in General Quarter Sessions should establish the rates and fees for ferrying, and the 8th Victoria, chapter 50, introduced the provisions which are contained in the 10th section of the Consolidated Act. Between 1797 and 1845 the ferryman was left to his Common Law action for disturbance, there was no statutory penalty. The preamble to the 8th Victoria

(*a*) Payne v. Partridge, Show. 257.
(*b*) 2 Wil. 146.
(*c*) L. R. 2 Eq. 123.
(*d*) 2 C. M. & R. 441.
(*e*) 3 Hare 593.

1868.

Smith v. Ratté.

states an intention to afford *greater* protection to the lessees of the Crown of ferries, which is opposed to the idea of taking any away. So far as the case of *Beckford* v. *Hood* can apply I think it is in the plaintiff's favour. The case of *Globenski* v. *Luken* (*a*), decided in Lower Canada, follows the same principle.

It is further objected that it does not appear that the plaintiff was damnified. But it appears that the plaintiff is subject to a yearly rent; that he has established a ferry with sufficient boats and workmen, and was ready to convey travellers, &c., across the river upon payment of a certain ferriage, and that since the establishment of this ferry travellers have crossed in plaintiff's boats and have paid him for the transport; and the fourth paragraph of the bill complains that the defendant for hire and reward has conveyed across the river numerous passengers who would otherwise have crossed in plaintiff's boats and have paid him. This is a plain statement of loss and injury, the quantum is a mere question of evidence.

Judgment.

The next objection was that the Letters Patent were as pleaded void for uncertainty, and therefore the Court will not assist a claim founded on them; for it is said they may equally be construed as leasing a ferry from the City of Ottawa to Haycock's Point, or from Haycock's Point to the City of Ottawa, or from each of those places to the other of them. The case of *Giles* v. *Groves* was cited to prove that a right of ferry may exist from A to B and yet not from B to A.

I see no ground for doubt as to the true construction of the language used. The Crown leases the ferry across the Ottawa river, not saying from the City of Ottawa to Haycock's Point nor *vice versa*, but "*between*

(*a*) 3 L. C. Jur. 316.

1868.

Smith v. Ratté.

those two places." Whichever of them is made the starting point, in order to cross the river, the ferry so used is within the description across the river and between the termini named. When the King's Grant may be taken to two intents, one of which may be good and the other not, the Grant shall be construed to such intent that it may take effect. (*Earl of Cumberland's* case 8 Co). The defendant's argument is that by the language used, either of these constructions may with equal propriety be adopted and that either will make the Grant valid, if it were known which was the true one, and therefore it is not within the principle just stated; but the answer is that the language used clearly covers the ferry across the river each way, and so there is no uncertainty.

In *Pim* v. *Currell* (*a*) it was held that on a declaration describing a ferry as across the river Mersey from the township of B. in the county of C. to the parish of L. in the county of L., the plaintiff might recover though he proved a ferry both ways, and that under a lease describing it as a ferry both ways a ferry across the river one way only might pass. I think this objection fails. Judgment.

The last objection seems to have been most relied upon. The ferry is granted for the term of ten years from the date of the lease. The first section of the Statute applies to "all grants of ferry on the frontier line of Upper Canada," which ferries by section two "may be granted for any period not exceeding fifty years." The third section enacts that, except as in the Act otherwise provided, ferries in Upper Canada shall only be leased by public competition, and that no *such* ferry shall be leased or the license thereof granted for a longer term than seven years at one time.

(*a*) 6 M. & W. 234.

1868.

Smith v. Hatté.

If this were held to be a frontier ferry, the lease would be good, but the defendant's counsel contends that it is not, but is a ferry in Upper Canada and therefore could only be leased for ten years. I agree that this is not a frontier ferry, which as the learned Chancellor held in the Court below refers to that frontier in Upper Canada which is opposite the United States. But I do not agree with the defendant's counsel, that this is a ferry "in Upper Canada," within the true intent and meaning of the third section.

The provisions of the 5th, 6th, 7th, 8th and 9th sections of the Act go far to shew that by "ferries in Upper Canada" was meant "ferries over any stream or other water *within* Upper Canada" (s. 5.), and also where the two shores or termini although not within the the same municipality or even County, are nevertheless both in Upper Canada (ss. 5 and 9). Unless this be so, section 6 would be inapplicable, and every ferry "in Upper Canada" is apparently meant to be embraced within section 4 or the following sections 5 to 9 inclusive.

Judgment.

There is I believe no Statute of Upper Canada which fixes ten years as the period for leasing any ferry. The Consolidated Statute of Lower Canada, chapter 9, which relates only to certain ferries over the St. Lawrence, provides that no lease shall be granted thereof for more than ten years at one time. This Act professedly consolidates the Statute 16 Victoria, chapter 12. But that Act expressly mentions ferries over any river, stream, lake or water within Lower Canada, and not wholly within the local limits of any municipality thereof, and it is included in Schedule A annexed to the Consolidated Statutes of Lower Canada as a repealed Act, and its provisions from section 2 to section 9 inclusive, are contained in Schedule B to the same Acts. Still the Consolidated Statute refers only to the ferries across the St. Lawrence between the City of Quebec and the Parish of Notre

Dame de la Pointe Levi, and between the City of Montreal and the Parish of Longueil, and contains no reference to any other river, &c., in Lower Canada. Thus it appears that neither the Consolidated Statutes of Upper nor of Lower Canada make any express reference to ferries, one terminus of which is in the (now) Province of Quebec, and the other in the (now) Province of Ontario.

1860.

Smith v. Ratté.

The earliest of our Statutes which mentions a "ferry on the frontier line of Upper Canada" was the 20th Victoria, chapter 5, passed by the Legislature of United Canada. If that phrase was intended to apply to the river Ottawa it is only reasonable to suppose that some similar provision as to ferries on the frontier line of Lower Canada would have been thought necessary by the same Legislature. But no such provision has ever been made, and its absence fortifies the conclusion already expressed as to the true construction of the words the frontier line of Upper Canada. I am compelled to admit that as frontier ferries, *i. e.*, ferries on the frontier opposite the United States, they are included in the general words "ferries in Upper Canada," and that the Legislature in accordance with the case of *Kerby* v. *Lewis* have sanctioned the leasing of a ferry, one terminus of which is in the Province, the other in the United States, and the actual terminus of which ferry being necessarily where British territory ends, must be in the middle of the river Niagara. The case of the *People* v. *Babcock*, cited on the argument shews that by statute law of the State of New York, authority is given to the Court of Common Pleas of each County to license ferries across any river or lake within the limits of such County; and as the limits of one County of that State extended to the middle of the river the Court held that a license for a ferry might be granted across the river, although it could only give the lessee exclusive privileges as far as the centre of the river. This is not

Judgment.

1868.

Smith v. Ratté.

a fitting occasion to consider the difficulties of holding that either Government can grant a ferry across a river only one half of which is included in their territory. It certainly is an old common law doctrine that a ferry is in respect of the landing place, not of the water, which in a navigable river is a public highway. In Saville pl. 11, 39, the doctrine is carried further, for it is added that each side of the water should belong to the owner of the ferry for otherwise he cannot land on the other side. This however is too strongly put, as it is only necessary that there should be the right to land (*a*.)

The Legislature in the Consolidated Act speaks generally of ferries in Upper Canada, and then makes special provisions for the grant of ferries on the frontier line. It then provides for ferries over any stream or water *within* Upper Canada (s. 5), and for cases where one shore of such stream or other water is within the limits of a city, town or incorporated village, and the other shore in a Township or rural municipality (s. 89). It imposes conditions precedent to the granting by the Crown of a license of a ferry in Upper Canada, and limits the term (s. 4), and gives authority to certain Municipal Councils to pass by-laws regulating ferries between any two places within the municipality, and for establishing the rates of ferriage.

Judgment.

But it affords no other aid to interpret the meaning of the words "ferry in Upper Canada," and all the provisions except as to a ferry on the frontier line, appear to me to assume that the whole ferry including both termini, is in Upper Canada, though Mr. *Boyd* has argued that it is sufficient to make it a ferry in Upper Canada if one terminus be in that Province. I find far less difficulty in holding that in United Canada with one executive exercising the delegated powers of the Crown,

(*a*) See 12th Ea. 324 n. *a*, and Peter v. Kendall, 6 B. & C. at p. 711, per Bayley and Holroyd, JJ.

1868.

Smith v. Ratté.

a ferry, such as the one in question might be lawfully granted, as this has been without regard to the provisions of the Consolidated Act of Upper Canada; in other words, in treating a ferry, one terminus of which is in Upper Canada, the other in Lower, as not included in or regulated by that Statute, than in arriving at the conclusion from any provision in the Act, that the Legislature meant to include it in a general form of expression, while all or nearly all the special provisions except those as to penalty or exemption therefrom, are no more applicable to this particular ferry than they are to a ferry on the frontier line, to which unquestionably they do not relate.

I think the appeal should be dismissed.

Per Curiam—Appeal dismissed with costs.

MARTIN v. MCGLASHAN.

Pleading—Dowress.

Where a widow is made a defendant as being entitled to dower, it is not sufficient for the bill to allege that the husband died leaving her his widow: the bill should further expressly aver that she is entitled to dower and that she claims to be so entitled.

Demurrer for want of equity.

Mr. *McLennan* for the demurrer.

Mr. *Moss*, contra.

Shuttleworth v. *Roberts* (*a*), *DeLorme* v. *Hollingsworth* (*b*), *Daniels* Ch. Prac. p. 302: *Lewis* Eq. Pl. pp. 72, 74, 75, 89, 95, were referred to.

(*a*) 11 Gr. 247. (*b*) 1 Cox. 462.

1868.

Martin v. McIlnahan.

VanKoughnet, C.—I incline to think that the objection is good. In a Bill by a person claiming as heir, I think the invariable practice in order to shew his right, as such, to property descended, is to state that his ancestor died intestate leaving him his heir. I doubt if a mere statement that the ancestor died leaving plaintiff his heir, without stating the intestacy, would be sufficient to justify bringing a defendant into Court. You must either aver a right in him or a claim of right by him. Here, the Bill merely states that testator died leaving defendant his widow; but it does not go on and say "and entitled to dower," or "who claims dower." Does it follow that because a man leaves a widow, she is entitled to dower? Is that such a necessary inference of law that the plaintiff is relieved from stating it? I think that in every pleading I have seen or heard of, the pleader states that deceased left "his widow who is entitled to dower," or "who claims to be entitled to dower, in said lands."

Judgment.

Camero. v. Bethune.

Trustees—Interest on investments—Commission to trustees, executors, &c.

Mortgages, reserving six per cent interest, were taken by trustees before the abolition of the usury laws, and were not called in for several years after the change of the law, but as it did not appear they were aware of an opportunity of investing at a higher rate, the Court refused to charge them with more than was reserved by the mortgages.

Where a suit for the administration of an estate is pending, in this Court, it is improper for the Surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors.

This was an appeal and cross-appeal from the Master's report. The defendants were executors and trustees under the will of the late *Lachlan McLean Cameron*, who died on the 12th July, 1854. The bill was filed on the 22nd February, 1855, by his infant children for an

1868.

Cameron v. Bethune.

administration of the trusts of the will. The executors, on the 22nd September, 1855, invested the sum of £650, upon mortgage, payable six years after date with interest at six per cent. On the 26th August, 1856, they invested a further sum of £200, payable six years thereafter with interest at the same rate, and on the 11th April, 1857, they invested a further sum of £400, payable six years after date with interest at the same rate. These mortgages were still oustanding, bearing the same rate of interest and the executors have only received interest at six per cent. upon these investments ever since they were made.

The executors, in August, 1867, made an application to the Judge of the Surrogate Court of Ontario, for an allowance under section 66, chapter 16, Consolidated Statutes of Upper Canada, page 109, and he made an allowance to them and ordered it with their costs of the application to be paid out of the estate. Evidence was produced before the Master shewing that for several years after these mortgages were due a greater rate of interest than six per cent. could have been procured, and the Master by his report certified this fact to the Court and submitted that the executors ought to be charged with interest at eight per cent. on the above investments. The Master also allowed the executors the commission given to them by the Judge of the County Court, and the costs of the application. The defendants appealed from the finding of the Master as to the interest and the plaintiffs from his allowance of the commission and costs to the executors.

Mr. *George Evans*, for the plaintiffs.

Mr. *Alfred Hoskin*, for the defendants.

VanKoughnet, C.—I think the executors should not be charged with more than six per cent. interest reserved to them in the mortgages. The first three mortgages

Judgment.

1868.

Cameron v. Bethune.

were taken when not more than six per cent. could by law be reserved; and, though the moneys have been due for many years, yet the interest has been regularly paid and the executors considered, and produced a considerable body of evidence to shew, that the security was ample. It does not appear that they knew of any investment at eight per cent., and according to my opinion in *Smith* v. *Roe* (*a*), they were not bound to search for it. I allow the appeal as to this, and the sufficiency of the title with costs to both parties.

As to the sufficiency of the security and the costs of the appeal in regard to it, I reserve both questions till after the mortgage moneys overdue are called in, which must be done immediately; and for these purposes the executors are to proceed by bill in this Court to procure a sale; and, if any delay be had in the prosecution of the suit, the plaintiffs to be at liberty to apply for the conduct of the cause. The Master must charge the executors with interest at six per cent. on any balances remaining in their hands more than six months uninvested, and which were not required for any expenditure when such balances amount to £100 or over. The executors, do not shew that they tried or were unable to invest such sums, and as guardians of the infants it was their duty to have come to the Court for permission to invest, and not to have retained these moneys, received since the suit was instituted, idle and unproductive. Excepting as to the costs reserved above, costs of all parties to be taxed as between solicitor and client. Moneys realized on securities to be paid into Court and invested. Balances in hands of executors from time to time after paying their own costs to be paid into Court. Executors not to have any costs attendant on perfecting the titles.

Judgment.

As to the allowance of the sum awarded by the Surrogate Judge during the pending of this suit for com-

(*a*) 11 Gr. 311.

1868.

Cameron v. Bethune.

mission to the executors, I think that the Surrogate should not have interfered. It has long been held that this Court will consider and award a proper compensation where there is a suit for administering the estate. The Surrogate cannot tell what the conduct of the executors has been or how the property has been administered when the account is taken in this Court. This Court, on the application of any party, would, I have no doubt, restrain such an improper thing as an application to the Surrogate while the estate was being administered here, and disregard any allowance if ordered by that tribunal.

JESSOP v. MCLEAN.

Specific performance—Husband and wife—Demurrer.

A husband and wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of land of the wife; but the wife must sue by her next friend.

Demurrer to bill.

Mr. *Chadwick*, for the demurrer.

Mr. *Moss*, contra.

Houlding v. *Poole* (*a*), *Flight* v. *Bolland* (*b*), *Fennelly* v. *Anderson* (*c*), were referred to by Counsel.

VANKOUGHNET, C.—I think the wife must appear by an independent next friend and that this is a good ground of demurrer, and I allow it accordingly, with leave to the plaintiff to amend generally; and without costs—as I overrule the other two grounds of demurrer. It is settled, and I think rightly, by the case in 1st Ir. Ch. Reports that husband and wife may as vendors

Judgment.

(*a*) 1 Gr. 206. (*b*) 4 Russ. 298. (*c*) 1 Ir. Ch. 706.

1868.

Jessop v. McLean.

maintain a bill for specific performance. Here, the objection to the prayer of the Bill is as insufficiently stated, at least, as the prayer found fault with.

One ground for requiring a next friend is that otherwise the husband is *dominus litis*, and the wife therefore not bound by the decree, and that she might immediately after institute a new suit by a next friend. A defendant is not to be subjected to be thus twice vexed. I think the husband a proper co-plaintiff, and in *Fennelly* v. *Anderson*, there does not appear to have been a next friend to the wife, who united with her husband as plaintiff; but, if this were so, the objection must have been overlooked.

Crippen v. Ogilvie.

Mental capacity—Intemperate habits—Improvident conveyance—Inadequate consideration.

The owner of land, who had become utterly abandoned to drunkenness, created a mortgage thereon for about one-fourth of its value; and within a year afterwards the mortgagee obtained from him an absolute conveyance of the land, for a very trifling, if any, further consideration than the mortgage debt, in which conveyance his wife joined to bar her dower, and the same was executed by the husband and wife in the presence of their son. The evidence shewed that the grantor from his habits had become incapable of properly understanding business transactions.

The Court under the circumstances, although after great delay in taking proceedings, gave him relief against the deed, although in the meantime three of the persons present at the execution thereof —one of them the son of the grantor—had died; the Court assuming for the purposes of the decision that the parties, other than the son, would have testified to their belief in the sobriety and intelligence of the grantor.

Examination and hearing at Cobourg.

(*a*) Fenelly v. Anderson, 1 Ir. Ch. 706.

1868.

Crippen v. Ogilvie.

Mr. *Roaf*, Q. C., and Mr. *S. M. Jarvis*, for the plaintiff.

Mr. *Strong*, Q.C., for the defendant.

SPRAGGE, V. C.—The bill impeaches a conveyance bearing date 14th March, 1855, made by the plaintiff to the defendant, by which two half acre lots in the village of Campbellford, are in terms conveyed absolutely, for the expressed consideration of £40. *Crippen's* wife joined in the conveyance to bar her dower.

The bill states that for some years previously, *Crippen* had acquired very intemperate habits and had continued in them, whereby his mind became weakened, and that he was in such a state as made him easily imposed upon and unfit for the transaction of business. It is further stated that the plaintiff was induced to make a deed, absolute in terms, by the defendant's representations, that the property would be thereby saved to his family, and by engaging to apply it to their use, and it is alleged, that when the plaintiff executed the deed, he was wholly incapacitated by intemperance from attending to business, and that he did not understand the nature of the transaction. These allegations are not perhaps entirely consistent, but the meaning of them is sufficiently intelligible.

Judgment.

A mortgage between the same parties upon the same property, had been made on the previous 22nd of May, to secure £48. This mortgage is not impeached. The bill states no further consideration was given upon the execution of the conveyance, and the only proof of any further consideration is that contained in the examination of the defendant himself who states a further consideration of between $50 and $60 which I will refer to presently.

1868.

Crippen v. Ogilvie.

The evidence, and that of witnesses of great respectability, discloses a course of habitual drunkenness on the part of the plaintiff, for a period extending for some years previous to 1854, till the death of his son in 1863. In 1854 and 1855 he is described as scarcely ever sober even for a day, as scarcely ever, if ever, fit for the transaction of business. One of the witnesses, *Gibb*, speaking of his habits from 1850 to 1860, says that during that period there were occasions, but very seldom, when he was sober and in possession of his faculties; others speak of seeing him almost daily, and never seeing him sober, and two, speaking of the state of his mind say, that if drink were kept entirely from him he might in a short time come round to himself. He was a carpenter by trade, and sold his tools, and as one witness says everything he could lay his hands upon, for drink. The evidence presents, altogether, a most deplorable case of utter abandonment to drunkenness. The witnesses for the most part, as well as the man himself, lived in a small village where the habits of all were known to one another, and the defendant also lived in or near the same village.

Judgment

So much for his general habits and mental condition. Only one of the plaintiff's witnesses applies this particularly to the period of the execution of the conveyance. This is *Luke Hoskin* who says that the plaintiff had delirium tremens in the beginning of 1855, he thinks in March.

The plaintiff gives evidence also of the value of the property at the date of the conveyance: some witnesses place it as high as £200. There was a dwelling-house on one lot and a store on the other; and I cannot say looking at what other lots were sold for, and also at the rentable value of the premises that they over estimated the value. I am satisfied their estimate was honestly given. Others estimated it at a somewhat lower

price, and the Honorable Mr. *Cockburn* at a price considerably lower. Upon the whole of the evidence as to value, I should think it might fairly be taken at somewhere between £150 and £200. Upon the question of value, and also as bearing upon the case otherwise, is a circumstance proved in evidence, that an offer was made to the plaintiff in 1854, by a Mr. *Miller*, that he would for one of the lots, pay for the two lots to the original vendor, Major *Campbell*, letting the plaintiff have the buildings on both lots. The witness supposed that only £20 and some six or seven years interest was then due to Major *Campbell*. Something like £10 more was claimed and exacted by Major *Campbell*.

The defendant on the other hand shews some circumstances which appear to be in his favor. The conveyance was drawn by and executed in the presence of a Mr. *Rowed*, who is spoken of by several witnesses as a man of high character. The plaintiff's wife, and his grown up son described as sober, industrious and intelligent, accompanied the plaintiff and the defendant to the house of Mr. *Rowed*, and were present at the execution of the conveyance. The instrument was witnessed by a person named *Bailey*, and by a male and female servant of Mr. *Rowed*. The two latter are called as witnesses. The evidence of the woman amounts to this, that the plaintiff appeared to her to be sober, and she says the deed was read over. The man swears positively that the plaintiff was sober. He did not give his evidence in at all a satisfactory manner, and he said what in my mind greatly impaired the value of his testimony, that the plaintiff in 1854 and 1855 was sometimes given to liquor and sometimes sober, and that he would be sober for weeks together at times during those years. This is altogether opposed to the evidence of several witnesses, whose evidence I judge to be entitled to much more weight.

Judgment.

1868.

Crippen v. Ogilvie.

Bailey, the third witness is dead, and Mr. *Rowed* and *Dougald*, the son of the plaintiff, are also dead. Mr. *Rowed* died some nine or ten years ago. The bill was filed on the 9th of May, 1868.

The circumstance of the wife and son of the plaintiff being present at the execution of the impeached deed, the former joining in it, and both going to the house of Mr. *Rowed* in order to be present, and the circumstance of the document being drawn and executed in the presence of such a man as Mr. *Rowed* is described to be, he being too, aware, as appears by the evidence, of the intemperate habits of the plaintiff, are circumstances of great weight; and make it difficult, but for other circumstances, to believe that advantage was taken of the plaintiff's habits or mental condition, or that he was not, in the belief of those parties at any rate, in a fit state to do business, and that notwithstanding a circumstance which somewhat militates against it that he executed by his mark not by his signature, while several other documents produced are signed by him with his name. There is also the circumstance of the execution of the mortgage by the plaintiff which he does not impeach, in May, 1854, during the period spoken of so strongly by the witnesses in regard to the habits and mental condition of the plaintiff.

Judgment.

The circumstance of the wife and son of the plaintiff being present at the execution of the conveyance lose much of their force, if we are to believe the evidence of *Archibald McColl*. He is a brother of the plaintiff's wife, and was, as he says, asked by the defendant to assist in a scheme for saving the property of the plaintiff to his family, which he thus details:—

"In the forepart of March, 1855, I met defendant in Campbellford. He said: 'I want to talk to you about *Crippen's* affairs.' He said he had foolishly signed a

note for £22 10s. 0d. to *McKay* when the amount due was only £2 10s. 0d; that he had involved himself in a debt for £10 0s. 0d. with *Gibb*; that these parties had told him that they would join notes and sell *Crippen's* property; that he could not hold the property in his mortgage as the property was worth five times more than the mortgage; that he had consulted lawyers in Belleville, and had a scheme which was that they would get him, when he did not know what he was about, and get him to sign a deed of the property to *Ogilvie* so as to hold the property from *Gibb*, *Miller* and others; and the son could get time to pay. I told him I would have nothing to do with it. He said he would keep the plan a secret. He said whenever *Dougald* would be able to produce the mortgage money he would take it from him. He said they would pretend the deed was some other document connected with the mortgage and so get plaintiff to sign it. He said *Dougald* had paid him some money on the mortgage, he did not know what, but not exceeding £8. I met him again at the end of March, and he said 'we have got old *Sam* fixed at last. We got him a few days ago when he did not know his right hand from his left, and took him down in my sleigh, and took some whiskey with us.'"

1868.

Crippen v. Ogilvie.

Judgment.

There was also some evidence given by a witness named *William Black*, which I will refer to before noticing further the evidence of *McColl*. He said:—

"I know the parties. In 1857 I had a conversation with *Ogilvie*. He said he had taken a deed of plaintiff's property to save it for him and his family. He said he expected to get into trouble with *Crippen* on that account. He said *Miller* wanted to undermine him, and take it from him. He said he took the property with the intention of giving it back again on payment of principal and interest. He said he had received some rent for interest. He said he did not in-

1868.
Crippen v. Ogilvie.

tend to give it back now because it had become valuable, that he had paid the value at the time he got it. He said he had got a lawyer's letter about the matter."

With regard to the evidence of *McColl*, he is a man of a good deal of intelligence, but is evidently somewhat of a partizan in favor of the plaintiff. He exhibited a bias for the plaintiff, and I thought seemed inclined to exaggerate; but I thought him in the main, as far as I could judge, not untruthful. I am not inclined to think that his story was a mere fabrication; and the evidence of *Black*, an intelligent and fair witness, lends some confirmation to it; for after the defendant had determined to keep the land, and when it would have destroyed his claim to keep it if he had admitted that he had engaged to allow redemption, he still went so far as to say that he had taken the property with the *intention* of giving it back again, on payment of principal and interest. Under the circumstances it is not unfair to him to infer that he put the matter as favorably for himself as he could, and that having an intention to allow redemption, he expressed that intention to those interested in the redemption. It makes it highly probable that there is truth in the story of *McColl*, and that the defendant obtained the conveyance upon the faith of his representing that he would allow the property to be redeemed.

Judgment.

It would be the merest infatuation on the part of the wife and son of the plaintiff, as well as on the part of the plaintiff himself, who, there is reason to believe was really fatuous, for the wife and son to lend their aid in bringing about this conveyance unless upon the understanding that it was to be redeemed, and all the circumstances favor the position that it was to be redeemable. Take the property at what according to the evidence was its minimum value, £150, the defendant held a mortgage upon it, dated less than a year before, for £48,

upon which neither principal nor interest was due, the principal being payable at the expiration of six years, and the interest yearly at 9 per cent: the rentable value of the property being sufficient to pay the interest twice over. The offer that had been made by *Miller* is also to be borne in mind. Now it is evident from the whole of the defendant's own examination, that the parties went to Mr. *Rowed's* to have the conveyance drawn; that the bargain was made before they went, and according to the defendant's own account that bargain was that he should become a purchaser simply for the mortgage money. It is true, he says that after they got to Mr. *Rowed's* a further sum of $50 or $60 was added to the purchase money, being as he says a debt due by the plaintiff to the estate of a Dr. *Denmark*, of which estate *Rowed* was an executor. But the bargain was as the defendant says, for an absolute conveyance to himself, for the mortgage debt. This appears to me, simply incomprehensible. The mortgage debt was about one-third of the value of the property, and was not payable for five years, the interest was not burthensome for the rents, as I have said, would pay it twice over; and having rejected *Miller's* offer, which was infinitely more advantageous, they are represented as making this absurd, unequal and most disadvantageous bargain with the defendant. I say "they," because my conclusion from the evidence is, that the plaintiff's wife and son had much more to say to it than the plaintiff himself. The conclusion appears to me almost irresistible that either the plaintiff had not possession of his senses, and that advantage was taken of the miserable state to which he had reduced himself, or that it was understood and agreed that the property should be redeemable, for if it was an absolute purchase, it was for such a grossly inadequate price, and made under circumstances that I do not see how it could, in this Court, be allowed to stand.

1868.

Cripps v. Ogilvie.

Judgment.

It is suggested in regard to any understanding as to

1868.

Ippen v. Ogilvie.

redemption, that it was at any rate nothing more than an honorary engagement on the part of the defendant, and made in favor, not of the plaintiff but of his son. It is possible certainly that a party receiving an absolute conveyance might hold out to the party conveying to him a hope and expectation that he would be allowed to redeem, and at the same time so guard himself as to give no right to redeem; but if in this case there was any understanding as to redemption, I have no reason to suppose it was anything less than a right to redeem that was given; and as to its being given to the son I take it to be only this, that it was the son, an intelligent industrious mechanic, that was expected to provide the money; and I should say this, that if the question were only whether it was the father or the son that, upon payment would be entitled to a re-conveyance, it would, looking at the circumstances under which this conveyance was obtained, certainly be the father.

Judgment.

Taking the evidence as it is, apart from the question of delay, and the loss of evidence arising therefrom, I think it impossible to hold that the defendant could be allowed to hold this conveyance. But for the intervention of the wife and son I should say that a conveyance for such a consideration obtained from such a man as the plaintiff, could not be allowed to stand. Mr. *Roaf* was right, I think, in his contention that there was indeed no real consideration, so far at least as the bargain went, for the release of the mortgage debt was in fact no consideration, looking at the value of the mortgaged premises. Then as to the intervention of the wife and son, it is incredible that they should have lent their aid in carrying out a bargain for an absolute, unconditional conveyance to the defendant. If evidence such as that of *McColl* had not been given, one would have cast about for something to explain the strange procedure of the son and wife of a man, so besotted by drink as scarcely ever to have possession of his senses, joining

with a stranger in enabling him to get rid of his property for one third of its value, and that without any reason, and with no purpose to be served. This Court certainly cannot proceed upon a mere surmise, but the Court will presume fraud from gross inadequacy of consideration, and it is not going any further to presume that there was in this case *legal* fraud in the procurement of this conveyance. It would by many be looked upon, as an innocent scheme that the conveyance should be procured from the plaintiff; a scheme which the wife and son might well be excused for entering into as a means of saving the property from the improvidence of a helpless drunkard.

1868.

Crippen v. Ogilvie.

The Court is not always able to see what means have been used to compass an end, but if it can see that a great wrong is accomplished it will presume that improper means were used in order to accomplish it. If it be urged that the presence of the wife and son rebut the presumption of fraud, the answer is that their presence can very naturally be accounted for consistently with the existence of fraud, and in this view the evidence of *McColl* is not necessary to the plaintiff's case. But I think that the evidence of *McColl* should not be discarded. I believe that it is substantially true, not merely because it is probable, but because I have no reason to suppose that he would be guilty of the deliberate perjury that would be involved in the fabrication of his story, and also because it derives some confirmation, though but slight, from the evidence of *Black*. I think it is scarcely possible that the plaintiff could have exercised an assenting mind to the execution of an absolute conveyance, intended to be what it purported to be, to the defendant. His habits and mental condition are placed beyond doubt by the evidence. Such being the case it should be shewn clearly and satisfactorily that upon this occasion he was able to comprehend what he was doing; that his mind did take in and assent to an absolute

Judgment.

1868.

Crippen v. Ogilvie.

indefeasible alienation of his property; what is proved falls far short of this. He appeared to two servants to be sober, I have already referred to their evidence, and think it insufficient to establish that he was able to do more than to hold himself up, and utter a word or two; his nerves had probably been to a certain degree steadied by a stimulant, as had been done at other times, as appears by the evidence; and after all it is only his mark that we have to the instrument. He would moreover naturally feel safe in executing any instrument in the presence of his wife and son. What they represented it to be, we do not know, and how far he comprehended what Mr. *Rowed* said to him, we do not know.

A Court of Equity will scrutinize very closely any transaction in which a disadvantageous bargain has been obtained from a person of such habits and mental condition as this plaintiff is proved to have been. In *Dunnage* v. *White* (*a*), Sir *Thomas Plumer* said: "of the incompetence of *James Edward Lewis* there is no satisfactory evidence; the solicitor who attests the deed, proves that he was sober, and under no mental disability; and with regard to undue influence, the evidence certainly is not sufficient to impeach the deed: but as to his general description, there is strong testimony, and all on one side; that he was dissolute, illiterate, addicted to intoxication; that he had recently passed from a low station into the possession of property for which he was not apparently destined, and that his course of life rendered him extremely subject to imposition. Such habits, though not constituting absolute incapacity, lay a ground for a strict examination, whether the instrument contains in itself evidence that advantage was taken of them." The bill in that case was to enforce the deed, and the Court refused to execute it: and if the bill had been as this is, a bill to set it aside, I apprehend that

Judgment.

(*a*) 1 Swan, 149.

1868.

Crippen v. Ogilvie.

that relief would have been given. In *Cooke* v. *Clayworth* (*a*), Sir *William Grant* said: "I think a Court of Equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand, ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time: I say merely upon that ground; as, if there was as Lord *Hardwicke* expresses it in *Cory* v. *Cory*, any unfair advantage made of his situation, or as Sir *Joseph Jekyll* says in *Johnson* v. *Medlicott*, any contrivance or management to draw him into drink, he might be a proper object of relief in a Court of Equity." *Say* v. *Barwick* (*b*), was a case where a lease, very disadvantageous to the lessor, had been obtained from him immediately upon his coming of age, and after a good deal of intoxication, in which the lessee had been the companion of the lessor: there had existed no fiduciary relation between the parties. It was, however, a very strong case for relief. The lease was executed about seven o'clock on the morning of the day on which the plaintiff came of age. Sir *William Grant* thus speaks of his impression of the evidence: "Some witnesses say he was so much affected by the former night's debauch as to be utterly incapable of business: others represent him as perfectly cool and collected, and aware of what he was about. My impression is, that he did know what he was doing; and that what he did was merely an execution of what he had previously promised and determined to do:" that is to give him a lease, but as the learned Judge thought, such a lease as any other tenant would have, and he goes on to explain that the lease was a very disadvantageous one to the lessor. "Now, this farm is proved to be let at not much more than half its value. The rent reserved is £51. By the lowest estimate it is worth £86, and some

Judgment.

(*a*) 18 Ves. 15.

(*b*) 1 V. & B. 195.

1868.

Crispen v. Ogilvie.

of the witnesses say it is fairly worth £100. The covenants are not so advantageous to the landlord as is usual in the part of the country where the farm lies; and no evidence whatever of the adequacy of the rent is given by the defendant. The plaintiff, therefore, in granting a lease on such terms, must either have acted in total ignorance of the value of his estate, or he must have been imposed upon with regard to it. This must, to all substantial purposes, be considered as the lease of a mere infant. The seal certainly was put to it a few hours after he was of age; but the agreement was made, the terms were settled, the instructions given, the engrossment prepared, during his infancy. He had not for a single hour the opportunity of applying his adult judgment to the subject." In *Say* v. *Barwick* there were certainly some features which do not exist in this case; but on the other hand there was more evidence of the plaintiff knowing what he was doing; for he himself gave instructions for the lease, and sent for the attorney to have it executed; and there was also evidence of some acts of confirmation, but not sufficient, as Sir *William Grant* thought; and he set aside the lease with costs. It will be observed that the inadequacy was not so great in the case cited as in this: and I refer to the case partly on that account. In the case before me there is, as there was in *Dunnage* v. *White*, evidence of such habits as, if not constituting absolute incapacity, still lay a ground for a strict examination, whether the price given was not so grossly inadequate as, with the time and circumstances to which I have adverted, to be evidence that advantage was taken of those habits to obtain this conveyance. I think the proper conclusion is that this conveyance was obtained through advantage taken of those habits and the mental condition induced by them; and I should say this independently of the evidence of *McColl*.

Judgment.

With respect to the delay in bringing this suit, it is

1868.

Crippen v. Ogilvie.

certainly very much to be regretted; but the ground of this suit being fraud, the time that has elapsed does not operate as a bar. Length of time, as was put by Lord *Eldon* in *Morse* v. *Royal* (*a*), operates only "upon the infirmity attending all human testimony: where witnesses are suffered to die before the claim is made, much is to be presumed against it." I am inclined to give all the effect to this that can justly be given to it; and I thought at the hearing that it formed a serious obstacle to the granting of relief in this case; for upwards of thirteen years have elapsed since the transaction; and no less than three of the persons present at the execution of the deed in question have since died. But still, this objection must not be carried too far. Mr. *Rowed* died nine or ten years ago, and at that time the delay had not been very great; the plaintiff's son died in 1863; it does not appear at what date *Bailey* died. Now with regard to two of these persons, *Rowed* and *Bailey*, the only point to which it is suggested that they could speak is as to the appearance of the plaintiff at the execution of the deed, and as to what passed upon that occasion. The defendant can have nothing to complain of, if it be assumed in his favor that these persons, if living, would have testified to their belief in the sobriety and intelligence of the plaintiff. Mr. *Rowed* would be the principal witness, and appears to have addressed some words to the plaintiff, not words, however, calling for any response, but rather words of regretful remonstrance upon his habits and their consequences. It may be assumed that he believed the plaintiff competent to understand what he was about, and that *Bailey* believed the same; it would still be proper to remember that Mr. *Rowed* would be naturally disarmed of suspicion by the presence of the plaintiff's wife and son; and unless there was something in the manner or appearance of the plaintiff that forced

Judgment.

(*a*) 12 Ves., 377.

1868. Crippen v. Ogilvie.

itself upon Mr. *Rowed's* attention, he would probably consider him, habitual drunkard though he knew him to be, still sufficiently in his senses to execute the deed ; in short, he would consider him so protected by his wife and son, who had a common interest, as he would suppose in what was being done, that it was not necessary for him to protect him. I say this, assuming that he was not in the secret of any such plan, as stated in the evidence of *McColl*.

Further, as to the loss of the evidence of Mr. *Rowed*, if his death occurred within such a period after the transaction as would not be an unreasonable delay on the part of the plaintiff, the plaintiff would not, I apprehend, be held blameable for the loss of his evidence. Mr. *Rowed* appears to have died some three or four years after the transaction, the plaintiff's habits still continuing the same as before. It would be unfair to place him in a better, or the defendant in a worse position because the plaintiff continued in his course of intemperance, and of carelessness as to his interests; but still any inference that might otherwise arise as to acquiescence, is thereby negatived, and I cannot say that a lapse of three or four years should be considered as a long delay under the circumstances.

Judgment.

The other party who has since died, is the plaintiff's son. There are some undeniable facts in this case that lead me to believe that the defendant has lost no evidence favorable to him, by the death of the plaintiff's son. What was done was so obviously against the interest of both his parents, and against his own, if it was an absolute sale and conveyance, and so intended by and known to his father, that it is absolutely incredible that the son could have assented to it. I cannot assume nor can I believe that the death of the plaintiff's son has been any loss of evidence to the defendant.

Upon the whole I have come to the conclusion that the conveyance ought to be set aside and with costs. 1868.

Crippen v. Ogilvie.

McDougal v. Miller.

Specific performance—Mortgage by vendor after contract.

A party after making a contract for the sale of land, mortgaged it, and then filed a bill for specific performance. The mortgage not being due, the Court on the hearing directed an inquiry whether the plaintiff could make a good title free from incumbrance; and reserved further directions and costs in case the Master should find the plaintiff could not clear up the title.

This was a suit for specific performance, the bill in which had been taken *pro confesso* against the defendant.

Mr. *J. A. Boyd*, for the plaintiff, asked for the usual decree; but

VanKoughnet, C.—The plaintiff contracted with the defendant to give him a deed of the land free from all incumbrances except a then existing mortgage to *Sparks*. Since this agreement the plaintiff has acquired a title to the land and has incumbered it with a mortgage to one *Moffatt* for $1400 or so, payable in two annual instalments, neither of which is yet due. The plaintiff states that defendant was aware he was going to make this mortgage. He does not state when defendant was aware of this; nor that defendant consented to it, or acquiesced in it. The Bill does not allege that *Moffatt* will take his money. The plaintiff is not then, on his own shewing, in a position to give a title free from incumbrances. The Bill says that defendant has accepted the title, but this does not imply that he is content to take it subject to this incumbrance to *Moffatt*. The defendant has allowed the Bill to go *pro confesso*, Judgment.

1868.

McDougal v. Miller.

but, the plaintiff not being in a position to make a clear title, is not entitled to call on defendant for payment. The most I can give him is a decree without costs, and an inquiry before the Master as to whether he can make a title free from incumbrances excepting the mortgage to *Sparks*, which defendant is to pay.

Subject to this, decree specific performance in usual way according to terms of agreement—Reserve further directions and subsequent costs in case the Master finds that plaintiff cannot clear the title.

CAMPBELL v. SIMMONS.

Lease—Injunction—Specific performance—Damages.

One of the conditions of a lease was that the lessee (the defendant) should erect a barn of certain specified dimensions, and the land whereon it was to be erected was mentioned but the lease was silent as to the exact location or site of the barn. The lessee commenced to erect a barn on a site with which the lessor was dissatisfied, who thereupon filed a bill, alleging that such site was unsuitable, and that it had been selected by the defendant from improper motives; that another site had been agreed on between them and that the building itself was faulty in its construction, and prayed an injunction restraining the defendant from allowing the barn to remain in its present position; and by amendment sought to enforce specific performance of the contract. The evidence failed to establish the material allegations of the original bill:

Held (1) That by the terms of the lease the plaintiff had not the right of selecting the site of the barn; (2) That it was not a proper case for decreeing specific performance or to award damages in lieu thereof, but that the plaintiff must be left to his remedy at law.

The bill in this cause was by *Thomas Campbell* against *William Simmons*, setting forth (1) that an indenture was executed between one *Elias D. S. Wilkins* and defendant, in the words and figures, or to the effect following:

1868.

Campbell v. Simmons.

(2) "This indenture, made the 3rd day of November, 1860, between *Elias D. S. Wilkins*, of the Village of Trenton, County of Hastings, of the first part, and *William Simmons*, of Hope, County of Durham, of the second part, all of the Province of Canada. The condition of this obligation is, that the party of the first part leases unto the party of the second part lot No. 10, in the 6th concession of Hope, for the term of two years, from the 12th day of April, for the sum of £80 per annum, payable the 1st day of November in each and every year; and that the party of the second part binds himself not to clear any land without the written consent of the party of the first part. He further agrees to pay all taxes and assessments on the said lot: and the party of the first part further agrees to lease the party of the second part 100 acres falling to his share, for the term of ten years, at £50 per annum, payable as above; or the whole of the said lot, should he acquire it by purchase or otherwise, for the sum of £80 per annum. The party of the second part further agrees with the party of the first part to erect a barn, at the expiration of two years, 40 by 60, with 16 feet posts, and to be put upon a good stone foundation, and to erect the same upon that portion of lot that may fall to the share of the party of the first part, free of all costs; and it is also understood, should the party of the second part fail in paying the rent for the space of three months after it shall become due, then the party of the first part is at liberty to enter and take peaceable possession, without recourse to law. The party of the first part further agrees to send 400 fruit trees, to be delivered at station or wharf at Port Hope, free of costs, next April, and the party of the second part agrees to receive the same, and to set them out on lot No. 10, 6th concession, and take care of the same in a husbandmanlike manner. At the expiration of the within lease, the party of the second part is to give peaceable possession to the party of the first part, his

Statement.

1868.

Campbell v. Simmons.

heirs or assigns." (3) That defendant, in pursuance of such instrument, entered into and remained in possession of the premises, and *Wilkins*, having become possessed of the whole thereof, his estate therein has been conveyed to and vested in the plaintiff, who has become, and now is, the owner of the reversion of the premises, subject to the said lease and agreement, and entitled to the benefit of the covenants contained therein. (4) That the premises were of an oblong shape, consisting of an improved farm about 400 rods long and 80 rods wide, with a concession line on the south end, and a side-line along the west side. (5) The most convenient place for a barn thereon is near the side line, about 125 rods from the south end of the farm. (6) The said defendant having neglected to comply with his covenant to build a barn, in the said indenture contained, your orator, being then such owner as aforesaid, about the month of March, 1867, saw the said defendant on the subject, and the said defendant then pointed out to your orator the place where he proposed to build the said barn, which was in the situation hereinbefore described, and where the said defendant had staked out the ground for the purpose; and the defendant then asked your orator's approval of the said site, and your orator did then approve thereof and agree thereto, and it was then eventually agreed between your orator and the said defendant that the said barn should be, and the defendant promised that it should be, forthwith thereon erected. (7) Thereafter your orator was obliged to prevent the said defendant from committing waste on the said premises by cutting timber therefrom, and in consequence of this the said defendant became annoyed with your orator, and determined not to build the said barn on the said site, but to build the said barn in an inconvenient and improper place, in order to wreak his vengeance on your orator by depreciating the value of the said premises, and he thus rendered the said barn comparatively useless. (8) Your orator remonstrated

Statement.

with the said defendant on such his determination, when the said defendant answered he would put the barn in the proper place (meaning the said agreed place) if any other person than your orator owned the farm, but as your orator owned the farm he would put the barn in the said inconvenient and improper place. (9) The place which the said defendant has chosen in order to accomplish his said improper object is at the extreme south limit of the said lot, in the place where the old barn was built where the first clearing was made on the said lot, which clearing was quite at the south end, and did not run back any distance, while the present clearing extends at one side to the extreme rear of the lot, and at the other side about 250 rods. (10) The place so chosen is also very low and wet, and otherwise unsuitable for farm buildings. (11) The result of building the barn there will be that all the produce of the farm must be hauled to the south end, and all the manure made on the farm must be hauled from the south end. Statement.

The statements of paragraphs 12, 13, 14, 15, and 16, are sufficiently set forth in the judgment.

(17) Your orator has applied to the said defendant to perform the agreement embodied in the said indenture, your orator being ready and willing to perform the same on his part, but the said defendant has refused and neglected to perform the same in the particulars aforesaid, and has refused and neglected to build a barn on the said premises, conformable to the said agreement, though he insists that thereunder he is entitled to have a lease of the said premises, and he is in equity the lessee thereof under the contract for a lease thereof, in the said indenture contained.

The amended bill, amongst other things, prayed that the agreement embodied in the said lease might be specifically performed and carried into execution, plain-

1868.

Campbell v. Simmons.

tiff submitting, and thereby offering to perform the same in all things on his part to be performed; and for an injunction to restrain the defendant from erecting or maintaining the barn in its then position.

The defendant answered the bill, and the cause having been put at issue, it came on for the examination of witnesses and hearing at the sittings of the Court at Cobourg.

Mr. *Blake*, Q.C., and Mr. *J. D. Armour*, for plaintiff.

Mr. *Strong*, Q.C., for defendant.

Judgment.

Spragge, V.C.—The questions in this suit arise out of an instrument, dated 3rd November, 1860, entered into between one *Elias D. S. Wilkins* and the defendant. It is headed "This Indenture," and after the date and parties proceeds thus, "the condition of this obligation is, &c."—[Here the Vice Chancellor read the terms of the instrument as above set forth.]

There is then, in the first place, a lease of the whole lot for two years at £80 a year; then a further lease or agreement to lease 100 acres of the lot for ten years at £50 a year, or the whole lot at £80. *Wilkins* being, as I infer, entitled to the whole for two years, and to an unascertained 100 acres afterwards, with a prospect of acquiring the residue. Then follows this provision, out of which the difficulty between the parties has grown. "The party of the second part further agrees with the party of the first part, to erect a barn at the expiration of two years 40 by 60 with sixteen feet posts, and to be put upon a good stone foundation, and to erect the same upon that portion of lot that may fall to the share of the party of the first part, free of all costs." *Wilkins* subsequently acquired the residue of the lot, and it was afterwards conveyed to, and became vested in, the plaintiff.

1868.

Campbell v. Simmons.

The barn was not built for a considerable time. It was commenced in the present year, 1868, and while it was in course of erection, on the 3rd of July last, the bill was filed. As originally framed it was an injunction bill. The gravamen of the charge was that the defendant was building the barn in an inconvenient place, and that he was placing it in such place from improper motives, instead of placing it, in a locality which was agreed by both of them to be the most convenient site. [Here the Vice Chancellor read paragraphs of bill 6, 7, 8, 9, 10, 11. He also complained of the stone foundation as too little below the ground and too little above it, and of insufficient thickness, and dangerously slight.

The injunction applied for was refused, but as I am informed, upon grounds which do not touch the merits of the case as it stands before me. The bill was then amended on the 12th October, when the plaintiff added another objection to the locality of the barn, viz., that a great part of it was not on the farm at all, but upon the public highway; and he complained also of the construction of the superstructure of the barn as insufficient in the number of bents, and in other particulars of construction; and dangerously slight. He also converted his bill into a bill for specific performance, but in very general terms. [Here the Vice Chancellor read paragraph 17 and prayer above set forth.]

Judgment.

The only thing specifically pointed at, as to be specifically performed is the building of the barn; the making of a lease is referred to, but only as insisted upon by the defendant, and possibly in the submission by the plaintiff to perform the agreement in all things on his part to be performed.

A good deal of evidence has been given as to the locality of the barn and as to its construction. It furnishes no ground for the imputation that it was built

1868.

Campbell v. Simmons.

where it is out of mere spite, or in order to injure or annoy the plaintiff. Taking the farm as it is, and cleared as it now is, there is a part of it a considerable distance from the front, a piece of elevated ground better adapted for the site of farm buildings, than the immediate front, where the present buildings stand. The present buildings besides the barn in question, consist of a dwelling house, stable, old barn, and cattle shed, the latter put up by the defendant. Prospectively, that is when a new dwelling-house and other farm offices are built on the elevated ground, whenever that may be, it will be very inconvenient for the barn to be where the defendant has placed it ; but in the meantime it would be very inconvenient for a farmer occupying the present house to have his barn so distant from his house and his other farm offices, as was pointed out by the defendant's witnesses.

Judgment.

The plaintiff's position is that he was entitled to designate the spot on which the barn should be built. Without acceding to, or denying, this position as a general rule, I think, looking at the terms of the contract, that he has not such right. The description and dimensions of the barn are provided for, and as to its locality there is also a provision, viz., that it should be built upon that portion of the lot which might fall to the share of the lessor. This defined its locality to a certain extent, and if it was not to be left at large to the tenant to place it where he might find it convenient, subject to this provision, one would expect that its locality would have been further defined, or that the selection of site would have been in terms accorded to the lessor.

It is a serious objection, if a portion of the new barn is built upon the road. According to a line run some thirty years ago the building is not at all upon the road. That line has for many years been accepted as the true

1868.

Campbell v. Simmons.

line, fences have been put up in accordance with it, though not always very straight, and statute labor for many years has been performed upon the road, the fences in *Wilkins's* time were placed upon the assumption that this was the true line. The farm passed from his possession to that of the defendant, upon that assumption, and the cattle shed put up by the defendant is still further south than the barn. According to a very recent survey the fence is too far south, encroaching considerably upon the road, and several feet of the southern end of the barn are also upon the road. The cattle shed, as I judge from its position, must be wholly upon the road.

This line from the way in which it has been run is probably the true line. I say probably only, for surveyors often differ widely as to what is the true line. But this true line, assuming it to be so, is a matter of very recent discovery. When the bill was filed it was unknown to the plaintiff as well as to the defendant. I am justified in assuming this, for the stone foundation of the barn was then built or in course of being built, and while the locality was objected to as inconvenient, the more weighty objection that it was in part on the highway, was not alluded to.

Judgment.

A good deal of evidence has also been given in relation to the faulty construction of the barn itself, of the foundation, and also of the superstructure. With regard to the foundation, the plaintiff's case fails, the weight of evidence is in favor of its being well and sufficiently built; that the place in which it is built is low and wet, is also disproved. As to the superstructure the evidence is conflicting: the result may be stated to be, that though the timbers are not so heavy as have been used in most of the barns in the neighborhood, and it would have been better if an additional bent had been used, still it is of sufficient strength. There is however a fault in the construction of the roof, and the consequence

1868.

Campbell v. Simmons.

is that it sinks, or, as it is described, "sags" somewhat in the centre. It is still a barn answering substantially the contract, not a mere colorable fulfilment of the contract, but a substantial fulfilment, though with a fault, perhaps more than one fault in the construction.

The grounds upon which the plaintiff came into Court originally, are displaced. The question is whether he is entitled to any decree upon his amended bill. As a general rule the Court may, when the plaintiff's case is one in which the Court has jurisdiction to decree specific performance, give to the plaintiff, under the Act, damages in addition to, or in lieu of specific performance. *Soames* v. *Edge* (*a*) and *Middleton* v. *Greenwood* (*b*), are instances of this. On the other hand, it is clear that where the Court has not jurisdiction to decree specific performance, it cannot grant damages under the Statute. *Middleton* v. *Magnay* (*c*), *Rogers* v. *Challis* (*d*). In *Wicks* v. *Hunt* (*e*) Sir *W. Page Wood* is made to say that it did not appear to him that the statute "extends the jurisdiction of the Court to cases where there is a plain Common Law remedy, and where before the Statute the Court would not have interfered." In the case in which the learned Judge made this observation, the subject matter was of a nature in which a Court of Equity has jurisdiction, but it was a case in which, in his judgment it was not proper to exercise it.

