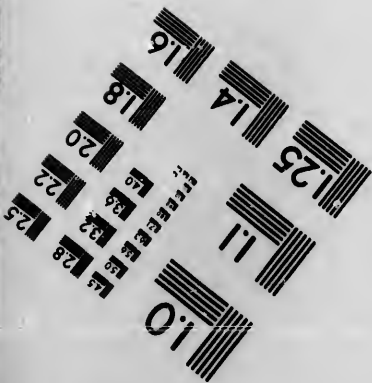
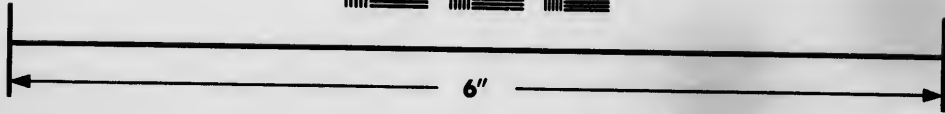
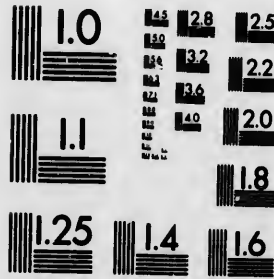


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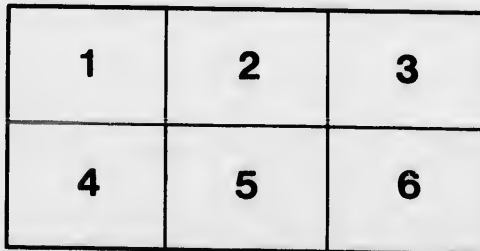
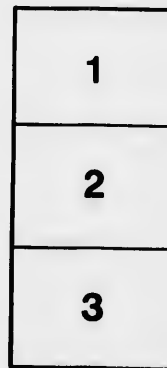
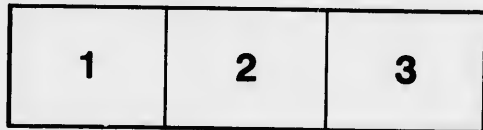
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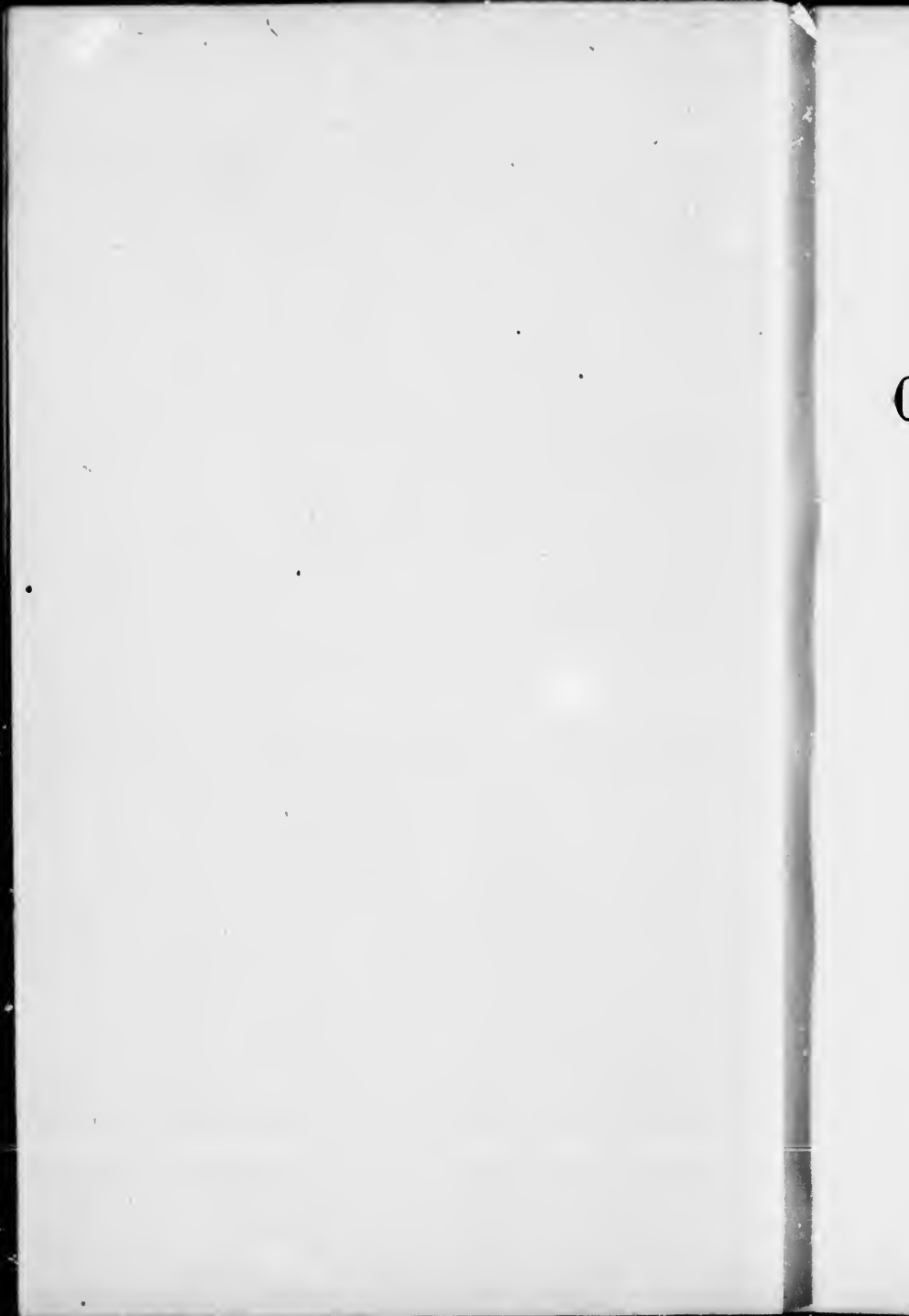
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REPORTS OF CASES
 ADJUDGED IN THE
COURT OF CHANCERY;
 OF
ONTARIO,
 DURING PORTIONS OF THE YEARS 1877 AND 1878.

ARMSTRONG V. GAGE.

Duress—Coercion—Weighing Evidence—Overruling Master—Practice.

The plaintiff, a farmer of about sixty years of age, and unacquainted with legal matters, was taken by the defendant to a lawyer's office, and when there was charged with having defrauded the defendant, by changing the figures in certain weigh tickets for grain, to an amount of about \$500, and was threatened that if he left the office without settling the claim he would be arrested by a detective, who was pointed out to him, in consequence of which the plaintiff executed a mortgage on his farm for the sum of \$600. The Court, on appeal from the Master, found that the mortgage was void as having been obtained by duress and coercion, although the plaintiff, before giving the instrument, had been told that he might leave and go where he pleased, but the party so giving him permission declined to undertake that in case of his leaving he would not be arrested.

The parties to a cause are entitled, as well on questions of fact as on questions of law, to demand the decision of an Appellate Court, and that Court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own inferences and conclusions, though it will always bear in mind that it has neither seen nor heard the witnesses, and will make due allowance in this respect. Where the evidence against the plaintiff could at most only raise a case of suspicion, the Court, on appeal from the Master, overruled his finding, the effect of which was to shew the plaintiff guilty of forgery or other criminal offence.

Although the rule of the Court, as stated in *Daily v. Brown*, ante vol. xviii. p. 681, is not to overrule the Master upon a question of

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credibility of evidence, still, where upon a careful examination of the evidence adduced in support of the Master's finding, and that in contradiction of it, it was clear that the Master had erred in the proper weight to be attributed to the evidence, and it did not appear that he had proceeded on the manner or demeanour of the witnesses, the Court reversed the finding of the Master, although upon a question of fact.

THE bill in this cause was filed on the 10th December, 1873, by *James Armstrong*, against *William Gage*, *Norris Freeman Birely*, and *Robert R. Waddell*. It stated that the plaintiff was a man of advanced years, sixty or thereabout, and of a nervous and timid disposition, by occupation a farmer, and wholly unacquainted with legal matters.

That the defendant *Waddell* was a solicitor, practising in Hamilton, and the defendant *Birely* a dealer in grain and produce in that city; and that all the defendants were men of great shrewdness and business capacity, with whom the plaintiff was wholly unable to cope in any business matter.

Statement.

That the plaintiff had recently brought to Hamilton a load of wheat for sale, and having procured a ticket, according to the usual and accustomed course of business, evidencing its weight, sold it to the defendant *Birely*, to whom the plaintiff had previously made divers sales of grain, and in whose integrity he had the fullest confidence, and left the ticket at his place of business with his clerk, who afterwards objected that the quantity of wheat mentioned in the said ticket was much larger than that actually delivered by the plaintiff,—the truth of which the plaintiff was unable to determine, inasmuch as he had not examined the ticket.

That on the 15th November, 1873, the plaintiff, being at Hamilton, was met by *Birely*, who told him that the defendant *Waddell* was desirous of seeing him, whereupon the plaintiff accompanied *Birely* to *Waddell's* office.

That the defendants *Birely* and *Waddell* then falsely and fraudulently accused the plaintiff of having altered

a large number of tickets of a similar kind, and of having thereby defrauded *Birely* of a large sum of money, and charged the plaintiff with being guilty of the crime of forgery, and said that if he could not prove that the amounts of grain previously delivered by him to *Birely* were equal to the amounts of the tickets, he would be convicted of a crime, and sent to the penitentiary.

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That the defendants *Waddell* and *Birely* had previously concocted the scheme of making the said charge against the plaintiff, with the view of extorting from him money, or a security for money, and communicated the scheme to the defendant *Gage*.

That the said defendants, in pursuance of that scheme, made the charge against the plaintiff, and alleged that a warrant had been issued and was in the hands of an officer for his arrest on that charge, and that the plaintiff had obtained a sum of \$504.37 from *Birely* by means of forgery, and that unless he executed a mortgage for \$600 upon his property, he would forthwith be arrested and committed to gaol, all of which allegations were entirely untrue, and made with intent to coerce the plaintiff into executing the mortgage.

That the plaintiff denied the charges, and requested to be allowed to communicate with some solicitor, but the defendants refused to permit him to do so, and threatened that if he left the office he would immediately be arrested.

That the plaintiff was utterly prostrated by these charges, and did not know what legal responsibility he might inadvertently have incurred, and dreaded the consequences of such a charge, though unfounded, being publicly made, to such a degree that he was wholly unable to judge clearly or deliberately of his position, and at length, after being kept in *Waddell's* office for at least four hours, he was, by the coercion and duress of the defendants, induced to consent to execute the mortgage.

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That the defendants *Waddell* and *Birely* had previously arranged with *Gage*, who is a relative of *Waddell*, that the mortgage should be taken in his name for the purpose of giving colour to it, and throwing difficulties in the plaintiff's way.

That the plaintiff, under such duress and coercion, executed a mortgage upon his land to the defendant *Gage*, securing payment of \$600.

That the whole amount of grain ever sold by the plaintiff to the defendant *Birely* could not exceed \$250.

The bill further alleged that the plaintiff never was indebted to the defendant *Gage* in \$600, or any sum, and that *Gage* was merely used to complicate matters, and he held the mortgage as a trustee, and there was an agreement among the defendants to participate in the advantage of the fraud; and prayed that the mortgage might be declared fraudulent and void, and be ordered to be delivered up to be cancelled, or be discharged.

Statement.

The defendant *Birely*, by answer, stated that from about the middle of September until the 8th November, 1873, he had received a number of loads of wheat and barley from the plaintiff. On the 8th November, 1873, the plaintiff, as *Birely* was informed and believed, brought a load of wheat, which on being weighed was found to contain 12 bushels and 40 lbs., and he was given a ticket by the weighing clerk for that quantity, marked in figures, "12.40"; when he left the warehouse and went to the office, a short distance from the warehouse, and presented the ticket with the figure 1 altered to a 4, thus making it a ticket for 42 bushels and 40 lbs.; that on presenting this to the warehouse clerk, the plaintiff received from him a receipt for the larger quantity, and the clerk entered that quantity in the book as the quantity actually received. In a few minutes afterwards it was accidentally discovered by the weighing clerk that the warehouse clerk had given this receipt, and he told him that only 12 bushels and 40

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lbs. had been delivered, and that the ticket he gave was for that quantity, and if for a larger there had been a fraud committed. The two clerks went in search of the plaintiff, and finding him in a few minutes demanded from him the ticket; on his producing it he was charged with altering the figures, which he denied; and he left the office saying he would return soon, which he never did.

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The defendant *Birely* then proceeded to detail the means by which, from the tickets given to the plaintiff, and given up on payment, and from information received from his clerks, he came to the conclusion that he had been defrauded by the plaintiff of 259½ bushels of wheat and 10,170 lbs. of barley, and perhaps to a larger extent. He then stated that on or about the 15th of November he started on his way to the plaintiff's residence in Grimsby, when he met him coming to Hamilton, and requested the plaintiff to accompany him to *Waddell's* office, which he did. *Birely* explained to the plaintiff what he had ascertained, and made up a statement of the quantities of grain of which he claimed to have been defrauded, and asked him to repay the value, and expenses, to which the plaintiff replied he had no money then; that it was then suggested that *Birely* would take a mortgage on his farm, and give him a year to pay. The plaintiff objected to this at first, but subsequently gave the mortgage, as *Birely* understood, freely and voluntarily, and without duress or coercion. But *Birely* alleged that he knew nothing of this personally as he left it in the hands of his solicitor. *Birely* denied the fraud and conspiracy charged against him; denied making any threat, or making any promise not to institute criminal proceedings. *Birely* said that at first he did state to the plaintiff that if he left the office of his solicitor without settling he might be arrested, but subsequently, and about two hours before the execution of the mortgage, he withdrew all objection to his leaving, and he was perfectly free to come and go as he pleased.

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The defendant *Waddell* denied having charged the plaintiff with having altered any tickets, or with the crime of forgery, or that he had stated that if he (the plaintiff) could not prove that the quantity of grain previously delivered was equal to the amount of tickets, he would be convicted of a crime, and sent to the penitentiary; but in reply to a question by the plaintiff "as to what he thought of the matter," he did say, that the last transaction had the appearance of fraud; and that he had no doubt he knew the guilty party; and that he believed some person by the name of *Armstrong*, or using that name, had defrauded *Birely* of large sums of money; and that when the matter was well sifted, as it would be, he feared it would be found the plaintiff was the guilty party. *Waddell* further denied having concocted any scheme to make the charge against the plaintiff, but he did inform the plaintiff that *Birely* had consulted him as to the propriety of taking criminal proceedings against him for forgery, and that he had advised against such proceedings until further information was obtained, but that proceedings had been instituted on a charge of fraud. *Waddell* stated that he requested and pressed the plaintiff to repay to *Birely* all sums of money improperly obtained from him, and upon the amount, \$504.37, being made known to him, he replied he had not so much money, and *Waddell* then suggested that he could give a mortgage for the amount, which after some hesitation he consented to do. *Waddell* further said he did not refuse to permit the plaintiff to communicate with any solicitor, nor did he threaten that if he left the office he would immediately be arrested; but on the contrary advised the plaintiff to consult some solicitor before executing the mortgage, and that if he had not received the money for which the mortgage was to be given, he ought in justice to himself to refuse to execute it; and that unless he freely and voluntarily executed the mortgage for the purpose of securing to *Birely* the repayment of the money he would not accept.

Statement.

it. That the plaintiff did not consult another solicitor, and during his, *Waddell's*, absence at dinner executed the mortgage, and in the afternoon returned to get the grain tickets for more careful inspection, saying he could not have received so much money as stated; but this was refused, *Waddell* saying that if upon a careful investigation the sum proved to be less than \$600, the mortgage would be reduced accordingly, with which he appeared satisfied. That the plaintiff was cool, clear, and collected, and executed the mortgage without any coercion or duress.

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The defendant *Gage* denied all fraud and conspiracy, and alleged that he knew nothing of the mortgage till after it was executed; stated that he held the mortgage as trustee for *Birely*, and was willing to assign to him, or as he or this Court should direct.

The cause came on for hearing at Hamilton, on the 6th June, 1874, before Vice-Chancellor *Blake*, who, with the assent of all parties, and without taking any evidence, made a decree referring it to the Master at St. Catharines "to inquire and state what, if anything, was due to the defendant *Birely*, in respect of the grain transactions in the pleadings mentioned on the 15th November, 1873," and reserved the consideration of further directions until after the Master should have made his report.

Statement.

On the 9th October, 1874, an order was made transferring the reference from the Master at St. Catharines to the Master at Hamilton.

The Master at Hamilton made his report on the 8th July, 1876, by which he found there was due to *Birely* on 15th November, 1873, in respect of the grain transactions in the pleadings mentioned (without taking into account twelve bushels and forty pounds of wheat delivered by the plaintiff at *Birely's* storehouse on the 8th November, 1873, the price of which was then \$1.14 per bushel), the sum of \$453.81; whereof the sum of \$450.65 was principal money, and \$3.16 was interest. And

1877. ^{Armstrong} as to the twelve bushels and forty pounds of wheat ^{v.} the Master certified that the plaintiff fraudulently ^{Gage.} altered the ticket by changing the figure one into a figure four, whereby the quantity was made to appear (contrary to the fact) to be forty-two bushels and forty pounds in place of twelve bushels and forty pounds, and the plaintiff then wrongfully presented the altered ticket to *Birely's* clerk, and received from him a warehouse receipt in *Birely's* name for forty-two bushels and forty pounds of wheat; and the fraudulent alteration having been discovered by the clerks, they demanded and receive from the plaintiff the warehouse receipt, and destroyed it. That the defendant *Birely* did not buy the said wheat, nor has he paid for the same as he did to the holders of other warehouse receipts he had given to the plaintiff for larger quantities than he had received. And if, under the circumstances, the plaintiff is entitled to be paid for the same, then the amount found due to *Birely* is to be reduced to \$489.37, of which \$436.21 being the principal money, should bear interest from the 15th November, 1873.

Mr. *Bethune*, Q. C., for the appeal.

Mr. *Boyd*, Q. C., Mr. *Leggo*, and Mr. *A. Hoskin*, contra.

The points relied on appear in the judgment.

Sep. 5. **PROUDFOOT**, V. C. [after stating the facts as above set
Judgment forth.]—The plaintiff appeals from the report because the Master should not have found anything due to *Birely* on the wheat transactions.

The appellant's counsel upon the argument was proceeding to shew that the mortgage had been obtained by duress, when the counsel for the respondent objected that this was not open to the appellant, since the decree was based on the assumption that the mortgage was valid.

From the manner in which the decree was obtained, it is clear that the learned Judge who made it intended to affirm nothing of the kind; and on its face the decree makes no mention of the mortgage. It may be that the Judge considered it useless to inquire as to its validity, until it was ascertained that something was due to *Birely* on the wheat transactions,—if anything should be found to be due, it would be time enough to inquire how the mortgage would be affected by it. And upon this appeal, the only use of discussing the question was, to determine upon whom the burden of proof lay. I thought then, and still think, that in this view it was open to the plaintiff, and of material importance to him, to shew, if he could, that the mortgage was obtained from him through duress. If objectionable on account of duress, then no presumption is to be made against the plaintiff of being indebted to any amount; and the burden is thrown upon the defendant of shewing that he paid for more wheat than he received.

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I would have thought the statements in the answers of *Birely* and *Waddell* almost enough of themselves to prove that the plaintiff was not a free agent when he executed the mortgage. He was charged with fraud in altering the wheat tickets, with a suggestion that it amounted to a graver crime—forgery—which, however, he was kindly informed was not intended to be proceeded with until further investigation had been had. The plaintiff asserted his innocence, and denied the charge. For two hours he is kept in *Waddell's* office, and told if he left it without settling, he might be arrested. He is then told he is at liberty to come and go as he pleased. After this the advice said to have been given by *Waddell* to consult another solicitor,—that if he did not owe the money he ought, in justice to himself, to refuse to sign the mortgage,—when he had shortly before told him that proceedings had been instituted on the ground of fraud, must have seemed to the plaintiff fallacious and deceptive.

1877. But however it may be upon the answers—upon facts not disclosed in the answers, and upon the evidence, it seems to me clear beyond question, that the plaintiff was intimidated by *Birely* and *Waddell* into signing the mortgage.

Birely in his answer would lead us to suppose that when he met the plaintiff on the 15th November, he (*Birely*) was on the road alone on his way to see the plaintiff to endeavour to get repayment of the money of which he had been defrauded. But upon his examination it appears that he had gone that morning to the police office, and obtained a warrant for a person, name unknown, procured the services of a detective, *McMenemy*, and with *Birely's* clerk, *Secord*, left for the purpose of arresting plaintiff. *Secord* was to identify the man who had committed the fraud. And while these three were going together in a wagon for that purpose, they met the plaintiff coming into town. And then *Birely* says: "*Secord* identified him, and then we turned round and followed his carriage and got ahead of him and stopped him, asking him to go to *R. R. Waddell's* office, which he did. * * I told him after getting to *Waddell's* office that I had started with an officer to bring him in, but was glad I had met him." This was about nine o'clock in the morning. "At one time during that morning I told plaintiff that I wanted the matter settled before he left the office. * * *Waddell* said I was wrong in threatening plaintiff, or telling him he must not leave the office. I then told plaintiff he was at liberty to go and get a solicitor or leave the office. I never told plaintiff I would have him arrested if he left the office. I said he should not leave the office till the matter was settled, and five minutes after I said he could leave and go where he liked. I had been shewing the plaintiff the tickets and had charged him with fraud and forgery, which he neither admitted nor denied. * * I then figured up the amount of grain claimed by me that he had altered in the tickets, and I made the amount be-

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tween \$550 and \$600. Plaintiff said he did not think it would amount to that much, he said he had no money.

* * I said in my answer that if plaintiff left the office he might be arrested. I did say so to him. I did not know but that the constable was down in the street; I have no doubt but he was somewhere round, I might have said to detective, 'Mc. (McMenemy), don't go away.' I include in the expense the horse and carriage, \$5; paid detective, \$10; and my own men were engaged several days in the matter, and my solicitor's expenses; these expenses were included in the mortgage."

Waddell, in his examination, says: "*Birely* was not present when the mortgage was given. I told him to leave, that it was not necessary he should be present any longer, as I understood the matter thoroughly"—the witness declined to answer why he told *Birely* to leave, as it was privileged. "*Birely* went away through my advice, and in consequence of some remark he had made.

* * At one time in the morning while plaintiff was present detective *McMenemy* was in the outer office. I understood he was there through advice given by me to *Birely* in the matter." Witness declines to say what the advice was. * * "I did not point out the detective to plaintiff, but plaintiff spoke of the detective being in the next room. I don't know how he knew this, he complained that the detective was there, and asked why he was there, and what was to be done with him. Plaintiff seemed to know or understand that some proceedings were being taken against him on account of the grain. I think that in the commencement plaintiff was told that he should not leave the office until there was some settlement made of the matter. I told *Birely* he was wrong, and he then withdrew it. Plaintiff said in substance that he would come up some other day, and look into the matter; and *Birely* said he should not leave until the matter was settled. I explained to *Birely* that his course was improper, he then said to plaintiff that he withdrew any objection." Waddell then reiterates the statement in

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1877. his answer as to pressing the plaintiff to get advice from some other solicitor.

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McMenemy gives an account of being employed by *Birely*, and going with him and *Secord* to arrest some person whom *Secord* was to identify, meeting the plaintiff, following him, going to *Waddell's* office, staying in the outer office from one-half to three-quarters of an hour, being told by *Waddell* to go away; was not ordered to hold himself in readiness; he was ready to act if called on.

Mr. *Leggo*, whose office adjoined *Waddell's*, was examined. On the day in question the plaintiff and *Waddell* came into his room and told him the difficulty. "*Waddell* told the plaintiff that *Birely* charged him with fraudulently making the alterations whereby the quantity of grain was much increased * * The plaintiff neither admitted nor denied the thing * * The plaintiff got very much agitated, and asked *Waddell* what *Birely* wanted, to which *Waddell* answered all he wanted was restitution * * *Armstrong*, in the course of conversation, said he was under duress, or was not allowed to leave the office. That called to my mind that I had seen a bailiff sitting in the outer-room; then I took *Waddell* in another room, and told him if the man was under restraint any mortgage he would give would be of no force, and that he must be informed that he was at liberty to go where he pleased, and that he need not give a mortgage unless he pleased. *Waddell* came back to my room (acting on my suggestion) and told the plaintiff distinctly just what I had said, and I told him the same thing. Then the plaintiff said, 'Well, if I do leave the office perhaps I will be arrested on the street.' *Waddell* said 'I do not know anything about that, but I want you to understand you may go where you like,' and that he desired the plaintiff to go and consult a solicitor before he did anything further in the matter * * * *Waddell* went to his dinner, leaving the affair in my hands to carry out if *Armstrong* concluded to give the

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mortgage. * * I said to him if he was not guilty of what was charged he would do very wrong to give a mortgage, and I not only advised him, but urged him to go and consult a solicitor before doing anything further.

* * When *Waddell* and the plaintiff came into my room the plaintiff was much agitated. He said he was stricken down with the charge, or something to that effect. It might be that he said he was unmanned. He did not say he was unfit to do any business. He said something to the effect that he had been threatened with arrest in the other room * * I think he said he did not know a solicitor. I do not recollect his asking if *Hillyard Cameron* was at home or not, nor did I hear him say, to my recollection, that if any law was to be had he would have it * * * At the time the mortgage was given the plaintiff was perfectly calm and collected." Upon a subsequent examination Mr. *Leggo* says, "I think the plaintiff said before the mortgage was signed, that if there was any law in Canada for that he would have it, but I told him if that was his idea he should not sign the mortgage." Judgment.

G. F. Jelfs, one of the subscribing witnesses to the mortgage, and a clerk in *Waddell's* office, says,—“The plaintiff did not at first say he would give the mortgage, Mr. *Waddell* and Mr. *Leggo* said he should not do so unless he was willing to make restitution, and they suggested to him to go and take advice about it. * * After the mortgage was prepared, the plaintiff said, ‘I suppose I will have to sign this,’ referring to the mortgage. Mr. *Leggo* told him he was not obliged to sign it, and that he would (not) take the mortgage in that way, nor unless he gave it freely and voluntarily. * * I heard *Armstrong* say when he was told to advise with a solicitor, that he was afraid of being arrested. Mr. *Waddell* told him he would not be arrested, that he was free to go as far as he knew. * * I heard the plaintiff complain once of not being allowed to leave the office. He complained to Mr. *Waddell*, who told him he was

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1877. free to go and consult a solicitor. What I mean is, that he said he was afraid of being arrested when told to go and consult a solicitor.'

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Upon this evidence, without using the examination of the plaintiff, it seems to me plain that the plaintiff gave the mortgage under duress. It appears that *Birely*, who considered himself injured, was violent and threatening, and that, until warned by Mr. *Leggo*, *Waddell* was the same. Although all swear they did not tell the plaintiff that there was a detective in the adjoining room, yet the plaintiff knew it; he was afraid of being arrested,—afraid of the exposure to which he might be subjected,—was desirous of consulting a solicitor, but was afraid to do so, as he had been told he would be arrested if he left without settling. He was desirous of having time to examine the wheat receipts at leisure, which was refused. He was told by *Waddell* he was at liberty to go and consult a solicitor, but when he asked if he would not be arrested, he only received an assurance that so far as *Waddell* was concerned he might, but that *Waddell* could not answer for what *Birely* might do. That the plaintiff, an old man of sixty, was agitated, unmanned, by the charge made against him; which is quite inconsistent with the statements of *Birely*, *Waddell*, *Leggo*, and *Jelfs*, that he was quite cool and collected; and, finally, that before the execution of the mortgage, the plaintiff told *Leggo* "if there was any law in Canada for that he would have it,"—the plaintiff alleging his innocence of the charges preferred against him.

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I will now add a few passages from the examination of the plaintiff, which seem to me to be amply corroborated by what I have quoted from the evidence of the defendants:—" *Birely* said he wanted to see me at Mr. *Waddell's*. I said, 'What is up?' that I came in to see about my ticket that I had not got paid the last Saturday. He said yes, you will find more tickets than one, that there were several tickets I had altered, or words

to that effect. Ho said this thing must be settled; if not, that there was a detective who would arrest me at once. I learned afterwards that the detective was *McMenemy*. * * He (*Waddell*) said, this was a heavy charge they had brought against me. I said, what is it? He then produced a lot of tickets, which he threw down on the table, and said, here is a lot of tickets you have forged. I said I was too old a man to commence that sort of game; that I was an old man and the father of seven children. * * I declared I had never done such a thing in my life. *Birely* turned round and said I was a liar,—that I was lying then. *Waddell* turned round and said he was sorry he could not believe me. He said there was one way, and only one, that I could settle the matter, that was by giving a mortgage on my farm. I told him I could not, and would not do such a thing. He told me then I had only one alternative, which was to go to gaol. He looked round and pointed to a man, and said, this is a detective who would arrest me at once. I asked the amount of the charge they had against me. They said about \$600. I told them I wanted to go and see my wife, who was in the market, before doing any thing. *Birely* said I should not leave the house until I gave the mortgage, or until I settled the matter. * * *Waddell* told me I had my choice, either to give a mortgage or go to gaol. He told me I would be placed in the dock, and would not get leave to say a word in my defence, and would be put in the penitentiary not less than three or five years. * * He said he was an alderman of the city, and he could investigate the matter and commit me himself. I saw there was nothing for it but give the mortgage or go to gaol. I was too confused to examine the tickets. * * I told Mr. *Leggo*, while *Waddell* went for a blank, that if there was law in Canada I would put them through for that. * * I was completely unmanned, and I offered my note for \$1,000 as security that I would come back on the following Wednesday, in order

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1877. *Armstrong v. Gage*. that I could consult a solicitor. * * Mr. *Waddell* told me I had better go and consult a solicitor then. I told him I had only brought fifty cents to pay toll, and had no money with me, and that I did not know any solicitor in town, and I wanted to consult my wife. He said I was at liberty to go and consult a solicitor. I said if I go out, what will *Birely* do? he will have me arrested. I said I was afraid to go. He said he did not know what *Birely* would do; that I must risk that."

The doctrine of the Common Law upon the subject of avoiding deeds for duress does not seem in any essential manner to differ from that of the Roman law, or the law of modern continental Europe. *Story's Equity Jurisprudence*, sec. 239 n. 1. The language of the Prætor's edict was: *Quod metus causâ gestum erit, ratum non habebit*. But the instrument executed under the influence of fear produced by violence or threats, was not considered null *ipso jure*, like the deed of an infant or a lunatic. It gave rise to an action *quod metus causa*—to a proceeding to obtain a *restitutio in integrum*—and to an *exceptio metus causa*. It was considered that the freedom of the will was not affected by the violence: that he who was threatened or menaced preserved this faculty. He had the option of choosing between three determinations: to perform the act dictated to him; to refuse to do it; or to submit to the evil by which he was menaced. If he take the first of these resolutions he evidently had the liberty of choice and of will; and, if the subject be a contract, that the contract must have all its judicial effects: *Savigny Traité du droit Romain*, sec. 114, edition *Guenoux*, vol. iii. p. 100. Dig. 4, 2, 21, s. 5; Dig. 23, 2, 21, 22 &c.

There might indeed be violence to such an extent as to reduce the object of it to a state purely passive, as where a man is constrained to sign a deed by holding his hand, or the terror occasioned by it is so great as nearly to assimilate it to lunacy, or to the highest degree of intoxication, and that a man, a prey to this.

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terror, loses the consciousness of his words and acts. In such a condition there is no will, and no Judge would ever have a doubt about it. It is of little importance that this kind of delirium be the result of threats, or of a natural event, or even the chimerical terror of an exceedingly timorous man. Everything done in such a condition is void *ipso jure*. But such cases are very rare. In effect when terror is carried to the point of suspending the use of the intellectual faculties, there can scarcely remain even the appearance of activity; nearly always this condition induces fainting, or at least the incapacity of every manifestation that might be falsely interpreted as a declaration of will. *Savigny, ubi supra.*

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But while violence ordinarily is not incompatible with freedom of will and choice; yet, to use the language of modern jurists, the immorality which accompanies violence and invades the domain of right, requires to be repressed. Hence the different remedies and defences given by the law to the object of it. *Savigny, ubi supra.*

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The conditions that violence must include to attract the intervention of the law for its repression are as follows:

The evil threatened must be serious, death, wounds, or loss of liberty, whether the material loss of liberty, prison or chains, or the state of servitude; and in these cases it is indifferent whether the threat be directed against ourselves or our children: *Williams v. Bayley (a)*. But it is not sufficient if the menace only attacks reputation or property, nor if it only threaten an action, civil or criminal, for in these cases the law will sufficiently prevent the infliction of injury.

It is next required that the fear should be well founded, that is to say, that the evil be probable and difficult to avoid.

And finally, it is not enough that the fear exists; it

(a) L. R. 1 H. L. 209.

1877. must result from a threat, that is, it must have been excited with the design of bringing about the act attacked. *Savigny, ubi supra.*

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As fear is a mental condition, it is often difficult of proof, and jurists have had resort to conjectures and presumptions from acts that may induce a just apprehension. "Quia metus consistit in mente, nam cum metus sit instantis periculi, vel futuri causa mentis trepidatio, confugiendum est ad conjecturas et indicia. Mascardus de Probationibus, Con. 1057, No. 6." Thus if a person is shut up and restrained in any, even a private house, whatever he does is presumed to be done under the influence of fear: "Cum quis in aliqua domo etiam privata retinetur clausus, et astrictus: nam tunc quidquid agit, presumitur metu actum.—Mascardus, de Prob. Con. 1056, No. 45." So, if one makes a contract in a place, or at a time, when deprived of liberty: "Quando quis contraxit in loco, vel tempore quo libertate carebat.—Menochius, de Presumptionibus, Lib. 3, Pres. 126, No. 26." And in like manner when armed men are placed at the door of a house in which the contract is executed: "Quando ad ostium domus, in qua celebraretur contractus, extant armati, qui facile possunt armis vim inferre.—Menochius, Ib. No. 27." And greater credit ought to be given, it was said, to two persons deposing to the existence of the fear, than to a thousand denying it, or asserting that the will was free: "Magis sit credendum duobus deponentibus de metu, quam mille negantibus. vel asserentibus de libera voluntate.—Masc. de Prob. Con. 1058, No. 1." And if the witnesses testify simply to the fear, and do not specify the acts inducing it, then little credit is to be given to them; but if they prove acts which would be likely to produce fear, they are the more readily to be believed: "Si testes de metu deponunt simpliciter super eo, et actus metum inductivos non deducunt; tunc non est eis magis credendum; sed si probant actus, ex quibus verisimiliter metus inferri potuit, tunc magis credetur.—Masc. de Prob. Con. 1058, No. 4."

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The evidence in this case, to which I have already referred at some length, seems ample to shew that *Armstrong*, though he may have retained his freedom of will, in the legal sense, was yet the object of such immoral violence as the law will interpose to rectify. He was *clausus et astrictus* in *Waddell's* office,—a constable, the equivalent of the *armatus*, standing at the door,—the ostensible liberty of egress was a mockery, as he was left under the impression that upon going out he would be arrested.

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It was argued, however, that although the mortgage were obtained by duress, it ought to stand as a security for anything that might be due, upon the taking of the account, from *Armstrong* to *Birely*: that, the doctrine of duress did not apply to the action of a creditor compelling payment of a debt by his debtor: that the debtor suffered no wrong, he was only paying or giving security for a just debt.

The full development of this subject will be more properly made at the hearing on further directions, if any thing be found due to *Birely*. The present decree takes no notice of it; and the only use of it in the present stage of the cause is, if the argument be well founded, to cast the burden of proof on the plaintiff. It therefore becomes necessary to investigate it so far as may be needed for the determination of that question.

Upon principle, there seems to be no reason why the *immorality* is not as great in forcing a security by duress from a debtor, as in forcing it from a person who is not a debtor. In neither is the expression of the will free from the unauthorized violence.

It is true that in the civil law an action, *quod metus causâ*, did not lie in such a case, but that was on the technical ground that the action sounded in damages, and a debtor could not be said to have suffered a damage by merely paying his debt. But the creditor, though not exposed to that action, offended against another law of the code, and lost his right to the debt that was

1877. owing to him, by using violence to enforce payment: Warnk. Comm. Jur. Rom. Priv., s. 1229, vol. 3, 572, Dig. 4, 2, 12, s. 2, and s. 13. The law is found also in Dig. 48, 7, 7, and is to the effect that creditors desiring to recover payment from their debtors should have recourse to the ordinary legal remedies, and not take the law in their own hands. If in another mode they took possession of their debtor's property *jus crediti eos non habere*. The words of the law are, "Optimum est, ut si quas putas te habere petitiones, actionibus experiaris: interim ille in possessione debet morari tu petitor es. Et quum Marcianus diceret, vim nullam fecit; Caesar dixit. Tu vim putas esse solum, si homines vulnerentur? Vis est tunc, quotiens quis id quod deberi sibi putat, non per judicem resciscit. Non puto autem nec verecundiæ, nec dignitati tuæ convenire, quicquam non jure facere. Quisquis igitur probatus mihi fuerit rem ullam debitoris, non ab ipso sibi traditam, sine ullo judice temere possidere, eumque sibi jus in eam rem dixisse; jus crediti non habebit."

Judgment.

It was not consistent with the honour and dignity of the sovereign, nor compatible with the maintenance of the public peace, to permit the functions of the judiciary to be exercised by individuals for their private ends.

This law in terms applies to a creditor who has taken possession of his debtor's property as a quasi pledge; *rem ullam debitoris possidere*. The law in Dig. 4, 2, 12, 2, includes the case of a creditor who has forcibly obtained payment in money. In the latter case, the effect of the loss of the *jus crediti* was that the debtor might bring his action for money paid without consideration; *condictio sine causa*: see the Gloss in loco. Some commentators on the former law, equivalent to Dig. 4, 2, 13, interpreted it as causing the loss of the *jus crediti*, if the thing seised was that due to the creditor,—or the right a creditor might have obtained over anything else he took possession of; but not his whole right as a creditor, which he might enforce against any

other property of the debtor. But *Cujas* (Com. ad tit. Quod metus causa, ad l. Extat. 13, supra) characterizes this as ridiculous, as the decree manifestly speaks of *any property* of the debtor, and does not regard the fact whether the creditor has any right in the property seized or not.

1877.
Armstrong
v.
Gage.

Our law on this subject coincides with the civil law, so far at least as to prevent the creditor from asserting any right under the security obtained by duress: *Boddy v. Finley (a)*. In that case the defendant had bought a piece of land from the plaintiff which was subject to a mortgage,—and which the plaintiff was to pay. The defendant caused the plaintiff to be arrested on a criminal charge for obtaining money under false pretences,—and while before the magistrate the plaintiff promised to execute a security against the mortgage, whereupon he was discharged, and afterwards did execute it. Relief was refused to him because the violence or duress to which he had been subjected had ceased when he gave the security. The Chancellor, then Vice-Chancellor, observes that there was nothing unreasonable in the defendant being indemnified against the mortgage, or in its being done by such instruments as were executed. But he says if these instruments had been given before the discharge of the plaintiff he was of opinion they could not stand. That was a case in which the defendant was only seeking to get a security to which he was entitled if the mortgage were not discharged, but had he got it by violence, it would not have been valid.

I conclude therefore that in taking the account the mortgage must be laid entirely aside, that no presumption is to be made against the plaintiff from his having executed it, and that the burden is on the defendant *Birely* of shewing that anything was due to him on the grain transactions referred to in the pleadings.

Before proceeding to consider the evidence in regard

Judgment.

(a) 9 Gr. 162.

1877. *Armstrong v. Gage.* to the alterations of the tickets that were paid for, it will be convenient to notice the special finding of the Master in regard to a ticket spoken of as number eleven, which was not presented for payment, and which the Master certifies to have been fraudulently altered by the plaintiff. I do not think the Master was going beyond the bounds of the reference. He was directed to inquire into the grain transactions between the parties, and this is a transaction of that kind. The plaintiff is entitled to payment for twelve bushels and forty pounds of wheat on that ticket by the evidence of that quantity having been delivered. It may be that he has subjected himself to a criminal prosecution for the forgery. But as he never presented the warehouse receipt for payment, *non constat* that he ever would have done so, or that he would have asked for payment of more than was really and justly due to him. Supposing it to be established that the plaintiff had altered the ticket, and had obtained a warehouse receipt for the larger quantity in this instance, I think the finding of the Master immaterial. It could not be evidence of the fact of forging the prior tickets. Had it been presented and paid, it might perhaps have been admissible as part of a series of frauds perpetrated by the plaintiff on *Birely: Griffiths v. Payne (a), Regina v. Garner (b), Taylor* on Evidence, sections 299, 300.

Judgment.

The character of the evidence by which *Birely* has to prove that *Armstrong* is indebted to him, requires some notice. It is not like an ordinary case of an action for goods sold and delivered; for, although the rules of evidence are the same in civil and criminal cases, it is necessary to adhere to them with greater strictness, and to require more abundant proof, where every step in the defendant's case is to prove that the plaintiff has been guilty of a crime. Bearing that in mind, I will now examine the evidence in regard to the alteration of the other tickets for grain.

(a) 11 A. & E. 131

(b) 4 F. & F. 346.

No. 1. 16th Sept., 1873.—A ticket for one load of wheat, Mr. *Armstrong*; signed *S. Davis*, Market Clerk. The contract of sale on the back is, sold to *Jacob Hespeler*, to be delivered at *Birely's* warehouse, price \$1.32, inspected No. 1; *R. Hall*, street buyer.