Judgment.

In the first place then, the Court must have jurisdiction, and having jurisdiction it is a matter for its discretion, whether to grant specific performance and damages in addition; or by way of substitution, or in its judgment to refuse relief in any of these shapes, or in any shape.

In this case the ground of injunction fails. If specific

(*a*) 1 Johnson 669. (*b*) 2 DeG. J. & S. 142.
(*c*) 2 H. & M. 236. (*d*) 27 Beav. 175. (*e*) 1 Johnson, 372.

performance be decreed it must be either of the contract to build a barn, or for the taking by the defendant of a lease: or, as put by the learned Counsel for the plaintiff, the building of a barn by the defendant and the making of a lease by the plaintiff were intended to be contemporaneous acts, and as the defendant was entitled to a lease upon building a barn, so the plaintiff was upon the principle of mutuality entitled to compel the building of the barn. I incline to think that the principle of mutuality does not apply in such a case as this, but assuming that it does apply, the question remains whether this is a proper case for specific performance. The only ground could be, the barn having been built partly on the highway. I have already made some observations upon the long user and general and public acceptance of a line according to which the whole of the barn would be within the plaintiff's land, and upon the land passing from *Wilkins* to the defendant, with that line as the southern boundary of the land demised. I think that *Wilkins* held that line out to the defendant as his southern boundary—in effect alleged that it was so; and this plaintiff, until after the barn was built, evidently believed that it was so. It would, in my opinion, be out of the question for the Court, to entertain a bill under the guise of specific performance, for the removal of the barn, involving if not the pulling down of the barn itself, still a removal of a considerable part of the stone foundation, and the whole of the superstructure, and this bill was indeed for no such purpose, but is only now sought to be sustained upon that ground. In this case there is a plain common law remedy. Independently of the Statute the Court I apprehend clearly would not have interfered. I think it was no case for a bill for specific performance, and that the Court ought not to retain the bill for the purpose of ascertaining damages, or for any purpose.

Judgment.

The bill is not framed for specific performance of any

1868.

Campbell v. Simmons.

part of the instrument of 1860 other than the building of a barn. It is certainly not framed to compel the defendant to take a lease, and I doubt from the form and terms of the instrument whether any future lease was contemplated—whether that instrument was not intended to operate as a lease for the whole ten years. If so, the argument from mutuality of remedy would fail at any rate.

The plaintiff's bill will be dismissed with costs.

Heward v. Heward.—[In Appeal.]*

A person having a power of attorney to sell certain land, entered into possession after the death of the owner, with an intention to acquire the title, and died in possession, but before his possession had ripened into a title as against the representatives of the true owner:

Held that he had such an interest as passed under a general devise in his will.

Held also, that the devisees were entitled to claim the property in equity, as against the testator's heirs, who had gone into possession; but that a suit for the purpose could be successfully resisted by shewing sufficient length of possession by the heirs after the testator's death to give a title as against the plaintiffs.

This cause was heard in the Court below before Vice Chancellor *Spragge*.

The facts are fully stated in the judgment.

Mr. *Blake*, Q.C., for the plaintiffs.

Mr. *Strong*, Q.C., and Mr. *Cattanach*, for the defendant.

---

*Present—Draper, C. J. Q. B., VanKoughnet, C., Richards, C. J. C. P., Spragge, V. C., Morrison, J., A. Wilson, J., and Mowat, V. C.

1868.

Heward v. Heward.

SPRAGGE, V. C.—The first point raised for the defence lies at the very root of the plaintiff's title. It is, shortly, whether the land in question passed by the testator's will.

The devise, which is to trustees, is of "all my real and personal estate, of what nature soever, and wheresoever situate."

The words, therefore, are comprehensive enough. But, it is argued that the law will not infer that the testator intended this land to pass, but other lands only, to which he had title; and the nature of the trusts of the will, and the absence of title to this land are relied upon. The trusts apply to both the real and personal estate, and they are in the first place "by disposing of the same or such part thereof as may be necessary as soon as possible after my decease, pay all my just debts, and that after my debts are paid they hold the residue, if any there be, of my real and personal estate in trust for the sole use and benefit of my dear wife *Mary Heward*, during her natural life, and to assist in the maintenance and education of my children; and in further trust to sell or dispose of the same or any part thereof if thought advisable, and to apply the proceeds to the same purposes;" and lastly, that after the decease of his wife, the whole of his property, real and personal, should be divided equally by the trustees or the survivor, among his children, each child receiving his share on becoming of age. This will is dated 21st August, 1828. The testator died in the same year.

Judgment.

The title to the land in question was in one *Bracken* and the connexion of the testator with it arose in this way: In 1806 *Bracken* gave to the testator a power of attorney to sell the land, and to convey it to the purchaser. It does not appear that anything was done under this power of attorney, I mean anything in the

1868.

Heward v. Heward.

way of carrying it out, but at some period between its date and the death of the testator, he entered upon the land. The parties agree that this was a number of years after 1806, and several years before the death of the testator—the date is not fixed more clearly. He cut down trees and made a clearing, and put up a small dwelling house upon the land. It is said that being agent to sell, it was his duty to protect the land in the meantime. Assuming that he had *authority* at any rate to protect the land, we must see whether his acts were of the character of protection, or whether they were not rather acts of ownership. Taken by themselves, they were unquestionably acts of ownership. Did the fact of agency in the person who did them alter their character? If they had been of an equivocal character, and of a nature that could be referrible to the agency, even perhaps to a mistaken view by the agent of the extent of his authority, I incline to think they should be regarded as done in that capacity; for I agree that a wrongful intent should not be attributed to an agent where there is room to attribute a right one. But these acts were unmistakable acts of ownership. The mere taking possession, it is conceded, was not within the scope of Mr. *Heward's* authority; that is, the acts following it were wrongful and of a character adverse to the owner. These acts probably furnish sufficiently their own explanation; but the letter of Mr. *Francis Heward* himself, addressed to his brother *Peter*, of 3rd February, 1842, gives a key to them, and to the animus with which they were done. He refers in it to the power of attorney, (which he sends for the perusal of the late Mr. *Baldwin*) and says, "I hope it will sift the matter to the bottom, and if possible, get the matter so arranged as to admit of my taking out a deed for it in my own name, on my guaranteeing to pay over to the 'heirs,' should there be any, the amount originally paid for the property by *Bracken*." Then follows this material passage, "which mother will tell you was father's

Judgment.

original intention previous to his building or clearing any part of the premises."

This then was Mr. *Heward's* position and his intention as declared by the defendant *Francis: Bracken* was assumed to be dead, and his heirs, if he had any, were unknown. He could not sell the land as agent for *Bracken*, as his authority had been revoked by *Bracken's* death; and he therefore resolved to change his position. Instead of selling the land for the owner, or returning it to the owner or his heirs, or rather abstaining from meddling with it, he resolved to take it and to keep it himself. The reasonable and proper inference from the letter is, that Mr. *Heward* did not know where *Bracken's* heirs might be, and thought it probable that they might never turn up: that if they did he would pay them what *Bracken* had paid for it, if not he would keep the land without payment; that in any case he would keep the land. He must, I think, have contemplated such a possession as would ripen into a right, for what he proposed to himself, to pay to the heirs of *Bracken*, was manifestly not what they would have a right to, if they had any right at all, nor even an equivalent in money for that to which they would be entitled in specie, if their right were not extinguished.

Judgment.

All this is material upon the question whether the land passed by Mr. *Heward's* will, for it is simply a question of intention, and that intention is to be gathered largely from the testator's view of his own position in regard to this land. When he made his will his possession had been for several years ripening into a title, or into a possessory right, and he devises all his real and personal estate of what nature soever.

The rule upon which Mr. *Strong* bases his proposition that the land in question does not pass by the will is quite intelligible. As I understand it, it is that where a man has land, to which he is not beneficially entitled,

1868.

Heward v. Heward.

and makes a general devise for purposes applicable only to land to which he is beneficially entitled, the latter only shall pass; for, as put by Mr. *Jarman* (*a*), it cannot be supposed that the testator intended to subject property not beneficially his own to the payment of his debts, or to legacies or annuities, or to any other species of charge, and he adds: "the rule under consideration does not of course deny the power of a testator to limit estates vested in him as mortgagee or trustee, in a manner inconsistent with a due regard to the testator's duty as mortgagee, creditor or trustee; it merely refuses to see an intention to do so in a general devise" (*b*). The presumption no doubt would be, in the case of a general devise for payment of debts or for the benefit of devisees, that the intention of the testator was as to lands of which the testator was mortgagee, that upon payment of the mortgage money his heirs should re-convey; as to lands of which he was trustee that his heir or other person upon whom the trust might devolve should execute it. But there is no room for such presumption here, the testator was acquiring, or time was acquiring for him, an absolute beneficial estate in the land, he had possession ripening into title, he did not mean the land to go elsewhere, under any circumstances, he only meant in one contingency that money should be paid in respect of it, and that as a matter of conscience. I apprehend it can make no difference that the testator is conscious that he had not title in himself, the rule does not turn upon that; but upon its being his intention, as it is his duty, to do nothing in contravention of the title of another for whom he in some shape holds the land. Here the testator had already manifested his intention to contravene the title of another; an intention he had persisted in for years before he made his will; and at the time of his making it there is no ground of imputing to him a different intention.

Judgment.

(*a*) 3 ed. 662.

(*b*) p. 663.

1869.

Heward v. Heward.

Again the rule invoked proceeds upon this, that the testator intended to except certain lands from the general devise, in order that his heir (or co-trustee or some other person) should, in regard to those lands, deal with the rights of some third person whose rights the testator meant to respect. Surely any such intention in this instance is negatived by the whole conduct of the testator in regard to the land in question.

I do not understand it to be denied that the testator had an interest in these lands that would pass by devise. In Doe *Pritchard* v. *Jauncey* (*a*), a father was in possession without a title, and after seventeen years' possession, died; and Mr. Justice *Coleridge* held that upon the death of the father at any time after taking possession, the land would descend to his heir, provided the real owner did not interfere.

Judgment.

If it would descend to the heir it would pass by devise. This is, of course, quite a separate question from the one I have already discussed, which is a question of construction, looking at the will and the surrounding circumstances. My opinion is that the testator had a devisable interest in the land in question: and that it did pass by his will; consequently that the plaintiffs have a *locus standi* in Court, and it lies upon the defendant *Francis Heward* to oust their title. He sets up first the statute of limitations.

I will first notice the position taken by Mr. *Blake* for the plaintiffs, that the possession of the heir-at-law of Mr. *Heward* the testator, was a continuation of the possession of the testator himself; and so on, that the possession of his next eldest son, and then of *Francis Heward* himself as his heir, is a continuation of the same possession and cannot be set up against those claiming under Mr. *Heward's* will. *Charles* was the eldest son

(*a*) 8 C. & P. 99.

1869.

Heward v. Heward.

of the testator, it is not clear whether he went into possession or not; he died in or about 1834 unmarried. *Henry* was the next eldest brother and appears to have gone into possession; he died in 1841, also unmarried, and *Francis*, as the next eldest brother, assumed to deal with the property as his own shortly afterwards, at any rate in the following year, as appears by his letter to *Peter*, to which I have already referred. The will appears to have been ignored by all parties until a comparatively recent period. They appear indeed to have been ignorant of its existence, for upon no other hypothesis is the letter of *Francis* to *Peter*, of February, 1842, to be understood.

Judgment.

Charles, it must be assumed, if he entered into possession at all, did so as the heir of his father; *Henry* must be taken to have gone into possession as heir of *Charles*, heir of his father, and *Francis* as heir of *Henry*. But I do not see anything in this to debar them from setting up their possession as adverse to the devisees. Several cases were cited to shew that where a person having taken possession, had a right to such possession under a devise; their possession shall be referred to such rightful possession, and they shall not be permitted to set up that they had such possession adversely, or in any other way than under the devise. This point has been decided in *Hawksbee* v. *Hawksbee* (*a*), *Yem* v. *Edwards* (*b*), and *Asher* v. *Whitlock* (*c*). In all these cases the devisor had no title. The distinction between those cases and the one now before me is this; that in those cases there was a right of possession under the devise of those having possession; but there was no right of possession in *Charles*, or *Henry*, or *Francis* under the devise, and there is no pretence that they were in possession under the will. Take for instance *Francis*, his letter to *Peter* is as distinct an assumption of exclusive

(*a*) 11 Hare, 230. (*b*) 30 L. T. 87, S. C. on Appeal, 110.
(*c*) 1 L. R. Q. B. 1.

individual right as can possibly be. I have already quoted a portion of it in which he speaks of taking out a deed in his own name. It contains these further passages: "I want now to secure the property in such a way as to place it beyond dispute in any shape or way whatever: at all events when I get *Baldwin's* advice I will then know how to act about selling, &c. P. S. Could you rent the *Scarboro'* farm? Tell *Wilson* he must move off before 1st April. If he won't quietly, he must take the consequences." 1869. Heward v. Heward.

The letter is the more significant from this, that he was writing to one, who, under the will, was entitled to precisely the same interest as himself, and who, if the will were known, would know that the writer was assuming to deal with the land in contravention of his own rights, and of the rights of his mother and the younger children. His letter seems to prove two things—one, that the possession of *Francis* was absolute and exclusive; the other, that the existence of the will was, at the time, unknown to both *Francis* and *Peter*. The other children were comparatively young. *Peter* died not very long afterwards. Judgment.

There seems to have been an acquiescence down to that period, and, indeed for several years afterwards, in the title of *Francis* by heirship; and I think I am justified in inferring from that acquiescence, and from the terms and tone of the letter from *Francis* to *Peter*, that the will was then unknown, for I cannot suppose that those entitled under the will, acquiesced under the notion that the land in question did not pass under the will, upon the grounds upon which a learned counsel now argues that they did not pass. My conclusion then is, that the possession of *Henry*, probably of *Charles*, and certainly of *Francis*, was an absolute exclusive possession, and that there is nothing to prevent his now setting it up as against the devisees

1869.

Heward v. Heward.

under the will. His possession since has been of the same character. His sale of the wood to Mr. *Munro*, and his sale of a portion of the land to the Grand Trunk Railway Company, are among the most prominent of his acts, shewing the character of his possession.

I think, upon the evidence, that the defendant *Francis* has established a possession, commencing more than twenty years before the commencement of this suit, which would, *prima facie*, oust the title of the plaintiffs; and I do not understand the fact of such possession to be denied.

The plaintiffs on their part give some evidence of the interruption of such possession, and, in fact, of possession and acts of ownership on the part of those entitled under the will.

Judgment.

[The learned Vice Chancellor then proceeded to discuss the evidence on this point, but as the discussion involved no matter of law, and the Court of Appeal afterwards came to a different conclusion upon the evidence, this part of the judgment is not reported].

The decree was for the plaintiffs with costs.

From this decree the defendant appealed on the grounds that this being the question of a disputed title the Court of Chancery had no jurisdiction in the premises, and the proper proceeding is by action at law; that before the filing of the bill in this cause the defendant had acquired a good legal title as against the plaintiffs to the parcel of land in question; that the plaintiffs failed to shew that the defendant held the land on any trust for the plaintiffs; that the general devise of lands contained in the will of the testator in the pleadings mentioned, does not comprise the lands in question, inasmuch as the testator held the land upon a trust; that

1869.

Heward v. Heward.

there was no evidence in writing signed by the defendant or by any one authorized by him to establish or prove the alleged trust in favor of the plaintiffs; that the statute of limitations defeated any alleged equitable title of the plaintiffs; that the provisions of the statute commonly known as "The Dormant Equities Act" apply to this case, and effectually bars any alleged equities of the plaintiffs; that the plaintiffs waived and abandoned their alleged equities in the said land, and acquiesced in the defendant's dealings with the same as the sole and absolute owner thereof, and that the accounts and inquiries in the said decree by which the defendant is to be charged with rents and profits and alleged waste are erroneously directed having regard to the circumstances of the case.

Mr. *Strong*, Q. C., and Mr. *Crooks*, Q. C., for the appellant.

Judgment.

Mr. *Blake*, Q.C., and Mr. *Wells*, for the respondents.

The judgment of the Court was delivered by

DRAPER, C. J.—In 1806 one *James Bracken* was seized in fee of lot No. 33, front A. and the south part of No. 33 of front B, in the township of Scarborough and being about to go to England executed a power of attorney to *Stephen Heward* to sign, seal and deliver a deed of bargain and sale to any purchaser. It would seem that he soon afterwards left the Province, at all events the evidence gives no further account of him. This power of attorney was in the hands of the defendant *Francis Harris Heward* in February 1842, for at that date he wrote respecting it, "I hope it will sift the matter to the bottom, and if possible get the matter so arranged as to admit of my taking out a deed for it in my own name, on my guaranteeing to pay over to the 'heirs,' should there be any, the amount originally paid

1869.

Heward v. Heward.

for the property by *Bracken*, which mother will tell you was father's original intention previous to his building or clearing any part of the premises."

The defendant therefore in 1842 recognizes as a fact that his father built and cleared upon this property of *Bracken*, intending to pay his (*Bracken's*) heirs, if they should make their appearance, the amount *Bracken* had paid when he purchased the land in question.

The plaintiffs, by their bill, filed 16th February, 1866, claim that the land passed under the will of *Stephen Heward* who died about 1827 or 1828—while the defendant denies that his father was ever seized or entitled to the land or to any interest therein and he asserts a title acquired by adverse possession "for a period of about twenty-five years" against all the world. His letter of the 3rd February, 1842, shews his knowledge that he then had no valid title and that one *Timothy Wilson* then in possession, held without his consent. *Wilson* continued in possession up to 9th November, 1842. Then *George Macdonell* had possession under an agreement under seal dated 3rd May, 1847, to take charge of the premises "for *F. H. Heward*, Esq., of Montreal." Next *William Stroud* agreed by instrument under seal dated 15th June, 1848, to rent and take charge of the premises binding himself to prevent persons from chopping or making away with wood thereon without an order from Mr. *J. O. Heward*, who is one of the plaintiffs. No reference is made in this instrument to the defendant. After that *John McGee* was in possession under a sealed agreement "for Mr. *J. O. Heward*." It is suggested that the name was originally written *F. H. Heward*. This writing is dated 30 January, 1844; but it is admitted it should have been 1849. And lastly, on 4th April, 1849 *John Collins* by deed agrees to rent and take care of the premises, not saying for what term, and he binds himself to prevent taking or cutting wood without an order from *J. O. Heward*.

[Judgment.

1869.

Heward v. Heward.

Stephen Heward the elder died in August 1828, having made a will dated the 21st of that month; by which he devised all his real and personal estate of what nature soever and wheresoever situate to three trustees, none of whom ever acted—and who have all died—the last surviving having died since this bill was filed. Several years before his death (in argument it was said about thirteen) he (*Stephen H.*) went into possession of this land by clearing a small quantity thereof and building a house, which house however he was not shewn to have occupied either in person or by any servant or agent, but (as is said by the defendant) intending to pay the heirs of *Bracken* the amount he had originally paid for the lot. As already stated nothing is shewn as to *Bracken* after the date of the power of attorney. It would seem that *Stephen Heward* took possession as above set forth about 1815. The death of *Bracken* at that time would have been a legal presumption—and therefore it could not be presumed *Stephen Heward* was acting as his attorney in these proceedings.

Judgment.

Stephen Heward left a widow him surviving—also his sons *Charles*, *Henry*, *Francis*, *William*, *Peter*, *John*, and *Stephen*, and a daughter *Mary Ann*. *Charles*, *Henry*, and *Peter* died before 1st January, 1852, unmarried and intestate. The defendant *Francis H. Heward* is their heir at law. *Mary Ann* died after January, 1852, unmarried and intestate, her five surviving brothers were her co-heirs. The will, after payment of the testator's debts, gave his estate, real and personal, in trust for his wife for life and after her death to be equally divided among his children.

The question, whether upon the facts appearing—the possession of *Stephen Heward* could be deemed adverse, as the law stood up to the passing of our statute of 1834, was very ably argued by Mr. *Strong* and I thought at first it was material to the decision of the case and

1869.

Heward v. Heward.

therefore examined a number of authorities which bore upon it. But on reflection I am convinced that however indispensable the solution of that question would be in a suit in which *Bracken* or his heirs were claiming this property, it has no bearing upon the rights of the present litigants; and the cases referred to by the learned Vice Chancellor in his judgment establish the correctness of his conclusions that this land would pass by the will of *Stephen Heward*. In *Hawksbee* v. *Hawksbee* (*a*) *A. B.* after occupying a house for several years as tenant from year to year, found no one to receive the rent for fifteen years before his death, and devised the house (with a power of sale under certain conditions) for the benefit of his wife and children. His eldest son occupied the house paying rent to the widow for fifteen years after *A.* B's death, when the widow died. Vice Chancellor *Wood* held that notwithstanding the infirmity of the testator's title his son could not insist on retaining possession of the house adversely to the devisees beneficially interested under the will.

Judgment.

In *Yem* v. *Edwards* (*b*)— *Y.* was in possession of certain encroachments on Crown Lands and died in 1824 having devised them to his wife for life remainder to such of his sons as should survive her. After *Y.'s* death an act was passed by which commissioners were empowered to grant leases of such encroachments for three lives at low rents to the then holders, and persons entitled to such leases were also declared to be entitled within a fixed time to purchase the fee simple at twenty years purchase on the amount of the rent reserved. The widow under this purchased, paying her own moneys for the price. The same learned judge held that although *Y.* had no good title and could not strictly speaking have made any settlement of those encroachments yet his widow must be taken to have acquired the fee for the benefit of all

(*a*) 11 Hare, 231. (*b*) 3 Jur. N. S. 462; 3 K. & J. 564.

parties claiming under the same title as that under which she held at the time of passing the act and those in remainder under *Y.'s* will were declared entitled as against persons to whom the widow had devised the lands on their paying to the widow's representatives (without interest) the money she had paid to obtain a conveyance of the fee.

The particular circumstances of these two cases cause them to bear a strong analogy to the case in judgment and the principle is affirmed in more general terms in *Asher* v. *Whitlock* (*a*) where *Cockburn*, C. J., after referring to and approving of the case of *Doe* v. *Dyball* (*b*) says "There can be no doubt that a man has a right to devise that estate which the law gives him against all the world, but the true owner."

I conclude therefore that *Stephen Heward* had a devisable estate or interest in these lands.

Judgment.

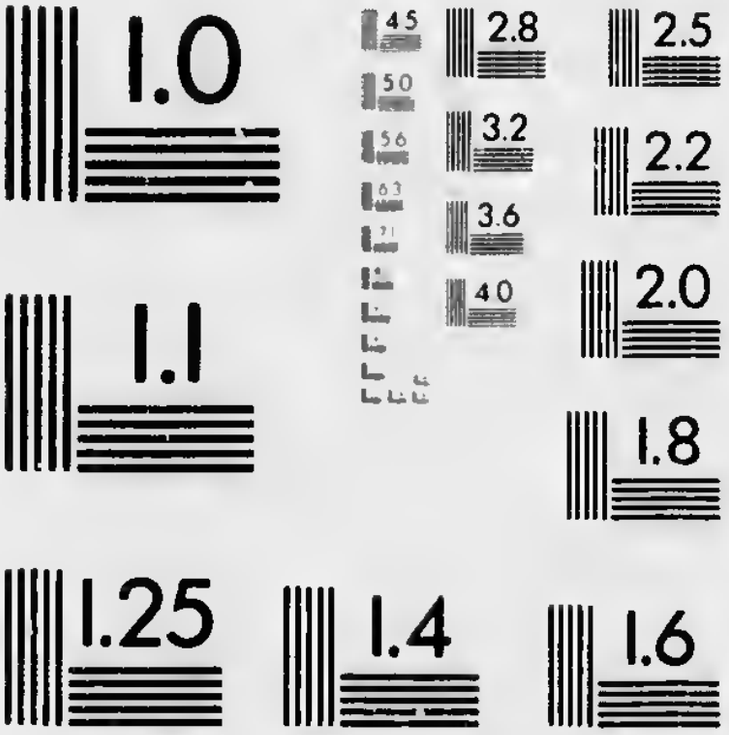
The authorities collected in *Jarman* on Wills, ch. 21, establish that trust estates will pass under a general devise unless it can be collected from expressions in the will or from the purposes or objects of the testator that he did not mean they should pass. It is not questioned that the words used are sufficient to pass estates in which the testator was beneficially interested; if so, the land in question passed even if he was a trustee of it.

But I do find authority to warrant the assertion that if a man holds a power of attorney giving him only authority to sell and convey a lot of land he thereby becomes a trustee of such land. For the power such as I have described passes no estate to him—and in entering and taking possession for his own use, *Stephen Heward* was as much a trespasser as if he held no such power.

(*a*) L. R. 1. Q. B. 1. (*b*) Mood & M. 346.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 0300 - Phone
(716) 288 5989 - Fax

1869.

Heward v. Heward.

This taking possession was an act altogether beyond the power—wholly unauthorized by it and was obviously taken as a step towards acquiring title; and whatever it might be as to *Bracken* and his heirs, as to all the rest of the world it was an assertion of right in himself. He was not a trustee in fact—and his entry immediately gave those to whom that act was a wrong, a legal right to treat him as a trespasser. And if by wrong he ultimately should have acquired the legal estate so as to deprive *Bracken* of any legal remedy, I do not see that *Bracken* would thereby have obtained a right to proceed in equity. To assert this would be to assert that a disseizor by the act of disseisin becomes a trustee of the land for the disseizee.

In my opinion this land passed by the will subject to no other trusts than those which are expressed therein; trusts for the benefit of the widow for life and for all the testator's children afterwards.

Judgment.

Before proceeding to consider how the principal contention of the defendant *Francis H. Heward* should be dealt with, I must remark that a very inconvenient system and practice appears to have become prevalent in respect to the making up of appeal books. In this case I have lost much time and have been put to useless trouble by finding printed, as part of the evidence, pages of matter which I at last found out ought not to be inserted and could not affect the decision, and this is far from being the only ill consequence attending the practice. We cannot expect those practitioners who bring before the Court a mixed heap of chaff and grain under the name of evidence, will be particularly industrious in sifting them apart in order to save suitors the unnecessary costs—and the court will probably be obliged to impose this duty on its officers, by ordering that they tax no costs of the printed books to parties whose negligence swells their contents so unreasonably.

1869.

Heward v. Heward.

The remaining point in this case for consideration is, whether the evidence as to possession by the defendant *Francis H. Heward* and those under whom he claims is sufficient to establish a continuous or unbroken possession for twenty years—since the death of his father *Stephen Heward*.

If the plaintiffs desire a further inquiry as to this point—the evidence being as it now stands confused and indefinite—and will offer any further evidence thereupon—we remit the case to the Court below, that such inquiry may be had and the cause be disposed of there. If the appellant succeeds the bill is to be dismissed with the costs of the Court below. If he fails he is to pay the costs of this appeal as well as of those of the Court below.

If the plaintiffs decline to act on this permission, then we are of opinion their bill should be dismissed with costs. Judgment.

We adopt this course, because in this suit the title to the land as between these parties will be finally disposed of—in that particular, the decree differs wholly from a judgment in ejectment which would have been the proper mode of trial if the title had been legal instead of equitable.

The plaintiffs must signify their election on or before Thursday, 11th March next.

1869.

SUMMERS v. ABELL.

Patent—Simplicity of invention—Prior use.

The invention of an inclined plane in a certain form and position, as a means or appliance for directing a tool cutter, so as to produce spiral or curved grooves in a roller, was *held* a proper subject for a patent; the simplicity of a new contrivance being no objection to a party's right to a patent for it.

A machinist invented a machine in which an inclined plane was applied for a novel purpose: he contemplated further improving his invention, but meanwhile made use of it in his wook-shop. Five years or more afterwards he adopted or invented a contrivance which was not new, but which, in connection with the inclined plane, increased greatly the value of the machine; and he then took out a patent for the improved machine.

Held, that notwithstanding his prior use of the original machine, the patent was valid, and that the patentee was entitled to the exclusive use of the inclined plane. [MOWAT, V. C., dissenting.]

Statement. The plaintiff on the 14th of March, 1867, took out a patent for an improvement in the method of making the fluted iron rollers used in the construction of grain-crushing or chopping mills.

His machine was thus described in the patent: "An index (letter F, fig. 3) is furnished with a set screw to the end of the shaft of the roller to be cut, the plain roller is supported on two standards (letter G, fig. 3), which are bolted to an iron planer table (letter H, fig. 3). The index has spaces on its edge corresponding in number with the number of the grooves to be cut in the roller. There is an inclined plane (letter I, fig. 3), on the side of the planer bed plate (letter I, fig. 4) for the index to traverse in, being screwed on the inclined plane. The edge of this plate is slightly curved from ends to the centre. The inclined plane is set more or less steep according to the twist to be given to the grooves in the roller. A reversed inclined plane (letter K, fig. 3) hinged at the upper end, and loose at the point, is so placed that the loose end rests on the botton of the inclined

plane. The cutting tooth is placed in the usual tool box of the planer, or fixed in any other convenient manner. When the planer is at work, and the index has been carried forward to the bottom of the inclined plane, the tooth, having made or deepened a groove in the roller to the end, the index is then carried up the short reversed plane. As the planer returns, the index raises the reversed plane one space without stopping, the planer carrying the roller round at the same moment to the extent of that space. The index now entered on the inclined plane in the space next to that in which it passed down, the tooth passing up the groove, and on returning it cuts the groove. The index is self-acting, changing the cut every time until the roller is finished."

1869.

Summers v. Abell

The bill charged the defendant with having surreptitiously obtained a knowledge of the plaintiff's machine, and it alleged that he was manufacturing machines the same in form and principle in violation of the plaintiff's right as first inventor and patentee thereof. The prayer was for an injunction, an account and other relief.

Statement.

The answer denied that the plaintiff was the first inventor; alleged that the machines with the contrivances which he claimed the exclusive privilege of using, had been in use for the same and like purposes long before the plaintiff applied for his patent; denied also that his machine was the same in form and principle with the plaintiff's.

The cause came on for the examination of witnesses and hearing before the Chancellor, in Toronto.

Mr. *Read*, Q. C., and Mr. *J. A. Boyd*, for the plaintiff.

Mr. *McLennan*, for the defendant.

1869.

Summers v. Abell.

VanKoughnet, C.—Upon the evidence I find that the invention of the inclined plane, or perhaps the form and position of the inclined plane employed by the plaintiff as a means or appliance for directing the tool cutter, or the roller upon the tool cutter, so as to produce spiral or curved grooves in the roller, was, and is a novelty, first introduced and discovered by plaintiff, and that this invention is of great utility in reducing the labor and cost formerly incurred in preparing such grooves. Its simplicity is no objection, but is its greater recommendation. Many of the most valuable contrivances when produced are remarkably simple in character, and, therefore, of the greater benefit and advantage. One may be astonished that every one did not before adopt so simple a plan; but the merit of it belongs to him who first suggested and brought it into use. This inclined plane is, I think, the novelty in the plaintiff's cutting machine. That the plaintiff has combined with it for the purpose of working the machine, other things, not new, cannot detract from the value of this invention, else no machine could be patented, as boards, nails, screws, bolts, &c., necessary to its construction are not new in character. The cutting of straight grooves in solid or hollow rollers or cylinders by machinery appears not to have been new; and, so, the cutting of spiral grooves by hand, or chipping was well known; and perhaps other means have been used; but it does not appear to have occurred to any one but the plaintiff to produce spiral grooves by giving the plane, on the edge of which the turning or index wheel works, an incline, the necessary effect of which is to give the grooves more or less curvature according to the dip or steep of the incline. Very simple, true! when it is pointed out to you; and yet, introduced into practice, how valuable!

Judgment.

I had some doubt whether plaintiff might not have forfeited his right to a patent by previous public use

or exhibition of this method of cutting the grooves; but I think the true result of the evidence is that during the prior years he was only experimenting to perfect the machinery. He does not appear to have sold any rollers or cylinders so made; and he seems to have lingered over the perfecting of the machine in endeavouring to discover some simple contrivance by which to reverse the index or working wheel while in motion. Various appliances, it is said, may be used for this purpose; and, had the plaintiff consulted some more practical man than himself, he might, probably, long before his own machine was completed, have discovered a means sufficient for this purpose. But, supposing that he had thus obtained this requisite means, still would remain that which was the novelty and is the chief value of his machine—this simple inclined plane—the introduction of which in itself is of such value and importance as to entitle the machine with the combination of its other parts to be called a new invention, or else to warrant its being treated as such an improvement upon former machinery, as to deserve a patent.

Judgment.

The defendant does not in his answer set up prior use or publication by the plaintiff; but he asserts that there is no novelty in plaintiff's invention, and that it had long been in general use. This is not established by the evidence; no one but the plaintiff appears ever to have used it, prior at all events to the 1st February, 1868, before which time the plaintiff had employed an agent to prepare the materials necessary to sustain an application for a patent. It is strange that the defendant should then first have adopted and put in use plaintiff's plan. He does not appear to have perfected it before; and the evidence leads me to the conclusion that he borrowed it from plaintiff. One sight of plaintiff's machine—one glance at it—would have at once shewn to a practical machinist the value and use of this inclined plane; and defendant and his workmen had access to the plaintiff's workshop, and at least some

1869.

Summers v. Abell.

of them had examined his machine. I agree with Mr. *Read* that there is a difference between our Statute and the Statute of James I (*a*). Section 6 of that Statute permits of patents to the true inventor which others "*at the time of the making* of such letters patent shall not use." The 3rd section of our Statute gives the inventor the right to a patent for any new and useful art, &c., or any new and useful improvement on any art, &c., "the same not being known or used in this province by others before his discovery or invention thereof, and not being at the time of the application for a patent in public use or on sale in this province with his consent or allowance as the inventor or discoverer thereof." Now, this machine was not in public use or on sale with the plaintiff's consent at the time of his application for a patent. The defendant, while the plaintiff was preparing his application, set up a similar machine and had it in use; but he had not the consent of the plaintiff therefor. The plaintiff, I suppose, might make the public a present of his invention, and thus deprive himself of the right to a patent afterwards, notwithstanding the words of the Statute as quoted; but I do not find, upon the evidence, that he ever did this; and, thinking him within the protection of the Statute, I decree a perpetual injunction, and an account and payment with costs.

Judgment.

The defendant reheard the cause.

On the rehearing Mr. *Read*, Q. C., and Mr. *J. A. Boyd*, appeared for the plaintiff.

Mr. *Blake*, Q.C., and Mr. *McLennan*, for the defendant.

After taking time to look into the authorities,

VanKoughnet, C., retained the opinion expressed by him on the original hearing.

(*a*) 23 James I, ch 3.

1869.

Summers v. Abell.

SPRAGGE, V. C.—We are all agreed, I believe, as to the novelty of the invention on the part of the plaintiff; and as to its usefulness. The only point of difference is as to whether there has been any "publication" of the invention before application for patent.

The words of our Patent Act are "the same not being known or used in the Province by others before his invention or discovery thereof, and not being at the time of the application for a patent, in public use or on sale in this Province with his consent or otherwise as the inventor or discoverer thereof." There are here two conditions to the validity of a patent, and the two refer to different periods of time. The first is that there must have been no knowledge or user by others before the discovery or invention of the patentee; the other is that at the time of the application for a patent the invention must not have been in public use or for sale with the consent of the inventor. It is upon this latter condition alone that we have any question.

Judgment.

Our statute is more explicit and more favourable to the inventor than the Patent Acts of England or the United States. In the statute of *James* the words are "to the first and true inventor or inventors of such manufactures, which others at the time of the making of such letters patent and grants did not use." In the United States the provision is, that the invention be "not known or used before the application." Contrasting the language of those acts with that of ours, which only avoids the patent in case of a *public* use of the thing invented or its being "on sale" with the *consent or allowance* of the inventor, it will be seen that the English and American cases in favor of the inventor upon a point of publication, are *a fortiori* in favor of the inventor in Canada.

In a case referred to in *Holroyd* (a) *Bramah* v.

(a) Page 82.

1869.

Summers v. Abell.

Hardcastle it was conceded that the making some two or three articles according to an invention, afterwards patented, such articles not being made by others, and there being no other publication did not vitiate the patent.

In the leading case of *Cornish* v. *Keene* which is reported very fully in Mr. *Webster's* treatise on patents for inventions, there will be found several observations upon this point scattered through the learned and elaborate charge of Sir *Nicholas Tindal*, and he thus sums up in conclusion "I would only observe that it must not be such a practice of it as is only referrible to mere experiments for the purpose of making a discovery, or something secret or confined to the party who was making it at the time; but that it must be, in order to set aside the patent, a case where it was in public use and operation among persons in that trade, and likely to know it."

Judgment.

In *Pennock* v. *Dialogue* (*a*) in the Supreme Court of the United States Mr. Justice *Story* had to place a construction upon the words I have quoted from the American Patent Act, and he said "the words then to bear any rational interpretation must mean not known or used by others before the application. But how known or used? If it were necessary, as it well might be, to employ others to assist in the original structure or use by the inventor himself; or if before his application for a patent, his invention should be pirated by another or used without his consent, it can scarcely be supposed that the legislature had within its contemplation such knowledge or use." Our statute has made that plain which was arrived at, as the result of reasoning by Mr. Justice *Story*.

I have carefully read the evidence in this case and have arrived at the same conclusion as the Chancellor as

(*a*) 2 Peters 1.

1869.

Summers v. Abell.

to the character of the use made by the plaintiff of his invention. The principle of his invention was of great value; but something yet remained to make it practically useful, useful at any rate to anything like the extent which was desired by the inventor; and that something he was striving after for a long time before he hit upon it, feeling all the while that until that something was discovered his invention was incomplete. His use of the machine in the meantime if not strictly experimental, was still in my opinion not a use within the statute, and it may I think fairly be assumed that the use was not for profit merely or perhaps principally, but as a means of leading to the discovery of the desideratum, without which the invention was felt to be an imperfect one.

Judgment.

The evidence shews that the machine was not "in public use" by the inventor. His occasional concealment of parts of it proves this. The inference is that he used it in his shop without concealment, when those were present from whom he apprehended no danger of piracy; but used concealment whenever he apprehended such danger. Then it was not on sale, and certainly it was not in "public use" by the defendant or any other person with the consent or allowance of the inventor. The single question is whether it was "in public use" by the inventor himself. I agree in the Chancellor's conclusion that it was not.

To put it most strongly for the defendant, it is *doubtful* whether there was not such public use. The defendant has not by his answer set up that there was such use, an argument perhaps that in fact there was no such use. But however that may be I am satisfied of this, that there was no such withholding of his invention from public knowledge with improper motives as is commented upon by Judge *Story* in *Pennock* v. *Dialogue*. It is possible that the plaintiff has brought himself within the

1869.

Summers v. Abell.

mischief of the statute: though I think that he has not; but if he has, I think he has done so innocently; and there is no merit in the plaintiff's objection, which is indeed a mere afterthought, having nothing to do with the real question between the parties. I should therefore feel disinclined at any rate to allow the defendant to raise the question now.

Upon the whole I think the plaintiff entitled to relief and with costs.

MOWAT, V. C.—I think the evidence in this case establishes that for several years before the plaintiff applied for a patent, he had invented a machine for cutting fluted rollers; that the incline plane was adopted in this machine for the same purpose as in the improved machine which is described in the patent; and that for several years before the plaintiff applied for a patent he made open use of his machine in making rollers for sale in the course of his business.

Judgment.

I think that this prior use disentitled the plaintiff to a patent for the exclusive use of the inclined plane for the same purpose. I think the doctrine now recognized by the English Courts is that thus stated and illustated by Lord *Abinger* in *Carpenter* v. *Smith* (*a*): "If a man invents a thing for his own use, whether he sells it or not,—if he invents a lock and puts it on his own gate,—and has used it for a dozen years, that is a public use of it," such as avoids a patent. In *Re Adamson's* patent (*b*) the inventor of an apparatus for use in building piers and other harbour works, had made use of it for four months only, in the construction of certain works for which he had a contract; and to account for this he alleged that it was impossible to test the efficacy of the invention except in rough weather, or without its being

(*a*) Webster's Patent cases, 535. (*b*) 6 DeG. McN. & G. 420.

exposed to the view of the public. But the prior use for four months was held fatal to his right to a patent. As the Lord Chancellor there observed: "No doubt an experiment might have been made, and if made *bona fide* only for the purpose of testing the merits of the invention," such use would not amount to a dedication to the public; but I find it impossible to see how the use of the plaintiff's invention in his shop for the purpose of his business as a machinist, for five or six years, can be treated as mere experimenting.

1869. Summers v. Abell.

There is some evidence that the plaintiff during this period contemplated making, and hoped to make, some improvement on his machine; but he used it meanwhile as it was; and the improvement he subsequently made was by making use of a contrivance long known, and used in this country and elsewhere for a like purpose. The learned counsel for the plaintiff did not claim for him a right to the exclusive use of this contrivance; and if the plaintiff had a right to such exclusive use, it would be immaterial to the case, for the contrivance has not been adopted by the defendant in his machine. I think that according to the latest English authorities, the prior use by the defendant of the inclined plane for so long a period was sufficient to invalidate his patent, and that our law differs from the English law on the point, only in allowing an inventor a year to apply for his patent after commencing the use of his invention (*a*).

Judgment.

For these reasons I respectfully dissent from the judgment pronounced by the Chancellor. But,

Per Cur.—Decree affirmed with costs (MOWAT, V. C., dissenting).

(*a*) See sec. 22.

1869.

STEVENSON v. HODDER.

Practice—Style of cause—Costs.

Where a notice of hearing is irregular in form, and the opposite party does not take the objection until the cause is called on, he is not entitled to costs.

It is sufficient in a notice of hearing to name in full the first plaintiff and first defendant, the words "and another," or "and others," after the name, are sufficient without naming the other or others.

Hearing by way of motion for decree.

Mr. *Wells* for the defendant objected that the notice of motion gave the style of cause in the short form, "*Stevenson* v. *Hodder*." He referred to *Caroll* v. *McDougall* (*a*) and other cases in this Court.

Judgment. MOWAT, V. C., reserved judgment on the question of costs, and, on a subsequent day, said, that the objection would be allowed without costs; that, on conference with the other Judges. they were all of opinion that an objection of the kind should be taken promptly, and should wherever practicable be taken by a motion in Chambers, in order to entitle the party to costs; and that if not taken until the hearing the objection should be allowed without costs.

The Vice Chancellor also said that, although it had been decided by the late Vice Chancellor *Esten*, and the decision had been followed by other Judges, that the short style of cause adopted in this notice was irregular in a notice of hearing, it was not to be inferred from this that where there are more plaintiffs or defendants than one, it is necessary to name more than one in full; that the words "and another," or "and others," after

(*a*) Ante page 328.

the name, are in such cases sufficient without naming the other or others: and that the other Judges of the Court concurred in this view.* 1869.

Stevenson v. Hodder

McGregor v. Robertson.

Legal title—Cloud on title.

Persons having a legal title to land of which defendants had been in possession for many years, were held not entitled, before establishing their right at law, to set aside, in equity, as clouds on their title, instruments to which they were not parties, under which they made no claim, and which they did not allege to be fraudulent.

Demurrer to bill for want of equity.

The bill alleged, that the father of the plaintiff *Isabella McGregor*, *Andrew Robertson*, died intestate in May, 1839, leaving him surviving two children, *Elizabeth*, now wife of *John Armour*, and the plaintiff *Isabella* (wife of *Alexander McGregor*); that, at the time of his death, *Andrew Robertson* was equitably entitled to a conveyance from one *Thomas Bailey*, of certain land described in the bill, and was in possession thereof; that defendant *Peter Robertson*, a brother of the intestate, with his mother, and his sister *Christina*, now the wife of *Joseph LaRush*, took possession of the property, and continued therein until 1857; that from 1857, the defendants *Joseph* and *Christina LaRush*, and their then infant child *Andrew Robertson LaRush*, had been in the occupation and enjoyment of the premises; that *Peter Robertson* had lately executed a conveyance of the property to the defendants *Joseph LaRush* and *Andrew Robertson LaRush*, reciting therein that the grantor had theretofore conveyed the land to his mother, that that con- Statement.

* See May v. Prinsep, 11 Jur. Rep. 1032.

1869.

McGregor v. Robertson.

veyance had been lost, that the mother had devised the land to the defendant *Christina LaRush*, and that the new conveyance was made in confirmation of the lost deed; that the new conveyance had been duly registered; that *Elizabeth*, co-heiress of the intestate, had conveyed her interest in the premises to the plaintiff *William Hepburne Scott;* and that on 17th December, 1862, the heiress-at-law of *Thomas Bailey*, the legal owner, had executed a conveyance of the land to the plaintiffs in fee. The bill charged, that defendant *Peter Robertson*, at the time of making the said alleged deed (if any) to his mother, had no right, title, interest, or claim to the said land and premises; that the conveyance was so made for the purpose of defeating the title or claim of the infant children of said *Andrew Robertson*; that the deed of *Peter Robertson* to *Joseph LaRush* and *Andrew Robertson LaRush*, conveyed no interest in said land, and was a cloud on the title of the plaintiffs thereto;

Statement.

that *Peter Robertson* was for a long time in possession of said land and premises, and in receipt of the rents and profits thereof; and had sold thereof a large quantity of valuable timber and wood, and converted the proceeds to his own use. The prayer was, that *Peter Robertson* might be declared to have had no interest in the said land and premises at the time of making the said conveyances, or either of them; and that said *Joseph LaRush* and *Andrew Robertson LaRush* took nothing thereunder; that the said conveyances and registration thereof might be declared to be a cloud on the title of plaintiffs; and might be ordered to be delivered up to be cancelled; and that the entry thereof in the Registry office might be ordered to be cancelled; that defendants might be ordered to convey the land to the plaintiff, and that defendant *Peter Robertson* might be ordered to account to plaintiffs for the rents and profits of said land and premises during the time he occupied the same, and for the value of the timber he had sold. The defendant, *Peter Robertson*, demurred for want of equity.

1869.

McGregor v. Robertson.

Mr. *S. Blake*, for demurrer, cited *Salvage* v. *Hyde* (*a*), *Shaw* v. *Ledyard* (*b*), *Buchanan* v. *Campbell* (*c*), *Gilbert* v. *Lewis* (*d*), *Gillespie* v. *Grover* (*e*), *Crowther* v. *Crowther* (*f*).

Mr. *Spencer*, contra, cited *Pierce* v. *Webb* (*g*), *Hayward* v. *Dimsdale* (*h*), *Davis* v. *Duke of Marlborough* (*i*), *The Attorney General* v. *Morgan* (*j*), *Bloomfield* v. *Eyre* (*k*), *Walker* v. *Symonds* (*l*), *Manners* v. *Rowley* (*m*), *Campbell* v. *McKay* (*n*), *Nelson* v. *Robertson* (*o*), *Lewin* on Trusts, 752 (last Am. ed.), *McPherson* on Infants, 265.

During the argument the Vice-Chancellor referred to *Pierce* v. *Creswick* (*p*), and to *Barlow* v. *Slade* (*q*).

At the close of the argument,

Judgment.

MOWAT, V. C., allowed the demurrer, observing that the allegations in the bill in regard to the impeached documents did not amount to a charge of fraud; and that the plaintiffs having, as they alleged, the legal title, and there being no obstacle to their recovering at law, they were bound to pursue that remedy, and were not entitled to come into equity to remove, as clouds on their title, the deeds under which the defendants claimed the property at law, until they had established their right. His Honor referred to *Bloomfield* v. *Eyre*, *Crowther* v. *Crowther*, *Slade* v. *Barlow*, and *Shaw* v. *Ledyard*, and observed, that he thought (upon consideration) *Pierce* v. *Creswick* did not apply to the present case,

(*a*) Jacob, 151.
(*b*) 12 Grant, 382.
(*c*) 13 Grant, 163.
(*d*) 1 DeG. J. & S. 49.
(*e*) 3 Grant, 558.
(*f*) 23 Beavan, 305.
(*g*) 3 Br. 16, C. C. note.
(*h*) 17 Ves.
(*i*) 1 Swan. 157.
(*j*) 2 Russ. 306.
(*k*) 8 Beav. 250.
(*l*) 3 Swan. 69.
(*m*) 10 Sim. 470.
(*n*) 1 M. & C. 60.
(*o*) 1 Grant, 530.
(*p*) 2 Hare.
(*q*) Weekly notes for 1869, page 44.

1869.

McOregor v. Robertson.

though in some respects resembling it; that as to the the account of rents prayed against *Peter Robertson*, it appeared from the bill that it was more than six years since the plaintiffs had come of age, and it was therefore unnecessary to consider whether, but for these circumstances, the plaintiffs would have been entitled to this relief against *Robertson*.

Per Cur.—The demurrer allowed with costs (*a*).

White v. Bastedo.

Dower—Deficiency of assets.

Where a wife joined in a mortgage, and on the death of the husband there are not sufficient assets to pay all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors.

This was an administration suit, and came on for hearing on further directions and costs.

Mr. *S. Blake*, for the plaintiff.

Mr. *J. C. Hamilton*, for the widow of the intestate.

Mr. *Hoskin*, for the infant defendants.

Judgment.

Mowat, V. C.—The only question I reserved in this case was as to the claim of the widow to have the mortgage money paid out of the estate of her husband in priority to his simple contract debts, there being a deficiency of assets to pay his debts. On the one hand, *Sheppard* v. *Sheppard* (*b*) was relied upon, the Chancellor having there decided the very point against the creditors; and, on the other hand, *Thorpe* v. *Richards* (*c*) was re-

(*a*) See Strickland v. Strickland, 6 Beav. 77; Griffith v. Edwards, 2 Jur. N. S. 586; Thiedemann v. Goldschmidt, 1 DeG. J. & F. 4.

(*b*) 14 Gr. 174.

(*c*) 15 Gr. 408.

1869.

White v. Bastedo.

ferred to, where his Lordship observed, that he was not sure that he had not "gone too far in that case in giving the wife the value of her dower in the entire estate, as against the creditors of the husband;" adding that perhaps he had not sufficiently considered the point, as the case had not been argued on the ground on which his judgment proceeded. These observations of his Lordship deprive the decision in *Sheppard* v. *Sheppard* of the authority which would otherwise belong to it, and have made it necessary for me to consider the question for myself. The conclusion to which I have come is, that the widow has not the right she claims.

DUFFY v. GRAHAM.

Judgment creditor—Personal representative—Statute 13 *Elizabeth—Costs.*

A creditor recovered judgment against his debtor, who having afterwards died intestate, the creditor had himself appointed administrator of his estate, and thereupon, without suing out execution against lands, filed a bill against the real representatives of the intestate for relief under 13 Elizabeth:

Held, that the peculiarity of his position, as both creditor and personal representative, did not entitle him to relief in this Court, without first suing out execution on his judgment. But the pleadings being sufficient to warrant it, the decree for administration was made with such costs as would have been incurred on taking out the ordinary administration order; the plaintiff paying to the defendants their costs of answer and of the hearing.

Examination of witnesses, and hearing at Hamilton.

Mr. *M. O'Reilly*, Q. C., for the plaintiff.

Mr. *Edward Martin*, for the defendants.

SPRAGGE, V. C.—I disposed of the case at the close of the argument, subject to a question which arises upon the following circumstances: Judgment.

1869.

Duffy v. Graham.

The plaintiff was a creditor of the late *James Graham*, and files his bill against *John Graham* his son and others, for relief under 13th Elizabeth. He recovered judgment against *James Graham : James Graham* died intestate, and no administration of his estate being taken out, the plaintiff after citation to the next of kin, was appointed administrator. The question is whether he has a *locus standi* in Court, not having taken out execution upon his judgment against goods and against lands. But for the peculiarity of his position being judgment creditor, and also personal representative of the estate of the judgment debtor, it is clear that he would have no *locus standi* without such writs, but he contends that inasmuch as his position disables him from taking them out, and he has gone as far as he can at law, he is *rectus in curiâ*.

Judgment.