1877.
Armstrong
 v.
Gage.

38.00
 25.40
 ———
 63.40

S. Davis, Jr., says the ticket was given by him; the figures indicating 38 bushels are his writing, but the figures 25.40 under the others, and the figures 63.40 are not his. He will not swear that the plaintiff was the person who delivered the wheat marked on that ticket.

R. Hall, says he purchased that load from the plaintiff. He knows one other person selling wheat on the market by the name of *Armstrong*. He bought from no *Armstrong* but the plaintiff that fall. He knows he bought that load of wheat, and he thinks he bought it from the plaintiff, but he may be mistaken.

W. H. C. Secord gave a warehouse receipt for the 63.40 bushels of wheat on this ticket to "*Mr. Armstrong*." He cannot say he gave it to the plaintiff, but he has no recollection of giving that kind of receipt to any *Armstrong* but to the plaintiff and *Charles Armstrong*, a cartage agent, and the latter generally brought larger loads.

Jos. Armstrong says that in the fall of 1873, he sold in Hamilton as much as 600 bushels of wheat and two loads of barley; the first load on the 10th September, the day of *Barnum's* show, he sold to *Isaac Armstrong*, a buyer on the market, he thinks. He delivered it, he thinks, at *Birely* or *Williamson's* warehouse; thinks, but not sure, that one *Johnson* weighed it. He did all his hauling before the 13th of October that year. His impression is he delivered wheat at both warehouses. For the first load he got \$1.36, then the price fell and he got \$1.32 for some. He brought large loads, say 60

1877. or 70 bushels a load, weighed at two drafts. The figures 25.40 on that ticket are not his.

Armstrong
v.
Gage.

Isaac Armstrong, the buyer on the market, says he thinks he bought once or twice from the plaintiff in the fall of 1873. There are two or three *Armstrongs* that bring wheat from Beverley; does not remember if they brought grain in 1873; there are other *Armstrongs*, sons of a blacksmith about Mount Hope, whom he has noticed in the market with grain for three or four years; can't say if in the year 1873.

Ellen Bowslaugh details the circumstance of the plaintiff borrowing her father's seed drill, asking for it on the 16th September, getting it on the 17th, a Wednesday, the week after *Barnum's* show (proved to be on the 10th).

W. H. Bowslaugh details the particulars of the borrowing the seed drill; plaintiff sent on the Tuesday after *Barnum's* show to ask for, and the next day got, the seed drill; 16th and 17th September; it was got back 18th.

Judgment.

Sarah Agnes Armstrong, a daughter of plaintiff recollects *Bowslaugh* coming for the seed drill.

Elizabeth Armstrong, plaintiff's wife. The plaintiff did not go to Hamilton either the day the drill was got nor that on which it was returned, and he hauled no grain that fall before he used the seed drill, and he hauled barley first.

I think that is all the evidence on this ticket No. 1, and it seems to me signally to fail in identifying the plaintiff as the person to whom the ticket was given. It is shewn there were other persons of the name of *Armstrong* who brought wheat to the market that year. Some of the witnesses think, but none of them will swear positively, that this ticket was given to the plaintiff. *Joseph Armstrong* sold wheat that fall for \$1.32, the price marked on this ticket: he usually brought large loads, 60 to 70 bushels. There is also the evidence of the plaintiff's wife that he brought no wheat before using.

Bowslaugh's seed drill, and the evidence of *Bowslaugh* and his daughter are sufficient corroboration of the facts regarding the drill, and that neither on the 16th nor 17th September could the plaintiff have been in Hamilton. This first ticket being dated the 16th.

1877.
Armstrong
 v.
Gage.

No. 2.

Ticket No. 2, is for a load of wheat, Mr. *Armstrong*, 17th September, 1873. Sold to Mr. *Abraham* to be delivered at *Birely's* warehouse, price \$1.32. *W. W. W.* (*W. W. Waddell*) street buyer.

35.10
 34.05

69.15

The evidence in regard to this is of the same character, but a little more positive as to the identity of the plaintiff than in the former case. *Davis* says he marked the figures 35.10 but not the 34.05 (they appear to me to be in the same writing), but cannot swear that plaintiff delivered this wheat. *Waddell* says he bought the grain from the plaintiff, does not recollect buying from any other *Armstrong* in the fall of 1873, but knows of another bringing grain to the market that fall. He feels confident the ticket was given to the plaintiff. He generally bought all the plaintiff's grain; apart from the tickets he would say he purchased five or six loads from him that fall. He never bought from the other *Armstrong*. He knows plaintiff. Judgment.

Malcolm, the clerk of the purchaser *Abraham*, says he believes that wheat was bought from the plaintiff and paid him \$91.41. Knows plaintiff only as he did some other farmers; saw them through the glass partition and over it. Remembers plaintiff's spectacles and looking at him through the glass partition; does not recollect paying any other *Armstrong* for grain that year. *Secord* is not more positive as to giving a receipt for this to the plaintiff than he was as to No. 1.

There is other evidence of more *Armstrongs* than one

1877. *Armstrong*
v.
Gage. selling wheat, and as to the plaintiff not being in Hamilton on the 17th, the same as before. If the latter is to be believed, then *Waddell* and *Malcolm* must be mistaken. I confess I have great difficulty in understanding how the personal appearance, such as wearing spectacles, could enable a witness to identify him as presenting a particular piece of paper, on which there is nothing to shew that the plaintiff wore spectacles, nothing to connect it with the individual. I have no doubt that a Mr. *Armstrong* did get paid for the grain in this ticket, but I am utterly incredulous that either *Waddell* or *Malcolm* can say that the plaintiff was the man. Among the papers are thirteen warehouse receipts in the name of Mr. *Armstrong*, from *Williamson's* warehouse, and two from *Birely's*, during September and October, 1873, which are not in issue in this suit, and are not shewn to have been given to the plaintiff. The tickets for which these were given would have been as easily shewn to have been given to the man with spectacles.

Judgment. *Birely* was responsible for grain stored in *Williamson's*, and several of these receipts are marked with the initials of *Secord*, his clerk. And it is not surprising that the witnesses should be unable to give positive evidence considering, what is shewn to be the case, the press of business during the grain market season, and the presence of other Richmonds in the field; while the evidence in regard to the plaintiff not being in Hamilton on the 16th, 17th, or 18th of September, seems to me clear enough and precise enough to enable me to say that it ought to be relied on. But were it not to be thought of such a character as to invite implicit reliance, that on the other side seems still less reliable from the cause I have mentioned, and would at most only raise a case of suspicion of too slight a nature upon which to find the plaintiff guilty of forgery or other criminal offence.

No. 3, is for one load barley, Mr. *Armstrong*; September 20, 1873, *S. Davis*; sold to *Jacob Hespeler*,

to be delivered at *Williamson's* war house; price \$1.11. 1877.
R. Hall, street buyer.

18.80

15.55

34.35

Armstrong
 v.
 Gage.

Davis says no part of the writing is his.

Hall says he bought the load from the plaintiff. He identifies this in the same way as the others, viz.: He bought the load, thinks from the plaintiff, may be mistaken.

Johnson says the figures 15.55 are his, but not the others. Satisfied all the tickets 3, 4, 5, 6, 7, 9, and 10, were given to plaintiff. Positive he gave these tickets to the plaintiff. This witness requires some notice. He says he knows the plaintiff well. He was in the habit of bringing in small loads, sometimes wheat and sometimes wheat and barley in the same load. He remembers one occasion on which he had only two bags of wheat and some barley. Plaintiff bought another load of five bags of wheat a few days after the two bags; that was on the 24th October, 1873. *Johnson* asked plaintiff why he brought such a small load; he said he brought in his woman to a show and he had only brought in enough to pay his expenses. That was the time he brought the two bags of wheat and three of barley. On that occasion *Johnson* told him there was no show that day. He said the woman came in shopping, and I saw the woman with him at the warehouse. On that occasion he only brought 4.30 bushels of wheat and three bags of barley, amounting to 330 lbs. Gave him the ticket 6 on that occasion, which has been altered to 44.30 of wheat and to 1330 lbs. barley. *Johnson* saw two women in a one-horse waggon with the plaintiff—a democrat waggon; that was the time he was going to a show; does not know what kind of a show it was. Another time there were women along with him that he said were going shopping. This he thinks was the second time the women were with him.

Judgment.

1877.
 Armstrong
 v.
 Gage.

Elizabeth Armstrong, the plaintiff's wife, proves that the plaintiff never had a one-horse waggon. Neither she nor her daughter ever went to market with the plaintiff with grain, nor did she ever go to a warehouse with plaintiff in Hamilton with grain.

Sarah Ann Armstrong, plaintiff's daughter, says she never came to the market with plaintiff in 1873 with grain. She has two smaller sisters; neither of them nor her mother came with the plaintiff with grain that year, that she knows of. She was never at any warehouse in Hamilton, to her knowledge. Sure she was never at any grain warehouse in Hamilton. She was not at *Barnum's* show, but was at a Provincial Show when Lord *Dufferin* was there. She did not know that plaintiff took any grain to Hamilton in a market waggon.

Johnson was an old man, about 69, and his evidence bears trace of some confusion as to the times he speaks of seeing the plaintiff; but the precision with which he speaks to the plaintiff and his wife, and some woman, coming in a one-horse democrat waggon, contradicted as it is by the plaintiff's wife and daughter, leads me to read his evidence with considerable distrust of its accuracy. It is quite possible he may have mistaken the plaintiff for some of the numerous *Armstrongs* who seem to have dealt that year in wheat.

No. 4.

For one load barley, Mr. *Armstrong*, September 23, 1873. *S. Davis*, market clerk. Sold to Mr. *Abraham* to be delivered at *Birely's* warehouse. Price \$1.12. *W. W.*, street buyer. Barley.

1855

1580

3435

Johnson says the figures 1580 and 3435 were not on the ticket when he delivered it to the plaintiff. On cross-examination, he says, "I remember the plaintiff bringing small loads. I remember one load 1580 lbs. As to ticket 4, what I said was, that the figures 1580

on it are mine, not the figures 1855." The witness is evidently confused, and the remarks already made on his evidence are to be borne in mind. Upon looking at the figures, I should say they were all made by the same hand. *Waddell* says he bought the grain on this ticket from the plaintiff. There are some remarks to be made on this witness's evidence, as to all the tickets to which he speaks. No. 10 is a ticket of 30th 'October for 49.20 bushels wheat, which *Waddell* says he bought from the plaintiff. A witness *Sarah Ann Armstrong*, (wife of *Robert Armstrong*, who is in the employment of the Freehold Loan and Savings Society, and who is a brother of plaintiff,) says she remembers two occasions, on which plaintiff stopped a night each time at their house in Toronto, after he went to Grimsby in 1871. *Cathron*, cashier of that society, says the plaintiff was in their office in Toronto, on 31st October, 1873. He was making a payment: he had borrowed money, and given a mortgage. The payment is entered on the 31st October. He remembers plaintiff being there that day. The entry in the cash book was made the same day the money was paid. *Elizabeth Armstrong*, the plaintiff's wife, says he went to Toronto on 30th October, 1873. She and her son came with him to Hamilton on the way. They came in the market waggon, and brought some butter and fruit, but no grain that day. Plaintiff returned home next evening, when she met him with her son *Joseph*. He went to pay money. She remembers the day plaintiff went to Toronto, for next night was Hallowe'en.

Armstrong
v.
Gage.

Jud ment.

Joseph Armstrong, jr., the plaintiff's son, seems to have been confused as to dates, and I have hitherto abstained from quoting his evidence. But this event of his father going to Toronto was one he would be likely to remember, and he does remember the occasion, but does not specify the date. He says he and his mother went with the plaintiff to Hamilton that day—left home pretty early in the morning. We brought to

1877. the market with us some butter and some fruit, but no grain, except horse feed. He thinks he (plaintiff) came back next day. He met him at Grimsby station in the evening, he thinks. *Sarah Agnes Armstrong* recollects her father, the plaintiff, going to Toronto. Her mother and brother came with him, intending to accompany him as far as Hamilton. To the best of her knowledge he came back the next day. He did not come back the same day he went.

Armstrong
v.
Gage.

Upon that evidence I think it is sufficiently established that plaintiff brought no grain to market in Hamilton on the 30th October, and that the receipt No. 10 must therefore have been given to some other *Armstrong*, and that *W. Waddell* is mistaken in supposing he bought from the plaintiff on that day. But he swears to this as positively as to the others, and therefore his evidence, as to all, should receive some corroboration before implicit reliance can be placed upon it.

Malcolm is not positive that it was the plaintiff he paid and got this ticket and the corresponding warehouse receipt from.

Judgment.

No. 5.

One load barley, Mr. *Armstrong*, September 27, 1873. *S. Davis*, market clerk, sold to Mr. *Abraham*, to be delivered at *Birely's* warehouse; price 90c. *W.*, street buyer. Barley 1750.

Davis says the word barley is his writing; the figures 1750 are not. He thinks he can see other figures mostly rubbed out that have been there before. He thinks these last were his writing, but is not certain. He cannot swear the plaintiff delivered the grain mentioned in that ticket.

I have used a good magnifying glass, but have failed to discover any traces of figures rubbed out. The figures look as if made with the same pencil that wrote "barley."

Johnson swears that the figures are not his. The mark is visible on the other side of the ticket, as if written with considerable pressure. *Waddell* bought this grain from the plaintiff. *Malcolm* is not positive he got this from the plaintiff.

No. 6.

One load barley and wheat, Mr. *Armstrong*, October 2nd, 1873. *S. Davis*, market clerk. Sold to Mr. *Abraham* to be delivered at *Birely's* warehouse, price \$1.25. *W. W.*, street buyer.

1877.
Armstrong
v.
Gage.

1.05	Wheat.	Barley.
	44.30	13.30

Neither *Davis* nor *Romp* knows anything of this. *Johnson* says he gave it to the plaintiff; that it has been changed from 4.30 bushels wheat and 330 lbs. barley. This was the ticket he gave when plaintiff spoke of going to the show. *W. Waddell* bought from plaintiff. *Malcolm* not positive he got it from plaintiff. This depends wholly on the evidence of *Johnson* and *Waddell*, and for the reasons already given I think it would be unsafe to rest a finding on their evidence. To appearance the figures all look as if made by the same hand.

No. 7.

October 11th, 1873. One load barley wheat, Mr. *Armstrong*. *S. Davis*, market clerk. Sold to Mr. *Abraham*, to be delivered at *Birely's*, price \$1.23, 1 12½. *W.* street buyer. Wheat 47.00. Barley 1470. Judgment.

This also depends on the evidence of *Johnson* and *Waddell*, as does the last. *Johnson* says he marked it 7.00 bushels wheat and 470 lbs. of barley, and that it has been altered. The figure 1 before the 470, and the figure 4 before the 7 have been added. And certainly these figures would seem to have been made with more pressure than the others as they have made a mark on the other side of the card. *Malcolm* is not positive he got it from the plaintiff.

I do not think it would be safe to charge the plaintiff on such evidence. If the ticket were shewn conclusively to have been given to plaintiff the difference in the pressure used in marking the figures might have a little weight. To appearance they have been all made with the same pencil and the same hand.

1877. No. 8.

Armstrong
v.
Gage.

18th October, 1873. One load wheat, Mr. *Armstrong*, *S. Davis* market clerk, sold to Mr. *Abraham*, to be delivered at *Birely's* warehouse, price \$1.21. *W. W.* street buyer. White 31,
39.25.

Romp says the figures 31 he thinks to be his, not the 39.25. These last seem made with more pressure than the first, the marks show through the ticket. *Waddell* gives similar evidence in regard to this as to the others. *Abraham* swears positively he paid for this wheat to the plaintiff.

I take it that this conclusively establishes this receipt to have been given to the plaintiff, and that he got paid for 70.25 bushels of wheat marked on it. But it does not seem to me to be satisfactorily shewn that there is any error in the ticket. *Romp* does not swear positively that the 39.25 are not his figures: he thinks so. To all appearance they seem made by the same hand as the 31. It is altogether too slight to charge the plaintiff with the forgery.

Judgment.

No. 9.

24th October, 1873. One load wheat. Mr. *Armstrong*. Sold to Mr. *Abraham*, to be delivered at *Birely's* warehouse; price \$1.22. *W. W.*, street buyer. White 40.00.

Johnson says the ticket has been altered from 10 to 40 bushels, the figure 1 made into a 4. He gave the ticket when plaintiff brought the women to town. *Waddell* bought from plaintiff. *Malcolm* not positive.

The remarks I have made upon *Johnson's* evidence, and the contradiction it met with in regard to the women who he says accompanied the plaintiff, and upon *Waddell's* evidence, shew that I could not charge the plaintiff with this. There is one thing to be noticed also, that the 0 in 40, admitted by *Johnson* to be his, has been pressed so as to mark the other side of the ticket, so that not much reliance can be placed on this circumstance.

No. 10.

I have already disposed of under No. 4, so far as *Waddell* is concerned. It is a ticket of 30th October, 1873, for 49.20 bushels wheat at \$1.20. *W. W.*, street buyer.

1877.

Armstrong
v.
Gage.

Johnson says he gave it for 9.20, and that it has been altered to 49.20. *Malcolm* says he received the ticket and the corresponding warehouse receipt from the plaintiff. Remembers the plaintiff, while he was making up the amounts and putting down the figures, and calculating the amounts, kept talking very much, and different from other people, and he looked round at him several times in consequence. But he gives no explanation how he comes to remember that, in regard to this ticket any more than the others. There are no spectacles marked on the ticket, and that is the way by which he seems to remember him. Considering the evidence of the plaintiff being in Toronto on the 20th and 31st of October, I don't think this sufficient to charge him with No. 10.

Judgment.

The plaintiff was examined on his own behalf. He says the first grain he brought in in 1873, was on the 10th September, 4 or 5 bags,—that was the day of *Barnum's* show. In this respect he differs from his wife, who says he brought no grain in till after the 18th September. So far from detracting from the reliance to be placed upon either, it seems to be an evidence of their good faith. If the story were a fictitious one, this discrepancy would have been avoided (a). A close and minute agreement would induce the suspicion of confederacy and fraud (b). The substantial question being whether any grain was delivered on the 16th and 17th of September, the question of delivery before those dates was immaterial.

The plaintiff continues,—The next time I came to Hamilton was a week from the following Saturday, viz.,

(a) Taylor Ev. s. 47, 1st ed.

(b) Paley Ev. of Ch. part 3, c. 1.

1877. on the 20th September. I brought this time a large load of barley. I think I sold it to *Hespeler*, and delivered it at *Williamson's* warehouse. Can't tell if ticket 3 is that I got for it or not. The buyer was *Hall* for *Hespeler*. Between the 10th and 20th, I was working constantly on the farm, except Sunday. I was not in the city in that time, nor my teams, nor any of my family.

Armstrong
v.
Gage.

Bowslaugh says, as we have seen, that plaintiff sent for his seed drill on the 16th, got it on the 17th, and it was brought back on the 18th. He determines these times not by the days of the month, but the days of the week, and their proximity to the time of *Baraun's* show. He also says the plaintiff was very anxious about his seeding. He was sowing something more than usual. He says he was late with his seeding, but is positive it was not two weeks after the show that plaintiff got the drill. This seems to me to be a corroboration of the plaintiff's testimony that he was not in town between the 10th and 20th, at all events it is enough to shew he was not in on the 16th and 17th.

Judgment.

The plaintiff further says he hauled no wheat until he finished hauling the barley, which was the last threshed, and was in front in the granary. At the close of hauling the barley there was about half a load, and that was hauled with half a load of wheat—the only time he took wheat and barley together.

Watts, who threshed the plaintiff's grain, proves that the barley was threshed last.

Joseph Armstrong, the son, says the wheat was threshed first, it was put at the back of the granary, the barley was put in the passage. Had to go over the barley to get at the wheat. The first grain he took to *Hamilton* after the seeding was barley. He did not take any wheat until the barley was all taken away except the last load; that load was part barley and part wheat.

Plaintiff's wife says he hauled the barley first. Plain-

tiff further says he is positive that *Johnson* weighed no grain for him that year: that he brought large loads on every occasion that year, except the first and last loads. He had no conversation with *Johnson* in reference to the women going to the show. He never brought two bags of wheat and three of barley at a time. All these and many more things spoken to by *Johnson* the plaintiff in precise terms contradicts. He says further he never hauled grain to Hamilton in 1873 on two consecutive days; and was not in Hamilton either on the 16th or 17th September, 1873.

The plaintiff is corroborated in all these respects to such an extent that I think his statements may be relied on.

As to tickets 6 and 7 he is not able to say that either of them was given to him. One may be his, but the other could not, as he only brought wheat and barley once on the same load that year. He cannot recognize any of the tickets as given to him. As to 10, he brought no grain to Hamilton that day, 30th October. He went to Toronto that day, and returned the next. He returned on Hallowe'en night, and his family had some friends at the house. He brought in no grain on the 31st October. He never altered a ticket in his life.

I think it is proved almost to a demonstration that the plaintiff brought no grain on the 30th October, and that No. 10 must have been given to some one else. And I think it equally clear that he brought none on the 16th and 17th September, and that tickets 1 and 2 never were given to him. Three out of the ten tickets being thus disposed of, it throws great doubt upon the remaining seven. The witnesses speak as positively to the one as to the other. But after all it is only evidence of belief, not of facts: it must be so from the nature of things. And it is an old rule, "Testes debeant deponere sic esse, vel non esse, non autem credere, vel non credere."
—*Masc. de Prob. Concl.* 1370, No. 3.

1877.

Armstrong
v.
Gage.

Judgment.

1877. The wheat tickets are given to "Mr. *Armstrong*." There is no Christian name, no place of residence, and no mark of any kind by which they could be identified as those given to the plaintiff. The witnesses give their evidence at the distance of more than a year from the date of the tickets.

Armstrong
v.
Clage.

Romp says, "We paid little attention to the names of the parties bringing in grain." *Secord* says, "I do not know, and I cannot swear that I gave any of these tickets to the two *Armstrongs* I have mentioned (the plaintiff and *Charles Armstrong*), because there may have been other *Armstrongs* that I did not know." And during the season of the wheat market it appears that the clerks and weighers were kept busily employed, weighing many loads a day. It has been shown that there were other *Armstrongs* selling wheat in the market that season. Under such circumstances it seems to me incredible that any of the witnesses could swear with accuracy that any of the receipts had been given to the plaintiff. And if he did swear positively as to any of them, I would not place much reliance on his testimony.

Judgment.

Several of the witnesses, with commendable caution, express their belief in the facts to which they testify in a very qualified way. They believe the tickets were given to the plaintiff, but cannot be certain. Upon such evidence it is quite possible none of them may have been given to the plaintiff. In a case of this kind, where the debt sought to be established arises from the criminal acts of the plaintiff, it has been said the evidence should be clearer than the noonday light. Probationes debent esse luce meridiana clariores: *Masc. Concl.* 1867, 4.

The improbability of the witnesses being able to identify these pieces of paper as those given to the plaintiff is so great, and depends, not on anything extraordinary in the papers themselves, but upon the incapacity of the mental faculties to distinguish them from others of

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a similar appearance given to a person or persons of a similar name, that the early rules of evidence on such subjects may be well applied to it. When witnesses testify to improbable things, they do not prove them, but render themselves in some measure suspected of falsehood—for what is not probable is not credible, nor to be considered,—probability is akin to nature, improbability is contrary to nature. Even many witnesses testifying to improbabilities do not prove them, number does not supply defect.

Armstrong
v.
Gage.

1877.

Testis deponens non verisimilia non probat, sed est admodum de falso suspectus. Quod est non verisimile, non est credibile, nec considerabile: est enim verisimilitudo cognata naturæ, et e contra non verisimile naturæ adversatur; id quod distat a verisimili, imaginem habet falsitatis. Etiam si plures testes sint, qui deponant non verisimilia, non probant: Numerus enim non supplet defectum. Masc. Concl. 1371, Nos. 1, 2, 3, 4, and 13.

Where the improbability arises from the facts not being in accordance with those we have previously known and believed, it were presumptuous to discredit them: making one's own knowledge and observation the exclusive standard of probability. But in such cases we require much more cogent evidence, than for those statements that do accord with our previous knowledge:

Judgment.

Taylor, sec. 48.

In the case before me, the improbability is of so high a degree as to amount to a moral impossibility. The chance of being correct is diminished by the addition of each ticket, and by the addition of each person of a similar name to whom the tickets could have been given. If only one ticket had been issued, and only one *Armstrong* had brought grain to market, then the evidence would have sufficed; but at each increase of tickets and persons the probability diminishes, until when they run up to ten tickets and perhaps as many persons the probability is very small indeed. It becomes the *non verisimile*.

1877. I have not been certified upon what evidence the Master arrived at his conclusion. It does not appear, from anything I see upon the depositions, that the Master at all proceeded on the manner or demeanor of the witnesses. But the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect: *The Glannibanta* (a).

In this instance it does not seem to be very material to inquire what evidence the Master relied upon, for, assuming that he discarded entirely the evidence of the plaintiff and the members of his family, and the witnesses called by him, there does not seem to me such evidence given for the defendants as justifies the findings on the report. If the plaintiff and his witnesses are not rejected Judgment. the case is much clearer, but it does not rest upon them. It is not to be overlooked also, that the defendant *Birely's* witnesses are chiefly persons in his employment, and it is not improbable that they have a bias in his favour. Nor is it to be forgotten that *Birely* was not satisfied to adopt the legal method of righting himself; but, by threats and menaces, compelled the execution of a security, without giving the plaintiff time to consult a legal adviser, or to take any steps to protect himself from the violence employed against him. The strongest motives therefore would induce *Birely* to maintain the existence of a debt due to him by the plaintiff, and one who has shewn himself so little scrupulous as to the violation of the law in one respect, would not be likely to hesitate to strain it in another to secure his advantage.

(a) L. R. 1 Prob. & D. 283.

An attempt was made to prove that there was a *shortage* between the amount of wheat purchased and that cleared from the warehouses. But no evidence was given to show the security of the warehouses, nor of the precautions taken against loss. No account was kept of the grain that was deposited in the warehouses, so that the deficit is only a guess. And even if proved, it would require further to be more closely identified with the plaintiff than anything yet shewn to justify me in making him responsible for it.

1877.

Armstrong
v.
Gage.

Judgment.

I allow the appeal, with costs.

SOLICITORS.—*Bethune, Osler, and Moss*, agents for *J. C. Rykert*, St. Catharines, for the plaintiff; *Leggo*, Hamilton, for the defendants.

1877.

THE GRAND JUNCTION RAILWAY COMPANY V. THE
CORPORATION OF THE COUNTY OF HASTINGS.

Invalid assignment of Corporation assets—By-law necessary to authorize assignment thereof.

To give legal authority for the alienation of the property of a municipal corporation, it is necessary that a by-law of the corporation should be passed, even though the title thereto has been obtained originally in an informal manner.

This suit was instituted to set aside a transfer of \$50,000 of stock, held by the defendants, the County, in the company of the plaintiffs, to the defendant *McIntosh*, alleged by the plaintiffs to have been so made to him fraudulently on the 2nd October, 1873, in order to avoid payment of future calls; and charging that *McIntosh* was a person of no means, and unable to pay calls.

The cause came on to be heard before Vice Chancellor *Proudford* at the Spring Sittings, 1876, at Belleville, when the learned Judge determined that if the transfer were real it would not be void, even though the object of such transfer were to get rid of the liability to pay calls; that the result of the evidence was to establish that it was intended to be an absolute transfer, unfettered with anything in favour of, or for the benefit of the County: reserving simply the question whether or not the transfer had been effectually made.

Mr. *Moss*, for the plaintiffs.

Mr. *MacLennan*, Q.C., for the defendants the County.

Mr. *Ponton*, for defendant *McIntosh*.

Sept. 5th.
Judgment. PROUDFOOT, V. C.—I have delayed delivering judgment in this case at the request of some of the parties, in the expectation of a settlement being arrived at; but as I am now informed there is no prospect of such a conclusion of the suit, I proceed to dispose of it.

A great many objections were made by the counsel for the defendants as to the validity of the original subscription for stock, contending that the by-laws in relation to the matter were informal, defective, and void. By the 37 Vict. ch. 43 sect. 16, O., (24th March, 1874,) it is enacted that all subscriptions for stock made before the passing of the Act, and which when that Act passed were subsisting, should be taken and held to be valid and binding as if duly subscribed and "taken under this Act." No question was ever raised as to the *bona fides* of the original subscription, however informal it may have been. The County acted on it for a number of years, paid \$15,000 in calls, which appeared in the annual accounts of the County, and finally by the attempt to transfer the stock, and by a by-law repealing that under which it was subscribed for must be taken to have affirmed the original validity of the subscription. If it were not validly transferred on the 2nd October, 1873, I must hold that all defects in the original subscription have been cured by the statute.

1877.
Grand Junction R. W. Co.
County of Hastings.

Judgment.

On the 1st October, 1873 the stock stood in the name, and was the property of the County. On that day the council was sitting and authorized the warden to appoint a committee of six to act with him in the Grand Junction Road matter, to report next day. The warden appointed a committee, which reported next day, recommending that the warden be instructed to pay the present call on the said stock, and that he be authorized hereafter without calling the council together to manage the stock as he might think best in the interest of the council, and with the full power to sell or otherwise dispose of the same as he might think fit. The report was adopted.

The warden on the same day sold the stock to *McIntosh* for \$1, and executed a transfer to him under the seal of the County.

The stock was assumed to be throughout the property of the County. There was no by-law authorizing the

1877. sale of it, merely the resolution of the council adopting the report recommending a sale.

Grand Junction R.W.Co.
v.
County of Hastings.

To give legal authority for the alienation of the property of a municipal council, I apprehend a by-law under the seal of the corporation is necessary. The Municipal Act, passed in March, 1873 (a), and which in this respect but repeats previous enactments, enacts (b) that the council of every county may pass by-laws for obtaining such real and personal property as may be required for the use of the corporation, and for disposing of such property when no longer required; and so section 383, sub-section 5, for obtaining lands for high schools, and for disposing of such property when no longer required. A resolution seems in some cases to have amounted to an agreement which equity would enforce, but that was where money had been expended on the faith of it (c). But the general rule, I conceive, is to be found in the statute which treats a by-law as necessary.

Judgment. On the day following the sale to *McIntosh* the council passed a by-law, No. 269, repealing by-law No. 48, which gave authority to subscribe for the stock, and it was argued that this in effect ratified the transfer. This was not its object, it does not purport to have been passed for that purpose, and it does not seem to me to be its legitimate effect. The repeal of No. 48 might have been necessary to prevent any subscription anew for stock. The council no doubt thought they had got rid of the stock, and that nothing further was required to be done to relieve them of it or to complete the alienation. If it had purported to ratify the transaction of the day before I think very likely it would have had that effect.

For the reason therefore that the sale to *McIntosh* was not duly authorized, that the stock remained the property of the corporation, that the Act of 1874

(a) 36 Vict. ch. 48, O. (b) Sect. 372.

(c) Grant on Corp. 57.

cured any defects that may have been in the original subscription, the decree will be for the plaintiffs, declaring the transfer invalid, and ordering payment of subsequent calls with costs.

1877.
Grand Junction R.W.Co.
v
County of Hastings.

SOLICITORS.—*Bethune, Osler, and Moss*, for the plaintiffs; *Mowat, Maclean, and Downey*, agents for *Ponton and Denmark, Belleville*, for the defendants.

BROUGH V. THE BRANTFORD, NORFOLK, AND PORT
BURWELL RAILWAY COMPANY.

Practice—Costs on higher or lower scale.

Semble, that since as well as before the Law Reform Act (1868), which transferred to the Court of Chancery the jurisdiction theretofore exercised by the County Courts, it is competent to the Master, upon a direction to tax costs generally, to tax upon the higher or lower scale, according to whether or not the subject matter of the suit was or is within the County Court jurisdiction.

In a suit to enforce the specific performance of an agreement by a railway company for the purchase by them of the right of way over the plaintiff's lands, a decree was made for that purpose, and a reference directed to the Master to ascertain the amount due by the defendants in respect of purchase money and interest; and also for damages for not constructing fences and crossings, as agreed upon, and to tax the plaintiff his costs. The Master found due to the plaintiff for purchase money, &c., \$187.24 only. It appeared that the defendants had constructed the fences and crossings after the institution of the suit, and that an interlocutory injunction had been obtained during its progress. Under these circumstances, the Master taxed the plaintiff's costs on the higher scale:

Held, on appeal, that the Master had properly taxed the costs on that scale.

This bill was filed (in July, 1876) by a land owner on the line of the railway—for the specific performance of an agreement entered into by the plaintiff with the company in respect of land taken for the purposes of the railway, setting forth:

(Par. 2.) "That the defendants being desirous of obtaining the right of way across your complainant's

Statement

1877. lands for their railway, your complainant agreed to sell to the defendants the lands required by them for their said railway across the above described lands, at the price of forty dollars per acre. 3. The defendants agreed, upon obtaining such right of way, to build and maintain on the said lands a good and sufficient farm crossing over their said railway, to enable your complainant to continue the use and enjoyment of his lands. 4. The terms and conditions of the said agreement were reduced to writing, which said writing was dated sometime in the month of July, 1874, and was signed by your complainant and accepted by the defendants. The said agreement is now in the possession of the defendants, and your complainant craves leave to refer thereto."

Brough
v.
Brantford,
Norfolk, &c.
R. W. Co.

The injury complained of by the plaintiff was set forth in the sixth, seventh, and eighth paragraphs of his bill, as follows:—

Statement. "The defendants laid the rails on the line of their said railway across the lands of your complainant during the autumn of 1875, and have been running gravel or ballast trains during last autumn and winter, and on the 1st of May last past began to run regular daily passenger and freight trains. The defendants have not built the crossing across the said railway, nor have they paid the purchase money in accordance with the terms of the said agreement. The defendants have not fenced their railway from the adjoining lands of your complainant, and your complainant has been, and still is, put to great trouble and expense * * for want of proper fences."

At the sittings of the Court at Woodstock in April, 1877, Vice Chancellor *Proudfoot* made a decree declaring:—

(1.) "That the plaintiff is entitled to have the contract in the bill mentioned specifically performed and carried into execution. (2.) * * * That defendants do make and maintain the said fences and farm crossings as mentioned in the agreement set out in the plaintiff's said bill, (3.) and this Court doth refer this cause to the Master at Woodstock to take an account of what is due to the plaintiff for purchase money and interest of the said land so taken by the defendants as in the said bill mentioned, and of the damages sustained by the plaintiff by reason of the omission of the defendants to make the

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said fences and crossings, and to tax to the plaintiff the costs of this suit including the costs of the motion for the injunction, and of the said inquiry, which amount the defendants are to pay to the plaintiff forthwith after the Master shall have made his report. (4.) And this Court doth further order that on such payment being made the plaintiff do execute and deliver to the defendants, on the same being tendered to him for execution, a deed of conveyance of the said right of way in the said bill mentioned, and the said Master is to settle the conveyance in case the parties differ. (5.) And this Court doth further order, that in case the said Master shall find that the plaintiff has not sustained such damages as aforesaid alleged by him to have been sustained, the plaintiff is to pay to the defendants their costs of said inquiry forthwith after taxation."

1877.

Brough
v.
Drantford,
Norfolk, &c.
K. W. Co.

In pursuance of this decree the Master, on the 21st June, 1877, reported that he had

"Taken an account of what is due to the plaintiff by the defendants for the purchase money and interest of the lands taken by the defendants as in the bill mentioned, and of the damages sustained by the plaintiff by reason of the omission of the defendants to make the fences and crossings in the bill mentioned; and I have taxed to the plaintiff the costs of this suit, and find the same to be as follows:—

For purchase of said lands..... ..	\$96 35
Interest thereon from 1st October, 1874, to date, at 6 per cent. per annum..... ..	15 89
Damage by reason of such omission...	75 00
Costs of suit taxed by me and revised at..... ..	291 93
Total amount due plaintiff..... ..	\$479 17"

From this report of the Master the defendants appealed on the ground that the Master should have taxed and allowed to the plaintiff his costs on the lower scale only, the amount found due to him being the sum of \$187.24, such sum being within the jurisdiction of the County Court.

1877. *Mr. Spragge*, for the appeal, referred amongst other cases, to *Re Reece* (a), *Judd v. Plumb* (b), *Forrest v. Haycock* (c), and submitted that the Law Reform Act renders it imperative on the Master to allow costs on the lower scale, when it is ascertained that the sum properly allowable to the plaintiff is within the County Court jurisdiction.

Brough
v.
Brantford,
Norfolk, &c.,
R. W. Co.

Sept. 14th.

Mr. Howard, contra. The bill here was filed for an injunction which was granted on motion, relief which the County Court could not have granted the plaintiff. Here the decree directs generally that plaintiff shall receive his costs; therefore the Master had not any discretion as to the scale upon which he was to tax them, but was bound to allow them according to the higher scale. *Goldsmith v. Goldsmith* (d), *McLeod v. Miller* (e), *Re Hall v. Curtain* (f), *Laurason v. Fitzgerald* (g), *Hyman v. Roots* (h), *Skelly v. Skelly* (i), were referred to.

Sept. 19. Judgment. SPRAGGE, C.—It appears by an order dated the 11th August, 1876, that by an order of the 21st July the issue of an injunction was stayed for ten days to give the defendants an opportunity of constructing the fence and railway crossings, and that at the date of the later order the fences and crossings had not been built, an injunction was therefore ordered to issue, and did issue, on the following day.

The decree, which is dated 11th April, 1877, decreed specific performance of the agreement set out in the bill, directed the defendants to make and maintain fences and farm crossings as mentioned in the agreement, and referred it to the Master to take the accounts mentioned in the third paragraph.

(a) L. R. 2 Eq. 609.

(c) 18 Gr. 611.

(e) 12 Gr. 194.

(g) 9 Gr. 371.

(i) 18 Gr. 495.

(b) 29 Beav. 21.

(d) 17 Gr. 23.

(f) (c) 28 U. C. R. 533.

(h) (e) 11 Gr. 202.

The decree speaks of fences as provided for in the agreement. I do not find them mentioned in the copy of the bill briefed. It would seem, however, not to be material whether this provision is embodied in the agreement or not, as there is a statutory obligation on the defendants to make fences. The decree in terms also gives the costs of the suit including the costs of injunction; and the Master found due in respect of purchase money, interest, and damages \$187.24.

1877.

Brough
v.
Brantford,
Norfolk, &c.,
K. W. Co.

The plaintiff is entitled to full costs as taxed unless in the words of sub-sec. 8 of section 34 of the County Courts Act of 16 Vict., "the subject matter involved (in his suit) does not exceed the sum of \$200."

The subject matter involved in this suit was something beyond compensation for land taken, or for loss or damage suffered by the defendant, as a consequence of the non-performance of the agreement.

It is true that the money compensation so far, falls short by a small amount (less than \$13) of the sum of \$200; but the suit involved the right of the plaintiff to have fences and farm crossings made, and not only made but maintained. I may assume that they have been made; but the right to have them made was a question in the suit; and was as I have said, a something beyond the money compensation to which the plaintiff was entitled by reason of their not having been made. Further, the plaintiff was entitled, I apprehend, to make them himself as a matter of necessity; certainly the fences, because he could make *them* without going upon the land taken for the railway. If he had himself made the fences he would have been entitled to charge the defendants with the cost of making them; and that, I suppose, I may assume would have swelled the pecuniary claim to a sum beyond \$200. I certainly cannot assume the contrary. The fences having been made by the defendants, is a fact that does not alter the question. They had not been made when the bill was filed, nor indeed when the decree was made, and that being so, their being made was a subject matter involved in the suit.

Judgment.

1877.
 Brough
 v.
 Brantford,
 Norfolk, &c.

But a further matter involved in the suit is, the right of the plaintiff to compel the defendants in the future to maintain the fences and the farm crossings, which by their agreement, they engaged not only to make but to maintain; and the decree would properly have reserved liberty to the plaintiff to apply in respect of such future maintenance according to the old practice, but that by our general order an express reservation is rendered unnecessary.

It appears therefore clear to me that subject matters are involved in this suit outside of and beyond a pecuniary claim to the extent of \$200, and that the suit was therefore not within the jurisdiction of the County Court.

Being of this opinion it is not necessary for me to determine the other points argued. I may say, however, that the inclination of my opinion is, looking at general order No. 318, and the practice since and before the transference to this Court by the Law Reform Act of 1868, of the jurisdiction theretofore exercised by the County Courts, of taxation by the Master according to the jurisdiction upon a direction to tax costs generally, that it is competent to the Masters to tax upon the higher or lower scale according to whether or not the subject matter of the suit was before the Law Reform Act within the County Court jurisdiction.

Upon the practice governing, in regard to taxation, I would refer to what was said by Lord *Cottenham*, in *Cradock v. Piper (a)*.

The appeal is disallowed with costs.

SOLICITORS. — *Mowat, MacLennan*, and *Jowney*, agents for *Fletcher and Finkle*, Woodstock, for the plaintiff; *Hodgins and Spragge*, agents for *Hardy and Wilkes*, Brantford, for the defendants.

(a) L. M. & G. at 674.

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WILLIAMS V. REYNOLDS.

1877.

Administration suit—Dower—Execution.

The question, whether the right of a widow to dower, which is not yet assigned to her, is seizable under common law process, or is only so liable in equity, considered and treated of.

In a suit for administration, it was found that the widow of the testator was indebted to the estate in a considerable amount, and the plaintiff, a creditor of the estate, sought to set off her indebtedness against the amount which might be found due to her in respect of past as well as of future dower.

Held, that, whether her right to dower was or was not exigible under common law process, the creditors were entitled to this relief; but as part of her indebtedness was composed of rents received by her, she was entitled to retain one third of such rents by way of arrears of dower, and thus reduce the amount of her indebtedness.

This was an administration suit. The testator left real estate in which the defendant, the widow and executrix of the will, claimed dower who, by the Master's report, was found indebted to the estate in \$660.70. The widow's dower had not been assigned to her, and the plaintiff in the suit, a creditor of the testator, sought to make the dower and arrears of dower available for satisfaction of her indebtedness to the estate.

Mr. *G. B. Gordon*, for the plaintiff.

Mr. *Evans*, for the widow.

Mr. *Hoskin*, Q.C., for the infant defendant.

SPRAGGE, C.—This is an administration suit at the instance of a creditor. The defendant is the widow and executrix of the will of the testator. The report finds her a debtor to the estate in a considerable amount: on account of personalty, \$350: on account of rents and profits, \$310.70. Real estate was left by the testator in which the defendant is entitled to dower. Dower has

Sept. 12th.

Judgment.

1877. not been assigned. The plaintiff seeks to make her dower and arrears of dower available for the satisfaction of the debt proved in the Master's office.

Williams
v.
Reynolds.

In *McAnnany v. Turnbull* (a), decided in 1863, it was determined that the right of a widow to dower, dower not having been assigned, was not saleable in execution at law. This was decided by the full Court upon rehearing.

In *Rose v. Zimmerman* (b) which does not appear to have been cited in *McAnnany v. Turnbull*; it was held by the late Chancellor, Mr. Blake, that a right to dower was an assignable interest. The bill in that case was by the widow and her assignee to have dower assigned.

Previously to the Act of last September, (40 Viet. ch. 8 section 37,) the law as to what interests were seizable in execution stood thus: section 5 of chapter 90 of Consol. Stat. U. C. made certain interests assignable, and section 11 of the same Act made exigible by common law process such interests as were made assignable by section 5. Then came the Act abolishing registration of judgments, passed in 1861., (24 Viet. ch. 41,) in which section 8 is substituted for section 11 of chapter 90 with a variation not material to this question; and so the law stood when *McAnnany v. Turnbull* was decided.

Then came the general Registry Act of 1865, which repealed, *inter alia*, the Act of 1865, and enacted that Acts and parts of Acts thereby repealed should remain repealed; so that section 11 of chapter 90, *inter alia*, remained repealed.

If that section or section 8 of the Act of 1861 were in force, then a question would arise whether section 35 of the Administration of Justice Act, 1873, would not apply, or rather the principle embodied in it. But these sections have been repealed, and the creditor is without remedy unless section 37 of the Law Amendment Act of last session will help him.

(a) 10 Gr. 293.

(b) 3 Gr. 598.

That section revives section 8, and amends it so as to read thus: "Any estate, right, title, or interest in lands which under the said section of chapter 90 of the Consol. Stat. U. C. may be conveyed or assigned by any party, or over which such party has any disposing power, which he may without the assent of any other person exercise for his own benefit shall be liable to seizure and sale under execution," &c.

1877.

Williams
v.
Reynolds.

Proceedings in this suit were commenced before the passing of this Act, and the question arises, whether its provisions apply to it, whether applying it would give it a retrospective operation within the meaning of the rule against giving statutes such operation. The rule and its application in the United States are exceedingly well stated by Mr. *Kent*, in his Commentaries, vol. i., sec. 455: "A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void," or, as we should say in this country, where the construction of a statute not in terms retrospective is in question, the affecting vested rights would be a reason for holding it not retrospective. However, what I quote the learned Chancellor for is, for what follows: "But this doctrine is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance, of the remedy, by curing defects and adding to the means of enforcing existing obligations." Where what is enacted is (in the words of the Chancellor) in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations, I see no reason why, in the absence of anything to the contrary it should not apply to pending suits. It is not open to any of the objections which in principle apply to retroactive legislation. It is indeed in a proper sense

Judgment.

1877. of the term, though not perhaps in its primary sense, legislation in reference to procedure.

Williams
v.
Reynolds.

This point, however, was not argued. The inclination of my opinion is in favour of the application to this case of the provisions of the Administration of Justice Acts of 1873, and of the last session to which I have referred; but if counsel for the executrix desire to speak to the point, I shall be happy to hear him. I should think it probable that the question may have arisen upon the Common Law Procedure Act; the provision for the sale of equities of redemption by common law process or some other provision of the Act.

If the clauses I have referred to of the Administration of Justice Act do apply, the question will stand thus: *Rose v. Zimmerman* decides that a right to dower is an assignable interest in equity; but suppose *McAnnany v. Turnbull* to make that open to question, the language of the Act of last session is more comprehensive than that of section 8 of the Act of 1861, which was in force when the latter case was decided. The added words were evidently intended to embrace, and I should say do embrace any and every interest which the execution debtor may possess for his own benefit disposable by himself. If that be so it may be reached under section 37 of the Act of last session (assuming that it may not be reached directly by *fi. fa.*), and if so, may be reached in this Court.

Judgment.

It may also be a question whether, assuming that the dower may be reached, the arrears of dower may also be reached. As to that I should say that as the widow is charged with rents and profits received, she should be allowed to retain one-third of the amount by way of arrears of dower. This would reduce the amount with which she is chargeable on that account to \$206.72. But parties may speak to this, if they so desire.

It might be that the widow's dower would exceed in value the amount with which she is chargeable:

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I see no other way of providing for that contingency than by directing that the excess, if any, should be paid to her. 1877.

Williams
v.
Reynolds.

SOLICITORS.—*Spencer, McDougall, and Gordon*, for the plaintiff. *Evans and Boomer, and J. Hoskin*, for the defendants.

TAYLOR V. BROWN.

Invalid sale—Money paid by a stranger—Voluntary payment—Party seeking equity must do equity.

The maxim that "he who comes into equity must do equity," applied in a case where the defendant became the purchaser at sheriff's sale of the lands of the plaintiff, paid the amount bid, and obtained a conveyance from the sheriff. In fact such sale was wholly invalid, the lands having been previously sold, under the same execution, to the mother of defendant, to whom the sheriff had conveyed them, although she had paid only a portion of the amount bid for her, by the defendant as her agent: Such conveyance however, had been to the knowledge of the defendant treated and intended as a security merely. The defendant's object in purchasing the second sale was to obtain a title adverse to the plaintiff, and which he set up against the plaintiff, who thereupon filed a bill seeking to redeem on payment of the amount paid on account of the first sale and interest merely, less rents received.

Held, that the payment made by the defendant having enured to the benefit of the plaintiff the defendant was entitled to be repaid the amount, although paid for an improper purpose: and the plaintiff having sought to deprive the defendant of this money on purely technical grounds, the Court, on over-ruling his objections to the claim, did so with costs: *Semble*, that if the plaintiff had not sought to charge the defendant with rents and profits he could not have claimed the amount he had so paid.

This was a redemption suit brought by *Joseph Taylor* Statement. against *Frank Brown, Nancy Mahon, Ellis Brown, Charlotte Jarmin*; and *Thomas Taylor, Joseph Taylor, John Taylor, and James Taylor*, (the four last named being infants under the age of twenty-one years), setting

1877. forth that on the 26th November, 1863, the plaintiff was the owner in fee of certain lands in the Town of Amherstburg, containing two acres and three quarters, before which date one *John McLeod* had recovered a judgment against the plaintiff in the County Court of the County of Essex, for \$219.36, upon which a *fi. fa.* was issued and placed in the hands of the sheriff of that County, and was on that day in his hands to be executed, and on that day the plaintiff accompanied the defendant *Frank Brown*, at his suggestion, to his mother *Charlotte Brown*, both of whom informed plaintiff that the sheriff had advertised the said land for sale under such writ, and urged plaintiff immediately to take steps to pay *McLeod* the amount of the judgment, otherwise the land would be sold and wholly lost to the plaintiff; and they then proposed to the plaintiff that *Charlotte Brown* should pay *McLeod* the amount of his judgment, and in order to secure her the amount advanced that the plaintiff should give her the said land in security, which the plaintiff accordingly conveyed to her in fee on that day, and the conveyance thereof was registered on the 27th of the said month of November; which conveyance purported to be executed in consideration of the sum of \$450 paid by *Charlotte Brown* to the plaintiff, although no money whatever was ever paid to him; but that the true and only consideration therefor was the said promise and agreement of the said *Charlotte* and *Frank Brown*.

Statement.

The bill further stated, that before executing the conveyance the plaintiff had not been afforded any opportunity of consulting with independent and disinterested friends, or of procuring professional advice, and that by the exercise of their influence over him the said *Charlotte Brown* and *Frank Brown* prevented the plaintiff from ascertaining his true position, and from obtaining any writing or acknowledgement signed by *Charlotte Brown* shewing the terms upon which she held the lands under that deed.

That *Charlotte Brown* did not pay *McLeod*, and thus prevent the lands being sold, but allowed the sheriff to sell the same on the 9th of April, 1864, at which sale the defendant *Frank Brown*, acting as the agent of his mother, bid for the said land the sum of \$416, and the same was accordingly knocked down to him; and the sheriff by a deed poll on that day conveyed the said land to the said *Charlotte Brown*; but the plaintiff charged that the said sale and sheriff's conveyance was only a mode of paying the judgment adopted by the said *Charlotte Brown*; and that by such sale she did not intend to, and did not in fact, become entitled to hold the said land otherwise than upon the agreement with the plaintiff before set forth; and that up to the time of her death she never denied the right of the plaintiff to a re-conveyance upon payment of the amount of the judgment and interest; but on the contrary she frequently acknowledged that notwithstanding such deed from the plaintiff to her and the sale and conveyance by the sheriff, she only held the land as security.

Statement.

The bill further stated that *Charlotte Brown* died intestate 21st January, 1865, leaving the defendants *Frank Brown, Nancy Mahon, Ellis Brown, and Isabella Taylor*, her only children her surviving; and that the said *Isabella Taylor* died intestate on the 3rd of February, 1871, leaving the infant defendants her only children her surviving: that letters of administration of the estate of *Charlotte Brown* were granted the defendant *Ellis Brown*, to whom the plaintiff had paid several sums on account of the sum secured to *Charlotte Brown* by the conveyance of the 26th November, 1863, and some of the defendants since her death had received moneys on account of the plaintiff which ought to have been applied on account of that amount.

The prayer was for an account and a re-conveyance on payment of what should be found due.

The cause came on for the examination of witnesses and hearing before Vice-Chancellor *Blake*, at the sittings

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1877. of the Court at Sandwich, on the 24th April, 1876, when a decree was pronounced declaring that the deed of the 26th November, 1863, was intended as a mortgage security only, and that the plaintiff was entitled to redeem the defendants on paying such amount as might be found due by the Master at Windsor, to whom a reference was directed for the purpose of taking the accounts between the parties.

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In pursuance of that decree the Master at Windsor after taking evidence in the month of September, 1876, made his report dated 29th January, 1877, finding the amount due by the plaintiff to the defendants as the representatives of the said *Charlotte Brown*, after giving the plaintiff credit for rents received by *Frank Brown* and *Ellis Brown*, to be \$121.12.

Statement.

From this report the plaintiff appealed, on the ground that the Master should have given credit to the estate of *Charlotte Brown* for the sum of \$75 only, being the only sum paid by her or her estate, and that the Master should therefore have found her estate indebted to the plaintiff instead of the plaintiff being indebted to the estate.

From the evidence taken before the Master it appeared that although the land had been bid-off at the sale mentioned in the bill, and conveyed to *Charlotte Brown* in pursuance thereof, neither she nor her representatives had paid up the amount of the execution, but only a sum of \$75 on account thereof; and that in consequence of this default in payment the sheriff, by the direction of the attorney for the plaintiff in the action, proceeded to a second sale of the land, when the defendant *Frank Brown* attended the sale and bid off the property, as he stated in his evidence, for himself.

It was shewn that *Ellis Brown* had never taken out letters of administration as stated in the bill, and the objection having been taken by the defendants of the absence of a personal representative an administrator *ad litem* was appointed by the Court.

Amongst the witnesses in the Master's office, *John McLeod* was called on behalf of the defendants, and proved the fact of *Mrs. Brown* having paid the \$75; the fact of the second sale by the sheriff at the instance of the plaintiff in the action when the defendant *Frank Brown* became the purchaser in his own name; the deed to him by the sheriff; and that *Frank Brown* had paid up the full amount of the execution remaining due after giving credit for the \$75 paid by *Mrs. Brown*. The contention on the part of the plaintiff was, that the second sale by the sheriff was absolutely void: that the payments made by *Frank Brown* were voluntary on his part, and could not be recovered from the plaintiff: that the only sum properly chargeable against the land therefore was \$75 and interest, against which was to be set-off the amount of rents received by *Charlotte Brown* and the defendants, which would have the effect of making the estate of *Mrs. Brown* indebted to the plaintiff.

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Mr. *Moss*, for the appeal.

Mr. *Hoskin*, Q. C., contra.

The other facts in the case and the authorities cited are mentioned in the judgment of

SPRAGGE, C.—This was an appeal by the plaintiff from the allowance by the Master of a sum paid by the defendant *Frank Brown* in satisfaction of the judgment of *McLeod* against *Taylor*. October 3rd.
Judgment.

It is agreed that the second sale by the sheriff was inoperative and void. The person to discharge this judgment was *Charlotte Brown*, the mortgagee. She did discharge it only to the extent of \$75.

The purchase by *Frank Brown* at the second sheriff's sale was on his own account, with his own means, and for his own benefit.

It has been suggested, and it may be the case, that

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he purchased in order to acquire the property for himself. Whether he did so or not it was certainly not as agent of the mortgagee. It was in the eye of the law a payment by a stranger not at the request of the judgment debtor, and without there being any legal liability.

He cannot therefore so far claim the sum paid against the judgment debtor. Further as a reason against his being allowed this sum it is said that he may obtain an assignment from *McLeod* of the judgment and use it against plaintiff. He may be entitled as of right to an assignment of the judgment. *McLeod* was not bound to accept the money from *Brown*, but having accepted it he may be bound to assign or he may assign voluntarily, and *Frank Brown* may himself assign or may enforce the judgment against the plaintiff.

To this it is answered that he is a party and would be enjoined. Further, it may be proper to require satisfaction of the judgment to be entered. In that case it may be that the satisfaction piece should be prepared by *Taylor*. *Taylor* comes to redeem; the parties to be redeemed are the personal representatives of *Charlotte Brown* and her heirs, the latter having been made parties by reason of the legal estate being in them. She died intestate. Administration to her estate was not taken out, and there was not any personal representative till one was appointed *ad litem*.

The bill states that she was to pay the *McLeod* judgment, but that instead of doing so she allowed the lands to be sold: that *Frank Brown*, as her agent, bid for the lands \$416, and that the sheriff conveyed to *Charlotte Brown*, 9th April, 1864. The bill also alleges that the sale was only a mode of paying the judgment: alleges that *Charlotte Brown* never denied the right of the plaintiff to a re-conveyance on payment of the judgment with interest, but acknowledged that the title was as set up by the bill.

These allegations assume that the judgment debt had been paid by *Charlotte Brown*, and the plaintiff now seeks to redeem upon that footing.

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Frank Brown sets up that it was an absolute purchase. *Ellis Brown* and the infants take the same ground.

The bill alleges payment to *Ellis Brown* of moneys on account of the mortgage, and that the defendants have received various sums of money applicable to the mortgage debt.

In the Master's office it appeared that the \$75 was paid by *Charlotte Brown* to the judgment creditor after the first sale, the balance by *Frank Brown* after the second sale.

It appeared also that rents were received by and on account of *Frank Brown* to a considerable sum. The Master does not state by whom received, but he places the amount received or with which the mortgagor is entitled to be credited against the mortgage debt at a larger sum than the amount paid the creditor, and crediting the defendants with the sum paid by *Frank Brown* (the sum in question) as well as the sum paid by *Charlotte Brown*, and interest on both, he makes the balance payable by the plaintiff \$121.12.

It would seem that if the plaintiff had not charged the defendants with rents and profits, &c., *Frank Brown* could not claim against him the amount paid by *Brown* to the creditor. But he has made him (with other defendants) an accounting party. The question is, whether that makes any difference.

By the evidence it appears that it was by him (*Frank*), or by his authority that the rents were received, and he received them not as one of several entitled to receive them, but as, in his own right in respect of purchase money paid. He was in possession under that purchase, in firm and void though it was, and it was in respect of that possession and the profits derived from it that he was made an accounting party.

A question might arise, whether if he had made improvements it would come under the Act allowing compensation for improvements made under mistake of title. Perhaps it would, but it is not necessary to go so far.

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Being made an accounting party his position is, that the possession, under which he was made to account, was obtained by a payment of money which enured to the mortgagor's benefit, though made *alio intuitu*, still a payment that was to have been made to the person to whom it was made, and for the purpose for which it was made. Being made to account under that possession he says it is reasonable that the mortgagor while charging him, should on the other hand credit him with what he paid to obtain that possession, and of which payment he, the mortgagor, obtained the benefit. There is nothing unreasonable in this, and apart from this motive of the payment it would be hard and unjust to deny the claim.

It is not unlike the principle upon which Lord Romilly proceeded in *Teasdale v. Sanderson*, (a). There a tenant in common had made improvements and rents and profits were asked against him; Lord Romilly observed: "I think these accounts must be reciprocal, and, unless the defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements on any part of the property."

Judgment.

The question whether he was chargeable with rents and profits was not dealt with directly; but if charged he was to be allowed for improvements, unless charged he was not to be allowed for improvements. There the charge in respect of possession, if made and allowed, was to let in a counter charge which, but for it, was inadmissible.

There are cases certainly which limit the rule "that he that comes into equity must do equity" to that which a party could obtain directly if a plaintiff in equity: *Hanson v. Keating* (b), and cases of that class; but there are cases of great authority the other way. The rule is thus stated by Lord Cottenham, in *Sturgis v. Champneys* (c): "Hence arises the extensive and

(a) 3 Beav. 534.

(b) 4 Hare 1.

(c) 5 M. & C. 162.

beneficial rule of this Court that he who asks for equity must do equity; that is, this Court refuses its aid to give to the plaintiff what the law would give him (if the Courts of common law had jurisdiction to enforce it,) without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce." And this is precisely the principle upon which Lord Romilly proceeded in *Teasdale v. Sanderson*, and which has been adopted and acted upon in other cases in this Court, among them in *Rice v. George* (a).

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If the defendant *Frank Brown* had paid the balance of the plaintiff's debt to *McLeod* because his mother had undertaken to do so, or to serve the plaintiff, or to save his estate; or if he had administered to his mother's estate, or for any other good reason; there could be no sound or just reason why, when called upon by the plaintiff to account, he should not be allowed, against what he had to account for, the money he had paid to *McLeod*. But his motive was not a good one. Should he be punished by giving the plaintiff the benefit of the payment simply for nothing unless to punish the man who made the payment? I think it is not necessary to the ends of justice that this should be done. It may properly have its effect upon the question of costs, but is not in my opinion a good reason for disallowing the payment. On the other hand the payment should not be allowed to him unconditionally. He should procure satisfaction of the judgment to be entered or an assignment of the judgment from *McLeod* to the plaintiff, or in some way place the plaintiff beyond the reach of being molested in respect of the *McLeod* judgment. If he had placed his difficulty in the Master's office upon that ground, it would have been consistent with justice. As it is he has objected to the allowance to *Frank Brown*

Judgment.

(a) 19 Gr. 174.

1877. of this payment upon purely technical grounds, and I think, therefore, that over-ruling his objection I should do so with costs.

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Per Curiam : Appeal dismissed with costs.

SOLICITORS.—*Bethune, Osler, and Moss*, agents for *White*, for the plaintiff. *McCarthy, Hoskin, Plumb, and Creelman*, agents for *Horne and Killam, Windsor*, for the defendant.

GOYEAU V. GREAT WESTERN RAILWAY COMPANY.

Railway terminus—Land conveyed on condition.

The plaintiff on the representation of parties (not agents of the company) interested in the location of one of the termini of a railway, conveyed to the company a lot of land for the purpose of locating such terminus and depot thereon without any money consideration being paid therefor, the deed reciting that the same was conveyed for the purpose and on the condition that the terminus and depot should be placed there, "and the execution of which condition was the real consideration for this grant." The company did construct the necessary buildings for that purpose, including those for passenger and freight stations, and continued to use them for several years, when they discontinued the use of the passenger station, and were about establishing it in another locality. On a bill filed to restrain such removal :

Held, that the company were bound to retain the terminus and depot on the properties conveyed to them by the plaintiff and one *H.*, or in default, the land conveyed by the plaintiff should revert in him : and, if the plaintiff desired it, a reference to the Master was directed to ascertain and report whether the condition was performed, the company to pay the plaintiff his costs of suit.

The terms railway "station," "terminus," and "depot," considered and defined.

Statement. Examination of witnesses and hearing at Sandwich at the Autumn Sittings, 1876.

Mr. *O'Connor*, Q. C., and Mr. *Moss*, for the plaintiff.

Mr. *Boyd*, Q. C., and Mr. *Barker*, for the defendants.

The facts of the case and the points relied on, appear sufficiently in the judgment of 1877.

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Sept. 12th.

SPRAGGE, C.—It is not brought home to the railway company that they made to the plaintiff the representations stated in the bill. Representations were made as to the probable advantages that would accrue to the plaintiff, and which would probably compensate him for conveying the land to the company without a money payment, but these representations seem to have been made by persons who, for their own reasons, were anxious that the terminus should be at Windsor rather than at Sandwich. They served the railway company but were not, as far as appears, employed by them. The plaintiff probably supposed that they were employed by the railway company, but it is not proved that they were so, and the company of course, are not bound by what they said.

That being so the plaintiff must rely upon the language of the instrument,—every word almost of the statement of consideration is material. It must be taken upon the evidence that Goyeau knew that the railway company was in treaty with *Hall*, the owner of Lot 84, the adjoining lot for the same purpose, and that he understood that both lots would be required for the purposes of the company. Judgment.

A question has been raised as to the meaning of the words used, and it has been contended that the word “depot” does not mean necessarily or primarily a railway passenger station, but looking at the context the question is, could it mean anything else. The words used in this connection are not, I apprehend, to be taken most strongly against the grantor, they are the words quite as much of the railway company as of the grantor, it was they, and they only, who could say that the land which they were acquiring, had been selected by them for the purpose of establishing the Western terminus and depot of their road thereon and it was as much their statement as that of the grantor that “the

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execution of which condition constitutes the real consideration for this grant." The word depot is used in the United States and is used also in Canada as synonymous with station; it may be inaccurately; but the question is, not whether the word is accurately used when applied to a passenger station, but whether we can see that it was used and understood in that sense by these parties. The word depot is not used alone but with the words "western terminus," and in this connection the western terminus and depot of their road thereon. The definition of the word terminus in railway matters given in the Imperial Dictionary is, "the extreme point at either end of a railway, the intervals along its course being called stations; also, the buildings for offices, &c., at the extremity of a railway," and of the word station a definition is, "a halting place intermediate between the termini of a railway where passengers are taken up and let down; also, though less appropriate, a railway terminus." And in the supplement this meaning is given to the word "depot," "a building for goods at the terminus or station of a railway, canal," &c. Without then resorting to the leading American dictionary, *Webster*, the meaning given to the words in England is sufficient. To take the words used without the word "depot"—the western terminus means not only the extreme western point or end of the railway, but also the buildings for offices, &c., and if we take the proper meaning of the word station to be an intermediate place between the termini, a terminus must comprehend a place "where passengers are taken up and let down," and be included in the words "buildings for offices, &c.," inasmuch as a building for that purpose is indispensable to the working of a railway at its termini. The absence of the word "station" is the absence of a word not properly to be used in that connection, and which if used, would have added nothing which is not comprehended in the word terminus. The addition of the word "depot" to "terminus," appears to have been unnecessary. It was, however, probably used

Judgment.

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in the United States sense as designating a building or buildings for the taking up and letting down of passengers, and also for the deposit of goods. I cannot doubt that the words used were understood by *Goyeau*, and intended by the company to be understood by him, in their widest and most comprehensive sense; and, further that the words used, mean all that is contended for by the plaintiff.

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But it is contended that assuming this to be the case, the railway company have done all that on their part they were bound to do. In other words that they did erect buildings for a terminus and station in the sense contended for by the plaintiff, and did use them for those purposes; and that by discontinuing their use so far as a passenger terminus is concerned they have not committed a breach of the condition upon which a grant of this land was made to them. Upon this point an American case, *Meal v. Ballard* (a), is cited. I do not agree in the reasoning upon which that case was decided, nor in the conclusion arrived at. But the language of the instrument in that case, and in this is different, the agreement in this case is not to locate or to erect, but to establish. The land, it is stated, "has been selected by the railway company, for the purpose of establishing," &c., and their doing so is styled a condition which they are to execute, "the execution of which constitutes the real consideration for this grant." The words used import permanency. They had compulsory powers. If they had acquired the land under these powers, they would have had to pay a money consideration. So they would have had to do if a price had been fixed by agreement; the money consideration would have been absolute, on one side the land parted with, on the other the money parted with absolutely, for ever. Where the consideration is as it was in this case not money but something else taken to be an equivalent for money, I do not see

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(a) 7 Wallace, 290.

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how the character of permanency can attach less to the equivalent for money than to money itself. In reason if the consideration for the grant ceases, the grant also should cease. I speak now only of what is to be implied from the language used, and the nature of the grant. One point of distinction between the American case referred to and this case is, that in that case it was a purchase of land for its value, and the purchase money was paid; while in this case the *whole consideration* was the establishing a terminus and depot by the company. If the defendants are right upon this point they must be at liberty to remove not only the passenger station (as for convenience sake I may call it), but every building upon the land conveyed; for if the condition is fulfilled they must be entitled to hold the land discharged of it, and for the like reason they must have been entitled to make the like removals at any time after the buildings were erected, provided it did not appear that their erection, was merely colorable to obtain a conveyance of the land. I have perhaps anticipated somewhat the technical objections made by the company to the plaintiff's suit. I agree that the condition upon which the grant in this case was made, was a condition subsequent, but I do not agree that it should be construed *stricti juris*, for it was not a condition subsequent only, but its fulfilment was the consideration and the whole consideration for the grant; and the real question is, whether the railway company can hold the land without performing the condition upon which they obtained it. I am of opinion that they cannot.

Judgment.

At the same time it is to be observed that it is against the principle of this Court to enforce a forfeiture and if the plaintiff can obtain what was stipulated for, the railway company retaining the land, that, I apprehend, will be the proper relief in this suit.

I will state what I conceive the plaintiff to be entitled to, and what he is not entitled to, under the condition contained in the grant. I think him entitled to claim

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that on lots 83 and 84, the properties conveyed to the company by himself and *Hall*, there be and be maintained all that is ordinarily appurtenant to the terminus of a railway such as the Great Western Railway; that the condition is not fulfilled unless there be upon the front of lot 83 a passenger station as well as a depot for goods; that in the passenger station what is ordinarily appurtenant to passenger stations, a place for sale of tickets, for checking baggage, and ordinary waiting-rooms, and conveniences for the taking on and letting down of passengers. It is not necessary that the whole of the passenger station and depot for goods should be upon lot 83, for the plaintiff was aware that lot 84 was being acquired for the same purpose, but he is entitled to require that a substantial, not a colourable, portion of these buildings, shall be upon his land; that his land, together with the front of lot 84, should be the western terminus and depot of the railway, in the meaning and sense in which the words used, are in the opinion that I have expressed to be interpreted. It is clear to me ^{Judgment:} that in the arrangements which the company have made ~~that~~ they have not fulfilled either in the spirit or the letter, the condition upon which they obtained their grant.

On the other hand the plaintiff has, I think, contended for too much. Regard must be had to the exigencies of trade and a reasonable interpretation must be put upon the agreement of the parties. It was necessary, looking at the connections which the defendants' railway would from its geographical position, be expected to make, and which it has made at its western as well as its eastern termini, that facilities should be afforded for freight and passenger traffic beyond its termini, and in affording these facilities, so far as they are *bona fide* facilities for such traffic, the company does not, in my judgment, contravene the condition contained in the grant; they have not actually or virtually removed the western terminus of their road to Detroit. But they have not only virtu-

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1877. ally but actually removed it from lot 83 to a place considerably to the eastward of it; leaving upon lot 83, some buildings indeed, but not upon it, either alone or in conjunction with lot 84, the western terminus and depot of their road, within the meaning of the condition contained in their grant from the plaintiff.

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I do not see my way to making a decree in the nature of a decree for specific performance, directing in terms that the defendants shall erect such buildings as are suitable and proper for the western terminus and depot of their railway, and that they establish such terminus and depot upon lot 83, or upon lots 83 and 84; because I find no covenant on the part of the defendants to do this. The stipulation, so to call it, is by a condition subsequent, the estate conveyed vesting in the company, subject to be divested for non-fulfilment of the condition. The thing to be performed, was, in my judgment, not of temporary, but of permanent obligation. It may be that the company will decline to fulfill the obligation; they may prefer that the land should be divested, and they have, I apprehend, an election in the matter, unless indeed the Court should visit their past defalcation with the full consequences of non-performance of condition and declare and decree the estate divested. I do not think it necessary or proper to do this.

Judgment.

I think the proper decree will be to declare what the plaintiff is entitled to, in the terms that I have already indicated, in the event of the defendants not establishing their western terminus and depot in the manner already indicated, doing therein whatever is necessary and proper for carrying the same into effect, within three months from the making of this decree (liberty to apply to extend the time may be reserved): declare and decree the estate conveyed to them divested by reason of their non-performance of the condition upon which the same was conveyed, excepting thereout, however, two certain parts subsequently acquired by the company by purchase from *Gardner and Ouillette*. If the plaintiff desires it there

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may be a reference to the Master (at Sandwich) to ascertain and report whether the condition has been performed.

The decree will be against the defendants with costs.

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SOLICITORS. — *Solomon White*, for the plaintiff.
Samuel Barker, for the defendants.

HENDERSON V. WEIS.

Marriage by repute—Divided repute.

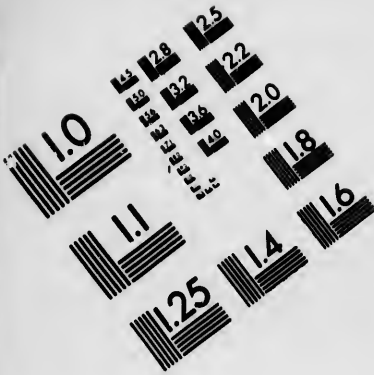
When it is sought to establish the fact of marriage by repute, it is essential that such repute should be general and uniform; a divided repute will not suffice for that purpose.

This was a suit for redemption of land in the township of Etobicoke. The liability of the defendants to be redeemed by the proper parties was scarcely denied, the principal, indeed the only question really discussed being whether the parents of the plaintiff, *Eliza Henderson*, were or were not married, her only claim being as heir-at-law of *Obadiah Henderson*, his daughter by *Cordelia* his wife. There was no evidence of the marriage of *Obadiah* and *Cordelia*, other than that of repute; they were people of colour, of the labouring class, and had come to Canada in 1831 or 1832.

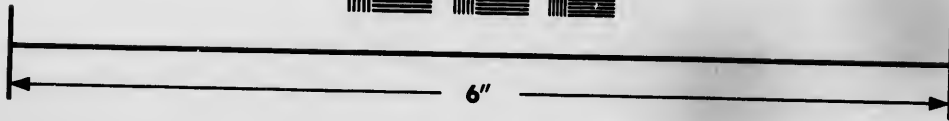
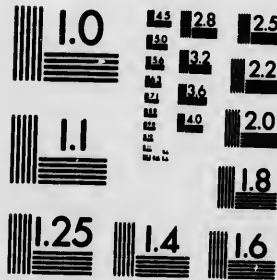
It appeared that *Obadiah* had died intestate, being entitled in fee to a lot of land in the township of Etobicoke, indebted in sundry sums; that his widow *Johanna Henderson*—the witness mentioned in the judgment—took out letters of administration, and as administratrix, assumed to convey the land to one *Atkinson*, who held a mortgage on the property for a small balance of the purchase money, and who satisfied the debts due by the intestate and paid to the administratrix a small sum for

Statement.





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1877. her interest as dowress. *Atkinson's* title subsequently became vested in the defendants, who took their conveyance with full knowledge of the nature of the title, and that if an heir-at-law should appear, their title would be subject to be defeated. Under these circumstances the present suit was instituted and came on for the examination of witnesses and hearing at the Spring Sittings of 1877, in Toronto.

Henderson
v.
Weis.

The other facts in the case appear in the judgment.

Mr. *Attorney-General Mowat*, for the plaintiff, contended that reputation of marriage in a case circumstanced as this was, was sufficient, and that it was not necessary to give evidence establishing positively the fact of marriage: *Hervey v. Hervey (a)*, *Goodman v. Goodman (b)*, *Hubback*, p. 255. The fact of the purchase by defendants under the circumstances appearing in this case, was not such as called for a peculiarly favourable consideration of their case; and it is not in accordance with sound principle that their position should be now considered with any special favour. Indeed the purchase was effected under such circumstances as would entitle the plaintiff to call for the very strictest application of the rules of the Court against them. It is expressly shewn that they took their title knowing the danger they ran of an heir turning up. The title on the face of it is defective and bad; the deed to *Atkinson* being executed simply by the administratrix, and *Atkinson* in selling never asserted the title was good, and if this sale had not taken place the evidence now adduced would have been sufficient to entitle the plaintiff to call upon the mortgagee to reconvey. Here there is not any rival claim of heirship; if the plaintiff is not entitled as such, then there is no heir. The mere fact of *Henderson* saying to *Thompson* that *Cordelia* was not his wife, was not sufficient to outweigh the evidence of that fact adduced

Argument.

(a) 2 W. Bl. 877.

(b) 28 L. J. Ch. 745.

by the plaintiff, especially when considered and explained by the circumstances of her having quitted the house of the intestate, and *Thompson* expostulating with him as to his ill-treatment of her. Then, as to any weight to be given to the fact of *Cordelia* cohabiting with *Towne*, it is only necessary to say that the alleged marriage with him took place, if at all, at so recent a date comparatively, that it could easily have been proved if it had ever really taken place.

1877.
Henderson
Wels.

Mr. *Moss*, for the defendants. The purchase by the defendants was made in the strictest good faith; and under the belief of being the absolute owners they have made large and valuable improvements on the estate; these circumstances raise a very strong case for the favourable consideration of the Court so that, unless satisfied beyond a shadow of a doubt, of the thorough truthfulness of the case set up by the plaintiff, the Court will not now interfere with the title thus obtained by the defendants. The defendants are justified in calling for the strictest proof of the plaintiff's right to relief; but the evidence of the plaintiff herself, as well as that adduced on her behalf, falls far short of what is required to satisfy the mind of the Court, and is totally insufficient to satisfy any technical rule on the subject. The only marriage here attempted to be established is one by repute, but if there ever was any repute on the subject it was certainly a divided repute, and when that is the case the repute must preponderate greatly in favour of marriage before the Court will act. To establish the fact of marriage by repute the actions and conduct of the parties must throughout be consistent with such repute, while here we have this man and woman living separately for twenty-five years and during all those years never having any intercourse with each other. The Court will not now give such effect to the evidence as would establish *Obadiah* to have been guilty of bigamy; on the contrary, instead of assuming him to have been guilty of

Argument.

1877. ^{Henderson} this offence, the presumption is, in such a case, particularly after the death of the party, always in favour of innocence. He referred, amongst other cases, to *The Breadalbane Case* (a), *Yelverton v. Yelverton* (b), *Hubback*, p. 244. Counsel also insisted that if redemption were decreed it should, under the circumstances, be on the very strictest terms, as to payment for improvements and all other allowances including costs of suit. That allowing redemption being discretionary with the Court it can impose such terms as will be just between the parties: *Skae v. Chapman*, (c), *Farhall v. Farhall* (d), *Gordon v. Eakins* (e), *Lovell v. Gibson* (f), were also referred to.

Argument.

Mr. Attorney-General Mowat, in reply. The argument on the other side seems to lose sight of one principle of the law, which is, that legitimacy will always be presumed and it is an error to say that the evidence in favour of the marriage must be of great and overwhelming preponderance; but, the evidence in assertion of legitimacy must be met by that of a positive and distinct character before the Court will determine against the legitimacy of a claimant. *Best*, on Presumptive Evidence, pp. 426, 464. Here the defendants are strangers who desire to take advantage of the technical rule that an equity of redemption does not escheat to the Crown; the mortgage here was for a very trifling sum (\$136), and yet if the defendants' contention prevails this will be sufficient to prevent the Crown from extending its bounty in favour of the plaintiff. This is not the case of a question as to which of two parties claiming was the heir of the intestate. The defendants here have thrust themselves into this false position. The alleged marriage of *Johanna* was of so recent a date that it could have been easily proved if it really took place, and therefore no weight

(a) I. R. 1 Sc. Ap. 92-102.

(c) 21 Gr. 534.

(e) 16 Gr. 362.

(b) Ib., 218.

(d) L. R. 12 Eq. 92.

(f) 19 Gr. 280.

ought to be attributed to the fact that the mother of the plaintiff had not taken steps to prosecute for bigamy; no knowledge of this circumstance or of *Obadiah's* denial of his marriage with herself having been brought homo to *Cordelia*.

1877.
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v.
Weis.

SPRAGGE, C.—The leading question in this case is, whether the parents of the plaintiff *Eliza Henderson* were or were not married. Her *locus standi* in Court is as heir-at-law of *Obadiah Henderson*, his daughter by *Cordelia* his wife. There is no evidence of the marriage except that of repute.

Obadiah and *Cordelia* were coloured people in humble life. They came to Canada in about 1831 or 1832. It is not quite clear from the evidence whether they came first to Toronto, then York, or to Etobicoke. If first to Etobicoke, it was in the Spring of 1832. This date is fixed by *Hannah Morgan*, whose first husband, *James Long*, died in the Summer of that year of cholera. This witness and her husband were coloured people. *Obadiah* and *Cordelia* went together to the house of the *Longs*, he on foot, and she on horseback. He was in search of a place to rent, and made inquiries of *Long*. *Long* asked *Obadiah*, "Who is that with you?" and the answer was That it was his wife; or the question may have been, *Mrs. Morgan* says, "Is that your wife with you?" and the answer, "Yes." It does not seem material which it was, or that he should acknowledge the woman to be his wife, for it is a thing he would almost certainly do whether she was his wife or not, in order to the better reception of both of them by those among whom he was proposing to settle, and the more so as the woman was about to become a mother, for, as *Mrs. Morgan* says, a child (the present plaintiff) was born there shortly afterwards. The evidence leads me to think that *Obadiah* and *Cordelia* came first to York, in or about 1831, and went in the Spring of 1832 and

1877. settled in Etobicoke, first on a farm rented of one
Thompson.

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The next circumstance is, the baptism of the child as the child of *Obadiah* and *Cordelia* in the Methodist Episcopal Church, in York, by *Samuel H. Brown*, a preacher of that denomination, himself a coloured man. *Obadiah* and *Cordelia* were both present, as were also several others. *Brown* kept no record of the baptism: thinks it was about the year 1833, or 4, or 5.

Wesley Coates, a coloured man, knew them before they went to Etobicoke, says they stayed in York but a short time before they went to Etobicoke, and lived together in York, and passed as man and wife. They lived together in the same way in Etobicoke for about three years, when they separated. *Eliza* the plaintiff, was the only child born to them. Before they separated *Cordelia* was in the habit of coming into town and working—bringing her child with her; sometimes, as I gather, in service, and sometimes as a washerwoman; working during the summer on the farm in Etobicoke. Some of the witnesses speak of his using her ill, and of her complaining of it to others; and to the plaintiff she expressed her regret that she had not left him at the first and taken with her a sum of money, \$800, which they said they brought with them from the United States. Before they separated they appear to have been taken by some of the neighbors to be husband and wife, but not by all, for *Obadiah* spoke of *Cordelia* to a Mr. *Death*, father of a witness of that name, as a woman who lived with him. The witness says, *Obadiah* spoke of her by the name of *Cordelia*, not Mrs. *Henderson*, or his wife, and about a year before she left gave a narrative of his leaving the place where he was living in the United States; of her following him; of his trying to give her the slip; and of her joining him again; and he declared to Mr. *Thompson*, another witness, that *Cordelia* was not and never would be his wife.

When *Cordelia* left him, which was about the year

Judgment.

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1835, she and a coloured man named *Towns* lived together in York as man and wife. They were reputed to be so, and to have been married; she was addressed as Mrs. *Towns*. The plaintiff herself gives evidence of this, and says she did not think it strange, says her mother went by the name of Mrs. *Towns* as long as she can remember; that she has herself been called *Towns*, and has called herself so. Her mother died in 1860; her father in 1865.

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Henderson
Weis.

After *Cordelia* had left, and shortly afterwards, *Obadiah* and a white woman lived together for about two years; this was followed by his living with another white woman, and while living with her that occurred which was spoken of by the woman herself as a marriage with *Obadiah*. *Obadiah* himself said afterwards that they were married. This woman died in *Obadiah's* house, and shortly afterwards he married a woman named *Johanna*, who was a witness in the cause. This must have occurred about 1856-57, consequently some years before the death of *Cordelia*.

Judgment.

The plaintiff herself during her earlier years was living in service, or as one of the family of *Towns*, and her mother. She relates, one occasion when she was a "big girl" going out to Etobicoke to her father's place, her mother going out with her to shew her the way, and this being the first time she recollects being there.