If the reason for requiring the appropriate common law process to be taken out, were that the plaintiff must proceed at law as far as he can proceed, it would divest the case of a good deal of its difficulty; but that is not the reason. The reason is stated by Lord *Redesdale* in his treatise on pleading, to be that he must proceed at law "to the extent necessary to give him a complete title." In *Neate* v. *The Duke of Marlborough* (*a*), Lord *Cottenham* who goes at great length into the question, quotes Lord *Redesdale* with approbation, and places the rule upon this, that the Court is acting in aid of the common law. After referring to the Act 13 Edward I. chapter 18, which gives creditors a right to proceed against lands for the satisfaction of their debts; and to the nature of the writ of *elegit*, which gives to the creditor a legal title, and which if no impediment prevent him, he may enforce at law, he proceeds thus, "If there be a legal impediment he then comes into this Court, not to have a greater benefit than the law, that is, the Act of Parlia-

(*a*) 3 M. & C. 407.

1869.

Duffy v. Graham.

ment, has given him, but to have the same benefit, by the process of this Court, which he would have had at law, if no legal impediment had intervened. How then can there be a better right, or how can the judgment which *per se*, gives the creditor no title against the land be considered as giving him a title here?" Lord *Cottenham's* judgment has more to the same effect, and Sir *George Turner* in *Smith* v. *Hurst* (*a*) decided the same point upon the like reasoning.

In the two cases I have referred to the estate of the judgment debtor was an equitable estate. Strictly, process against lands does not give title to the creditor against an equitable estate; and it might not unreasonably be put, why require process to issue which is only a form? But if in such a case it is held to be necessary it is *a fortiori* that it is proper and necessary where its effect is to confer a title; and this Court acting as ancillary to a Court of law, and the plaintiff having title, he comes to this Court for relief. In such case indeed he does not come to remove a legal impediment, for if he is right in his facts, that which he comes to impeach is void as against him, and he might proceed to sell by common law process, but he comes to this Court to have it declared void, and for consequential relief—a sale.

Judgment

In England the process of *elegit* was of a nature that strengthened the reason for its being sued out before the creditor could come to a Court of Equity; the *elegit* as its name implies, giving the creditor an option which if he exercised he was put into possession of a moiety of the land; and Lord *Cottenham* says, "suppose he never sues out the writ, and never therefore exercises his option is this Court to give him the benefit of a lien, to which he has never chosen to assert his right." It might be argued that it was upon this ground that the Court

(*a*) 17 Jurist, 30.

1869.

Duffy v Graham.

required the issue of the writ, but it is not so, as the issue of process is also required where a conveyance of chattels is impeached. The reason is that *title* is to be shewn in the creditor, before he comes to this Court.

I am stating the rule as I find it established; and the reasoning upon which it is founded as given by high authority. The Statute of Elizabeth certainly does not in terms require these proceedings, but gives relief to creditors simply as such. As against them certain conveyances are declared void. This Court, acting in aid of a Court of Law, would properly require that a party coming here should first have established his debt by recovering judgment at law. It is now a settled rule that he must go further; and that rule rests upon reasoning that I must set aside if I give to the plaintiff the relief that he asks.

Judgment

If indeed I had no alternative between giving relief to the plaintiff in the shape in which he asks it, and leaving him without remedy, I might perhaps venture, rather than leave the Statute of Elizabeth a dead letter in the case of creditors situated as this plaintiff is, to hold, that it applied to a creditor who had recovered his judgment at law, and who by reason of his position could go no further.

There would still however be this difficulty, that although by the recent Statute (29 and 30 Vic. ch. 25), executions against goods and against lands may be issued at the same time, it is enacted that there shall be no sale upon the execution against lands, until after a return of *nulla bona* in whole or in part upon the execution against goods; and further, that such return shall not be made until the whole of the goods are exhausted. This Court could not, without violating the spirit of that enactment, sell the lands without first ascertaining that there are no goods to satisfy, or to go

towards satisfying, the judgment debt. Now that would be in substance an administration of the estate of the debtor: and it is an administration decree that is in my opinion the proper remedy for the plaintiff. That will give him all that he is entitled to; and such being the case it would be wrong to go against the spirit as well as the letter of English decision upon this point: as would certainly be done if the decree asked for should be granted. 1869. Duffy v. Graham.

I have not the pleadings in this case; it may be that such decree may be made upon the present record. I have already decided as far as the materials before me enable me to do so, the point in question between the plaintiff and the defendant, to whom the impeached conveyance was made. Upon the pleadings being furnished to me I will see whether an administration decree can be made in this suit.

Judgment.

I have since examined the pleadings, and find that a decree for the administration of the estate of *James Graham* may properly be made upon them. But the plaintiff can have only such costs as he would have been entitled to if he had taken out the ordinary administration order, and must pay to the defendants their costs of answer and of the hearing.

McDONELL v. THE UPPER CANADA MINING COMPANY.

The decree in this cause, reported ante page 179, has since been affirmed by the three Judges on a re-hearing; SPRAGGE, V. C., concurring in the reasons given by MOWAT, V. C., and THE CHANCELLOR doubting.

1869.

BOX v. THE PROVINCIAL INSURANCE COMPANY.

Sale of wheat, part of a larger quantity—Warehouseman's receipt.

Where a warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat to be delivered pursuant to his order to be indorsed on the receipt:

Held—(MOWAT, V. C., dissenting)—that, the 3,500 bushels not having been separated from the other wheat of the seller, no property therein passed.

The Chancellor made a decree against the plaintiffs, as reported *ante* page 337, and the plaintiffs reheard the cause before the three Judges.

Mr. *Blake*, Q.C., and Mr. *Blain*, for the plaintiffs.

Mr. *Moss*, for the defendants.

VANKOUGHNET, C., adhered to his former opinion.

SPRAGGE, V. C., concurred therein.

Judgment. MOWAT, V. C.—On the 15th of March, 1867, the plaintiffs, claiming to be owners of 3,500 bushels of spring wheat, stored in the warehouse of one *Robert Todd*, insured the same for $5000 with the defendants, through their agent at St. Mary's, and received from the agent the usual provisional receipt for the premium. The company approved of the risk agreeably to the conditions of the provisional receipt, but before the policy was issued, viz., on the 18th March, 1867, the warehouse and its contents were destroyed by fire. The bill is for payment of the insurance money. The company resist this demand on various grounds; and the cause having come on to be heard before the Chancellor, at Guelph, his Lordship dismissed the bill, on the ground that the plaintiffs had no property in the wheat. Their claim to

1869.

Box v. Provincial Ins. Co.

it was derived under a purchase from *Todd;* and the view of the facts on which the decree was based was thus stated by his Lordship: "*Todd*, the vendor, was also a wharfinger, and he sold to the plaintiffs 3,500 bushels of spring wheat, forming part of a much larger quantity then in store. These 3,500 bushels, or any portion thereof, were not separated from the mass of which they formed part; or in any way ascertained as distinct from the rest before the fire, by which they, and more of the wheat in bulk, were destroyed." And, there having been no such separation, the Chancellor was of opinion that no property had passed.

His Lordship did not refer to the warehouse receipt, which, on the completion of the transaction, had been given to the plaintiffs; but I respectfully think that this receipt is very material; that in fact it relieves the plaintiffs' case from all difficulty. The receipt names the plaintiff *George Carter* only, but was given to him on behalf and for the benefit of himself and his co-partners, who are joint plaintiffs in the suit, and is in the following terms:—"Received in store from *George Carter*, owner, 3,500 bushels No. 1 spring wheat, to be delivered pursuant to his order to be endorsed hereon. This receipt to be regarded as a receipt under the provisions of Statute 22 Victoria, chapter 20, being 22 Victoria, chapter 54 of the Consolidated Statutes of Canada, and the amending Statute 24 Victoria, chapter 23: Seaforth, C. W., 30th January, 1867."

Judgment.

"ROBERT TODD."

Under precisely similar circumstances the Court of Queen's Bench in *Clark* v. *The Western Insurance Company* (*a*), held, or rather assumed, that the property did pass, and that the purchaser had an insurable interest in it. I make the following extract from the

(*a*) 25 U. C. Q. B. 209.

1869.

Hoe v. Provincial Ins. Co.

judgment;—"It has been insisted that the plaintiff was bound to prove that the identical wheat he purchased and insured was destroyed by the fire. We do not accede to this proposition, thinking that the defendants must be taken to have contracted upon the usual and well understood course of business, in the receiving, storing, and delivering wheat into and from warehouses, and therefore they knew the plaintiff's right was to get 2000 bushels of spring wheat from that warehouse, as he had purchased that quantity being stored there; and they made the policy accordingly. The Statute appears to us to have made the warehouse receipt evidence of the right, as it has made the right transferable for some purposes by indorsement and delivery of the receipt; the wheat is then virtually assumed to be where the receipt represents." I think that we should follow this decision, unless we are very clear that it is wrong; for, as the Chancellor observed in his judgment, we have to deal with the case as a Court of law would have dealt with it if a duly executed policy had been issued.

Judgment.

In *Woods* v. *Russell* (*a*), the Court disposed of a similar question of property on the same principle. There one *Paton*, a shipbuilder, contracted with the defendant to build a ship for him, and to complete and launch her on a day named, and the defendant was to pay for her by instalments as the work progressed. Before she was completed or launched, the defendant, with the builder's privity, took steps to get her registered in his own name; and to enable this to be done, the builder signed the usual certificate of her build, &c., and thus enabled the defendant to register her as his own. The builder continued working on her, but she was not finished or launched when he became bankrupt. The defendant then took possession, and finished and launched her himself. The assignees of the bankrupt thereupon

(*a*) 5 B. & Ald. 942.

1869.

Hoe v. Provincial Ins. Co.

brought an action of trover. It was contended on behalf of the defendant, amongst other things, that the payment of the instalments vested the property in the defendant, but the Court did not give judgment on that ground, observing as follows:—"We are not called upon to decide how far that payment vests the property in the defendant, because here, *Paton* signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and *by that act consented*, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant. * * We think the legal effect of signing the certificate for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant." After referring to a case cited for the plaintiffs, and distinguishing it on the ground that the builder there "had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser:" The Court added, "but the signing of the certificate, here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was necessary to enable the defendant to obtain such registry should, as between them, be considered as complete, and that as the defendant would have to swear that he was sole owner of the ship, the ownership should be considered his." The judgment was accordingly (*a*).

Judgment.

In the present case, *Todd* expressly certified that the plaintiff, *Carter*, was the owner of the wheat in question; and so certified in a form which rendered himself liable to punishment as for a misdemeanour if the ownership was otherwise (*b*). This certificate demonstrates that both parties meant that the property, though there was no separation from *Todd's* other wheat, should pass to the

(*a*) See Clarke v. Spence, 4 A. & E. 467. (*b*) 24 Vic. ch. 23, sec. 1.

1869.

Box v. Provincial Ins. Co.

vendee; and it is the intention of the parties which determines the question. To pass land there must generally be words of conveyance; but in the case of chattels, a contract alone is usually sufficient, if the intention to pass is sufficiently clear by the terms of the bargain, or appears by the subsequent acts or admissions of the parties. On this point I shall content myself with quoting the explanation of the law which is given by Mr. *Blackburn* (now Mr. Justice *Blackburn*), in his book on Contracts of Sale (*a*): "The next question to be considered is, what are the circumstances under which a contract (good within the Statutes) amounts to a bargain and sale of goods so as to operate as an actual sale of them, and when not? This is, properly speaking, a question depending upon the construction of the agreement, for the law professes to carry into effect the *intention* of the parties as appearing from the agreement, and to transfer the property when such is the *intention* of the agreement and not before. * * *The parties do not contemplate* a bargain and sale till the specific goods on which that contract is to attach are agreed upon. When the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an *intention* to postpone the transference of the property till the fulfilment of any conditions; and when by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable state, or when anything is to be done to them to ascertain the price, it is presumed that the parties *mean* to make the performance of those things a condition precedent to the transference of the property. But as these are only rules for construing the agreement, they must yield to anything in the agreement that clearly shews a contrary intention. The parties may lawfully agree to an immediate transference

Judgment.

(*a*) Page 120, part 2, ch. 1.

1869.

Box v. Provincial Ins. Co.

of the property in goods, although the seller is to do many things to them before they are to be deliverable; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please. * * It makes no difference although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies: the parties did not *intend* to transfer the property in one portion of the stock more than another, and the law, *which only gives effect to their intention*, does not transfer the property in any individual portion." (*a*). In *Woods* v. *Russell* (*b*), the evidence of the intention to pass was, not the terms of the contract, but the subsequent actsof the seller. Here the receipt acknowledging the ownership of the plaintiffs, seems to have been given at the time of the purchase, and is the only writing that appears to have passed between the parties. It was given as evidence of this ownership, not only as between the seller and the buyer, but also to enable the latter to deal with other persons as owner of the property. The evidence of intention is thus very complete.

Judgment.

There are reported cases in which, though no act had been done between the parties to shew an intention that the property should pass without being separated from the bulk of which it was a portion, yet, the vendee having resold, and the vendor having acknowledged that he held the goods for the new purchaser, the property has been held to pass without any separation. These cases have not been founded on any supposed fraud on the new purchaser; or on any ignorance of his at the time of his purchase, or at the time of the original vendor's acknowledgment, that there had been no

(*a*) P. 123. See Logan v. Lemesurier, 6 Moo. P C. 116; Wait v. Baker, 2 Exch. 9; Turley v. Bates, 2 H. & Colt, 211; and cases cited *post*.

(*b*) 5 B. & Ald. 942.

1869.

Box v. Provincial Ins. Co.

separation or appropriation of the part sold. I refer to *Whitehouse* v. *Frost* (*a*), *Woodley* v. *Coventry* (*b*), and *Pooley* v. *Budd* (*c*).

If there had been any statutory enactment declaring separation and appropriation to be necessary, or if a joint ownership of goods or other property were against the recognised policy of the law, the result would have been different. But, as there is no such enactment or policy; as the legal power of passing property without prior separation is certain; as the question is altogether one of intention; as a conveyance of an undefined acre of a farm has been held a good conveyance (*d*); and as a gift of thirty of the sixty horses which a testator had in his stable has been held a good specific bequest (*e*), I think it follows clearly that the property in 3,500 bushels of *Todd's* No. 1 spring wheat, if there was so much in his warehouse at the time, did pass to the plaintiffs, and that they had therefore an insurable interest.

Judgment.

When the course of dealing in such matters,—as set forth by the Court of Queen's Bench, at page 214, of the report in *Clark's* case (*f*),—is considered in connection with the statutory enactments there referred to, the view I have taken as to the legal effect of the receipt, appears to me to receive strong confirmation.

I think the legal property in the wheat passed; and it is therefore unnecessary to consider whether an equitable interest may not pass in such cases though the legal property is not affected. On this point *Pooley* v. *Budd* (*g*), *Langton* v. *Horton* (*h*), and other cases would

(*a*) 12 East, 614. (*b*) 2 H. & Colt. 164. (*c*) 14 Beav. 34.
(*d*) Cummings v. McLachlan, 16 U. C. Q. B. 626.
(*e*) Jacques v. Chambers, 2 Coll. 441.
(*f*) Clark v. The Western Insurance Company, *supra*.
(*g*) 14 B. 34. (*h*) 1 Hare 549.

require consideration. Any interest, equitable or legal, is insurable (*a*). 1869.

Box v. Provincial Ins. Co.

I think the decree should declare the company liable for the plaintiffs' loss, but not to an amount exceeding $5000; and for interest; should refer it to the Master to ascertain the amount; should direct the defendants to pay the same with the plaintiffs' costs, except the costs of the rehearing; and should order the deposit made by the plaintiffs to be returned to them.

Sed per Curiam, decree affirmed with costs. [MOWAT, V.C., dissenting.]

SOVEREIGN v. SOVEREIGN.

Executors and trustees—Interest—Costs—Form of report.

Executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands.

Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss.

Where a plaintiff files a bill for an administration decree in a case in which the decree would have been made on notice without a bill, he is not entitled to the increased costs thereby occasioned.

It is inconvenient and objectionable for a Master to set forth the evidence in his report, instead of adjudicating thereon.

Statement.

This was a suit by one of the residuary legatees of *Joseph Sovereign*, deceased, for the administration of his estate. The usual administration decree was made on the 23rd of April, 1867. On the 4th of February, 1868, the Master made his report; and on the 4th of March

(*a*) Davies v. The Home Insurance Company, 3 Er. & App. 269, and cases there cited.

1869.

Sovereign v. Sovereign.

following the cause came on before the Chancellor for further directions, and as to the costs reserved. On the 27th of April his Lordship made a decree, which was afterwards re-heard before the full Court, at the instance of the executors of *Thomas Cook*, executor of *Joseph Sovereign*.

The judgment of the Chancellor on the points contested on the appeal, was as follows:—

As to the liability of *Cook's* estate in respect of the £703 for the chattels left by the testator, there can be no doubt, on the evidence, that *Cook* in his lifetime was, and his estate now is, responsible for the loss occasioned by the sale or use of these chattels by *Levi Lemon Sovereign*. *Cook* saw the waste and sale going on, and, though protesting against both, did nothing to prevent it as he should have done. His estate must therefore be charged equally with that of *Clarissa* in respect thereof.

Judgment.

As to interest, it has been held, no doubt, that an executor who has been merely careless or negligent will not be charged with interest on the loss of property; as when he might have collected rents and neglected to do so; *Tebbs* v. *Carpenter* (*a*). But in this case it seems to me that there was something more than mere negligence on the part of *Cook*; that his inaction amounted in effect to acquiescence in the spoliation of the estate which was going on, of which he was aware, and against which, though complaining, he did nothing. It is hard that the infant legatee should suffer from this wilful inaction of the executor, and I think that *Cook's* estate, equally with *Clarissa's*, must be charged with interest on the value of the chattels sold, or on their produce at the sale, if the sale was a fair one; and from the time of the sale, or from the times after

(*a*) 1 Madd. 290.

the sale, at which the purchaser should have paid. The Master appears to have calculated interest from the time the inventory was made out, after the death of the testator *Sovereign*. This is going too far. The executors were not obliged to sell immediately, and I think it fair only to charge interest from the time I have mentioned. 1869. Sovereign v. Sovereign.

As to costs, *Cook's* estate and *Clarissa's* must pay the costs of all parties in relation to the inquiry as to this personalty, except the costs of *Levi Lemon Sovereign*, who must be ordered also to pay these costs, and who will get no costs at all in the suit. In relation to the other inquiries, all parties except *Levi Lemon Sovereign* will get their costs out of the estate of the testator *Sovereign*. As this suit appears to have been rendered necessary by the misconduct and neglect of *Clarissa* and *Cook*, I will give them no costs up to the hearing. The other parties (except of course *Levi Lemon Sovereign*) to have their costs up to the hearing, and inclusive of it. Judgment.

The Master has not specifically found as to the wild lands, but it would appear from schedule A to his report that the testator only left 100 acres of wild land. *Mary Louise* and *Sarah Ann Sovereign* would seem to be each entitled to one-third of this one hundred acres, and the other one-third would be held by the four children as tenants in common; but *Levi Lemon* has parted with what interest he had in it. As the plaintiff is entitled to the whole estate, it would seem to be for his interest to close matters with as little delay and expense as possible. Reserve further directions, if necessary.

On the re-hearing,—

Mr. *Blake*, Q. C., appeared for the executors of *Thomas Cook*.

1869.

Sovereign v. Sovereign.

Mr. *Read*, Q. C., for the plaintiff.

Mr. *Bowlby*, for other parties.

The judgment of the Court was delivered by

Judgment.

MOWAT, V.C.—Certain defendants, executors of *Thomas Cook*, the executor of *Joseph Sovereign*, object to the decree on further directions, as having improperly charged them with a sum of £703, lost through the fault of *Cook* and of the executrix *Clarissa Sovereign*, the testator's widow. This is the value of the testator's farming stock and implements, his household furniture and other chattels. The facts which led to the charge are these: After the testator's death, his widow, had possession of these chattels for some time, and had possession of the testator's farm also. She leased the farm to *Levi Lemon Sovereign*, one of the residuary legatees under the will; and she delivered to him the chattels. On the 16th of March, 1853, he signed a receipt for the latter, in which it is stated that he was to have the use of them free of any charge, during the term of his lease of the farm from his mother; and he thereby agreed to return the chattels after the expiration of the lease, or to account to the executors of *Joseph Sovereign's* estate for the amount thereof. There was nothing in the will authorizing this dealing with the chattels. *Levi Lemon Sovereign*, besides receiving possession of the chattels on these terms, was authorized by his mother, the executrix, to act as agent for the estate in collecting debts. The arrangement about the chattels and the appointment of *Levi* to collect debts were known to the executor, *Thomas Cook*, and were not interfered with by him. *Levi* from time to time after this disposed of the chattels and collected debts with the knowledge of *Cook*, and he squandered what thus came to his hands. So far as the evidence shews, *Cook* contented himself with expressing from time to time to

third persons his dissatisfaction at the conduct *Levi* was pursuing, and with intimating to them his intention of taking the management of the estate out of *Levi's* hands if he did not change his course, but *Cook* took no steps whatever to put a stop to the mismanagement or to save the estate. *Levi* became insolvent, if he was ever otherwise; and he has left the country. The sum named has consequently been lost. In 1864 *Cook* died; and in the following year the plaintiff instituted this suit. The Chancellor held that, under the circumstances detailed, the executors of *Cook* were liable, jointly with *Clarissa Sovereign*, to make good the £703, and to pay interest thereon. On the re-hearing, this decision was not combated so far as relates to the principal sum; but it was contended that interest thereon was not chargeable against *Cook*, because the estate had never come to his hands; and reference was made to *Vanston* v. *Thompson* (*a*), and *Blain* v. *Terryberry* (*b*)—decisions of my brother *Spragge's*—and to a passage in Mr. *Lewin's* book on Trusts (*c*), as shewing that even where the negligence of trustees and executors renders them liable to make good sums which have been lost to the estate, they are not charged with interest thereon, unless the assets had come to their hands and been subsequently lost. The principle of this distinction is not very apparent, though there are cases, both in this country and in England, in which it has been acted upon; and the rule must be considered to be the law of the Court in all cases corresponding with those in which it has been so laid down and acted upon. But there are cases of the highest authority in which interest has been charged though the principal sums never reached the hands of the trustees or executors who were charged with the loss. I refer, amongst other cases, to *Mucklow* v. *Fuller* (*d*), *Munch* v.

Judgment.

(*a*) 10 Gr. 542. (*b*) 12 Gr. 221. (*c*) p. 279, 5th ed.
(*d*) Jacob, 198.

1869. Sovereign v. Sovereign.

Cockerel (*a*), *Hanbury* v. *Kirkland* (*b*), *Styles* v. *Guy* (*c*), *Maitland* v. *Bateman* (*d*), *Byrne* v. *Norcott* (*e*) and *Horton* v. *Brocklehurst* (*f*). In view of what was done in these cases, I see no sufficient reason for interfering with the Chancellor's decision on this point.

The second objection to the decree on further directions is as to the costs. It is contended, that the administration order might have been obtained in Chambers on notice without pleadings or formal hearing; and that the additional costs incurred by these unnecessary proceedings should not be charged against the estate. That contention seems correct; and if the objection had been taken before the Chancellor, the disallowance of the extra costs would, I presume, have been provided for. The plaintiff should have no more costs by reason of having filed a bill, than if he had taken out the administration order on notice.

Judgment.

On behalf of *Maria McCool*, one of the testator's daughters, it was said that there had been an omission in the report. The will gave to each of the testator's three daughters one hundred acres of wild land. I understood the learned counsel to say, that in pursuance of this devise a conveyance had been made to each of the other two daughters of one hundred acres; that the land so conveyed was not in the list of lands which the Master reports that the testator owned at the time of his death; and that a direction was needed for the conveyance to Mrs. *McCool* of her hundred acres, namely, one of the lots mentioned by the Master. If these are the facts the parties should make the conveyance without any order. If they refuse to do so, the regular course for Mrs. *McCool* would seem to be, to present a petition

(*a*) 5 M. & Cr. 178
(*b*) 3 Sim. 272.
(*c*) 16 Sim. 30; S. C. 1 McN & G. 422, 428, 436.
(*d*) 16 Sim. 233, note.
(*e*) 13 Beav. 336.
(*f*) 29 Beav. 504.

setting forth the facts and praying for the relief she seeks as to this devise; but the other members of the Court think a reference may, in the present case, be directed, at the risk and expense of Mrs. *McCool*, without a petition. 1869. Sovereign v. Sovereign.

By consent of the parties, the Master has embodied in his report the whole of the evidence bearing on the questions relating to the £703 and interest. We are all agreed that this is a very inconvenient and objectionable course where the Master has not been expressly directed by the decree to report the evidence; and where there is such a direction the evidence should appear, if practicable, by way of schedule or of reference, rather than in the body of the report.

ROBSON v. WRIDE.

The order made herein and reported, ante, volume XIV, page 606. has been affirmed on the grounds mentioned in the Vice-Chancellor's judgment there.

FORD v. ALLEN.

Mortgagee—Arrears—Interest.

A Mortgagee sold the mortgaged property under a power of sale: *Held*, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years.

The plaintiff was a mortgagor; and the defendant a mortgagee. The mortgage contained a power of sale. Under this power the mortgagee offered the property for sale by auction, and became himself the purchaser at a sum equal to the mortgage debt and interest, including

1869.

Ford v. Allen.

arrears of interest for more than six years. The mortgagor did not object to the defendant's keeping the property as purchaser, but insisted that the mortgagee was not entitled to more than six years' arrears of interest, and the bill was filed to compel the mortgagee to pay the difference.

The cause was heard before Vice-Chancellor *Spragge*, who held (1), that the mortgagor was entitled to hold the mortgagee to his purchase; (2), that the mortgagee could not retain for more than six years' interest.

The cause was thereupon re-heard at the instance of the defendant. His liability to carry out his purchase was not denied: the question raised was as to the interest.

Mr. *Blake*, Q. C., for the plaintiff.

Mr. *Strong*, Q. C., for the defendant.

The judgment of the Court was delivered by

Judgment.

VanKoughnet, C., who observed that the case of *Edmunds* v. *Waugh* (*a*) was the last reported case on the question, and had not been cited to the Vice-Chancellor; that it decided the point in favor of the mortgagee; and that the Court saw no sufficient reason for not following that decision. The mortgagee having the money in his hands, and not claiming the arrears as a plaintiff, but merely insisting, as a defendant, on a right to retain the amount in arrear in a suit by the mortgagor for the payment to him of the surplus, the case was not within the words of the statute; nor (according to *Edmunds* v. *Waugh*) within its meaning. The decree made at the hearing would therefore be varied accordingly.

(*a*) L. R. 1 Eq. 418.

1869.

THE ERIE & NIAGARA RAIL[illegible] Co. v. GALT.

Practice—Preliminary objection—Costs of former application.

Non-payment of the untaxed costs of an unsuccessful application in a former suit, is no bar to a motion for a like purpose in another suit between the same parties.

This was an application for an injunction. The plaintiffs had made a similar application by petition in a suit of *Galt* v. *The Erie & Niagara Railway Company*, which was refused with costs on the ground that the facts on which relief was sought, were such as could not be brought before the Court in that suit. The costs of the motion had not been taxed.

Mr. *G. D. Boulton*, for the defendants, objected to the present application that these costs must be paid before the motion could be entertained.

Mr. *Cattanach*, contra.

MOWAT, V. C.—There seems to be no reported authority warranting a preliminary objection of this kind before the costs are taxed. In a note to *Killing* v. *Killing* (*a*), it is said to have been held by the Vice-Chancellor (Sir *John Leach*) in another case, that if the costs have not been taxed, non-payment is no objection; and I have not seen any reported decision the other way. But however that may be, I am of opinion that in the present case, where the untaxed costs are in another suit, the non-payment is no answer to the application. Judgment.

(*a*) 6 Madd. 68.

1869.

CRIPPEN v. OGILVIE.

Mortgagor—Mortgagee—Interest.

If a mortgagee retains possession of the property after being paid in full, the general rule is to charge him with interest and rests in respect of his subsequent receipts. *A fortiori* is such a charge proper where a mortgagee resists the mortgagor's right to redeem.

This was an appeal from the report of the Master at Cobourg, made in pursuance of the decree of Vice-Chancellor *Spragge*, reported *ante* page 490.

Mr. *S. M. Jarvis*, for the plaintiff, who appealed.

Mr. *Crickmore*, contra.

Judgment. MOWAT, V. C.—The Master finds, that the defendant was over-paid in May, 1863, by the sum of $83.57; and that by reason of rents afterwards received by him, he was indebted to the plaintiff, at the date of the report, in the sum of $659.77, on which sum the Master has charged him with interest since the filing of the bill. The plaintiff claims that he is entitled to interest on all sums received by the defendant after his debt had been paid. The Master is said to have disallowed interest before the filing of the bill, on the authority of *Quarrell* v. *Beckford* (*a*). The bill in that case was filed in Trinity Term, 1796, and the mortgagee does not appear to have been overpaid until the 31st of December, 1795. The over-payment then was £1572; this sum had, on the 31st of December, 1808, been swelled by subsequent rents (exclusive of interest) to £24,370 0s. 7d.; and there seems to have been no discussion as to interest for the short interval which elapsed between the time of the over-payment and the time of filing the bill. The cause came on upon further directions in 1816. In the present case, there was a period of five years for which the defendant con-

(*a*) 1 Madd. 268.

tinued to receive the rents after being paid off, and before the filing of the bill. In *Wilson* v. *Metcalfe* (*a*), where the mortgage debt was paid off in 1801, and the bill was filed in 1803, the mortgagee's representatives were charged with interest and annual rests from the former period, and it is clear that that is the general rule of the Court.

The learned counsel for the defendant referred to the circumstances of the case as they appeared at the hearing, to shew that the case was not one for interest. I have read the judgment of my brother *Spragge*, and I do not find that it supports the contention of the learned counsel. On the contrary, the case appears like the one which called forth the following observations from Lord *St. Leonards* with reference to a like claim of exemption from interest (*b*):

"This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner, and when a creditor denies his character as such; and claims as owner, I cannot allow him to fall back on his original character as creditor, as if he had never departed from it. I will never allow a party who has put the owner at arm's length, to turn round when defeated, and claim all the benefits attached to the character of a fair creditor." Judgment.

The appeal must be allowed with costs. I presume no reference back will be necessary to make the proper correction of the report.

(*a*) 1 Russ. 526.

(*b*) The Incorporated Society v. Richards, 1 Dr. & War. 334.

1869.

STEVENSON v. HODDER.

Interest on purchase money—Vendor and purchaser—Damages.

On a purchase of land the vendee gave his promissory note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator, it was held that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note.

On a sale of land the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the amount of the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to re-sell the land in consequence of the mortgage:

Held, not allowable.

Hearing on further directions.

Statement. In 1853 one *John Goldie* sold a lot of land, 120 acres in the township of Dunn, to the defendant, for £200 stg., half of which was paid down, and for the other half the defendant gave his promissory note, dated the 16th of November, 1853, whereby he promised to pay *Goldie* $486.67 with interest, one year after date. *Goldie* thereupon conveyed the lot to the defendant, by a deed dated the 12th of December, 1853, and containing covenants that the grantor had done no act to incumber the land, and that the defendant should have quiet possession, free from all incumbrances. At the date of the conveyance there was a mortgage on the premises, which *Goldie* had theretofore executed to secure £540 18s. 8d. This mortgage was on 547½ acres, including the land in question, and the amount due thereon at the time of the sale to the defendant was less than the amount of his note. Before the note became due, viz, on the 24th of March, 1854, *Goldie* died. No letters of administration were taken out until the 7th of

August, 1865, and until that time there was no personal representative of his estate. 1869. Stevenson v. Hodder.

On the 8th of December, 1866, the administrator, *Francis Sabine Stevenson*, commenced the present suit. The bill prayed that the amount due on the note, with interest, should be declared a lien on the property, and also prayed other consequential relief. The defendant answered, claiming damages for breaches of the covenants for title, and insisting that he was not liable for interest until the appointment of an administrator. On the 25th of June, 1867, a decree was made, by consent, declaring that the plaintiff was entitled to a lien on the land for the unpaid purchase money; referring it to the Master at Cobourg to inquire whether there had been any breaches of any of the covenants for title contained in the conveyance, and whether the defendant was entitled to any —and if so, to what—damages by reason of such breaches of covenant, and whether the defendant was entitled—and if so, to what sum—by way of set off against the purchase money; directing the Master to report any facts proved before him affecting the plaintiff's right to recover interest on the balance of the purchase money; and reserving further directions and costs. The Master made his report on the 25th of January, 1869, setting forth the facts) and the conclusions of law he drew from them. To these conclusions both parties made objections which are mentioned in the judgment.

Mr. *McLennan*, for the plaintiff.

Mr. *Wells*, for the defendant.

Judgment.

MOWAT, V. C.—The plaintiff claims that he is entitled to interest from the date of the note, while the Master has disallowed interest from the day the note became due (16th November, 1854,) until the appointment of an administrator (7th August, 1865). In support of

1869.

Stevenson v. Hodder.

this finding, the case of *Murray v. The East India Co.* (*a*), was referred to, in which the Court was of opinion that the calculation of interest should begin from the time of the demand of payment by the administrator, and not sooner. But that was the case of a bill of exchange, which was not, by its terms, payable with interest, and on which, therefore, interest was recoverable as damages only. In 6 Modern, 138, it is stated to have been laid down by the Court, that interest upon a bill of exchange commences from demand made; and therefore if there be no demand made until action brought, that the defendant is not liable to interest: that was the old rule. In case of a bill not naming interest, the question whether any damage has been sustained requiring the payment of interest, is always a question for the jury (*b*). On the other hand, if a note is in terms payable with interest, the interest is part of the debt, and not merely damages for detaining it, and has always been recoverable without any prior demand (*c*). In such case, the interest is as much a part of the debt as the principal is, or as the several instalments of a principal sum would be if it were payable by instalments; and to such a case the opinion expressed in *Murray* v. *The East India Co.* (*d*) does not apply (*e*).

Judgment.

The same principle shews that the plaintiff is not confined to arrears for six years. The interest is part of the debt; and in *Murray's* case (*a*) it was laid down that "a cause of action cannot exist unless there be also a person in existence capable of suing." The

(*a*) 5 B. & Ald., 211.

(*b*) Gibbs v. Fremont, 9 Exchq. 31.

(*c*) Crouse v. Park, 3 U. C. Q. B. 468; Hudson v. Fawcett, 7. M. & r 350.

(*d*) 5 B. & Ald. 217.

(*e*) And see Richards v. Richards, 2. B. & Ad. 455; Roffey v. Greenwell, 10 A. & E. 224.

1869.

Stevenson v. Hodder.

promisee died before the note matured, and the cause of action on it did not exist until an administrator was appointed. Until then the interest was not due or in arrear, though it was to be calculated from an antecedent date. There are many analogous cases in which interest for more than six years has been held recoverable. I refer, amongst other cases, to *Richards* v. *Richards* (*a*), *Toft* v. *Stephenson* (*g*), *Williams* v. *Glenton* (*c*), and *Herbert* v. *The Salisbury & Yeovil Railway Co.* (*d*),—which were cited at the bar. I understood the learned counsel for the plaintiff to contend, that as between vendor and vendee interest was never confined to six years; but in that view I do not concur. The true principle is explained by Lord Justice *Turner* in *Toft* v. *Stephenson* (*e*). The decree will now give the plaintiff the interest disallowed by the Master.

Judgment.

The defendant claims to set off against the note certain damages which he claims by reason of the outstanding mortgage. It is no part of his case that he was not aware of this mortgage when he made his purchase. But he alleges that he had opportunities of selling the land at a considerable profit, and was unable to do so in consequence of the mortgage; and he claims the amount of this profit as damages against the plaintiff. I am not aware of any English authority for setting off unliquidated damages against unpaid purchase money after conveyance (*f*); and I think, besides, that the damages claimed are not recoverable under the covenants. Where the covenantor should have paid off a mortgage, and he fails to do so, the covenantee may pay it off and recover the amount with interest from the covenantor; or he may get a decree in equity com-

(*a*) 2 B. & A. 455.
(*b*) 5 DeG. McN. & G. 537.
(*c*) 11 Jur. N. S. 801.
(*d*) Law Rep. 2 Eq. 221.
(*e*) 5 DeG. McN. & G. 537, 539.
(*f*) See Smith v. Wootten, 12 Gr. 200, 203.

1869.

Stevenson v. Hodder.

pelling payment by the covenantor to the party entitled to the mortgage money. If he sues at law without having paid the money, and without having lost the property by foreclosure or otherwise, it does not appear to be clearly settled that he is entitled to more than nominal damages. The cases cited for the defendant (*a*) on this point do not apply. But, apart from these considerations, the defendant had in his hands more than enough to pay off the mortgage; and it would be preposterous to suppose that he could retain this money, and claim substantial damages because his grantor had not paid off the mortgage before his death. The opportunities of re-selling on which he bases his claim, appear to have occurred after—indeed some years after—*Goldie's* death. The Master was clearly right in disallowing this claim.

Judgment.

It was contended that the decree decided, in effect, that the damages claimed were to be allowed; but the contrary is clear.

The plaintiff is entitled to the costs of the suit.

SHERBONEAU v. JEFFS.

Possession not notice under Registry Act of 1868.

Where a father and son lived together on certain land of the father, and continued to do so after a conveyance by the father to the son, it was *held* that the son's possession after the conveyance did not affect a subsequent purchaser from the father.

Possession is not such notice as, under the late Registry Act, postpones a registered deed to the prior unregistered title of the party in such possession.

This was a motion for an injunction to restrain proceedings in ejectment. The plaintiff claimed to be

(*a*) Locke v. Furze, L. R. 1 C. P. 441; Robinson v. Harman, 1 Ex. 855; Engell v. Fitch, Law Rep. 3 Q. B. 334.

entitled to lot 15, in the 4th concession of the township of Elzevir, under a family arrangement made in 1860, whereby in consideration of an assignment by his father (who was the original locatee), of his interest in the lot, he agreed to support the family. The bill alleged that the agreement made at that time had been destroyed without notice to the plaintiff, and that a fictitious transfer of the locatee's interest had been obtained, and registered in the Crown Lands Department, by a brother of the plaintiff; that subsequent assignments were made, and in 1867 a patent issued in favour of one *Farley*, who, in 1869, conveyed to the plaintiff's brother, *Gabriel Sherboneau*, who, on the same day, conveyed to the defendant. The defendant alleged that he had no notice of the fictitious transfer, and proved by two witnesses that the locatee had made the transfer which had been lodged in the Crown Lands office, and on which the patent had issued. He claimed to be a purchaser for value without notice, and set up that his title was a registered one under the Registry Act.

Mr. *Crickmore*, for the motion, relied upon *Holmes Powell* (*a*).

Mr. *Hodgins*, contra, contra, referred to *Elsey* v. *Lutyens* (*b*). Registry Act (1868), ss. 67, 68.

VanKoughnet, C.—On hearing read the affidavits I find no evidence of notice to the defendant *Jeffs*, except that notice which arises from possession of the plaintiff. This possession, however, was not an exclusive possession, but one shared with his father who had been in possession, and the recognised owner of the land for thirty years. The plaintiff, his son, had lived with him on the place for that time, or from his birth, as had his brothers and sisters. Judgment.

(*a*) 8 DeG. M. & G. 572. (*b*) 8 Hare, 159.

1869.

Sherbonneau v. Jeffs.

There does not seem to have been any such change of possession as would have warned an intending purchaser to inquire what interest the plaintiff might have acquired from his father by any agreement between them.

But, independently of this, I think the question of notice is governed by the 67th clause of the last Registry Act (1868). That Act requires "*actual*" notice. It is not always easy to distinguish between actual notice, and what is called constructive notice. Mr. *Story*, in section 399, of his treatise on Equity Jurisprudence, says, "Notice may be either actual and positive, or constructive and implied. Actual notice requires no definition, for in that case knowledge of the fact is brought directly home to the party." Now the mere fact of possession by a claimant is not such "actual" notice, in my opinion, as the Legislature meant; and I think we must not fritter away their meaning by mere subtleties of construction or doctrine .The notice must be express and direct, and not arising out of circumstances or facts merely, which should put a party on inquiry. I am of opinion, therefore, that there is no such notice shewn as could affect the defendant, the title being a registered one, and the transaction having taken place since the passing of the Act.

Judgment.

Moreover, the patent had issued but a short time before the defendant *Jeffs* had purchased, and everything in the Crown Lands Department appeared regular. The transaction between the plaintiff and his father took place years before. It would be absurd to require a patentee of Crown lands in this vast territory to inspect a lot of land, the title to which was in the Crown, and the sale or location of which, with mesne assignments, if there were any, appeared to be regular. The plaintiff claiming the benefit of the patent cannot, in the case as constituted, obtain relief against the purchaser without

notice on the ground that the patent issued improperly. His only course would be to induce the Attorney General to file an information to rescind it. 1869. Sherboneau v. Jeffs.

The motion will therefore be refused.

COCKBURN v. JOHNSTON.

Accommodation indorsers—Contribution.

Where two persons indorse a note for the accommodation of the maker, and the second indorser knows when he indorses that the first indorser is, like himself, an accommodation indorser, he must share equally the loss occasioned by the maker's default.

Examination of witnesses and hearing at Cornwall.

Mr. *J. Bethune*, for the plaintiff.

Mr. *J. McLennan* and Mr. *D. B. McLennan*, for the defendant.

VANKOUGHNET, C.—*Primâ facie*, the first indorser is liable to the second. It may be shewn, however, that both indorsed as sureties for the maker; and if this be the simple case, then I apprehend that each must contribute his proportion of the liability. Judgment.

Here it is shewn for the plaintiff, that he became the first indorser on the note of *Grey* the maker: that *Grey* took the note with the plaintiff's name on it to the defendant, who then indorsed it: that *Grey* told each indorser that he was obtaining his name to the note to enable him to obtain money on the paper from one *Anderson*, and that each, on this representation, and at *Grey's* request, indorsed it: that when this note fell due, or rather six days before it fell due, a fresh note

1869.

Cockburn v. Johnston.

for the same amount, dated the 15th May, was prepared and signed by *Grey*, and the same parties as indorsers, either with the intention of renewing the note about to mature, or to raise money on it with which to retire that note: that on this occasion a mortgage was executed on real estate by *Grey* to cover this new note, with a proviso for payment at the time the note would fall due, viz., in one year—the same length of time the prior note had to run—that defendant wished and asked for additional security which does not appear to have been furnished: that both defendant and plaintiff executed this mortgage as mortgagees: that this note, intended to be used, never was so used, (and I suppose because the maker could not turn it to account either with the holder of the outstanding note, or by raising money on it): that the note falling due on the 21st May, 1862, was put in suit in June following: that the maker and indorser defended that action, each pleading satisfaction and payment: that plaintiff's goods were seized by the Sheriff under the judgment and execution in that action, and that plaintiff paid the amount by instalments;—the defendant contributing nothing. On this case, it seems to me that the plaintiff is entitled to succeed.

Judgment.

Then, has the defendant displaced this case? The only evidence which he offers is that of admissions made by plaintiff, that defendant through his influence indorsed the note, and that defendant would not suffer by it. The witnesses say, that in conversation with them severally, at different times, and while his goods were under execution, plaintiff said that it was through his influence defendant indorsed the note. Mr. or Captain *George Johnson*, in stating this, goes on to add that plaintiff and defendant had great influence, the one with the other. Now this probably explains what these witnesses, ignorant men, state in attributing to plaintiff the use of the word "influence," viz.: that it implied or meant rather confidence; and no more than this that,

1869.

Cockburn v. Johnston.

defendant, having every confidence in plaintiff, his judgment and prudence, was induced to sign or indorse the paper on seeing plaintiff's name on it, believing that plaintiff would not have made himself subject to a liability if he had not felt quite secure in doing so. This interpretation is also supported by the evidence of *Grey* as to the manner in which defendant's indorsation was procured. But give the word "influence" its widest meaning; this is fully satisfied by finding that plaintiff induced defendant to become a co-surety with himself— and it by no means implies that plaintiff solicited defendant to put his name on the paper on the understanding, or even expectation, that plaintiff was to bear the whole loss, and defendant be freed from a share of it. It would not be fair, in view of the common liability which each assumed by the act of indorsing for the accommodation of the maker,—to give it this signification, when a far less comprehensive one will exhaust the term employed. The only evidence which at all tends to make out such a case of solicitation and promise is the remark attributed to plaintiff, that the defendant would not be a sufferer. But this was after execution issued and in course of levy, and could not of itself deprive the plaintiff of any pre-existing right to contribution, and it is no where stated that plaintiff admitted or said that he had promised to save defendant harmless. It may have meant no more than this, that plaintiff would pay in the first instance (and he appears to have been given easy terms of payment), and that no loss would fall on defendant, as the security taken from *Grey* would protect them both; though, as stated, that security has since become of little value, the buildings on the premises having been burned down. There is also the want of any precise evidence as to the defendant having been called upon by plaintiff to contribute his quota, though *John A. Cockburn* does say that defendant was called upon by plaintiff to pay; and another witness, *McLean*, swears

Judgment.

1869.

Cockburn v. Johnston.

that in the summer of 1863, while walking and conversing with defendant, and seeing plaintiff and his solicitor in this suit near by, defendant remarked "I should not wonder if they were not going to make me pay the half of *Grey's* note." On the whole I do not think the defendant's evidence sufficient to destroy the case made by plaintiff, which establishes in him the clear equitable right to contribution—that is one-half of the amount which the plaintiff has been compelled to pay—and I decree accordingly with costs. The defendant, by paying his half of the original liability, might have avoided the subsequent costs and expenses, at least as against himself; but he aided in occasioning these by an untrue defence at law.

Re Eves.

Maintenance under the statute.

Maintenance under the statute can only be ordered where the infant is under twelve years old and is transferred by the court to the mother's custody.

Mr. *Hoskin* moved on petition for an order that her children might be left in her custody, and directing that her husband, the father of the children, should pay a sum for their support and maintenance.

Mr. *G. Murray*, contra.

Judgment.

VanKoughnet, C.—I do not think I have any jurisdiction, as the children are in the custody of the mother; and I cannot order payment of maintenance, as it is only in the case of a child transferred to the care of the mother, and under twelve years of age, that this can be done.

1869.

AIKINS v. PIPER.

Use of partnership name—Injunction.

Hiram Piper and *Noah Piper* carried on business under the name of *Hiram Piper & Brother*. They afterwards dissolved partnership, and each carried on like business in his own name. Subsequently *Hiram* assigned his business to the plaintiff, with authority to carry it on in *Hiram's* name, and then two sons of *Noah Piper* carried on a similar business next door, under the firm of *H. Piper & Co.* An injunction to restrain the use of that name was refused.

This was a motion for an injunction to restrain the defendants from using the name of *H. Piper & Co.*, in carrying on their business, on the grounds stated in the head-note and judgment.

One of the defendants had filed a demurrer to the bill for want of equity, which was argued at the same time.

Mr. *Roaf*, Q.C., for the plaintiff.

Mr. *J. A. Boyd*, contra.

Williams v. *Osborne* (*a*), *Banks* v. *Gibson* (*b*), *Churton* v. *Douglas* (*c*), *Ainsworth* v. *Walmsley* (*d*), *Burgess* v. *Burgess* (*e*), *Harper* v. *Pearson* (*f*), *Edyington* v. *Edyington* (*g*), and *Kerr* on Injunctions, page 477, were referred to.

VANKOUGHNET, C.—The plaintiff is carrying on business under the name of *Hiram Piper*, who assigned and sold to her the business which, under that, his own proper name, he had theretofore carried on. *Hiram Piper* had at one time, in conjunction with Judgment.

(*a*) 13 L. T. N. S. 498. (*b*) 34 Beav. 566.
(*c*) Johnson, 174. (*d*) L. R. 1 Eq. at p. 525.
(*e*) 3 D. M. & G. 896. (*f*) 3 L. T. N. S. 547.
(*g*) 11 L. T. N. S. 299.

1869.

Aikins v. Piper.

his brother *Noah*, carried on business in the same premises under the name *Hiram Piper & Brother*. They dissolved their co-partnery: and each then carried on a similar business in his own name; *Hiram Piper* remaining in possession of the old premises. The old name or the good-will of the business does not seem to have been disposed of. Each of the former co-partners was therefore entitled to use it. Recently, two sons of *Noah* have commenced a similar business in a building next south of the plaintiff's place of business on Yonge Street, under the name of *H. Piper & Co.*; a name never before used here in such a business. The evidence establishes, that this was not done with any fraudulent design by the defendants. The two shops are totally distinct in appearance. *H. Piper & Co.*, is a very distinct style from that of *Hiram Piper*, and the defendants are entitled to describe themselves truly. *Henry* and *Edward Piper* are the co-partners. Why should I compel them to call themselves *Henry Piper & Co.*, when *H. Piper & Co.*, as correctly designates them? They have not assumed an incorrect or false title, and I cannot interfere.

Judgment.

As to the demurrer of *Henry Piper*. The bill is vaguely stated. It charges the defendants, or some or one of them with having rented a shop. This mode of charging a wrongful act against several would not do; but the bill charges all of them with having fitted up the outside of the shop so as to resemble plaintiff's; and the 9th, 10th, and 11th paragraphs of the bill charge all the defendants with acts sufficiently wrongful to sustain an equity.

I overrule the demurrer, with leave to answer on payment of costs.

1869.

ELLIS v. DELLABOUGH.

Mortgage—Purchase for mortgagee under power of sale

Where a sale took place under a power of sale in a mortgage, and the clerk of the mortgagee's attorney became the purchaser but paid nothing, notwithstanding which the mortgagee conveyed the property to him, and he immediately reconveyed to the mortgagee:

Held, that the sale was invalid, and the property still redeemable, although the mortgagor immediately after the sale accepted a lease of the property.

Examination and hearing at Brockville.

Mr. *Clarke*, for the plaintiff.

Mr. *J. McLennan*, for the defendant.

VANKOUGHNET, C.—I think the sale cannot stand. Either the defendant himself bought through his attorney who was conducting the sale, or his attorney bought. Neither could make such a purchase. The introduction of *Shuttleworth*, the attorney's clerk, was a mere sham. The attorney himself says that *Shuttleworth* thought he was bidding for his master. *Shuttleworth* never paid anything. Immediately or shortly after the sale, it was understood or arranged that defendant should convey to *Shuttleworth*, and *Shuttleworth* re-convey to him. *Shuttleworth* is in court, and is not called by defendant. I do not think that plaintiff taking a lease, as he did, immediately after the sale, bars his present complaint. He did not know then, so far as we see, that *Shuttleworth* was not a *bona fide* purchaser, and he was most probably ignorant of the rule of the Court which prevents the vendor or his solicitor buying. Judgment.

The defendant has improperly resisted the plaintiff's demand to redeem, and his answer is not sustained. There must be a decree for the plaintiff allowing redemption with costs up to and inclusive of the hearing, and

1869. Ellis v. Dellabough. if the tender made on the 20th November last was then sufficient, the defendant is to pay the subsequent costs. If not sufficient, then plaintiff to pay the costs subsequent to decree.

Reference to Master to take the account and tax costs.

SPENCE v. CLEMOW.

Taxation of costs.

Where there were two suits by a solicitor for the same object, the master refused in one of the two suits without a special order to tax as between party and party, more than part of the costs, and it appearing that, as between solicitor and client no part of that bill could have been recovered, the court refused to interfere with the taxation.

Statement. This was an appeal by the plaintiff from the report of the Master at Ottawa, on the ground that he had disallowed the costs of one suit, although the decree directed the taxation of them.

Mr. *J. C. Hamilton*, for the appeal, contended that the Master was bound under the terms of the decree to have allowed the plaintiff his costs; as the Master could not tell whether both suits were in respect of the same thing, and referred to *McLeod* v. *Miller* (*a*).

Mr. *Moss*, contra, objected that the plaintiff, if dissatisfied with the ruling of the Master, should have come before the court by way of petition, complaining of the mode of taxation—referring to *Snelling* and *Jones's* Orders, page 209. In any event, however, the

(*a*) 12 Gr. 194.

Master was right in having disallowed the costs; and cited *In re Atkinson and Pegley* (*a*) *Jarvis* v. *The Great Western Railway Co.* (*b*).

1869.

Spence v. Clemow.

VanKoughnet, C.—I think the master had a discretion to disallow so much as he did of the costs of one of the suits. It is clear that as between the plaintiff's solicitor and his client, the master under the ordinary order for taxation might have disallowed the whole of the costs of the second suit, and the solicitor would thus have lost them. If he could not recover them against his own client, why should he have them against the opposite party? The master has not disallowed all the costs of the second suit. He has allowed a portion of them, though but a small portion (*c*).

Judgment

Refused with costs.

Lawrason v. Buckley.

Practice—Amendment after decree.

After decree and report in a foreclosure suit, the Court refused to amend a mistake in the description of the property in the bill.

Mr. *Roaf*, Q.C., for the plaintiffs, moved on petition for an order to amend the bill in this cause, by inserting therein the proper description of the mortgage premises. It appeared that the decree had been issued and the Master's report in pursuance thereof made in the cause.

Mr. *F. T. Jones*, for the defendants.

(*a*) 1 Ch. Cham. R. 187, 193. (*b*) 8 U. C. C. P. 280.
(*c*) Daniels Chy. Pr. p. 1334.

1869.

Lawrason v. Buckley.

VANKOUGHNET, C.—This petition was presented some time ago to amend the description of premises in the bill after decree and master's report. I stated at the time that I did not see how it could be done but was told that my brother *Spragge*, had made an order to amend in a similar case. I have seen him on the subject and he does not recollect the case. In *Barrett* v. *Gardner* (*a*), I ruled that it could not be done, and, following that case, I must refuse the prayer of this petition.

MARTIN V. MARTIN. [IN APPEAL.*]

Will—Compos mentis.

A will was executed by the testator on his death bed: he was *compos mentis* at the time, but was so extremely weak in body and mind that his directions were given at intervals, and there was considerable difficulty in understanding them. No fraud, however, was pretended, and the court was satisfied that the will was in accordance with the testator's wishes, and contained all that was understood of them, though probably not all the testator desired to express; and was understood by the testator at the time of executing it.

Held, [affirming the decree of the court below] that the will was valid.

Statement.

This was an appeal by the plaintiffs from the decree of Vice-Chancellor *Mowat* as reported ante volume xii. page 500, for the following amongst other reasons:—That the evidence shews that the deceased was not capable of understanding, and that he did not understand the contents of the alleged testamentary paper; that even if he was capable of understanding portions of the will, yet he was wholly incompetent to understand the same, as a whole, and he did not fully comprehend its

(*a*) 1 Chy. Cham. Rep. 344.

* PRESENT.—Draper, C.J., VanKoughnet, C., Richards, C.J. C.P., Spragge, V.C., Morrison, A. Wilson and J. Wilson, JJ., and Mowat, V.C.

meaning, and the same is not in fact the will of the deceased; that important and material additions and variations, (as appears in the evidence,) were intended by the deceased to be contained in such testamentary paper, which would have had the effect of materially changing the contents of, and results from the said testamentary paper, and therefore, even if the deceased was capable of understanding the same, paragraph by paragraph, yet not being able to remember or comprehend the same as a whole, he was unable, at the conclusion, to say whether or not those material additions and variations were embraced in the written testamentary paper, but, in fact, he thought that they were embraced therein, and he would not have signed the same if he had been told or had known that they were not embraced in the said testamentary paper; that the deceased intended to give instructions for those variations and additions, and he did, in fact, give some of such instructions, but the instructions were given in such a way that they could not be wholly understood, and they were not inserted in the will; and that the said testamentary paper does not contain the true intentions of the testator, even as to those matters which are contained therein.

Statement.

In support of the decree it was alleged on behalf of the infant *George Martin*, that the plaintiffs had failed to establish as against the respondent, such a case as would have justified the Court of Chancery in making a decree against him, or in declaring the will of the testator, in the pleadings mentioned, to be void as regards the interests of the respondent thereunder; and that therefore the said Court of Chancery could have made no other just decree in the premises than the decree which has been made, dismissing the plaintiffs bill.

Mr. *Strong*, Q. C., and Mr. *McMichael*, for the appellants.

1869.

Martin v. Martin.

Mr. *Gwynne*, Q. C., for the respondent.

DRAPER, C.J.—I have very little to say, but that I concur in the opinion expressed by the learned Vice Chancellor (*Mowat*) in the court below.

It is to be borne in mind that there is in the case no charge of direct fraud; that it is not asserted as a ground for denying the validity of this instrument as a will that it was set up, or prepared by the party deriving the principal or substantial benefit under its provisions. The devisee, *George*, was an infant of about fifteen years old when the will was made, and exercised no influence whatever, so far as appears, either over the testator or over the person by whom the will was prepared. Nor is he propounding this will in the proper sense of the term. The other children of the testator seek to establish that he died intestate.

Judgment

If a will be propounded under circumstances of suspicion—as where the party propounding is also the party benefited, and himself prepared the instrument, such party must bring forward such evidence as will entirely satisfy the mind of the court that the testator knew and approved of the contents of the instrument (*a*). But there are no such peculiar circumstances of suspicion in this case. The devisee most benefited certainly had no direct instrumentality, either in procuring any will to be made, or in bringing about the devise in his favor. The party who drew up the instrument stands free from any charge or insinuation of improper dealing; probate of the will has been granted, and, as I collect from the dates given, the suit to set it aside and to substitute an intestacy was not thought of until after the death of the testator's widow—whose evidence, it is easy to see from the testimony of the Rev. *R. H. Thornton*, must have been of the highest value to the devisee *George*.

(*a*) See Michell v. Thomas, 12 Jur. 967, 6 Moo. P. C. 137.

1869.

Martin v. Martin.

The petitioners rest their case upon this charge, that the deceased was, at the time of executing the will of which probate has been granted, and from thence until the time of his death, wholly incapable of understanding the contents thereof or of dictating the same—did not dictate it—did not understand it, and it was not, therefore, properly his last will and testament.

The evidence very clearly shews that the matters contained in the will were written by Mr. *Thornton* as being the expression of the wishes and intentions of the testator for the disposition of his property—not *all* that Mr. *Thornton* believed was in the mind of the testator, but "to a considerable extent" what was so. This expression was beyond doubt obtained with difficulty—under the impediment presented by weakened faculties of mind, as well as weakened physical powers, caused as to both by a disease of some continuance, and by the near approach of death. The expression was far from continuous; not one act the result of unbroken "continuity and concentration of thought," (as the medical attendant expressed it) first deliberately conceived, and then deliberately dictated; but uttered at intervals, when the mind (which wearied and exhausted by the previous effort) had been recalled to the point at which he had broken off, and thus by slow degrees the writer was enabled to gather and to put into writing the disposition of his property by the dying man.

Judgment.

No suspicion is cast, or attempted to be cast, as I have already incidentally remarked, on the character or conduct of Mr. *Thornton* in the transaction. It does not appear that he had any preconceived notions of what the testator desired or intended. He seems to have anxiously endeavoured to understand his wishes, and to have done his best to express the intention of the testator as he gathered and understood it.

1869.

Martin v. Martin.

The evidence does not shew positively whether the deceased had or had not prior to his illness settled in his own mind in what manner he would dispose of his property, though the petition asserts that he had frequently before his illness expressed a different intention from that which the will contains; but there is no proof of this. Mr. *Thornton* had been told by the wife that the arrangement had been settled; but this is all, and is not evidence of the fact, nor, if it were, that those arrangements were followed in the will.

Indirectly, the charge made that the testator did not dictate, and was incapable of understanding, or of dictating the contents of the will, is a charge of fraudulent advantage taken of his condition to impose upon him, by obtaining his signature to a disposal of his property;—which the alleged incapacity rendered it beyond his power, whatever his intention at some other time may have been, to make at that time.

Judgment.

There are two witnesses only whose testimony need be considered for the purpose of determining whether this charge is sustained, Dr. *McGill's*, and Mr. *Thornton's*.

The first states a belief that, during the greater part of his illness, the deceased was incapable of attending to any business that required continuity or concentration of thought. That if the arrangements had all been made before he was taken ill, he was (in the witness's opinion) *capable of assenting to the will afterwards*, that if the testator had not arranged previously, he could not have dictated the terms of the will on Sunday morning, but he could have understood what was written down; and if his previous arrangements were put in writing, clearly he could have understood and given his assent to them. All this is no more than the opinion of the medical attendant—of great value to aid in coming to a conclusion, but in no respect conclusive; except that

1869.

Martin v. Martin.

sub modo—hypothetically put—it admits the existence of a disposing mind and memory.

The second establishes, first what the other evidence confirms, a failing mind in the dying man; an incapacity to fix his attention except at intervals—a difficulty of communicating his wishes; but it appears to me also to afford proof that the testator had a purpose in view, and that to accomplish one object that was in his mind he thought (rightly or wrongly is unimportant) that an entail was necessary—an entail being mentioned as a means of effecting such object. And thus independently of what Mrs. *Martin* stated, I find proof that he had meditated on the disposition of his property, and had in his mind some fixed conclusion with regard to it.

Judgment.

I am much impressed with the observations of the Master of the Rolls in *Swinfen* v. *Swinfen*. "It would certainly be a new fact, if it could be established, that in advanced age, or in any other stage of disease, the mind of the sufferer is incompetent to do a thing one day because it failed to accomplish it the preceding day. * * * I know not that for the mere testing the power of a decaying intellect to do a particular act, a medical man is more competent than another to form a correct opinion." And on the whole I prefer in this case to rest my conclusion on the evidence of Mr. *Thornton* when he says "the deceased was of sound mind, memory, and understanding, so far as a simple question was concerned. He gave me a good many of the items himself, without any suggestion. At other times Mrs. *Martin* suggested the subject and he endeavoured to say what he wished done. For a single sentence he would express himself distinctly: he was *compos mentis*. I have no doubt he had at the time an intention of making a will. He sometimes was in doubt what to say, and did not define it. I did not write down what I did not understand. * * * It was

1869.

Martin v. Martin.

painful for me to draw the will because of my doubts of his meaning. He was incapable of expressing two sentences consecutively; but being allowed to rest a while, he would then commence afresh. I am not satisfied that I gathered his meaning on all the points of the will."

There is not the slightest trace of any influence being exercised over the testator, unless on the part of his wife, and that appears to me to be much more distinctly attributable to the desire that he should not die intestate, than to bring about any particular disposal of the property, further than this, that according to her own statement to Dr. *McGill*, that arrangements of what the will should contain had been made, and she was desirous they should be written down. But this is very far from the influence against which the observations of *Creswell*, J., were directed in the Earl of *Sefton* v. *Hopwood* (*a*).

Judgment.

"It must be an influence depriving the party of the exercise of his judgment and his free action: it must be such an influence as induces you" (the jury) "to think that the will when executed is not the will he desired to execute: that he does not benefit the parties whom he would wish to benefit, but that he is doing that which is not his desire, and therefore not his will."

Assuming that the testator entertained the desire or intention of making some other and additional provisions to his will, but could not express them so as to enable Mr. *Thornton* to understand them with sufficient accuracy to write them down, and that the testator executed the will after hearing it read, as it now appears;—such omission would not upon any principle or authority render the will void. It would be presumed that he was content to acquiesce in the omission rather than that he would make no will.

(*a*) 1 F. & F. 578.

1869.

Martin v. Martin.

The will was in course of preparation for three hours on Saturday. The addition of the formal conclusion, and the execution were deferred until the following, morning, when it was read over to the testator "carefully" by Mr. *Thornton*, and then, as *Hutton Starr*, one of the subscribing witnesses, swears, after signing the will, the testator said "referring to his signing it so badly, * * he would try to do it better next time." Whatever other idea the remark may give rise to, it appears to me a confirmation that he knew what he had just been doing.

Upon the whole case, I feel it impossible to adopt the conclusion that he died intestate.

I might, in fact, condense my conclusion into this: The instrument in question was executed in due form of law. It may not, and judging from the evidence of Mr. *Thornton*, probably does not contain all that was in the mind of the testator—but which found no articulate expression—all that, which, if he had been capable of "continuity and concentration of thought," as when in full health, he would have expressed. He probably would not have died intestate, as is said to have been the case, as to any part of his property. But it is not the less a valid testament because he has not disposed of everything, or because it does not contain everything which at some former time he may have expressed an intention of doing, or which even may have passed across his mind while this instrument was in preparation. But acting upon the evidence of Mr. *Thornton* as trustworthy, I cannot resist the conclusion that the testator did intend what was written, and that he understood it after it was written, and as the correct expression of what he desired might be written. Unless this were so Mr. *Thornton* has written what he did not satifactorily ascertain and believe to be the testator's wish and direction—has acted on the suggestion and representations of

Judgment.

1869.

Martin v. Martin.

others, and has without any sufficient reason or excuse attested and sworn to—not the mere signature of the testator, but that he executed the instrument as his last will and testament.

I think the appeal should be dismissed with costs.

Stephen v. Simpson. [In Appeal.*]

Registry law—Possession.

In 1831, *A.* demised his farm to his widow in fee, and left her in possession. The will was never registered; and shortly after the testator's death his eldest son and heir went into possession with his mother, and so continued until his mother's death in 1854; the son managing the farm, and being reputed owner during this period. After his mother's death he was in sole possession; and in 1862, he executed a mortgage on the property to a person who had no notice of the will or of the widow's title.

Held, [affirming the decree of the court below], that the widow's heirs could not claim the property against the mortgagee. [A. Wilson, J., dissenting].

Statement.

This was an appeal by the defendants from the decree of Vice Chancellor *Spragge*, as reported *ante* Volume XII. page 493.

Mr. *Strong*, Q. C., and Mr. *Roaf*, Q. C., for the appeal, contended that the widow of *John Simpson*, having had actual possession of the premises in question for more than twenty years after her husband's death, had thereby, independently of his will, acquired an absolute title to the said premises, and the same descended to all her children, upon her death, and was indefeasible by any subsequent act of the heir-at-law; that at her

---

* Present.—Draper, C. J., VanKoughnet, C., Richards, C.J. C.P., Spragge, V.C., Morrison, A. Wilson, and J. Wilson, JJ., and Mowat, V.C.

death, and long before the mortgage in question, the widow had by the combined operation of the will and more than twenty years' possession, acquired an indefeasible title to the premises, which thereupon descended to all her children; that after more than twenty years' possession under the will, the widow's title was indefeasible by any subsequent act of the heir-at-law; that notwithstanding the registry laws, the court might and should look at the will as a fact existing and explanatory of the other fact of possession anterior to the giving of the mortgage; and that, though the will may now be void under the registry laws, yet it was not so during the widow's lifetime, and she, having had more than twenty years' lawful possession, before it became void, had thereby acquired a title indefeasible by any subsequent avoidance of the will.

1869.

Stephen v. Simpson.

Mr. *Blake*, Q. C., contra, submitted that the defendant *James Simpson*, and the plaintiff claiming under him, having had actual possession of the premises in question for more than twenty years prior to the bringing of this suit, acquired an absolute title to the said premises; that the will in the pleadings mentioned was fraudulent and void, as against the plaintiff, and being so, cannot in any way or sense be used in aid of the defendants', or in impeachment of the plaintiff's title; that *Margaret Simpson*, in the pleadings named, was not in possession of the premises for twenty years, as against *James Simpson*; that as between the plaintiff on the one hand, and the defendants, other than *James Simpson*, on the other hand, *James Simpson* must be deemed to have been in possession of the premises since his father's death; that *James Simpson*, being the heir-at-law of his father, was, and the plaintiff as his assignee is, entitled to the said premises in fee simple, unless the said will is valid, or unless there has been a possession by the said *Margaret Simpson* which would give her a title under the Statute of Limitations; that the will is

Statement.

1869.

Stephen v. Simpson.

void as against the plaintiff, and there has been no such possession by the said *Margaret Simpson:* therefore the plaintiff is entitled.

DRAPER, C. J.—*John Simpson* died on the 18th September, 1831, seized in fee of the rear half of lot No. 1, and the rear half of lot No. 2, 2nd concession of Elizabethtown, containing about two hundred acres, which land he held by a registered title, and by his will, duly executed to pass real estate, dated 5th March, 1829, he devised the same in fee to his wife *Margaret*, to whom he also bequeathed his personal chattels and estate, after payment of his debts and funeral expenses, making her sole executrix.

At the time of his death *James*, (a defendant) his eldest son and heir-at-law lived on seventy-five acres of land, which his father had conveyed to him, the deed for which was registered. It appears that he had also conveyed to his daughter *Jane Dalton*, and to *Laura Lambeth* (whose connection with the family, if any, is not shewn) some other portions of his lands. The widow *Margaret* and some of her children were, at the time of the testator's death, living in a frame house on the land devised, and *James* on the day after his father's death moved, with his family into the same house, where he and his brother *George* lived with the other inmates, they two working the farm together until *George* removed to the seventy-five acres, which *James* by deed dated 26th December, 1835, conveyed to him. After this *James* alone cultivated the farm, disposing of the produce, &c., and after some time he built a stone house thereon, into which he removed, his mother accompanying him, and the old house was torn down. There is scarcely any evidence as to what became of the personalty left to the widow. One witness says "there was a debt on the place, and the stock or part of it was sold off towards paying the debt. It is probable the cattle and farming

Judgment.

1869.

Stephen v. Simpson.

implements were used in cultivating the land and supporting the family, and that the furniture was treated for the common benefit of the members of it. The widow remained thus living in the new house until her death in September, 1854. *James* continued to occupy the place some time longer, a year, more or less, and from his father's death (and especially after *George* removed), he was the reputed owner, and actual occupant as above stated carrying on the farming, and voting at elections as a freeholder of these premises. One *Daniel H. Shipman*, whose name appears as a subscribing witness to the execution by *Margaret* the devisee, of a memorial of *John Simpson's* will, gives clear evidence that *James* acted as owner after his father's death. *James* himself was examined as a witness, and gave an unwilling and equivocal admission in these words: "I may have always represented myself as the owner of this land." His brother *George* (another defendant) stated to a witness that he got the deed of the seventy-five acres from *James*, and that it was understood *James* was to have the homestead; that a deed from the widow to *James* had been prepared, but that when they went to the registry office, the registrar told them they were making unnecessary expense; if they left it alone it would be as they wanted. It appeared that about the year 1864, a search was made in the registry office, and the will, the memorial of it above referred to, signed by the widow, and dated 28th May, 1834, an unexecuted deed dated May, 1837, purporting to be made by *James Simpson* to his mother, to convey the devised premises to her for life,—and another unexecuted and undated indenture to convey the same land from the widow to *James* were found, not among the registered documents, but in a miscellaneous parcel containing papers belonging to different people.

Judgment.

John Simpson had executed a mortgage dated 5th April, 1824, to *John Shuter*, which was unsatisfied at

1869. Stephen v. Simpson.

the time of his death; and on the 22nd April, 1842, *Shuter* signed the usual statutory certificate of payment and satisfaction thereof, made by *James Simpson*, eldest son and heir-at-law of the mortgagor. *James Simpson* in giving evidence, states that all the receipts for payments were drawn up in the name of the widow; that he paid part, but his brother *George* paid the chief part, and he (*James*) thought by taking up the *Shuter* mortgage, that that would give *him* a title to the land, and that his reason for leaving the seventy-five acres, and removing to the land in question was that he thought it necessary for him to undertake to pay off the mortgage as it covered the homestead, the seventy-five acres, and Mrs. *Lambeth's* land.

On the 22nd November, 1862, *James Simpson* mortgaged the land mentioned in the will to *George Stephen* (the plaintiff) to secure payment of $3136.85, with interest at ten per cent., on 8th November, 1863. The plaintiff files his bill for foreclosure and sale, and praying that the *pretended* will and certain conveyances dependant on its validity may be declared fraudulent and void as against him.

Judgment.

The defendants (except *James Simpson*, against whom the bill has been taken *pro confesso*) set up the will alleging that the devisee was wholly prevented from registering the will by the neglect of the registrar, to whom the will, with a proper memorial thereof, and the necessary affidavit of the execution of such memorial, had been delivered for the purpose of registration, together with his fees, but who wholly neglected to register it, and concealed from the devisee that it had not been registered.

The same defendants also set up that after the death of *John Simpson*, his widow held and occupied the premises to her own use for upwards of twenty years;

that she thereby acquired the right and title, and on her death intestate, such title vested in all her five children, and that *James* consequently had only a right to an undivided fifth part.

1869.

Stephen v. Simpson.

Neither the statement in the answer, nor the evidence sustain the unregistered will against the prior registered conveyance of the heir-at-law. The statutory provisions are plain: 1st. That every "devise by will" of lands mentioned or contained in any registered memorial, that shall be made and published after the registering of such memorial shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered. 2nd. That registry of the memorial of a will within six months after the death of the devisor, shall be as valid against subsequent purchasers as if it had been registered immediately after the devisor's death. 3rd. That if the devisee by reason of the contesting the will or other inevitable difficulty without his or her wilful neglect or default, shall be disabled to exhibit a memorial for registry within the time limited, then the registry of the memorial within six months next after the attainment of the will or a probate or removal of the impediment shall be a sufficient registry. Here, taking the most favorable view of the facts for the defendants, the executrix appears to have had the will at once, though she did not execute a memorial of it until between two and three years after her husband's death. There never was, for all that appears, any impediment at any time disabling or hindering her from exhibiting a memorial, nor has there been any since her death. The case made by the answer charges neglect and concealment on the registrar's part. If that had been proved, I by no means wish to intimate that the devisee could lie by, without so much as inquiring whether the memorial had been registered, but it is unnecessary to decide anything upon that question, as the evidence, in my judgment, establishes that

Judgment.

1869.

Stephen v. Simpson.

the will was deliberately and designedly left unregistered with the intention of letting a different disposition of the property take effect, namely, that *James*, the heir-at-law, should convey his seventy-five acres to his brother *George*; that he should take the estate as eldest son and heir, as the law of inheritance then stood, and as for his own sake he must pay off the mortgage made by his father, he would thereby relieve from that incumbrance, the lands included in it which were owned by other members of his family.

As to possession by the widow, two questions have been raised; first, whether apart from the will the evidence establishes that she and not *James* was the occupant, the person in possession as apparent owner, or if not, whether, as she lived on the premises from the time of her husband's death, till her own, upwards of twenty years, and was the sole devisee of the land, the law does not attribute her possession to her title under the will, which, as against the heir-at-law, was a good title, although no memorial had been registered.

Judgment.

Putting the will aside, I have no hesitation, upon the evidence, in holding that *James* had possession, claiming as heir, possibly not on his moving in after his father's death, but at least as soon as it was agreed among them that the will should not be registered, but that he should take as by descent. In other words, I think the defendants do not establish a right in their mother acquired by the naked fact of twenty years' possession. If she had no title to give a character to her living on the premises, so that her so living should be deemed an enjoyment by virtue of her title, I think the proof is that *James* and not his mother was the person in possession. As to the other alternative, we are not dealing with the heir, but with a mortgagee for value, who obtained his security from the heir. As against him, the unregistered will must be adjudged fraudulent and

void, and that not merely as I understand the law from the time he acquired his interest, but *ab initio* otherwise the devisee of the unregistered will might in various ways elude the provision of the statute, and in this view I think the appeal should be dismissed. 1869. Stephen v. Simpson.

VANKOUGHNET, C.—I think my brother *Spragge's* decree in this case right.

The whole question is whether or not the widow can set up, as against the assignee of the heir, for value, the will of the testator, for the purpose of establishing by it that her possession of the premises, which, standing by itself, would not be such an exclusive possession as to give her a title under the Statute of Limitations, must, nevertheless, be attributed to her legal title under the will, and so give her, *as legal owner*, a right to claim that she had exclusive possession for twenty years, and can therefore claim the benefit of the statute. The proposition seems self-destructive. The widow had no exclusive possession of the premises after her husband's death. If any one had it, it was the son, the heir; he exercised sole control, though his mother lived on the place. The most that can be said in favor of the mother is that they shared the possession between them, and that neither acquired title as against the heir by possession merely. If either did it was certainly the son. Putting the will aside, the mother could not at any time during her life have ejected the heir, nor, of course, his assignee. Admitting that the heir had not acquired title as against her by adverse possession, she could of course have ejected him under the will in her favor. But it is admitted that she cannot set up this will against the assignee for value of the heir, because as against him it is void for want of registration. It is argued, however, that she may use it to establish in herself the possession of the premises or explain her possession. Suppose the land had been vacant,—a wild lot for Judgment.

1869.

Stephen v. Simpson.

instance,—and the heir had sold it more than twenty years after the testator's death, could the widow set up the will in order to shew that possession was to be attributed to her intermediate legal title; and that therefore, though she could not rely upon the will as against the assignee of the heir, yet she might use it incidentally to create by means of it a possessory title which without the will could not exist? Would not this be using the will as the foundation of, or, at all events, a necessary part of the evidence on which to sustain such a title? and does not the statute say that such a will shall be adjudged fraudulent and void as against a subsequent purchaser? How then can the will be set up in the case proposed to make out a title which without it must fail? Is there any difference in the present case? There is no exclusive possession by the widow, none such as by or of itself, any more than in the case of a vacant possession, would give her a right or title under the Statute of Limitations. To get over this difficulty she says all this time I was legal owner under the will, and therefore the possession of the premises not being adverse to me must be treated as mine, and I therefore gain a twenty years' title. Look at the absurdity of the thing. A twenty years' possession under the statute must be an actual possession, such as the widow had not here. Feeling this, those claiming under her say; Oh, but she was, while in possession, legal owner, and therefore the possession must be hers. That is, possession *per se* won't save us, but possession under a legal title which is void as against the assignee of the heir will. Two things are confounded here: a title may be acquired by possession so as to shut out the legal ownership; the legal ownership may be kept alive by shewing a possession consistent with it within twenty years, though it be not an exclusive possession. View it in any way you will, the attempt is made to make out a title (which cannot be made out otherwise) by the use of a void will. I do not see how this can be accomplished.

Judgment.

1869.

Stephen v. Simpson.

A. WILSON, J.—When *John Martin* the elder died in 1831, his widow was, by his will, unquestionably entitled to the possession of the land as devisee.

No conveyance of any kind was made either by the heir-at-law of the testator or by the widow during her life. She died in September, 1854.

The heir-at-law and widow lived together on the land from a period beginning shortly after the death of the testator until her death. During all that time the legal title was in her, and the possession would be referable to her title.

Then, from her death in 1854, until the 22nd November, 1862, the heir-at-law of the testator, and the heir-at-law of the widow also, his mother, who died intestate, still continued in occupation of the land; and on this latter day he made a mortgage in fee to the plaintiff, *George Stephen*, which mortgage was registered on the 24th of the same month. Judgment.

This title having been a registered title, and the will not being registered, was cut out of priority by reason of the prior registration of this mortgage made by the heir-at-law.

If all this had happened within twenty years after the testator's death, and there had been no question of any kind arising under the Statute of Limitations, the mortgagee would, by operation of the registry law, have had a preferable title to the devisee or to any one claiming under her.

But the mortgage was not made till 1862, a period of thirty-one years after the testator's death, during twenty-three years of which time the widow as devisee, or being devisee, was in possession in fact, and during

1869.

Stephen v. Simpson.

that time, or nearly all that time, the heir-at-law was in possession also in some way or character, and during the eight years after her death, and until making the mortgage in 1862, and from that time forward he has also been in possession. As the widow and devisee died intestate, all of her children claim the land under her equally as her heirs-at-law; and they assert her title, firstly, under the will and, secondly, by length of possession: for they say that all the twenty-three years she lived on the land, after her husband's death, she held under the devise—which was an indefeasible title then. And if that be defeated by anything that has since happened as by the prior registration of the mortgage of 1862, made by the heir-at-law of the testator, she and those claiming under her can still claim by length of possession.

Judgment.

This, I presume, is a correct view to take of her rights. She had a right to the possession by the will, and the best and only legal right by reason of it, and while that clear and unquestionable right continued, a new title by length of possession arose to her also, which was perfected by a twenty years' possession.

She had in her life time, then, a paper title and a prescriptive one. There is no reason why she might not have relied on either title or on both titles, and such titles as she had, descended by her intestacy to her heirs-at-law, and in like manner they could rely on either or on both of the titles.

If, therefore, by any means, after her death, as by the prior registration of the mortgage of 1862, made by the heir-at-law of the testator, the will was defeated of its further operative power as a title, the heirs of the widow could still depend upon the possessory title; and this is in fact what they now do.

1869.

Stephen v. Simpson.

Their case is established. The question is, whether the plaintiff, the mortgagee of the heir-at-law of the testator, having avoided the will by his prior registration, can now set up a title in the heir-at-law, under whom he claims as against the widow and devisee? She was devisee and had title, as before stated, and was in possession. But the heir-at-law was also as a fact in possession of the land too, in some capacity or upon some arrangement with the widow. Does it appear, then, there was any change of possession by the widow, or is there any evidence from which it may fairly be inferred that she gave up the possession to her son, the heir-at-law of the testator? She certainly never left the occupation of the place, nor did she ever pay rent, nor attorn, nor make any specific acknowledgment to that effect.

James, the heir-at-law of the testator, worked and managed the land during his mother's life, and he built a stone house and barn on it, getting the materials off the place, and he took the proceeds of the farm, merely maintaining her.

Judgment.

I do not see any evidence that the mother and devisee ever gave up her right or title or possession, but the contrary.

1. All the receipts for payments made on Mr. *Shuter's* mortgage were drawn up by Sir *Daniel Jones* in the mother's name, though *James*, but chiefly *George*, made the payments.

2. *James's* wife said:—"The old lady was mistress, she called it her house; she considered the house as hers, and I so considered it; she sometimes objected to our being there; she turned us out of the house once; we stayed out a while and then went in again. * * I did not suppose the land was ours; there was an under-

1869. Stephen v. Simpson.

standing spoken of that *George* was to have the seventy-five acres and we were to have the other land; the old lady never spoke of it, but spoke of giving it to my eldest son."

Charles Simpson says:—"The old woman has told me the place was hers."

That *James Simpson* believed the land was his is clear, for he thought by taking the discharge of the mortgage from Mr. *Shuter* to himself, *as heir-at-law*, and registering it, that he had thereby done away with the will. And it is also clear that when he gave *George* the seventy-five acres it was on some understanding that he was to have the land in question as his share. He always represented himself as the owner of it, and he offered to give a deed of it and £100 to the plaintiff if he would release him from his demand—this was after the mortgage was given.

Judgment.

Mr. *Senkler's* evidence is good as against *George*, but I don't see that it is evidence against *James*. And there is no evidence shewing that the old lady or even *James* ever assented to the will not being registered to make way for *James's* claim, or to the draft deed being prepared from her to *James*, or of the draft deed from *James* to her back for life.

These matters certainly shew that the old lady had the title, and meant to have one *for her life* at any rate, and I see nothing to satisfy me that she ever gave up her right to the land.

In one case the person setting up a title by limitation, among other acts which were construed against him, returned himself, while assessor for one year, as *occupier*, and the true owner as proprietor; and it was held the jury might from that fact assume the defendant had

1869.

Stephen v. Simpson.

a rightful tenancy of some sort, and as none other appeared that they might assume it to have been a tenancy at will continuing at that time: *Turner* v. *Doe d Bennett* (*a*), *Millett* v. *Millett* (*b*), *Dayman* .v *Moore* (*c*), *Groves* v. *Groves* (*d*), *Baker* v. *Coombes* (*e*), *Lansdell* v. *Gower* (*f*).

In *Doe dem Dayman* v. *Moore*, it appeared that a person and his wife had been in possession of land from the year 1801 not adversely; that the true owner, in 1837, dying within the five years after the passing of the 3 & 4 William IV., chapter 27, devised the land to the occupant's wife for life, remainder to a stranger in fee; that the husband and his wife continued their possession till 1843, when the wife died, and the husband alone then continued the possession till 1844, when the remainder man brought ejectment. Held, as no entry or action was made or brought within the above period of five years, the possession of the occupant became at the end of that period complete by the statute, and the devise to the wife before the expiration of that time, and the continued occupancy of the husband and wife thereafter, and even the taking of an annuity under the same will charged on other land in favor of the wife, did not change the former tenancy or constitute a holding under the will as devisee; though if any other person than the wife had been in possession after the devise for the residue of the five years she could have brought an action and turned him out of possession. But the court said: "It does not follow that she must be taken to have entered as against her own husband, and to have clothed herself with the life estate under the will."

Judgment.

In *Doe dem Groves* v. *Groves* the facts were that

(*a*) 9 M. & W. 643, Ex. Ch.
(*b*) 11 Q. B. 1036.
(*c*) 9 Q. B. 555.
(*d*) 10 Q. B. 486.
(*e*) 9 C. B. 714.
(*f*) 17 Q. B. 589.

1869.

Stephen v. Simpson.

W. H. was seised in fee, and died in 1798, leaving a widow and son, a minor above fourteen years of age. The widow, with whom the son lived, continued to occupy. The same year the widow married the defendant, and he went into occupation. In 1805 the son left the property, but occasionally resided there for two or three weeks at a time with the defendant and his wife. The wife died in 1841. In 1842 the son mortgaged the property in fee to the lessor of the plaintiff for money which was raised on behalf of, and which was paid to, the defendant, the defendant himself being present at the execution of the deed and privy to its contents. Held, the jury were warranted in presuming that the defendant occupied as tenant at will to the son, though the son never interfered in the holding, occupation, use, letting or management of the property, nor in the receipt of the rents, nor had the defendant ever paid him any rents or made any acknowledgment. Lord *Denman*, C. J., said:—It is merely a question which, of two suppositions, [*i. e.*, whether the defendant was or was not tenant at will to the son], is the most consistent with the facts in evidence.

Judgment.

Patteson, J., said:—"I do not say that a party having a legal title to an estate conveys it away by mere equivocal acts, which may amount to an admission of title in another; but here the title is only by limitation, and his acts may well amount to an admission that during the period in question he was in fact tenant to another."

Erle, J., said:—"The lessor of the plaintiff is clearly entitled, and his title was recognized in the plainest way by the defendant."

These cases shew nothing whatever that can be relied on, as against the widow and devisee to impeach her title, or to raise fairly any question whether her posses-

sion or the character of her possession was altered; and, I think, they shew also nothing whatever that can properly be urged against her heirs-at-law either. 1869. Stephen v. Simpson

Is this such a title that if *James*, the eldest son, had filed a bill for specific performance against the plaintiff as vendee the court would have made a decree? Clearly not. Or if the plaintiff, with a knowledge of the real state of the title, had so contracted, could he have recovered more than nominal damages, excluding *James's* part, in respect of the non-conveyance of the other parts?

It may be conceded that the will, whenever the mortgage was registered in 1862, became fraudulent and void, not absolutely, but as "against the plaintiff, who is a subsequent mortgagee for valuable consideration." *Fury* v. *Smith*(*a*); *Carlisle* v. *Whaley* (*b*). But the title of the devisee, which was defeasible at any time by the heir-at-law within the twenty years, became absolute by possession at the end of that time, so that she could have held against the registered purchaser of the heir after the twenty years by reason of her possessory title, and that possessory title is a valid and available title to those who are now claiming under her, unless such of them as may be personally estopped by their conduct from setting up a claim. Judgment.

The legal title should not be transferred from hand to hand by acts of so equivocal a nature. The fullest effect is given to the beneficial operation of the registry law by declaring the will fraudulent and void as against this plaintiff. More than this, we are not warranted in doing on such evidence; but this, as I have said, will not entitle the plaintiff to a decree, and therefore, in my opinion, the appeal should be allowed.

Per Curiam.—Appeal dismissed with costs, [*A. Wilson*, J., dissenting].

(*a*) 1 Hud. & Br. 756. (*b*) L. R. 2 E. & I. App. 401.

1869.

LIVINGSTONE v. ACRE—WALLACE v. ACRE.

Reforming deed—Specific performance—Fraud—Conflicting equities.

The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed to the plaintiffs in these suits for valuable consideration. After the lapse of more than fifteen years the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings in this Court to reform the deed executed by the defendant, or, treating it as a contract only, for a specific performance thereof. *Held*, (1st) That though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing; and that his equity being the elder, and having the legal title in his favor, the court could not interfere to give the plaintiff relief; and (2nd) That though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief were he in court as a plaintiff, still they did not constitute a ground for granting the plaintiffs the relief sought, and under the circumstances, the court dismissed the bill with costs.

Examination of witnesses and hearing at Woodstock.

Mr. *Strong*, Q. C., for the plaintiffs.

Mr. *J. A. Boyd*, for the defendant.

Judgment. SPRAGGE, V. C.—The defendant's father died intestate in August, 1851, seized of the north-half of lot 1 in the 9th concession of Bayham, leaving several children; of whom the defendant in these suits was the eldest son, and heir-at-law. The defendant, it is shewn by the evidence, was and is a man of very weak intellect. The witnesses differ a good deal, as witnesses nearly always do in such cases, as to the degree of mental capacity possessed by him. I think the result of the evidence is, that it was very greatly below the average.

At the time of his father's death the defendant was absent in the United States: he returned on the 14th

October following. Between the death of the father and the return of the son, a scheme was concocted by his mother, aided by some of her children, to induce the eldest son to believe that his father had left a will, and that under it, he was entitled to a sum of $200; and to induce him in that belief to execute a document which should be in fact a conveyance to his mother of the land of which his father died seized. And a deed intended to carry out this scheme was prepared before the son's return. Upon his return the representations agreed upon were made to him; and on the following day he executed the deed which had been prepared. 1869. Livingstone v. Acre.

He became aware of the fraud which had been practised upon him within some two or three weeks afterwards; and complained then, and at intervals afterwards, that he had been deceived and cheated; but took no steps to set aside the conveyance that had been obtained from him. I find it difficult to come to any satisfactory conclusion as to whether the defendant understood the nature of the instrument that he was executing. A Mr. *Moss*, a very respectable man, says that he explained it to him so fully that he could not help understanding it; and I have no doubt that Mr. *Moss* thought then, and when he gave his evidence, that he did understand it; but then Mr. *Moss's* estimate of the intelligence of the defendant is higher than, looking at all the evidence, I think it deserved. If he understood it at all to be a deed of land, it is, I think, more than doubtful that he understood it to be a conveyance of his title as heir-at-law: for he had been told, and he believed, that the land was not his by descent, but had been disposed of by will. The form of the instrument was what is called a quit-claim deed, and the most that I think the evidence warrants me to believe, is that he thought he was doing what was necessary in regard to the land, in order to give effect to the will, and to entitle himself to the $200 which he was told was left to him. In concocting and Judgment.

1869.

Livingstone v. Acre.

carrying out the scheme his mother, and those acting with her, must have counted largely upon his credulity and blind confidence, and want of intelligence; and they were not disappointed.

As to the consideration, I think upon the evidence there was none given by the mother to the son. A horse and a pair of steers were nominally given, and perhaps some harness, by way of payment of $100, and $100 more was to be paid at a future time. There is some doubt whether the steers had not been previously given to the defendant by his father, but if not, all that was given in specie was of the personal estate of the father. The widow did not administer, but assumed to give to the defendant a certain portion of it, and that not more, as appears from the evidence, than he was entitled to beneficially as one of the next of kin. But further, the absence of consideration appears to me to be clear from this: what passed was neither given nor received *as* consideration for a conveyance by the defendant of this land; but as what he was entitled to under a pretended will. He was not selling land to which he was entitled for $200; but receiving $200 to which he supposed himself entitled *otherwise;* and executing some document (it may be assumed in respect to this land) which he had been told it was proper for him to execute. It seems to me that chattels or money received by the defendant under such circumstances, cannot with any propriety, be called consideration for the conveyance of the land by the defendant to his mother.

Judgment.

On the 1st of February, 1858, the mother conveyed to her son *Alexander* the west-half of the parcel conveyed to her by the defendant, and it may be assumed, for valuable consideration, and on the 25th of June, 1866, *Alexander* conveyed the same for valuable consideration to the plaintiff *Wallace*. On the 10th of March, 1860, the mother conveyed the other half of the

land to her son *Jacob*, and as may be assumed, for valuable consideration; and on the 10th of June, 1865, *Jacob* conveyed the same for valuable consideration to the plaintiff *Livingstone*.

I judge from the evidence that it was for a long time supposed that the instrument executed by the defendant to his mother was effectual to convey the legal title, and that his only remedy was in this court. He seems, however, to have been afterwards otherwise advised, and he brought ejectment against *Wallace* and *Livingstone;* and it was held in the Court of Queen's Bench that the legal title did not pass. Hence these suits by *Wallace* and *Livingstone*.

What is sought in these suits is an injunction, and relief on the ground, as I understand the bill, that the defendant is bound to execute such a conveyance as it was at the time intended that he should execute; in effect to reform the quit-claim deed of 1851, and that what he did execute was a contract to convey, of which contract the plaintiffs are entitled to specific performance.

Judgment.

The position, then, of the parties is this: the party defrauded—deceived into making the deed of 1851, is not in this court as plaintiff, seeking to set it aside; but certain persons claiming through the person by whom the fraud was committed are plaintiffs seeking the aid of this court against the party defrauded. Parties in such a position have very serious difficulties to encounter.

If the plaintiffs have equities as purchasers for value, the defendant on the other hand has an equity to set aside the deed which he was deceived into executing to his mother; and where there are equities on both sides it is the law of this court to remain passive unless the equity of the plaintiff is superior to that of the defendant.

1869.

Livingstone v. Acre.

Here the equity of the defendant is the older equity, and there is this also in the defendant's favor, that he has the legal title. Again, the plaintiff's case fails whether as a bill for reforming the instrument of 1851, or as a bill for specific performance, by reason of its being a conveyance not for valuable consideration. I do not quote authority for this, as I take it to be settled and received law.

Further, upon the question of reforming an instrument, I apprehend that the court will not reform an instrument where it is in the form that it was intended to be, merely because it has not the legal effect that it was supposed that it would have: *Hunt* v. *Rousmaniere* (*a*), and see *Cockerell* v. *Cholmeley* (*b*). And further, upon the same point, the court must be able to see, and that very clearly, that that was intended by the parties at the time, which the court is now asked to compel the

Judgment.

the parties to do; as put by Mr. Justice *Story* (*c*) — "Courts of Equity, in assuming to correct alleged mistakes, must of necessity require the very clearest proof, lest they create errors in attempting to correct them." So, if the evidence left it at all in doubt whether this defendant did intend to convey his title as heir to his mother, I ought not to direct him now to convey it. So far from its being clear that he did intend to convey it, I am satisfied from the evidence that he did not.

The plaintiff in each case sets up as an equity that no claim was made by the defendant during the time that the land was in the possession of his mother and of his brothers respectively, a period of fifteen years; and each plaintiff says that he had no notice of there being an adverse claim to the land until after he had purchased the

(*a*) 8 Wheat. 174; 1 Peter's Sup. C. R. 1

(*b*) 1 R. & M. 418.

(*c*) E. J. S. 138 a.

same. If this were a bill by the heir-at-law to set aside these conveyances, and these plaintiffs were defendants to such a bill, and if the matters alleged were true in fact, these defences might avail them. But even as to that it is to be observed that abandonment or confirmation is not alleged, nor is acquiescence alleged in terms; nor have the plaintiffs, in respect of their alleged purchase without notice, made such averments as would be necessary by way of defence, to protect themselves as purchasers for value without notice.

My opinion is, that being plaintiffs, what they so set up could not avail them, even if true. I have formed an opinion in regard to the facts of the matter so alleged; but inasmuch as I think that assuming the facts to be with the plaintiff, they would form no ground of equity in these suits, I abstain from expressing it.

Judgment.

If the deed to the mother had been effectual to carry the legal title, and if bills had been filed by this defendant against these plaintiffs to set aside the deed to the mother and the subsequent conveyances, it might have been proper to refuse relief, and proper also to refuse relief in these suits. This is what was done in *Salmon* v. *Cutts* and *Cutts* v. *Salmon* (*a*).

Cockerell v. *Cholmeley* (*b*) was a strong case for relief if the court had felt itself at liberty to grant it, against the defendant's legal right. The defendant had recovered an estate against the plaintiff by a writ of formedon: the bill was to restrain the defendant from proceeding upon the judgment; to supply a defect in the execution of a power, and to reform a deed. Sir *John Leach* designated the case as one of the most unfortunate that ever occurred in a court of justice, and said, "The parties concerned in the transaction complained

(*a*) 4 DeG. & S. 125, 130. (*b*) 1 R. & M. 418.

1869.

Livingstone v. Acre.

of, acted with the most perfect fairness and integrity, and after an enjoyment has been had under it of nearly half a century, and after a transmission of interests to other persons, and great improvements, so that the property has become more than doubled in value, it is sought to be recovered upon the restoration only of the original price. And it must be observed that the transaction at the time worked no injury to the defendant. It is not pretended that full justice was not done to his contingent interest in the price paid; and where all was just in substance, he comes into court and claims the property upon a mere mistake of form. But the law is with him; and in the exercise of the jurisdiction of a court of equity, I am fettered by precedent. * * * Upon the whole I know no precedent for a decree in favor of the plaintiff, and consider myself bound, therefore, though reluctantly, to dismiss the bill." In that case the bill was dismissed without costs, for the plaintiff at law had in that case nothing to complain of. In that respect the case of this defendant differs very materially.

Judgment.

The bills must be dismissed with costs.

MEYERS v. SMITH.

Mandatory injunction—Mortgagor and mortgagee.

The plaintiff, a mortgagee, filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that the building having been actually removed, it was a proper case for a mandatory injunction, but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case.

Examination of witnesses and hearing before Vice Chancellor *Spragge*.

1869.

Meyers v. Smith.

Mr. *Bain*, for the plaintiff.

Mr. *Spencer*, for the defendants.

SPRAGGE, V. C.—The doubt which occurred to me in the case, and which I expressed, was, whether the court has jurisdiction in regard to the removal by defendent *Reeves*, from the mortgaged premises of the building put upon it by *Smith*, the mortgagor, and which he (*Smith*) sold to *Reeves*.

I had not, and have not, any doubt that the building was a part of the freehold. My doubt arose from the circumstance of its not appearing upon the evidence that the bill was filed before the removal of the building. If there was a threat of removal, or if at the filing of the bill the building had been in course of removal, there would have been a clear case for injunction; and, as it is, and assuming that the building has been actually removed, I think the court has jurisdiction. Judgment.

It seems to be settled by the case of *Durell* v. *Pritchard* (*a*), and the cases referred to by the late learned and eminent Lord Justice Sir *George Turner*, that the court will in a proper case grant a mandatory injunction, although the act complained of has been completed before the filing of the bill.

It is true that in this case the injury occasioned to the plaintiff by the removal of the building is of a nature that may be compensated by damages: but I do not think that I ought for that reason to send him to law. It was the clear right of the plaintiff as mortgagee to have the building in question remain upon the premises. If the removal had been by the mortgagor himself, the court would no doubt have issued a mandatory injunction,

(*a*) L. R. 1 Ch. App. 244.

1869.

Meyers v. Smith.

unless, indeed, the mortgagor had been prepared to pay the mortgage debt. *Reeves*, who purchased from the mortgagor, had notice of the mortgage, which was registered, and besides was expressly warned to desist from the removal of the building; but he chose to persist, and must take the consequences. The court will in such a case interfere all the more readily, and will listen less to the plea of inconvenience set up by the wrong-doer: *Jacomb* v. *Knight* (*a*); *Hepburn* v. *Lordan* (*b*). Certainly in such a case, where the court has jurisdiction and the plaintiff a *locus standi* in court, the court will not send him to law.

It appears by the evidence that *Reeves* has removed the building piecemeal, and there may be a difficulty in restoring it. An inquiry as to its value will probably meet the justice of the case; or, if *Reeves* will pay the mortgage debt, that will meet all that the plaintiff can demand. It may be that the mortgagor and *Reeves* can make some arrangement as to this. The plaintiff in any case is entitled as against *Reeves* and the mortgagor to the additional costs beyond those of an ordinary foreclosure suit, occasioned by proceedings in this suit arising out of the removal of the building. The ordinary costs to be as usual.

Judgment.

(*a*) 32 L. J. Ch. 604.

(*b*) 2 H. & M. 352.

1869.

In re Shaw, a Lunatic.

Lunacy—Committee—Wilful neglect and default.

The committee of a lunatic's estate having neglected to collect rent of a tenant whom he found in possession of a portion of the estate, was charged with the amount thereof on passing his accounts.

The committee of a lunatic's estate expended more money in making surveys and roads—with a view to a sale of a portion of the estate—than the court had authorized, and which excess of expenditure was occasioned by the failure of a neighboring proprietor, who had agreed to contribute towards such expenditure. On appeal from the Master disallowing such excess, it was considered that as the court will, under certain circumstances, sanction some expenditures, even though made without authority, if done for the benefit of the estate, and the expenditure was such as would have been authorized at the time, directed the amount to be allowed him on passing his accounts.

The powers, duties and liabilities of a committee of a lunatic's estate considered and acted on.

This was an appeal and cross-appeal from the report of the Master.

Mr. *Roaf*, Q.C., for the creditors of the estate who appealed.

Mr. *Strong*, Q.C., contra.

Spragge, V. C.—This is an appeal and cross-appeal from the report of the Master, dated the 28th of October 1868. The appeal is by certain creditors of the lunatic, against the disallowance by the Master of a surcharge carried into his office, in which the creditors sought to charge the Committee of the lunatic's estate with the rents of certain real estate of the lunatic, from the time of his appointment, in 1854, to the present time, at the rate of £50 a year. The premises had been occupied by *Alexander Shaw* before the appointment of the Committee, and have been so occupied ever since. Judgment.

1869.

In re Shaw.

In a petition presented by the Committee, in March, 1863, the following statement is made in paragraph 45:

"That by a certain other order of this honorable court, the said Mr. *Alexander Shaw* was allowed to reside with his family upon, and to farm the said homestead lot, (being the property mortgaged to the Trust and Loan Company) at a rental fixed by the court at £50 per annum.

"That by the above list of accounts due by the estate, Mr. *Shaw's* name appears for an item of £38 14s. 9½d., with accrued interest thereon; that when the roads as before mentioned (see clauses 11 and 39) were ordered to be made, Mr. *Shaw* contracted for the making of a portion of the same, and on his accounts for making such portion, as duly certified by the engineer and surveyor, a balance remains due and unpaid to him of £24 13s. with interest; that Mr. *Shaw* has also paid the taxes for the last five years, amounting to a large sum, and he also claims to have expended considerable sums on repairs to the premises; that under this statement of account the estate is, according to his statement, considerably in his debt, and having a large family, his case is one which calls especially for the consideration of the court in devising means for paying the debts of the estate."

Judgment.

No order fixing the rent to be paid by *Alexander Shaw* has been found; and it is suggested on behalf of the Committee, that in his petition he had spoken from information only, and that he had been misinformed. It is not improbable that a verbal direction to this effect had been given by one of the Judges of this court; at any rate, the petition shews that the Committee was cognizant of the tenancy of *Alexander Shaw*, and as he supposed, at a rental fixed by the court of £50 a year.

It is contended on behalf of the Committee, that he is not liable, like a trustee, for wilful neglect and default; that he is a mere officer of the court, with powers akin to those of a receiver; that he is only liable for the consequences of not acting upon orders made by the court; and is not liable for not applying to the court for direction; and that his powers are very limited. I do not agree in this view of the authority, and the duties of a Committee. The care of the lunatic's estate is committed to him. This is evident from the terms of the grant made to the committee (*a*), which gives to the Committee "the custody, regulation, occupation, disposition, and receipt as well of all manors, messuages, lands, tenements, houses, farms, revenues, services, and hereditaments, with the appurtenances, and of all rents, revenues, and profits thereof which the aforesaid A. P. hath or ought to have * * as also the custody and government of all goods and chattels * * to the said A. P. belonging or in any manner appertaining, and also the use and negotiation of the same to the use, &c., of the said A. P. and for the maintenance, &c., of the said A. P. and his family * * and also for the maintenance, &c., of the messuages, lands, tenements, &c., of the said A. P., to have and to hold the aforesaid custody, regulation, and receipt of the aforesaid manors, &c., of the said A. P. and all and singular other the premises above given, &c., unto the said, &c.: provided always, that the said ——, his executors, &c., shall render a true account of the issues, revenues, &c., once in every year at least."

Judgment.

All these powers and duties are committed to him by his appointment; they are incident to his office of Committee. This suffices for the ordinary management of the estate. If any extraordinary steps become necessary, it becomes the duty of the Committee to apply

(*a*) 2 Grant's Prac. 414.