Morgan Coates, a witness to whose evidence I have already referred, speaks of conversations that he had with *Obadiah* some time after *Cordelia* had left him. *Obadiah* spoke of her kindly, and as the witness says spoke of her "as his wife." The terms in which he spoke of her were peculiar; it was as a smart, clean woman, and he blamed himself for the separation. The witness asked him about a woman *Mary*, that he was living with, and told him it was reported that he had married her. This he denied, saying that she was only his housekeeper. There are one or two things to be observed upon this: *Obadiah*, the witness says, spoke of *Cordelia* "as his

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wife," and he says he did not say that she was not his wife. But on the other hand, he did not say that she was his wife, and when speaking of the report that he was married to the woman with whom he was living, he did not add to his bare denial that it could not be, for he was already married to *Cordelia*. Further, at the date of these conversations *Cordelia* was cohabiting with *Towns*. All that *Obadiah* said (putting aside the witness's language, for it is his language that *Obadiah* spoke of *Cordelia* "as his wife,") was more like the terms in which a man would speak of a mistress who had left him, than of a wife who had deserted him, and had formed an adulterous connection with another man. But assuming that he did speak of *Cordelia* to *Coates* as his wife it amounts only to this, that to him he spoke of her as his wife, while to others he spoke of her as only a woman living with him. *Coates* says that *Obadiah* spoke to him of his good intentions on behalf of his daughter, the plaintiff. I do not see that this adds much, if any weight to her case; for men are often affectionately attached to their natural children, and this daughter appears to be the only child he had by any of the women with whom he had connexion. If he had made some provision for her he would have done no more than his duty, but he put off, with an excuse, *Coates's* suggestion that he should give her something. He seems to have been a bad and selfish man.

Judgment.

The plaintiff in this case must rely upon the marriage of her parents being established by habit and repute. The case appears to me to be a weak one. It is possible certainly that the plaintiff's mother, if a married woman, might have left her husband on account of ill treatment after some three or four years' cohabitation, and have lived with another man as his wife for a number of years, bearing his name and having children by him, and it is possible that the father, if a married man, might have lived with other women, as he did, marrying one of them, perhaps two of them, one after

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the death of the other, while he had a wife, *Cordelia*, living away from him; but it was a habit and course of life on the part of each of them in strong disaffirmance of the marital tie existing between them. It consists rather with the connection between them being from the first illicit, lasting until disinclination on one side or both and harsh treatment on the part of the man induced a separation, followed on the part of each by illicit connection probably,—certainly illicit on the part of the man, and if not illicit on the part of the woman with the man *Towns*, it makes the case stronger against the fact of marriage with *Obadiah*, as by a marriage with *Towns*, she would, if married to *Obadiah*, commit bigamy, and so *Obadiah* committed bigamy by his subsequent marriage or marriages during the life of *Cordelia*, if married to her.

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v.
Weis.

It is scarcely an answer to say that the marriage tie sits lightly upon such people, that they care not for it. Such a feeling may account as well for an illicit connection without marriage as for an illicit connection after marriage.

Then as to the repute that they were husband and wife. During the short time that they lived in York before going to Etobicoke, they appear to have been reputed to be husband and wife. They would naturally represent themselves to be so in order to their being better received among people of their own colour, with whom they appear to have associated. In Etobicoke the neighborhood was then very sparsely settled. What evidence we have is scarcely that of general repute that they were husband and wife. *Obadiah* spoke of her by her Christian name *Cordelia*, or as his woman, not as his wife or as Mrs. *Henderson*. I am aware that it is the habit of some married men to speak of their wives as their women, without meaning any disrespect; but I think they also use the more proper designation wife or Mrs.—, their own surnames. Some may in a small neighborhood, speak of their wives by their Christian name, but the witnesses seem to have thought it singular.

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 Henderson
 v.
 Wels.

Two witnesses are called from Etobicoke, both of them by the defendants, and both speak of statements by *Obadiah* that *Cordelia* was not his wife; he so stated to the father of the witness *Death*, and to the husband of *Mary Thompson*, and this before *Cordelia* left him. This evidence is clearly admissible upon the question of repute. The only evidence of repute by neighbors in favor of marriage is that of Mrs. *Thompson*, who says that when *Eliza*, the plaintiff, was born she supposed her parents to be man and wife. She does not say, nor does any one, that they were generally so reputed in the neighborhood, and it was a year before she left that *Obadiah* gave to Mrs. *Thompson's* husband the narrative to which I have referred. The witness *Death* himself gave practical proof of his own opinion in the matter when, upon his purchase from *Obadiah* of his farm, for which he paid in cash \$1,600 he did not require the dower to be barred. This was, to be sure, in 1856, when her adulterous connection with *Towns* (if married to *Obadiah*) would have forfeited her dower unless followed by reconciliation, but *Obadiah* represented himself as not married, and *Death* speaks as believing him.

Judgment.

I find no statement on the part of *Cordelia* herself, one way or the other. There is indeed her regret expressed to her daughter that she had not, when she had the opportunity, gone off with the money, with the keeping of which he had entrusted her, a sentiment that consorts rather with her being his mistress than his wife. The only other evidence, besides that of *Death* and Mrs. *Thompson* from Etobicoke, is that of *Hannah Morgan*, and she having left the neighbourhood so early as she did would know almost nothing on the question of repute.

It is to be borne in mind that all these—conduct, habit, repute—are no more than items of evidence as to a fact, that fact being marriage, they do not of course constitute marriage.

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In *Cunningham v. Cunningham* (a), there had been clearly an illicit connection certainly before any marriage. This of course made it more difficult to establish marriage by repute. But after the illicit connection there was a living together as man and wife for ten years, and until the death of the woman; a cohabitation which, apart from the first illicit connection, would have been sufficient under the law of Scotland, if not of England, to afford a presumption of marriage. The observations of Lord *Eldon* were founded mainly upon that circumstance. Those of Lord *Redesdale* were more general: (b)

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v.
Wels.

"In every country marriage was a contract, and every contract was a fact to be proved by positive evidence of the fact, or by other evidence from which the fact might be presumed. By the law of Scotland, cohabitation with habit and repute, was presumptive evidence of marriage, and it was, more or less, in all countries; and so it had been declared in Statute 1503 ch. 77; which at the same time proved that the presumption might be refuted by contrary evidence. There must be such a cohabitation as to induce persons to form the opinion that the parties were married. The cohabitation by itself was nothing at all here, as it was known to have been in its origin illicit. Where that was not known, the presumption was in favour of marriage, as it was not to be presumed that the parties would live in such a way unless they had formed that contract: but the evidence as to that presumption must rest on repute. * * * The question then rested on repute, and the parties must be reputed and *holden* to be married; it must not be an opinion of *A.* in contradiction to an opinion of *B.*, and of *C.* in opposition to *D.*: it must be founded not on singular, but on general opinion. That species of repute which consisted in *A.* *B.* and *C.* thinking one way, *D.* *E.* and *F.* another way, was no evidence on such a subject. It is true the evidence here was extremely contradictory; but in such cases he had always understood that they ought to look at what were the collateral circumstances, in which there could be no error; and which were not liable to that impression, one way or the other, to which witnesses were often subject."

Judgment.

(a) 2 Dow, 482.

(b) at p. 510.

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Weis.

Campbell v. Campbell (a), The *Breadalbane Case* established that notwithstanding the cohabitation commenced in illicit intercourse, a marriage may be established in Scotland by subsequent habit and repute. It would no doubt be more difficult to establish it under the like circumstances in England.

In *Lyle v. Ellwood (b)*, Sir *Thomas Hall* determined that notwithstanding the evidence of repute be of divided repute, the fact of marriage may be presumed from other circumstances. There is no doubt that in any country—in England and in Canada for example—where a woman upon her marriage is ordinarily furnished with some writing evidencing the fact of marriage, there are more difficulties in proving the fact, by repute only, than in countries like Scotland where less is required to constitute the contract of marriage.

Judgment.

I should assume the law and practice to be the same where these people came from, as with us, the contrary not being proved. In that case *Cordelia* should have had some written evidence of her marriage, and she would naturally preserve it with religious care for the sake of her daughter, and probably place it in the hands of her daughter when she became old enough to take care of it and understand its value. We find nothing of the kind; we do not even find that she ever declared to her daughter that she had been married to her father.

It is not necessary to say how the case would have stood under different circumstances, *e. g.*, if *Obadiah* had by his silence and conduct left his neighbors in the belief that he and *Cordelia* were husband and wife, so that the repute would be that they were so, and if they had lived together until separated by death. As it was, the repute was not uniform or even general except for a short time, and the conduct of both parties was such as in my judgment to outweigh what little repute there was at one time in favour of marriage. There is so much to

(a) 1 Sch. Ap. 152.

(b) L. R. 19 Eq. 93.

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rebut the presumption that would arise from the early period of their cohabitation that I cannot upon the whole case presume in favour of the fact of marriage.

I have examined the cases at common law to which I have been referred. They are cases in which a *prima facie* case, sometimes a slight one, has been allowed to go to the jury where the defendant was a stranger, having himself no claim of right, and offering no evidence. They do not apply to a case where a title, though it be an infirm one, is shewn by the defendants, who may, without acting vexatiously, put the plaintiff upon proof of her alleged heirship.

The plaintiff's bill must be dismissed with costs.

SOLICITORS.—*Morphy, Morphy, and Winchester*, for the plaintiff. *Bethune, Osler, and Moss*, agents for *Scane and Houston*, Chatham, for the defendants.

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Henderson
v.
Wels.

MURPHY V. MURPHY.

Will—Dower—Election by widow.

The testator devised as follows: "To my beloved wife *A. M.* I give and devise a full and sufficient support for her natural life; or in case of any disagreement between her and other members of the family I give and bequeath the north part of my house, with an annuity of eighty dollars in cash, to be paid half-yearly. I give and bequeath to her also the use of the well, to which she must have free access without any hindrance whatever. I give and bequeath also to my beloved wife all the furniture in the north part of the house."

Held, that this had not the effect of putting the widow to elect between her dower and the provision made for her by the will; and that she was entitled to an inquiry as to the sufficiency of the estate to allow her the bequests in her favour, as also her dower; as in the case of *Lapp v. Lapp*, ante vol. xvi., p. 159.

The facts of this case, which came on for hearing at the Spring Sittings of 1877 in Toronto, sufficiently appear in the head-note and judgment. Statement.

1877.

Murphy
v.
Murphy.

Mr. *M. McCarthy*, and Mr. *Moss*, for the plaintiff.

Mr. *J. A. Boyd*, Q.C., for defendant *John Murphy*.

Mr. *Hoskin*, Q.C., for the infant defendants.

Judgment.

Sept. 12th.

SPRAGGE, C.—The short point argued in this case is, whether the will of the late *Robert Murphy* sufficiently manifests, upon the face of it, an intention on the part of the testator that the provision therein made for his widow should be in lieu of dower. The law may be stated thus, that whether the provision made by the will be given out of the particular estate in which she is entitled to dower, or out of that estate amongst other property, she will be entitled also to her dower, unless in the first case the estate is insufficient to answer the provisions made by the will and the widow's dower, or unless upon the whole will such an inconsistency appears, between the provisions of it and the right to dower, as to make the intention of the testator manifest that she was not to have the provision made by the will and also her dower. Lord *Redesdale* says in *Birmingham v. Kirwan* (a), that the intent to exclude by voluntary gift must be demonstrated either by express words or by clear and manifest implication. "If," he says, "there be anything ambiguous or doubtful, if the Court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported."

In the will that is before me the testator after directing payment of his debts and funeral expences, disposed of "the residue of (his) estate that shall not be required" for that purpose, and makes a provision for his wife in these terms; "To my beloved wife, *Ann Murphy*, I give and devise a full and sufficient support for her natural life or; in, case of any disagreement between her and

(a) 2 S. & L. 452.

other members of the family I give and bequeath the north half of my house with an annuity of eighty dollars in cash to be paid half yearly. I give and bequeath to her also the use of the well, to which she must have free access without any hindrance whatever. I give and bequeath also to my beloved wife all the furniture in the north part of the house." 1877.

Murphy
v.
Murphy.

Then follow pecuniary bequests and devises of real estate. It is alleged, and not denied, that disagreements have arisen between the widow and other members of the family, and she now claims the specific provision made for her by the will and also her dower. It is asked that a reference be directed such as was directed in *Lapp v. Lapp*, and this is assented to on behalf of the infants, but opposed by the defendant, *John Murphy*, who contends that she must be put to her election.

Most of the authorities bearing upon this question have been referred to in other cases that have been before this Court. I purpose only to refer to two or three that bear most directly upon the provision made by the will in this case. Judgment.

The question arises upon the devise, which upon the construction of the clause I take to be for life, of "the north half of my house." If this devise had been to a third person and it were to be gathered from the will, as I certainly think it is from this will, that the testator contemplated for such third person the personal use, occupation, and enjoyment of the house or half house devised, then it should probably be held that it would be inconsistent with the widow's right to dower out of that house. That was the case in *Miall v. Brain (a)*; but I gather from the language of Sir *John Leach* in that case that he would have held otherwise if the devise had been to the wife instead of, as it was, to the daughter of the testator, for he says that an intention to exclude the wife from dower "is not to be implied either from

(a) 4 Mad. 124.

1877. the gift of particular messuages and hereditaments to the wife for her life, or from the annuity provided for her.”

Murphy
v.
Murphy.

In the leading case of *Lawrence v. Lawrence*, reported in 2 Vern. (a), the testator devised a part of his real estate and an annuity to his widow. By the report in appeal (b) it appears that what he devised to her was the manor of Sherrington and the “mansion house where he lived,” and other lands of a certain annual value. The ultimate decision in the Lords was, that the widow was not put to her election. I refer to this case particularly because the natural inference from the will is, that the testator contemplated a personal use, occupation, and enjoyment by his widow of the mansion house devised, as in *Miall v. Brain* was the case in respect of the house devised to the daughter; and still in the case of the house devised to the wife, she was held to be not put to her election. *Lawrence v. Lawrence* is not questioned to be law, so far as I have seen, down to the present time, and really governs this case.

Judgment.

In *Birmingham v. Kirwan* (c) there was a devise to trustees for the benefit of the wife of what he calls in his will “my demesne together with my house, offices, and gardens.” The residue of his lands and his personal estate he devised and bequeathed otherwise. The devise to the wife was at an annual rental with a provision as to keeping in repair and against letting. Lord *Redesdale* held that these terms indicated an intention on the part of the testator that his widow should not have this provision and also her dower, and he points out how, in his view, a right to dower could not consist with that provision in the will. He says: “If she brought a writ of dower against the trustees as devisees in respect of the house and demesne, and was to have a third part set out to her, they could not execute the trust reposed in

(a) 365.

(b) 3 Bro. P. C. 493.

(c) 2 S. & L. 444.

them, of permitting her to enjoy the whole under the will, one third being recovered from them; nor could they reserve an acreable rent on the whole, and of the rent to be reserved she could not have dower: so that she, admitting the right of the trustees to the whole, (which she must do for the purpose of having the devise made to her under the will) must yet dispute their title as to one third, if she claims dower of the house and demesne. If she had entered on the whole of the house and demesne under a lease from the trustees, before suing her writ of dower, she must have demanded dower against her own title, and avoided the lease as to one third."

Lawrence v. Lawrence was cited in the above case, and is not questioned. Lord *Redesdale* seems to have treated the case before him as an exceptional one upon the grounds explained by him to which I have referred. He held the widow not excluded of her right to dower in the residue of the lands devised.

In the case before me I must hold the widow not put to her election by the terms of the will. There will be an inquiry, as was directed in *Lapp v. Lapp*.

SOLICITORS,—*M. McCarthy*, for the plaintiff. *Blake, Kerr, and Boyd*; and *McCarthy, Hoskin, Plumb, and Creelman*, for the defendants.

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Murphy
v.
Murphy.

Judgment.

1877.

THE CORPORATION OF THE TOWNSHIP OF WALLACE V.
THE GREAT WESTERN RAILWAY COMPANY AND
WELLINGTON, GREY, AND BRUCE RAILWAY COM-
PANY.

*Railway company—Covenant to keep a station—Specific performance—
Lessee of railway.*

A railway company covenanted with a municipal corporation to erect, keep, and maintain a permanent freight and passenger station at a village named. *Held*, that the erection of buildings, without providing a station master, ticket office, baggage master, or other servants to receive or forward goods, was not a compliance with the covenant.

After entering into such a covenant, the railway company leased the road to another railway company for 1,000 years, and the latter company agreed to equip, maintain, and work the line so leased.

Held, that the covenant with the municipality was binding on the latter corporation, and that the municipality was entitled to a specific performance of the covenant as to the station.

Statement. The bill in this case set forth, that in 1871 *The Wellington, Grey, and Bruce R. W. Co.* being about to construct a portion of their railway, under the authority of the statutes in that behalf, through parts of the counties of Perth, Bruce, and Huron, called and known as the extension of the Wellington, Grey, and Bruce Railway through the northern portions of those counties—the plaintiffs, in order to aid the company in such undertaking, agreed to advance them a bonus of \$10,000, a by-law for which purpose was duly submitted to, voted on and carried by the ratepayers and finally passed by the Municipal Council of the plaintiffs, on the 23rd of September, 1871; that a principal inducement for such voting on and carrying and finally passing such by-law was an undertaking and promise previously given and made by and on behalf of the defendants *The Wellington, Grey, and Bruce R. W. Co.*, that in the construction of the said extension, and as part thereof, they would erect and maintain a permanent passenger and freight station at the village of Gowanstown, in the municipality of the plaintiffs, near the south-westerly angle of lot 24, in the

fifth concession thereof; and one of the stipulations and conditions of the said by-law was, that before the Reeve should issue the debentures under said by-law, the defendants *The Wellington, Grey, and Bruce R. W. Co.*, should furnish an agreement under their corporate seal, agreeing that the said extension should branch off from their main line at the station then erected on said main line in the municipality of the plaintiffs, and proceed to the village of Listowell, with a permanent freight and passenger station at Gowanstown, situate within a distance of six chains of the above mentioned point; which agreement was subsequently, and on the 17th of May, 1872, duly executed under the corporate seal of the said railway company, whereby the company covenanted and agreed to erect, keep, and maintain, a permanent freight and passenger station, at the village of Gowanstown, to be erected at the place above mentioned, and providing that in the event of there being any natural or engineering difficulties to prevent its being so placed, then at a distance of twelve and a half chains from the above mentioned angle of the said lot 24. That the said agreement having been duly executed and delivered to the plaintiffs, they, in pursuance of the said by-law, issued and delivered to *The Wellington, Grey, and Bruce R. W. Co.* the debentures for \$10,000; and the said railway company, in pursuance and part performance of their said agreement, did erect a passenger and freight station buildings at Gowanstown, and the same were duly kept open and maintained for such freight and passenger station, until the time that they leased and transferred to their co-defendants *The Great Western R. W. Co.*, their line of railway, and the right and power to run trains over the same; and that they, the last named defendants, had assumed the management and control of the said railway, and exercised the powers and rights acquired by them under the said lease and transfer, and in or about the month of May, 1875, discontinued the proper use of the said station at Gowanstown: that

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Statement.

1877. the agent at such station had been withdrawn, and the station buildings closed up; the defendants refusing to receive freight at, or send or ship it from such station, or to receive freight at other stations for or deliver freight at the said station; that freight trains did not stop at the station, and although occasionally passenger trains did draw up, passengers were unable to procure tickets at such station, and no agent or other official was stationed there from whom tickets for other places along the line, or information regarding the running of trains could be obtained.

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The bill further alleged that but for the said agreement by *The Wellington, Grey, and Bruce R. W. Co.*, to keep and maintain such station at Gowanstown, the plaintiffs would not have submitted or passed the said by-law, nor would the ratepayers have confirmed the same, nor would the plaintiffs have issued the debentures, and that through the failure of the defendants to perform and carry out the agreement so entered into with the plaintiffs in good faith the ratepayers and inhabitants of the said municipality and the public generally were put to much inconvenience and loss.

Statement.

The bill prayed, amongst other things, that the defendants might be ordered to carry out and perform the said agreement, keep and maintain a permanent freight and passenger station, according to the true intent and meaning of the said agreement; and for an account of the damage sustained by the plaintiffs.

The defendants *The Great Western R. W. Co.*, answered, relying principally upon the defence of want of notice of the alleged agreement between their co-defendants and the plaintiffs.

The Wellington, Grey, and Bruce R. W. Co. demurred for want of equity.

The cause came on for the examination of witnesses and hearing before the Chancellor, at the sittings of the Court at Guelph, in the spring of 1876, when the evidence was taken, and the argument of the case adjourned to Toronto.

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Mr. Moss, for the plaintiffs. The merely putting up the buildings necessary for the purposes of the station was not a compliance with the agreement entered into between the parties. This road has been run by the Great Western Railway Company ever since it was first used, *The Wellington, Grey, and Bruce R. W. Co.* never really ran it; and the fact that the *Great Western Railway Company* opened an office there shews what their understanding of the agreement was; and the closing of the office and removal of the station must have been productive of very great inconvenience to the travelling portion of the community; whilst the inconvenience caused by the non-receipt and delivery of freight at the station is felt by a large portion of the inhabitants generally. The plaintiffs here insist that notice is sufficiently established against *The Great Western Railway Company*, if it were necessary to prove notice against them; this, however, counsel contended was not necessary, as the company must take the benefits of the arrangement entered into with these plaintiffs *cum onere*.

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Argument.

Mr. Boyd, Q.C., and Mr. Barker, for the defendants, cited *Feilden v. Slater (a)*, *Bowes v. Law (b)*, and *Attorney-General v. Boulton (c)*, on the question of the demurrer by *The Wellington, Grey and Bruce R. W. Co.* The bill avers notice by *The Great Western R. W. Co.* of the arrangement with the plaintiffs; not that *The Wellington, Grey, and Bruce R. W. Co.* had omitted to notify the other defendants thereof, and by reason thereof that the plaintiffs were damnified, and on that ground claimed relief against them—that being the only ground upon which it could be contended for a moment that the demurring defendants were necessary parties. The case as against *The Great Western R. W. Co.* is one for damages rather than specific performance; therefore the contract must be strictly construed: *Car-*

(a) L. R. 7 Eq. 523.

(b) L. R. 9 Eq. 636.

(c) 20 Gr. 402.

1877. *roll v. Casemore (a)*, *Wilson v. The Furrer R. W. Co. (b)*, *Great Western R. W. Co. v. Rous (c)*, *Pearce v. Watts (d)*. Counsel also contended that *The Great Western R. W. Co.* in accepting a lease or transfer of the road did not thereby become bound by and subject to all the contracts and liabilities of *The Wellington, Grey, and Bruce R. W. Co.* The mode of management at this station cannot be said to be a merely capricious one, as several other stations on the line are worked in a similar manner. The maintenance of an office at the stations of the company for the sale of tickets is merely for the convenience of the company, not of passengers; and there is certainly nothing in the agreement binding the company to do so. The agreement or covenant entered into with the plaintiffs by *The Wellington, Grey and Bruce R. W. Co.* was not such as runs with the land, thus binding the property in the hands of *The Great Western R. W. Co.* who are *bona fide* purchasers for value without notice. They also referred, amongst other cases, to *Doughty v. Bowman (e)*, *Roach v. Wadham (f)*, *Tulk v. Moxhay (g)*, *Keppell v. Bailey (h)*.

Argument.

Mr. Moss, in reply. This agreement should be now construed according to the spirit and intention of the parties entering into it at the time of so doing. Here the buildings were actually erected before *The Great Western R. W. Co.* acquired any interest in the road, the only duty devolving upon them therefore under the contract and the transfer of the road to them, was the keeping and maintaining the station at Gowanstown as a regular freight and passenger station; in this, however, it is clear they have wholly failed, and the question really resolves itself into this: are the defendants *The Great Western R. W. Co.* bound by the contract entered

(a) 20 Gr. 16.

(c) 19 W. R. 169.

(e) 11 Q. B. 444.

(g) 2 Ph. 774.

(b) L. R. 9 Chy. 279.

(d) 23 W. R. 28.

(f) 6 East 289.

(h) 2 M. & K. 517.

into by their lessors or transferors? And what the plaintiffs contend for is, that (apart from the Registry Law) lessees are affected by and with all that affects their lessors. *Feilden v. Slater*, already cited, and *Wilson v. Hart* (a), are clear authorities for this position.

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As to the demurrer put in by *The Wellington, Grey, and Bruce R. W. Co.*, he contended that the bill by the 8th, 9th, and 10th paragraphs, in effect, charges that they had committed a breach of the agreement with the plaintiffs by having transferred their road to another company which did not carry out the agreement, or even attempt to do so; and it is not shewn that it is out of the power of the demurring defendants to keep and maintain this station as a freight and passenger station. The cases referred to by the other side in the 7th and 9th volumes of the Law Reports (Equity) were not cases of covenants to do an act, there they were merely negative covenants.

Argument.

SPRAGGE, C. — The agreement set out in the 6th paragraph of the bill is admitted in the 5th paragraph of the answer of the *Great Western R. W. Co.* The allegation of the bill is that

Sept. 12th.
Judgment.

“By an agreement dated the 17th day of May, 1872, under the corporate seal of the said defendants, the *Wellington, Grey and Bruce Railway Company*, and made between the said defendants of the first part and the plaintiffs of the second part, after reciting the herein-before mentioned by-law and the stipulations and conditions therein contained with reference to the issue of the debentures thereby authorized, the defendants the *Wellington, Grey, and Bruce Railway Company* covenanted and agreed with the plaintiffs to erect, keep and maintain on the said extension a permanent freight and passage station at the said village of Gowanstown, such station to be built within a distance of six chains from the southerly angle of lot number 24, in the 5th concession of the plaintiffs' municipality, provided no natural or engineering difficulties prevented its being placed within those limits, but if the chief engineer for the time being of the

(a) L. R. 1 Chy. 468.

1877. *Great Western Railway Company* should certify that any such difficulties intervened, then within a distance of twelve and a half chains from the said angle of said lot."

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Co. et al.*

The by-law is referred to in the 5th paragraph of the bill, where it is alleged that one of the stipulations and conditions of the said by-law was "That before the Reeve of the plaintiffs' municipality should issue the debentures under the said by-law, the defendants *The Wellington, Grey, and Bruce Railway Company* should furnish an agreement under their corporate seal, agreeing that the said extension should branch off from their main line at the station then erected on the said main line in the plaintiffs' municipality, and proceed to the village of Listowell, with a permanent freight and passenger station at Gowanstown built within a distance of six chains from the south-westerly angle of lot number 24 in the said 5th concession; and it is alleged and proved that a principal inducement to the township Council to submit the by-law to the ratepayers and afterwards to pass the same, and to the ratepayers to vote for and carry the same, was, that *The Wellington, Grey, and Bruce R. W. Co.* in the construction of the extension of their line, called the Kincardine Fork, would erect and maintain a permanent passenger and freight station at the village of Gowanstown.

Judgment.

The complaint of the township is, that although such station was erected and maintained for a while by *The Great Western R. W. Co.*, it was afterwards disused. *The Great Western R. W. Co.* are lessees from *The Wellington, Grey, and Bruce R. W. Co.* of this branch line, as well as of the main line of *The Wellington, Grey, and Bruce R. W. Co.* Both companies are made defendants, and the plaintiffs ask for a decree against them, for the specific performance of the agreement made by *The Wellington, Grey, and Bruce R. W. Co.* The latter company demur. *The Great Western R. W. Co.* has put in a defence. The agreement for lease to *The Great Western R. W. Co.* is dated 23rd December, 1872.

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One ground of defence by *The Great Western R. W. Co.* is, that they are not affected by the agreement between the plaintiffs and *The Wellington, Grey, and Bruce R. W. Co.*; not having had notice of the agreement, and being in the position of purchasers for valuable consideration from *The Wellington, Grey, and Bruce R. W. Co.* They also set up that they have fulfilled the agreement by erecting buildings for the station; and they give evidence of passengers being taken up and set down there. The reason they offer for not continuing to use the buildings as a station is, that it was unprofitable. I feel no doubt that the putting up of buildings suitable for a freight and passenger station was not *per se* a performance of the agreement made with the plaintiffs to erect, keep, and maintain a permanent freight and passenger station. In all such cases the Courts look at the relative position of the parties. They consider the objects to be attained by the party contracted with, and the benefits to be derived by him from the carrying out of the contract; and they presume that such objects and such benefits were the considerations with such party for entering into the contract; and to do this is perfectly legitimate; it is only an application of the principle of construing an instrument by the light of surrounding circumstances, the Court placing itself in the position of the parties to the contract. To apply this principle to the contract before me. It is manifest beyond a question that the benefit the Council and the ratepayers expected and supposed that they were getting, was, the convenience and profit of having passengers taken up and set down, and freight carried to and from the place designated for a station; this was what they purchased and paid for, and less than this would be a mere mockery. If what is now contended for as a performance of the agreement had been put in so many words in the written contract, can it be doubted that it would have been very emphatically repudiated:—rejected as not expressing the true agreement of the parties. And very reasonably so,

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Judgment.

1877. for the mere putting up of buildings would be of little or no advantage to the general body of ratepayers.

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I feel equally clear that these buildings without a Station master, or ticket office, or baggage master, without any servant of the company for receiving or forwarding goods, is not a freight and passenger station within the meaning of the agreement; so that if *The Wellington, Grey, and Bruce R. W. Co.* had still retained in their hands the management of the railway, instead of having transferred it to *The Great Western R. W. Co.*, and this suit were against them upon their contract with the plaintiffs, I should feel no doubt of the plaintiffs' title to decree. It remains to consider whether the plaintiffs have the same rights against *The Great Western R. W. Co.*

Judgment.

With regard to the notice of *The Great Western R. W. Co.*, and the position of the company as purchasers for value. As early as June, 1869, there was an agreement between the two companies in relation to the railway then being constructed by *The Wellington, Grey, and Bruce R. W. Co.*, that company at that date agreeing to grant a lease to *The Great Western R. W. Co.*, and the latter agreeing to equip, maintain, and work the line then being constructed, "and the several sections thereof as the same should be completed and ready for traffic, upon certain terms and conditions therein mentioned." The construction of the "Kincardine Fork" was authorized by the 34 Vict. ch. 37, passed 15th February, 1871. From the agreement of 1869, and the provisions of the above Act, and from the evidence of Mr. Muir, who was the Great Western Railway Co.'s General Superintendent, I gather that it was contemplated by both companies from the time of the passing of the above Act, and probably before, that the branch or section called the Kincardine Fork was to be equipped and worked by *The Great Western R. W. Co.*, and that company would probably be aware of the bonuses given by municipalities, and of the terms upon which they

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were given. Mr. *McInnes*, spoken of in the evidence of 1877.
 Mr. *Muir*, was a director in both companies; and the agreement which is the foundation of this suit was known to him as it was to Mr. *Muir*, I think it is to be inferred, before the execution of the agreement of the 23rd of December. Mr. *Muir* refers to other directors of the company with whom he had discussions in relation to the station at Gowanstown; he names Mr. *Carling* and Mr. *McMaster*, though he does not say that he communicated to them the terms of the agreement or the by-law. Still in discussing with them as to the expenditures upon that and other stations which they wished to keep within very moderate bounds, even lower than the specifications stated, the terms of the by-law and agreement would very probably come up in the discussion; and it is to be observed that none of the gentlemen named in the evidence of Mr. *Muir* have been called by the defendants.

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It is further to be observed upon this defence that there was no duty on the part of the municipality to give notice to any one, nor was there any want of diligence on their part in having such documents as they had, and in having their agreement, in the shape in which it was. Further, in regard to this defence, it is a defence ordinarily set up, by a party who has acquired legal title, to a suit by a party having a prior equitable title, though I am not prepared to say that it can in no case be set up against a prior legal title. I doubt however if it can in such a case as this.

Judgment.

Further as to how it is set up in this case. What is denied is notice of the agreement before the execution of the lease. There is no denial of notice of the bonus given by the municipality, nor of the by-law, nor of the terms of the by-law. And further, such denial as there is is not upon oath, the answer is only under the corporate seal of the company. The oath of no officer of the company is pledged to its truth. Mr. *Price*, the then manager of the company (as stated in the evidence of the solicitor) may have had such notice as would make

1877. *the agreement binding on the company ; and I may add, I think it extremely probable that he had. I incline to think for these reasons that *The Great Western R. W. Co.* is not in a position to avail itself of this defence, and, indeed, their whole case is, in my opinion, so unmeritorious that I should not give them leave to better their pleading in this respect.*

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ern Railway
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It is contended for *The Great Western R. W. Co.* that the agreement in question is not a covenant running with the land. In the ordinary technical sense this may probably be so ; but it is another question whether it is not an agreement affecting *The Great Western R. W. Co.*, as having by assignment (for a lease for 1000 years, is virtually an assignment) the railway, its land and its franchises ; and this upon the principle that taking the benefit they take it *cum onere*. This point was a good deal discussed in the *Earl of Lindsey v. The Great Northern R. W. Co.* (a) before Lord *Hatherley*, then Vice-Chancellor. There was a contract with the promoters of a company which was applying for incorporation. Another company was also applying for incorporation. A contract was entered into between the promoters of the first named company and Lord *Lindsey*, through whose estates, though by different lines, each of the projected railways would pass, for the making and maintaining of a station, and for pecuniary compensation varying in amount according to certain contingencies. The contract *inter alia* provided for the event of the amalgamation of the two companies, the provisions in that case being, in substance, that the agreement should as far as applicable be performed by the amalgamated companies. The companies were amalgamated by Parliament, under the name of the *Great Northern R. W. Co.*, and the learned Vice-Chancellor held the amalgamated company bound to perform the agreement. He interpreted and adopted the views of Lord *Cottenham*, in the well-known

Judgment.

(a) 10 Hare 664.

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case of *Edwards v. The Grand Junction R. W. Co. (a)* 1877.

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The question in that case was, whether the defendants were bound by an agreement entered into between the promoters of their company and the trustees of certain turnpike roads. Lord *Cottenham* puts it as "An agreement of the parties who were seeking an Act of Incorporation; that, when incorporated, certain things should be done by them," and he goes on to say: "But the question is not, whether there be any binding contract at law, but whether this Court will permit the company to use their powers under the Act in direct opposition to the arrangement made with the trustees prior to the Act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities * * So here as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered." After referring to a case in which it was held that the agent of a corporation must, in order to bind the corporation, be authorized by power of attorney, he adds "But it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise affecting those to whose positions they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? The powers under the Act give them the right; but before that right was so conferred it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of the opinion that they cannot.

Judgment.

In Lord *Lindsey's* case the Vice-Chancellor refers to

(a) 1 M. & C. 650.

1877. another case in which Lord *Cottenham*, referring to *Edwards v. The Grand Junction R. W. Co.*, says, "I did not put it precisely on the contract; but what I did put it on was this, that if a party enters into an agreement by the means and operation of which a body is afterwards incorporated and brought into existence and acquires powers, I will not allow that company to exercise powers acquired through the medium of that previous contract and arrangement, without carrying that contract and arrangement into full effect."

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It must be conceded that not all the language of Lord *Cottenham* is applicable to this case, but it appears to me that the principle upon which he proceeded is applicable. The *Great Western R. W. Co.* acquired their powers in the branch road in question from the *Wellington, Grey, and Bruce R. W. Co.* They succeeded to the position of the latter company, and the latter company was affected by the equities created by their contract with the plaintiffs.

Judgment. Lord *Hatherley*, in *Lord Lindsey v. The Great Northern R. W. Co.*, carried the doctrine further than it was carried by Lord *Cottenham*, but still upon the same principle. He held a corporate body bound by an agreement not entered into by that corporate body, on the ground that it acquired the rights of another body acquired through its promoters, and with its rights succeeded to its liabilities. It is true that the *Wellington, Grey, and Bruce R. W. Co.* did not obtain its charter through the agreement which is sought to be enforced, but it obtained the means of practically carrying its charter into effect, *i.e.*, building and equipping the road, through the means of that agreement, only partially of course and to a small extent, but so it was also in the cases to which I have referred.

There is a passage in Lord *Hatherley's* judgment, again referring to *Edwards v. The Grand Junction R. W. Co.*, which is apposite to this case. "The case of *Edwards v. The Grand Junction R. W. Co.* is of im-

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portance on this point, for the very point was argued before Lord *Cottenham*, of the great hardship on the number of shareholders, who, it was said, had no notice of this agreement. One feels some difficulty in understanding how an agreement of this kind should not have been known; nor is it, I think, distinctly sworn that it was not known. It is only sworn, I think, that the positive agreement was not known; it seems to be a little difficult to understand how all this should have passed and the *Great Northern Co.* have been entirely ignorant as to what had been done with Lord *Lindsey's* property. However, I assume, for the purpose of the argument, that they did not know anything about it; and I find this observation of Lord *Cottenham*, in *Edwards v. The Grand Junction R. W. Co.*, which seems to me to be applicable. It was urged strongly by Mr. *Jacob*, that it would be the greatest possible hardship, for it was said they had subscribed, and obtained an Act of Parliament, which they supposed gave them large and ample powers; instead of which they found, that by a private agreement made by some one, of whom they knew nothing, they were restricted in those powers, and were made to subscribe to an object not so beneficial as that which they contemplated. Lord *Cottenham* says, 'It was contended for the Railway Company, that to enforce this equity would be unjust towards the shareholders of this company who had no notice of the arrangement.' To this, two answers may be made: First, that the Court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the Act. Now both those things concur here. Looking at the whole corporation, we find that the whole corporation is affected by having imported into it this large body of promoters who have entered into an agreement with the plaintiff, and that this agreement is not in any way inconsistent with the provisions of the Act."

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ern Railway
Co. et al.

Judgment.

1877. There is another aspect in which the case may be viewed. The *Wellington, Grey, and Bruce R. W. Co.*, the owners of the land and the franchise makes an agreement with the plaintiffs, an agreement affecting their land and their franchise, in this sense, that a Court of Equity would not permit them to exercise their franchise except subject to this agreement, and would enforce upon them a specific performance of their agreement: *Hood v. The North Eastern R. W. Co.* (a). I mention this because it is the best and most effectual remedy; but it was also an agreement enforceable at law. This agreement being in force, the *Wellington, Grey, and Bruce R. W. Co.* make another agreement, subsequent in point of time, with the *Great Western R. W. Co.*, transferring to them with their franchise this land which was the subject of the contract with the plaintiffs. The agreement with the plaintiffs was the older agreement—the prior right was with the plaintiffs. Can a party with whom a subsequent agreement is made override this prior right? or does Judgment. not the maxim *qui prior est tempore potior est jure* apply. A similar instance of the application of the rule is, where a mortgagor leases to a tenant (this apart from the registry laws) without the privity of the mortgagee, the mortgagee in such case has priority and may bring ejectment without notice to the tenant. Here the *Great Western R. W. Co.* claim to be lessees. (Whether lessees or transferees in perpetuity can make no difference.) The plaintiffs have a charge in respect to a portion of what is transferred; and the transferees by a puisne title can, I apprehend, take only subject to that charge, the plaintiffs having the prior right.

I would observe with regard to these transfers from one railway company to another, of which there are not a few instances in Canada, that grievous injustice to municipalities and to individuals would be the probable consequence of allowing transferee railway companies to

(a) L. R. 8 Eq. 566.

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set up that they are purchasers for value without notice; and on that ground repudiate the agreements entered into by the transferors. I take it to be the duty of the transferees to exercise the utmost diligence to ascertain the relative positions of the transferors, and the municipalities and private land owners through which the line of the railway passes. The general office of the transferors should, and I may assume does as a general rule, contain a record of all agreements made with municipalities and landowners; and I assume that no treaty for transfers would be consummated without the transferees having access to all such records. I think it would be no hardship to hold the transferees bound by all that would appear upon an examination of such records. If they examined them they would have notice; if they failed to examine them, they should, in my opinion, be held to have been wilfully blind. In the case before me a copy of the agreement in question was in the office of the transferors, and open to the inspection of the transferees, for it was there seen by Mr. *Muir*. I think their defence in this case does, and ought to fail.

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Great Western
Railway
Co. et al.

Judgment.

In my opinion the plaintiffs are entitled to a decree against the *Great Western R. W. Co.*, in the terms, *mutatis mutandis*, of the decree in *Hood v. The North Eastern R. W. Co.*, minutes of which will be found at the end of the report of the case. The decree will be with costs.

The bill must be dismissed as against the *Wellington, Grey, and Bruce R. W. Co.*, or rather their demurrer must be allowed. Looking at the allegations in the bill, I do not see why they are made parties, and they are entitled to their costs.

SOLICITORS.—*Bethune, Osler, and Moss*, for the plaintiffs. *S. Barker*, for the defendants.

1877.

PATON V. HICKSON.

Will, construction of—Probate—Executors—Forfeiture of bequest.

A testator devised his estate to *W. P.*, a resident of Scotland, and to two others, residents of Canada, in trust to convert and divide the same; and appointed the same parties executors of his will. To *W. P.* he bequeathed \$5,500, and to the two others \$1,500, and \$500 respectively over and above any expense to be incurred in the nature of travelling expenses or expenses incident thereto, and generally in the management of his estate. For the convenience of the other executors, *W. P.* renounced probate of the will.

Held, that by such renunciation he had forfeited the bequest in his favour.