1869.

In re Shaw.

for authority and direction. As to the lands of the lunatic, he may on his own responsibility, and it is his duty to let them from year to year at such rents, and upon such terms as he may consider best for the lunatic's estate: he has no authority to grant a lease. It is urged for the Committee in this case that he had no authority to distrain (*a*), and this probably is the case, as there was not, so far as appears, any lease or agreement for a lease at a fixed rental. Whether the absence of such power relieves the Committee from responsibility for not collecting rents in this case, is another question. One of the duties of the Committee is to pass his accounts annually; another is to keep the court informed of whatever is material to the interests of the estate. The accounts, if properly and fully made out will, to a great extent, inform the court of what is material in the management of the estate: they would do so in this case. I find under the head of "Lunacy," in the first vol. of

Judgment.

Grant's Practice (*b*), directions as to what the accounts and the affidavit in support, of the Committee of the estate should contain. The form of a receiver's account is referred to as proper to be followed. This is to be found in vol. 2 (*c*), and in it is contained a description of premises, the names of tenants, the annual rents, the amounts received, and the amounts in arrear, specifying at what periods the tenants are in arrear. As to the duty of the Committee generally to keep the court informed, I find it stated by Lord *Truro* in *In re Skingley* (*d*), that it is the duty of the committee to attend to the management of the estate, "and to keep the court informed of all that materially relates to it."

Now I find that up to the present year the Committee has never passed his accounts. Upon the reference reported upon in October last, the Committee carried in

(*a*) Elmer's Lunacy, p. 88.
(*b*) P. 527. (*c*) P. 335. (*d*) 3 McN. & G. 230.

two sets of accounts, one from his appointment in 1854 to 1863, the other from 1863 to 1868. These accounts omit all mention of the tenancy of *Alexander Shaw*, and of there being any rental due to the estate.

The petition of March, 1863, to which I have referred, does indeed state the occupancy of the farm by *Alexander Shaw*, at a fixed rental as it says; and it states that *Shaw* at that date claimed that there was a balance it his favor. The prayer of the petition, while asking for direction upon several points, asks no direction in relation to the amount payable by *Alexander Shaw*. The natural inference is that it was intended to be collected by the Receiver.

Judgment.

It is hardly necessary to say that it was not the province of the Committee to remit the rents, or to forbear to collect them by reason of any such considerations as were suggested in court upon the hearing of this appeal. It was simply his duty to collect them; and, if necessary, to inform the court of their non-payment, that is, if applied for and not paid, and to ask for whatever authority might be needful to enforce payment. So far from having any authority to forego the payment, he had no authority even to reduce the amount, *In re Fitch* (*a*), *ex parte Town* (*b*).

From all this it is evident that there has been a serious loss to the estate through the omissions on the part of the Commitee, which it has been my duty to point out. It must follow from this that the Committee is bound to make good the loss; and I should have held it to be so, without the authority of a case, in which it has been so determined. The point was before the Lords Justices Lord *Cranworth* and *Knight Bruce* in *Ex parte Swindell* (*c*). The committee in that case had let

(*a*) 1 R. & M. 354. (*b*) T. & R. 137.
(*c*) 2 DeG. M. & G. 91.

1869.

In re Shaw.

a house, part of the lunatic's estate, to an objectionable tenant—the solicitor of the Committee who had been a bankrupt—and the court found fault with him for doing so. The solicitor continued tenant for four years and never paid any rent. The excuse for not collecting the rent was, that there were costs accruing due from time to time, constituting a sort of set-off against the payment of rent, and that on this account the Committee abstained from proceeding against the tenant: Lord *Cranworth* said: "The question is, whether there having been no rent received, except certain sums on account of the rent, we can do otherwise than conclude that the rent was lost through the default of the Committee in not enforcing payment," and he concludes thus: "No other conclusion can be arrived at than that this loss has arisen because the Committee was wanting in that vigilance which the court is entitled to expect, and is bound to require, from one holding that fiduciary situation. I am extremely grieved that such is the result at which I am compelled to arrive; but considering how important it is to watch the conduct of persons undertaking the care of those who, by the visitation of God, are incapable of taking care of themselves, there is no other course to be taken than to charge the estate of the Committee with the whole amount of £395, giving credit for £179, adding another year's rent and deducting from it £98."

Judgment.

Every word of this is applicable to the case before me. The letting to an objectionable tenant was a circumstance in the case before the Lords Justices, which is animadverted upon; but all the reasoning upon which the decision proceeds is just as applicable to a case like this, where a Committee finds a tenant in possession, and does not enforce payment of rent. The case is so clear an authority for fixing the Committee in this case with the liability, that had it been cited to me at the argument of the appeal, I should not have thought it necessary to reserve my judgment.

1869.

In re Shaw.

From this estate having been already before me more than once, I have no reason to doubt, indeed I know, that the Committee, a professional man, and a gentleman of high character, has given much time and labor, care and anxiety in the management of the estate: and it is on that account all the more painful to me to be obliged to come to the conclusion that he is liable to make good to the estate whatever loss it has sustained by his not enforcing payment of rent from *Alexander Shaw*. His liability for rent accrued since his petition of 1863 seems very clear: as to rent before that, he will be excused to the extent to which *Alexander Shaw* had claims against the estate, which could properly be set-off against the rent.

Judgment.

If there are any other considerations which would induce the court to hold *Alexander Shaw* excused from the payment of rent, they must be brought before the court in the regular way. I assume, however, that they are only of the nature suggested at the hearing of the appeal, and I cannot encourage the Committee to believe that the court would feel itself at liberty upon those grounds to hold *Alexander Shaw* excused. There are some observations of Lord Eldon in *ex parte Whitbread* (*a*), which go as far in that direction as any that I remember to have seen; but they are hardly applicable to a case like this: and I must add that neither the Committee nor, according to his statement, the court had any idea, upon any ground whatever of excusing *Alexander Shaw* from the payment.

The conclusion at which I have arrived, I confess with a good deal of reluctance is, that the Master was wrong in disallowing the surcharge against the Committee. At the same time I think the court should, as far as possible, lend its aid to the Committee for the recovery of the rent from *Alexander Shaw*.

(*a*) 2 Mer. 101.

1869.

In re Shaw.

I observe that the accounts, as carried in, charge the Committee with interest from the end of each year. In *Vance* v. *Thompson* (*a*), I came to the conclusion that where the court charges as for wilful neglect and default, and not for the actual receipt of moneys, it does not charge interest.

There is a cross-appeal by the committee against the disallowance by the Master of a small sum £36 1*s.* 9*d.*, in the shape of a deduction of that amount from a much larger sum, £350, expended by the Committee upon surveys and making roads with a view to a sale of a portion of the estate of the lunatic. These roads would have been of benefit to the proprietors of neighbouring lands, and one of these proprietors after agreeing to contribute a certain sum had failed to the extent now claimed by the Committee, and this sum had to be paid out of the Committee's own pocket. It is true that in this way and to this extent he exceeded the amount to which he had been authorized to go by the court; but under the circumstances the court ought not to allow the loss to fall upon him. The court will sanction some expenditures made without its authority, and proceed in that respect upon a less rigid rule than it formerly did. Instances of this are to be found in *Tempest* v. *Ord* (*b*) and *In re Brown* (*c*). In the matter of Sir *James Langham* (*d*), indeed the court refused to allow an expenditure beyond what had been authorized by the court: but that was, as the court said, an extreme case; a setting of the court at defiance. I cannot doubt that in this case the expenditure would have been allowed at the time, and that it ought to be allowed now.

Judgment.

The exception is allowed.

It must be referred back to the Master on both points. It is not a case for costs.

(*a*) 10 Gr. 542.
(*b*) 2 Mer. 55.
(*c*) 1 McN. & G. 201.
(*d*) 2 Ph. 299.

1869.

THE ROYAL CANADIAN BANK v. CUMMER AND MASON.

Security on real estate—Weight of evidence.

The customer of a bank created a mortgage in favor of the institution by deposit of title-deeds. In a suit to realize the security the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off: the officers of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed, at the time of the deposit, on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful; while if made for the purpose stated by the debtors would have been illegal, made a decree in favor of the bank with costs.

Examination of witnesses and hearing before Vice Chancellor *Spragge*.

Mr. *Strong*, Q.C., and Mr. *Bain*, for the plaintiffs.

Mr. *Blake*, Q.C., and Mr. *McMurrich*, for defendant *Mason*, the assignee in insolvency of *Cummer*.

The bill was *pro confesso* against *Cummer*, and he did not appear.

SPRAGGE, V. C.—I have read and compared the evidence in this case carefully. The short question is, whether a deposit of title deeds made by *Cummer* to the bank was made in order to secure his general indebtedness; or only in contemplation of, and in order to secure some particular advances, which may be styled briefly, the Buffalo drafts. The question is between the bank and the assignee in insolvency of *Cummer*. Judgment.

Cummer had what is called a line of credit at the bank to the extent of $20,000, upon paper, to which he and a brother or brothers of his, were parties. In July,

1869.

R. C. Bank v. Cummer.

1868, the newly elected president of the bank, Mr. *Metcalfe*, considered his account unsatisfactory; and upon *Cummer* asking for further advances pressed him to give security, and *Cummer* agreed to give security upon some land that he had in the township of Walpole. Mr. *Metcalfe* is so explicit as to the agreement being to give security for the whole debt, that I cannot doubt that the agreement at that time was that it should be for the whole. It is undisputed that a deposit of *Cummer's* title deeds of his Walpole lands was made, and that it was made by way of security. The inference would be that it was in pursuance of the agreement with Mr. *Metcalfe*, and for the purpose and to the extent then agreed upon, unless some change of agreement, or of purpose be shewn. The evidence of the cashier and of one of the directors, Mr. *Manning*, is also express as to the agreement being that the deposit should be for the whole debt.

Judgment.

The date of the deposit being made is left in some doubt; there having been no record of the date kept in the bank. The defendants place it in the early part of July, or about the middle of that month; and the evidence of the cashier upon that point tends to the same date. The evidence of the president and of Mr. *Manning*, on the other hand, would make the deposit in the month of August; and the evidence of the assistant cashier, Mr. *Michie*, inclines to the same month. He received the title deeds in an envelope from the hands of the cashier, who had just received them from *Cummer* and Mr. *Michie* upon receiving the paper indorsed upon the envelope the words "Mortgage, *F. D. Cummer*, of land transferred as collateral to the bank for sundry notes under discount," following, as he says, as nearly as he could the words that the cashier had used in handing him the papers. This written memorandum made at the time is confirmatory of the plaintiff's position, that the deposit was made to secure the whole debt. Its

language imports this, and was inappropriate if intended to secure the Buffalo drafts only.

Mr. *Michie* omitted to put any date to his memorandum. I do not myself think the date of the deposit very material. If I might hazard a conjecture I should think that it was probably made shortly before the middle of July, or perhaps as *Cummer* says on the 15th. From the temper he exhibited at a later date, after the directors had refused to cash any more of the Buffalo drafts, his refusing to correct an error and telling the president that the bank might register the title, intimating that he would not, I should judge that he would not have made the deposit after such refusal; and that refusal he would learn shortly after the 15th of July.

It would not be against the plaintiff's case that the deposit was to answer all indebtedness, if it had been clearly proved that it was made on the 15th of July, as *Cummer* asserts it was. The only effect of the difference upon that point in the evidence of the plaintiffs' witnesses, would be to throw discredit upon the account they give of the transaction; but I do not think that it ought to have that effect. It is a matter of memory with but little to aid it, and it is a point upon which parties may honestly differ. The defendants, I suppose, fix that date in order to connect the deposit with a contemporaneous advance, and to confine it to that advance: but the evidence is strong that it was not so confined. Judgment.

The evidence of *Cummer* has been taken upon commission, he having absconded in the autumn of the same year. He swears positively that the deposit was made only to secure the contemplated advances upon the Buffalo drafts, and he produces what he calls the original of a letter which he says was in the envelope with the deposited title deeds. I rec[illegible] his evidence subject to objection. Supposing it to b[illegible] missible, I do not think

1869.

R. C. Bank v. Cummer.

it ought to outweigh the direct evidence on the other side. The alleged letter appears to have been seen by none of the officers of the bank. I think it at least doubtful whether such a letter was sent. He details, moreover, a conversation with Mr. *Michie*, who denies having ever had such conversation with him, or any conversation on the occasion of the making of the deposit. I thought Mr. *Michie's* evidence fully entitled to credit.

There were two interviews between the cashier and the Toronto manager of the Merchants' Bank, which, no doubt, led the latter gentleman to believe that the security was not for the whole debt due by *Cummer* to the Bank, but for some smaller sum, $2000 or $2500, as he recollects it. Mr. *Woodside*, upon being recalled, says he must have been misunderstood, and that there never was any such sum as $2000 or $2500 between *Cummer* and the bank. I have no doubt of the perfect honesty of the manager's evidence; but there was room for misunderstanding, and it would not be safe upon that alone to pronounce the fact to be other than what the plaintiffs' witnesses have sworn it to be.

Judgment.

The weight of the direct evidence is in favor of the plaintiffs' contention. *Prima facie*, where advances are made contemporaneously with a deposit of title deeds, in the absence of any memorandum shewing the purpose of the deposit, the presumption appears to be that the deposit is made only to secure the contemporaneous advances, not an antecedent debt; and where, in proceedings in bankruptcy, the oath of the depositee is that it was to secure an antecedent debt as well as contemporaneous advances, and the oath of the bankrupt is that it was to secure the latter only, it will be allowed only to secure the latter: *Ex parte Martin* (*a*). The court, however, will direct an inquiry where affidavits

(*a*) 2 Mont. & Ayr. 243; 4 D. & C. 457.

are conflicting: *Ex parte Barnes, In re Stratton* (*a*); and an inquiry was directed by Lord *Eldon*, in *Ex parte Mountfort* (*b*), where the question was the same as it is here. It is, I apprehend, always the right of the depositee to adduce evidence to rebut the *prima facie* presumption.

In this case, besides the direct evidence, there are other considerations which are also in the plaintiffs' favor. Taking the simple fact of deposit by way of security by the debtor of a bank, to a bank, there being a debt and there being further advances contemplated but not yet made, a deposit for the debt due would be lawful; but a deposit by way of security, against which the bank customer might draw, would be against the law; and the law upon this point is so well known to bankers that they would hardly be likely to transgress it. The probabilities are also in favor of the plaintiffs: *Cummer* was largely indebted, and the debt was not considered a safe one. The further advances that he asked were, to all appearances, and were in fact, upon a much better and safer footing for the bank than the old debt. He asked to draw against consignments which he was then shipping to Buffalo, and for some of which, at any rate, he shewed bills of lading. It is supposed that the bank demanded collateral landed security for business of this character, and did not ask it for the old debt, for the safety of which they were really apprehensive. The Buffalo drafts have been paid.

Judgment.

I think, upon the evidence, I cannot do otherwise than decree for the plaintiffs, and with costs. I may observe at the same time that I have no doubt that the assignee in insolvency believed, I assume, from *Cummer's* statement, that the deposit was only to secure the Buffalo drafts.

(*a*) 6 Jur. 652. (*b*) 14 Ves. 606.

1869.

DUFF v. BARRETT AND THORNBURY.

Principal and surety—Extension of time.

After judgment had been recorded against a debtor and his surety, the party holding the judgment entered into an agreement with the debtor to extend the time for payment, and a bill was afterwards filed by the surety claiming to be discharged by reason thereof:

Held, that, under the circumstances, the surety was not discharged.

Examination of witnesses and hearing at Barrie.

Mr. *McCarthy*, for the plaintiff and defendant *Thornbury*.

Mr. *Blake*, Q.C., for *Barrett*.

SPRAGGE, V. C.—The plaintiff comes for relief as surety for the defendant *Thornbury*, on the ground that time was given to the principal debtor, by the creditor; and also on the ground that the original debt for which he was surety has been satisfied.

Judgment.

The debt in question was originally money borrowed by *Thornbury* from a Mr. *Jones*, upon the security, so far as the plaintiff was concerned, of a promissory note for $1,500, of which *Thornbury* was maker, and the plaintiff indorser. This note was afterwards sued upon, and judgment recovered against *Thornbury* and the plaintiff by persons of the name of *Gladstone*; and an execution against goods was issued upon the judgment. All this occurred before Mr. *Barrett* had any connection with the matter. His connection with it arose in this way: *Thornbury* applied to him for aid to extricate him from his difficulties; which he agreed to do upon certain terms. The transactions were somewhat complicated, relating to other matters besides the *Gladstone* judgment —and I do not propose to enter into them any further than may be necessary to explain the grounds upon which I dispose of the case.

1869.

Duff v. Barrett.

A formal written agreement was entered into between *Barrett* and *Thornbury*, dated the 22nd of October, 1864, setting forth the terms upon which *Barrett* was to give his assistance; among other things, *Barrett* was to advance money to pay off the *Gladstone* judgment, and it was stipulated that that judgment should be assigned to him. It was also agreed that *Thornbury* should give a mortgage upon certain specified lands, to secure all the advances that he should make; and the agreement contained a stipulation that *Thornbury* should procure from the plaintiff (and from another on another transaction) his consent to the extension of time thereby given for the payment of the *Gladstone* judgment (and another judgment); and that no advantage would be taken by reason of such extension of time for the payment of the same, but that the judgments should be in full force as against the parties against whom they were obtained, as if the same were then enforced. A mortgage was executed by *Thornbury* on the 31st of August, 1865, to secure the advances then made by *Barrett;* and time was given for repayment, in accordance with the agreement. There are some small points of variance between the two; but in the mortgage the terms of the agreement are substantially carried out. I see nothing in either instrument, and in nothing that was done under either of them, that could amount to a satisfaction of the judgment debt. *Barrett* becoming assignee of the judgment, negatives any such intention; and the provision for obtaining the plaintiff's assent to the extension of time proves that the debt as against him as well as against *Thornbury* was intended to be kept alive.

Judgment.

Time was given to the principal debtor as I have stated. It is made a question whether *Barrett* was aware that the plaintiff was a surety only; and also whether *Jones* was aware that he was so. *Jones*

1869.

Duff v. Barrett.

probably knew the fact, and *Barrett* suspected it; but I think it not material. *Prima facie* time being given to the principal debtor releases the surety. Two answers are given to this, in this case, one that before time was given judgment had been recovered by the creditor against both; the other that by the stipulation as to the consent of the surety being obtained, time was given only conditionally upon such consent being obtained.

It is, as I understand, a settled principle of law, that upon the recovery of judgment upon a simple contract debt, the debt is merged in the judgment. In the case of *Hamilton* v. *Holcomb* (*a*), in the Common Pleas, that principle was affirmed by the Chief Justice of the Court of Appeal, then Chief Justice of the Common Pleas; and the authority of Lord *Ellenborough* in *Drake* v. *Mitchell* (*b*), was referred to. It was also affirmed in the same case, by the Chief Justice of the Queen's Bench, then a judge of that court (*c*), and was also affirmed upon the appeal (*d*) of that case by the then Chief Justice and the late Vice Chancellor *Esten*; and the principle was referred to, upon a question arising out of the relation of principal and surety. The language of Lord *Ellenborough*, in *Drake* v. *Mitchell*, is, "If, indeed, one who is indebted upon simple contract, give a bond or have judgment against him upon it, the simple contract is merged in the higher security."

Judgment.

When this comes to be applied to a case of principal and surety, as in *Hamilton* v. *Holcomb*, it means, as I understand, that the contract by which the relation of creditor and principal debtor and surety was created, has become merged in the new obligation created by law upon the recovery of the judgment, and that the rights

(*a*) 12 C. P. 38.
(*b*) 3 East. 251.
(*c*) 12 C. P. 48.
(*d*) 2 U. C. E. & A. 238, 240.

of the surety as such are thereby annulled as between him and the creditor. There are conflicting decisions upon the point in the American courts, which are referred to in the American notes to *Rees* v. *Barrington* in the American reprint of *White* and *Tudor* (*a*). 1869. Duff v. Barrett.

In a case of *Jenkins* v. *Robertson* (*b*), Sir *Richard Kindersley* held that such was the effect of a decree of the Court of Chancery. A creditor after a decree gave time to the principal debtor by taking a judgment by arrangement, payable by instalments, without the assent of the surety. The learned Vice Chancellor said:—"I do not in any degree doubt that, as a general rule, the creditor, by giving time to the principal debtor, discharges the surety; but that is not this case. This is a case in which there is a creditor who has, by the decree in the suit, established his right against the surety. If he had brought an action against the principal debtor before the decree; and taken, as has been here done, a judgment by arrangement, giving time, no doubt the surety would be discharged. But the creditor having by the decree established his right against the estate of the surety, has a right to proceed under it, and all that follows is in the nature of execution of the decree, and the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is no longer *as surety*, but under the decree." Judgment.

The same reasoning would of course apply to a judgment. The new liability created by a decree or judgment obliterates the liability created by the former contract, and with it the relative position of the parties: the judgment debtor is no longer liable upon a contract of suretyship, but upon the direct liability which the law has created by the judgment. The result in this case

(*a*) 3rd Vol. 382. (*b*) 2 Dry. 351.

1869.

Duff v. Barrett.

would be the same as in *Jenkins* v. *Robertson*. Time given before judgment recovered against the plaintiff would have discharged him; after judgment it has no such effect. I state the law as I find it, though I confess I think there is much reason in what appears to be the present leaning of the American courts, that the equitable rights of the surety remain, after the recovery of judgment against him, as they were before.

This makes it unnecessary to determine whether the stipulation that *Thornbury* should obtain the consent of the plaintiff to the extension of time has the effect contended for by the defendant *Barrett*. I am inclined to think that it has that effect. *Thornbury's* covenant is that he should procure the assent of the surety as to the extension of time. This necessarily implied his own assent that recourse against the surety should be kept alive, and was an agreement by both that the security of the surety should remain unaffected; and if so, there was nothing to debar the creditor—such assent not being obtained from the surety—from proceeding, at the instance of the surety to enforce payment against the principal debtor; and when that is the position of the parties the surety is not discharged.

Judgment.

The debt for which the plaintiff originally became liable has been to some extent satisfied by the effect of transactions to which I have not felt it necessary more particularly to allude. There will be a reference to ascertain the amount remaining due.

The defendant *Barrett* is entitled to his costs.

GALT V. ERIE AND NIAGARA RAILWAY CO. 1869.

Vendor and purchaser—Vendor's lien—Purchase by railway company.

It is clearly settled that the rights and franchises of a railway company do not prevail over a vendor's lien; and where land was sold to a railway company for the purposes of the road, and a mortgage taken to secure the unpaid purchase money:

Held, that the vendor's lien was not thereby lost.

This was a petition for liberty to amend the bill of the plaintiffs by setting up a claim of vendor's lien for unpaid purchase money, pursuant to the liberty given to present such petition, as reported *ante* volume xiv., page 499.

Mr. *Strong*, Q. C., and Mr. *G. D. Boulton*, for the plaintiffs.

Mr. *Roaf*, Q.C., and Mr. *Cattanach*, contra.

SPRAGGE, C.—It is now clearly settled by authority that the rights and franchises of a railway company do not prevail over the vendor's lien for unpaid purchase money. Judgment.

The next question is whether the vendor, having taken security for the unpaid purchase money by mortgage upon the premises sold, thereby loses his lien. There is no case that decides that the lien is thereby lost; and the cases in which it has been held that the taking of a mortgage upon an estate other than the estate sold, is presumed to be an abandonment of the vendor's lien upon the estate sold; that the taking of a mortgage upon a portion of the estate sold is presumed to be an abandonment of the lien upon the residue, and that taking a mortgage upon the estate sold for a portion only of the purchase money is presumed to be a waiver of lien as to the rest of the purchase money, are, in my

1869.

Galt v. Erie and N. Railway Co.

view, all authorities in favor of the lien remaining when the mortgage is taken upon the same estate for the whole of the purchase money due. They seem to be exceptions to a general rule, and Lord *Redesdale* in his remarks in *Hughes* v. *Kearney* (*a*), upon one of them *Bond* v. *Kent* (*b*), implies this, I think. He says, "in the case in second *Vernon*, it was manifestly the intention of the parties that the amount of the note should not be a lien upon the lands, else they would have had a mortgage for the whole." In that case a mortgage had been given for a portion of the purchase money, and the note referred to by Lord *Redesdale*, had been given for the balance, and his Lordship, as I understand his language, implies that while a mortgage for a portion of purchase money negatives any intention to have a lien for the residue, a mortgage for the whole does not negative the intention to have a lien for the whole, but rather the contrary; for his words import that if the parties had intended that there should be a lien for that part of the purchase money for which the note was given, as well as for that for which the mortgage was given, they would have had a mortgage for the whole.

Judgment.

It is the *prima facie* equitable right of the vendor to have a lien for his purchase money upon the land sold, and I see nothing in authority or in reason for its being lost upon a mortgage being taken: the mortgage may well be taken as a cumulative security and remedy. There is in my judgment nothing in the taking of a mortgage from which it is to be inferred that the parties intended that there should be no lien. It is necessary to go that length or the lien will continue to subsist.

The late learned Vice-Chancellor, for whose opinion I always felt the utmost respect, inclined to think

(*a*) 1 S. & L. 135.*b* (*b*) 2 Ver. 281.

differently in *Baldwin* v. *Duignan* (*a*), but the point was not necessary for the decision of the case, and the weight of authority is, I think, in favor of the lien. 1869. Galt v. Erie and N. Railway Co.

I think, upon consideration, that the petitioners should have their costs of, and incidental to, the hearing of this petition. I find, that upon disposing of the petition of the *Great Western Railway Company*, I gave them their costs of, and incidental to, the hearing, on the ground that those costs were occasioned by the plaintiffs' resistance to the variation of the decree to which I adjudged the Railway Company to be entitled. I did not give them the costs of their petition, as it did not appear that the plaintiffs were cognizant of the interest of the Railway Company set up by their petition. I think I should deal with the plaintiffs, the present petitioners, in the same way; they should have their costs of, and incidental to, the hearing of their petition, because the Railway Companies have resisted their claim to lien as vendors; and as they resist it now, I assume that they would have resisted it if it had been set up on the former petition. I do not give them the costs of their petition, because they should have presented their case for lien in opposition to the petition of the *Great Western Railway Company*, and because it does not appear that the Railway Companies were cognizant of its existence. Judgment.

(*a*) 6 Gr. 595.

1869.

ELLIOTT v. HUNTER.

Mortgagor and mortgagee—Evidence.

The decree directed a reference to the Master at Brantford to take an account of the amount due upon the mortgage in question. The only evidence before the Master besides what was used at the hearing of the cause, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the Master's report finding the whole amount due was allowed.

Semble, that the onus of proof under such a reference rests upon the holder of the mortgage.

Appeal from the report of the Master at Brantford.

Mr. *Moss*, for the plaintiff, who appeals.

Mr. *Roaf*, Q. C., and Mr. *V. McKenzie*, contra.

Judgment. SPRAGGE, V. C.—The bill in this case is filed by a judgment creditor of *James Hunter*, and impeaches a mortgage made by *James Hunter* to *John Hunter*, his brother. Both are since dead, the mortgagor having died pending the suit. A good deal of evidence was given before me at Brantford, and after the examination of witnesses on both sides I directed (all parties consenting) that a commission should issue for the examination, at Kincardine, of the mortgagor, who, it appeared, was seriously ill, and that after his evidence was taken I should hear the cause at Toronto. His evidence was taken, and the cause was subsequently heard before me at Toronto, when I directed a reference to the master at Brantford to take an account of the amount due upon the mortgage. The form of the reference was to inquire and report what (if anything) was due.

The master reported the whole amount, $5,600 and interest, to be due. The objection to the report is that, with the exception of the evidence which was before me,

1869.

Elliott v. Hunter.

nothing was before the master but the affidavit of the personal representative of the mortgagee; that he believed the whole amount to be due; that affidavit was not evidence as to the amount due, but such affidavit is required by the practice of this court, in ordinary cases between mortgagee and mortgagor, for the protection of the mortgagor. The personal representative is, as he has stated in his answer, a stranger to the matters stated in the bill, beyond the fact of the execution of the mortgage; and as it has not been pretended that any money has been paid upon the mortgage, his affidavit was a mere form. It was no evidence for a report one way or the other: and the matter comes to this, that upon the same evidence upon which I referred it to the master to inquire what (if anything) is due, he reports that the whole is due.

Judgment.

I should have thought it sufficiently apparent from the pleadings, the evidence taken, and the form of the decree, that the purpose of the reference to the master was to inform the conscience of the court as to whether the mortgage debt was really advanced or was really a true debt or not; or (if any) how much of it was so, so that upon the further directions which were reserved the court might be able to deal with the question which is the subject of the suit.

The only question that, as it appears to me, *could* have arisen before the master was whether the onus of proof was upon the holders of the mortgage or upon the plaintiff, and I think the answer to that question should have been that it was upon the holders of the mortgage. Evidence had been given by the plaintiff before the decree, the tendency of which was to throw suspicion upon the mortgage. This was not so met by the evidence for the defendants, but that the court desired to be informed what sum (if any) was really due. The bill is not a bill to redeem, though in one aspect it supposes

1869.

Elliott v. Hunter.

the possibility of some actual debt being shewn to exist, but is essentially a bill under the statute of Elizabeth. In making such a reference under such pleadings and evidence, the court having evidence before it throwing suspicion upon the *bona fides* of the mortgage, evidently, I should say, put it upon the holders of the mortgage to prove the affirmative of what was referred to the master. The court could not mean to leave it to the master to say whether the evidence made a sufficient case of suspicion to put a mortgagee to prove consideration. That was the function of the court, and the decree shewed that function to be executed. If it was for the holder of the mortgage to prove consideration he has not done it, for his affidavit is no proof. The master should have called upon him to prove it, and to report according to the proof given.

Judgment.

I do not think that there is anything in the form of this decree to make the duty of the holder of the mortgage, or of the master, other than what I have stated it to have been. I am referred by defendant's counsel to *Wharton* v. *May* (*a*) and *Piddock* v. *Brown* (*b*). In the former case the reference was as to what sums were actually paid and advanced. The inquiry is comprehended under the terms used in this decree. They are the same as in *Penn* v. *Lockwood* (*c*), where the question was as to what sums were advanced. In *Piddock* v. *Brown* it was declared by the Lord Chancellor that upon producing a bond or mortgage this *prima facie* is good evidence of a debt; but that whenever there are manifest signs of fraud in the obligee he ought to be put to the proof of actual payment. No one will dispute that, and the defendant has been put to such proof by affidavit and sufficient words in the decree. I do not say "upon manifest signs of fraud," but upon what I thought

(*a*) 5 Ves. 69. (*b*) 3 P. Wm. 289.
(*c*) 1 Grant 547.

1869.

Elliott v. Hunter,

a sufficient case of suspicion, and the sufficiency of which is not now the question. *Pollock* v. *Perry* (*a*) was also cited. There the master erred in the opposite direction, for in the language of the late Chancellor, "in the absence of any evidence whatever to impeach the transaction, the master ordered the production of the previous accounts, which had been long treated by all parties as settled and closed."

The matter must be referred back to the master, the costs of the appeal to be borne by the defendant *John Hunter*, the personal representative.

Filman v. Filman.

Partition—Title by possession—Hotchpot.

The son of an intestate and his wife having been in undisturbed possession of certain land of the intestate long enough for the possession to have ripened into a title in one or the other; and it appearing that it was farmed and improved by the husband, and assessed in his name, and the claim of the wife thereto had not been set up until after her husband had fallen into difficulties, and such claim rested only upon the statement of the intestate, made after the title had ripened in some one, that he had, in his waggon, conveyed the wife of his son to the land while the son was absent, and left her in possession:

Held, that the possession was that of the son; and that his title vested in his assignee in insolvency.

A child who has been advanced is bound to bring into hotchpot that wherewith he has been advanced only when it has been so expressed in writing either by the parent or the child so advanced.

Examination of witnesses and hearing.

Mr. *Lazier*, for the plaintiff.

(*a*) 5 Grant 591.

1869.

Filman v. Filman.

Mr. *R. Martin*, for the defendant *Peter S. Filman*.

Mr. *Freeman*, Q. C., for the widow of the intestate.

Mr. *Proudfoot*, for the defendants *Hancock* and *Kerr*.

Mr. *Robertson*, for the defendants *Bowman*, *Lewis*, and *Binkley*.

Mr. *Leman*, for the infant defendant.

Judgment.

SPRAGGE, V. C.—This is a bill for partition filed by one of the heirs of the late *Jacob Filman*, who died seized of several parcels of real estate in this Province. The bill alleges that *Jacob Filman* died intestate. This is admitted by the co-heiresses of the plaintiff, *Catharine Hancock*, *Elizabeth Bowman*, *Magdalen Kerr*, and *Maria Lewis*, and by their husbands, and by *George Binkley*, the surviving husband of another of them, and by the widow. One of the heirs, *Peter S. Filman*, sets up that there was a will, and his wife, who is made a defendant upon another question, makes the like allegation.

There has been an inquiry as to the genuineness of a document sent anonymously through the post office to the plaintiff, since the case was before me for hearing, which purported to be the will of *Jacob Filman*; and my brother *Mowat*, before whom the inquiry was had, has pronounced against the genuineness of that document. No other paper, purporting to be the will of *Filman*, has been found; and there is no sufficient evidence of his having left any will. The conclusion upon the evidence, therefore, must be that *Jacob Filman* died intestate.

Besides the question of the will, *Peter* and his wife set up title in the wife to 150 acres of land, being those

numbered eleven in the bill, and being composed of lot 17 and the west half of lot 16, in the 7th concession of Barton; and assuming *Jacob*, the father, to have died intestate, *Peter* claims to be entitled to his share of the residue. *Peter* himself has made an assignment in insolvency; and it is material to his wife, and is contended by him, as well as by her, that the title to the 150 acres should be established in her. The assignees in insolvency are made parties.

The 150 acres are not spoken of in the evidence as separate parcels, but as constituting together one farm. Possession of 200 acres, of which this was a part, was delivered by the father about six months after the marriage of *Peter* with his present wife, whose it is now claimed to be; and it was, as appears by the evidence, possession given with a view to permanent occupancy, not as a tenancy, but as a gift. To whom? is the question. What was done, as stated by the father after *Peter's* difficulties, was this, that he, the father, with his own waggon, conveyed *Peter's* wife to the place; *Peter* himself being absent at the time, up the country, it is said. It does not appear that he gave her any formal or symbolical possession, or any actual possession, unless conveying her in his waggon to the place can be so considered. This took place some twenty-five years before the death of the father.

Judgment.

In the evidence the possession is spoken of as the possession of *Peter*, or the possession of *Peter* and his wife, or that they occupied it from that time. It was farmed and improved by *Peter*, and assessed in his name; and I do not find from the evidence that any claim was set up on the part of *Peter's* wife, that the farm was hers, until her husband fell into difficulties. After assignees in insolvency were appointed, she made her claim; and it does not appear to have been understood previously between her husband and herself that

1869.

Filman v. Filman.

she made any claim to the land; for upon the occasion of crops being sold by the assignee, she, while saying that she was put on the place by *Peter's* father, said that "she hadn't told her husband until lately how she held."

There is in strictness no evidence that *Peter's* wife was put into possession, or conveyed to the place by the father. There is no evidence of this except the statement of the father, made at the earliest in 1864, and after possession had ripened into title in favor of some one, whom that was, could not be decided by the declaration of any one. It is now, and either was (or was expected to be) at that time, a question of title between *Peter's* assignees and his wife; and the father expressed his apprehension that it would go to *Peter's* creditors.

Judgment.

The question does not indeed really depend upon whom the father put in possession, but whose possession it has been. Unquestionably it has been in the possession of *Peter:* for the first year regarded by the law as a tenancy-at-will, and thenceforward as the possession of *Peter*, which, at the expiration of twenty years, ripened into title in *Peter:* this would be, at the latest, in 1862. As between *Peter's* assignee and his wife, I am clear that the title was in *Peter*.

It appears to me clear, also, upon the evidence, that as between *Peter* and his co-heirs, the possession of *Peter* had been of such a nature as to have ripened into title in 1862. There was only one act done by the father after the original putting into possession which could be construed as an interference with that possession; and that was the sale of 50 acres, the farm having originally consisted of 200 acres; but that, when examined, amounts to nothing. In the first place, there is no proof of it; there is only the statement of the father, and the

witness who speaks of it states his belief that the sale was by *Peter*, and the deed given by the father. But supposing it proved, it was, so far as we can see, not intended as any interruption of the possession that he had given, to any extent beyond the 50-acre piece itself.

1869.

Fillman v. Fillman.

There is nothing in the case like the peculiar circumstances which existed in *Foster* v. *Emerson* (*a*); and the declarations of the father, which are of course receivable against his own title, shew that he regarded the possession as an exclusive possession by *Peter*, and one ripening into title. I think, too, that the possession must be taken to have been of the whole 150 acres, not merely of that part actually farmed. There is indeed no evidence shewing that any less than the whole had been actually occupied; and *Peter* is spoken of as in possession of the whole. But what is material is, that there was no tortious taking of possession of a piece of land forming part of a lot of land; but an actual putting into possession by the owner, of a farm and probably of wood land adjoining: and, as stated in the evidence, the father was thenceforth out of possession, and the son is spoken of in evidence as exercising acts of ownership generally, over the piece of land in question. I agree with my brother *Mowat*, in *McKinnon* v. *McDonald* (*b*).

Judgment.

A question is made between the co-heirs on the one hand, and *Peter* and his assignees on the other; whether, assuming *Peter* to have acquired title to the 150 acres, it is not to be regarded as by way of advancement to him by his father, under section 20 of 14 & 15 Vic. ch. 6, and therefore to be brought into hotchpot. The statute makes the real estate of persons dying intestate distributable among heirs substantially, as personal estate was and is distributable among the next of kin. The old statute of distributions 22 & 23

(*a*) 5 Grant, 135. (*b*) 13 Grant, 158.

1869.

Filman v. Filman.

Charles II., contains a provision to the effect contended for; and that provision is imported into our act, abolishing the law of primogeniture, to which I have referred, but with a qualification. The provision in our act is thus expressed, "that if any child of an intestate shall have been advanced by the intestate, by settlement or portion of real or personal estate, or of both of them, and the same shall have been so expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate," &c. The provision that the advancement shall be expressed or acknowledged to be such in writing is not in the English statute. It was probably introduced into our statute to avoid the questions which have arisen as to what constituted an advancement. At all events, under our statute a child advanced is bound to bring into hotchpot that wherewith he has been advanced, be it real or personal estate, only where it is so expressed in writing, which is not the case here. Shortly, then, my conclusion is that the father died intestate; that *Peter* acquired title by possession to the 150-acre parcel of land, and that he was not, and his assignees are not, bound to bring it into hotchpot, consequently that he was, and they are entitled to a distributive share of the residue of the estate.

Judgment.

As to costs,—the costs of the inquiry as to the genuineness of the paper produced as a will have been disposed of by my brother *Mowat;* the other costs should be as usual in partition cases. I do not except from this the costs of the first hearing, because while *Peter* failed in his contention as to a will he succeeded as to his title to the 150 acres.

1869.

BINKLEY v. BINKLEY.

Infant legatee—Maintenance during infancy.

A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, and charged the same on the shares of two of the devisees; but the will was silent as to interest upon the legacy.

Held, that the infant was entitled to maintenance out of the estate of the testator, during her minority, to the extent (if necessary) of the interest on the legacy; and an inquiry as to the ability of the widow of the testator to maintain the infant, was refused.

Examination of witnesses and hearing before Vice Chancellor *Spragge*.

Mr. *Bruce*, for the plaintiff.

Mr. *Blake*, Q. C., for the defendants other than the widow.

SPRAGGE, V. C.—The plaintiff is the infant daughter of the testator, *Jacob Binkley*, who died in June, 1867, the infant then being eight years of age. Judgment.

The will is short. After providing for the payment of his debts and funeral expenses, the will proceeds thus: "First. I give and bequeath to my beloved wife, *Catherine Binkley*, the sum of $300 per annum, during her natural life, and the use of west dining room, and bed room off, on the first floor of my dwelling-house, to be received and accepted by her in lieu of dower. Second. I give and bequeath to my beloved daughter, *Mary Amelia Binkley* (the plaintiff) the sum of six thousand two hundred dollars, lawful money of Canada, to be paid to her when she shall attain the age of twenty-one years of age, to her heirs and assigns for ever." The testator then devises 100 acres of land to his married daughter, Mrs. *Bowman;* and gives the residue of his estate real and personal to his son; and he directs that

1869.

Binkley v. Binkley.

the sums bequeathed to his wife and infant daughter should be paid by his son and Mrs. *Bowman* in proportion to the value of their shares.

The testator left real and personal estate of considerable value. The bill states them to be together of the value of $60,000. The answer puts the value of the real estate at $18,000, and of the personal estate at $5000.

Evidence was offered of the expressed intentions of the testator in relation to the legacy to his infant daughter, which evidence I held to be inadmissible.

The question arises out of this legacy.

Judgment.

It is clear law, and it is undisputed, that a legacy by a parent to an infant child, payable upon coming of age, or upon that event or marriage, the will being silent as to interest upon the legacy, stands upon a different footing from a legacy to a stranger; the latter not carrying interest; while in the case of a legacy to a child, the child is entitled to maintenance to the extent, if necessary, of interest upon the legacy—this as a general rule:—it is otherwise when other provision is made by the will, for the maintenance of the infant.

But the defendants contend that if the mother be of ability out of her own means, or otherwise, to maintain the infant, this maintenance will not be allowed in respect of the legacy; and they ask an inquiry whether she is of such ability.

It is clear that it is the duty of the mother, remaining unmarried after the death of her husband, to maintain her children. *Isaac* v. *Martin* (*a*); anonymous case

(*a*) Bun. 136.

reported in *Ventris* (*a*); *Butler* v. *Duncomb* (*b*); *Billingsley* v. *Critchet* (*c*), and other cases.

This further point is also settled by the authorities, that when there is a devise or bequest to infants, not by a parent, or one standing in *loco parentis*, the court will, even where maintenance is directed by the will out of the property given by the will, refuse to allow it to the father if he is of ability to maintain his children; but direct the fund to accumulate for the benefit of the children. Upon such a will Lord *Thurlow* in *Hughes* v. *Hughes* (*d*) directed a reference as to the ability of the parents (in subsequent cases it has been as to the ability of the father when living); and upon the question being again mooted before him, upon the minutes of the decree being spoken to, he adhered to his former determination. This decision has been followed in subsequent cases; in some of them a reference has been dispensed with, but the principle has been preserved.

Judgment.

It might be argued that if the court will direct such an inquiry, where a testator has made express provision for maintenance, it will direct such inquiry, and perhaps *a fortiori*, where there is no such provision. I have met with no case in which this has been done; and when we look at the reasoning upon which this reference has been directed, and at the reasoning upon which it has been held that in the case of a legacy from parent to child, payable on coming of age, maintenance is held to be payable in the meantime, we shall find reason and consistency in its being directed in the one case and not in the other, the reasoning throughout being based upon the duty of the parent to provide for the support of his children.

In the case of a legacy from parent to child, payable

(*a*) 2 Vent. 353.
(*b*) 1 P. Wm. 448.
(*c*) 1 B. C.C. 268.
(*d*) 1 B. C. C. 387.

1869.

Binkley v. Binkley.

upon the latter coming of age, the court presumes that the parent, being bound by natural duty to provide for his child, must have intended when giving such legacy that his child should be maintained in the meantime. So Lord *Hardwicke* in *Heath* v. *Perry* (*a*) gives as the reason for the rule that the court "will not presme the father *inofficious*, or so unnatural, as to leave a child destitute." And Lord *Rosslyn*, in *Long* v. *Long* (*b*), gives the reason more at length. "I take the rule of the court to be that in case of a legacy to a child payable at twenty-one or marriage, if there is no provision, the court will raise interest to supply, what it is quite fair to construe, a mere mistake. It is the duty of the parent to maintain the child: that he meant to execute it is proved by the legacy." And the same learned Chancellor in *Mitchell* v. *Bower* (*c*) says that the court "has proceeded upon the ground of a very natural presumption, that a father bound by natural duty to provide for the child, giving a legacy to that child, though he postponed the payment to a distant period, commonly, the age of twenty-one, or marriage, could not but intend that that child should be maintained: and therefore the court gives the interest, where there is an omission of any direction as to interest; and gives the interest for the maintenance."

Judgment.

It is upon the same reasoning as this, that the court proceeds, when in the case of a will made by a stranger, provision is made for the maintenance of infants, and the court directs that such provision shall accumulate. It is, that it being the natural duty of the father to maintain his children, if of ability to do so, the court will not, except in special cases, relieve him from that duty.

Looking at this will I find a legacy from a father to his daughter, a mere child, payable when she comes of

(*a*) 3 Atk. 102. (*b*) 3 Ves. 286, *n.* (*c*) 3 Ves. 287.

1869.

Binkley v. Binkley.

age, and no provision made for her support in the meantime. The legal presumption is, that the omission to give interest or other maintenance was a mere mistake on the part of the father. His intention to provide for his child is evident by his legacy to her: the inference is that he did not mean to leave her to starve in the meantime. And it is not a just inference that he meant to shift the burthen of support upon his widow, or upon any other person. His estate is the source from which her support should be derived, and not the private means of the widow, if she has private means.

There is nothing exceptional in this case: the decree, therefore, will be for a reference as to the proper sum to be allowed for the maintenance and education of the plaintiff until she comes of age; and as the defendants, other than the widow, have resisted this, the decree must be against them with costs; and they must also pay the costs of the widow. The sum to be allowed for maintenance is of course not to exceed interest upon the legacy, and is not to come up to that amount unless necessary and proper. A larger allowance will probably be necessary some years hence, as her education advances, than is necessary now. It will commence from the death of the testator, not from one year afterwards. Judgment.

STEWART v. GLASGOW.

Infant cestui que trust—Maintenance—Vested interest.

By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one:

Held, that the infant took a vested interest; and the court directed an inquiry as to her past and future maintenance.

Motion for decree.

1869.

Stewart v. Glasgow.

Mr. *O'Reilly*, Q.C., for the plaintiff.

Mr. *Moss*, for the defendant.

SPRAGGE, V. C.—The plaintiff is the infant daughter of the late *John Stewart*; the defendants are trustees under a conveyance made by his direction by certain parties from whom he had made a purchase of land, and are also executors under his will. The conveyance bears date 30th October, 1845 or 1855.* The trust is short, and is in these terms: "In trust for *Margaret Stewart*, daughter of *John Stewart*, of said township, yeoman; and if she dies before attaining the age of twenty-one years without issue, then in trust for *Jane Ann Stewart*, also daughter of said *John Stewart*, her heirs and assigns forever, to be conveyed to said *Margaret Stewart* in fee simple, on her attaining the age of twenty-one years, by the said trustees." The will is of subsequent date.

Judgment.

The plaintiff claims that under this conveyance she takes a vested interest, and asks an allowance for past, as well as for future maintenance. The defendants admit the receipt of rents and profits of the trust estate to the amount of $700, but say that they are advised that they cannot safely apply the same for the maintenance and education of the plaintiff, unless by the sanction and order of this court.

I think it clear from the cases, among which are *Phipps* v. *Ackers* (*a*), and *Simmonds* v. *Cocks* (*b*), cited to me by the plaintiff, that the plaintiff takes a vested interest under the trust deed, and is entitled to maintenance out of the rents and profits. There will be an

(*a*) 9 Cl. & Fin. 583. (*b*) 29 Bea. 455.

* The bill stated it to be 1855. The copy of the trust deed laid before the court shewed that 1845 was the date.

order for the payment into court of the sum in the hands of the defendants, and a reference as to how and by whom the plaintiff has been supported since the death of the testator, and what will be a proper sum to be allowed in respect of the past and also in respect of the future maintenance and education of the plaintiff.

1869.

Stewart v. Glasgow.

GUNN v. DOBLE.

Mortgagor—Mortgagee—Purchaser.

Where the purchaser of mortgaged premises had perfected his title thereto by means of a conveyance from the mortgagee, who had obtained a final order of foreclosure, and it was sought by the mortgagor to impeach the title of such purchaser, by reason of irregularities in the foreclosure proceedings, of which, however, it was not shewn that the purchaser was aware; but the decree and final order on the face of them were regular:

Held, that the purchaser was not bound to inquire into the regularity of the proceedings upon which the decree and final order were founded, and dismissed the bill with costs.

Examination of witnesses and hearing before Vice Chancellor *Spragge*.

M. *Blake*, Q. C., and Mr. *Wells*, for the plaintiff.

Mr. *McMichael* and Mr. *A. Hoskin*, for the defendant.

SPRAGGE, V.C.—The facts in this case are somewhat complicated; so far as they are material they appear to be as follows: On the 10th of August, 1863, the plaintiff mortgaged the premises in question to a Miss *Annie Louise Rait*, a lady resident in England, and who was investing money in Canada through Messrs. *Blaikie & Alexander*, of Toronto. The mortgage money being in arrear, a bill of foreclosure was filed 29th October, 1864,

Judgment.

1869.

Gunn v. Doble.

and which was served 30th December in the same year. Between the filing and service of the bill the plaintiff applied for an extension of time for the payment of the interest in arrear; and on the 11th of November, 1864, Messrs. *Blaikie & Alexander* sent the following answer:

"We have received your letter of the 8th instant. On the 29th of April when writing you about the completion of the loan, we mentioned that the interest we required to be paid with unfailing punctuality. On the 7th of September we wrote to you reminding you that the interest was due on the 10th August, and giving you till the 25th September to pay it, and if not then paid Chancery proceedings would be taken. We delayed doing anything however till the 21st October, when the mortgage was handed to Mr. *Kingstone*, who, on the same day, wrote to you. We have just called on Mr. *Kingstone*, and find that on the 29th October he, not having heard from you, filed a bill in Chancery and sent a copy of it to the sheriff at Goderich to serve on you. It is now too late to stop the sheriff doing so. * * * We have no wish, however, to put you to unnecessary trouble, and we have told Mr. *Kingstone* to stay proceedings to the 10th of February, by which time you say you can pay up interest in arrear and costs, also one year's interest in advance.

Judgment.

"We beg you to understand that if payment be not made to us on or before the 10th February, the proceedings in Chancery will be pushed on again."

The arrear of interest was not paid; and after the expiry of the time limited by the letter, the suit was proceeded with, and a decree taken as by the defendant's default. The plaintiff in his bill complains of this and puts the correspondence in a light not warranted by its contents. The letter of Messrs. *Blaikie & Alexander* was sufficiently explicit. It certainly did not lead the plaintiff

to expect another service of the bill, or any further notice of proceedings. 1869. Gunn v. Doble.

A decree was taken upon *precipe*, 24th February, 1865, and it was thereby referred to the master to take an account of the plaintiff's mortgage, and of other incumbrances. The master by his report, dated 8th April, 1865, found the amount due on the plaintiff's mortgage, and the amount due to one *Archibald*, a judgment creditor who had come in under the decree, and had proved in his office. Subsequent accounts were taken, and by a report dated 27th March, 1866, the amounts found due were directed to be paid on the 27th June following. A final order of foreclosure was obtained on the 29th of June in the same year.

The bill complains of these proceedings as erroneous in several particulars. They were taken *ex parte*. That was not irregular; as the defendant had not on his part put in an answer, or taken any proceedings to make it necessary to serve him with appointments or notices of any kind. In the fourth paragraph he states that "A few days after receiving said letter, and on the 30th day of December, 1864, the said bill was served on your complainant, but in consequence of the said letter your complainant did not regard the said service as the commencement of proceedings against him; but regarded it as a step which would have been prevented had it been possible under the circumstances to have countermanded the instructions to the said sheriff; or knew or considered that the said *Rait* or her agents relied upon the said service as a valid service of that day, or of any other day, and he did not, until recently, know that the suit was being proceeded with." The suit was not in the proper name of the mortgagee, but in the name of *Rail* instead of *Rait*. In the suit of *Boughton* v. *Frere*, (*a*) the action was upon a bill of Judgment.

(*a*) 3 Camp. 29.

1869.

Gunn v. Doble.

exchange drawn by *Edmund Boughton* upon, and accepted by the defendant. The action was in the name of *Edward Boughton*. Upon this discrepancy the defendant moved for a non-suit, but Mr. Justice *Bayley* upon its being proved that the bill was drawn by the plaintiff, and that the defendant knew by whom the action was brought, held it sufficient, and the plaintiff had a verdict. In this suit it is proved that the mortgage was to the same person as instituted the suit, and it is abundantly clear that the defendant in that suit (the plaintiff in this) knew by whom that suit was instituted. Several passages in his bill, and its whole tenor, shew this. It is sufficient to refer to the paragraph in which he points out the mistake, where he says "the said *A. L. Rait* was wrongfully described and named therein, and in all the subsequent proceedings as *Annie Louise Rail.*" No question as to identity, but an erroneous description. There is nothing in this objection; and I should have said so without reference to the decision at Nisi Prius.

Judgment.

Other defects are alleged which I will notice after referring to other facts of the case. Pending these proceedings in this court for the foreclosure of Miss *Rait's* mortgage, proceedings were being taken at law by creditors of the mortgagor. Judgments were recovered by *Archibald*, who proved in the master's office by his attorneys, Messrs. *Toms* and *Moore*, and by another creditor, *Little*, by his attorney, Mr. *Cameron*, and *Gunn*, being in gaol for not attending to be examined, executed to *Cameron* a conveyance of the mortgaged premises on 13th February, 1865, for the purpose of securing the judgment debts of *Little* and *Archibald;* and accordingly by a defeazance of the same date, executed by *Cameron*, he agreed to reconvey upon payment of *Little's* judgment in one month, and *Archibald's* in two months, with interest; time to be of the essence of the contract.

1869.

Gunn v. Doble.

Gunn made default in these payments, and the attorneys of the judgment creditors took steps to realize the judgments out of the mortgaged premises. They placed the land in the market for sale through a Mr. *McCaughey*, a land agent, and through him a sale was made to a person who was looking for a farm, and with this person *Cameron* entered into a contract of sale on the 12th of November, 1865. The sale was for $1700; of which $270 was paid down, $1000 was made payable on the 15th of February, 1866, and the balance in one year thereafter. This purchaser was *Doble*, the defendant in this suit.

The conveyance from *Gunn* to *Cameron* was by a "quit claim deed," which was not sufficient in terms to pass the legal title; and the attorneys of the judgment creditors thought it expedient that the foreclosure suit should be proceeded with in order to perfecting the title by final order of foreclosure, and then obtaining a conveyance from Miss *Rait*; and this accordingly was done. A payment of interest in arrear was made by or through one of them, and the future conduct of the foreclosure suit was transferred to the Toronto agents of *Toms* and *Moore*. It was attempted to be shewn that the suit was conducted by the solicitors of *Doble*, but this was disproved. Before the written contract for sale entered into by *Cameron*, a verbal contract for sale was entered into with *Doble* by one of the solicitors of *Little*. It was some time before this that *Toms* and *Moore* had, by their Toronto agents, taken charge of the foreclosure suit.

Judgment.

Besides the alleged irregularities to which I have referred, it is alleged that *Cameron* was a necessary party to the foreclosure suit. But his purchase was *pendente lite*, and he did not acquire the legal title, and indeed he could not, as it was in the mortgagee, even if the conveyance to him had been sufficient in terms to convey it to him.

1869.

Gunn v. Doble.

Another objection is, that the second report was not really made till some time after its date. It bears date 27th March, but was not actually signed till the the 18th of April. It appears to have been prepared and settled on the day it bears date, and to have been retained in the hands of the accountant until the production of a supposed decree on further directions, which had no existence in fact, but in regard to which some recital was introduced into the report, and which was struck out before the report was signed. The report then, or rather the draft or engrossment of it, was altered as well as signed after its date, and less than three months elapsed between the actual making of the report and the time appointed for payment. The report was in fact ante-dated, and I cannot pass it over without expressing my disapproval of it.

Judgment.

All the other objections to the conduct of the suit fail, and it is unfortunate that the accountant, and the solicitor conducting the suit should have committed this irregularity, a thing wrong in itself, and which has left the subsequent proceedings open to question. If the question were between the original parties it would be at least doubtful whether the mortgagee could have held her final order of foreclosure. The question is whether *Doble*, purchasing under the circumstances that he did, can be affected by the irregularity.

The plaintiff puts his case and argues it as if he were in the same position as one having an equity against the legal title of another, and he puts the irregularities which he sets out in his bill as if they were matters of equitable title. If it were so he would be entitled to prevail against a purchaser in all cases where he had not paid all his purchase money, and also obtained his conveyance before notice. If the defendant were a purchaser at a sale made under the direction of this court, it is clear that this irregularity would not affect him.

1869.

Gunn v. Doble.

Such purchaser must see that there are proper parties and that there is a decree or order warranting the sale: he is not bound to examine into the correctness of the previous proceedings. The reasons upon which the courts have held this in the case of sales do not all apply in the case of foreclosure. I allude particularly to what may be called reasons of policy, for instance, that to require a stricter rule would tend to damp sales. Still, some of the reasons given do apply, among them that of Lord *Redesdale*, in *Bennet* v. *Hamill* (*a*), expressed as follows: "On the contrary, as far as I can find, the general impression they (the cases) give is that a purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that it has in that investigation properly decreed a sale; then he is to see that there is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the court; and he has further to see that taking the conveyance he takes a title that cannot be impeached *aliunde*. He has no right to call upon the court to protect him from a title not in issue in the cause and no way affected by the decree; but if he gets a proper conveyance of the estate so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, I think the title of the purchaser ought not to be invalidated." And he adds: "If we go beyond this we shall introduce doubts on sales under the authority of the court which would be highly mischievous." I refer also to the language of the same learned judge in *Colclough* v. *Sterum* (*b*), in the Lords: "It is a settled maxim of equity that persons purchasing under decrees of the court are bound to see that the sale is made according to the decree. * * * The decree protects parties only according to its terms," enunciating the same doctrine in a converse

Judgment.

(*a*) 2 S. & L. 577. (*b*) 3 Bligh. 186.

1869.

Gunn v. Doble.

case. The purchaser, though not bound to look behind the decree, is still bound to see that there is such a decree as will protect him. The case of *Bowen* v. *Evans* (*a*), before Lord *St. Leonards* when Lord Chancellor of Ireland, was also a case of sale under decree. The Chancellor made this observation (*b*): "If I found a purchaser buying where fraud appeared clearly on the face of the decree, I should hold him to have notice of it; but I should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud which was not discovered by the court, or the officers of the court, or the counsel concerned in the cause, whose duty it is, not to permit the court to make a decree not warranted by the facts of the case."

Judgment.

The observations of the learned judges whose language I have quoted, occurred in cases of sales under decrees, and were directed, primarily at least, to decrees for sale; but I apprehend that they did not mean to hold purchasers under decrees not bound to look at the proceedings before decree, merely on the ground that to require more would have a tendency to damp the sales of the court, in other words, that it would not be expedient to require more; but that, while pointing out the injurious effect that the requiring more would have upon sales, they held as a matter of principle, that parties acquiring rights under decrees, not being themselves parties to the suit, could not be held bound to see whether the proceedings by which the decree was arrived at, were correct and regular; including in the word decree any decretal or other order by which the rights of the parties were disposed of; and which would comprehend an order of final foreclosure, and, as the form is in Ireland, of foreclosure and sale. If a purchaser at a sale by the court "has a right to presume that the court has taken the steps necessary to investigate the rights of the

(*a*) 1 J. & Lat. 178. (*b*) Page 257.

1869.

Gunn v. Doble.

parties, and that it has on that investigation properly decreed a sale," it does appear to me upon principle that a purchaser from a party in whose favor the court has decreed final foreclosure, has the like right to presume that the court has taken the like steps, and has upon investigation properly decreed final foreclosure. Again, to refer to the language of Lord *St. Leonard's*, while there would be no wrong in holding a purchaser bound by what appears upon the face of the decree or other order which may be said to constitute a link in his chain of title, it would be quite another thing to hold him bound to look into that which was not discovered by the court; which the court had passed as correct and regular; and upon which the court had founded its decree or order.

In this case, indeed, it is not necessary to go that length. The decree and the final order are upon the face of them regular, and if an abstract were made of all the papers in the cause, they would, as far as is shewn in this cause, appear to be regular It would be hard indeed if a purchaser after final order were held to be affected by errors not even discoverable upon an inspection of the papers, and not only hard, but in my judgment contrary to reason and principle. The answer denies very explicitly that the defendant had notice of this, or of any of the alleged irregularities set out in the bill.

Judgment.

There is another ground upon which the defendant is entitled to protection, if he paid his purchase money before this bill was filed and served. The last payment fell due on the 15th of April, 1867; the bill alleges that he obtained his conveyance before that date—the answer says, on that date, and sets up that he was a purchaser for value without notice. I will allow him, if he desire it, to prove by affidavits, other than his own, at what date he completed the payment of his purchase

1869. Gunn v. Doble.

money. In my view of the case, this is not necessary, but if he is advised that it will make him more safe, I will admit such proof.

The bill is dismissed with costs.

SPRINGER v. CLARKE.

Administration—Executor—Costs.

Where an executor obtained the usual order for the administration of his testator's estate, and, upon the hearing on further directions, no reason was shewn for invoking the aid of the court, and the guardian for the infants did not object in any way to the course taken by the executor, the court refused both parties their costs.

Hearing on further directions.

Mr. *Lazier*, for the plaintiff.

Mr. *Gibson*, for the infants.

Judgment.

SPRAGGE, V. C.—The usual administration order was obtained upon the summary application of *David Reynolds Springer*, the only executor of the will of *Samuel Clarke* who took out probate; of the other executors, one is dead and the other renounced probate. The master reports personalty come to the hands of *D. R. Springer* to the amount of $941, and rents and profits of realty to the amount of $75. He reports $885 properly applied, and after allowing him commission he reports a balance in his hands of $83; he reports outstanding debts to an amount under $150.

Upon the cause coming on upon further directions, counsel for the executor asks for his costs. He asks me also to declare that under the will the widow is put

to her election; and further, that the legacies given by the will are a charge upon the real estate. He asks that the real estate be sold to satisfy the outstanding debts and to pay the legacies. The guardian for the infant appears and assents to what is asked, and on his part asks for his costs. No other parties are represented.

1869.

Springer v. Clarke.

It is obvious that I cannot, upon these proceedings, make any declaration as to the rights of the widow, nor as to the legacies: these questions not having been raised. But I desired to look at the papers; and among them the will of the testator is put in. It is short and simple. It directs that the three persons whom the testator names as executors shall, as soon as possible after his decease, dispose of all his real estate, and all his chattel property: the household furniture is by a subsequent clause excepted from the latter, and bequeathed to his wife; and he directs its application first in the payment of debts, and the residue for the support of his wife and children, with the exception of the sum of $500, which he disposes of in legacies to sons and daughters.

Judgment.

Upon reading this will and the master's report I find it difficult to understand for what purpose the executor came to this court for an administration of the estate. He had paid all the debts with the exception of a trifling balance, and he had the power, and it was made his duty under the will to sell the real estate, and it is not suggested that any difficulty of any kind has occurred in regard to the dower or the election of the widow or otherwise. On the contrary, in regard to the latter I was informed that no difficulty with the widow was apprehended.

The will is dated 1st February, 1868; the probate, 29th May, 1868; and the order of this court for administration, 25th September in the same year. The only

1869.

Springer v. Clarke.

reason for coming to this court, which has been suggested, is, that creditors were pressing for payment, as appears, I am told, by an affidavit filed by the executor upon his application for the administration order.

I do not see how this can be a valid reason for coming into this court, for he had the power under the will to do all that this court could do for him. I do not suppose the parties mean me to understand, in reference to the pressure of creditors, that the executor came into this court and obtained a decretal order for administration, simply in order to prevent proceedings at law, and to force the creditors to come into this court to prove their debts; and yet I see no other purpose that could be served by instituting proceedings in this court. I need hardly say that the court could not admit such a reason as a valid one for instituting proceedings here. It would be making this court an instrument for delaying creditors in the recovery of their debts, and would be a great abuse.

Judgment.

It is settled in *White* v. *Cummins* (*a*), decided in this court more than sixteen years ago, that if a personal representative comes into this court without having good and sound reason for doing so, he will at least not be entitled to his costs: as put by the late learned Vice Chancellor "there must be some real question to submit to the court, or some dispute requiring its interposition;" and it was expressly held that the obtaining an indemnity by passing his accounts is not a sufficient reason for coming into this court. There being in this case no sufficient reason that I can see for coming into this court, and none having been suggested, I must refuse the plaintiff his costs. I think it my duty to take the same course in regard to the costs of the guardian of the infants. The guardian should have suggested to

(*a*) 3 Grant, 602.

1869.

Springer v. Clarke.

me that, looking at the will, there was no valid reason for the estate being onerated with the costs of this suit: he was appointed guardian in order to his protecting the interests of the infants; and it was his duty to bring under the notice of the court everything that was material to the interest of the infants. Strictly he should have objected, by way of answer to the executor's application for an administration order, that proceedings in this court were unnecessary. He should at least have done so upon the first occasion of the matter coming before the court. Instead of which he assented in terms to the plaintiff having his costs, and to his having such a decree as he asked: and indeed appeared, as far as I could see, only to ask for his own costs. Under the circumstances I think I ought not to give them to him.

I have hesitated as to what is the proper course as to further proceedings in this suit. But for the creditors who have come in under the administration order and who have proved their debts upon the faith, it is to be assumed, of their being paid through the administration of their debtor's estate in this court, I should probably have considered the right course to be to refuse the further aid of this court; and to leave the executor himself to carry out the directions of the will. They are very simple, and present no question of doubt or difficulty, unless the one of the widow being put to her election, upon which the plaintiff has not placed himself in a position to ask the direction of the court. As it is, creditors having proved, I think the court should proceed to sell the real estate, for the purposes for which the will directs that it should be sold. The plaintiff, however, may find it to be to his interest to advance the small sum beyond the amount in his hands, necessary to satisfy the creditors; and himself to execute the directions of the will; rather than have them executed by the court at his expense. The plaintiff can have two weeks to consider what course he will take. The court

Judgment.

1869.
Springer v. Clarke.

has possession of the subject matter of the suit, though as I conceive unnecessarily, and I will give all parties liberty to apply.

As neither the plaintiff nor the guardian of the infants has given me any good reason why this suit has been instituted, I may fairly assume that none exists. Still I will very willingly hear from them anything they may have to suggest as a reason for proceedings in this court having been taken.

BAKER v. DEWEY.

Ships—Vendor's lien—Demurrer.

The part owner of a British registered ship sold his shares therein on credit to the defendants *D.*, who having made default in payment of the balance of purchase money an execution at law was obtained therefor, under which their interest in the vessel was sold by the sheriff to *C.*, another defendant, and a bill was thereupon filed by the vendor claiming a lien on the vessel for unpaid purchase money. A demurrer thereto for want of equity was allowed.

Demurrer for want of equity.

Mr. *Moss*, for the demurrer.

Mr. *Hodgins*, contra.

Judgment.

SPRAGGE, V. C.—The plaintiff and the defendant *Casey* were joint owners of the schooner "Alma," a British registered ship, each owning thirty-two shares of the vessel. The plaintiff contracted to sell to the defendants, the *Deweys*, his shares in the vessel. This contract, and what was done upon it, are thus stated in the bill: "On or about the twelfth day of March, one thousand eight hundred and sixty-seven, a contract in writing was entered into at Belleville, in this Province,

1869.

Baker v. Dewey.

by and between your orator and the above named defendants, *Josiah B. Dewey*, *Charles Benedict Dewey*, and *Alonzo W. Dewey*, whereby your orator contracted to sell, and the said last named defendants contracted to purchase, your orator's thirty-two shares in the said schooner "Alma," for the sum of two thousand dollars, payable as follows: in cash at the time of the said agreement, five hundred dollars, which *Josiah B. Dewey*, *Charles Benedict Dewey*, and *Alonzo W. Dewey* then paid; five hundred dollars in six months, with interest at seven per cent, and one thousand dollars in twelve months, with interest at seven per cent; and the said *Josiah B. Dewey*, *Charles Benedict Dewey*, and *Alonzo W. Dewey* then agreed to insure the said vessel or ship in some responsible insurance company, and to assign the policy to the plaintiff.

"The said last named defendants, after making the said agreement, paid to your orator the sum so agreed to be paid down, and subsequently the further sum of five hundred dollars, by them then agreed to be paid in six months; but the sum of one thousand dollars is yet in arrear and unpaid, and the time for payment thereof has elapsed. Judgment.

"That promissory notes were given for the said five hundred dollars, due at six months, and for the one thousand dollars due at twelve months, which were signed as the said contract was signed, by the partnership name of the said last mentioned defendants of *J. B. Dewey & Co.*

"No further assignment or bill of sale thereof was made or executed, nor were the said defendants, the *Deweys*, entered or registered in the said port of Montreal as the registered owners of the said thirty-two shares, nor were their names indorsed on the said certificate of registry as provided by law."

1869.

Baker v. Dewey.

Subsequently to this an execution was issued, as it is alleged, against the goods and chattels of the *Deweys*. What was done under it is thus stated: "Subsequently to the said contract of sale by and between your orator and said last mentioned defendants, an execution on a judgment at law, issued from one of the superior courts of common law against the goods and chattels of the said last named defendants, and under and by virtue of the same the sheriff of the county of Northumberland, in whose bailiwick the said schooner then was, lately pretended to sell the said thirty-two shares, or some right or title in the said shares under said pretended execution against the said *Josiah B. Dewey*, *Charles Benedict Dewey*, and *Alonzo W. Dewey*, and the said defendant *Thomas Casey*, became the pretended purchaser thereof;" and it is added that *Casey* "now claims the right or interest of said defendants, the *Deweys* therein, by virtue of such pre-

Judgment.

tended sale, and refuses to allow the claim or lien of your orator thereon, for the balance of purchase money due by said *Deweys* to your orator." The bill then charges notice to *Casey* of the unpaid purchase money; and that the *Deweys* were not registered owners. The demurrer is by two of the three defendants, the *Deweys*.

The ground of the plaintiffs coming into court is lien for unpaid purchase money; and the allegations are just such as would be made in a bill for the like purpose by a vendor of real estate. The plaintiff concedes, what indeed it would be vain to contend for, that lien upon the sale of an ordinary chattel does not exist to the same extent as in the case of the sale of real property; but he contends that the sale and transfer of ships stand upon a peculiar footing, different from that of ordinary chattels. They certainly do, but the reasons for the difference furnish no argument in favor of the retention of lien by a vendor; nor do any cases that I have seen, lend any countenance to such a

1869.

Baker v. Dewey.

doctrine. I observe, too, that Mr. *Basil Montague*, in his Treatise on the Law of Lien, in his chapter on "lien respecting ships," makes no distinction in favor of the vendors of that species of property over the vendor of any ordinary chattel.

The bill assumes that there was a valid and effectual sale to the *Deweys*, and alleges delivery of the vessel in pursuance of it. Taking a ship to be upon the footing of an ordinary chattel in regard to lien, it is clear that delivery to the *Deweys* divested the plaintiff of his lien. The case of *Ellis* v. *Hunt* (*a*) is an express authority upon this point; and the cases which have turned upon partial or qualified delivery, are also authorities for the same position, inasmuch as they concede the general rule, and only go to establish exceptions to it. *Dixon* v. *Yates* (*b*), *Miles* v. *Gorton* (*c*), *Townley* v. *Crump* (*d*), are cases of this character. There is also the case of *Ex parte Shank* (*e*), where a person who had made repairs on a ship for one who afterwards became bankrupt, claimed a lien upon the vessel, but having delivered it, the same law was applied. Judgment.

Further this bill shews that part of the purchase money was paid by the *Deweys*, and that credit was given for the balance. The purchaser had a right to immediate possession, and such possession was delivered; and until the credit had expired there was no debt due upon which the lien could attach: *Hammond* v. *Anderson* (*f*), *Bunney* v. *Poyntz* (*g*); and the point is thus stated by *Bayley*, J., in the case of *New* v. *Swain*, "where the owner of goods sells on credit, the buyer has a right to immediate possession, but if he suffer the goods to remain until the period of payment has elapsed,

(*a*) 3 T. R. 464.
(*b*) 5 B. & Ad. 313.
(*c*) 2 C. & M. 504.
(*d*) 4 A. & E. 58.
(*e*) 1 Atk. 234.
(*f*) 4 B. & P., 1 N. R. 69.
(*g*) 4 B. & Ad. 568.

1869.

Baker v. Dewey.

and no payment in fact is made, then the seller has a right to retain them." I have, however, met with no case where, after absolute possession delivered, the vendor has been allowed to attach a lien upon the chattels sold, after credit given and default in payment; and that is the plaintiff's position here.

It is also to be observed that where there is lien, by a vendor, the general property in the thing sold has passed to the purchaser. The sale of ships and the passing of the property upon sale, stands upon peculiar grounds, under the Merchant Shipping Acts; and something beyond the mere contract of the parties is requisite to give them effect. This is well put by Sir *William Grant*, in *Mestaer* v. *Gillespie* (*a*). Speaking of the act then in force, he says, "It is to be considered that this act was framed not for the purpose of ascertaining the rights of parties against each other, or protecting them from fraud, but with the view to a great purpose of public policy; and the act in all its relations compels them to observe regulations, not in any degree requisite for their own private interests, in order to accomplish the ends of the act." And so in the case of *Speldt* v. *Lechmere* (*b*), where a sale of a ship had been made without the formalities prescribed by the act, Lord *Eldon* held it to be utterly void; "the transaction," he said "is void at law; and void to all intents and purposes. * * The construction of these acts of Parliament, as upon the annuity act, is that if the transfer is not in the mode prescribed by the act, the whole is void; and the property remains where it was." To the same effect was *ex parte Yallop* (*c*), which was also before Lord *Eldon*, and *Thompson* v. *Leake* (*d*), before Sir *Thomas Plumer*. The subsequent Merchant Shipping Acts differ somewhat in

Judgment.

(*a*) 11 Ves. 642.
(*b*) 13 Ves. 588.
(*c*) 15 Ves. 60.
(*d*) 1 Mad. 39, 44.

1869.

Baker v. Dewey.

phraseology from those then in force, but it has been adjudged that they preserve the same policy, and they have received substantially the same interpretation. I refer particularly to *McCalmont* v. *Rankin* (*a*) before Sir *J. Knight Bruce*, when Vice Chancellor, and upon appeal (*b*) before Lord *St. Leonards*; and to the *Liverpool Borough Bank* v. *Turner* (*c*) in which a very elaborate and able judgment was given by the present Lord Chancellor, then Vice Chancellor *Page Wood*; and which was affirmed upon appeal by Lord *Campbell* (*d*). In this bill we have an express allegation that upon the sale by the plaintiff to the *Deweys*, the requirements of the acts were not complied with: and if so, the contract of sale was void to all intents and purposes; and in the language of Lord *Eldon*, the property remains where it was: so no property passed to the *Deweys*, and there was nothing for a lien to attach upon. What rights not pointed at by this bill, the plaintiff may have, it is not necessary for me to consider.

Judgment.

An equity has indeed been suggested as arising upon the facts stated in the bill, which I may as well dispose of. It is that a bill for specific performance would lie by the purchasers of a vessel, and that on the ground of mutuality of remedy, a bill lies by the vendor for payment of purchase money. It is decided that the vendor of a ship cannot obtain specific performance: *Brewster* v. *Clarke* (*e*). And this was followed in *Hughes* v. *Morris* before the Lords Justices (*f*); and by Lord *St. Leonards* in *McCalmont* v. *Rankin* (*b*). In the two latter cases the bills were by the purchasers. The case of *Lynn* v. *Chaters* (*g*), which is cited by the plaintiff, was decided upon its peculiar circumstances. It was

(*a*) 8 Hare 1.
(*b*) 2 D. M. & G. 413.
(*c*) 1 J. & H. 159.
(*d*) 2 D. F. & J. 502.
(*e*) 2 Mer. 75.
(*f*) 2 D. M. & G. 349.
(*g*) 2 Keene, 521.

1869.

Baker v. Dewey.

part of the agreement upon the sale of the ship in that case, that in case of default in payment of that portion of the purchase money which was not paid in hand, that what was paid down should be forfeited; and that the vendors should be at liberty to resell the ship. There was default in payment for which the plaintiffs sued at law, but were met by a plea that by the bill of sale which was executed by them, they had admitted payment of the whole purchase money. Lord *Langdale* placed his judgment expressly upon these grounds, which he thought gave the court jurisdiction.

The points which I have considered involve this, that the plaintiff has not in my judgment any *locus standi* in court; and it is therefore unnecessary that I should consider the effect of the sale by the sheriff. What I have said can probably lead to only one conclusion upon that point; but the proper course is to give judgment only upon such points as are necessary for the determination of a case.

Judgment.

The demurrer is allowed with costs.

CAMPION v. FAIRBAIRN.

Fraudulent conveyance—Purchase for value without notice.

A sale of land was effected subject to a mortgage created by a former owner:

Held, that this circumstance did not preclude the purchaser from setting up the defence of a purchase for value without notice.

Examination of witnesses and hearing.

Mr. *Hodgins*, for the plaintiff.

Mr. *Strong*, Q. C., Mr. *Boultbee*, Mr. *Donovan*, and Mr. *Bain*, for the defendants.

1869.

Campion v. Fairbairn.

SPRAGGE, V. C.—This bill is under the Statute of Elizabeth, by an execution creditor having a *fi. fa.* against lands in the hands of the sheriff. *Fairbairn* is the principal defendant, the land having come to him through several *mesne* conveyances from the execution debtor. *Fairbairn* has a registered title and is a purchaser for value, not, however, having paid his purchase money in full, there being a mortgage to a building society, which was at the time of the sale by the execution debtor, and still is, outstanding; and this circumstance, it is contended, lets in the plaintiff's claim without his proving notice to the purchaser. I held otherwise in the case of *Ferguson* v. *Kilty* (*a*), and have seen no reason to think that I was wrong.

I may assume for the present that the conveyance impeached by this bill, from *Silas Emes* to *Aaron Emes*, *is* impeachable under the statute as made in fraud of creditors. The bill alleges usury in the different subsequent conveyances down to that to *Fairbairn*, but does not allege that *Fairbairn* had notice of any such usury. The only question, therefore, is whether *Fairbairn* had, as alleged, notice of the conveyance from *Silas* to *Aaron* having been made to defeat or hinder creditors. The allegation of notice is put in various ways, but it amounts to what I have stated.

Judgment.

The proof of notice rests upon the evidence of a Mr. *Payson*, and upon an alleged admission made by *Fairbairn* in a suit in this court between the defendant *Aaron Emes* and the defendants *Barber*, *Fairbairn*, and others.

The conveyance to *Fairbairn* was made on the 14th of September, 1866, and *Payson's* evidence is of a conversation that he had with him in the previous July.

(*a*) 10 Grant, 102.

1869. Campion v. Fairbairn.

His evidence is short—as follows: "He spoke about *Willoughby* and *Sprague*, that they had offered him their place for sale; I said there would be some question about the title; he asked me whether I thought the land would be holden for the costs of the suit; I said I had been told that it would; I suppose that he knew about the suit, which was a matter of notoriety in the township; he said he did not think he would buy it, but did not tell me any reason; I am friendly with defendant *Fairbairn*, and am a brother of the plaintiff; nothing more was said than what I have mentioned; the name of the suit was not mentioned, nor whose claim might attach." They were, however, speaking of a suit in this court to which *Silas Emes* was a party, and in which suit the execution, upon which the plaintiff proceeds in this suit, was issued. By a decree of this court dated 10th May, 1866, *Silas Emes* was ordered to pay into court a sum of $228, (to a portion of which the plaintiff in this suit was entitled), and also to pay to the plaintiff in this suit her costs of that suit. In that suit *Silas Emes* was the plaintiff, and it was commenced, as the bill alleges, in February, 1863. The conveyance from *Silas* to *Aaron Emes* was made in August of the same year.

Judgment.

I do not think that the evidence of *Payson* fixes *Fairbairn* with notice of that of which the bill charges that he had notice. The subject of their conversation was not any supposed fraudulent conveyance from *Silas* to *Aaron Emes*, but a question, it may be of dry law, whether the land then in the hands of *Willoughby* and *Sprague* was liable for the costs adjudged to be paid by *Silas Emes*. *Fairbairn* asked *Payson* whether he thought it would, and *Payson* answered that he had been told that it would; nothing more passed. The conveyance was made after that suit commenced, hence probably the question, though the order to pay the money was not made till nearly three years after the

conveyance. Not a word appears to have been said in impeachment of the conveyance from *Silas* to *Aaron*,—nothing against its *bonâ fides* or its being for value. So much as to the *fact* of notice. As to the quarter whence it came, and the time and occasion upon which it was made there are further difficulties. I had occasion to consider that point in *McNames* v. *Phillips* (*a*), and gave my views upon it at some length, and upon reading over carefully what I then said I remain of the same opinion. The result is that, in my judgment, the evidence of *Payson* fails to prove notice to *Fairbairn*.

1869.

Campion v. Fairbairn.

As to notice by admission of *Fairbairn* in *Emes* v. *Barber*. In that case the conveyance impeached in this case was assumed to be good. *Aaron Emes*, the grantee in the deed impeached here, was the plaintiff in that suit, and the deed that he impeached was a conveyance from himself to *Albert Barber*. It would have been strange if he had asked *Fairbairn* as to his knowledge of defects in the conveyance under which he himself claimed: what he did ask about was his knowledge of defects in, or facts vitiating the conveyance from himself, the then plaintiff, to *Barber*. Bearing this in mind, there is nothing in the examination which bears upon the conveyance impeached in this suit. When the case was before me at Barrie I leaned to the opinion that where the issue in the two suits was so different, I could not look at the examination in the one in order to prove notice in the other; and Mr. *Strong* appears to have understood me to feel so clear upon the point that he forbore to call witnesses. Upon further reflection I have thought that if *Fairbairn*, upon his examination in that suit, had admitted notice of facts, which would vitiate the conveyance from *Silas* to *Aaron*, they would be evidence against him in this suit, not because such facts were in issue in that suit, but as being admissions which would affect

Judgment.

(*a*) 9 Grant, 314.

1869.

Campion v. Fairbairn.

him wherever made; but that in judging of them and of the weight to be attached to them, the issue in that suit should be borne in mind; and the court should be careful to see clearly to what subject his admissions applied. If I had come to the conclusion that they applied to the conveyance impeached in this suit, I should have felt it proper to give the defendant *Fairbairn* an opportunity to call further evidence: that is unnecessary, coming to the conclusion that I do. There is nothing whatever in his examination that shews notice of anything vitiating the conveyance impeached in this suit. The result is that the plaintiff's bill as against the defendant *Fairbairn* must be dismissed, and he must have his costs.

As to the other defendants, they seem to have been made parties only for the purpose of getting an order against them for the payment of costs. Upon the case failing as against the principal defendant, the only question is whether the other defendants should have their costs. The case as against them rests upon the evidence of *Rosanna Emes* and her husband, *Aaron Emes*. The wife was examined first. The husband upon his examination disclosed a fact which shewed that the bill was filed in part for his benefit, and it was objected that he was not a competent witness; but it seems to have escaped observation that his wife was disqualified also by reason of her husband's position. Without their evidence there is nothing proved that can disentitle the defendants who have answered to their costs.

Judgment.

I am sorry that the whole costs should fall upon the plaintiff, for there is much to lead to the belief that the conveyance from *Silas* to *Aaron* was made in order to defeat her claim, but they, having allowed the bill to be taken *pro confesso*, have no costs. As to the others, there does not seem to have been any sound reason beyond the bare right to make them parties, for *Fairbairn* appears to be a man well able to pay the costs if the plaintiff's case had been established against him.

1869.

EMES v. BARBER.

Fraudulent conveyance—Secret trust—Public policy.

The plaintiff had executed a conveyance of land without consideration for the purpose of avoiding an execution which it was supposed would be issued against his grantor, upon the secret trust or understanding that when called upon the grantee would re-convey. The court under these circumstances refused to enforce a re-conveyance and a bill filed for that purpose was dismissed with costs.

Examination of witnesses and hearing.

Mr. *Hodgins*, for the plaintiff.

Mr. *Strong*, Q.C., Mr. *Boultbee*, Mr. *Donovan*, and Mr. *Bain*, for the defendants.

SPRAGGE, V.C.—The bill in this case is in respect of the same land as the bill in *Campion* v. *Fairbairn* which I have just disposed of. In that case I had occasion to state shortly the nature of this bill. It commences by stating the plaintiff's purchase from *Silas Emes*, and a conveyance to him by *Silas* and his wife, stating also the consideration, and that it was paid and satisfied. It then alleges that, in 1864, *Lawson Barber*, by false and fraudulent misrepresentations, induced the plaintiff to believe that his title would be impeached and the conveyance to him set aside; and proceeds thus:— Judgment.

"The occasion of such false and fraudulent representations was the following: A suit had been instituted in this honorable court to which the said *Silas Emes* was a party; and the said defendant *Lawson Barber* represented to your complainant that the said suit had been decided adversely to the said *Silas Emes*, and that he was immediately liable to pay a large sum of money.

"The said *Lawson Barber* further represented to your complainant that the sheriff would be at your

1869.
Emes v. Barber.

complainant's place of residence in eight days from that time, and that he would seize and sell all the loose property he could find, and deprive your complainant of the same, and that immediately afterwards a bill would be filed in this honorable court to set aside the conveyance so made by the said *Silas Emes* to your complainant; and that your complainant would be harrassed with a litigation in this honorable court in regard of said lands, and that it would cost your complainant upwards of one thousand dollars to defend said suit."

It is then stated that the plaintiff having become greatly alarmed by these misrepresentations, asked the advice of *Lawson Barber* as to what he should do under the circumstances, and that *Barber* advised him to convey the land to some friend, and thereby be enabled to get out of his trouble and difficulty; and suggested that the conveyance should be to *Albert Barber* his son.

Judgment.

What was done upon this, and the purpose and object of what was done are thus set forth:—

"Your complainant being greatly alarmed, and fearing the loss of his said property, ultimately agreed, on the said representations of the said defendant *Lawson Barber*, to convey said lot to his son, the said defendant *Albert Barber*, upon the distinct and clear agreement and trust that the said *Albert Barber* should re-convey said property to your complainant the next ensuing fall, when all danger of litigation should have passed away.

"Thereupon, in pursuance and part performance of said agreement, your complainant, by an indenture of bargain and sale, bearing date the fourteenth day of June, 1864, and at the express request of the said defendant *Lawson Barber*, conveyed or purported to convey said land to the said defendant *Albert Barber* for the nominal consideration of $2,000.

"No money or other consideration was given by either of said last named defendants, *Lawson Barber* or *Albert Barber*, for said conveyance of said land, but the same was conveyed by your complainant upon the express trust and agreement that the said defendants *Lawson Barber* and *Albert Barber* should protect the said property for your complainant, and should re-convey said lot to your complainant the next ensuing fall." 1869. Emes v. Barber.

These allegations are sufficiently explicit: they amount to this, that in order to defeat an execution which it was apprehended would be issued, he conveyed his property to *Albert Barber* upon a secret trust and without consideration: and the objection to the bill as a matter of law, is that such conveyances are against public policy, and that this court will not lend its aid to the grantor in such a conveyance. I think the objection a sound one. The principle of refusing relief in such cases has been acted upon in England in several instances, and in this court in *Langlois* v. *Baby* (*a*), which was affirmed upon rehearing (*b*). What is sought by this bill is nothing less than to enforce a secret trust, the object of the trust being to remove lands, the subject of the trust, beyond the reach of an execution. Judgment.

I think there is nothing in the distinction taken by the plaintiff's counsel that the plaintiff was not the execution debtor. The conveyance was to defeat an execution which it was supposed would attach upon them. It is the policy of the law that the process of its courts should not be defeated or obstructed, and it is no justification of a collusive conveyence having that object, that the grantor was not himself the debtor. If the conveyance from the debtor to the grantee was *bona fide*, for value, and without notice of any fraudulent intent on the part of debtor, it would not be liable to an execution

(*a*) 10 Grant, 358. (*b*) 11 Gr. 21.

1869. Emes v. Barber.

against the lands of the debtor. The plaintiff alleges valuable consideration and its payment, but does not negative notice, or collusion. I do not, however, say that if he had it would have made any difference.

I observe that the bill does not state whether or not in fact any execution was issued against the lands of *Silas Emes;* nor am I prepared to say that it was necessary. As a fact such execution was issued, as appears by the evidence given in *Campion* v. *Fairbairn.* I have not noted whether the evidence given in that case was agreed to be read in this case. I think it was. If it was, the fact of the issue of such execution is proved. If it was not read, the facts alleged in this bill are sustained by no evidence, and the case fails on that ground.

Judgment.

In this case, as in the other, *Fairbairn* is the principal defendant; and to support the plaintiff's case against him, it was necessary that it should be free from the objection in law that has been taken to it; next, that the facts alleged against the *Barbers* should be proved; and lastly, that notice of them should be proved against *Fairbairn.* Without the evidence of *Rosanna* and *Aaron Emes* nothing is proved against the *Barbers*; and their evidence is of course out of the question in this suit, *Aaron* himself being plaintiff; and the examination of *Fairbairn* does not establish notice against him. The case therefore fails upon the facts, as well as upon the law; and the bill must be dismissed with costs

1869.

In re Scott.—Hetherington v. Stevens.

Administration suit—County Court—Costs.

Where creditors, whose claims in the aggregate were under $200, obtained the usual administration order, and it was shewn that the value of the estate including lands was under $800, and although the real estate which it was necessary to sell to satisfy such claims was encumbered by mortgage to an amount which together with those claims exceeded $200, it was *held* that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the County Court, and the plaintiffs were refused their costs of suit.

Hearing on further directions.

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

Mr. *Crickmore*, for the infant defendant.

Judgment.

Spragge, V. C.—This is an administration suit, an order having been obtained upon the summary application of creditors; and the question is whether the plaintiffs, the creditors, are entitled to their costs.

The master reported the debt of the plaintiffs to be $61.67; that no other creditors have come in; that no personal estate has come to the hands of the administrators, and that none is outstanding. Upon this a further reference was directed as to the real estate and its incumbrances, and an account of rents and profits. A second report was then made, finding that the intestate died seised of the east half of the south half of a lot in the township of Dummer, subject to a mortgage to one *Greenshields*, deceased, on which there was due for principal $160, and for interest $39.10. On further directions the plaintiffs ask for a sale of this land, subject to the mortgage; and for costs. The guardian for the infant defendant appears and contends that the suit is within the jurisdiction of the County Court.

1869.

In re Scott.

For the plaintiffs *Hyman* v. *Roots* (*a*), and a case of *Seath* v. *McIlroy* (*b*), before the Secretary, were referred to; and in the case before the Secretary, besides *Hyman* v. *Roots*, *McLeod* v. *Miller* (*c*) and *Laurason* v. *Fitzgerald* (*d*) were cited. In the two latter cases it was held that the suits were properly brought in this court upon grounds apart from the question of amount. In the case before the Secretary the bill was filed to foreclose a mortgage on which there was due $169.30 for principal and interest, and there was a subsequent mortgage on the same premises for $120. It appeared that an order for substitutional service had been obtained by the plaintiff. For the plaintiff it was contended that the suit could not have been brought in the county court—1, because the plaintiff's claim, together with that of the subsequent mortgagee exceeded $200, and—2, because the county court could not grant an order for substitutional service: and the learned Secretary agreed with the plaintiff on both grounds. The latter ground was sufficient, if, as I suppose was the case, the defendant did not live within the county. For the other ground *Hyman* v. *Roots* was relied upon: but it does not decide that the county court has not jurisdiction where the plaintiff's claim, together with the amount of other incumbrances on the estate of the debtor exceed $200: and I have asked the learned Secretary if he knows of any case in which it has been so decided, and he informs me that he does not, and I am justified in believing that there is no such case, or Mr. *S. Blake* would have cited it to me.

Judgment

In *Hyman* v. *Roots* the plaintiff when he filed his bill was the holder of two mortgages, amounting together to upwards of $200, and the point was put shortly thus:—the plaintiff "being an incumbrancer to an amount

(*a*) 11 Grant, 202.
(*b*) 2 Cham. Rep. 93.
(*c*) 12 Grant, 194.
(*d*) 9 Grant, 371.

exceeding £50, would the suit be proper in the County Court or in this court; in other words has the County Court jurisdiction in such a case?" and it was held that it had not. The point decided was essentially different from that for which it was cited to the Secretary. With the exception, then, of *Seath* v. *McIlroy*, which was sustainable upon another ground, there is no authority that I am aware of for the plaintiff's position. 1869. In re Scott.

The language of the statute is not in his favor. It gives the County Court jurisdiction in *inter alia* the case of "a creditor upon the estate of any deceased person, such creditor seeking payment of his debt (not exceeding $200) out of the deceased's assets (not exceeding $800)." In this case the plaintiffs' debt is under $200, and the assets of the deceased, as appears by affidavit, do not exceed $800, *i. e.*, taking lands to be assets within the act, as probably they are, so that the case is literally within the act. I think an affidavit is receivable upon this question of costs. At any rate I apprehend that the creditor's debt being within the jurisdiction it would lie upon him to shew that for some other reason his suit was not within the jurisdiction; or the court might direct an inquiry. It might be, certainly that, though the creditor's suit was under $200, the claims of other creditors upon the estate might amount to many thousands. That might be a reason for removing the suit into this court, as provided by the 57th section of the act. But in this case the plaintiffs had nothing to go upon but the fact of there being a mortgage upon the estate for close upon $200. Judgment.

Unless the plaintiffs were strictly entitled to their costs of a suit in this court I should certainly refuse to give them to them. In this very small case there have been three applications to this court; the matter has been twice before the master, and if there is a sale it must be before him again, and all to realize a debt a little over

1869. In re Scott. $60. His proper remedy was in the County Court, on either the equity or common law side. I must refuse them their costs.

CUMMING v. THE BANK OF MONTREAL.

Principal and surety—Discharge of surety.

The plaintiff, who was indorser on a note made by one *McF.* to a bank shortly after the making thereof made a mortgage to the bank to secure the debt, which was stated in terms to be an additional security for the payment of the note and any renewal or renewals thereof. Subsequently the bank absolutely discharged the principal debtor:

Held (1) That the position of the surety was not changed by the making of the mortgage. (2) That the surety was discharged, although it was shewn that by the agreement between the principal debtor and the bank the surety was to be still held liable.

Examination of witnesses and hearing.

Mr. *Wallbridge*, Q.C., and Mr. *Hodgins*, for the plaintiff.

Mr. *Blake*, Q.C., for the defendants.

Judgment. SPRAGGE, V.C.—This is a bill by a surety, claiming that he is discharged from his liability by a release having been given by the creditor to the principal debtor, one *McFaul*. The release is produced, and is a formal unqualified discharge of the debtor from all his liabilities to the creditor, the bank. It excepts from the operation of the discharge two promissory notes, each for the sum of $100, dated 27th June, 1867, made by the debtor and indorsed by *Walter Ross*. The release is dated 3rd July, in the same year, and is expressed to be in consideration of $200.

1869.

Camming v. Bank of Montreal.

There is no doubt that the position of the plaintiff had been that of surety, but it is contended that he had since become a principal debtor; and it is also contended that it was expressly agreed between *McFaul* and the agent of the bank at Picton, through whom the arrangement for the discharge of *McFaul* was made, that the rights of the bank as against the plaintiff should be unaffected by the discharge, and that it was by mistake that a clause to that effect was not inserted in the instrument.

The suretyship of the plaintiff was created originally by his indorsement of a promissory note for $3,200, of which *McFaul* was maker, one *McMahon* first indorser, and the plaintiff second indorser, and of which the bank was the holder. It is so stated in the second paragraph of the bill and is admitted in the answer, and is so stated also in a memorandum put in, which was furnished by the bank. The note is dated 19th March, 1864, and must have been at 90 days, being inserted in the memorandum with the date June 20th.

Judgment.

It is contended that the plaintiff changed his position and became a principal debtor, and no longer surety, by giving a mortgage to the bank to secure the debt. The mortgage was given on the 9th of July, 1864, nineteen days after the maturing of the note. In the proviso the note and the indebtedness of the plaintiff upon it are stated, and five years are given for the payment of the amount with interest; then follow these words: "These presents being given as additional security for the payment of said note, and of the renewal or renewals of the same which have been or which may hereafter be made; and it is agreed between the parties hereto that whatever sum or sums of money may be paid to the parties hereto of the third part (the bank), or may by them be realized from the said *Edward Dudley McMahon* and from the said *Thomas McFaul*, or either of them, or from the heirs, &c., of either of them, on account of their indebt-

1869.

Cumming v. Bank of Montreal.

edness on the note," should be applied as payment or part payment of the mortgage. The mortgage contains the usual covenant for payment.

I do not see how the giving of the mortgage can have the effect of altering the character of surety in which the plaintiff then stood to the bank. If it has that effect it would be upon the most technical reasoning, that the agreement of suretyship by simple contract was merged in the higher security, and that there was a direct agreement to pay by the surety to the creditor in lieu of the former liability; that he had made himself primarily liable instead of being, as theretofore, liable for the default of another. The technical, and, I think, sufficient answer to this is, that the parties themselves state in the instrument itself that it is "additional security." The word "additional" negatives the idea of the note being merged in the mortgage. It imports the continued existence of the note, and its continued existence is emphasized by the reference to the contemplated renewals, in which the plaintiff would of course be a surety; and if so, his position would be the same in the note, of which future notes would be renewals. As to direct liability there was no change in that; he is stated to be indebted, which involves default in the principal and notice to the indorser, so that when he gave the mortgage he had already become directly liable, and the relation of suretyship had still continued. The only thing then that could change that relation would be the doctrine of merger, and I think that it was saved from merger by the terms of the instrument itself.

Judgment.

It is very different from the case of *Reade* v. *Lowndes* (*a*) at the Rolls. In that case the plaintiff had been principal debtor as to part of the debt, and surety as to

(*a*) 23 Bea. 361.

1869.

Cumming v. Bank of Montreal.

another part; the dealings between him and other debtors and the creditor had became very complicated. Judgment had been recovered by the creditor against the plaintiff, and Sir *John Romilly* relied upon that and upon the terms of a compromise entered into between the plaintiff and the creditor as altering the whole character of the relation between them, not only, as I understand the judgment, by its legal effect, but that such was necessarily the nature and the effect of what was done.

The case of *Hall* v. *Hutchons* (*a*) is also referred to. The point is shortly stated in the judgment of the Master of the Rolls. "Generally speaking," he says, "a release to the principal debtor is a release to the surety; but if the surety has previously to the release given by the creditor paid part of the debt and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety for the remainder of the debt." In that case the release contained a clause reserving the rights of creditors in respect of any securities held by them for their debts, and at that date it was not settled that such a release would be inoperative by reason of the debt being gone at law. The report of *Ex parte Gifford* (*b*) is rather the other way. It is to be observed, too, that in *Hall* v. *Hutchons* no cases were referred to either by the counsel or the court; and Sir *John Leach* does not explain how or why the security given in that case took the case out of the general rule—the security given was the joint acceptance of the surety and a third person, not a security of a higher nature than the debt for which he was surety. Mr. *Pitman* in his Treatise on the Law of Principal and Surety, in referring to the case, puts the decision upon the ground of the surety by giving the security that he did, made

Judgment.

(*a*) 3 M. & K. 426. (*b*) 6 Ves. 805.

1869.

Cumming v. Bank of Montreal.

the debt "his own individual debt;" and Mr. Justice *Story* refers to the case for this position, that "circumstances may exist under which even a release of the principal might not release the surety, where it was clear from the whole transaction that it was intended that the surety should remain bound." There is at all events this broad distinction between that case and this, that in this it is apparent upon the face of the instrument given by the surety that the original debt was to continue to subsist. There is nothing from which it can be inferred that he made it his own individual debt, or that it was intended that he should forego any of his rights as surety.

Jenkins v. *Robertson* (*a*) is also cited. I have referred to that case in *Duff* v. *Barrett* (*b*). The principle upon which it was decided does not apply to this case, where the original debt is not merged but kept alive.

Judgment

As to the other answer to the plaintiff's case. The weight of evidence upon the question of fact, even taking into account as admissible the evidence of *McFaul*, is that it was intended and was agreed between him and the bank agent that his sureties should not be discharged. But I do not see how this betters the case of the bank. In the first place there is the difficulty that this is an absolute release; and *Nicholson* v. *Revill* (*c*), *Kearsley* v. *Cole* (*d*), and *Webb* v. *Hewitt* (*e*) are all in favour of the position that if what was intended and agreed upon had been incorporated in the release it would be inoperative, on the ground that by the release the debt is gone at law.

Further, as a fact, it is not inserted, and a verbal agreement, where the instrument by which the rights of

(*a*) 2 DeG. 351. (*b*) *Ante* p. 632.
(*c*) 4 A. & E. 675. (*d*) 16 M. & W. 128.
(*e*) 3 K. & J. 442.

the surety are affected is a deed, is not sufficient. This from the course of the argument I understand to be conceded.

The answer states that the bank has filed a bill against the plaintiff and *McFaul* in order to have the release rectified by inserting in it a clause to the effect of the agreement between the bank agent and *McFaul*. It has occurred to me whether I ought to direct that the decree in this cause be not drawn up until such time as may be necessary to enable the bank to bring that cause to a hearing. I think my best course will be to leave that as a matter of application by the bank if so advised. There appear to me to be grave difficulties in the way of rectifiying the instrument. It is not, as I understand, a good ground for reforming an instrument that it has not the legal effect that the parties supposed that it would have, provided it is in the form in which it was intended to be. Here it is not suggested that the release contains anything that was not intended to be in it, or that anything is omitted from it that it was intended to contain. This point was before me in *Livingstone* v. *Acre* (*a*), in which I gave judgment a short time ago, and in which I referred to some cases upon the subject.

Judgment.

Further by reforming the instrument now, the plaintiff would be placed in a worse position than if the instrument had been originally in the shape in which it is now proposed to put it: *i. e.*, supposing the proposed clause would be operative, and if inoperative, it would be useless to insert it. Assuming it to be operative,—then, during all the time between the date of the release and the hearing of the suit on the bill of the bank, he has been debarred from the right which he ought to have had to set the creditor in motion against the principal debtor. It would be reforming an instrument to which the surety was no party, to the prejudice of the surety.

(*a*) *Ante* p. 610.

1869.

Cumming v. Bank of Montreal.

It is contended by the bank that the plaintiff, if entitled to any relief, is entitled to the extent of only half the debt: that *McFaul* was not the principal debtor, but that he and the plaintiff were co-sureties for *McMahon;* and it is stated in the mortgage given by the plaintiff that the moneys advanced by the bank were advanced to *McMahon*. From the evidence of the bank agent, as well as of *McFaul*, I should have inferred that *McFaul* was the principal debtor, as his position on the note, that of maker, would indicate him to be. But however this may be as between the bank and the parties to the note, the position of *McFaul*, maker of the note, and the plaintiff, indorser after *McMahon*, is that of principal and surety as between themselves; and the plaintiff's right was to call upon *McFaul* to pay the whole note. It is not a case of contribution.*

Judgment.

It appears to me that the plaintiff is entitled to the declaration that he asks; and to a reconveyance of the mortgaged premises, and with costs. Nothing was said in argument about the repayment by the bank, of moneys paid by the plaintiff.

I suppose I may infer that no moneys have been paid, and that the third paragraph of the prayer was inserted by way of precaution. I should not suppose from the evidence that any payments have been made by the plaintiff; at any rate after the giving of the release.

---

* See on this point Cockburn v. Johnston, *ante* p. 577.

1869.

CAMERON v. BROOKE.

Solicitor—Principal and agent—Demurrer.

The solicitor of a party has not, as such, any authority to enter into a contract for the sale of his client's lands.