This was a bill to obtain a construction of the will of *John Shedden*, late of the city of Toronto, Esquire, deceased, whereby, amongst other devises and bequests, the testator proceeded as follows:

Statement. "I bequeath to my nephew *William Huntington Paton*, at present in Sherbrooke, in the Province of Quebec, fifteen thousand dollars to be paid to him in stock held by me in the 'Paton Manufacturing Company' in Sherbrooke aforesaid, and over and above any benefit or advantage he may otherwise derive under my will. And I do also bequeath to my said nephew *William Huntington Paton*, my watch and chain and all my jewellery, as well as my guns, fishing rods, entire sporting equipment and wearing apparel. * * * And as to all the rest and residue of my estate, both real and personal, I devise the same unto *William Paton*, of Johnstone, in Renfrewshire in Scotland, Manufacturer; *Joseph Hickson*, of the city of Montreal, Esquire, and *Thomas Symington*, also of Montreal, Esquire, their heirs, executors, and administrators, respectively, according to the nature and tenor thereof, upon trust that the said *William Paton*, *Joseph Hickson*, and *Thomas Symington*, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall as soon as conveniently may sell the same either together or in parcels, and proper deeds and conveyances thereof to execute, sign, seal, and deliver, and further, to do all such assurances and acts for effectuating any such sale as they or he shall think fit. And I declare that the said *William Paton*, *Joseph Hickson*, and *Thomas Symington*

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shall hold the proceeds of such sale, or any securities now existing, in trust for the following purposes: To divide the same into three equal parts, and shall give one-third part to my sister *Mary*, wife of *William Paton*, or in the event of her death to her children, to be divided equally among them. * * * And I appoint the said *William Paton*, *Joseph Hickson*, and *Thomas Symington* executors of this my will; and to the said *William Paton* I bequeath the sum of five thousand and five hundred dollars, and to the said *Joseph Hickson* I bequeath the sum of five hundred dollars, and to the said *Thomas Symington* I bequeath the sum of one thousand and five hundred dollars over and above any expenses to be incurred in the nature of travelling expenses incident thereto, and generally in the management of my estate."

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Hickson.

For the convenience of the other executors in carrying on the affairs of the estate the plaintiff renounced probate of the will, and afterwards claimed to be paid the amount of the legacy in his favour. The acting executors having been advised that it was doubtful if the plaintiff was, under the circumstances, entitled to be paid this legacy, declined doing so without the sanction of the Court, and, thereupon, the present bill was filed. The cause came on by way of motion for decree.

Mr. *Moss*, for the plaintiff. The inequality of the legacies to the three executors named, and the marked benefits given by the testator to the family of the plaintiff, indicate clearly a strong personal feeling of friendship towards him, arising, no doubt, from family relations, and afford a good reason for the great inequality of the bequests; and would seem to indicate conclusively that the trouble consequent upon the discharge of the duties of executor was not the sole motive for giving him the legacy of \$5,500. And even if it were partly the motive the other considerations which influenced the testator will be sufficient to support the whole of the gift, as the will does not supply any grounds or basis for dividing notwithstanding the failure of such part.

Argument.

1877. In such a case, there is, at most, only a presumption that the gift is to him as executor, and this may be rebutted, which it is submitted is done, when the relationship between the parties is borne in mind.

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By law, now, an executor being entitled to compensation for his services, as such, makes it clearer in favour of the plaintiff's right. Formerly the reason for giving legacies to executors was with a view to recompense them for their time and trouble, and thus form an inducement for them to act. This ground no longer exists, as the Court has power to fix the remuneration to which an executor is properly entitled; and *Denison v. Denison* (a), shews that an executor may be allowed a compensation under the statute even when a legacy has been given.

In addition to the cases mentioned in the judgment, *Burgess v. Burgess* (b), *Re Denby* (c), were referred to.

Mr. *Rusk Harris*, for the executors.

Mr. *Bain*, for the defendants, *Jane* and *Margaret Paton*.

Pigot v. Green (d), *Griffith v. Pruett* (e), were referred to.

Sept. 12.
Judgment.

SPRAGGE, C.—The testator, by his will dated 1st April, 1870, describes himself as of the city of Toronto, in the province of Ontario. After some pecuniary and some specific legacies, his will proceeds to “devise the residue of his estate, real and personal,” unto *William Paton*, of Johnstone, in Renfrewshire in Scotland, manufacturer, *Joseph Hickson*, of the city of Montreal, Esquire; and *Thomas Symington*, also of Montreal, Esquire, in trust to convert the same, and to divide it into three equal

(a) 17 Gr. 806.

(c) 3 D. F. & J. 350.

(e) 11 Sim. 202.

(b) 1 Coll. 367.

(d) 6 Sim. 72.

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parts, "to give one third part to my sister *Mary*, wife of *William Paton*, or, in the event of her death, to her children." Two other third parts were given in trust for the other two sisters of the testator, or their children.

The clause of appointment of executors is as follows: "And I appoint the said *William Paton*, *Joseph Hickson*, and *Thomas Symington*, executors of this my will, and to the said *William Paton* I bequeath the sum of \$5,500, and to the said *Joseph Hickson* I bequeath the sum of \$500, and to the said *Thomas Symington* I bequeath the sum of \$1,500, over and above any expenses to be incurred in the nature of travelling expenses, or expenses incidental thereto, and generally in the management of my estate."

William Paton renounced probate. *Hickson* and *Symington* proved the will. This suit is for payment of the legacy of \$5,500; the executors who proved and *Jane* and *Margaret Paton*, two of the children of *Janet Paton*, deceased, are made defendants; and the question is raised whether *William Paton*, notwithstanding Judgment.

Reed v. Devaynes (a), *Stackpoole v. Howell* (b), *Dix v. Reed* (c), and other cases, among them the late case of *Jervis v. Lawrence* (d), before Sir *Wm. James* when Vice Chancellor, establish the rule thus stated in Mr. Justice *Williams's* book on *Executors* (e): "The presumption is that a legacy to a person appointed executor is given to him in that character; and it is on him to shew something in the nature of the legacy, or other circumstances arising on the will, to repel that presumption." Upon the face of the will in this case, there is nothing to rebut the presumption, unless it be the inequality in the amounts bequeathed to the several executors.

In *Cockerell v. Barber* (f), before Sir *John Leach*,

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(a) 2 Cox 285.

(c) 1 S. & S. 239.

(e) 6 Ed. p. 1190,

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(b) 13 Ves. 420.

(d) L. R., 3 Eq. 345.

(f) 2 Russ. 535.

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and on Appeal before Lord *Eldon* the case was taken out of the general rule, partly, perhaps, upon that ground, but chiefly, as I understand the case, from the terms in which the legacy was given: "I give and bequeath unto my friend and partner, *John Palmer*, of Calcutta, aforesaid, Esquier, the sum of 100,000 sicca rupees, to be paid to him after my death as soon as conveniently may be." Upon this Sir *John Leach* observes: "Now, because Mr. *Palmer* is afterwards named one of the executors, I must, according to the argument for the defendant, assume that this gift is given to him expressly in that character. Such a construction is, to say the least, extremely inconsistent with the expressions of the testator, who calls Mr. *Palmer* 'my friend and partner,'—classes him among his friends and gives him this legacy without any reference in words to the character of executor." Upon the inequality in amount of legacies to executors, the same learned Judge says: "Gifts to persons simply in their character of executor would naturally be equal, because the trouble is equal to all," a remark, I may observe, that only applies *where the trouble is equal to all*. When the trouble would be unequal, would be greater to one having the larger legacy, it might, and probably would, indicate an intention on the part of the testator to give larger compensation for greater trouble, and perhaps, greater responsibility. There is nothing on the face of this will indicating the mind of the testator to be to give to *Wm. Paton* this legacy otherwise than as executor, unless it be that it is larger in amount than the legacies to the other executors; and a probable and sufficient reason for its being larger appears on the face of the will itself, where *Paton* is described as a manufacturer, residing in Renfrewshire in Scotland. What would be ample compensation to a person residing in Montreal, within a few hours' journey of Toronto, or Sherbrooke, would probably not be an approach to compensation to a manufacturer residing in Renfrewshire.

Judgment.

I understand from counsel that the plaintiff would

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decline to accept the trust upon the terms of the legacy being paid to him. This helps to throw light upon the will. It leads to the belief that the testator thought this legacy not too much to purchase the services of the plaintiff as an executor and trustee. The plaintiff himself holds it to be too little. Hence the inequality: or there is, at any rate, sufficient in this circumstance to account for the inequality.

I do not find anything in the way of phrase, expression, or anything else, tending to shew that this legacy was by way of friendship or goodwill, or for any reason apart from the executorship. The bill alleges that the plaintiff is a brother-in-law of the testator. The answer of the beneficiaries made defendants, while admitting some allegations, does not admit this. But assuming the fact to be so, the will in that case might also be said studiously to omit naming him in that connection. When it speaks of the testator's sister *Mary*, wife of *Wm. Paton*, it does not say of the said *Wm. Paton*. There is nothing but the identity of name to lead one to Judgment. think that the executor and brother-in-law are, or may be, the same person; and this may have been done advisedly, to indicate, what indeed the language itself indicates, that the legacy to *Wm. Paton* was to him in his character of executor, and not as a connection by marriage.

If I were to hold the case of *Wm. Paton* to be an exception to the general rule, I hardly see how I could avoid holding the case of *Symington* to be also an exception, for the legacy to him is three times the amount of that to *Hickson*, and there is the absence of the reason which may have influenced the testator in regard to *Paton*—his residence in Scotland—*Hickson* and *Symington* both living in Montreal; and there would be room to argue in regard to *Hickson* that the legacies to the others not being annexed to the office, and so intended by the testator, was an indication of the intention of the testator to the same effect as to all.

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I should not have hesitated to hold *Paton* not entitled, under the circumstances, to the legacy claimed by him, but for the case of *Jervis v. Lawrence*. In that case there were separate bequests, and in different parts of the will, to the two persons named as executors: first of a leasehold house and premises in these terms, "unto and to the use of *Wm. Lawrence*, ham and tongue dealer (the now occupier of the same, and one of my trustees and executors hereinafter named), his executors," &c. After several other bequests, comes a legacy to the other executor, as follows: "I give and bequeath to *Joseph Thomas Paul* (of, &c.,) one of my trustees and executors hereinafter named, £100 for his own use and benefit." The testator appointed *Lawrence* and *Paul* executors of his will. He died on the 27th of June. *Lawrence* proved his will on 27th August, alone. On 16th September following, *Paul* died without proving it, and without renouncing probate. Sir *Wm. James* held the executors of *Paul* entitled to the legacy. He said: "The presumption that a legacy to an executor is given to him in that character may be rebutted; and it appears to me that the inequality in the subject-matter of the two gifts is sufficient in this case to rebut the presumption."

Judgment.

Cockerell v. Barber was referred to in the discussion of the case by counsel for the executors, upon the learned Vice-Chancellor asking if there was any case in which the gifts to executors being of unequal amount the circumstance of one of them not proving was held to disentitle him: the learned counsel candidly saying that the decision rather turned in that case on the expression by the testator, "my friend and partner," thus conceding rightly, I think, that *Cockerell v. Barber* was not an authority for allowing the legacy to the estate of *Paul*.

The ground upon which its allowance is placed by Sir *W. James* was, that the inequality in the subject matter of the two gifts was sufficient to rebut the presumption.

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By these words I understand it to be meant, that the gift to one executor being a house and the gift to the other a sum of money, there was a difference "in the subject matter of the two gifts," and that being so, that the presumption that the legacies were given to the executors in that character was rebutted. I need say nothing upon the case before Sir *W. James* except this, that neither the circumstances nor the *ratio decidendi* apply to this case. The ground of the decision may be sound or not sound. It is only necessary for me to say that it does not touch the case before me.

In the case of the will of this testator there is not in my judgment sufficient to rebut the ordinary presumption; so far from it, there is, I think, much in the terms of the will and in the connection in which the legacies and the appointment of executors appear in the will, coupled with the description of the different places of residence of the executors, that leads almost inevitably to the conclusion that the testator intended the legacies to the executors in that character.

I am unable to recoup Mr. *Paton* the expenses incurred by him in coming to Canada. They were not expenses incurred in the execution of the trusts of the will, with the duties of which he declined to charge himself, or with the management of the estate, in the management of which he declined to assist. I will, however, under the circumstances, and as the will raised a fair subject for discussion, dismiss the bill, without costs.

Judgment.

SOLICITORS.—*Bethune, Osler, and Moss*, for the plaintiff. *Ferguson, Bain, and Meyers*; and *Morris, Harris, and McBride*, for the defendants.

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KEITH V. KEITH.

Practice—Decree—Rehearing—Alimony—Costs—32 Vict. ch. 18.

It is too late to rehear a decree, on the ground of an improper order therein as to the payment of costs, after the parties to the suit have accepted the decree, and acted according to the provisions thereof. In answer to a bill for alimony, founded principally on the ground of desertion, the defendant alleged that he had always been, and still was, ready to receive his wife and children, and support them. At the hearing, instead of calling evidence the plaintiff agreed to accept the defendant's offer, whereupon a decree to that effect was drawn up whereby the defendant was ordered to pay full costs: and in pursuance of such decree the plaintiff returned with her children to the house of the defendant, who received them, and provided for their support. The Court, on rehearing, refused, under the circumstances, to vary the decree as to costs, although it would seem that the costs to which the plaintiff was strictly entitled, under the statute (32 Vict. ch. 18) were only the cash disbursements properly made by her solicitor. [SPRAGGE, C., dissenting.]

Statement. This was a suit for alimony, the chief ground for relief being desertion, only one instance of personal violence being charged. The defendant in his answer denied the statements of the bill and said: "I have always been ready and willing, and I am now ready and willing, and hereby offer to receive the plaintiff as my wife whenever she brings my said children back to me."

At the hearing before *Proudfoot*, V. C., the plaintiff, without calling any evidence, declared her willingness to return and live with her husband, and a decree was thereupon drawn up, whereby the husband undertook to do what he had offered to do by his answer; the plaintiff on her part agreeing to return to him with their children, and the defendant agreeing to receive and provide for them, he to pay full costs. If the plaintiff failed to return with her children, the decree gave her disbursements only.

Acting under this decree, the plaintiff did return with her children to her husband, and he received them and provided for their support. But, insisting that the only

costs he should be called upon to pay were disbursements merely, the statute (32 Vict. ch. 18) providing that "in no suit for alimony in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor," the defendant reheard the cause with a view of obtaining a change as to the payment of costs. It was objected that the parties had acted under the decree, and it was now too late for either to complain of its provisions.

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v.
Kelth.

Mr. *Boyd*, Q. C., and Mr. *W. Cassels* for the plaintiff.

Mr. *Maclennan*, Q. C., and Mr. *Ewart*, for the defendant.

SPRAGGE, C.—The bill, which is for alimony, contains one allegation of cruelty, in the way of personal violence, the chief ground, however, being desertion. The answer denies the case made by the bill, and says: "I have always been ready and willing, and I am now ready and willing, and I hereby offer to receive the plaintiff as my wife whenever she brings my said children back to me."

Judgment.

The cause was carried down to a hearing by the plaintiff, and at the hearing, without any evidence being given, the plaintiff declared her willingness to return and live with her husband, and a decree was then made, the husband undertaking to do what by his answer he had offered to do, and the wife on her part returning to him with their children, and he receiving and providing for them, he should pay full costs; if she failed to return to him with her children, the decree gives her disbursements only.

The question now is, whether the costs payable by the defendant under the circumstances are all costs; or disbursements only, under 32 Vict. ch. 18, which provides that "in no suit for alimony in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed

1877. to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor."

Keith
v.
Keith.

The position of the parties upon the cause being called on for hearing, what I may call the attitude of the parties, was that of hostility; a non-acceptance by the plaintiff of the offer made by the defendant in his answer, and a proceeding to enforce against him through the medium of the Court something different:—that for which she had prayed by her bill. The bill prays that she may be declared entitled to alimony, and that the defendant may be ordered to pay the same to her. The plaintiff declaring her willingness to return with her children and live with her husband, was an entire change of the attitude which up to that moment had been maintained by her in the suit; it was an abandonment of her position, and an acceptance of the offer made by the answer, which up to that time she had practically refused.

Judgment. It is contended for the plaintiff that the decree made is in effect a decree for alimony. I do not agree in this contention; it is wholly different from what is prayed for by the bill—a declaration that she is entitled to alimony, and an order upon her husband that he pay it to her. Further, if *Edwards v. Edwards*, reported upon rehearing in 20 *Grant* (a), was rightly decided, the Court could not in this case, upon the material before it, have made a decree for alimony, but if a decree had been asked upon that material, the Court must have dismissed the bill. In that case the bill was dismissed, and disbursements only allowed (b).

We are referred to definitions of the word "alimony." I do not think the definitions given assist the plaintiff's case, but at any rate there can be no question as to the meaning of the words "obtain a decree for alimony," they can mean only what is shortly put in *Tamlin's Law Dictionary* as the meaning of the word: "in a legal

(a) p. 392.

(b) See head note.

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sense it is taken for that allowance which a married woman sues for, and is entitled to upon separation from her husband."

I can conceive that the statute may sometimes have the effect of placing the legal advisers of a woman suing for alimony in an embarrassing position. The woman may have a good case, but still, rather than prosecute it to a decree, may be willing to accept an offer to receive her back and treat her well. The solicitor should not discourage her acceptance of such an offer, unless convinced that it could not be safely accepted, yet the law makes it his interest to discourage it, if he can rely upon his client and her witnesses proving her case at the hearing. This is, however, probably a rare case, and upon the whole the Act is a salutary one.

In this case I do not see that there is any escape from this provision of the Act as to costs; it is imperative and leaves no discretion to the Court; and there is only the short question, whether the plaintiff has, in the language of the Act, failed to obtain a decree for alimony. She has not, in my opinion, obtained such a decree, and must, I apprehend, be taken to have failed in doing so; especially as, with the material before the Court, she could not, if she had asked for it, have obtained such a decree. Indeed, from the terms of the decree itself it seems to be plain that she could not have obtained such a decree. The defendant on his part undertakes to do what he had already offered to do, while the plaintiff on her part undertakes to do what she had, so far as the Court sees, up to that time refused to do. Failing to do that her bill is dismissed with disbursements only. I confess I cannot see how this decree can with any propriety be called a decree obtained by her for alimony. It appears to me rather a *locus penitentiae* on her part, embodied in a decree. Suppose a like decree, so far as circumstances would admit, in a suit other than for alimony, the defendant would be entitled to his costs, and a dismissal in the event of non-compliance by the plaintiff

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Keith
Keith.

Judgment.

1877. would be with costs. In an alimony suit the only difference in principle is, that the plaintiff gets only disbursements, where in another suit the plaintiff would pay costs.

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Kelth.

It does not seem to me to be a serious difficulty that the defendant has, if he has, accepted the decree in the present shape. It is not a decree *by consent*, nor does it appear by whom it has been taken out. It is claimed for the plaintiff that it is a decree in her favour: if so, it would be assumed to be taken out by her. The defendant comes before us complaining of one provision in it. How has he debarred himself from making his complaint? We do not know that it has been acted upon. The party to act was the plaintiff. The plaintiff was to offer herself with their children to the defendant. Was the defendant to lock his door against them; and, unless he did so, to be taken to have acquiesced in the direction as to costs? To place him in such a dilemma would be against public policy; making a difficulty in the way of reconciliation between husband and wife. Whether the plaintiff has offered herself with her children, we do not know; but if she has, and if the defendant has received her and them, he has not in my opinion barred himself from complaining that the direction, as to costs, is erroneous. In my opinion it is erroneous, the provision of the statute being imperative.

Judgment.

It seems to be a hard case upon the plaintiff's solicitor, a case in which, under the law as it stood before the statute, which creates the difficulty, was passed, the Court would in all probability have given full costs.

I observe that the decree omits to provide for one contingency, that of the wife returning with her children to her husband, and he refusing to receive her. In that event there should be a reference to fix the amount of alimony, and in that case I agree that the defendant should be decreed to pay full costs.

Per
C., diss

Solicitor
Mowat,

BLAKE, V. C.—I do not think it necessary to consider whether the decree pronounced is such an one as the Court should have granted at the hearing. The defendant submitted to take his wife, the plaintiff, back to live with him. The Court granted costs in pronouncing this, otherwise, consent decree. In pursuance of the decree the defendant has, it is alleged, received back the plaintiff as his wife. It is impossible for the Court, after the decree has been thus acted on, to open it up. If the defendant was dissatisfied with the addition made to his consent, whereby costs were charged against him, he should have asked that the time specified should be enlarged, in order that he might appeal against the decree with which he was dissatisfied. Not having taken this course, but having changed the position of the parties by, in the meantime, receiving back his wife, I think he cannot now ask the Court to interfere with the decree, and that it must be affirmed with costs.

1877.

Keith
v.
Keith.

PROUDFOOT, V. C.—Thought that, although it might admit of question whether the decree had properly directed the defendant to pay full costs, still as the parties had accepted the decree and acted under it, it was now too late to take exception to it, and he was therefore of opinion that the decree should be affirmed with costs.

Per Curiam.—Decree affirmed with costs. [SPRAGGE, C., *dissentiente.*]

SOLICITORS.—Blake, Kerr, and Boyd, for the plaintiff.
Mowat, MacLennan, and Downey, for the defendant.

1877.

CAMERON V. SPIKING AND TEED.

Specific performance—Part performance—Names of vendors—Parol evidence.

A written agreement to purchase, in order to satisfy the Statute of Frauds, must specify by name or description who is the vendor. The plaintiffs agreed to sell certain premises to the defendants, who signed a written contract agreeing to purchase. The writing omitted any mention of the names of the vendors. Possession of the property was taken by the defendants through their agent, who carried on business therein for two days in their names.

Held a sufficient part performance to let in parol evidence as to who were the vendors.

THE defendants had agreed to purchase from the plaintiffs, and signed a memorandum in the following terms :—

“ We, the undersigned, do hereby agree to purchase the Collingwood Brewery and premises, for the sum of \$2,100, subject to a mortgage of \$1,200. Malt to be taken at one dollar and fifteen cents per bushel, new barrels to be taken at cost price, and old barrels at valuation; hops at 12½ cents per pound, and pay freight on the same; ale at eighteen cents per gallon; anything else in connection with the brewery not mentioned above to be taken at a valuation. Insurance to be transferred to us.

(Signed) “ J. T. SPIKING,
“ GEORGE TEED.

“ Collingwood, March 18th, 1876.”

On the 20th of the month, the plaintiffs gave up possession, and the defendants, through their agent, one *Radford*, entered into possession, and one of the defendants in his examination stated he understood that he had authorized the plaintiff *Cameron* to tell *Radford* to brew in the name of the defendants. On the 22nd, *Radford* took to *Spiking* \$3.00, saying, “ This is the first money taken by the Collingwood brewery.” *Spiking* stated that he made no objection, and afterwards he got a dollar, and towards evening the same day, *Radford*, while in the brewery, told him he had just booked an account, and had put it down “ *Spiking & Teed.*” He could not say whether or not *Radford* shewed him the book. It was shewn that *Radford* had at one time been

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in the employ of the plaintiffs, but had ceased to be so for a month previously. Two days afterwards, the 24th of March, the defendants having repented of their bargain refused to complete the purchase, whereupon a bill was filed to compel them specifically to perform the agreement. On the hearing *Proudfoot*, V. C., made the decree as asked, and the defendants thereupon reheard the cause before the full Court.

1877.

Cameron
v.
Spiking.

Mr. *Bain*, for the plaintiffs.

Mr. *J. A. Boyd*, Q.C., for the defendants.

The points relied on appear in the judgment.

In addition to the cases mentioned in the judgment, counsel referred, amongst others, to *Foxcraft v. Lyster* (a), *Frame v. Dawson* (b), *Pyke v. Williams* (c), *Lacon v. Mertins* (d), *Bond v. Hopkins* (e), *Glass v. Hurlburt* (f), *Caton v. Caton* (g), *Ham v. Goodrich* (h), *Foster v. Hale* (i), *Corrigan v. Woods* (j), *Pulbrook v. Lawes* (k), *Nicol v. Jackaberry* (l), *Butler v. Church* (m), *Clinau v. Cooke* (n).

SPRAGGE, C.—In this case there was a written paper signed by the defendants, which there can be no doubt was intended to be a note or memorandum of an agreement for the sale by the plaintiffs to the defendants of the premises in question. It is in the following terms:—
Judgment.

[Here the Chancellor read the memorandum above set forth.]

The writing does not satisfy the Statute of Frauds, inasmuch as it does not specify by name or description who are the vendors from whom the signatories agreed

(a) Colles. 108.

(c) 2 Vern. 455.

(e) 1 Sch. & L. 428.

(g) L. R. 1 Ch. 137.

(i) 3 Ves. 696.

(k) 1 Q. B. D. 284.

(m) 18 Gr. 193.

(b) 14 Ves. 386.

(d) 3 Atk. 1.

(f) 102 Mass. 24.

(h) 33 New Hamp. 32.

(j) I. R. 1 C. L. 73.

(l) 10 Gr. 110.

(n) 1 Sch. & L. 40.

1877. to purchase. The plaintiffs therefore are put to shew a parol agreement partly performed.

Cameron
v.
Spiking.

It is unprofitable at this day to enter into the question whether it would not have been more wise to have held parties rigidly to the terms of the statute, and whether the grounds upon which part performance has been held to take a case out of the statute, or, as put in *Rathbun v. Rathbun (a)*, to stop a party from insisting upon it, are strictly logical. They are criticised by Mr. *Roberts* in his treatise on the statute, p. 133. I agree that the doctrine of part performance has gone quite far enough, and I think that the tendency of modern decisions is rather to limit than to extend it. What the plaintiffs have to rely upon in this case is, delivery of possession by them to the defendants. It is not denied that where there has been a clear unambiguous delivery of possession to a party, he cannot set up the statute, and the way is opened to the party delivering possession to shew upon what agreement the delivery of possession was made. *Ungley v. Ungley (b)*, reported in the current volume of the Law Reports, was decided upon that principle, and I refer to it for the purpose of shewing that such is still the doctrine of the Court.

Judgment.

But is said in this case that there was no such clear, unambiguous delivery of possession as the law requires; that there was not any "notorious" delivery of possession. The cases where a sale from a landlord to his tenant has been alleged have no application. The possession in such cases would almost necessarily be ambiguous; and a change in the character of the possession must be notorious or it would be uncertain. And so in the case of an alleged sale of houses or lands in the possession of tenants; and other instances might be mentioned. The fact of delivery of possession is the thing to be established; it must be made to appear clearly, and it must be unambiguous; its notoriety will

(a) 6 Barbour 106.

generally depend upon the nature of the property, and can, I apprehend, only be necessary where it is necessary as a piece of evidence; for knowledge in a neighbourhood, or indeed in any parties other than the parties to the agreement, of what is done in pursuance or in execution of an agreement, cannot be necessary *per se* in proof of what is done. If there be no concealment, and the act of delivery be not vague and uncertain in its character, and be as much known as from the nature of that which is the subject of the sale might reasonably be expected, and be established by sufficient proof to satisfy the mind of the Court of the fact, the rule of the Court as to delivery of possession would, I think, be complied with.

The writing purporting to be an agreement was signed on Saturday the 18th. On the same day, as I understand from the evidence, there was conversation between *Cameron* and *Spiking* in relation to brewing being done by *Radford*. I take this passage from *Spiking's* evidence: "*Cameron* asked if he would tell *Radford* to brew. I said he might if he liked. I understood that I authorized him to tell *Radford* to brew in our name." On Monday, the 20th, *Radford* was put into possession. That would or would not be putting the defendants into possession, according to whether or not he was their agent to receive possession. The defendants were not personally at the brewery until the 22nd. On that day *Radford* took to *Spiking* \$3, saying: "This is the first money taken by the Collingwood Brewery." *Spiking* says he made no objection, and that afterwards he got a dollar, and towards evening the same day, *Radford* said he had just booked an account, and had put it down "*Spiking & Teed*;" he says he cannot swear whether or not he shewed him the book. What occurred was in the brewery. *Radford* had ceased to be in the employ of the plaintiffs about a month previously. On the 22nd,

1877.

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v.
Spiking.

Judgment.

1877. whether regularly engaged by them or not, he was acting for them; and the keys of the brewery had been delivered to him as their agent or servant. Upon the question who in fact were in possession of the brewery on the 22nd, I should say, not the plaintiffs, for they had formally given up possession: the defendants were there actually and in fact, and exercising acts of ownership. Then how did they come to be there? On the Saturday they had asked when they could have possession; they were answered, on the Monday; and on that day possession was delivered to *Radford* for them. What they did on the Wednesday, their presence there, and what passed between them and *Radford* was, in my opinion, an unequivocal adoption of the delivery of possession to *Radford* as a delivery of possession to themselves. Then the written paper itself is cogent evidence of the character of their presence in the building. It falls short of being a note in writing of their agreement, but it is evidence of their proposing to become owners of this same property by purchase from some one, and taking it in connection with the other evidence to which I have adverted, it satisfies my mind that they were there as purchasers, and that they had received possession from the plaintiffs. Mr. *Roberts*, speaking of the effect given by the Court to part performance, and which he thinks is to be regretted, has this note: (a) "Where there is a written agreement, wanting only the signature of the parties, this effect given to part performance stands on a principle of much greater consistency, for in such case the terms are ascertained; and there is an object of reference for the part execution to be construed by." This must be *a fortiori*, where the written paper purporting to be an agreement, is signed by the party to be charged, and wants only the name of the vendor to be a perfect note of agreement within the meaning of the statute. All that is really necessary to satisfy the mind

Judgment.

Cameron
v.
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(a) *Roberts on Frauds*, page 137, note 67,

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of the Court in such a case, is, to shew by clear evidence who is the vendor. I grant tha' more must be shown; but I think that the executed paper writing may properly be used for the purpose of shewing what appears upon the face of it.

1877.
Cameron
v.
Spilking.

Mr. *Browne's* book on the Statute of Frauds, section 473, is referred to as to the nature of the delivery of possession by way of part performance. He says it must be notorious, and adds, "To allow a mere technical possession not open to the observation of the neighbourhood, and capable of being proved only by select and confidential witnesses, to be sufficient for obtaining a decree to enforce the contract, would manifestly afford an opportunity and an encouragement to dishonest testimony." I have already observed upon this question of notoriety, and have only to add, that the change of possession in this case was open to the observation of the neighbourhood, and capable of proof by other than select and confidential witnesses. Upon the fact itself this is to be noticed, that while the bill expressly alleges delivery of possession to the defendants on the 20th of March, the answer contains no denial of this, nor is it denied by the evidence given by the defendants on their own behalf. Judgment.

It is further objected that such delivery of possession as there was was only of the brewery, while the sale was of the brewery and premises, and the evidence shews that the premises consisted of other buildings besides the brewery. An American case, *Allen's Estate* (a), is referred to on this point. There was in that case a sale for one gross sum of two distinct parcels of land, one, a house and lot of ground situate in "Taylor's Town," the other, "a lot of ground containing from eight to ten acres adjoining said town." It was agreed that the purchaser should take possession of the latter immediately, and that he did so, and that he was not to have

(a) 1 Watts & Ser. 383.

.1877.
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 v.
 Spiking.

possession of the former till some time nearly a year afterwards. It was said in judgment that the delivery of one parcel was not part performance, and it certainly was not. There was not indeed, as appears from the case, any delivery of possession at all, even of the one parcel. Here there were not separate and distinct parcels, and I apprehend that a delivery of possession of a house, this being appurtenant to the house, stabling and outhouses, would be a delivery of possession of the whole.

I attach but little importance to the taking of the inventory. It may have been merely tentative, in order to see whether what was proposed to be purchased with the brewery was within the means of the defendants.

As to the alleged misrepresentation, and the terms of agreement being other than those in the signed paper. Looking at the whole of the evidence, I take these to have been an afterthought. They repented of their bargain on Friday the 24th, and wished to get out of it. That they looked upon it as a concluded agreement, I think is clear. They were willing to forfeit the deposit they had made, and to run the risk of such damages as a jury might give, which they trusted would be small, if any thing. That was a time and an occasion on which they gave all the reasons and state all the grounds, occurring to persons of their class, for retiring from their bargain. They stated none of them, but gave as their only reason that the things to go with the brewery came to more than they expected.

If the signed paper had contained the names of the vendors, so that the bill might have been founded upon it, these grounds of defence must have failed. They ought really to have no more weight now, when it is shewn beyond question who were the vendors with whom the contract was made, and that it was acted upon by the delivery of possession to the defendants, they also accepting and acting upon it. It may be that the parties were overpersuaded by *Radford*; but the pur-

Judgment

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chase of this brewery was not a new idea with them. And if they were weak enough to be overpersuaded, the plaintiffs are in no shape answerable for it, and it can be no reason for refusing specific performance.

1877.

Cameron
v.
Spiking.

BLAKE, V. C.—There seems no doubt on the evidence that on Monday the 20th of March, 1876, the plaintiffs gave up possession of, and the defendants accepted the brewery in the pleadings referred to, and through their appointed agent, *Radford*, entered upon these premises. As to possession, Mr. *Browne* says, section 481: "Where the party alleging the contract was, however, previously a stranger to the estate, the question, *quo animo*, is generally answered, without further proof, by the mere fact of his being in possession with the knowledge of the owner of the fee, and without objection by him; a natural presumption arising from this fact that some contract has been entered into between the parties." In *Ungley v. Ungley (a)*, *Malins*, V. C., thus refers to possession: "I should say therefore, that if *A.* is about to marry, and proves a promise on behalf of the intended wife's father that he will give him a house on his marriage, that is a void contract, because it is not in writing; but if that promise is followed upon the marriage by possession, that simple fact, if it be for an hour only, ought, in my opinion, as being a part performance of the promise, to take the case out of the Statute of Frauds, and the party who has got the contract thus perfected by part performance is in just as good a situation as if he had a contract in writing by the father saying that, "In consideration of the marriage, I will give or settle upon you a house." In the present case the defendants, previously strangers to the estate, enter on the premises and deal with them in such a manner as, I think on the authorities, enables the plaintiffs to prove how the defendants were upon their premises.

Judgment.

(a) 4 Ch. D. 73.

1877. They thereupon prove an agreement in writing, wanting the names of the vendors, but otherwise complete in all its parts, signed by the defendants, and they also shew that in pursuance of this agreement they (the plaintiffs) gave up possession to the defendants, and the defendants accepted of the same. The fact of possession being proved, the authorities seem to allow the owner of the premises to shew the circumstances under which it was taken, and thus to prove an agreement for its sale or purchase. In this manner I think the plaintiffs are at liberty to refer to the paper and therefrom to shew the agreement entered into. The reason for not fulfilling the agreement entered into between the parties appears to have been the want of funds on the part of the defendants, and a fear that the business would not turn out as well as they had anticipated. There was a concluded agreement between the plaintiffs and defendants, one which the plaintiffs are entitled to have performed, and as to which the defendants have not shown any reason why they should be absolved from its terms. For some time previous to the 18th of March the defendants had been thinking of purchasing a brewery, and had been negotiating with the intention of buying the property in question. On the 18th of March they agree to buy, and then sign a paper to that effect. On the 20th of the same month possession is delivered to their appointed agent. They proceed to take the inventory needed to shew the amount they were to pay: they received two sums for beer sold: they negotiate with *Radford* for his employment in their service in the brewery: they have books opened in the name of *Spiking & Co.* These unequivocal acts enable the plaintiffs to prove an agreement between them and the defendants, and entitle them to look at the writing, not as an agreement to be supplied by parol evidence, but as evidence of a parol agreement.

I think the decree should be affirmed, with costs.

Cameron
v.
Spiking.

Judgment.

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PROUDFOOT, V. C., concurred.

Per Curiam.—Decree affirmed, with costs.

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Cameron
v.
Spiking.

SOLICITORS.—*Ferguson, Bain, and Meyers*, agents for *Moberly and Gamon, Collingwood*, for the plaintiff; *Blake, Kerr, and Boyd*, agents for *Wilson, Meaford*, for the defendants.

DOMINION BANK V. KNOWLTON.

Specific performance—Offer to purchase—Withdrawal of offer—Sale by agent of corporation—Verbal authority to sell.

The defendant wrote to the manager, who was verbally authorized to sell certain lands belonging to a bank: "I hereby agree to purchase from the Dominion Bank all," &c., and paid on account of the purchase money \$100. This memorandum was not submitted to the managing board of the bank, nor was it signed by any one acting on their behalf, and the solicitor for the bank refused that it should be put into such a shape as to bind the bank.

Held, that the memorandum amounted to an offer to purchase only, and that before a formal acceptance thereof by the bank authorities the defendant was at liberty to withdraw the same:

And *quære* whether in such a case authority for the purpose of selling the lands of the bank could be conferred by parol.

This was a suit to compel the specific performance of an alleged agreement to purchase, signed by the defendant, in the following words:

"I hereby agree to purchase from the Dominion Bank all their undivided half estate and interest in the fifty-five acres composed of the easterly portion of the westerly half of lot number thirty-seven in the third concession from the bay, in the township of York, in the county of York, together with all the rights of way, privileges, and appurtenances thereto belonging, at and for the price or sum of four thousand five hundred dollars of lawful money of Canada to be paid in cash, provided the said bank or their successors convey, or cause to be conveyed, to me by a good

1877. and sufficient deed their one undivided half estate and interest in the said lands, together with all the rights of way, privileges, and appurtenances thereto belonging or appertaining thereto, freed and discharged from all dower and other incumbrances. *Title to be completed by November 1st, 1876.**

Dom. Bank
v.
Knowlton.

(Sgd.) W. H. KNOWLTON."

Toronto, October 19, 1876.

The evidence adduced at the hearing on the part of the plaintiffs, shewed that their manager, one *R. G. Bethune*, had agreed to sell to the defendant the lands in question on Saturday the 21st day of October, 1876. It appeared that the defendant was desirous to purchase the property by reason of its affording him facilities for obtaining gravel which he thought he would require large quantities of in carrying on certain works which he expected having to construct; that on the conclusion of the treaty of purchase the manager of the bank sent the defendant to the office of the solicitors of the bank, for the purpose of having the sale carried out, and the above memorandum of agreement was then prepared and signed by the defendant, but Mr. *Bethune*, acting for the bank, refused to sign the paper, in consequence, it was alleged, of some difficulty existing as to the title of the bank; and though the bank authorities refused to sign the memorandum they always treated it as a binding agreement on the defendant, who at the time of signing the intended agreement, paid to the bank \$100 on account of the purchase money.

Statement.

The witnesses called on behalf of the defendant also established the fact of his anxiety to obtain the property, and that the bank should be bound to sell: that the agent for the plaintiffs made certain representations to the defendant as to the probability of his effecting an arrangement of partnership with one *Richard West* who it was alleged owned the other portion of the property, which would have enabled him more efficiently to

*The words printed in italics were interlineations.

carry on his works : that the agreement above set out was written by himself on Thursday, the 19th October, 1876, the day which it bore date, and was enclosed in an envelope addressed to the plaintiffs' manager, as an offer to purchase : that he called on the manager on Saturday the 21st, and certain variations to the said offer were agreed upon, and that although cash was mentioned in the memorandum yet that time was to be given ; that defendant brought his solicitor to the office of the plaintiffs' solicitors to have the matter closed, and although the plaintiffs were strongly urged to have the agreement signed by their manager, and their corporate seal affixed, the plaintiffs objected to it as the matter would have to go before the board on Wednesday for approval ; the defendant's solicitor objected to the defendant signing an agreement, and said that the paper defendant had signed would do by putting in ten days to have the matter formally closed, which was done, and no other agreement or document was drawn. It was further shewn that the defendant had ascertained on Saturday that the representations above referred to as to partnership would not be carried out, and on Monday, October 23rd, the defendant's solicitor wrote a letter to the plaintiffs withdrawing his offer to purchase ; that before delivering such letter of withdrawal the solicitor asked the manager if the plaintiffs had yet accepted the defendant's offer for the gravel pit, when the manager answered in the negative ; the solicitor then asked if the matter stood in the same position as it did on Saturday, and the manager said, yes. Thereupon the solicitor handed him the letter, and said the defendant withdrew his offer ; when the manager remarked he did not think he could do so. Thereupon the present suit was instituted.

Mr. Moss and Mr. Mulock, for the plaintiffs. An agreement is binding on the party signing it, although the other party thereto may not have executed it: Argument.

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Knowlton.

1877. *Tr. v. Bethune*, 161. There can be no doubt upon the evidence that *Bethune* had full authority to sell; at all events, it is certain that the bank would have carried out any contract or agreement into which he might enter. One defence raised in the fifth paragraph of the answer is, that *West* was to become partner in the carrying on the works in which the defendant was concerned, but clearly this, though considered and suggested by *Bethune* as probable, was never looked upon or treated as being a condition on which the purchase was proposed to be effected.

It is now asserted that the writing which the defendant signed was a mere offer of purchase, but we contend it is more,—it is an *agreement* to purchase unreserved and unqualified in any way; and the anxiety of defendant to procure the property was such that he had frequently urged upon the officers of the bank that he should have the first offer, and when it was communicated to him that the bank would sell he unhesitatingly signed the paper agreeing to purchase; and the payment of \$100 on account of the purchase money shewed that the signed memorandum was intended to be, and was in fact, treated by both parties as something more than an offer to purchase merely. Then the fact that *Bethune* went to the office of their solicitor to have the agreement drawn up in such a manner as should bind the defendant renders it most improbable that *Bethune* ever said anything to the parties as to referring the matter to the Board. And after the memorandum was prepared it was corrected and initialled by the defendant, and the witness *Campbell* says that the defendant's chief, indeed his only objection, was, that the bank was not bound by it to sell.