The bill in this case stated that *John Lawrence*, being seized in fee of one hundred acres of land in Madoc, by a deed, dated 6th May, 1867, conveyed the same to plaintiff; that in December, 1855, the Sheriff of the County of Hastings sold ten acres of the said land to the defendant for the taxes due thereon, amounting to £5 13s. 7d., the conveyance whereof from the sheriff had been registered; that the plaintiff, through his solicitor, afterwards, and after the time allowed for redeeming the land, tendered and offered to pay to the defendant the amount for which the ten acres had been sold to him with interest at ten per cent., and that after several negotiations between the solicitors of the respective parties, it was agreed between the solicitors that the defendant would execute a quit claim deed of the property, and claimed that under the circumstances above, and in the judgment set forth, the defendant should be ordered specifically to perform the agreement so made between the solicitors.

The defendant demurred for want of equity.

Mr. *McLennan*, for the demurrer.

Mr. *Roaf*, Q. C., contra.

SPRAGGE, V.C.—The bill alleges seisin in the plaintiff in certain lands; that a portion thereof was sold for taxes; that the defendant was the purchaser; that the time allowed by law for redemption expired; and that the plaintiff through his solicitor, offered to pay the defendant the amount of purchase money paid by him with interest

Judgment.

1869.

Cameron v. Brooke.

at ten per cent. from the date of the sale. He thus alleges facts from which it appears that the defendant has acquired title in the land purchased, which title he alleges nothing to impeach. His application to the defendant must therefore be regarded in the light of a proposal to purchase: or it may be said to re-purchase the land purchased by the defendant—what was done upon this application is stated in the bill thus:—

"That your complainant's solicitor was informed after making said offer to the said defendant, by Messrs. *McLennan & Henderson*, solicitors, carrying on business in the said City of Toronto, that the said defendant *Daniel Brooke* had placed the matter in their hands, and negotiations were carried on for some time between your complainant's solicitor and the said solicitors for the said defendant.

"That on or about the 12th day of November, 1867, your complainant's solicitor received a letter from the said solicitors for the said defendant, stating that their client would execute a quit-claim deed to your complainant without covenants, on being paid the amount the said defendant had paid for the land, with interest from the date of purchase, and asking that the proposed quit-claim should be sent to them for perusal to which letter your complainant craves leave to refer when produced before this honorable court.

Judgment.

"That in accordance with the terms of the said letter, your complainant's solicitor prepared a quit-claim deed and sent the same with a letter to the said defendant's solicitors, informing them that their proposal was accepted, and your complainant was ready to carry out the sale, and the quit-claim deed was sent for perusal."

This is of course meant as an allegation that the solicitors of the defendant agreed that the defendant should execute what the bill calls a "quit-claim

deed" upon certain terms. It is not alleged that the defendant so agreed, or that he gave to his solicitors authority so to agree; and the question intended to be raised by the demurrer, and which was argued before me, is whether without express authority they could so agree; and by such agreement bind their client. The prayer is for specific performance.

Solicitors, like other agents, have implied authority to do whatever acts may be necessary and proper, for the due execution of the duties committed to them by their clients; and so it has been held in some cases that they have authority to compromise suits: but I apprehend that the time at which, and the circumstances under which, the compromise has been made must be taken into account. In *Swinfen* v. *Swinfen* (*a*) and in *Swinfen* v. Lord *Chelmsford* (*b*), the question was a good deal discussed as to the authority of counsel and attorneys to compromise suits. The compromise in question in those cases was made while the case was before the jury, and when the client was not present to give or to withhold express authority: and in what was said in favor of the authority it was put upon this, that the existence of such authority was necessary to the due administration of justice. If it is so necessary, its existence must be implied from the functions of counsel and of attorneys, and it falls within the general law of agency that the duties are of such a nature, that for the due execution of them, such power is necessary. Yet, even in that case, specific performance of the agreement of compromise was refused and a new trial was granted. The observations of Lord *Romilly* upon that occasion are so sound and just, and so applicable to the case before me that I cannot do better than quote them (*c*). "The case is rested, first upon this question of principle

Judgment.

(*a*) 25 L. J. C. P. 303.

(*b*) 26 Ib. 97.

(*c*) 24 Beav. 557.

1869.

Cameron v. Brooke.

whether an attorney or solicitor employed by a client is at liberty to compromise the subject matter of the suit without the express authority of the client; and, secondly, the case is put upon the practice which the court adopts in such cases. I do not understand how, upon the principle by which the relation of principal and agent is governed, the argument can be supported. An agent has full authority to do everything that is within the scope of his authority expressed or implied. What is the authority which is vested in an attorney in these cases? He is employed to conduct a suit for a client, but I apprehend it to be perfectly clear that a compromise does not come within the term "conduct of a suit," and that a compromise is not within the meaning of the words "management of a cause." Upon what principle, then, can it be said that an attorney has an *implied* authority to compromise the subject matter of a suit which he is employed to conduct? How far does it reach? Does such implied authority extend so far as to enable him to sell the subject matter of the suit? Yet in point of fact a compromise is nothing more then a sale between the parties on certain terms."

Judgment.

After referring to some cases he proceeds thus (*a*): "I myself have no doubt whatever, both on principle and authority, that the employment of an attorney does not entitle him to sell the subject matter of the suit either to a stranger or to the opposing party without an authority for that purpose; and that so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself I should, in that case, be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence that the

(*a*) 563.

client himself had been communicated with on the subject.

1869.

Cameron v. Brooke.

"Since I have been upon the Bench I have always assumed that the client has been communicated with, and that what is proposed is done with his sanction and knowledge. My opinion is, that unless this were so the functions of this court in matters of consent would be paralized. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in a particular way, when, if he had communicated to him all the facts, the result would have been different, and yet that the other side are at liberty to say that they are entitled to insist on such an agreement, and that the party is bound by it."

The decision of Lord *Romilly* was affirmed by the Lord Justices upon appeal (*a*). Their Lordships, however, did not enter at any length upon the question of authority, Lord Justice *Turner* thinking it unnecessary. Lord Justice *Knight Bruce*, however, made this observation: "It is plain that neither before nor after the agreement (of compromise) had Mrs. *Swinfen* ever directed, authorized or sanctioned any compromise. That, under these circumstances, there was a case for specific performance against her was impossible to be maintained." It is specific performance that is sought in the case before me.

Judgment.

In the case against Lord *Chelmsford* Chief Baron *Pollock* thus expressed the opinion of the court upon the question of the authority of counsel to compromise the suits of their clients. "The other complaint made in the first count is, that the defendant agreed on the plaintiff's behalf that the estate should be given up, and a conveyance of it executed by the plaintiff. As to this

(*a*) 4 Jur. N. S. 774.

1869.

Cameron v. Brooke.

the plaintiff has always contended that the defendant had no authority or power to make such an agreement: that it was not binding, and that the agreement was a nullity; and we are of opinion that, although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it." *Chown* v. *Parrott* (*a*), was an action against an attorney for negligence, in consenting to an order for the compromise of an action of ejectment in which the plaintiff had been defendant. The opinion of the court was, as expressed by Chief Justice *Erle*, that "the general authority to conduct a cause gives the attorney authority to compromise," and he added, "The reason why the compromise is held to be binding is because the attorney is his general agent for that purpose." The true ground certainly upon which to place it. Judges *Willes*, *Byles*, and *Keating*, concurred with the Chief Justice, and in *Swinfen* v. *Swinfen* (*b*), upon one of the applications in the cause, other judges of the same court, Judges *Creswell* and *Williams* concurred with *Willes*, J., in expressing the same opinion. Upon a subsequent application in the same cause, Mr. Justice *Crowder* expressed his dissent from this view in clear and decided terms. In *Chown* v. *Parrott*, as well as in *Swinfen* v. *Swinfen*, the compromise was made at Nisi Prius. In the former case which arose upon demurrer, it is not stated whether the client was present. In the latter it is clear that she was not present. It may be necessary to the proper conducting of suits, that counsel and attorneys should have authority to compromise during a

Judgment.

(*a*) 14 C. B. N. S. 74. (*b*) 26 L. J. C. P. 105.

1869.

Cameron v. Brooke.

trial, when the client is not present to be advised with; and it is put expressly upon that ground by Chief Baron *Pollock* in *Thomas* v. *Harris* (*a*), and there being no such necessity in other stages of the suit, it may consistently be held that the attorney has then no such authority. At a trial when his client is not present he has it, if he has it at all, only because the having it is necessary for the due execution of his duty. Compromises at such a time would never be made unless binding upon the client; to hold them subject to his approval would be tantamount to preventing their being made except in the presence and with the assent of the client. Hence it may be held to be an authority *ex necessitate*. But where a proposal is made under circumstances which give time to the solicitor to communicate with his client and ascertain his mind, I am unable to see upon what ground he has an implied authority to make an agreement for his client.

Judgment.

To hold the client bound in the case before me would be stretching the authority of solicitors beyond reason or necessity, and as far as I know, beyond precedent. Upon the allegations in the bill, the case amounts to this—a person has acquired a title to land: a former owner by his solicitor makes a proposal to him to purchase it. The solicitor of the present owner makes an agreement with the solicitor of the former owner, that the latter may purchase at a certain price: there was no suit, only negotiations between the respective solicitors, and no assent to any agreement on the part of the owner of the land is alleged, to sell at the price his solicitor agreed upon, or even to sell at all. I am quite satisfied that specific performance of this agreement cannot and ought not to be enforced.

There are besides, other grounds upon which this demurrer must be allowed. There is no sufficient alle-

(*a*) 27 L. J. Ex. 353.

1869.

Cameron v. Brooke.

gation that Messrs. *McLennan* and *Henderson*, the solicitors with whom the solicitor of the plaintiff communicated, were in fact the solicitors of the defendant—they are described as solicitors carrying on business at Toronto, nothing more; and afterwards they are called "the said solicitors for the said defendant." But a more serious defect is, that there is no allegation of the performance by the plaintiff of all that was to be performed on his part. He was to pay certain purchase money, as well as to prepare a certain deed, and tender it for execution. He thus alleges what he did: "That your complainant's solicitor thereupon filled in the necessary particulars in the said deed, and tendered the same to the said defendant for execution; but the said defendant then refused and still refuses to your complainant the said quit-claim deed notwithstanding his agreement through his solicitor." Supposing no question as to the agreement, the defendant might well refuse to execute a conveyance before receiving his purchase money, yet that refusal is the ground upon which the plaintiff comes to this court.

Judgment.

I have thought it possible that the points which I have last noticed may be mere defects in pleading; and therefore have not allowed the demurrer on that ground alone. I have considered the general question, which indeed was the only question argued; and I have done so, because sending the plaintiff away upon these minor points would only have had the effect of an amendment of the bill and bringing on the main question to be re-argued.

The demurrer is allowed with costs.

1869.

ARRAN (TOWNSHIP) v. AMABEL AND ALBEMARLE (TOWNSHIPS.)

Rectifying deed.

On a separation of townships a certain sum was found due to one of them (A.) by the other two, which remained united; and an instrument was executed acknowledging the amount to be due and declaring it payable out of a fund supposed by all parties to be coming from the county to the two townships. It was subsequently discovered that no such sum was coming from the county, and the separated township (A.) thereupon filed a bill to correct the instrument by making the debt payable generally. The defendants set up the mistake, and alleged that the restriction as to the county fund was of the essence of the whole transaction; but the court, being satisfied that the debt was really due and payable, granted the relief prayed.

Examination of witnesses and hearing.

Mr. *Blake*, Q.C., for the plaintiffs.

Mr. *Moss*, for the defendants.

SPRAGGE, V. C.—The three townships were united, forming one municipality. In 1860, they separated, Arran, forming a separate municipality, the other two townships together also a separate municipality. After the separation, the respective councils of the separated municipalities met under the statute with a view to adjusting their accounts; and ascertaining how they stood to one another as to indebtedness among and between themselves, and it was agreed that the two townships were indebted to Arran in the sum of $2,832; the same being composed principally of the amount paid by Arran into the county treasury, in excess of the amount payable by that township: and an instrument was drawn up stating that sum to be due to Arran, and making it payable out of a fund supposed to be in the county treasury to the credit of the two townships, to

Judgment.

1869.

Arran v. Amabel

the amount, it was thought, of upwards of $14,000; and the assumption that they had so large a sum to their credit, reconciled the two townships to the payment of the amount found due to Arran, the amount of which was larger than they expected.

Arran was comparatively an old township, the other two townships more recently settled; and they contained a large quantity of unpatented lands, the property of non-residents. These lands had been assessed as taxable under a mistake, then generally prevalent, that they were liable to taxation; and under this mistake the then united townships had paid into the county treasury the county rate based upon the assessment of these lands, as well as upon the assessment of lands really taxable, and the balance in favor of Arran had arisen principally in respect of such county rate; and the assumed balance in favor of the defendant townships in the county treasury,

Judgment.

would have been the taxes on non-resident lands in the two townships. A small sum reached the county treasury in payment of taxes on patented non-resident lands;—some two or three hundred dollars: but the great bulk of the non-resident lands being unpatented, and it being adjudged at law that such lands were not taxable the two townships were disappointed of the large sum which they expected to have to their credit.

All the three townships were under a common mistake. They had assessed lands as taxable which were not taxable. The county authorities were under the like mistake, and imposed a county rate under that mistake, larger than they would have imposed otherwise; and the united townships under the same mistake paid the county rate; and the same mistake continued to exist at the time of the settlement of accounts after the separation of the townships. If it can now be shewn that the accounts ought to have been settled upon a different basis; or that a different result ought to have been

1869.

Arran v. Amabel.

arrived at, if the mistake had been discovered before the settlement of accounts, then I should say the accounts ought to be opened now. I take the position of the parties before the court to be this: Arran comes into court to correct a mistake in the agreement entered into upon the settlement, alleging that upon settling accounts with the other townships, a certain debt was found due by them to it—that being a debt it was payable at all events, and that it was by mistake made payable out of a particular fund. The two townships on their part say, that the amount arrived at is erroneous, being based upon data, in regard to which all the parties were under a common mistake. This common mistake may or may not affect the question of the amount of debt due from the two townships to Arran. If it did necessarily, or even probably, then I think the whole question of accounts between the three townships should be thrown open; and to this view the defendants do not object. The onus is upon Arran to shew that the mistake was of a nature, not to affect the question of the amount of debt. I think a fair test will be to try whether the result could properly have been different if the mistake had been discovered before the parties met to adjust their accounts.

Judgment.

From the common funds of all the three townships a large sum had been paid to the county treasurer. It was paid in error, but still it had been actually paid. The three townships had themselves contributed to the mistake, they may be said indeed to have originated it; and in common with all townships, for their own benefit. The townships claim the bulk of the taxes, or rather the whole; and the county claims a rate, or say a percentage upon what the townships are expected to levy. Well, from this common fund of the townships the county had been paid, and the point to be ascertained by the councils was, what proportion Arran, and what proportion the other two townships together, had con-

1869.

Arran v. Amabel.

tributed. To get at this they seem to have taken a proper course: a township officer on the part of each was deputed, and the two together examined the assessment rolls; they found that of 1860 most reliable, and took what appeared upon that, as the data for their calculations; they took the assessed value of the land in each township, and made each township bear the burthen in proportion to the assessed value of its land. It is not suggested that in this they were wrong. If there had been no mistake as to assessments on unpatented lands, they would it seems have been clearly right. Now, suppose it present to the minds of the parties that there had been this mistake, would the circumstance of there having been such a mistake have presented any considerations, which could properly or reasonably have led to any different result.

Judgment.

Suppose there had been no separation of the townships, the result of the discovery of the mistake would have been that the common fund of the three united townships would have been *pro tanto*, less than they all expected that it would be, just because one source of revenue had been cut off; but I do not see how the failure of an expected source of revenue could affect the relative position of the townships, as to the sums they had respectively contributed to the county; the county stood to them, in the position of a creditor whom they had paid; Arran having contributed more than its proportion to such payment; hence its title to have the payment equalized.

The case of partners may help to elucidate the point. Take the case of two partners who, under a mistaken belief that a sum of money was due to a third party, joined in making payment of that sum of money, out of the partnership funds; and suppose upon a dissolution of partnership, it was found that of the funds so applied a larger proportion belonged to one partner *A.*, than to

1869.

Arran Township v. Amabel, etc., Townships.

the other *B.*, and that upon the adjusting of accounts between themselves, *B.* was found indebted to *A.*; could the circumstance of the balance found against *B.*, being in part composed of the sum of money paid under mistake, make any difference as to the indebtedness of *A.* and *B.* as between themselves? Suppose further, the balance found against *B.* to be larger than was expected, and that *A.* to reassure him, had pointed to a fund, the proceeds of an estate of *B.*, his estate before and during and after the partnership, and had spoken of that fund as realizing a large sum, that fund upon the dissolution being the property of *B.*, and suppose that fund to fail utterly, still could that circumstance make any difference as to the indebtedness between *A.* & *B.*? Suppose again, to carry the analogy further, that this estate of *B.* was in mineral lands occupied by tenants from whom it was conceived that *B.* was entitled to a rent, or that the land was subject to a rent-charge in his favor; and that the rent-charge was subject to a royalty in favor of a third person; and suppose this presumed rent-charge would have formed, if received, part of the partnership funds; and that out of the partnership funds the royalty had been paid; and suppose it discovered, after such payment, that no such rent-charge as was supposed, was payable, and that the royalty had consequently been paid under a mistake: adding this circumstance to those that I have mentioned, could it make any difference in favor of *B.* upon a settlement of accounts between him and his partner?

Judgment.

If I could find any intelligible principle upon which I could say that the mistaken payment of this money should lead to the taking of the accounts between these townships upon a different footing from that upon which they were taken: or that ignorance of the mistake at the time operated to the disadvantage of the defendants, I should be in favor of opening the accounts, but I have been unable to see this; as far as I can see the accounts

1869.

Arran Township v. Amabel, etc., Townships.

must have been taken upon the same footing, whether the money to the county had been paid rightly, or under mistake; and whether the mistake had been discovered before or after the taking of the accounts.

It has been suggested that the accounts were taken less rigidly on the part of the defendants than they would have been if the mistake had been known at the time; that allowances were made to Arran which otherwise might not have been made. I cannot suppose that the defendants' council who in this settlement with Arran, were acting as trustees for the townships which they represented, were so far forgetful of their duty as to allow to Arran anything to which that township was not justly entitled; and, being comparatively new and poor townships, it is not likely that they would do so; and the evidence does not lead to the conclusion that they did. The sum agreed upon as due, was the result of a business-like examination of accounts, and other data leading to that result; items were gone over, and after discussion assented to, and it was only when startled with the aggregate of the items, that the representatives of the defendants made any demur; and then not to the accuracy of the accounts, but to their means of paying it: and it was only in this way that the expected fund came to be pointed to by the plaintiffs, as a means of payment.

Judgment.

It was not contended, and clearly could not be contended, that it amounted to a "representation." It was in truth nothing more than an allusion, a *reminding* of the defendants of a supposed fact as to which all had equal means of knowledge. The suggestion as to the comparative inexperience of the representatives of the defendants is not sustained in evidence.

It is not denied that if there was a debt the defendants are liable to pay it. The plaintiffs failed at law, it being

1869.

Arran Township v. Amabel, etc., Townships.

adjudged that it was made payable out of a particular fund. In this court the matter stands thus: accounts were adjusted between the representatives, *i.e.*, the trustees of different municipalities, under a statute which makes any debt found due upon such adjusting of accounts, payable by the debtor township. To make the debt payable out of a particular fund was *ultra vires*. It was in the eye of this court a breach of trust to make it so payable, and practically, though not intentionally, so in this case where the fund out of which it was made payable, had only a theoretical, not a real existence.

There is an account stated and settled, and a debt the result of that account acknowledged, and the debt is made payable upon a contingency which cannot happen. The trustees did their duty in adjusting the accounts: the court will not, of course, disappoint the *cestuis que trust* of their debt because the trustees transcended their powers by making it so payable.

Judgment.

I have felt not at all indisposed to open the accounts if I could see any ground for doing so. It may be that I have overlooked something bearing upon the point; but I have considered the matter with a good deal of care; and upon the best consideration that I have been able to give to the case, have come to the conclusion that there is no reason for opening the accounts.

As to the words "with interest" in the agreement, I stated at the hearing my conclusion that it was inserted in that agreement (duplicate), in which it appears, after execution.

The defendants have failed in the question which was in contest between them, and must pay the costs. The plaintiffs are entitled to a decree for payment. I may add that both parties appear to have acted in perfect good faith. They will probably be able to settle upon terms of payment.

INDEX

TO THE

PRINCIPAL MATTERS.

ADMINISTRATION.

See "Bona Notabilia."
"Costs," 4, 5.
"Foreign Administration."
"Limited Administration."

ADVANCES ON GOODS.

See "Insolvency," 2.

ADVERTISEMENT.

See "Tax Sales," 6.

AFFIDAVITS SWORN BEFORE A NOTARY PUBLIC.

See "Notary Public."

AFFIDAVITS NOT STATING SOURCES OF INFORMATION.

It is competent and proper for the court in a proper case to relax the rule requiring a deponent to state his means of information: where therefore the deponent swore that such a disclosure would tend to defeat the ends of justice, the court dispensed with such statement in an affidavit.

The Merchants' Express Company v. Morton, 274.

ALIMONY.

On a bill by a wife for alimony and the custody of children who are under twelve years of age, the court has jurisdiction to grant the latter relief without a petition.

Munro v. Munro, 431.

ALLOWANCE TO EXECUTORS BY SURROGATE COURTS.

See "Executors."

AMENDING BILL AT THE HEARING.

See "Lights."

AMENDING BILL AFTER DECREE.

See "Practice," 15.

ANNUITY—PAYABLE OUT OF CORPUS.

See "Will," 12.

APPEAL FROM CERTIFICATE OF TAXATION.

See "Practice," 4.

ARREARS.

See "Mortgage, &c," 13.

ASSETS.

See "Insolvency," 1.

ASSIGNEE FOR VALUE WITHOUT NOTICE.

See "Fraud on Creditors."

ASSIGNOR AND ASSIGNEE.

The plaintiff assigned the land in question first to one *C.* and afterwards to one *M.*, to secure certain advances, but at the time had no title thereto; the Crown having given effect to the assignment to *C.*, and issued the patent to him, the plaintiff sought to get in the legal estate outstanding in *C.*, but without paying *M.*

Held, under the maxim "He that comes into equity must do equity," that he was first bound to pay the advances made by *M.*

Wiggins v. Meldrum, 377.

See also "Insolvency," 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See "Preferential Assignment."

ATTACHMENT TO QUEBEC.

See "Insolvency," 10.

ATTORNEY GENERAL (THE).

See "Parties," 16.
"Pleading," 7.

BANKRUPTCY.

1. A debtor made an assignment of certain real estate to *B.* a creditor, the deed being absolute in form, but intended as a security for the debt; and the debtor afterwards became bankrupt under the Statute 7 Victoria, chapter 10. Many years subsequently he filed a bill against the mortgagee's administrator for an account, &c. The administrator, being ignorant of the bankruptcy, consented to a decree, referring it to the master to take the necessary accounts on the footing of the assignment being a security; but on afterwards discovering the fact of the bankruptcy, he filed a petition setting up the bankruptcy, and claiming relief against the decree:

Held, that the consent to the decree was no bar to relief; and that the decree should be set aside, and the bill dismissed with costs, unless the assignee in bankuptcy was willing to adopt the suit and become bound by it.

Hatch v. Ross, 96.

2. The plaintiff swore that at the meeting of creditors *B.* refused to give up the property without receiving from the creditors payment in full of his debt; and that they refused to pay:

Held, that this did not put an end to their right to the property, or authorize the bankrupt to sue for it to his own use.—*Ib.*

BILL—BY RATEPAYER.

See "Municipal Law."

BONA NOTABILIA.

Where a person, resident in a foreign country, dies possessed of mortgages on land, situate in the Province, the surrogate court, of the county within which the land lies, has jurisdiction to grant administration where the surrogate court of no other county has jurisdiction.

In Re Thorpe, 76.

CHAMBERS, APPEAL FROM.

A motion by way of appeal from an order made in Chambers, must be actually made within the fourteen days limited by the Consolidated Orders, and it is not sufficient to give the notice within the fourteen days. *Aliter*, in the case of an appeal from the master's report.

Jackson v. Gardner, 425.

APPLICATION TO.

See "Mortgege," II.

CHATTELS, DELIVERING POSSESSION OF.

See "Manufacture of Timber."

CHILDREN, CUSTODY OF.

See "Alimony."

CHOSE IN ACTION.

See "Principal and Surety."

CLOUD ON TITLE.

See "Legal Title."

COMMITTEE.

See "Lunacy" 3.

COMPENSATION TO EXECUTORS.

See also "Executors."

COMPENSATION TO TRUSTEES.

The old rule as to the compensation of trustees has only been abrogated by the surrogate act so far as relates to trusts under wills.

Wilson v. Proudfoot, 103.

See also "Executors."

COMPOSITION.

See "Insolvency," 9.

COMPOS MENTIS.

A will was executed by the testator on his death bed: he was *compos mentis* at the time, although so extremely weak in body and mind that his directions were given at intervals, and there was considerable difficulty in understanding them. No fraud, however, was pretended, and the court was satisfied that the will was in accordance with the testator's wishes, and contained all that was understood of them, though probably not all the testator desired to express; and was understood by the testator at the time of executing it:

Held, [affirming the decree of the court below] that the will was valid.

Martin v. Martin, 586.

COMPOUNDING DEBTS.

1. A trust was created for the benefit of creditors *pro rata*, in consideration of their discharging the debtor; all the creditors, except the plaintiffs accepted from two creditors, who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands, in full; the estate yielded more: *Held*, that the plaintiffs had no right to the difference.

Baldwin v. Thomas, 119.

2. Trustees accepted $250 in discharge of a debt of $300, and gave no evidence to explain the reason of this: *Held*, that, in the absence of such evidence, the master was right in charging the trustees with the loss.—*Ib.*

See also "Insolvency," 9.

CONFLICTING EQUITIES.

See "Specific Performance," 6.

CONSTRUCTIVE NOTICE.

The Court of Chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on, until the different doctrine lately held by V. C. Stuart, in England, and Mr. Justice Lynch, in Ireland, is adopted in Appeal, either in England or here.

Moore v. The Bank of British North America, 308.

CONTRACT, MORTGAGE AFTER.

See "Specific Performance," 4.

CONTRIBUTION.

See "Accommodation Indorser."

CORPORATION.

1. An arrangement with the plaintiff, such as was customary in carrying out objects like those defined in a company's incorporation act, and as was conducive to the attainment of those objects, having been duly carried out:

Held, that the arrangment could not afterwards be declared to have been beyond the powers of the company or its directors,

so as to entitle the company to keep for their own use, without compensation to the plaintiff, the whole benefit which the arrangement had afforded the company.

McDonald v. The Upper Canada Mining Co.—179.

2. *M.* was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it. He made known this location to an incorporated mining company under an agreement that he should be compensated for the communication; but the mode of compensation was not determined. The communication having proved valuable to the company, it was held that *M.* was entitled to compensation in the manner usual in such cases.—*Ib.*

3. The usual mode was proved to be, by receiving a share or partnership interest in the mine, on the patent being procured:

Held, that this mode was not *ultra vires* of the company or the directors.—*Ib.*

4. The agreement was not under the corporate seal. The company received $5,500 for their claim to the property by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors, to obtain secretly a grant of the property to himself personally:

Held, that the plaintiff was entitled to share this sum, and that the want of a seal was no defence.—*Ib.*

[Affirmed on re-hearing, see p. 551.]

CORPUS.—ANNUITY PAYABLE OUT OF.

See "Will," 12.

COSTS.

1. Where a party claimed on the ground of a parol trust to be entitled to a conveyance of land from the heirs of the legal owner and they required him to establish the trust by a suit, which he did:

Held, that he was not entitled under the circumstances to the costs of the suit.

English v. English, 330.

2. The beneficial owner of land omitted to have the paper title thereto in his own name, and thus enabled his son, who held such title to mislead parties into accepting a mortgage thereon from the son: the court, though unable to refuse him relief, in a suit brought to set aside such mortgage, under the circumstances, refused him his costs.

Gray v. Coucher, 419.

3. Where there were two suits by a solicitor for the same object, the master refused, in one of the two suits without a special order, to tax as between party and party, more than part of the costs, and it appearing that, as between solicitor and client no part of that bill could have been recovered, the court refused to interfere with the taxation.

Spence v. Clemow, 584.

4. Where an executor obtained the usual order for the administration for his testator's estate, and, upon the hearing on further directions, no reason was shewn for invoking the aid of the court, and the guardian for the infants did not object in any way to the course taken by the executor, the court refused both parties their costs.

Springer v. Clark, 664.

5. Where creditors, whose claims in the aggregate were under $200, obtained the usual administration order, and it was shewn that the value of the estate including lands was under $800, and although the real estate which it was necessary to sell to satisfy such claims was incumbered by mortgage to an amount which, altogether with those claims, exceeded $200, it was *Held* that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the county court, and the plaintiffs were refused their costs of suit.

Re Scott—Hetherington v. Stevens, 683.

See also

"Disclaimer."
"Exchange of Lands."
"Injunction," 2.
"Mortgage, &c.," 1, 2, 3.
"Personal Representative."
"Postponing Sale."
"Practice," 10, 12.
"Solicitor and Client."
"Taxation of Costs."

COUNTY COURT.

See "Costs," 5.

CROWN.

(THE RIGHT OF, TO JUDGMENT RECOVERED BY TRESPASSERS FOR TIMBER.)

Where timber which was unlawfully taken from Crown property, was subsequently taken by force out of the possession of the first taker and the latter recovered a judgment against the trespassers, which included the value of the timber:

Held, that the Crown was entitled to claim so much of their payment as represented the value of the timber, exclusive of the labour and money expended upon it.

The Attorney General v. Price, 304.

DAMAGES.

See "Specific Performance," 5.
"Vendor and Purchaser," 2, 4.

DECREE, VARYING.

See "Varying Decree."

DEED, WILL REVOKED BY.

See "Will revoked by Deed."

DEFICIENCY OF ASSETS.

Where a wife joined in a mortgage, and on the death of the husband there are not sufficient assets to pay all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors.

White v. Bastedo, 546.

DELAY.

See "Statute of Frauds," 3.

DELIVERING POSSESSION OF CHATTELS.

See "Manufacture of Timber."

DEMURRER.

See "Husband and Wife."
"Party," 7.
"Pleading," 3, 6.
"Ships."
"Solicitor and Client,"
"Timber Limits," 2.

DEVISABLE INTEREST.

A person having a power of attorney to sell certain lands, entered into possession after the death of the owner, with an intention to acquire the title, and died in possession, but before his possession had ripened into a title as against the representatives of the true owner:

Held, that he had such an interest as passed under a general devise in his will.

Held also, that the devisees were entitled to claim the property in equity, as against the testator's heirs, who had gone into possession; but that a suit for the purpose could be successfully resisted by shewing sufficient length of possession by the heirs after the testator's death to give a title as against the plaintiffs.

Heward v. Heward, 516.

DISCHARGE OF SURETY.

See "Principal and Surety," 2, 3.

DISCLAIMER.

To a bill of foreclosure, an assignee in insolvency filed an answer and disclaimer, admitting the statements of the bill, and alleging that he was willing, and offered before being served with the bill, to release his right to the property, but not alleging that he had made the offer to the plaintiff, or to whom he did make it:

Held, that the defendant was not entitled to costs.

Drury v. O'Neil, 123.

DISCOVERY.

See "Principal and Agent."

DISMISSAL AGAINST ONE DEFENDANT, WITHOUT PREJUDICE.

A cause having been brought on to be heard, it was found that a *pro confesso* note against one of the defendants had been waived by amending the bill. The plaintiff thereupon moved to dismiss the bill as against such defendant, without the dismissal being equivalent to a dismissal on the merits; and the court, under the circumstances, granted the motion and made a decree saving the rights of the defendant.

Waddle v. McGinty, 261.

DISTRIBUTION, PERIOD OF.

See "Will, Construction of," 13.

DOMINION STOCK.

See "Infants' Money," 2.

DOWER.

(PROVISION IN LIEU OF.)

See "Deficiency of Assets."
"Election."
"Equitable Dower."
"Equitable Estate."
"Maintenance."
"Pleading," 8.
"Will, Construction of," 4, 10.

(SALE OF.)

The court has jurisdiction in a suit, as well as on petition, to decree a sale of an inchoate right of dower.

Cassey v. Cassey, 399.

DOWRESS.

See "Pleadings," 8.

ELECTION.

An intending purchaser of devised lands had some doubt whether a provision made by the testator was in lieu of dower, and asked the widow whether she had or claimed dower:

Held, that if even her answer was in the negative, it afforded no ground for the purchaser afterwards applying to this Court to restrain an action for dower brought by the widow, on her being advised that, under the terms of the will, she was not put to her election.

Fairweather v. Archibald, 255.

See also "Maintenance."

EQUITABLE DOWER.

1. The act 4 William IV. chapter 1, giving dower out of equitable interests applies as well where the parties were married after, as where they were married before the passing of the Act.

McIntosh v. Wood, 92.

2. A mortgage was created by an absolute conveyance with a separate defeazance, and the mortgagor having died, his heir effected an arrangement with the mortgagee who conveyed to the heir, and accepted from him a deed of a portion of the land in discharge of the mortgage debt. The heir afterwards sold to a party who had notice of the several conveyances.

Held, that the widow of the mortgagor was entitled to dower in the portion conveyed by the heir to the purchaser.—*Ib.*

EQUITABLE ESTATE.

1. The owner of an equitable interest in lands under a contract of purchase made a conveyance thereof to the plaintiff, his brother-in-law, and subsequently while still in possession of the land, assigned the same property to third parties, in consideration of their giving him a lease of the premises, which

was subsequently executed in the presence of, and witnessed by, the plaintiff after the deeds were completed. The plaintiff some time afterwards filed a bill impeaching the assignment and lease as fraudulent. The evidence tended to shew that the conveyance to the plaintiff was colorable only; and there not being any evidence of notice of the claim of the plaintiff—the court dismissed the bill with costs.

Davison v. Wells, 89.

2. A testator while married, purchased the equity of redemption in certain lands to which he afterwards died beneficially entitled. The widow claimed dower out of the whole property both legal and equitable, and that the surplus money produced by a sale of the premises after paying off the mortgage, being less than one-third of the whole sum for which the property sold, should be invested for her benefit, as her dower; but there being creditors and specific or pecuniary legatees under the wills of the testator whose claims would more than exhaust the surplus:

Held, that the widow was only entitled to dower in the surplus money which represented the value of the equity of redemption

Thorpe v. Richards, 403.

See also "Purchase for value without notice."

EQUITABLE EXECUTION.

Equitable interests cannot be reached by an execution creditor unless he commences a suit or takes some other step for the purpose during the currency of the writ.

Wilson v. Proudfoot, 103.

EQUITABLE PLEA.

See "Injunction," 9.

EQUITABLE RIGHT.

See "Principal and Surety."

ESTATE TAIL.

See "Will, Construction of," 6.

EVIDENCE, WEIGHT OF.

See "Security on Real Estate."

EXCHANGE OF LANDS.

The plaintiff and defendant agreed to an exchange of lands, the plaintiff conveying 100 acres in B., upon which there was

a mortgage for $1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots—one in T. the other in S.—he should select: in the event of his selecting the latter it was to be assigned to him, subject to the payment of $150 in four equal annual instalments, with interest at seven per cent. The plaintiff selected the latter, but it appeared that the defendant had not yet obtained a title thereto, although he was in a position to call for a patent from the Crown on making certain payments, and which he procured the day the cause was heard. The court, as the defendant had all along had a title to the lot, and was at the time in a position to carry out his part of the agreement, and submitted to do so, directed that the contract should be completed by conveyance of the lot in S., and that the time for payment of the $150 should date from the hearing; from which time also the interest should be computed, but refused to give to either party the costs of the litigation.

Gray v. Reesor, 205.

EXECUTOR, (ACCOUNT BY).

See "Statute of Limitations," 2.

AWARD BETWEEN AND CO-EXECUTOR.

One of several executors being indebted to the estate, the matter was left by himself and his co-executors to arbitration, and the arbitrators awarded a large sum against him:

Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor as he had chosen to submit the matter to the arbitrators, and in a suit by the executors he was decreed to pay the amount.

Koella v. McKenzie, 331.

FI. FA., AGAINST, BEFORE PROBATE.

See "Injunction," 1.

EXECUTORS, COMPENSATION TO.

1. Since the passing of the act authorizing the judge of the surrogate court to allow compensation to executors and trustees (22 Vic. ch. 93, sec. 47, Con. S. U. C. ch. 16, sec. 66,) it has been the settled practice of the master here, in passing the accounts of executors to allow them compensation for their "care, pains, trouble, and time, expended in and about the executorship," without an order from the surrogate judge allowing the same:—Where, therefore, an executor, pending an account before the master, obtained such an order from the surrogate judge, and the master allowed the amount of compen-

2. Executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands.

Sovereign v. Sovereign, 559.

3. Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss.—*Ib.*

See also "Costs, 4."

(LEGACY TO.)

Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand.

Anderson v. Dougall, 405.

EXTENSION OF TIME.

See "Principal and Surety," 2.

EXTRINSIC EVIDENCE.

1. In the interpretation of a will, extrinsic evidence of surrounding circumstances, to shew what a testator intended by his will is admissible; but declarations by the testator of what he intended by his will, will not be received for that purpose.

Davidson v. Boomer, 218.

2. Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in mortmain whereon it was to be built, extrinsic evidence was given to shew that land for the site of a parsonage had already been given by a third person, and that the testator had on various occasions pointed it out as the site of a parsonage and had avoided building a school house upon it, lest doing so should interfere with its use for a parsonage; such evidence was received to rebut the presumption that would otherwise arise from the generality of the bequest, that the money bequeathed was to be applied in the purchase of land for a site, as well as for the erection, of the building.—*Ib.*

EVIDENCE.

1. At the hearing [illegible]he cause evidence is not admissible by one defendant aga[illegible]nother.

The Attorney General v. The Toronto Street Railway Co.....187.

2. A person having a paper title to land of which he was not the actual owner, created a mortgage thereon, to a person not a party to a suit by the party beneficially interested to get rid of another mortgage created by him on the estate, was asked if he had given notice of the claim of the real owner when creating the first mortgage, which he asserted he had given, and also denied having made such mortgage; evidence was called to contradict him:

Held, that this could not be deemed a collateral issue, and therefore such evidence was admissible.

Gray v. Coucher, 419.

See also "Mortgage," &c., 17.

FAILURE OF ISSUE.

See "Will, Construction of," 6.

FATHER AND SON.

See "Specific Performance," 1.

FERRY,

(BETWEEN UPPER AND LOWER CANADA.)

The Crown has a right to grant a license of Ferry across the Ottawa, between the Provinces of Ontario and Quebec, free from the restrictions contained in the Consolidated Statutes of Upper Canada, chapter 46; that statute not applying to such a case.

Smith v. Ratté, 473.

FI. FA. AGAINST EXECUTORS—BEFORE PROBATE.

See "Injunction," 1.

FIRE INSURANCE.

See "Insurable Interest."

FORECLOSURE.

See "Mortgage," &c., 11.

FOREIGN ADMINISTRATION.

A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him and a release by the heirs are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the Act for Quieting Titles.

In re Thorpe, 76.

FORMER APPLICATION, COSTS OF.

See "Practice," 14.

FRAUD ON CREDITORS.

1. An insolvent person executed to his son a mortgage for $1000, of which $600 was a sum fraudulently pretended to be due to the mortgagors's wife:

Held, that, even if the remaining sum was really due to the mortgagee, his concurrence in the fraud as to the $600, rendered the mortgage void *in toto*.

Totten v. Douglas, 126.

2. A married woman entered into a contract for the purchase of land: one of the terms being that the conveyance should be to herself. In payment of the principal part of the purchase money the husband assigned to the vendor a mortgage he held on other property, which, so far as appeared, was his only means. It did not appear that he was indebted at the time, but a month afterwards he indorsed a note for £40, which was not paid. The family, including the husband, went into possession of the land immediately after the purchase, and made improvements, but no deed was obtained, and a small balance of the purchase money remained unpaid for twelve years, when the money was raised by loan on the property, and the deed was taken to a son of the purchaser:

Held, that this deed was void as against the holder of the note.

Waddle v. McGinty, 261.

See also "Mortgage," &c., 12.
"Specific Performance," 6.

FRAUDULENT CONVEYANCE.

1. A sale of land was effected subject to a mortgage created by a former owner:

Held, that this circumstance did not preclude the purchaser from setting up the defence of a purchase for value without notice.

Campion v. Fairbairn, 674.

2. The plaintiff had executed a conveyance of land without consideration for the purpose of avoiding an execution which it was supposed would be issued against his grantor, upon the secret trust or understanding that when called upon the grantee would re-convey. The court under these circumstances refused to enforce a re-conveyance, and a bill filed for that purpose was dismissed with costs.

Emes v. Barber, 679.

GIFTS.

(FATHER TO SON.)

1. A gift can only be upheld if clearly proved, and where evidence of loose, casual, and inconsistent admissions and statements was offered to prove a gift of all the donor's means, the evidence was held insufficient.

McConnell v. McConnell, 20.

2. There is ordinarily, no presumption of undue influence in the case of a gift from a father to a son, unless it is proved that the son occupied towards the father, at the time, a relation of confidence and influence; but if that is proved, the gift may need for its support the same evidence of due deliberation, explanation, and advice as a gift to any other person occupying such relation of confidence and influence.—*Ib.*

3. Where there is no proof of *mala fides* or of an unfair exercise of influence, a gift of a trifling sum, as compared with the donor's property, does not stand in the same position as a gift of his whole property.—*Ib.*

4. If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of his father's means, if large, may not be upheld without the evidence required in other cases, of due deliberation, explanation, and advice, the gift of more than a trifling proportion may be sustainable without such evidence.—*Ib.*

HEIRS.

See "Costs," 1.

HOTCHPOT.

See "Partition," 2.

HUSBAND AND WIFE.

A husband and wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of land of the wife; but the wife must sue by her next friend.

Jessop v. McLean, 489.

IMPROVEMENTS BY PURCHASERS UNDER VOID SALES.

See "Mortgage," &c., 5, 6.

IMPROVIDENT CONVEYANCE.

The owner of land, who had become utterly abandoned to drunkenness, created a mortgage thereon for about one-fourth of its value; and within a year afterwards the mortgagee obtained from him an absolute conveyance of the land, for a very trifling, if any, further consideration than the mortgage debt, in which conveyance his wife joined to bar her dower, and the same was executed by the husband and wife in the presence of their son. The evidence shewed that the grantor from his habits had become incapable of properly understanding business transactions.

The court under the circumstances, although after great delay in taking proceedings, gave him relief against the deed, notwithstanding that, in the meantime, three of the persons present at the execution thereof—one of them the son of the grantor—had died; the court assuming for the purposes of the decision that the parties, other than the son, would have testified to their belief in the sobriety and intelligence of the grantor.

Crippen v. Ogilvie, 490.

INADEQUATE CONSIDERATION.

See "Improvident Conveyance."

INFANT CESTUIS QUE TRUST.

By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one:

Held, that the infant took a vested interest; and the court directed an inquiry as to her past and future maintenance.

Stewart v. Glasgow, 653.

INFANT EXECUTOR.

In a suit for the partition of the real estate of an intesate, who was one of the executors of his father's will and had taken possession of the personal estate and who died a minor, it was claimed on behalf of infant legatees who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might be charged upon the land in question before partition:

Held, that the executor, having been a minor, his estate was not liable to account therefor.

Nash v. McKay, 247.

INFANT LEGATEE.

A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, and charged the same on the shares of two of the devisees; but the will was silent as to interest upon the legacy:

Held, that the infant was entitled to maintenance out of the estate of the testator, during her minority, to the extent (if necessary) of the interest on the legacy; and an inquiry as to the ability of the widow of the testator to maintain the infant, was refused.

Binkley v. Binkley, 649.

INFANTS' MONEY.

1. In consequence of the danger to which the fortunes of infants are often exposed in private hands, the court, on the administration of an estate, takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee.

Kingsmill v. Miller, 171.

2. Since the establishment of a Government Dominion Stock, the investment of infants' money by the court should, as a general rule, be in such stock, rather than, as formerly, in mortgages.—*Ib.*

INCOME—WHAT IT MEANS.

A charge on all the property and income of a company was held not to give a charge on debts, except so far as they represented income; and the term "income" was held in such case to mean net earnings, after providing for current expenses.

McCargar v. McKinnon, 361.

INCONSISTENT EXPRESSIONS.

(CONSTRUCTION OF.)

See "Mortgage," &c., 4.

INJUNCTION.

1. The title of an executor being derived from the will and not from the probate, the court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate.

Stump v. Bradley, 30.

2. The plaintiffs filed a bill to restrain the use of a label which they alleged was an infringement of their trade-mark, or of any other label which resembled the same. The defendant admitted that the label he had used was an infringement, but he said that he had discontinued the use of it before suit on hearing that the plaintiffs complained of the label, and that after suit he informed the solicitors of the plaintiffs of this discontinuance, disclaimed all right of using the label, and was ready to account for the profits he had made and to pay the costs of the suit. The plaintiffs' solicitors declined to discontinue the suit; and, the defendant having put in his answer, the plaintiffs brought the cause on for hearing upon bill and answer. The defendant not disputing that his label was an imitation of the plaintiffs', or that he was aware of the plaintiffs' property in their label, an injunction was granted against using the label complained of, or any other label similar to or resembling the plaintiffs'; and the defendant was ordered to pay the costs of the suit.

Radway v. Coleman, 50.

3. On an application for an injunction against an execution at law, the plaintiff in equity has not necessarily to satisfy the court by evidence that the facts, if disputed, are as his bill and affidavits state; but only that there is a substantial equitable case which ought to be decided before execution goes.

Treadwell v. Morris, 165.

4. Where a party who is wrongfully sued at law comes into equity promptly, so that, by means of our system of circuits, his equitable case can be tried within a few weeks of the time when a legal defence would be triable at law, if he verifies his bill, shewing a good equitable case that is only triable in this court, he can seldom be refused an injunction to restrain any execution going until the equitable questions are disposed of. —*Ib.*

5. There is no technical rule requiring the plaintiff's affidavit in support of a motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered.—*Ib.*

6. If a defendant at law is guilty of delay in instituting his suit here, this may not be a bar to his application for an injunction; but the court, for the security of the plaintiff at law, may require the payment of the money into court, to abide the event; or may impose other terms which in case of a prompt application it might not be just or reasonable for the court to exact. Or, the court may, in exercise of its discretion, refuse the motion altogether, notwithstanding the *primâ facie* case which the plaintiff's bill and affidavits present in his favour;

and, in view of this discretion, it may be expedient for the plaintiff in such a case to fortifiy his own affidavit with other evidence, which in case of an earlier application might have been unnecessary.—*Ib.*

7. A defendant at law unnecessarily delayed filing his bill for an injunction until it was too late to have the equitable case it set up heard for six months; there were executions to a large amount out against his lands at the suit of other persons; and the defendant in equity swore that, if delayed by an injunction, he believed he would probably lose his debt. This statement not being met by any counter affidavit, an injunction was refused, except upon the terms of paying the money into court.—*Ib.*

8. Where a robbery has been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property in this country; the court granted an injunction to restrain the selling or incumbering thereof.

The Merchants' Express Company v. Morton, 274.

9. A defendant pleaded an equitable defence as if it were a legal defence, omitting the words "for defence on equitable grounds;" the plaintiff replied and demurred; the issue in fact was first tried, and went to the jury on the merits; the verdict was for the plaintiff; and the demurrer was afterwards allowed. Judgment being entered, the defendant filed a bill, setting up the facts stated in the plea, and praying for an injunction:

Held, that the proceedings at law were a bar to relief.

Arnold v. Allinor, 375.

[Reversed on re-hearing. See *Post* volume xvi., page 213].

10. A rule *nisi* in a County Court, for staying an execution on the ground that, the execution had been satisfied, having been discharged:

Held, no bar to an interlocutory injunction in this court on the same ground.

Bush v. Bush, 431.

11. *Hiram Piper* and *Noah Piper* carried on business under the name of *Hiram Piper & Brother*. They afterwards dissolved partnership, and each carried on like business in his own name. Subsequently *Hiram* assigned his business to the plaintiff, with authority to carry it on in *Hiram's* name, and then two sons of *Noah Piper* carried on a similar business next door, under the firm *H. Piper & Co.* An injunction to restrain the use of that name was refused.

Aikins v. Piper, 581.

See also "Principal and Agent."
"Specific Performance," 1, 5.
"Tax Sale," 2.

INSOLVENCY.

1. The other provisions of the Act being complied with, a discharge cannot be refused to the insolvent because of the neglect of the assignee to give notice, as required by sec. 10, sub-sec. 1, of the Act of 1864, or that the insolvent had no estate.

Re Thomas, 196.

2. A bank having cashed a bill of exchange, and taken by way of collateral security, a bill of sale of certain goods of the drawer, this transaction was held not invalidated by the drawer's insolvent circumstances at the time.

Newton v. The Ontario Bank, 283

3. The Insolvent Act (1864) forbids mortgages of real estate to a creditor by way of preference.—*Ib.*

4. But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so) and made a mortgage of real estate under pressure on the part of the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business and pay his liabilities in full, the mortgage was held valid as against his assignee in insolvency. —*Ib.*

5. Official assignees cannot be appointed by unincorporated Boards of Trade formed after the passing of the Insolvent Act.—*Ib.*

6. Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept and act upon the assignment: *Quære*, whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment.—*Ib.*

7. An insolvent absconded to the United States, taking money with him. He was followed there by the agent of a person in this country who had become surety for him, and, by the threats of criminal proceedings, induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs.

Roe v. Smith, 344.

8. *G.* recovered a judgment against *D.*, and afterwards, though in insolvent circumstances, assigned the same by two assignments to his attorney, one for costs due him by *G.* and

the other for a debt due to *R.* by *G.* Afterwards, *C.* obtained a judgment against *G.*, and attached the debt so due to him by *D.*, and gave notice of the attachment to *D.* before the assignee of *G.* had given notice of his assignments. *D.* paid the moneys due to *G.* by himself to the sheriff, under an execution issued at the instance of the assignee of *G.*

Held, (1st), that the mere fact of *C.* having been the first to give notice could not entitle him to priority over the assignee of *G.*, but that, by reason of the insolvency of *G.*, the assignments were void under statute 22 Victoria, chapter 96, section 9.

(2nd), That the solicitor of *C.* must be restricted to the costs incurred by him in the action brought by *G.* against *D.*, and that *R.* must stand as an ordinary creditor.

Davidson v. Douglas, 347.

9. By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the insolvent Act:

Held, that the stipulation as to the whole debt was not illegal, and that there having been default before the insolvency, the creditor was entitled to prove for the whole debt.

In re McRae, 408.

10. Where a trader in Ontario becomes insolvent, and an attachment in insolvency is issued to the sheriff of the county in which he resides, the county court judge has jurisdiction to issue another attachment to the sheriff of any county in Ontario, or of any district in Quebec, in which the insolvent has property.

Re Beard, 441.

INSURABLE INTEREST.

Where a person bought from a wharfinger 3,500 bushels of wheat, part of a larger quantity, and paid for it, but the wheat bought had not been separated from the rest, it was held that he had no insurable interest in the wheat.

Box v. The Provincial Insurance Co., 337.

[Affirmed on re-hearing, MOWAT, V.C., dissenting. *Post* 552.]

INTEMPERATE HABITS,

See "Improvident Conveyance."

INTEREST.

(ARREARS OF.)

A bargain for extra interest made between a derivative mortgagee and a mortgagor inures to the benefit of the original mortgagee.

Grahame v. Anderson, 189.

See also "Mortgage," &c., 7.

INTEREST ON INVESTMENTS.

Mortgages, reserving six per cent. interest, were taken by trustees before the abolition of the usury laws, and were not called in for several years after the change of the law, but as it did not appear they were aware of an opportunity of investing at a higher rate, the court refused to charge them with more than was reserved by the mortgages.

Cameron v. Bethune, 486.

See also "Executors," 5.
"Mortgages," &c., 13, 14.

INTEREST ON PURCHASE MONEY.

"See Vendor and Purchaser," 3.

INTERNATIONAL LAW.