Mr. *Boyd*, Q. C., and Mr. *J. G. Robinson*, for the defendant. The reason of the entering into the bargain can be easily discovered when it is seen that the bank agent had, in effect, undertaken and promised that a partnership would be formed between the defendant and *West*.

Don. Bank
v.
Knowlton.

Argument.

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No doubt that the effecting of such a partnership was indispensable to the effectual carrying on of the defendant's works, and therefore we may reasonably conclude that, until the result of negotiations having in view that object was known, any arrangement that *Knowlton* might make with the bank or its officers would be conditional only. But, however that may have been, we contend that until *Knowlton's* offer was formally accepted he could at any moment rescind or withdraw it, and that without assigning any reason for so doing; see *Martin v. Mitchell* (a). The Master of the Rolls, Sir *Thomas Plumer*, there states the point shortly thus: "How can the contract be complete before it is mutual? And can it be complete as to the one and not to the other?" Now here, it is unquestionable, taking even the evidence called on behalf of the plaintiffs alone, that Mr. *Bethune* acting for his bank refused to sign any memorandum or agreement binding that institution to convey; and where there is an entire want of mutuality the Court will stay its hand when called upon to enforce any agreement: *Boys v. Ayerst* (b).

The fact that *Knowlton* gave his check for \$100 on account of the purchase money has not any binding effect, as that may have been done simply to guarantee the bank against any loss in respect of solicitor's costs or other fees in the event of withdrawal by the defendant.

Mr. *Moss*, in reply.

SPRAGGE, C.—I reserved judgment in this case because I had my doubts as to whether there was a perfected contract between the plaintiffs and the defendant enforceable in this Court. Upon the facts of the case I thought the weight of evidence in favour of the case made by the plaintiffs, that on the 21st October, 1876, Mr. *Bethune*, as cashier of the bank, agreed to the modified proposal made by the defendant, and did not reserve it

(a) 2 J. & W. 428.

(b) 6 Madd. 313.

1877. to be laid before the board. I thought the evidence of Mr. *Bethune* and Mr. *Campbell* entitled to entire credit, and the circumstance of a cheque for \$100 being given by the defendant on account of purchase money, is confirmatory of the correctness of their evidence.

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Knowlton.

The offer to purchase made by the defendant by the paper on the 21st of October was formally withdrawn by him on the following Monday, the 23rd.

That paper commences thus: "I hereby agree to purchase from the Dominion Bank all" &c., and Mr. *Moss* contends that this imports more than an offer to purchase. But looking at the whole of the paper I doubt if its real character is not that of an offer to purchase. It is not an agreement *inter partes*—there is no agreement on the part of the bank to sell. It is not in the proper sense of the term an agreement. In a recent work by Mr. *Pollock* on "The Principles of Contracts at Law and in Equity," (a) are some passages very clearly expressed which apply to this case. "One always thinks of the consent of the parties as the main thing that goes to make a contract, as beyond question it is. A contract is before all things a transaction in which two or more persons consent. * *

Judgment.

Consider a familiar and unquestionable instance—the contract of sale. The first thing that we observe is, that it takes not less than two persons to make it. * * In the case of the sale the buyer and the seller intend to acquire new rights and undertake new duties." If this be correct, and I think it well expresses what is necessary to constitute an agreement, the paper in question is not an agreement but an offer to purchase. But it is said this is an unilateral contract. Mr. *Fry*, in treating of what he calls the exceptions and limitations to the doctrine of mutuality in this Court, says: "The contract may be of such a nature as to give a right to the performance to the one party which it does not give to the other, as, for instance, where a lessor covenants to renew upon the request of his lessee; or where the agreement is in the nature of

(a) p. 1.

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an undertaking. But the more accurate view of such cases as the first, perhaps of all that could be treated as wanting mutuality, seems to be that they are conditional contracts; and when the condition has been made absolute, as for instance in the case above stated by a request to renew, they would seem to be mutual and capable of enforcement by either party alike."

1877.
Dom. Bank
Knowlton.

From the nature of a contract of sale and purchase it cannot be unilateral: two parties must assent to the sale and purchase before there can be a contract. The doctrine that under the fourth section of the Statute of Frauds it is only necessary that the party to be charged should sign the contract, is not at variance with this position. In *Laythoarp v. Bryant* (a), the leading case upon that doctrine, Chief Justice *Tindal* says, p. 744: "I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement in truth is made before any signature;" and Lord *St. Leonards* takes the same view (b).

This of course assumes the pre-existence of an agreement between parties; and which agreement they put into writing—If the writing expresses the true agreement it imports a sale by one party and a purchase by the other, and it being necessary that it should be signed by one only, does not affect in the least the character of the agreement. Unless the agreement imports an agreement by one to sell and by the other to purchase it does not import an agreement but an offer. It is hardly necessary to say that an agreement and an offer stand in one respect upon the same footing, *i. e.*, upon the competency of the parties to contract or to make or to accept an offer as the case may be, and that they actually do contract, or make or accept an offer, as the case may be.

To apply what I have said to this case. The paper of the 19th October was, in my opinion, an offer of purchase and not a contract of sale and purchase. If Mr.

(a) 2 Bing. N. C. 735.

(b) V. & P. p. 128.

1877. *Bethune* had been a natural person instead of an officer of a corporation, if he had been acting for himself instead of officially for the bank, I should have held that there was an offer and acceptance on the 21st; but acting as he did as an officer of the bank, two questions arise: The first is, whether he had authority from the bank to accept the defendant's offer, in legal effect to enter into a contract of sale. The second is, whether he did enter into a contract of sale. If he had such authority, and did in pursuance of it enter into such contract, the bank was on the 21st bound to sell, and the defendant was bound to purchase.

Mr. *Bethune* says in his evidence that he had been authorized verbally to sell the land in question. Under *London Docks Co. v. Sinnott (a)*, it would be at least doubtful whether authority for such a purpose could be conferred by parol by a corporation. The head note describes accurately the contract on which the action was brought and the point in question in the suit. "Action by a corporation incorporated as a dock company, by a statute containing no express provisions as to the manner in which the corporation might be bound by contracts. The action was on an agreement to execute a contract under seal." Lord *Campbell*, in his judgment says, p. 352: "The contract is not of a mercantile nature; it is not with a customer of the company; it is not of a character which creates an impossibility that it should be under seal, as becoming party to a bill of exchange; on the contrary, such a contract may more conveniently be under seal than by parol. Therefore, we do think that no power to enter into such a contract by parol is conferred upon the corporation of the London Docks, and that the plaintiffs do not bring themselves within any of the exceptions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation." There is a more

(a) 8 E. & B. 347.

recent case: *South of Ireland Colliery Co. v. Waddle* 1877. (a), and reported in Appeal 4 C. P. 617, which however, does not overrule *London Docks Co. v. Sinnott*, though it may carry the doctrine of the non-necessity for the corporate seal further than previous cases.

Dom. Bank
v.
Knowlton.

But assuming that Mr. *Bethune* had authority, the question remains whether it was so executed by him as effectually to bind the bank. I think this question must be answered in the negative, for both Mr. *Campbell* and Mr. *Kent* agree that the former, who was solicitor for the bank, and to whom Mr. *Bethune* committed the legal conduct of the business, refused that it should be put in such a shape as to bind the bank. It is true that they do not agree as to the reason given for this refusal, but they agree as to the fact of there being such a refusal. The result is that there was not an assent on the part of those acting for the bank that the bank should be bound to sell; and the party offering to purchase could not have enforced a purchase against the bank, simply because there was no contract to sell. An agreement to sell was negatived on the part of the bank. Their position was, we will sell or not sell, according to circumstances: and the shape in which the matter stood was, that there was on the part of the defendant, a proposal to purchase, which stood unaccepted by the bank; for a qualified acceptance is clearly no acceptance. The consequence was, that after all that passed on the 21st, there was wanting that mutuality which is essential to a perfected contract, such as this Court will enforce. There was a deliberately expressed intention on the part of the bank, not then to be bound; that there should not then be mutuality of contract.

The next step was, the withdrawal by the defendant, on the following Monday; and this being while the offer of the defendant remained unaccepted, was a step which he had a right to take. It is hardly necessary to quote authority to shew that he had such right; it is too clear

(a) L. R. 3. C. P. 463.

1877. *Dom. Bank v. Knowlton.* to be open to question, *i. e.*, if the premises I have stated be correct, that at the time of such withdrawal there was an offer to purchase by one party, which stood unaccepted by the other. I will refer only to *Thornby v. Bovill* (a), and *Warner v. Willington* (b).

The case of *Martin v. Mitchell* (c), cited by Mr. *Boyd*, seems to have proceeded upon the assumed want of authority to contract on the part of a married woman, and Lord *St. Leonards* questions the soundness of Sir *Thomas Plumer's* opinion upon that point. The observations of the Master of the Rolls, for which the case was referred to by Mr. *Boyd*, are apposite to the case before me. What Sir *Thomas Plumer* said was: "I wished it to be considered whether the one party not having on her part done anything to bind herself, the other is in the meantime precluded from entering into a new agreement. What mutuality is there if the one is at liberty to renounce the contract, and the other is not? If she intended to bind them, she should have bound herself; but if she will reserve to herself a power to act or not to act, must they not have the same power? And then, were not they on that day in a situation in which they might repent and retract? * * * But when one party having entered into a contract that has not been signed by the other, afterwards repents and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus pœnitentiæ*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual? And can it be complete as to the one and not to the other?" I prefer, however, to rest my decision upon the short ground that I have stated—an offer to purchase withdrawn before any definitive acceptance by the party to whom the offer was made.

I therefore dismiss the bill, and it must be with costs, with the exception, however, of the costs of the evidence

(a) 1 Y. C. C. C. 554. (b) 3 Drew. 523. (c) 2 J. & W. 413.

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given by the defendant and his witnesses. I make this exception because upon the question of fact in issue between the parties, the weight of evidence is, as I have stated, in favour of the plaintiff.

1877.
Dom. Bank
v.
Knowlton.

SOLICITORS.—*Campbell and Mulock*, for the plaintiffs;
Kent and Robinson, for the defendant.

WOOD V. HAMILTON AND NORTH-WESTERN R. W. CO.

Railway company—Right of way—Arbitration—Demurrer—Solicitor of railway company—Agent of company.

In treating with the owner of lands for the right to cross the same by a railway, or in proceedings before arbitrators appointed between him and the Company, with a view to ascertain the amount of compensation, the solicitor acting for the Company at the arbitration, not qualified to enter into any special agreement binding the Company to construct and maintain a crossing.

This was a suit by the owner of lands through which the railway of the defendants was constructed.

The bill alleged that the defendants had offered certain compensation which the plaintiff declined, and thereupon the plaintiff and defendants respectively appointed an arbitrator, and they chose a third arbitrator. The arbitrator named by the defendants and the third met, when a solicitor for the plaintiff and a solicitor for the defendants were present, and a minute was then made and signed by these two arbitrators in the following words:—

“Terms were proposed and amount of award agreed on at \$475, the Company undertaking to erect, keep up and maintain a proper underpass for waggon and other service of the size now constructed, and at the place now located, with proper approaches thereto, and to give an agreement under seal covenanting in that behalf. The arbitrators in the fixing of this sum to consider the above agreement.

Mr. *Chisholm*, the third arbitrator, (the plaintiff's) not being present the further proceedings herein are adjourned to the office of *D. B. Chisholm* at noon to-morrow.”

1877. On that day the third arbitrator and Mr. *Chisholm* met and signed a minute of their proceedings—solicitors for both parties being present—as follows :—

Wood
v.
Hamilton &
North-West-
ern R.W.Co.

“Award made, pursuant to agreement, for \$475 in favour of *John Wood*, and minutes of yesterday’s meeting confirmed.”

The bill further stated that an award was duly made pursuant to an agreement as to the money agreed to be paid, and that the defendants, though they had taken possession of the land and constructed the railway, had wholly neglected and refused to carry out the agreement made by their counsel and attorney for the construction of the under-crossing provided for thereby, and refused to execute the agreement therein mentioned under their corporate seal and had not provided the plaintiff with a proper or sufficient crossing under or over the railway.

The bill prayed a specific performance of the agreement and undertaking made by the counsel and attorney of the defendants as set forth in said minutes, and that the defendants might be ordered to execute an instrument under seal as provided for thereby, and for an inquiry as to damages.

The defendants demurred, because the arbitrators exceeded the duty conferred on them and the powers vested in them in taking into consideration the construction of the pass or the agreement under seal; and that it was not alleged that the counsel or attorney of the defendants was authorized or empowered by the defendants to make the alleged agreement.

Mr. *Boyd*, Q. C., for the demurrer.

Mr. *B. Osler*, Q. C., contra.

Dec. 12th, Judgment. PROUDFOOT, V. C.—It is alleged in the bill that the award was made as to the money agreed to be paid, and I assume, therefore, that it contains nothing about the crossing or the agreement under seal, and although it is

SOLICITORS
Osler, Gwynne
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Wood
v.
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ern R.W.Co.

stated in the minutes of the first meeting that the arbitrators in fixing the compensation at \$475 are to consider the agreement in regard to the crossing and the sealed instrument, it is no where alleged that they did so consider it, or that it formed any part of the consideration for the right of way.

The relief sought is not performance of anything contained in the award, but of a collateral undertaking of the solicitor or counsel for the defendants; but there is no distinct allegation that he gave any such undertaking; the only statement of it is in the minutes of the arbitrators, and in the charge that the defendants refuse to carry it out.

Suppose the undertaking to have been given, there is no statement that the solicitor was authorized to give it, and that, I think, is a fatal objection. He is not said, to be the general agent of the defendants, who might for certain purposes, perhaps, bind the defendants, but for all that appears he was acting for them *pro hac vice*, and it would require clear and distinct authority to enable him to bind them in the very special manner they are sought to be made liable. Judgment.

It does not seem necessary to consider the question discussed at some length in the argument, whether the authority in such a case must be under seal. In whatever mode the authority requires to be conferred or authenticated it is essential that there should be authority, and of this there is no allegation in the bill. It was admitted that there was no right to award crossings except by consent, and I am unable to find, either in the character of solicitor or in the allegations of this bill, any authority to warrant the agreement.

The demurrer is allowed, with costs.

SOLICITORS.—*Bethune, Osler, and Moss*, agents for *Osler, Gwyn, and Teetzel*, Hamilton, for the plaintiff; *McCarthy, Hoskin, Plumb, and Creelman*, agents for *Bruce, Rurton, and Walker*, Hamilton, for the defendants.

1877.

ARMSON V. THOMPSON.

Administration suit—Claim of widow in lieu of life estate.

Where land devised subject to the payment of legacies and to a life estate therein is, after the death of the testator, sold at the instance of a mortgagee, the money remaining after payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatees will be paid ratably after the value of the life estate has been ascertained.

This was a hearing on further directions, when all the questions involved were disposed of, with the exception of a claim made by the widow for an allowance to be made to her out of moneys in Court in respect of a devise to her of a life estate in the house in which the testator had lived. It appeared that the testator had mortgaged the property, and then devised it upon certain conditions, amongst others, payment of \$1,400 to his son *Hugh*, \$500 to his daughter *Mary Jane*, and the provision above mentioned for his widow. After his death the mortgagee took proceedings on his mortgage under which the lands were sold, and the balance of the purchase money, after payment of the mortgagee's claim, was still remaining in Court.

Mr. *G. Lount*, Q. C., for the plaintiff.

Mr. *Hoskin*, Q. C., for the defendant *M. J. Thompson*.

Mr. *W. Mulock*, for the widow.

Mr. *A. F. Campbell*, for the defendant *Hugh Thompson*.

Dec. 12. FROUDFOOT, V. C. It was not contended that this
Judgment. money was to be treated in any other manner than if it
were the land devised. I expressed my opinion that the
legacies to *Hugh* and *Mary Jane* were conditions of the

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devise, and they must be paid in proportion to the amount of their legacies.

This provision for the wife is also one of the conditions of the devise, and upon the same principle the value of her interest must be ascertained and be paid ratably with the legacies to *Hugh* and *Mary Jane*.

1877.
 Armon
 v.
 Thompson.

MCDONALD V. REID.

Parties—Pleading—Demurrer—Interpleader.

The tendency of modern practice is to dispense with parties, where it can be done with safety; therefore where in certain interpleader proceedings one *R.* disclaimed any right to the proceeds of a sale under execution, and subsequently obtained possession of the property sold by means of a writ of replevin, but afterwards gave notice to the person holding the money that he claimed the proceeds of the sale, and forbade him paying back the purchase money to the purchaser, whereupon the latter filed a bill seeking to recover back the amount, on the ground of an entire failure of consideration, to which he made *R.* a defendant, who demurred, as being not a necessary or proper party; the demurrer was allowed with costs, liberty being given to the plaintiff to amend, in order to make a better case, if so advised.

This was a suit to recover back a sum of money in the hands of one *Miller*, Clerk of a Division Court.

The bill set forth that three several writs of execution had issued out of that Court upon judgments recovered by the defendants *Alex. McDonald*, *Neil McDonald*, and one *William Kennedy*, against the goods of *Duncan McDonald* and *James Barr*, and were placed in the hands of the bailiff of the Court, who had seized a quantity of timber as being the property of the execution debtors: that the defendant *Reid* had immediately notified the bailiff and the defendant *Miller*, the Clerk of the Court, that he claimed the property as his: that the bailiff sold the timber by public auction to the plaintiff in this suit, who paid to the bailiff the price bid therefor—\$384.

Statement.

1877. The bill further stated, in paragraph 5, that, "at the time of the sale and payment it was understood and agreed, by and between the bailiff and the plaintiff, that, as there was some doubt whether the timber belonged to the defendant *Reid* or to the execution debtors, in the event of *Reid* establishing his claim the purchase money should be returned to the plaintiff. 6. Upon this understanding the bailiff paid the proceeds of the sale to the defendant *Miller*, as such Clerk as aforesaid, and he agreed and promised to hold the same upon that understanding."

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v.
Reid.

The bill further stated that interpleader summonses were afterwards issued out of the Division Court, calling upon *Reid* to interplead with the execution creditors in those suits for the proceeds of the sale: that *Reid*, claiming the timber itself, repudiated all claim to the proceeds of the sale, and judgment was given on those summonses in favour of *Reid*, to the effect that the timber was his property; that *Reid* never claimed the proceeds, but always claimed the timber, and that *Miller* did not, in fact, issue, nor had he any authority to issue interpleader summonses with respect to the proceeds: that *Reid* shortly after took possession of the timber, whereupon the plaintiff took it again out of his possession: that *Reid* replevied, and an action of replevin was brought in the Court of Common Pleas, which was tried, and a verdict entered for *Reid* for \$4 damages: that the now plaintiff moved for a new trial, but the rule was discharged, the Court holding that *Reid* had no claim on the proceeds of the sale of the timber, but that he had retained his original claim for the timber itself, and had not in any way ratified the sale by the bailiff to the plaintiff: that *Reid* had remained in the possession of the timber ever since, but wrongfully claimed the proceeds of the sale, and refused to allow *Miller* to pay, and notified him not to pay them to the plaintiff, claiming to be entitled thereto under the judgment given in his favour by the Division Court Judge in the interpleader suits.

Statement.

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Under these circumstances the bill submitted that the plaintiff was entitled to recover the purchase money from *Miller*, the consideration having entirely failed, and that he was also liable to repay it to the plaintiff in pursuance of the agreement to that effect, and further that the execution creditor *Kennedy* had released all his claim on the proceeds to the plaintiff, and that the other execution creditors had agreed to consent to the purchase money being repaid to the plaintiff in case the interpleader proceedings were decided against them, but that they had lately renewed their claim thereto.

1877.
 McDonald
 v.
 Reid.

The defendant *Reid* demurred for want of equity.

Mr. *D. McCarthy*, Q. C., for the plaintiff.

Mr. *W. Cassels*, for the defendant.

PROUDFOOT, V. C. It would be obviously inequitable and unjust that *Reid* should retain the timber, and also get the purchase money for which it was sold; but he says he is not a proper party to the suit: that the plaintiff's remedy is against *Miller* upon the agreement to repay, or if any dispute as to the ownership of the property existed it should have been decided by interpleader before sale; and perhaps the agreement may be void if a remedy is sought against him as Clerk of the Court, but at all events there is no right to bring *Reid* here.

Dec. 12th.
 Judgment.

Some of the allegations in the bill are not very intelligible, as in the 7th paragraph, it is said that interpleader summonses were issued calling on *Reid* to interplead for the proceeds of the sale of the timber: that (8th paragraph) he appeared on the hearing and repudiated all claim on the proceeds, and judgment was given in his favor to the effect that he owned the timber itself; while, in the 9th paragraph, it is said that *Miller* did not in fact issue, nor had he any power or authority to issue, interpleader summonses with respect to

1877. the proceeds of the sale, but only as to the timber itself. It is difficult to see how the decision upon the summonses said to be issued could have been in *Reid's favor*, as he repudiated all claim to the subject, and the natural result would be that the creditors with whom he was interpleading should have the decision in their favor; and I cannot understand how the clerk issued, and yet did not issue, interpleader summonses in regard to the proceeds.

McDonald
7.
Reid.

Whatever may be the truth of these matters, it is clearly alleged that the decision of the Court of Common Pleas was in *Reid's* favour as to the ownership of the timber, and that he has had possession of it ever since; and of course he could not be allowed to hold both the timber and the proceeds. Whether the plaintiff can make good his claim as against the clerk and the execution creditors is not now the question, though I would suppose his remedy in this Court might be doubtful while the judgment on the interpleader in the Division Court stands unrevoked. The agreement alleged by the creditors to repay, was in case the interpleader should be decided adversely to them, but it is nowhere distinctly alleged what the result of these proceedings was, except that they were in favour of *Reid*, which seems to me impossible, as he made no claim to the subject, except in this sense, that it might be said to be in his favour as to the timber, it being on that account that he had no right to the proceeds; but the only matter in question then was the proceeds, and the decision must have been adverse to any right in him to these.

Judgment.

But the only matter I have now to deal with is, the necessity or propriety of making *Reid* a party.

The mere claim of an interest is not sufficient to justify making him a defendant to a bill for relief (a), though it might have sufficed in a bill of discovery merely (b). The bill must show some interest in the

(a) Mitf. by Jer. 160, Plumb. v. Plumb., 4 Y. & C. 345.

(b) Mitford 188.

defendant. The allegations of this bill are made for the purpose of shewing, and upon a fair construction of them it seems to me they do shew, that the claim of *Reid* is futile: that, under the circumstances stated, it has been investigated, and has been decided by a competent Court against him: that he disclaimed any interest in the proceeds, and that, in fact, the claim is without foundation.

1877.
 McDonald
 v.
 Reid.

The tendency of all modern practice is, to dispense with parties to the record where it can be done with safety, as was stated by *VanKoughnet, C.*, in *Brogden v. The Bank of Upper Canada (a)*, an opinion affirmed and acted on by *Blak*, V. C., in *West Gwillimbury v. Simcoe (b)*.

I fail to see what interest requires to be guarded by the presence of *Reid*; and he has not got possession of the money, and has taken no effectual steps to compel payment to him. The notice not to pay can give him no right, and the clerk incurs no hazard by refusing to pay attention to it. But if the clerk were plaintiff, and asked that the claimants might interplead, different questions might arise. That is not this case. Judgment.

I think the demurrer must be allowed, with costs. If the plaintiff thinks he can better his case he may amend.

SOLICITORS.—*McCarthy, Boys, and Pepler*, for the plaintiff; *Blake, Kerr, and Boyd*, agents for *Dennistown Brothers and Hall*, Peterborough, for the defendant.

(a) 13 Gr. 544.

(b) 21 Gr. 68.

1877.

MACNABB V. McINNES.

Infant—Education—Religious faith.

It is the duty of the Court to see that an infant is brought up in the faith of his or her father, but the mere fact that an infant was the child of parents belonging to the Presbyterian Church, and that she had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the Master's ruling approving of her being placed and educated at a seminary, the proprietress of which was a member of the Church of England, it being shewn that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that Church, and the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends and relatives, and there was the probability of a stricter personal supervision by the proprietress, than at a public institution in another part of the country which was in connection with the Presbyterian Church in Canada.

Statement. This was an appeal from the report of the Master approving of the infant *Agnes Lucy MacNabb* being educated at the school of Mrs. *Nixon* in Toronto.

The infant had two guardians, *Peter D. McKellar* and *Thomas G. McNabb*, who differed as to the school at which she ought to be educated. Both were relatives of the infant and equally desired, the Court assumed, what was most for her benefit.

Mr. *McKellar* wished her to be educated at Mrs. *Nixon's* school, in Toronto, because being constitutionally delicate, her father having died of consumption and her mother at an early age, she required careful watching and attention that could not be given at a large public school: that the educational advantages of a well conducted private school were equal, if not superior, to a public college: that the personal supervision exercised over pupils was stricter: that manners and deportment were more thoroughly cultivated: that there was less danger of contamination from pupils of loose morals; that a school in Toronto was preferable to one in Brantford for several reasons, amongst which were, that it was

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more accessible to her friends and relatives, who visited there several times yearly; and that many of her relatives had a large circle of desirable acquaintances there with whom she could associate; and that Mrs. *Nixon* provided for the spiritual instruction of her Presbyterian pupils by sending them to St. Andrew's Church.

Mr. *MacNabb*, on the other hand, was desirous of sending the infant to the Brantford Young Ladies' College, an institution in connection with the Presbyterian Church in Canada, as the infant's father was a strict Presbyterian, and would presumably, had he been alive, have desired her to go there; that the President and Principal of the College were distinguished clergymen of that Church; and the College was, besides, under the supervision of the General Assembly, who, on the 18th June, 1877, expressed their satisfaction at the gratifying success "that has thus far attended the College, and recommend it to the Church at large as worthy of their generous confidence and support." It further appeared that a competent staff of teachers was employed, and careful provision made for the religious instruction of the pupils.

Mr. *W. Cassels*, for the appeal.

Mr. *Hoyles*, contra.

PROUDFOOT, V. C.—The father of the infant was a Presbyterian, and it is the duty of the Court to see that the child is brought up in the same faith. In this case, however, there is no endeavour on either side to bring her up in any other faith, and the question resolves itself into a consideration of the comparative advantages of the two schools. Neither side disputes that a good education may be had at the school proposed by the other. But the appellant says that at Mrs. *Nixon's*, a Church of England school, the pupils are surrounded with influences in their daily studies that have a ten-

1877.
MacNabb
v.
McInnes.

Dec. 12th.
Judgment.

1877. dency to weaken their attachment to Presbyterianism, and the arrangement for attending a church of that denomination is no equivalent for the disadvantages arising from the habitual association with pupils of another creed.

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McInnes.

The comparative merits of private and public schools were also touched on in the argument. In the College there is accommodation for 75 boarders. The calendar shews a list of 113 students, and, deducting those who reside in Brantford, and who I suppose are day scholars, the boarding accommodation must be all required. The expense is about \$100 per annum less than at Mrs. *Nixon's*. The grounds around the College are some three or four acres in extent, affording a means of exercise and recreation that no school in a city could hope to offer.

The Master, upon all these facts, has pronounced in favour of Mrs. *Nixon's* school; and, before I reverse his finding, I must be satisfied that he is wrong.

Judgment.

An equally good education may be had at either place. There is no design to interfere with the hereditary religion of the pupil. If Mrs. *Nixon's* school were designed to instruct pupils in a certain religious faith, to fit them to propagate its tenets, and to extend its influence, one might well apprehend that habitual intercourse with its pupils would tend to weaken, perhaps to destroy, the infant's attachment to her own faith. But there is nothing of the kind here; the school is a ladies' school, to communicate the acquirements and accomplishments usual in such institutions; and I have no difficulty in concluding that attendance upon a Presbyterian Church and intercourse with its pastor, will more than counterbalance any influence of a contrary tendency.

There is besides the constitution of the infant to be borne in mind; and there is no doubt that at a private school, with a moderate number of pupils, there is a greater probability of care and attention, than at a college with some seventy boarders. No matter how

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conscientious and how kind the teachers and superintendents in the latter may be, it is impossible that they can bestow the same care, the same minute attention to the wants and necessities of the ill or the delicate, as in a private school.

In Toronto, also, it seems that the infant has relatives with whom she can associate and whose acquaintance it is desirable she should cultivate. This ought to have some weight in considering the comparative advantages of locality; these relatives will have an opportunity of watching her progress, and exercising a control that can be found in no school.

Mr. *MacNabb* says, that he objects to the infant coming to Toronto for personal reasons; but he assigns none, and does not enable me to judge of their importance. Judgment.

Upon the whole I am not satisfied that the Master has erred, and I dismiss the appeal.

I have not overlooked the difference in expense, but it is a matter of minor importance, the infant's fortune being large enough to enable her to get the advantages of either school that may be thought most for her benefit.

SOLICITORS.—*Bethune, Osler* and *Moss*, for *McKellar*; *Blake, Kerr*, and *Boyd*, agents for *A. Bell*, Chatham, for *McNabb*.

1877.

MacNabb
v.
McInnes.

1877.

BURNS V. CHAMBERLIN.

Common Law Procedure Act—Arbitration—Appeal from award—Practice—39 Vict. ch. 28—40 Vict. ch. 80, O.

A reference was by decree of the Court made to *W. H. W.*, one of the local masters, in his individual, not official capacity; the decree expressing the same to be by consent, and that the award should be appealable in the same manner as a Master's report; the reference being of all matters in the suit and also of questions in difference between two defendants:—*Held*, notwithstanding such consent, that the award could not be appealed from, and could only be moved against for cause in the same manner as an award of any other arbitrator; the Statutes 39 Vict. ch. 28, and 40 Vict. ch. 80, O., not applying to suits in this Court.

THIS was an appeal from the award of Mr. *William Henry Weller*, of Cobourg, he being the local Master of the Court there, to whom a reference had been directed under the decree of this Court, made by consent of the parties, whereby

(1.) This Court did "order and decree that this cause and all matters in dispute therein and all questions between the defendant *Chamberlain* and the defendant *Hatton*, as the administrator of the estate of the intestate in the pleadings mentioned, and the question of the costs of this suit be and they are hereby referred to the award of *William Henry Weller*, Esquire, of the town of Cobourg, in the county of Northumberland. (2.) It is further ordered, that either party be at liberty to appeal against the award of *William Henry Weller* herein named, in the same manner and to the same extent as a Master's report may be appealed from."

Mr. *Moss*, for the appeal.

Mr. *Boyd*, Q. C., contra.

Dec. 12th. SPRAGGE, C.—Upon looking at the decree which was made in this cause on the 18th of April, 1873, I confess myself unable to understand how I can hear an appeal from the award of the arbitrator named in that decree.

Judgment.

1877.

Burns
v.
Chamberlin.

It is a consent decree made upon, as it is expressed, the opening of the matter and hearing the pleadings and proceedings read, and the decree is, that the cause and all matters and disputes therein, and all questions between the defendant *Chamberlin* and the defendant *Hatton*, as administrator of the estate of the intestate, "and the question of the costs of this suit, be and are hereby referred to the award of *William Henry Weller, Esq.*, of the town of Cobourg, in the county of Northumberland."

The notice of appeal expressed it to be "from the finding or award of *W. H. Weller, Esq.*, the Referee," &c. It is not a motion to set aside an award; and the grounds are such as would be proper on an appeal from a report of a Master of this Court, but not grounds for setting aside an award.

Mr. *Weller* has not made a report. A paper is filed called an "award," and does not conclude as a report does certifying and submitting its contents to this Court, and certainly the parties could not well have indicated their intention more plainly than they have done that the award should be referred to an arbitrator and not be referred to a Master of this Court as a Master. They by consent refer it to Mr. *Weller*, who as I know judicially is a Master of this Court, and they might have referred it to him as Master or unofficially—they name him without his official designation; if they had meant a reference to him as Master, the reference would have been to him by his official designation without his name. Further, the reference is to the "award" of Mr. *Weller*, and the costs of the suit as well as the matter in dispute are referred to his award—a thing quite proper upon a reference to an arbitrator, and not proper upon a reference to a Master; and further, it is not only questions in the suit that are referred, but also questions in difference between two defendants, and therefore a reference of matters not proper to be referred under the C. L. P. Act: *Kendil v. Merrett* (a).

Judgment.

(a) 18 C. B. 173.

1877. *Burns v. Chamberlin.* Two things appear to me to be quite clear: one, that the reference is to an arbitrator, not to a Master, the other, that the parties meant it to be so; and the incidents of the two are different, one of them being the determination being subject to an appeal in one case, and not in the other, unless indeed an award, *i. e.*, an award strictly made by consent under a decree of this Court, is itself subject to an appeal under the Acts 39 Vict. ch. 28, and 40 Vict. ch. 80.

Judgment. I have carefully examined both of those statutes and the sections of the C. L. P. Act to which they refer, and my opinion is, that they do not apply to suits in this Court. A principal object of the late Acts was, to give to litigants in the Common Law Courts the like facilities in the investigation of accounts and some other matters as were already enjoyed by litigants in this Court. The whole phraseology of the Acts points to proceedings in the Common Law Courts, and probably for this reason, that all the necessary machinery already existed in this Court. The appeal being from that which is in my judgment not appealable, it is not within my province to express any opinion upon it. The appeal is dismissed, but as this reference was made appealable by consent of both parties, I give no costs.

SOLICITORS.—*Bethune, Osler, and Moss*, agents for *D. G. Hatton*, Peterborough, for the plaintiff; *Blake, Kerr, and Boyd*, agents, for *H. H. Smith*, Peterborough, for the defendant.

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THE WESTERN CANADA LOAN AND SAVINGS COMPANY 1877.
 V. COURT.

Trustees Relief Act—Surplus in hands of mortgagee on selling under power of sale—Interpleader.

Where a mortgagee proceeds to a sale of the mortgaged premises under the power contained in his security, and a surplus of the proceeds remains in his hands after payment of his own claim, and there are adverse claimants to such surplus, he cannot apply under the Trustee Relief Act to pay such surplus into Court: his proper course is to file a bill of interpleader.

THIS bill was filed for an interpleader between the defendants, both of whom claimed to be entitled to the surplus moneys in the hands of the plaintiffs, arising from the sale of lands under the ordinary statutory power in a mortgage after payment of the full amount of their own claims.

The defendant *Court* set up by his answer that the plaintiffs should have paid the money into Court under the Trustee Relief Act, and asked that they should not be allowed more costs than would have been incurred if they had done so.

Mr. *H. J. Scott*, for the plaintiff.

Mr. *Howard*, for the defendant *Court*.

Mr. *Fitzgerald*, Q. C., for the defendant *Fry*.

PROUDFOOT, V. C.—I do not think that this is such an express trust as to come within the meaning of the Trustee Relief Act, and enable the plaintiffs to pay the money into Court, and the course they have taken in filing a bill is proper. The usual decree will be made.

SOLICITORS.—*Robinson, O'Brien, and Tizard*, for the plaintiffs; *Robertson, McMurrich, and Howard*, for the defendant *Court*; *Fitzgerald and Arnoldi*, agents for *G. A. Alcorn*, for the defendant *Fox*.

WILSON V. McCARTY.

Partnership—Interest on capital—United States currency.

Parties about to enter into partnership, in Canada, agreed each to pay in \$8,000 capital, and one of them omitted to pay in any portion thereof: *Held*, that such omission formed no ground for charging the party with interest on his share of the proposed capital.

The same partner, during the continuance of the partnership, drew bills in the name of the firm, the proceeds of which he applied to his own purposes: *Held*, that on these he was liable to be charged interest, although the general rule is, that after a dissolution of partnership interest is never charged against one partner in favor of another.

Certain of the parties paid in the amount of their proposed capital in United States securities, mortgages and notes, in respect of which the Master credited them with their value in Canadian currency (\$7,200): *Held*, on appeal, that the agreement must be taken to have meant that the amount each agreed to pay in was that sum in Canadian currency, or its full equivalent in United States currency.

In this case two persons, *Wilson* and *Moul*, entered into partnership with the defendant *McCarty*; and the parties, that is *Wilson* and *Moul* on the one hand, and *McCarty* on the other, agreed each to furnish a certain amount of capital wherewith to carry on business. In pursuance thereof *Wilson* and *Moul* did bring in the amount stipulated for in United States currency, but *McCarty* never brought in any sum. In proceeding afterwards in the office of the Master at Barrie, to wind up the partnership business, *Wilson* and *Moul* claimed to charge *McCarty's* estate with interest on the amount agreed to be paid, in other words, to allow to them interest on the amount of capital paid in by themselves. This claim the Master allowed, and thereupon the defendant *Mason*, the assignee in insolvency of *McCarty*, appealed.

Wilson and *Moul* also claimed that they were entitled to be allowed credit for the full amount of their share of the proposed capital, although the securities, &c., were equal only to the sum of \$7,200 Canadian currency. This claim the Master rejected, allowing to the

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plaintiffs the value of the securities in Canadian currency, and *Wilson* and *Moul* thereupon moved against this ruling of the Master by way of cross appeal. The other facts are stated in the judgment.

1877.
Wilson
v.
McCarthy.

Mr. *Duff* for the defendant *Mason*, who appeals.
Mr. *D. McCarthy*, Q. C., and Mr. *Rye*, for the plaintiffs in support of the cross appeal.

SPRAGGE, C.—Upon the question of the allowance for interest, it is conceded that interest is properly charged against the estate of *McCarthy*, in respect of the drafts improperly drawn by him. But the question is, whether he is properly charged with interest upon the amount of capital which he agreed to bring into the concern but failed to bring in. *Jardine v. Hope* (a), is cited against the allowance of interest, but that was a different question. The claim for interest there was upon advances made by one of several partners in pursuance of an agreement, and interest was disallowed.

Judgment.

I find no case in which it has been allowed in such a case as the present. It appears to me to stand upon the same footing as a claim by the party advancing his capital—the other party failing to advance his—for interest on the capital he had advanced; *e. g.*, it is agreed that each of two partners should advance \$1,000; one of the two advances his share the other advances nothing—the interest on the sum advanced for a year would be \$60, the interest on the sum that was to be advanced would be the same sum. If the one making the advance could not claim interest upon it, so neither could he claim interest from the other for not making his advance. The former indeed would be a less objectionable shape in which to put the claim than the latter, for the latter would be rather a penalty than interest. That the partner paying in his capital in such a case as I have put is

(a) 19 Gr. 76.

1877. *Wilson v. McCarty.* not entitled to interest upon it, has been decided in *Hill v. King* (a). It seems to be the same case as referred to by counsel in *Rishton v. Grissell*, (b), in which he said: "As to the interest on capital; it is a well established rule that unless a contrary course of practice be shewn by the books," as was the case, I may observe in passing, in *Miller v. Craig* (c), "no interest is chargeable by one partner against a co-partner," and Lord *Hatherley*, then Vice Chancellor, in delivering judgment, says: "The express point has been decided in this Court, that unless there be an express stipulation, or a particular course of practice shewn by the partnership books to the contrary, interest between partners is not allowed."

Ex Parte Chippendale (d), cited by Mr. *McCarthy*, was a very different case. It was the case of a mining company, the wages of the miners were in arrear, and other debts were due, and the managing director obtained advances from some of the shareholders to meet these liabilities and prevent the seizure of the mines, seizable under the law in Germany, where the mines were. Lord Justice *Knight Bruce*, thought interest should be allowed on these advances, and Lord Justice *Turner* acquiesced, after some hesitation and doubt. It is only an authority that interest will be allowed on advances made under the pressure of necessity and at the request of those having the management of a business concern. In *Evans v. Coventry* (e), also cited by Mr. *McCarthy*, the directors paid themselves moneys out of a trust fund in breach of trust, and they were decreed to replace the moneys with interest. Neither of these cases is any authority for the position contended for.

It is urged in favour of the allowance of interest in this case that it is allowed only after the dissolution of the partnership. The rule appears to be just the other way.

(a) 3 D. J. & S. 417.

(c) 6 Beav. 436.

(e) 8 D. M. & G. 835.

(b) L. R. 5 Eq. 326.

(d) 4 D. M. & G. 18.

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1877.

Wilson
v.
McCarty.

In *Watney v. Wells* (a), it was agreed by the articles of partnership that each partner was to have interest on his share of capital. There was a decree for dissolution, and the Master of the Rolls held that interest on the shares of capital ought not thereafter to be allowed: and his order was affirmed by Lord *Chelmsford* on appeal; and the same principle was affirmed by Lord *Selborne* in *Barfield v. Loughborough* (b). This objection therefore to the Master's report is allowed.

The fifth objection was not necessary in the interest of the plaintiffs. The passage in the report to which it takes exception is mere surplusage and cannot affect the direction in the decree in regard to the item to which it relates, or any order that may hereafter be made in relation to it. I overrule the objection simply as unnecessary.

The plaintiffs appeal upon one point only. The report credits them with \$7,200 put in by them as capital. They claim to be credited with \$8,000. The agreement was, that they should put in \$8,000. The agreement was made in Canada, and the presumption would be that it was to be that sum in Canadian currency. They put in securities, mortgages, and notes to the amount of \$8,000 in American currency, which, it is agreed, was equivalent in value in Canadian currency to the sum allowed by the Master. The plaintiffs have to rebut the presumption that the sum they were to pay in was in Canadian currency. They do not say, and I assume that they are unable to say, that it was agreed that the sum to be paid was to be in American currency. *Wilson*, upon whose evidence they have entirely to rely, says: "Nothing was said about American currency when dealing with *McCarty*, except one remark that there was not much difference between the money, and that perhaps when the mortgage came due, the money would be worth as much as Canadian money, and he would get the interest on the mortgage in the meantime," the words following

Judgment.

(a) L. R. 2 Chy. 260.

(b) L. R. 8 Ch. 1.

1877. "practically he was content to take it as cash gold," I take to be the witness's gloss upon the words used by *McCarty*, and the gloss is certainly a very strong one. The other phrase, "it (*i. e.*, the mortgage and note,) was taken by *McCarty* as cash," may only mean "in lieu of a present payment of cash," not as cash beyond their real value.

I have no doubt that *Wilson* puts what passed between him and *McCarty* in as strong a light as possible, and it amounts to this, that he and *Moul* having agreed to put in \$8,000 they carried to him securities of the value of \$7,200, and that he made the remark, absurd under the circumstances, attributed to him by *Wilson*: as a matter of business, it was mere drivelling. A man might choose to be very liberal and knock off 10 per cent. of the money he was to receive, but it is scarcely conceivable that a man of business, in a business transaction, should talk such nonsense as to intimate that what he was entitled to, and what he was receiving, amounted to about the same thing, when in fact the difference was 10 per cent. He may have said that the difference in the two currencies was not very great and was still growing less, but that he said it in the sense and with the meaning of accepting the depreciated currency in lieu of that of considerable larger value, is scarcely credible. The creditors of *McCarty* are at a great disadvantage; he has absconded, and his evidence is not procurable. Evidence toonerate his estate, or what is the same thing, to exonerate his former partners, and that evidence from the mouth of one of them should be received with extreme caution. We have only this evidence, and that from one of them; not from both, for the other, *Moul*, is silent upon the point. Is it not a proper inference that he is unable to corroborate *Wilson*, unable to say that the capital to be put in by them was to be in other than Canadian currency; a fact upon which he was as likely to be informed as *Wilson*.

Judgment.

Wilson
v.
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Upon referring to the bill I find the plaintiffs thus stating that part of their case :

1877.

" On the said 28th day of November, the said plaintiffs then verbally agreed for the sale and purchase of an undivided two-third parts or interest of and in the said saw mill and premises, and also lot 37 in the second concession, and the right of cutting pine timber on lots 15, 19, an d32, in the second concession, and on the west half of lot 15, in the third concession, all in the township of Vespra, in the said county of Simcoe; and of all the share or proportion of the personal property and all other the partnership assets which had belonged to the co-partnership which had theretofore been carrying on the said lumbering business, at or for the price or sum of \$5,333, payable in cash at the time of such sale and purchase. * * * And thereupon the plaintiffs paid to the said defendant *McCarty* the sum of \$5,333, being the amount of the purchase money agreed to be paid by them for the said two undivided third interests in the said property. * * * The plaintiffs allege that they then gave to the said defendant *McCarty* securities equal in value to about \$2,666, which the said *McCarty* was to convert into money, and which was to be considered as a portion of the working capital to be used in the said business, furnished or put in by the plaintiffs."

Wilson
v.
McCarty.

Judgment.

What can the plaintiffs mean by this last allegation that they gave to *McCarty* securities equal in value to about \$2,600, except that they were about equal to that sum in Canadian currency? They make up an aggregate of \$8,000 less one dollar only, and there is not a word about American currency in their whole statement. The theory they now propound looks to me very like an afterthought. This also is a circumstance against the plaintiffs' position—that the value of what was to come from *McCarty* was estimated in Canadian currency. It would be almost a matter of course that the value of what the plaintiffs were putting in would be in the same currency. No further sum being demanded afterwards by *McCarty* from the plaintiffs is not a circumstance of much weight, as it was not very long afterwards that he absconded.

1877.

Wilson
v.
McCarty.

Mr. *McCarthy* puts it that there was something like an exchange in the matter. *McCarty's* land to be taken at a price named by him and the plaintiffs' money to be taken at more than its Canadian value. This may possibly have been the case; but it is not the case as put by *Wilson* himself. His case is, not that the amount to be contributed by himself and *Moul* was, by the original agreement to be that amount in American currency, but that *McCarty*, for some reason unexplained, unless it be extreme good nature accepted as equivalent to gold, that which was of ten per cent. less value than gold. I cannot accept his improbable and unsupported story—at variance too with his own bill—as sufficient to rebut the presumption that a contract in Canada for the payment of money in Canada is to be taken as a contract to pay in Canadian currency.

Judgment.

The plaintiffs' objection to the report is therefore overruled.

SOLICITORS.—*McCarthy*, *Boys*, and *Pepler*, Barrie, for the plaintiffs; *Barry* and *Duff*, Hamilton, for the defendant.

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EDWARDS V. SMITH.

1877.

Will, construction of—Residuary clause—Charitable bequest—Annuitants—Legatees—Persons interested in residue.

A testator, after making sundry dispositions of his real and personal estate, proceeded to dispose of the residue as follows:

"On the death of my said wife I order and direct my said executors and trustees to sell and dispose of all the rest, residue, and remainder of all the real and personal estate which I may die seized or possessed of, or in any way entitled, to the best advantage, and out of the proceeds thereof: 1st. To pay *Margaret Hope*, four hundred dollars. 2nd. To pay my nephews *Thomas* and *Joseph Toase*, one thousand dollars each. 3rd. To pay to *Margaret Hulse*, *Robert Ramsay*, *George Ramsay*, *John M. Wood*, and *James W. Wood*, two hundred dollars each. 4th. To pay to my nieces *Elizabeth*, *Amelia*, *Matilda*, and *Hannah*, daughters of my said brother *Thomas*, two hundred dollars each. 5th. To invest the sum of six hundred dollars on good security, and pay over the interest thereof to *John Henry Wright*, son of *John Wright*, during his natural life; and at his death I direct my executors to divide the said sum of six hundred dollars equally among the brothers and sisters of the said *John Henry Wright*, who may survive him; and as to all the rest, residue, and remainder thereof, I direct the same to be divided equally amongst all the legatees herein mentioned."

Held, (1) that under this residuary bequest, all the legatees named, including *John Henry Wright*, but not his brothers and sisters, were entitled to participate in the residue of the estate; (2) that *John Henry Wright* was entitled to the interest of the \$600 during his life, and that only his brothers and sisters living at his death (though born after the date of the will,) were entitled to share in the fund of \$600.

By another clause of the will, the testator bequeathed to *Hannah Wright* for her separate use a mortgage held by the testator against property of her husband, and all moneys secured thereby and unpaid at the testator's death:

Held, that she was a legatee, and as such entitled also to share in the residue.

The testator directed his executors "to cancel all claims I may have at the time of my death against my nephew, *H. T.*; and to cancel all promissory notes I may have against my nephew, *J. T.*; and to cancel all claims I may have against *A. H.*; and such cancelling shall in no way be construed as satisfaction or part satisfaction of any legacies hereby given":

Held, that this constituted these three persons legatees, and as such they were entitled also to share in the residue.

The testator gave to *M. E. R.* the household furniture and other chattels remaining after the death of the widow:

1877. *Held*, that she also as such legatee was entitled to share in the residue.
W. S. and *J. S.* were entitled to the interest of purchase money
 invested on the sale of land:

Edwards
 v
 Smith.

Held, that they were thus annuitants, that as such they fell within the definition of legatees, and therefore were also entitled to share in the residue.

The testator, amongst other bequests of personalty, directed his executors, "On the death of my said wife, to pay over to the Wesleyan Methodist Superannuated Ministers' Fund, out of the pure personalty then in their hands, the sum of eight hundred dollars." There was no such charitable institution as the one named in Canada, but there was a society called "The Connexional Society of the Wesleyan Methodist Church," one object of which was the maintenance of a fund called "The Superannuated or Worn-out Preachers' Fund."

Held, that the testator having been resident in Canada, the presumption was, that it was a Canadian society he meant; that "The Connexional Society" was entitled to receive this bequest, as the one most nearly answering the description given in the will; that they were thus legatees, and, as such, also entitled to share in the residue; such society being entitled to hold lands to the annual value of £5000, and it was shewn that the lands held by the society did not exceed £1000 a year; and therefore though the residue was composed of both realty and personalty, the Statutes of Mortmain did not apply to prevent the society sharing therein.

The devisee of real estate is not a legatee, and therefore where such an one claimed a share in such residue, the Court refused him his costs.

THIS was a suit instituted to obtain a construction of the will of the late *Henry Toase*.

Mr. *Mulock* for the plaintiff.

Mr. *Read*, Q. C., for the defendants *William Smith* and *Henry Toase*.

Mr. *Hoskin*, Q. C., Mr. *Boulton*, Mr. *Evatt*, Mr. *W. Cassels*, Mr. *A. Hoskin*, Mr. *J. H. McDonald*, and Mr. *H. Ferguson*, for other defendants.

Judgment.

SPRAGGE, C.—Very different views as to the proper construction of this will are presented to me on behalf of those having different interests.

A great deal turns upon the construction of the residuary clause. After divers devises of realty and bequests of personalty, to some of which I shall have to refer

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more particularly presently, the residuary clause is as follows : 1877.

Edwards
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“ On the death of my said wife I order and direct my said executors and trustees to sell and dispose of all the rest, residue, and remainder of all the real and personal estate which I may die seized or possessed of, or in any wise entitled, to the best advantage, and out of the proceeds thereof: 1st. To pay *Margaret Hope*, four hundred dollars. 2nd. To pay my nephews *Thomas* and *Joseph Toase*, one thousand dollars each. 3rd. To pay to *Margaret Hulse*, *Robert Ramsay*, *George Ramsay*, *John M. Wood*, and *James W. Wood*, two hundred dollars each. 4th. To pay to my nieces *Elizabeth*, *Amelia*, *Matilda*, and *Hannah*, daughters of my said brother *Thomas*, two hundred dollars each. 5th. To invest the sum of six hundred dollars on good security, and pay over the interest thereof to *John Henry Wright*, son of *John Wright*, during his natural life; and at his death I direct my executors to divide the said sum of six hundred dollars equally among the brothers and sisters of the said *John Henry Wright*, who may survive him, and as to all the rest, residue, and remainder thereof, I direct the same to be divided equally amongst all the legatees herein mentioned.” Judgment.

The learned counsel representing *John Henry Wright*, and the brothers and sisters of *John Henry Wright*, contend that he and they are alone entitled to the residue of the estate. In the words rest, residue, and remainder thereof, the word “thereof” would grammatically mean the residue of the investment of \$600, but that could not be meant, for the very plain reason that the testator disposes of the whole of that sum. Taking then the words used to mean and to apply to the residue of the whole estate not disposed of by the will, are *John Henry Wright* and his brothers and sisters solely entitled? The only colour for this contention exists in the circumstance that the words used are in the same paragraph as the direction to invest \$600 and to divide it, and follow that direction with only a comma between.

But there is that in the provisions of the will which outweighs this. There is the formal direction to the

1877. ^{Edwards} _{v.} ^{Smith.} executors to realize the residue of the estate on the death of the wife; followed by a direction as to its application,—“out of the proceeds thereof,” to pay certain legacies and to invest this \$600, and then the direction as to the residue that it be equally divided, not among the *Wright* family, but amongst all the legatees herein mentioned; the word “herein” meaning, as I read it, “in this my will;” and the word “all” having its ordinary signification, which it would not have if limited to the *Wright* family.

Before coming to the question who are the legatees entitled under the will, I will notice the contention that the brothers and sisters of *John Henry Wright*, now living, are entitled. It is contended that they take a vested interest; but I think it clear that they do not. The language of the will could scarcely be more explicit; the division is to be among those brothers and sisters of *John Henry Wright* who may survive him, the interest in the meantime being payable to *John Henry Wright* himself. The language employed is so plain that it seems scarcely necessary to cite authorities. I, however, will refer to *Daniel v. Daniel* (a), which was followed and adopted by Lord *Langdale*, in *Wordsworth v. Wood* (b), and affirmed by Lord *Cottenham* on Appeal (c). No doubt would have existed in that case if the disposition made by the will had been as simple as it is here. The language was, “for his then surviving children,” “then” applying to the death of his wife; and upon this Lord *Langdale* said: “It is perfectly clear that if the will had stopped here the children surviving the wife would alone have taken;” and he stated the rule thus: “That where an interest is given to one for life, and after his death to his surviving children, those only can take who are alive at the time the distribution takes place.” *Crowden v. Stone* (d), before Lord *Lyndhurst*, may also be referred to.

(a) 6 Ves. 297.

(b) 2 Bea. 26.

(c) 4 M. & C. 641.

(d) 3 Russ 217.

(a) 2

(c) 3

The real and important question, however, is, whether the brothers and sisters now living, as well as *John Henry Wright* himself, are within the term legatees, as used in the will. The interest of all these brothers and sisters is contingent, and, as to any of them who may die before *John Henry* himself it will never become vested, or if all should die before *John Henry*, the only vested interest would be that of *John Henry* himself. On the other hand there is the rule that a residuary bequest, though contingent in its terms, carries with it the income accruing in the meantime. This was decided by Lord *Hardwicke*, in *Green v. Elkins* (a), and by Sir *John Strange*, M. R., in *Trevanion v. Vivian* (b). In both cases the income was directed to be accumulated. There was another case also before Lord *Hardwicke*, *Butler v. Butler* (c), in which it was directed that the interest should be accumulated; his Lordship, however, not deciding whether the interest of the plaintiff was vested or contingent. Under the will before me the income is disposed of so that no brother or sister of *John Henry* can in any event be entitled to income (unless it be income accrued to him as survivor after the death of *John Henry*.) But I do not know that that circumstance makes any difference in the status of the brothers and sisters under the will.

This point has not been so fully argued as I could have wished; my present impression is, that *John Henry* takes a vested interest in a legacy given by the will, and that his brothers and sisters now living take contingent interests in the same legacy, and it may be that after-born brothers and sisters take the same interest. It is a question proper to be argued whether, assuming brothers and sisters to be entitled, those only are entitled who are in being at the period of distribution or whether those born afterwards are also entitled.

(a) 2 Atk. 472.

(c) 3 Atk. 58.

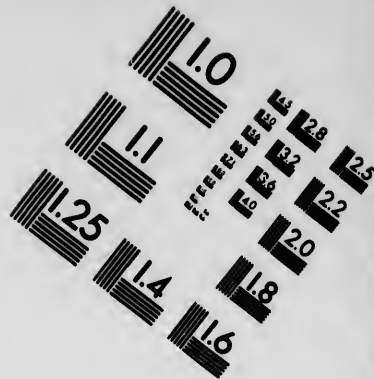
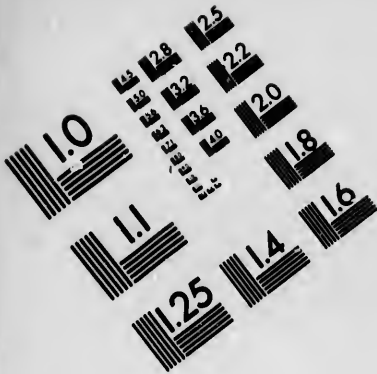
(b) 2 Ves. Sr. 480.

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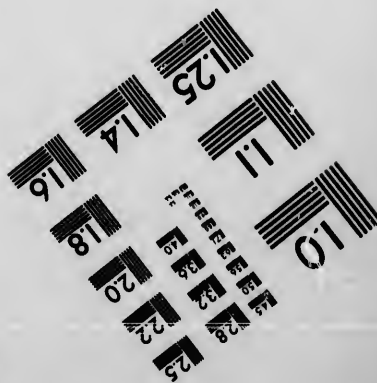
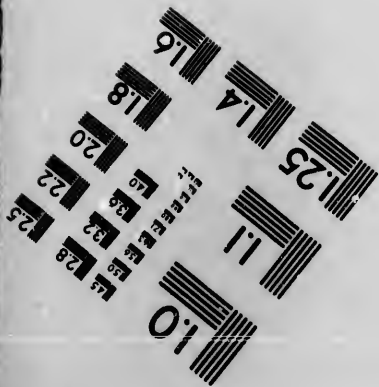
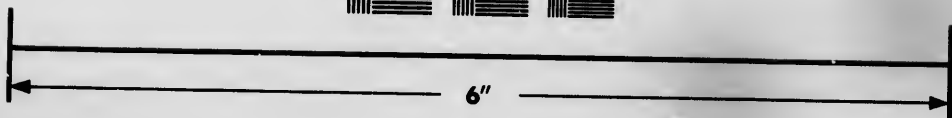
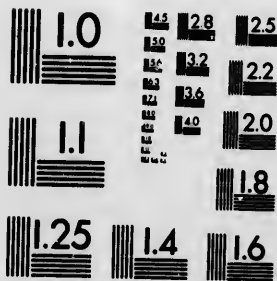
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1877. If others whom I hold to be legatees desire to argue this point, I should be glad to hear further argument from one counsel representing that interest, and one counsel representing the opposite interests. All other than the *Wright* family, have a common interest in contending against this claim of the *Wright* family.

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I see no room for doubt that *Hannah Wright* was a legatee. There is a bequest to her for her own separate use and benefit of a mortgage held by the testator against certain property of her husband, and of all moneys secured thereby and unpaid at the testator's death, and he empowers his executors to assign the mortgage to her. She was clearly a legatee.

A question has arisen upon another clause of the will, which is as follows: "I also order and direct my said executors to cancel all claims I may have at the time of my death against my nephew *Henry Toase*; and to cancel all promissory notes I may have against my nephew *John Toase*; and to cancel all claims I may have against *Andrew Hope*, and such cancelling shall in no way be construed as satisfaction or part satisfaction of any legacies hereby given."

Judgment.

In *Elliott v. Davenport*, reported in 2 Ver., p. 521, and more fully in 1 P. Wms. 83; in *Toplis v. Baker* (a) in *Sibthorpe v. Noxon* (b); and in *Maitland v. Adair* (c), a testator, a creditor of a person named in his will, made a gift of the debt to his debtor. The gifts in these cases varied in terms, and nice questions arose upon whether from the terms used they lapsed by the death of the debtor in the lifetime of the testator. These points are not material to the question before me, but the material point is that, in all these cases, the debtor beneficiary is treated as and is styled a legatee. In the last named case, *Maitland v. Adair*, the will ran: "I also return him [the testator's brother] his bond for £400, with interest, &c.," and Lord *Loughborough's*

(a) 2 Cox 118.

(b) 3 Atk. 580.

(c) 3 Ves. 231.

language is: "There is not the least doubt as to the bond. It is distinctly a legacy to the brother." Further, in *Williams* on Executors, such a bequest is treated as a legacy: "Not only in cases of bequests of money or of other chattels in possession, but also of a debt due from the legatee to the testator, the legacy will lapse by his death before the testator and the executor of the legatee must pay the money." A doubt might be suggested from the use of the words, "and such cancelling shall in no way be construed as satisfaction or part satisfaction, of any legacies hereby given," the doubt being whether he regarded the remission of debts as legacies, but I think it not sufficient if the real character of the bequest be a legacy; and there is this circumstance, that to other nephews of the same name, *Thomas* and *Joseph Toase*, he clearly gives legacies, viz., to each a pecuniary legacy of \$1000, and they are thus as legatees entitled to a share of the residue. I think *Henry* and *Joseph Toase*, and *Andrew Hope* also, entitled to share in the residue.

I see no ground for excluding *Margaret Hulse* from a share in the residue. She is a pecuniary legatee of \$200, and is, besides, one of several entitled upon the sale of a parcel of land in the township of King.

Mary Elizabeth Ramsay, *Mrs. Wallace*, seems also clearly entitled as a legatee. There is a bequest to her of the household furniture and other chattels remaining after the death of the testator's wife, and she is also entitled to \$2,000 out of the proceeds of the sale of the land in King.

William Smith and *John Smith*, sons of *Henry Smith*, are entitled to the interest of purchase money invested on the sale of land in St. Vincent. They are therefore annuitants, and annuitants fall within the definition of legatees. *Sibley v. Perry* (a) is one of the early cases. Lord *Eldon* held that an annuitant falls under the general character of legatee, unless there is something to

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1877. shew that the testator himself distinguished between them. In *Rannock v. Horton* (a) the same learned Judge held that the testator did so distinguish. *Bromley v. Wright* (b) is an important case upon the same point, so also are *Cornfield v. Wyndham* (c) and *Ward v. Gray* (d). It would be unprofitable to go through them; they all proceed upon the principle that an annuitant is a legatee, and will be included in a gift of the residue to legatees, unless from the context or other parts of the will an intention is manifest to distinguish and to exclude them.

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In several of the cases to which I have referred the learned Judges have expressed strong doubts whether the interpretation which they felt bound to give to the wills before them really carried out the intentions of the testators. In *Rannock v. Horton* the testator gave to each of several persons a mourning ring of the value of two guineas, and bequeathed the residue to be divided among legatees, and Lord *Eldon* said: "As to the legatees of rings, I do not believe he meant them to take any share; but still they are legatees, and there is no phrase to characterize them upon which I can conjecture as upon the word 'annuities,' " (which word he held from the context not to include legacies). The best construction is, to give the word all the operation it can have, unless there is something else in the will to confine it.

Robert H. Smith claims to be comprehended under the word legatee, and so to be entitled to share in the residue. He is simply a devisee with *John Smith*, his brother, of a parcel of real estate. The contention is, that the word "legatees" is not used in this will in its proper and legal sense, but is intended to comprehend devisees of real estate. In *Davenport v. Coltman* (e), which is cited upon this point, the will gave pecuniary legacies

(a) *Ib.* 391.

(c) 2 Coll. 184.

(e) 12 Sim. 588.

(b) 7 Hare 334.

(d) 26 Beav. 485.

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to sons and daughters; and possession and use for life of the testator's house in Chester, with the furniture therein, to his wife; and the residue was thus disposed of, "save and except the clauses in favour of my daughters as already mentioned at her [his wife's] decease, it is my will and pleasure that [his sons, naming them,] shall divide equally between them as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others." A case was stated for the opinion of the Court of Exchequer, and the Judges were of opinion that the real estate of the testator passed by the residuary clause, and the Vice-Chancellor, was of the same opinion. His Honour observed that a total absence of all knowledge of law appeared in the will from the beginning to the end. The use of the word legatees was thus accounted for, and it was obvious, from the whole scheme of the will, that the words were not used in their legal and proper sense, but as denoting a disposition of all not previously disposed of by his will, of which he should die possessed. That cannot be said of the will before me, which was said of the will in the case cited. Appropriate language is used with scarcely an exception according to whether real or personal property is disposed of. In the 6th clause both real and personal property is disposed of, and the words are devise and bequeath. The 7th clause is less correct, the same language being employed, though real property alone is disposed of. The 8th clause contains the devise in question, and in it and the three following clauses, all being devises of realty, the word devise alone is used. In no instance, but the one I have mentioned, is the word bequeath used where real estate alone is disposed of, nor in any instance is the word devise alone used where personalty alone is disposed of. There are several other legal phrases in the will which are correctly applied. The testator has not been unexceptionally accurate in the use of the terms employed in his will, but quite sufficiently so to indicate that he would not

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call a devisee of real estate a legatee; but the rule of construction goes further: it is, that where a testator uses technical words he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary. I cannot hold *Robert II. Smith* entitled to share in the residue of the estate.

The will contains, among other bequests of personalty, in the form of a direction to the executors, the following: "On the death of my said wife, to pay over to the Wesleyan Methodist Superannuated Ministers' Fund out of the pure personalty then in their hands the sum of eight hundred dollars." The bill alleges that there is no such charitable institution in Canada as the Wesleyan Methodist Superannuated Ministers' Fund, but that the Connexional Society of the Wesleyan Methodist Church in Canada claim the bequest, and claim also to be entitled to share as legatees in the residuary estate.

It is to be observed that this bequest does not purport to be, as was the case in *Re The Clergy Society (a)*, to any society or institution, but to a fund. All that is necessary, therefore, is to find a fund answering the description contained in the will. (b) It would appear from the answer of the Connexional Society, and from the statute incorporating that body, that one of the objects of the society is the maintenance of a fund called "The Superannuated or Worn-out Preachers' Fund." This is not precisely the same in terms as the fund described in the will. But the rule is, that a will is applied to that which does not strictly answer the description where there is none more appropriate, and this rule applies as well to the objects as the subjects of the will. This was well exemplified in the case of *The Clergy Society*, and is indeed a rule constantly applied. The description of the fund in the will approximates so closely to that in the statute, that there is scarcely room to doubt that the testator meant his bequest

(a) 2 K. & J. 615.

(b) 14 & 15 Vict. ch. 142.

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to be paid into the fund administered by the Connexional Society, and I shall so hold, unless it be made to appear that there is some other fund to which the description in the will is more appropriate. In *re The Clergy Society* there were several claimants. It does not appear how they came to apply, whether an advertisement was issued, or what was done. I shall be satisfied with an affidavit from some person cognizant of the organization of the Wesleyan Methodist body in Canada, and of the religious and charitable societies connected with it. The will does not, indeed, say "in Canada," but the testator appears to have been a resident of Canada, and the presumption is, that it was a Canadian society that he meant. The answer of the Connexional Society should be verified upon oath.

A point is made by some of the parties interested under the will, that the fund in question is not entitled to share in the residue; and one reason given is, that the bequest is to be paid out of pure personalty. This was, no doubt, lest the gift might possibly come within the Statutes of Mortmain, and to insure against its failure. This fund stands in that respect upon the same footing as other legatees whose legacies are payable out of a particular fund. It is further objected that the residuary estate is composed of realty and personalty, and that the Statutes of Mortmain apply. But the Connexional Society is, by the Act of Incorporation, authorized to hold lands to the annual value of £5000, and the answer of the society, which is to be verified upon oath, states that the annual value of the lands of the society does not exceed £1000. The objection of the society and of this fund is, that the society is the administrator of the fund, receiving and applying the fund in trust for those entitled to it, and is a legatee within the proper meaning of the term, and so entitled to a share of the residuary estate.

I have felt considerable doubt whether under the term legatees, the testator meant to comprehend some named

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1877. *Edwards v. Smith.* in the will, who are in the eye of the law legatees *e.g.*, those to whom he left nothing but the remission of the debts they owed to him; or to comprehend the brothers and sisters of *John Henry Wright*; or the Superannuated Ministers' Fund; and some others also may be doubtful; but if they are legatees and there be nothing in the will to control the meaning of the word as to them, I cannot say that it does not apply to them.

All parties are entitled to their costs with the exception of *Robert H. Smith*.

The points mentioned in this judgment were afterwards spoken to by

Mr. *Hoskin*, Q. C., for the *Wright* family.

Mr. *J. A. Boyd*, Q. C., contra.

Judgment. SPRAGGE, C.—I disposed some time ago of the several points arising upon the will in this cause, with the exception of one or two. One, whether the brothers and sisters of *John Henry Wright* are entitled to share in the residue, a question in which all the legatees are interested, and a subordinate question, whether such brothers and sisters born after the date of the will and before the death of *John Henry* are entitled to share in the £600 bequeathed. I have heard further argument upon the points suggested. The second point to which I have adverted must be answered in the affirmative. The rule, I take to be, that where the bequest is, as it is in this case, to a class, all of that class who are *in esse* at the period of distribution are entitled. The rule is succinctly stated in *Williams's Law of Executors*, (6th ed., 1015,) that where a bequest is immediate to children in a class, children in existence at the death of the testator, and they only, are entitled, but that "children born after the testator's death may be entitled under a bequest to 'children' in a class in cases where the division of the fund among the legatees is deferred until a particular period, which takes place after his decease. Thus, where legacies are given to

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the children of *A.*, when a child or children attains a particular age, or to be divided amongst them at the death of *B.*, any child who falls under the description at the time when the fund is to be divided is entitled to a share, although not born till after the testator's death, and although born of a subsequent marriage, and whether the gifts be vested or contingent." The points are stated more at large in Mr. *Jarman's* book, and to the same effect by Mr. *Hawkins*, and are fully supported by decided cases. The bequest here is, to brothers and sisters, not to "children," but, being to a class, the same rule must apply. That point is one in which the brothers and sisters of *John Henry* are primarily interested; but indirectly it has a bearing upon the larger question, whether these brothers and sisters are legatees, within the meaning of the will, entitled to share in the residue.

It is certain that a very inconvenient consequence would flow from their being held to be so entitled, for, if all brothers and sisters of *John Henry* who may be *in esse* at the date of his death are entitled, as in my opinion they are, the trustees whose duty it is made by the will to distribute the residue must wait until the death of *John Henry* before they can know among whom to distribute it. If those only are entitled who were *in esse* at the death of the testator, the trustees could distribute safely at once after the death of the wife; but the rule being as it is, they could not safely do so, as they might be distributing that to which after-born brothers and sisters would be entitled.

That inconvenient results would follow a particular construction has been a reason for avoiding such construction where it could be avoided without contravening the manifest intentions of the testator, and this, I apprehend, upon the assumption that the testator cannot have intended that which would lead to such results.

The direction of the will is, that "on the death of the testator's wife all the residue of his estate, real and

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personal, should be converted into money," and the will proceeds: "and out of the proceeds thereof, 1st, to pay *Margaret Hope* \$400;" then to pay other pecuniary legacies, and invest the \$600 already referred to; and then, "and as to all the rest, residue, and remainder thereof, I direct the same to be divided equally amongst all the legatees herein mentioned."

The scheme of the will appears to have been, that all this should be done presently after the death of the wife. The residue was certainly to be converted at that time, and the only direction as to investment is of the \$600. If the residue, after satisfying the pecuniary legacies, was to await the death of *John Henry Wright*, an investment thereof in the meantime would be necessary, would be at least proper, and nothing of that kind is indicated by the will. There would be necessarily a distribution following the conversion upon the death of the wife (saving of the \$600), or a holding of the residue by the executors for an indefinite period, *i. e.*, until the death of *John Henry Wright*.

Judgment

There may be something also in the expression "all the legatees herein mentioned." The will mentions by name all the legatees except the brothers and sisters of *John Henry*. Assuming them to be strictly legatees, they are not mentioned as such by name, as all the others are.

Upon the whole my opinion is, after I confess some fluctuation of opinion, that this is one of those cases in which the context shews, that, though strictly and technically these brothers and sisters of *John Henry* may be legatees, they were not so in the contemplation of the testator, and that the whole of the residue is presently distributable.

The costs will be as indicated in my former judgment.

SOLICITORS.—*Mulock* and *Campbell*, for the plaintiff; *Mark Scanlon*, *Bradford*, for the defendant *R. H. Smith*; *Cameron*, *McMichael*, and *Hoskin*, for the defendant *Mary Elizabeth Wallace*; *E. Morgan*, *Newmarket*, for

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the defendants *John and Mary Wright*; *Rose, McDonald,*
and Merritt, for *The Connexional Society*; *Blake, Kerr,*
and Boyd, for the defendant *Margaret Hulse*; *Bull* and
Johnston, for the defendant *William Smith*; *Boulton*
and Evatt, for the defendant *John Henry Wright*; *J.*
Hoskin, for the other defendants.

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HICKSON V. CLARKE.

Specific performance—Sale of land with water privilege attached.

The defendant agreed to purchase a piece of land, "with a water privilege attached," for the avowed purpose of erecting a mill on the land, and storing or booming the logs for his mill in the water adjoining.

Held, that this did not bind the vendor to retain the water in its then state for the purpose of securing to the defendant the benefit of such booming or storage; and that, notwithstanding the loss of the water privilege by reason of one of the dams having fallen into decay, the defendant was bound specifically to perform the agreement.

The bill in this cause was filed by *Joseph Hickson* and *Statement.*
James Symington, executors of *John Shedden,* deceased, who had been the owner of the premises in question, to enforce specific performance of the agreement entered into between *Shedden* and the defendant under the circumstances stated in the judgment.

The cause came on to be heard before the Chancellor, at the sittings of the Court in Toronto.

Mr. Moss (*Mr. R. Harris* with him), for the plaintiffs.
Mr. Attorney-General Mowat, for the defendant.

The objection relied on by the defendant against the relief sought by the plaintiffs, was, that the property was no longer that agreed to be purchased by the defendant.

SPRAGGE, C.—This was a bill by the executors of a *Judgment.*
 vendor for specific performance and payment of unpaid purchase money.

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The defendant set up that he was a purchaser of the two lots in question, together with a water privilege attached. It appeared by the evidence that what he contracted to purchase was, two certain lots in the village of Coboconk, the village being the property of the late *John Shedden*, and a "water privilege." These lots, 1 and 2, fronted on one side on what is called the Township road, and station grounds of the Nipissing railway, and on the other on a sheet of water, marked on the map of the village "dead water." In the spring of 1872, the defendant *Clarke* saw *Shedden* at his office, in Toronto. He and his agent *Cooke* had previously seen *Shedden's* agent, *Lusted*, in Coboconk, and he, *Shedden*, and *Lusted*, were together in *Shedden's* office, in Toronto. *Clarke's* declared object in making the purchase was, to erect a steam saw mill on the lots, and the map of the village was before them when they discussed the proposed purchase. What *Shedden* proposed to sell and *Clarke* to purchase was, the two lots, with a certain privilege in connection therewith, for the purposes of the mill he proposed to build, viz., the use, or as *Lusted* terms it, the control of the water in front of the two lots to the centre of the water in front, which from the shape of the lots would give him the use of the water up to about the road allowance on which the bridge was built. The declared purpose for which this water privilege was wanted was for the storage or booming of saw logs to be used at the mill, and for the supply of water for the boiler. That one declared purpose was for the booming of logs is confirmed by the circumstance of *Shedden* asking his agent *Lusted* if the booming of logs there would interfere with a project that he contemplated, of building a mill at a place called "the point" further up the river, and with his booming his logs for his own mill; and upon *Lusted* informing him that the booming of logs proposed by the purchaser could not interfere with his project, he assented to the privilege proposed.

Judgment.

Shedden named his price, and *Clarke* was to inform him whether he would purchase upon the terms proposed. This seems to have been the substance of what passed. Nothing was said about the water being continued at its then height, or about the dams then in existence being maintained. In a few days thereafter *Clarke* wrote a letter to *Shedden* agreeing to purchase the two lots, "with the water privilege attached thereto," at the price and on the terms which had been named by *Shedden*. It was certainly fully understood at the interview at *Shedden's* office that it was for the purpose of a steam saw mill that *Clarke* proposed to purchase; and *Shedden*—so *Clarke* states in his evidence—expressed his satisfaction at the prospect of the proposed mill being built in the village. Shortly afterwards *Clarke* came to Toronto, and asked when he could have his deed. *Shedden* said to the effect that the title was being perfected in this Court; and no conveyance was then or has since been given, and no part of the purchase money has been paid. The situation of the premises and the surroundings at the time was this: the "dead water," opposite the lots the subject of purchase, extended in the direction of down the river, the Gull river, to a dam over which a road, one of the streets of the village, was carried; and across the head of an island, part of the village, to a dam serving a saw mill propelled by water power, which may be called the upper dam; the existence of both these dams was necessary in order to serve *Shedden's* water saw mill, and if either had been lowered the dead water would have been lowered also, and if either had ceased to exist the dead water would escape, and the place covered with that water opposite the lots purchased by *Clarke*, and above and below that place, to what extent is immaterial to this case, would be left, if not dry, with an insignificant stream not sufficient for the booming of logs. The lower dam would appear to be placed lower down than would be necessary unless for the purpose of water

1877.

Hickson
v.
Clarke.

Judgment.

1877. storage for the water saw mill, or for a water front for
 lots 1 and 2, and lots lower down the stream, and for
 lots on the island opposite. At the time of the pur-
 chase by *Clarke* from *Shedden* the whole of this pro-
 perty was owned by *Shedden*, and had been laid out on
 a registered plan or map for the purposes of sale, with
 the single exception of "the point," on which he con-
 templated the erection by himself of a mill.

Hobson
 v.
 Clarke.

All this was perfectly well-known to *Clarke*. He
 knew by personal observation the exact position of the
 whole of the property, the land, the water, and the dams;
 and he knew also of the intended sale of the property
 by *Shedden*, with the one exception of the part called
 "The Point."

A cardinal point in the case is, the meaning to be
 given to the words "with the water privilege attached
 thereto," in the letter of *Clarke*, of 18th September,
 1872, notifying *Shedden* that he would purchase the two
 lots 1 and 2. The letter runs thus :

Judgment.

"I telegraphed to-day to say that I would take the
 two lots, viz., 1 and 2 on plan you shewed me in your
 office, at \$1000 for the two, with the water privilege
 attached thereto. If you will name a day, any time next
 week, I will come in and arrange about it.

I remain, yours obediently,

R. B. CLARKE."

The defendant's contention is, that the legal effect of
 what passed was, to create an obligation on the part of
Shedden to preserve to *Clarke* the water in front of
 these two lots in its then state, or at any rate in such a
 state as that there should be sufficient water to float the
 logs to be used at the defendant's mill. His contention
 must be to this extent, for he is resisting the payment of
 purchase money, and it is not pretended that there was any
 stipulation on the part of *Shedden* that the same should
 be preserved, or the water kept in the place in which it
 stood, or that that subject was mentioned between the
 parties; or that anything has been done by *Shedden*

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or his representatives since, actively to interfere with the enjoyment by *Clarke* of the water for the purposes contemplated, unless it be the sale by *Shedden* of the Coboconk property, and with it the sale of the mill property upon which one of the dams was built, and as to that it was well known to *Clarke* that such sale was intended by *Shedden*.

1877.
Hickson
v.
Clarke.

Then, could there be any water privilege attached to the lots sold which would not comprehend such an obligation as that contended for? There certainly could; for the right by defendant to boom his logs in any water that there might be opposite the lot purchased, would be a certain privilege; it would be an easement that would debar *Shedden* from doing any act in reference to the water or the water bed, that would interfere with the booming by the defendant of his mill logs. It is to be observed that it is not a *mill privilege* that is the subject of this contract, but a "water privilege attached" to land sold. The right to boom logs which could not be interfered with would be a substantial advantage to the owner of the land purchased, and would be a water privilege. Judgment.

It is probable, I think, that both parties expected the then state of land and water to be permanent; that they did not look for a contingency that has occurred, *i.e.*, one of the dams, the upper one, getting into such a state as to leave the water opposite the lots to flow off down the channel of the river. The not providing for such a contingency may have been mere want of forethought on the part of the defendant, or he may have considered that it was so obviously the interest of the owner of the mill to keep up his dam for the sake of his water storage, that he would be safe in that quarter; and the lower dam was a roadway of one of the streets of the town, upon the continuance of which he might safely reckon. These considerations are material in this way. There is no express stipulation that the water shall be preserved opposite the land sold. If it

1877.
 Hickson
 v.
 Clarke.

formed part of the contract it must be by necessary implication, and if it may be that the purchaser might have deemed himself safe without express stipulation, or through want of forethought omitted to provide for contingencies, the possibility of which would have occurred to a wary, farseeing purchaser, but did not occur to him. From whatever cause the omission of an express stipulation proceeded, it would be too much to import into the contract any such stipulation as being necessarily implied. It is, of course, clear law that in a grant, or contract to grant, that is implied which is a necessary consequence or incident of the grant, because it is presumed that the parties intended it; but at the same time the nature of the thing granted, the knowledge of the parties in respect to it, and the express stipulations are to be looked at. If I were to accede to the contention on behalf of the defendant, I should be in danger of importing into the contract something which neither party may have contemplated, and which, if asked for as a term of the contract, might have been refused by the vendor.

Judgment.

The decree should be with costs.

SOLICITORS.—*Morris, Harris, and McBride*, for the plaintiffs; *Morphy, Morphy, and Winchester*, for the defendant.

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KERR V. COGHILL.

1877.

Specific performance—Easement.

K., the plaintiff, a barrister and solicitor, who had been in the habit of acting professionally for the defendant, purchased from the defendant a "cottage and lot on the south-east corner of Gerrard and Jarvis streets, in Toronto"—the conveyance for which was prepared by the plaintiff under the short forms of conveyances' Act, describing the premises by metes and bounds. These premises and a small additional portion of land were occupied by one *L.*, as tenant of the defendant, and at the extreme limit thereof was a water-closet, which had been, and at the time of the conveyance to the plaintiff was used with the premises:

Held, that the water-closet passed as appurtenant to the cottage, although distant nearly two feet from the extreme limit of the land conveyed to the plaintiff, and the defendant swore that he had never intended to convey any interest therein to the plaintiff.

The defendant in January, 1874, and for some time previously, was the owner of a parcel of land in Toronto, bounded on the north by Gerrard street, and on the west by Jarvis street; and on which was a brick cottage with out-offices. The premises were at the time, Statement. and for some time previously, in the occupation of a Mr. *Lyon*, as tenant of the defendant. To the south of these premises was another parcel of land, also owned by the defendant, upon which were a dwelling house and out-offices. A Mr. *Gurney* was tenant of these premises to the defendant.

On the 13th of the above month an agreement was entered into between the defendant and the plaintiff, who was a barrister and solicitor, and had been in the habit of acting in that capacity for the defendant, for the sale to the plaintiff of "the cottage and lot on the south-east corner of Gerrard and Jarvis streets, in Toronto": the premises were no further described. On the following day a conveyance, prepared by the plaintiff, was executed between the parties, under the short forms of conveyances' Act, describing the premises by metes and bounds.

1877. At the south-east corner of the premises occupied by *Lyon*, there was a water-closet, which always had been, and at the time of the sale to the plaintiff still was used with those premises. The description in the conveyance to the plaintiff did not by metes and bounds comprise this water-closet.

Herr
v.
Coghill.

The second and third courses in measurement were in favour of the defendant's contention. The second course ran south 16 feet east 59 feet; and 59 feet did not reach even the north side of the water-closet by 1 foot 8 inches; and the third course was a straight line, while the southerly side of the premises occupied by *Lyon* was not in a straight line.