On the determination of the Civil War in the United States, the Government at Washington became entitled to the property theretofore belonging to the Confederate Government.

The United States of North America v. Boyd, 138.

INVENTION, SIMPLICITY OF.

See "Patent."

INVESTIGATION OF TITLE.

Where there was no other proof of the execution of a conveyance, which constituted a link in the chain of title, than a memorial purporting to be executed by the grantee in such conveyance, the court refused to force the title upon a purchaser.

Wishart v. Cook, 237.

LICENSE OF FERRY.

See "Ferry."

LIGHTS.

(INJUNCTION TO RESTRAIN THE CLOSING OF).

The plaintiff filed his bill to restrain certain of the defendants from closing windows which looked across a lane, of which plaintiff claimed to be owner, and on which the defendants were erecting a building some time before the commencement of the suit. It appeared in evidence that the plaintiff had no title to the lane, but that the former owner of it had given him to understand that the lane would never be built on. At the hearing the plaintiff was allowed to amend his bill, by striking out the part claiming title to the lane; and a perpetual injunction was granted, restraining the defendants from closing the lane—the delay in filing the bill having been satisfactorily accounted for,—with costs, less those occasioned by plaintiff's claiming title to the lane.

Biggar v. Allan, 358.

LIMITATIONS, STATUTE OF

See "Statute of Limitations."

LIMITED ADMINISTRATION.

The surrogate courts of this Province have the same authority to grant limited administrations as the probate court in England has.

In re Thorpe, 76.

LOSS OF MORTGAGE DEED.

See "Mortgage" &c., 1, 2.

LUNACY.

1. The committee of a lunatic's estate having neglected to collect rent of a tenant whom he found in possession of a portion of the estate, was charged with the amount thereof on passing his accounts.

In re Shaw, 619.

2. The committee of a lunatic's estate expended more money in making surveys and roads—with a view to a sale of a portion of the estate—than the court had authorized, and which excess of expenditure was occasioned by the failure of a neighbouring proprietor, who had agreed to contribute

towards such expenditure. On appeal from the Master disallowing such excess, it was considered that as the court will, under certain circumstances, sanction some expenditures, even though made without authority, if done for the benefit of the estate, and the expenditure was such as would have been authorized at the time, directed the amount to be allowed him on passing his accounts.—*Ib.*

3. The powers, duties, and liabilities of a committee of a lunatic's estate considered and acted on.—*Ib.*

MAINTENANCE.

Where the question as to whether the widow had elected to take an annuity in lieu of dower, arose in connection with a claim of the defendant for past maintenance and education of the plaintiff, and was a mere matter of inference, depending to a certain extent on the amount of moneys the widow had received—this point was reserved until after the master had made his report.

Walmsley v. Bull, 210.

See also "Infant *cestuis que trust.*"
"Infant Legatees."

(UNDER THE STATUTE).

Maintenance under the statute can only be ordered where the infant is under twelve years old and is transferred by the court to the mother's custody.

Re Eves, 580.

MALA FIDES.

See "Gifts," 3.

MANDATORY INJUNCTION.

See "Mortgage" &c., 16.

MANUFACTURE OF TIMBER.

To make valid against creditors of the vendor, a sale of timber to be cut down by the vendor, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual and continued change of possession as in the case of other chattels.

McMillan v. McSherry, 133.

MARRIED WOMAN'S ACT.

Under the Married Woman's Act, a *feme coverte* was held competent to bind her interest as residuary legatee by her written authority to executors, given and acted upon in good faith, to accept land in satisfaction of a debt due to the estate, without evidence of the husband having concurred in giving the authority.

McCargar v. McKinnon, 361.

MARRYING WITH APPROVAL OF TRUSTEES.

See "Will," 4.

MENTAL CAPACITY.

See "Improvident Conveyance."

MISSING DEED

See "Investigation of Title."

MORTGAGE—MORTGAGEE—MORTGAGOR.

1. Where a mortgagee loses the mortgage deed, he is bound, at his own expense, to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property; and with an indemnity against any demand third persons may have acquired, by deposit of the deed or otherwise, to the money or any part thereof.

McDonald v. Hime, 72.

2. After the loss of a mortgage deed, the mortgagor offered to pay the over-due interest, on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults. The court *held* that the plaintiffs must bear the expense of proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit. —*Ib.*

3. A mortgagee, has a right to file a bill of foreclosure the day after the mortgagor makes default; and, though such a course may be extremely sharp, he cannot be refused his costs.

Bennett v. Foreman, 117.

4. A mortgage dated 16th October, 1866, provided for the payment of the principal in three years from that date; and interest meanwhile at twelve per cent. half yearly, on the 16th of April and October in every year; and declared, that to secure

prompt payment of said interest the mortgagee would take at the rate of ten per cent. if the interest was paid on the said 17th day of April and October respectively; it was *held*, that the first reference to the day being unequivocal must govern; that the interest was due on the 16th; and not having been paid then, that a bill on the 17th was not irregular.—*Ib.*

5. Improvements made by a defendant under the belief that he was absolute owner, are allowed more liberally than to a mortgagee who improves knowing that he is but a mortgagee.

Carroll v. Robertson, 173.

6. A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside:

Held, that, as a condition of relief against him, he should be allowed for all the improvements he had made under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further; and that he was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee.—*Ib.*

7. During the lifetime of a mortgagor, the mortgagee has no lien on the mortgaged property for more than six years' arrears of interest; though he may have a personal action on the covenant for more; but, in this country as well as in England, after the mortgagor's death the mortgagee to avoid circuity may, as against the heirs, tack to his debt all the interest recoverable on the covenant.—*Ib.*

8. *A.* and *B.* mortgaged to *C.*, and afterwards sold and conveyed the same property to *D.*, receiving back a mortgage for the purchase money, which exceeded the amount due *C.* *A.*, without *B.*'s authority, assigned this mortgage to *C.* by way of further security for the debt due to him by *A.* and *B.* On a bill by *B.* against all parties, it was *held* that the proper decree was the same as if the purchaser had been the original owner, and had executed a first mortgage to *C.*, and a second mortgage to *A.* and *B.*

Grahame v. Anderson, 189.

9. A bargain for extra interest made between a derivative mortgagee and a mortgagor inures to the benefit of the original mortgagee.—*Ib.*

10. *B.* and wife, after executing a mortgage in favor of one *D.*, conveyed the premises comprised therein to *J.*, subject to the mortgage, which was referred to in the conveyance as also in the memorial thereof registered. After the registration of this conveyance, *J.* and his wife executed a quit-claim deed of the premises to the wife of *B.* A mortgage was subsequently made in favor of *S.*, which was signed and sealed by *B.* and

his wife, but she was the only granting party named therein, and the same was executed before the mortgage to *D.*

Held, that constructive notice of the mortgage to *D.* was the most that could have been imputed to *S.*, which was insufficient to postpone a prior registration; but that his mortgage was wholly inoperative in consequence of *B.* not being named as a granting party therein.

Foster v. Beall, 244.

11. A purchaser of real estate executed a mortgage to the vendor securing a balance of purchase money on the understanding that the vendor was to remove an incumbrance existing at the time of the sale. This mortgage was assigned, and the assignee thereof, though unaware of the terms upon which the same was executed, had notice of the outstanding incumbrance; and it was not pretended that he supposed that the purchaser had bought subject thereto—Upon a bill by the assignee for the foreclosure of the mortgage:

Held, that the most he was entitled to, was, that having reduced the prior incumbrance to a sum not exceeding that secured by the mortgage held by him, the purchaser was bound to pay that amount into court to be applied in clearing the title; or, in default, his interest should be foreclosed, unless it was shewn that the existence of this mortgage prevented the purchaser from raising money upon the security of the land, in which case the plaintiff was bound to remove that incumbrance out of the way of the purchaser who was declared entitled to three months after its being cleared off to procure the money: but that this protection was properly obtainable by an application in chambers.

The Church Society v. McQueen, 281.

12. *J.* being the owner of certain lands, conveyed the same in fee to *L.* The latter afterwards conveyed them to *J.*'s wife. She and her husband then executed a mortgage of the lands to *J.*; but the wife was never separately examined. *L.* then filed his bill, alleging that the mortgage was to be taken to secure part of the purchase-money, and that *J.*'s wife refused to be examined. By the decree it was referred to the master at Guelph to ascertain the consideration for the original deeds. The master reported, that the original deeds were given by *J.* to *L.* without consideration, and to enable *J.* to defeat his creditors. From this report the plaintiff appealed; but the appeal was dismissed. The defendants then heard the cause on further directions; but the plaintiff did not appear:

Held, that, under the circumstances, the plaintiff was entitled to have the mortgage completed, or the deeds to *J.*'s wife given up to be cancelled. But as the plaintiff did not appear, he did not get a decree, though the defendants were refused any relief.

Lindsay v. Johnston, 446.

13. A mortgagee sold the mortgaged property under a power of sale.

Held, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years.

Ford v. Allen, 565.

14. If a mortgagee retains possession of the property after being paid in full, the general rule is to charge him with interest and rests in respect of his subsequent receipts. *A fortiori* is such a charge proper where a mortgagee resists the mortgagor's right to redeem.

Crippen v. Oglvie, 568.

15. Where a sale took place under a power of sale in a mortgage, and the clerk of the mortgagee's attorney became the purchaser but paid nothing, notwithstanding which the mortgagee conveyed the property to him, and he immediately reconveyed to the mortgagee:

Held, that the sale was invalid, and the property still redeemable, although the mortgagor, immediately after the sale accepted a lease of the property.

Ellis v. Dellabough, 583.

16. The plaintiff, a mortgagee, filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that the building having been actually removed, it was a proper case for a mandatory injunction, but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case.

Meyers v. Smith, 616.

17. The decree directed a reference to the master at Brantford to take an account of the amount due upon the mortgage in question. The only evidence before the master besides what was used at the hearing of the cause, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the master's report finding the whole amount due was allowed.

Semble, that the onus of proof under such a reference rests upon the holder of the mortgage.

Elliot v. Hunter, 649.

18. Where the purchaser of mortgaged premises had perfected his title thereto by means of a conveyance from a mortgagee, who had obtained a final order of foreclosure, and it was sought by the mortgagor to impeach the title of such purchaser, by

reason of irregularities in the foreclosure proceedings; of which, however, it was not shewn that the purchaser was aware; but the decree and final order on the face of them were regular:

Held, that the purchaser was not bound to inquire into the regularity of the proceedings upon which the decree and final order were founded, and dismissed the bill with costs.

Gunn v. Doble, 655.

See also "Fraud on Creditors,"
"Insolvency," 3, 4,
"Pleading," 6,
"Registration," 2.

MORTMAIN.

1. Where a sum of money was bequeathed for the erection of a parsonage:

Held, (first), that there was an implied authority to purchase land whereon to erect such parsonage; and (second), that in the absence of anything to shew that no portion of the fund was to be applied in the purchase of the land, the bequest was void under the Statutes of Mortmain.

Davidson v. Boomer, 1.

See also "Extrinsic Evidence," 2.

MOTION FOR DECREE.

See "Stated Account."

MULTIFARIOUSNESS.

See "Parties," 7.
"Pleading," 1.

MUNICIPAL LAW.

1. Where a by-law was passed by a township council for raising a loan for a special purpose, it was *held* to be contrary to the duty of the township treasurer to apply the money to any other corporate purpose.

Grier v. Plunkett, 152.

2. But where, in such a case, the application had been actually made before the filing of a bill by a rate-payer complaining of the application, and such application had been made in good faith, in discharge of a legal liability of the township, and the township council approved of and adopted the payment, a bill by a rate-payer to compel the treasurer to repay the amount and personally bear the loss, was dismissed.—*Ib.*

PAROL AGREEMENT.

(EXECUTED.)

PAROL EVIDENCE.

A mortgagee, who was purchasing a prior mortgage, was advised by his solicitor to take the assignment to another person as trustee; and he took the assignment accordingly in the name of his son, not intending it as an advancement to the son:

Held, that parol evidence was admissible to prove the trust.

Barr v. Barr, 27.

Having afterwards foreclosed all other incumbrancers, the same party was advised to release his interest to his son, so that the whole title might be in him as trustee. The deed did not mention any trust, but was retained by the father in his own possession, and was not communicated to the son, who knew nothing of it for more than five years, during all which time the father was receiving payments from the mortgagor to the father's own use, with the knowledge of the son, and without any claim by him:

Held, that parol evidence was admissible to prove these facts, and a conveyance to the father was decreed—*Ib.*

PARTIES

1. To a bill either to establish or impeach the legality of certain charitable bequests, the attorney general may be made a party.

Davidson v. Boomer, 1.

2. To a bill for equitable dower, the tenant in actual possession of the premises may be a proper, though not a necessary, party.

McIntosh v. Wood, 92.

3. A municipal officer charged with some irregularities in the performance of his duty, but not guilty of any fraud or intentional wrong, is an improper party to a bill to set aside a tax-sale on the ground of such irregularities.

Mills v. McKay, 192.

4. Where a bill seeks the destruction of trust estate, some or one of the *cestuis que trust* are necessary parties.

Baker v. Trainor, 252.

5. In order to the proper constitution of the suit the husband of a female married plaintiff must be made a defendant thereto.—*Ib.*

6. Wherever the result of a suit, whatever it may be, will not prejudice the Crown, and there is no interest of the Crown to be protected, the attorney general is not a necessary party.

Bennet v. O'Meara, 396.

7. The plaintiff filed his bill against *M.* and *B.* claiming to be entitled to certain mortgage moneys as against *B.* which were payable by *M.*, the only contest being between the plaintiff and *B.*, an injunction was prayed to restrain *M.* from paying, and *B.* from receiving them, and *M.* was made a party solely for this purpose.

Held, that *M.* was a proper party to the suit, and a demurrer by him for multifariousness and want of equity, was overruled.

McKenzie v. Brown, 399.

See also "Husband and Wife."
"Pleading," 7.

PARTNERS.

See "Sheriff's Sale," 1, 2.

PARTNERSHIP ACCOUNTS.

Money borrowed by a partner, with the knowledge and assent of his co-partner, is not necessarily chargeable by the creditor against the latter. For that purpose, it must appear that the money was borrowed on partnership account, or used for partnership purposes.

Hamilton v. McIlroy, 332.

PARTNERSHIP NAME—USE OF.

See "Injunction," 11.

PARTITION.

1. An unequal partition obtained in a County Court against a minor and *feme coverte* through the contrivance of the co-tenant, the gross laches of the guardian *ad litem*, and the misapprehension of the referee (appointed under the 17th section of the Partition Act) as to the extent of his duty and power, was held not binding. The minor, on coming of age, filed a bill for a new partition, and a decree was made accordingly.

Merritt v. Shaw, 321.

2. A child, who has been advanced, is bound to bring into hotchpot that wherewith he has been advanced, only, when it has been so expressed in writing, either by the parent or the child so advanced.

Filman v. Filman, 643.

See also "Infant Executor."

PATENT.

(OF INVENTION.)

1. The invention of an inclined plane in a certain form and position, as a means or appliance for directing a tool cutter, so as to produce spiral or curved grooves in a roller, was *held* a proper subject for a patent; the simplicity of a new contrivance being no objection to a party's right to a patent for it.

Summers v. Abell, 532.

2. A machinist invented a machine in which an inclined plane was applied for a novel purpose: he contemplated further improving his invention, but meanwhile made use of it in his work-shop. Five years or more afterwards he adopted or invented a contrivance which was not new, but which, in connection with the inclined plane, increased greatly the value of the machine; and he then took out a patent for the improved machine.

Held, that notwithstanding his prior use of the original machine, the patent was valid, and that the patentee was entitled to the exclusive use of the inclined plane.—[MOWAT, V. C., dissenting.]—*Ib.*

PAYMENT, TENDER OF WHEN NOT ESSENTIAL.

The defendant having neglected to furnish a statement of his claim in respect of the advances made by him in pursuance of the agreement between the parties, and in consequence thereof the plaintiff was unable to tender the proper amount due the defendant, it was considered that the plaintiff was exonerated from making any tender.

McSweeney v. Kay, 432.

PAYMENT INTO COURT.

Where there was a controversy as to whether a purchaser bought subject to, or free from, a mortgage which was on the property, and there was no suggestion of danger in respect of the purchase money, the court in a very special case refused to order payment of the amount into court pending proceedings, though a conveyance had been executed and the purchaser had gone into possession.

Mulholland v. Hamilton, 53.

PERSONAL REPRESENTATIVE.

See "Judgment Creditor."

PLEADING.

An execution creditor of *A.* filed a bill impeaching a conveyance made by the debtor to *B.*, as fraudulent against creditors; alleging that to give colour to the impeached transaction, notes had been delivered by the grantee to the debtor's wife, for the pretended consideration of the conveyance; the parties falsely pretending that the property was hers. The bill prayed an injunction against the notes being paid or parted with until decree, and claimed a lien thereon in case the sale to *B* was not fraudulent. The debtor, his wife, and their grantee, were the defendants to the bill:

Held, that the bill was not multifarious.

Goetler v. Eckersville, 82.

2. Whether, in case the sale to *B* was upheld, the plaintiff was entitled to the alternative relief.—*Quære.*—*Ib.*

3. The plaintiff, a second mortgagee, filed his bill against the equitable owner of a prior mortgage, impeaching an alleged sale of the lands comprised in the plaintiff's mortgage, under a power of sale contained in such prior mortgage, as also a sheriff's sale of a portion of the mortgaged premises, and the purchasers thereat were made defendants. A demurrer by the equitable owner of the prior incumbrance, for want of equity and for multifariousness, was over-ruled.

McLaren v. Fraser, 239.

4. Where a party alleges the legal operation and effect of an instrument, he is bound by such allegation.

Foster v. Beall, 244.

5. In case of a bill to enforce a trust, it is not necessary to allege that there is any evidence in writing of the trust.

Smith v. Ross, 374.

6. A third mortgagee filed his bill for redempton against the two prior incumbrancers and the mortgagor, but did not allege either that his own mortgage or that of the second mortgagee was past due: a demurrer on these grounds by the second mortgagee was allowed.

Parsons v. The Bank of Montreal, 411.

7. A bill will lie by a member of the corporation of the Church Society of the Diocese of Toronto, on behalf of himself and all other members of the Society, to correct and prevent alleged breaches of trust by the corporation; and to such a bill the attorney general is not a necessary party.

Boulton v. The Church Society, 450.

8. Where a widow is made a defendant as being entitled to dower, it is not sufficient for the bill to allege that the husband ded leaving her his widow: the bill should further expressly aver that she is entitled to dower, and that she claims to be so entitled.

Martin v. McGlashan, 485.

PLEADINGS.

A bill was filed praying a declaration of the true construction of a will, and for an administration of the estate by the court. The bill was taken *pro confesso* against some of the defendants. At the hearing, the plaintiff wished to abandon the prayer for an administration of the estate, but one of the defendants, who was a legatee, objected:

Held, that he was entitled to a decree for administration as prayed.

Woodside v. Logan, 145.

POSSESSION, DELIVERY OF

(OF CHATTELS.)

See "Manufacture of Timber."

(NOTICE OF TITLE.)

The rule that possession is notice of the title of the party so in possession, considered and acted on.

Gray v. Coucher, 419.

See also "Registry Act of 1868."

(TITLE BY.)

See "Registration," 3.
"Title by Possession."

POSTAGE STAMPS.

See "Purchase without Notice."

POSTPONING SALE.

Where a sale under a decree of the court is put off, a note of such postponement at foot of the old advertisement will suffice, without incurring the expense of a fresh advertisement.

Thompson v. Milliken, 197.

POWER OF SALE.

(PURCHASE UNDER, FOR MORTGAGEE.)

See "Mortgage," &c., 15.

PRACTICE.

1. There is no fixed rule in England as to the time to be given by a decree for paying purchase money before the vendor is entitled to a rescision of the contract for the default.

Tylee v. Landes, 99.

2. When the decree in a vendor's suit for specific performance directed payment in a month, the court, on a subsequent application to rescind the contract, gave the defendant, under the circumstances, a further period of four weeks to pay after service of the order; and ordered on default a rescission —*Ib.*

3. The notice of setting down a demurrer for assignment must contain the full style of cause.

Carroll v. McDonald, 329.

[But see *Stevenson* v. *Hodder*, 542, "Practice," 11.]

4. Where on granting an interim injunction leave was reserved to the plaintiff to file an affidavit of *B.*, an application to extend which, when made, was enlarged in consequence of the other business of the court, and it was then agreed that no further affidavit should be filed, but the affidavit of *B.* was then in the plaintiff's hands ready to be used if the motion had not been adjourned, and was in fact filed and served the same afternoon:

Held, that plaintiff was entitled to read this affidavit.

The Merchants' Express Co. v. Morton, 274.

5. The proper mode of appealing from the master's certificate of taxation is by motion, and not by petition.

In re Ponton, 355.

6. A report, like a decree in equity, or the entry of a judgment at law, should state results only, and should not set forth the evidence, arguments, or reasons on which the conclusions are arrived at. Where a decree directs the master to state his reasons, they should be stated briefly. It is not proper, in a report in an administration suit, to append to the report a copy of the will.

McCargar v. McKinnon, 361.

7. Persons who acquired an interest in the subject of the suit before the suit was commenced, cannot be made parties by an order of revivor.

McKenzie v. McDonnel, 442

8. Where a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void; but, on the fact being brought before the court, such order will be made as may be just.—*Ib.*

9. Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the court made an order, at the instance of the defendants, staying proceedings until all proper parties should be brought before the court.—*Ib.*

10. Where a notice of hearing is irregular in form, and the opposite party does not take the objection until the cause is called on, he is not entitled to costs.

Stevenson v. Hoader, 542.

11. It is sufficient in a notice of hearing to name in full the first plaintiff and first defendant, the words "and another," or "and others," after the name, are sufficient without naming the other or others.—*Ib.*

12. Where a plaintiff files a bill for an administration decree in a case in which the decree would have been made on notice, without a bill, he is not entitled to the increased costs thereby occasioned.

Sovereign v. Sovereign, 559.

13. It is inconvenient and objectionable for a master to set forth the evidence in his report, instead of adjudicating thereon. —*Ib.*

14. Non-payment of the untaxed costs of an unsuccessful application in a former suit, is no bar to a motion for a like purpose in another suit between the same parties.

The Erie and Niagara Railway Co. v. Galt, 567.

15. After decree and report in a foreclosure suit, the court refused to amend a mistake in the description of the property in the bill.

Lawrason v. Buckley, 585.

See also
"Adjourned Hearing."
"Affidavits."
"Chambers—Appeal from"
"Dismissal against one defendant without prejudice."
"Evidence."
"Injunction," 3, 4, 5, 6, 7.
"Maintenance."
"Mortgage," &c., 11.
"Notary Public."
"Nuisance."
"Pleadings."
"Principal and Agent."
"Stated Account."
"Varying Decree."

PREFERENCE IN FOREIGN COUNTRY.

See "Insolvency," 7.

PREFERENTIAL ASSIGNMENT.

In 1857 A. made an assignment for the benefit of his creditors, and thereby provided for the preferential payment of all sums which other persons were liable for, as sureties or indorsers for him:

Held, that the creditors to whom these secured sums were due, were entitled to the benefit of this provision, and would not lose it by executing the deed of assignment, though it contained a clause releasing the debtor.

Mulholland v. Hamilton, 53.

See also "Insolvency," 3, 4.

PRINCIPAL AND AGENT.

Ordinarily a bill for an account will not lie by an agent against a principal.

James v. Snarr, 229.

Although, since the Common Law Procedure Act, bills for discovery in aid of defences at law are rare, yet they will lie; but in such a case the plaintiff cannot move for an injunction to restrain the proceedings at law until he has filed interrogatories—under special circumstances, however, the court directed the defendant to submit to an examination in aid of such motion, or in default ordered the injunction to go.—*Ib.*

See also "Devisable Interest."
"Solicitor and Client," 3.

PRINCIPAL AND SURETY.

1. A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where therefore a mortgagee filed his bill against the assignee of the equity of redemption to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises, it was held that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached.

Irving v. Boyd, 157.

2. After judgment had been recorded against a debtor and his surety, the party holding the judgment entered into an agreement with the debtor to extend the time for payment, and a bill was afterwards filed by the surety claiming to be discharged by reason thereof:

Held, that, under the circumstances, the surety was not discharged,

Duff v. Barrett, 632.

3. The plaintiff, who was indorser on a note made by one *McF.* to a bank, shortly after the making thereof made a mortgage to the bank to secure the debt, which was stated in terms to be an additional security for the payment of the note and any renewal or renewals thereof. Subsequently the bank absolutely discharged the principal debtor:

Held (1) That the position of the surety was not changed by the making of the mortgage. (2) That the surety was discharged, although it was shewn that by the agreement between the principal debtor and the bank the surety was to be still held liable.

Cumming v. The Bank of Montreal, 686.

PRIOR INCUMBRANCE.

See "Mortgage" &c., 11.

PRIORITY.

See "Mortgage," &c., 10.
"Insolvency," 8.

PRIOR USE.

See "Patent."

PROBATE.

(FI. FA. AGAINST EXECUTORS BEFORE.)

See "Injunction," 1.

PROPERTY WRONGFULLY OBTAINED.

See "Tracing Property," &c.

PUBLIC POLICY.

See "Fraudulent Conveyance," 2.

PURCHASE FOR VALUE WITHOUT NOTICE.

During the war, United States postage stamps to the amount of $10,500 were taken by a Confederate ship from a United States vessel. There was no condemnation in a Prize Court; nor any transfer of the stamps to any person by the Confederate Government. After the war was over, these stamps, being in possession of an officer of the Confederate ship, were sold by him through a broker to the defendant in Liverpool at a

large discount. The defendant alleged that he had bought without notice of any infirmity in the title: but the court—being satisfied that he bought with knowledge of the facts, or with a strong suspicion of them and designedly avoided inquiry—ordered the stamps to be delivered up to the United States Government.

The United States of North America v. Boyd, 138.

Semble, the defence of purchase for value without notice is available to a party, although the interest conveyed is an equitable one only.

Davison v. Wells, 89.

See also "Fraudulent Conveyance," 1.
"Mortgage," &c., 18.

QUEBEC—ATTACHMENT TO.

See "Insolvency," 10.

RAILWAY COMPANY—PURCHASE BY.

It is clearly settled that the rights and franchises of a railway company do not prevail over a vendors's lien; and where land was sold to a railway company for the purposes of the road, and a mortgage taken to secure the unpaid purchase money:

Held, that the vendor's lien was not thereby lost.

Galt v. The Erie and Niagara Railway Co., 637.

RATEPAYER, BILL BY.

See "Municipal Law."

RECTIFYING DEED.

On a separation of townships a certain sum was found due to one of them (*A.*) by the other two, which remained united; and an instrument was executed acknowledging the amount to be due and declaring it payable out of a fund supposed by all parties to be coming from the county to the two townships. It was subsequently discovered that no such sum was coming from the county, and the separated township (*A.*) thereupon filed a bill to correct the instrument by making the debt payable generally. The defendants set up the mistake, and alleged that the restriction as to the county fund was of the essence of the whole transaction; but the court, being satisfied that the debt was really due and payable, granted the relief prayed.

Arran (township) v. Amabel and Albermarle, (townships), 701.

REFORMING DEED.

See "Specific Performance," 6.

REGISTERED JUDGMENT.

Where a judgment was registered and a *fi. fa.* against lands was delivered to the sheriff before the expiration of three years, but the sale did not take place until after the three years had elapsed, and the judgment had not been re-registered

Held, that the sheriff could only sell any land the debtor had at the time the *fi. fa.* was placed in his hands; and that a conveyance made by the debtor before the judgment was obtained, but not registered till after the registration of the judgment, took precedence of the sheriff's deed:

Chesley v. Coupe, 214.

REGISTRATION.

1. In case of an unregistered interest of a date antecedent to the Registry Act of 1865, and not founded upon a deed or conveyance which was capable of registration, constructive notice is sufficient notice against a subsequent registered conveyance; and possession of the property by the party having such unregistered interest is sufficient constructive notice for this purpose.

Moore v. The Bank of British North America, 308.

2. The plaintiff purchased the land in question from *J.*, who had purchased from *G.*, no conveyance having been made to *J.* by *G.*, who afterwards conveyed the same land to *T.*, a son of the plaintiff, who mortgaged it and represented the property as his own; the plaintiff being all the while in possession. The title was not a registered one.

Held, that the mortgagees were affected with notice of the plaintiff's title by reason of his possession, although there was no pretence of actual notice to them; and they having omitted to set up the registry laws as a defence, liberty was given them to apply for leave to do so, if so advised.

Gray v. Coucher, 419.

3. In 1831, *A.* demised his farm to his widow in fee, and left her in possession. The will was never registered; and shortly after the testator's death his eldest son and heir went into possession with his mother, and so continued until his mother's death in 1854; the son managing the farm, and being reputed owner during this period. After his mother's death he was in sole possession; and in 1862, he executed a mortgage

of the property to a person who had no notice of the will or of the widow's title:

Held, [affirming the decree of the court below], that the widow's heirs could not claim the property against the mortgagee. [A. WILSON, J., dissenting].

Stephen v. Simpson, 594.

See also "Mortgage," &c., 10.
"Constructive Notice."

REGISTRY ACT OF 1868.

Where a father and son lived together on certain land of the father, and continued to do so after a conveyance by the father to the son, it was *Held* that the son's possession after the conveyance did not affect a subsequent purchaser from the father.

Sherboneau v. Jeffs, 574.

Possession is not such notice as, under the late Registry Act, postpones a registered deed to the prior unregistered title of the party in such possession.—*Ib.*

RENTS AND PROFITS.

Where the plaintiff being one of the heirs of an intestate took upon herself to lease the lands in question, she was held liable to account for all the rents she had received, and for all that but for her wilful neglect and default she might have received, and in case it should appear on the inquiry before the master that she had so dealt with the property as to make her properly liable both for rents and profits, the master was to report specially or separately. The costs of the account as to rents to fall upon the estate, or be borne by the plaintiff, according to whether what was done by her was or was not beneficial to the estate.

Nash v. McKay, 247.

REPORTS, FORM OF.

See "Practice," 5, 10.

RESCISSION OF CONTRACT.

See "Practice," 1, 2.

RESIDUE, UNDISPOSED OF.

See "Undisposed of Residue."

REVIEW, PETITION OF.

See "Bankruptcy," I.

REVIVOR.

Persons who acquired an interest in the subject of the suit before the suit was commenced, cannot be made parties by an order of revivor.

McKenzie v. McDonnel, 442.

REVOCATION OF WILL.

(BY DEED.)

See "Will Revoked by Deed."

SALE OF WHEAT.

(PART OF A LARGER QUANTITY.)

See "Warehouseman's Receipt."

SCHOOL LAW.

1. Where a board of school trustees passed a resolution professing to adopt a permanent site for the school and the resolution was confirmed at a special meeting of the ratepayers duly called, these proceedings were held not to prevent a change of site in a subsequent year.

Malcolm v. Malcolm, 13.

2. Where school trustees selected a new site for the school house, and at a special meeting of the ratepayers, duly called, those present rejected the site so selected and chose another, but neither party named an arbitrator:

Held, that an arbitrator might be appointed by the ratepayers at a subsequent meeting.—*Ib.*

3. The power of a county council to change the site of a grammar school is not lost by the union of the grammar school with a common school; though if the new site is not also adopted by the means provided by law for the case of a common school, the change may render necessary the separation of the schools.—*Ib.*

4. Where the joint board of a grammar and common school, after the site for the grammar school had been changed by the county council, wrongfully expended school money granted for a grammar school building; and a bill was filed against the trustees to restrain further expenditure, and to make them

refund what had been expended, the defendants were ordered to pay the costs, but were allowed time to ascertain if all parties concerned would, under the special circumstances, adopt again the old site.—*Ib.*

5. It is contrary to the rule of this court, in dealing with persons who have not acted properly, to punish them more severely than justice to others renders necessary; and therefore, where school trustees wrongfully expended money in building on a site which had been changed by competent authority, relief was only granted to a ratepayer who complained of the act, subject to equitable terms and conditions.—*Ib.*

6. A dissent by school trustees from a decision of the ratepayers as to a site for the school, should be intimated promptly, and if not announced till after the expiration of the current year, it is too late.

Coupland v. The School Trustees of Nottawasaga, 339.

SECRET TRUST.

See "Fraudulent Conveyance," 2.

SECURITY ON REAL ESTATE.

The customer of a bank created a mortgage in favor of the institution by deposit of title deeds. In a suit to realize the security the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off; the officers of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed, at the time of the deposit, on the envelope containing the deeds was to the same effect. The court in the view that the deposit, if made as alleged by the bank, was lawful; while if made for the purpose stated by the debtor would have been illegal, made a decree in favor of the bank with costs.

The Royal Canadian Bank v. Cummer, 627.

SETTING DOWN DEMURRER.

(NOTICE OF.)

The notice of setting down a demurrer for argument must contain the full style of cause.

Carroll v. McDonald, 329.

[But see *Stevenson* v. *Hodder*, 542, "Practice," 11.]

SHERIFF'S DEED.

See "Registered Judgment."

SHERIFF'S SALE.

1. A testator charged several legacies on his real estate, which, subject thereto, he devised, one-half to *R.*, and one-half to *G.*, his sons. Executions against the testator's lands, in the hands of his executor, to the amount of $131, and against the lands of the devisee *R.* to a larger amount, were placed in the hands of the sheriff, and the sheriff put up the half devised to *R.* under all these writs; it brought $1378; and the sheriff after paying the small executions, applied the balance to the executions against *R.*:

Held, that it was wrong to sell under the executions against the executor more than was enough to pay those executions; that the effect of the sheriff's course was to apply the property of the legatees to pay the debt of another person (*R.*): and that the sale did not deprive the legatees of their charge: but *R.* having assented to the sale, the same was not disturbed so far as it affected his interest.

Jones v. Jones, 40.

2. The sheriff, at a subsequent sale under another small execution against the executors, put up the whole farm, and the same was knocked down to the purchaser of the half at the former sale, at one-sixteenth of the value of the farm. Before conveyance, one of the legatees filed his bill to restrain the carrying out of this sale; and it was *held* that he was entitled to the relief prayed.—*Ib.*

SHIPS.

The part owner of a British registered ship sold his shares therein on credit to the defendants *D.*, who having made default in payment of the balance of purchase money an execution at law was obtained therefor, under which their interest in the vessel was sold by the sheriff to *C.*, another defendant, and a bill was thereupon filed by the vendor claiming a lien on the vessel for unpaid purchase money.

A demurrer thereto for want of equity was allowed.

Baker v. Dewey, 668.

SOLICITOR AND CLIENT.

1. A client who had a mortgage of certain premises instructed his solicitor to institute proceedings on the mortgage. The solicitor omitted to make *J.*, the owner of the equity of redemption in a portion of the property, a party to the suit.

SOLICITOR'S LIEN.

See "Insolvency," 8.

SPECIFIC PERFORMANCE.

upon payment of the amount so advanced, and interest, together with what was paid by the defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract:

Held, that, although the court, as a general rule, will hold a party to perform such a contract within the time limited, yet it is not ousted of its jurisdiction, but will admit him to shew a good and valid reason for its non-performance within such time, and in that case may order specific performance.

McSweeney v. Kay, 432.

4. A party after making a contract for the sale of land, mortgaged it, and then filed a bill for specific performance. The mortgage not being due, the court on the hearing directed an inquiry whether the plaintiff could make a good title free from incumbrance; and reserved further directions and costs in case the master should find the plaintiff could not clear up the title.

McDougal v. Miller, 505.

5. One of the conditions of a lease was that the lessee (the defendant) should erect a barn of certain specified dimensions, and the land whereon it was to be erected was mentioned, but the lease was silent as to the exact location or site of the barn. The lessee commenced to erect a barn on a site with which the lessor was dissatisfied, who thereupon filed a bill, alleging that such a site was unsuitable, and that it had been selected by the defendant from improper motives; that another site had been agreed on between them, and that the building itself was faulty in its construction, and prayed an injunction restraining the defendant from allowing the barn to remain in its present position; and by amendment sought to enforce specific performance of the contract. The evidence failed to establish the material allegations of the original bill:

Held, (1) That by the terms of the lease the plaintiff had not the right of selecting the site of the barn; (2) that it was not a proper case for decreeing specific performance, or to award damages in lieu thereof, but that the plaintiff must be left to his remedy at law.

Campbell v. Simmons, 506.

6. The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed to the plaintiffs in these suits for valuable consideration. After the lapse of more than fifteen years the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted procedings in this court to reform

the deed executed by the defendant, or, treating it as a contract only, for a specific performance thereof:

Held, (1) That though the plaintiffs had equities as purchasers for value, yet the defendant had in equity to set aside the deed he was deceived into executing; and that his equity being the elder, and having the legal title in his favour, the court could not interfere to give the plaintiff relief; and (2) that though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief, were he in court as a plaintiff, still they did not constitute a ground for granting the plaintiffs the relief sought, and under the circumstances, the court dismissed the bill with costs.

Livingstone v. Acre, 610.

See also "Husband and Wife."
"Statute of Frauds," 2.

STATED ACCOUNTS.

Where a defendant by his answer sets up a stated account the plaintiff does not admit the defence by bringing on the cause by way of motion for decree; and the proper decree in such a case is a reference as to such alleged account.

Neil v. Neil, 110.

STATUTE OF LIMITATIONS.

1. The defendant acquired the legal title under a deed in December, 1842, in the portion allotted to him of the land in which the plaintiff and defendant, as also one *M.*, had previously been jointly interested; and the strip of land in question in this suit was erroneously included in this conveyance; and the fact was known, but the conveyance was executed notwithstanding. About the same time the plaintiff and defendant executed a document agreeing to leave this strip for their mutual benefit, the plaintiff to have the timber thereon. The defendant had not actual possession of the strip, but there was no separation between it and the other portion of the lot which he did occupy under his conveyance:

Held, that this document operated to prevent the defendant from acquiring a title to this strip under the Statute.

Moffat v. Walker, 155.

2. The executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children, and on the eldest son coming of age in 1852 the executor pointed out to him the clause in the will directing a distribution of the

personal estate, but the only estate the executor then had was some household furniture. In 1867, the widow having set up a claim for dower, rejecting an annuity provided for her by the will, the heir at law filed a bill against the executor for an account:

Held, that the Statute of Limitations did not bar the relief: but, inasmuch as the executor had had reason to believe he would never be called on for an account, the court thought the master, in proceeding under the decree, should act liberally upon the rule of court giving the master a discretion as to the mode of vouching accounts in his office.

Walmsley v. Bull, 210.

See also "Vendor and Purchaser," 3.

STATUTE OF FRAUDS.

An undertaking as surety, must, to comply with the Statute of Frauds, name the person to whom it is given,

The Corporation of the Counties of Huron and Bruce v. Kerr, 265.

2. Where a guarantee did not sufficiently comply with the Statute of Frauds, but the transaction related to an interest in lands for one year, and the principal had gone into possession under the contract and retained possession:

Held, that the contract was binding on both principal and surety, on the ground of part performance.—*Ib.*

3. In such a case, some of the sureties, some weeks after possession was taken, refused to sign a formal lease. No proceedings were taken to enforce their undertaking until the year had expired, and the principal had given up possession, a defaulter in respect of his rent;

Held, that the delay was no bar to the suit.—*Ib.*

See also "Timber Limits," 1.

STOLEN MONEY

See "Injunction," 8.

STYLE OF CAUSE,

See "Practice," 3, 10, 11.

SURROGATE COURT JUDGE, ALLOWANCE BY,

See "Executors," 1, 3.

TAXATION, APPEAL FROM.

See "Practice," 5.

TAX SALES.

1. After a sale of land for taxes for 1859 and following years, a subsequent sale for the taxes of 1858 was held invalid, and the purchaser under the first sale was held entitled to retain the land free from past taxes.

Mills v. McKay, 192.

2. Where an action of ejectment had been brought by the purchaser of lands alleged to have been illegally sold for taxes, the court declined to interfere by injunction to restrain the action. The proper course in such a case, in the event of the sale being found invalid, is for the owner to tender a deed to the purchaser for execution, and on his refusal to execute such a deed, to apply to this court for relief.

Bamberger v. McKay, 328.

3. Where there were two lots on a street with the same number, one on the south side and one on the north side, and neither the assessment nor the sheriff's deed on a tax sale thereof distinguished the one from the other: the sale was *held* void for the uncertainty.

Lount v. Walkington, 332.

4. A tax sale of land for more than what was due is not rendered valid by 27 Vic. ch. 19, sec. 4.

Yokham v. Hall, 335.

5. Where two half-lots were assessed separately, a sale of the whole lot for the total amount was held to be invalid, notwithstanding that statute.—*Ib*

6 Where a tax sale was advertised in the *Canada Gazette* for thirteen successive weeks before sale, but such thirteen weeks did not amount to three calendar months from the date of the first publication, it was held that the irregularity did not invalidate the sale.

Connor v. Douglas, 456.

TENDER.

See "Payment."

TIME OF THE ESSENCE OF THE CONTRACT.

See "Specific Performance," 3.

TIMBER.

See "Crown."

TIMBER LIMITS.

1. The plaintiff who was the licensee of the Crown of certain "timber limits," entered into an arrangement with *J. N. & Co.*, whereby they were to make advances to him to the extent of $6,000, to enable him to get out timber during the then coming season, such timber to be consigned to them, and they were to be allowed a certain commission on sales, and interest on moneys advanced by them. And it was agreed that the plaintiff should transfer to them his interest in such timber limits, as a security for the payment of any balance arising on the transaction; which was done. Afterwards the plaintiff and *J. N. & Co.*, continuing to deal on the like terms, it was agreed between them, verbally, that the transfer already made should stand as a security for advances to be made by them upon subsequent transactions.

Held, that the subject of the contract was such an interest in lands as came under the 4th section of the Statute of Frauds, and that any agreement respecting it must be in writing.

McDonell v. McKay, 391.

2. A bill was filed in respect of certain timber limits by two of the devisees and legatees of the original licensee thereof.

Held, that the suit ought to be by the personal representative, and a demurrer to the bill, on the ground that it was not so constituted, was allowed.

Bennett v. O'Meara, 396.

TITLE BY POSSESSION.

1. In order to make a good title by possession it must be shewn that the *whole* of the land has been actually cleared or occupied for a period of at least twenty years.—*Ib.*

Wishart v. Cook, 237.

2. A title by possession can only be made to so much of a parcel of land as has been actually cleared or occupied for twenty years.—*Ib.*

3. The son of an intestate and his wife having been in undisturbed posession of certain land of the intestate long enough for the possession to have ripened into a title in one or the other; and it appearing that it was farmed and improved by the husband, and assessed in his name, and the claim of the wife thereto had not been set up until after her husband had fallen into difficulties, and such claim rested only upon the statement of the intestate, made after the title had ripened in some one,

that he had, in his waggon, conveyed the wife of his son to the land while the son was absent, and left her in possession :

Held, that the possession was that of the son ; and that his title vested in his assignee in insolvency.

Filman v. Filman, 643.

See also " Devisable Interest."

TITLE, INVESTIGATION OF.

See "Investigation of Title.

TRACING PROPERTY WRONGFULLY OBTAINED.

1. If the court can trace money or property however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner by holding it to be his in equity, or by giving him a lien on it.

The Merchants' Express Co. v. Morton, 274.

2. Accordingly, were money was stolen, the owner was held entitled to a leasehold, furniture, and other chattels, purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing.—*Ib.*

TRADE MARK.

See " Injunction," 2.

TRESPASSERS.

See " Crown."

TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

See

" Compensation to Trustees."
" Compounding Debts."
" Costs."
" Executors."
" Interest on Investments."
" New Trustees."
" Parol Contract."
" Pleading," 5.
" Specific Performance," 2.
" Will," 14.

ULTRA VIRES.

See " Corporation," 1, 3.

UNCERTAINTY.

See "Tax Sales," 3.

UNDISPOSED OF RESIDUE.

Where money, mortgages, and promissory notes, were bequeathed to a legatee for life, it was held, that she was not entitled to the possession and disposition of the same, but to the income only; though of farming stock and implements given for life by the same clause, she was to have the use in specie.

Thorpe v. Shillington, 85.

UNDUE INFLUENCE.

A person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice. A bill by his heir impeaching the deed was dismissed.

Corrigan v. Corrigan, 341.

VARYING DECREE.

An incumbrancer, made a party in the master's office, under the general orders of the 6th of February, 1865, cannot, after the lapse of fourteen days from the service of the decree, file a petition to vary the decree, without first obtaining leave by an application in chambers.

Roe v. Stanton, 137.

VENDOR AND PURCHASER.

1. *W.* entered into a contract for the purchase of property, the price being payable by instalments; and, there being a mortgage on the property which was not due, the vendor was to give the vendee a bond of indemnity in respect of the mortgage. A decree was afterwards made at the suit of the vendor for specific performance, on his undertaking, recited in the decree, to procure a release of the mortgage; the overdue instalments were ordered to be paid into the bank, subject to the further order of the court. Part only was so paid, and, in consequence of the default as to the residue, the mortgage was not paid when due, and was foreclosed in a suit to which both the vendor and vendee were defendants. The purchaser then applied by petition to stay all proceedings in the specific performance suit, which (the plaintiff not objecting) was granted, and the money in court was ordered to be paid to the vendor, in consideration of the loss he had sustained through the purchaser's default.

Robson v. Wride, 111.

[Affirmed on re-hearing, 565.]

2. Where a person, falsely representing himself to be the agent for the owner of certain land, entered into a contract for the sale thereof, and received a deposit on account of the purchase money, but the vendee could not obtain a specific performance of the contract:

Held, that his remedy against the agent for the return of the deposit was at law, and that a bill for that purpose would not lie.

Graham v. Powell, 327.

3. On a purchase of land the vendee gave his promissory note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator, it was held that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note.

Stevenson v. Hodder, 570.

4. On a sale of lands the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the amount of the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to re-sell the land in consequence of the mortgage:

Held, not allowable.—*Ib.*

See also "Practice," 1, 2.
"Railway Company, Purchase by."
"Specific Performance," 4.

VENDOR'S LIEN.

See "Railway Company, Purchase by."
"Ships."

VESTED INTEREST.

See "Infant Cestui Que Trust."

VOID BEQUEST.

Where property is bequeathed to executors on trusts which are too uncertain for execution, the executors are not beneficially entitled.

Davidson v. Boomer, 1.

WAREHOUSEMAN'S RECEIPT.

Where a warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat to be delivered pursuant to his order to be indorsed on the receipt.

Held,—(MOWAT, V. C., dissenting)—that, the 3,500 bushels not having been separated from the other wheat of the seller, no property therein passed.

Box v. The Provincial Insurance Company, 552.

WEIGHT OF EVIDENCE.

See "Security on Real Estate."

WILFUL NEGLECT AND DEFAULT.

See "Lunacy," 1.

WILL, CONSTRUCTION OF.

1. A testator, after bequeathing an annuity to his wife, preceded :—"I also give and bequeath to my said wife all my household furniture, goods, and chattels, of what nature or kind soever, and wheresoever situate; to have and to hold to her my said wife, her heirs and assigns, for ever;" and in subsequent clauses devised certain real property to different persons, and for different estates, and also bequeathed a number of annuities to different persons, charging them on his estate generally and disposed of his residuary real and personal estate:

Held, that the bequest to the wife, though large and comprehensive enough to pass the whole of the testator's personal estate, and though not inconsistent with the bequest to her of an annuity; yet, the subsequent bequests restricted the application of the bequest to personalty *ejusdem generis* with the particular description of property bequeathed; and the residuary bequest of personalty having failed through uncertainty as to the objects of the testator's bounty:

Held, that the wife was not entitled to it under the words of the bequest to her.

Davidson v. Boomer, 1.

2. A testator bequeathed to his wife maintenance or an annuity, at her option, to be furnished or paid by his sons *R.* and *G.*, and gave divers legacies, some of which he directed his executors to pay; and as to others, including the legacy to the plaintiff, he did not say how they should be paid; he then devised his farm to his sons *R.* and *G.*, subject to his

8. A will after giving several pecuniary legacies, contained this direction: "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding: "In them I repose full confidence that they will act fair and consistent:"

Held, that all the testator's lands were to be sold; and that the executors had power to sell them, although they had not the legal estate.

Woodside v. Logan, 145.

9. The surplus was to be divided amongst the legatees in proportion to the other sums bequeathed to each. One legacy was of $200, and an annuity; and the legatee died within a year after the testator:

Held, that her personal representative was entitled to a proportionate part of the annuity; and that her share of the surplus was to be based on the $200, plus this sum.—*Ib.*

10. Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower. Evidence for the purpose of shewing that the testator intended such provision to be in lieu of dower, was held inadmissible.

Fairweather v. Archibald, 255.

11. Where a testator by his will, after making a provision for his widow, directing certain of his real estate to be sold at the expiration of a lease thereof then existing, and the proceeds to be divided among his three daughters, and that in the meantime the rent was to be divided among them:

Held, that this latter expression was not inconsistent with the widow's claim to dower.—*Ib.*

12. Where the testator directed his executors to invest in good securities such a sum as would pay an annuity thereby bequeathed, and the income of the fund was insufficient to pay the annuity:

Held, that the annuitant was entitled to be paid the deficiency out of the *corpus* or capital.

Anderson v. Dougall, 405.

13. A testator devised all his real estate to his two daughters and a granddaughter "during their lives or the lives of any one of them for their support; and in case of the mariage of any of them then to those above-named remaining unmarried," and after their decease the property was to be sold for the benefit of all his grandchildren. At the time of his death all were living and unmarried; subsequently one of the daughters married but became a widow, the other daughter died unmarried and intestate, and the granddaughter afterwards married (in 1864):

Held (1) that the estate which became vested under the will in the granddaughter, was not defeasible upon her marriage.

(2) That the sale and distribution of the estate was not to take place until after the death of the granddaughter; and

(3) That the grandchildren, the devisees over, took vested interests, and that all grandchildren born before the period of distribution were entitled and took *per capita* and not *per stirpes*.

Wight v. Church, 416.

[Reversed as to the first and second findings on re-hearing, see *post* volume xvi. page 192.]

H. A testator devised his property in trust, amongst other things, to pay his son an annuity of £100, and in case of his marrying with the approbation of the trustees, then they were to hold certain specified property, or to convey the same for the separate use of the wife during her life, subject if the trustees thought best to the payment of such annuity to the son, and after the death of the wife then to the use of the children of the marriage or their issue, with a proviso "that the trusts in favor of such wife and children shall not arise, nor shall the approbation of my said trustees of such marriage be presumed or proveable unless my said trustees shall by deed declare the said trusts in favor of such wife and children." The son married, but no declaration of trust in accordance with this proviso was made:

Held, that a declaration by deed was necessary to give the wife or children a *locus standi* in court, and that evidence of conduct on the part of the trustees tending to shew their approbation of the marriage was insufficient.

Foster v. Patterson, 426.

See also "Compos Mentis."
"Extrinsic Evidence."

WILL. REVOKED BY DEED.

A testator devised 200 acres of his land to one of his sons, a minor, and the remainder (100 acres) to the testator's wife. The husband and wife afterwards agreed to live apart; that her 100 acres should be given to her at once; and that, in consideration of this, she should release her dower in the rest of his land. To effect this object, both joined in a deed of the 300 acres to a trustee; the trustee conveyed to the wife her 100 acres, and signed a declaration that he held the rest in trust to convey the same to any person whom the grantor should appoint:

Held, that the deed operated as a revocation of the will in equity, as well as at law:—the English statute (1 Victoria, chapter 26, sec. 23) not having yet been adopted in this country.

Loughead v. Knott, 34.

nder the will
ier marriage.
as not to take
; and
took vested
the period of
ot *per stirpes.*
ch, 416.
-hearing, see

nongst other
case of his
n they were
he same for
t if the trus-
to the son,
he children
at the trusts
nor shall the
e presumed
declare the
he son mar-
this proviso

to give the
evidence of
shew their

n, 426.

his sons, a
tor's wife.
part; that
nat, in con-
the rest of
ceed of the
e wife her
the rest in
ne grantor

ne will in
Victoria,
is country.
tt, 34.