When the plaintiff asserted a right to the use of this closet, the defendant proceeded to block up the same by running a fence across and otherwise obstructing the approach thereto.

The plaintiff thereupon moved for and obtained an *interim* injunction restraining the defendant from preventing the approach to and free use of this easement.

The cause came on for the examination of witnesses and hearing at the sittings of the Court, at Toronto, in the Spring of 1877. Both parties were examined as witnesses, the defendant swearing that he had never intended, nor would he have agreed to convey to the plaintiff any interest in the easement in question.

Mr. *Akers*, for the plaintiff.

Mr. *Attorney-General Mowat* and Mr. *Reeve*, for the defendant.

The other facts and the points relied on appear sufficiently in the judgment.

Judgment. SPRAGGE, C.—[After stating the facts to the effect as above set forth.] Under the short forms of conveyances Act, I have no doubt that the water-closet

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would pass as an easement—assuming there to be nothing else in the case.

I entirely agree with the position taken by the learned Attorney-General, for which *Cerley v. Lord Stafford* (a) is a leading authority—that the plaintiff, having undertaken to prepare the conveyance, was bound to prepare it as it would have been prepared by an independent conveyancer, or as it would have been sanctioned by this Court, had this Court been called upon to carry into effect the agreement. I use the language of Lord Justice *Turner*; and I think it may be added that he was bound to prepare it as a conveyancer possessed of all the knowledge that he possessed would have prepared it. A conveyancer having only the agreement before him, but being provided with a description by metes and bounds, would, without any neglect of duty, have drawn the conveyance as this conveyance is drawn. But I go further in assuming that he was bound to prepare it as a conveyancer possessed of his knowledge of the circumstances would have done. Further, I assume that it was the duty of a conveyancer possessed of such knowledge to point out to the grantor that under the Act respecting short forms of conveyance the conveyance would pass as an easement the water-closet, though outside the metes and bounds of the description. In putting the case thus, I put it as high as it can properly be put for the defendant, though I think not more high than is warranted by the law.

Each of the parties has given his evidence, and both agree that in the negotiation which preceded the agreement, nothing was said by either party about the water-closet. That is one fact. The plaintiff in his evidence says, that the defendant told him that Mr. *Lyon* was his tenant, and that he would give him all that Mr. *Lyon* had. The defendant's evidence was given after this statement by the plaintiff, and that statement is not denied by the defendant. A material piece of evidence is given by Mr. *Gurney*, the defen-

1877.
Kerr
v.
Coghill.

Judgment.

1877. dant's tenant of the south-east premises. It is to the effect that *Gurney* suggested to the defendant in August, 1874, to remove his (*Gurney's*) shed and water-closet to the end of his lot; and that the defendant said he could not do it, that the plaintiff would object, as it would interfere with his water-closet. Upon this, the defendant only says that, he does not recollect having such conversation with *Gurney*. The evidence of *Gurney*, who, when he gave his evidence, was still a tenant of the defendant, was, I have no doubt, truthful, and, from his clearness and intelligence, I should say accurate.

My conclusion is, that the subject of sale and purchase was the premises of which *Lyon* was tenant; and there is no question that those premises comprised *inter alia* the water-closet in question. The conveyance, with the legal effect given to it by the Act under which it was made, does no more than carry out what, upon the evidence before me, appears to have been the true agreement of the parties. The plaintiff is, therefore, entitled to the relief prayed by his bill—except as to damages. The cost of replacing the premises in the position they were in before being blocked up by the defendant, must be paid by the defendant. This may be ascertained and inserted in the decree. Beyond that, I give no damages, as the plaintiff promptly came for and obtained an injunction.

Judgment.

The plaintiff is entitled to his costs.

SOLICITORS.—*Kerr* and *Akers*, for the plaintiff;
Reeve and *Platt*, for the defendant.

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BURRITT V. RENIHAN.

1877.

Mechanics' lien—Filing bill before credit expired.

By the terms of a building contract the work was to be paid for by monthly instalments of 85 per cent. of the work done, and the balance in twenty days after the whole was completed, which was to be done on the 15th of January, and the work was actually finished on the 20th of that month. For the purpose of securing payment the contractors filed a bill to enforce their lien on the 6th of February. *Held*, that this proceeding was premature, except as to what remained due to them in respect of the monthly payments; as to these they were offered a reference at the risk of costs.

Hearing at Ottawa.

Mr. O'Gara, for the plaintiffs.

Mr. Fitzgerald, Q. C., for the defendants.

The facts appear in the judgment.

SPRAGGE, C.—The bill is for mechanics' lien by contractors on a building contract against the owner of the land, the terms of payment being 85 per cent. on the value of work done payable monthly, the balance to be paid in twenty days after the whole of the work has been done, deducting from or adding to the cost of the work any sum of money certified by the architect as the value of additions or diminutions in the work, as provided in one of the clauses in the contract. The contract price was \$3,000 and the plaintiffs claim \$250 for extra work. The work was to be completed on the 15th January, 1877, and the evidence is, that it was completed on the 20th of the same month. The bill was filed on 6th February, 1877; consequently before the expiry of twenty days from the completion of the work, and therefore before the term of credit had expired. It was agreed on both sides, that the lien attached under the Act of 1874 without suit, and, therefore I apprehend, attaches as the work progresses or materials are furnished; and it is contended that a right of suit accrued for the monthly payments of 85

1877.

Burrill
v.
Renhan.

per cent., and that as to them the suit was not prematurely brought.

This is probably an afterthought, for the suit is brought for the whole contract price; yet if it can be maintained for any money payable under the contract the plaintiffs are entitled to relief *pro tanto*.

The contract is dated 21st September, 1876. If the work was completed on the 20th of January following, there would be four monthly payments, from which 15 per cent. is to be deducted. The plaintiffs say they have received \$700. It may be that something is due in respect of these monthly payments, and the plaintiffs seem to be in strictness entitled to a lien and to maintain suit to enforce such lien in respect of them. The plaintiffs may, therefore, make a reference, but they do so at their peril as to costs and otherwise. It is for them to consider whether it would not be for their interest to abandon a suit brought evidently under a mistaken belief that the whole contract price was due and payable at the time they filed the bill. It is a very proper case for arbitration.

Judgment.

SOLICITORS.—*Mowat, MacLennan, and Downey*, agents for *O'Gara, Lapierre, and Remon*, Ottawa, for the plaintiffs; *Fitzgerald and Arnoldi*, agents for *Pinkey, Christie and Hill*, Ottawa, for the defendants.

GRAHAM AND CLEMOW V. TOMS.

Joint and separate debts—Set off—Costs.

T. purchased a quantity of bricks manufactured by the plaintiffs jointly; against one of whom (G.) he held a demand which he desired to set off against the price of the bricks; one of the plaintiffs being in fact assignee of a former partner of G. *Held*, that even if the effect of this was to constitute the plaintiffs tenants in common, it afforded no ground for setting off a separate against a joint debt.

Where a building society by their answer stated a sum of money to be in their hands as stakeholders, which was smaller than, at the hearing, they were willing to admit, the Court refused them their costs of the suit.

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Examination of witnesses and hearing at Ottawa.

Mr. *O'Gara* for the plaintiffs.

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

1877.

Graham and
Clemow
v.
Toms.

SPRAGGE, C.—I reserved judgment upon the question of set off raised by Mr. *Fitzgerald*, in order to refer to one or two authorities cited by him.

Graham and *Clemow*, the plaintiffs, sold to the defendant *Toms* a quantity of bricks. *Toms* claims a debt to be due him from *Graham*, and he desires to set it off against the bricks, or, as he puts it, against the interest that *Graham* has in the bricks sold. He admits the rule, which is indeed too clearly settled to admit of question, that a joint debt and a separate debt cannot be set off, the one against the other; but he contends that the circumstances of this case take it out of the general rule. *Graham* and one *Champneys* were partners in, and tenants in common of a brickfield. *Champneys* became insolvent and *Clemow* became his assignee. After the insolvency bricks were made upon, and out of the clay of the brickfield by *Graham* and *Clemow*, and it was a quantity of bricks so made that was sold by *Graham* and *Clemow* to *Toms*. *Toms* has no debt against the partnership or against the insolvent partner, but against *Graham* only. I see nothing in that state of facts to take the case out of the general rule. *Graham* and *Clemow* were joint owners of the manufactured articles, the bricks, though they derived their title differently and one of them as a trustee; or taking them to have been, as Mr. *Fitzgerald* contends they were, tenants in common, I do not see how it helps his case. There was a joint sale of an article in which the two vendors had property, and if so, a joint debt was created. There was an implied assumpsit to pay the two vendors. It was an obligation to them jointly. They were not separate creditors; and I do not see how the purchaser of the article could go behind the contract and say that

1877. *Graham and Clemow v. Toms.* being a creditor of one of the vendors, he was entitled to an inquiry how and in what proportion the vendors were entitled to the article sold; and Mr. *Fitzgerald* considers that such an inquiry would be necessary, as it certainly would be if *Toms* were held entitled to the set-off that he claims (a). It is indeed sufficient for the determination of this point that, if *Graham* and *Champneys* were still partners, the set-off claimed could not be allowed. It can make no difference in principle that the sale of the bricks was not by *Graham* and *Champneys* but by *Graham* and the representative in insolvency of *Champneys*.

Judgment. The case of *Whetherell v. Langston*, cited by Mr. *Fitzgerald*, from *Addison* on Contracts, has no application, whatever, to this case. It would not have been cited at all, (I may take it for granted), if the report of the case had been accessible. The case referred to, also in Mr. *Addison's* book, of a covenant with separate land owners to keep a sea-wall in repair, is also quite beside the question in this case. It was not a question of set-off, but of joint or several covenant. My opinion, therefore, is now, as it was at the hearing, that *Toms* is not entitled to the set-off claimed by him.

There was another short point which I did not dispose of, viz.: as to the costs of the Metropolitan Building Society. They are stakeholders, and, *prima facie*, would be entitled to their costs; but by their answer they state a smaller sum to be due by them than, as they admit at the hearing, was really due. As to them the decree should be without costs.

SOLICITORS.—*Mowat, Macdennan, and Downey*, agents for *O'Gara, Lapierre, and Remon*, Ottawa, for the plaintiffs; *Fitzgerald and Arnoldi, Pinhey, Christie, and Hill*, for the defendants.

(a) 17 L. J. Ex. 341.

RE CAMPBELL.

1877.

Bar of dower—Husband and wife—Notice of motion.

This Court will not, acting under the Revised Statutes of Ontario, ch. 126, sec. 10, order a conveyance free from the dower of a wife living apart from her husband, unless it is shewn that the party moving is unable to serve notice of the intended application upon the wife, or that she has left her husband and has expressed her determination never to return to reside with him.

This was an application by Mr. A. G. McMillan, (Whitby), upon the petition of R. E. Campbell, setting forth that the wife of the petitioner was, and had been for two years, living apart from him under such circumstances as, in the words of the statute, disentitled her to alimony; that he had contracted to sell certain lands which he was desirous of selling, and praying for an order to "dispense with the concurrence of the wife for the purpose of barring her dower therein."

Statement.

It appeared that no notice had been served upon the wife; that she was resident in the same locality as the husband, and that no difficulty existed in effecting service of a notice upon her. Counsel submitted that it was discretionary with the Judge before whom the application is made to grant the order *ex parte*; and that the facts appearing here were such as to warrant the order being made in this matter.

BLAKE, V. C.—The course pursued by the Courts of ^{Judgment.} England, acting under a similar provision, is, in all cases, to require notice of the application to be given, unless indeed it be shewn that unreasonable difficulties are thrown in the way of effecting service on the wife, or that she has left her husband's roof, and expresses a determination never to return to reside with him. I am clearly of opinion that you must give notice.

1877.

SMITH V. DREW.

Fraudulent conveyance—Husband and wife—Mortgage—Ignorantia juris.

In December, 1874, *D.* executed a mortgage for \$2000 in favour of his sons to secure moneys advanced by them for the erection of buildings on the mortgage premises, and in July following he conveyed the same property, with other lands, to his daughter in trust for his wife, who had advanced \$700 for the same purpose. Subsequently the sons, intending to benefit their mother, executed a statutory discharge of their mortgage. In July, 1876, *D.* having become insolvent, his assignee instituted proceedings impeaching the conveyance to the wife as a fraud upon creditors, and which she admitted, on her examination, though denied by her answer, to have been by way of security only. The Court negatived fraud in both transactions, and made a decree for redemption declaring the wife entitled to be paid the two sums of \$700 and \$2,000 and her costs.

The maxim "*Ignorantia juris neminem excusat*," treated of and explained.

The bill was filed by the plaintiff, who in July, 1876, was duly appointed assignee in insolvency of the husband of the defendant, seeking to set aside a conveyance, dated 9th July, 1875, of property called "The Leonard Avenue property," in the City of Toronto, thereby conveyed by the insolvent to his daughter for the use of the defendant, his wife, the expressed consideration for which was \$700; also another deed of the same date between the same parties conveying one hundred acres in Elzevir and eighty acres in Flos for the expressed consideration of \$700; on the ground of want or inadequacy of consideration, as well as that such conveyances were made to defraud then existing and subsequent creditors.

The defendant in her answer denied the insolvency of the grantor at the date of the conveyances; that the lands were not actually his property; and alleged that advances had been made by the wife to her husband of \$1,100 out of her separate estate, \$700 of which had been so advanced on the understanding that the husband would afterwards secure her on real estate; that their sons had put money of their own into the business on the Leonard Avenue property and had taken a mortgage from the insol-

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v. Hewitt

(a) 7
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vent for \$2,000 on that property, dated the 3rd day of December, 1874, which mortgage the sons had after the conveyance to her of the property discharged "for her benefit" by the ordinary statutory discharge; and she claimed to hold the property absolutely, though in her examination on her answer the defendant admitted that the land had been conveyed as security.

The case came on to be heard at Toronto before the Chancellor.

On behalf of the plaintiff it was contended that the husband was insolvent at the date of the conveyances, and contemplated incurring further liabilities for building purposes; that by the conveyance to his wife he parted with all his property; that the wife knew of his insolvency and of the indebtedness he contemplated; that the evidence did not establish with the satisfactoriness required by the authorities that the husband had obtained moneys from his wife on the basis of an agreement to repay them; that she knew if he obtained her money that it was going into his business and would be exposed to risks; that her evidence and the insolvent's was full of contradictions and entitled to no weight; that all the elements of fraud were present, the sons, husband, and wife, all living together on a part of the property conveyed and drawing the rents accruing therefrom; and that the defendant if she were redeemable was not entitled to the benefit of the \$2000 mortgage, it having been wiped out of existence by the discharge; that if there were any agreement to secure the defendant it only applied to the \$700 and to the Leonard Avenue property and not to the other land; and that by her denying the right to redeem the assignee was entitled to his costs.

Mr. W. A. Foster, for the plaintiff, referred to *Buckland v. Rose* (a), *Black v. Fountain* (b), *Crawford v. Meldrum* (c), *Kalus v. Ergert* (d), *Re Miller—Miller v. Hewitt* (e).

(a) 7 Gr. 460

(b) 23 Gr. 175.

(c) 3 E. & App. 101.

(d) 1 App. Rep. 75.

(e) 1 App. Rep. 393.

1877.

Smith
v.
Drow.

Statement.

1877. *Mr. Black*, for the defendant, contended that the evidence failed to establish any fraudulent intent on the part of either of the parties to the impeached transaction, and submitted that even if the Court should find against the defendant on that, the cases of *Howes v. Lee* (a), and *Buchanan v. McMullen* (not reported), shewed that *Mrs. Smith* was entitled to claim as well the amount secured by the mortgage to her sons as the \$700 advanced by herself out of her own moneys; there not being a shadow of suspicion cast upon the *bona fides* of either of those transactions.

Smith
v.
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SPRAGGE, C.—At the hearing I held the defendant entitled to hold the “Leonard Avenue property,” charged with the sum of \$700, being for moneys advanced by her upon an engagement by her husband that they should be secured upon that property. Further, I thought, upon the evidence, strengthened as it was by the agreement of 1st February, 1874, between *Matthew Drew*, the father, and his sons *John C. Drew* and *Matthew C. Drew*, that the mortgage of 3rd December, 1874, was *bona fide*, and for valid and full consideration; and I was satisfied that the certificate of discharge of that mortgage given by the mortgagees after the conveyance to the defendant of 9th July, 1875 (the date of the certificate is not before me), was given in order that the same might enure for the benefit of the defendant, their mother, she at that time having a conveyance in fee subject to that mortgage, and to a mortgage for \$3,000 to the Scottish American Investment Company.

Judgment.

I thought the plaintiff, as assignee of the insolvent, was entitled to redeem, and the question that I reserved for consideration was, whether the defendant was entitled to hold the premises charged with the amount secured by the \$2,000 mortgage as well as charged with the \$700, or charged with the latter only.

If the mortgage had remained in the hands of the

(a) 17 Gr. 459.

sons, I should have held them entitled; or, if they had assigned their mortgage to the defendant, whether for value or as the consideration was, natural love and affection, I should have held her entitled. My doubt was, whether, as there was no intention to keep the mortgage alive, she was entitled to set it up against the assignee in insolvency coming to redeem.

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The case of *Howes v. Lee* (a), in this Court, decided by Mr. Justice Strong, when Vice-Chancellor, goes a great way in support of the defendant's claim. The head note describes accurately the point in the case: "The equity of redemption in mortgaged premises was sold under execution at law, and a conveyance thereof was executed by the sheriff, purporting to convey the same to the purchaser, who subsequently paid off the mortgage, obtained from the mortgagee a statutory discharge thereof, which he caused to be registered, and went into possession of the mortgaged property. In a proceeding at law the sale by the sheriff was declared void in consequence of the invalidity of the writ under which he had assumed to sell." The mortgagor brought Judgment. ejectment against the purchaser, which was restrained by injunction. The reasoning upon which the learned Judge proceeded is apposite to this case. It was, that the purchaser, acting on the supposition, since determined by a Court of law to be erroneous, that he had acquired the equity of redemption, a mode of passing the legal title was adopted which had not the effect intended by the parties, but an effect entirely at variance with that intention: that the mortgagee being, as soon as he was paid off by the purchaser, a trustee for him of the legal estate, intending to convey it to the purchaser, through error and mistake conveyed it to the mortgagor,—i. e., that the legal effect of the certificate of discharge was (the sheriff's sale being void) to vest the legal title in the mortgagor instead of in the purchaser, as was the inten-

(a) 17 Gr. 459.

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Drew. tion of the parties. The learned Judge goes on to say: "It is no answer to the plaintiff's application to say that the misapprehension as to the effect of the sheriff's sale was a mistake of law which this Court will not relieve against. It is clear, on the highest authority, that the error into which the parties fell in the present case was one which the Court will remedy. In *Cooper v. Phibbs* (a), Lord Westbury says: "It is said '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting general law—the ordinary law of the country. But when the word '*jus*' is used in the ordinary sense of denoting a private right, that maxim has no application."

The maxim received the same construction from Lord Chelmsford, in *Earl Beauchamp v. Winn* (b).

Judgment. The case before me differs in some points from *Howes v. Lee*. The sons of the defendant, in this case, intended that the mortgage should be extinguished in favour of the defendant, and the legal effect of what they did was in accordance with that intention; but they did what they did under a mistake as to the consequences resulting in law from what they did. The motive of their act, the intention with which it was done, will be frustrated if, not their mother whom they intended to benefit but, third persons get the benefit of their act.

In one respect this case is stronger than *Howes v. Lee*, in there being, in this case, not a mistake of law only, but a mistake of fact, for I think the proper conclusion from the evidence is, that they, the sons, believed their mother to be absolutely entitled, subject only to the mortgage to the Investment Company, not redeemable by their father, or any claiming through him.

It is to be conceded that there were no equities between the mother and the sons after the granting of the certificate of discharge, she being a mere volunteer. Her position is, that there was a mistake, by which their

(a) L. R. 2 E. & I. App., at 170.

(b) 6 E. & I. App., at 234.

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intentions in her favour are disappointed if third persons can take advantage of it. The fact as to their intentions and as to the mistake are clearly established in evidence.

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Mr. *Black* has referred me to a case not reported, decided by this Court upon rehearing, which seems more nearly in point than *Howes v. Lee*. It is the case of *Buchanan v. McMullen (a)*. A conveyance was there set aside as void under the statute of Elizabeth.

(a) BUCHANAN V. McMULLEN.

Fraudulent conveyance—Grantee entitled to repayment—Rents and profits—Improvements.

An assignment of an equity of redemption was made, which the Court held to be void against the creditors of the mortgagor; but it appearing that the sons of the assignee had paid off the mortgage for her benefit, the Court gave relief only on the terms of the amount being paid to the assignee, and *Held*, by VAN KOUUNET, C., and SPRAGGE, V. C., (Mowat, V. C., dissenting), that the creditors were not entitled to set off the rents the assignee had received, and *Held*, also, that in such a case the assignee was not entitled to be allowed for improvements made upon the mortgage premises; but that if the same were properly allowable then that the rents and profits accrued should be set off against the value of such improvements.

This was a suit by execution creditors of *Archibald McMullen* to set aside a conveyance, made by the debtor to his wife, of certain lands in the village of *Fergus* previously mortgaged to one *Armstrong*. Vice-Chancellor *Spragge* at the hearing held the conveyance void against the creditors, but decreed that the assignee of the equity of redemption had a lien for the amount paid in redemption of *Armstrong's* mortgage.

The plaintiffs being dissatisfied with the decree reheard the cause. Mr. *Fitzgerald*, for the plaintiffs.

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

The judgment of the Court was delivered by VAN KOUUNET, C.—The sons swearing that they paid the money for their mother; the father making no claim to it, and the sons not insisting on any lien, I think the mother entitled to the benefit of the payment on this record. That the sons owed the father can make no difference. Supposing a stranger had expressly agreed to indemnify them or return them the money if they advanced it for their mother, that would not disentitle the latter to a lien on the land for the money which has gone in discharge of the mortgage, neither the father, the sons nor any person promising indemnity, objecting. If the sons after their evidence or the father who has let the bill go *pro confesso*, think themselves entitled to this money in the place of the mother, they can

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Between the conveyance and suit brought impeaching it, the grantee in the impeached deed paid off a mortgage upon the land, and took and registered a statutory certificate of discharge. The point decided seems to have been that the defendant was entitled to stand in the shoes of the mortgagee whom he had paid off: and I may add that I think the decision was certainly right.

file a bill against her, or make a claim in any shape they may be advised, Some one is entitled to this money, which was properly chargeable on this land: and I think the mother should be declared entitled to it, neither son nor father objecting; whether the money was given or loaned to her by her sons, can make no difference. The transaction of purchase is declared void; that cannot make it worse than if it had never taken place. Then suppose it had never taken place and she had paid off the mortgage, on the faith, as she did in this case, that she would have the benefit of it; or suppose she had procured the assignment of the mortgage to a trustee, would she not be entitled to a lien or the benefit of the mortgage. Would it not be presumed that it was understood she was to have this lien? Here she claimed to be the owner of the land. Some one must have paid this money. All the creditors had a title to was the equity of redemption; and it is the sale of this only that is set aside as fraudulent.

Decree affirmed, with costs.

In taking the accounts under the decree, the Master charged the defendant with the rents she had received as against the money she had paid to the mortgagee.

The defendant appealed against this, and against other charges which the master had allowed.

Mr. *Moss* for the appeal.

Mr. *Fitzgerald* and Mr. *Cross*, contra.

VANKOUGHNET, C.—The judgment of the Court on the rehearing of this cause and the form of the decree dispose, I think, in a great measure, if not actually, of the questions raised here on the appeal from the Master's report.

In this decree as affirmed on rehearing is the following paragraph: "But this Court doth declare that the defendant *Mary Jane McMullen* is entitled to a lien prior to the plaintiff's claim upon the said land and premises for the amount paid, or caused or procured to be paid,

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Though the defendant did not keep the mortgage alive, or intend to do so, the Court, while setting aside the impeached conveyance as void against creditors, held the defendant entitled to be subrogated to the rights of the mortgagee.

The case would have been different here if the certificate of discharge had been granted to the father

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by her in respect of the *Armstrong* mortgage, as in her answer stated, and that she is entitled to be paid the same out of the proceeds of such sale, with interest thereon; the amount so paid by her as aforesaid, the said Master is to ascertain in taking the accounts hereby directed."

In the judgment pronounced on the rehearing of this decree we held that the plaintiffs, as judgment creditors, were only entitled to sell the equity of redemption in the premises, *i.e.*, the estate which the execution debtor had in the lands, at the time of the fraudulent conveyance, the prior mortgage to *Armstrong* not being impeached, and having been purchased in by the assignee under the fraudulent conveyance:—in other words, that treating her, Mrs. *McMullen*, as representing for the benefit of his creditors the assignor of the estate fraudulently assigned, the Court would sell it and no more; and that they would treat the mortgage as outstanding for her benefit. The decree does not direct the Master to take an account of what is due to Mrs. *McMullen* upon this mortgage purchased in by her, but that he is to ascertain the amount paid by her on that purchase; and this, with interest thereon, she is to have out of the proceeds of the sale ordered. Under this provision in the decree, the Master should not have proceeded to charge her with rents and profits, and I do not think that the Court intended she should be so charged, or would have made any order to that effect.

In *Higgins v. The York Buildings Co.* (a), Lord *Hardwicke* says, "I do not know in a case of fraudulent conveyances that this Court has ever done anything more than remove such fraudulent conveyances out of the way; nor are there any cases that I can find of decreeing profits back against the original debtor and owner of the estate received *pendente lite* in this Court in favour of judgment creditors from the filing of the bill, nor any instance of a decree for a sale; but equity follows the law and leaves them to their remedy by *elegit* without interfering one way or the other." Lord *Hardwicke*, in subsequent cases, so far deviated from his opinion as to decree a sale without remitting the party to his execution at law; but I am not aware of any instance

(a) 2 Atk. 107.

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before the conveyance of 9th July. But here the defendant acquired it, not indeed by paying money for it, but for a consideration good in law; and I can conceive no sound reason for this Court enabling the creditors of the insolvent to have the benefit of a transaction intended for the benefit of the defendant, contrary to the intention of all the parties to that transaction.

in which the vendor or vendee under the fraudulent deed has been ordered to account for rents and profits, unless it may have been from the time of the decree, when, as Lord *Hardwicke* says, there being more judgment creditors than one "gives the Court a handle to decree an account of the profits of the estate from the time of the decree." Whether or not the Court would have ordered such an account if asked to do so, it is unnecessary now to decide, as the decree does not order it. We have held here that the estate would not be sold in this Court earlier than it could have been at law: that is, a year from the time of the delivery of the writ to the sheriff, though the time the writ may have so been in the hands of the sheriff, will be taken into such account in fixing the time for a sale here. I suppose no instance is to be found of an execution debtor being called upon to account for rents and profits prior to the sale; and I do not see that his assignee, who is treated as holding the estate just as he would have done for the benefit of his creditors, can be in a worse position. As against creditors, the assignee is treated as holding the estate of the debtor and which might have been sold at law as his, but for the difficulty created by the fraudulent conveyance. The removal of that difficulty is in the ordinary case the sole ground for the interference of this Court. It is said that the defendant *Mrs. McMullen* is treated as taking the grantor's estate, yet that being in possession if she is not charged with rents and profits, the mortgage will be swollen with interest and may eat up the estate. The execution creditor can prevent this by coming promptly to this Court for a sale.

Looking also at the form of the decree the Master should not have allowed anything for improvements. If it would be proper in any such case to allow a fraudulent vendee in possession for improvements, (and it would not be so, if the parties are to have no other rights here than they would have at law, on selling the property for payment of debts), then I think it would also be proper to set off rents and profits against such improvements.

I also think that the Master should allow *Mrs. McMullen* the costs paid by her to the mortgagee, *Armstrong*, as the decree gives her these. It directs that she shall have a first lien for the "amount

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The defendant succeeds upon the question really in contention between the parties, and is entitled to her costs. The plaintiff may redeem the defendant upon payment of what shall be found due upon the \$2,000 mortgage, and in respect of the \$700 advance and costs. [On the 21st of February, 1878, this decree was affirmed on rehearing by the full Court.]

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SOLICITORS.—*Foster and Clark*, for the plaintiffs;
Delamere, Black, and Reesor, for the defendant.

paid by her in respect of the *Armstrong* mortgage as in her answer stated," and in this answer she says, "That she paid to the mortgagee the balance due on the mortgage, and certain costs incurred in and about the collection thereof." These costs, I suppose, would have formed a charge against the execution creditor, and they were incurred, as I understand, prior to the deed to Mrs. *McMullen*.

The report must be corrected in accordance with this expression of opinion.

The plaintiff's rehear, by way of appeal, the order then pronounced by the Chancellor, which came on before the full Court.

Mr. *Strong* and Mr. *Cross*, for the plaintiff.

Mr. *Moss* for the defendant.

VAN KOUGHNET, C., retained his opinion.

SPRAGGE, V. C., concurred.

MOWAT, V. C. dissented.*

* The learned Vice Chancellor delivered a written opinion, which was handed by the reporter to the other members of the Court and was mislaid. It was thought advisable at the time not to report the case, though prepared for the press, without giving the views of the dissenting Judge.

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TOWNSHIP OF HAMILTON V. STEVENSON.

Foreclosure—Immediate sale—Incumbrancers.

In a suit to enforce payment of a mortgage security, if the mortgagor consents to a decree for an immediate sale, it is not necessary that subsequent incumbrancers should give their consent thereto; their right only being to be paid out of the surplus after satisfaction of the plaintiffs' claim.

This was a suit to foreclose a mortgage. The defendant by his answer admitted facts which entitled the plaintiffs to a decree, but asked a sale instead of foreclosure, as prayed by the bill.

On the cause coming on by way of motion for decree, Mr. *Boyd*, Q. C., for the plaintiffs, asked that a decree for the immediate sale of the mortgage premises might be made.

Mr. *Moss*, for the defendant, consented. It was Statement. stated by counsel that the solicitor for the plaintiffs had instructed him that there were subsequent incumbrancers, and that *Blake*, V. C., had, under similar circumstances, held that there could not be a decree for immediate sale in the absence of a consent from the subsequent incumbrancers, but that as no such case had been reported, the probability was, that the decision was only that in a suit to foreclose an immediate decree for that relief would not be granted in the absence of such consent. In case of a sale the subsequent incumbrancers have no right to redeem—only to be paid out of any surplus—and therefore are in no wise injured by an immediate sale being granted.

SPRAGGE, C., thought the decree might go as asked.

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DUNNET V. FORNERI.

Jurisdiction of Court—Communion—Costs.

An attendant at an Episcopal Church, and one of the lay members of the Synod therefrom, filed a bill against the incumbent of the Church praying, amongst other things, that the defendant might be restrained from refusing to allow the plaintiff to partake of the Lord's Supper, and from suspending or excommunicating the plaintiff as a member of that congregation or church: *Held*, that, although the facts were as alleged by the bill—though denied by the answer—this Court had not any jurisdiction to enforce the claim of the plaintiff, as no civil right of the plaintiff had been invaded—the office of lay representative giving only an ecclesiastical, not a civil status. But the Court being of opinion that all the grounds of defence, other than that of want of jurisdiction, had signally failed, on dismissing the bill, refused the defendant his costs.

THIS was a suit by *James W. Dunnet* against the Rev. *Richard Forneri*, the bill in which set forth: (1.) That the plaintiff was and had been for many years, a member of the Church of England within this Province, and a member of the congregation and vestry of Christ Church, Belleville, being a church and congregation of the communion of the said Church of England, and as such entitled to all the rights, privileges, and benefits of such membership. (2.) That the defendant was a regularly licensed and ordained clergyman of the said Church of England and was the incumbent or minister of the said Christ Church according to the rubrics, canons, and rules of the Church of England and the canons of the Incorporated Synod of the Diocese of Ontario. (3.) That the temporalities of Christ Church were managed by churchwardens elected under the Church Temporalities Act in force in this Province, and such churchwardens received the subscriptions and collections of the members of the congregation and vestry, and held the same in trust to provide, among other things, the salary of a minister or incumbent, and also out of such subscriptions, and at the charges of the congregation and members, to pro-

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vide suitable bread and wine for the administration by the incumbent of the Holy Communion of the Lord's Supper to all the members of the congregation and vestry according to the rites and ceremonies of the Church of England, as contained in the Book of Common Prayer and the canons and rubrics of the said Church.

(4.) That the plaintiff was and had been, since the establishment of Christ Church, a regular contributor to the funds for its establishment and maintenance; that as such, and as a member of the congregation and vestry, he was entitled to the benefit of the trust and to partake of and share in the administration of the Holy Communion according to such rites and ceremonies.

(5.) That the plaintiff was a regular attendant of the Lord's Supper in Christ Church, and it had been administered to him by the defendant as the incumbent of the said church and congregation. (6.) That the plaintiff was on the 29th of March, 1875, duly elected by the congregation a member of the Incorporated Synod of the

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Diocese of Ontario, and lay delegate or representative for Christ Church in the Synod for the period of three years, and plaintiff accepted the office, and attended the yearly meeting of the Synod, and had been duly recognized, entered, and enrolled by the Synod as such representative. (7.) That by the constitution and regulations of the Synod it was provided that the lay representatives should be male communicants of the full age of twenty-one years, who should have partaken of the Lord's Supper at least once within the previous year, and that should any lay representative abstain from the Lord's Supper for the space of one whole year he should therefor forfeit his office. (8.) That by the canons and rubrics of the Church of England every member of the Church is required to partake of the Lord's Supper at least three times in each year, and every incumbent was bound to administer the same to the members of the church. (9.) On Christmas Day, 1875, provision was duly made by the churchwardens, and the elements of

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bread and wine were provided by them at the charges of the congregation, for the due and regular administration of the Lord's Supper, to be dispensed to the members of the congregation by the defendant, as such clergyman, according to the rites and ceremonies of the Church of England. (10.) The plaintiff attended Divine service and desired to partake of the Lord's Supper on the said Christmas Day, but the defendant refused to administer it. (11.) On the 5th March, 1876, the elements of bread and wine were again prepared by the churchwardens, and were placed on the communion table to be dispensed by the defendant to the plaintiff and the other members of the congregation and vestry, but although the plaintiff presented himself to receive and partake of the Lord's Supper, and was then, and continued to be, lawfully entitled to receive it as such member of congregation and vestry and lay representative, yet the defendant unlawfully refused to administer it to him. (12.) The defendant, without any colour of right or authority, assumed power to, and at the said service did profess to suspend the said plaintiff from his rights and privileges of full membership, and to excommunicate him from being a member of the said Church and congregation, on the frivolous charge made and asserted by the defendant that the plaintiff had not contributed to the support of the Church according to his means. (13.) The defendant had, by that wrongful conduct, usurped authority not conferred upon him by law or by the canons, constitutions, or regulations of the Church of England, or of the said Synod. (14.) The defendant had further, by reading a libellous paper, which he declared to be the ecclesiastical sentence against the plaintiff, during Divine service on that day before the members of the congregation, sought to damage and destroy the plaintiff's reputation and character before the congregation, and to deprive the plaintiff of his position and rights as a member of the congregation and Church. (15.) The defendant, by his

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1877. wrongful conduct in depriving the plaintiff of his rights as a member of the congregation and vestry and as a communicant, and by so unlawfully excommunicating the plaintiff, was endeavouring wrongfully to cause a forfeiture of the plaintiff's office as a member of the said Synod, and of the rights, privileges, and franchises thereto belonging; and the plaintiff feared that unless the defendant were restrained from so unlawfully depriving the plaintiff of his rights and franchises, the office so held by the plaintiff as such lay representative would become forfeited. (16.) The plaintiff submitted that as contributor to the trust funds, and as a member of the congregation and vestry, he was entitled to all the rights and privileges appurtenant thereto, and one of such rights and privileges was, to partake with the other members of the congregation and vestry of the Lord's Supper as provided at the charges of the congregation. (17.) The plaintiff also submitted that the defendant was a trustee for the plaintiff so far as respected the plaintiff's right to share in and partake of the elements of bread and wine as provided for the celebration of the Lord's Supper, and that the defendant had no just cause or right to deprive the plaintiff of his rights in respect of the same, or to excommunicate or deprive the plaintiff of his membership.

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The prayer of the bill was, that the defendant might be ordered to desist from refusing to allow the plaintiff to partake of the Lord's Supper, or from suspending or excommunicating the plaintiff as a member of the congregation or Church, and for an order restraining the defendant from causing by his refusal a forfeiture of the plaintiff's office of member of the Synod, or in any way damnifying the plaintiff or interfering with his rights and privileges as thereinbefore set out—and for costs, and for other relief.

The defendant by his answer admitted the first, second, third, and seventh paragraphs of the bill. He said the plaintiff was never confirmed according to the canons and rubrics of the Church of England, and that without

such confirmation he was not entitled, by those canons and rubrics, to have the Holy Communion administered to him, nor to be a partaker thereof.

The defendant further alleged that it was his duty and right, as a clergyman of the Church of England, and as incumbent of the said Church, to use and exercise his discretion and judgment in the admission of members of the Church to be partakers of the Holy Communion, and that he had a perfect right, in the exercise of that discretion and judgment, to refuse any person to partake of the Holy Communion, whom he honestly, and truly, and justly believed ought not to be so admitted.

That so acting honestly, truly, and justly, he, in his discretion and judgment, refused to admit the plaintiff to be a partaker of the Holy Communion, as the defendant did not consider the plaintiff, according to the canons and rubrics, entitled to be a partaker thereof.

The defendant further stated that the plaintiff had acted openly and notoriously in violation of the canons and rubrics of the Church, that he was a common and notorious depraver of the Book of Common Prayer and administration of the sacraments of the Church, and of the orders, rights, and ceremonies therein; that he was a schismatic, and had maliciously and openly contended with the defendant and others his neighbours, members of the said Church, and that he had refused or declined to be reconciled to the defendant, or to them.

The defendant submitted that this Court, on the statements contained in the bill, had not any jurisdiction in this matter, and claimed the same right of objection thereto as if he had demurred.

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

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

The authorities cited appear in the judgment.

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PROUDFOOT, V. C.—[After stating the facts as above set forth proceeded.] The most important question in this case is, that of the jurisdiction of the Court to interfere at all in the disputes that have arisen between the plaintiff and the defendant.

Rights of the nature of those asserted in the bill may very well be the subject of adjudication in the appropriate Courts in England, where the Church of England is by law established. But the decisions in such cases are not precedents determining what ought to be done when disputes arise where the Church is not established and Ecclesiastical Courts do not exist.

Judgment.

By the Imperial Act of 1791, a provision was authorized to be made for the support and maintenance of a Protestant clergy, out of lands granted by the Crown; and in pursuance of that Act one-seventh of the Crown lands was reserved for the purpose. For many years this provision was the cause of fierce and bitter disputes as to the denominations comprised under the designation of Protestant clergy, amongst those who were willing to participate in the provision, the offshoots from the Church of England and the Kirk of Scotland claiming to be alone entitled to share, as they were established in Britain where Dissenters were only tolerated; indeed, the Church of England claimed the sole right as being the "Church of the Sovereign." But the contest, carried on with the greatest acrimony and persistence, was between those willing to share in the endowment and those who thought all State endowments of religion unsanctioned in theology and unwise in politics.

The latter ultimately prevailed. In 1840 (3 & 4 Vict. ch. 78, sec. 11) the sections of the Act of 1791, relating to any reservation of land to be thereafter made for the support and maintenance of a Protestant clergy, were repealed. In 1850 (13 & 14 Vic. ch. 18, sec. 6) it was enacted that it should not be necessary for any temporal purpose, privilege, or advantage, to qualify a person to obtain it, that he should take the Sacrament

of the Lord's Supper according to the rights and usages of the Church of England, and should be subject to no penalty for not taking it; and in 1851 (14 & 15 Vict. ch. 175) an Act was passed, which was reserved for Her Majesty's pleasure, and received her assent in 1852, which recited that the recognition of legal equality among all religious denominations is an admitted principle of colonial legislation; and that in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct legislative authority, recognizing and declaring the same as a fundamental principle of our civil polity; and it was enacted that the free exercise and enjoyment of religious profession and worship without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same. And it repealed the clauses of the Act of 1791, which authorized the erection of parsonages or rectories and their endowment.

By another Act of the Imperial Parliament in 1853 (16 Vict. ch. 21) the Legislature of Canada was authorized to alter the appropriation of the Clergy Reserves and their proceeds, and to make such other provision as should seem meet.

In 1854 (18 Vict. ch. 2), in pursuance of this authority, the Canadian Legislature passed an Act secularizing the Reserves, and making provision for rights that had become vested under the previous Acts.

The effect of these enactments is to place all religious bodies upon a footing of equality before the law—that no one denomination shall have any preference over another—that no test shall be required to qualify for any office or trust; and thus renders impossible any such close relation between civil government and Church polity and discipline as exists in England—and greatly

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All religious bodies are here considered as voluntary associations; the law recognizes their existence, and protects them in their enjoyment of property, but unless civil rights are in question it does not interfere with their organization or with questions of religious faith. When these rights come into question, however, it may often be necessary to investigate what tenets are held, and whether fundamental rules of the Church have been invaded. Numerous cases have arisen in our Courts from disputes as to the rights of property caused by the division in the Presbyterian Church in 1844, and more recently from the union of the different Presbyterian bodies in 1875. But the inquiry has been confined to the matter of fact, not as to whether one body is more truly the Church than another.

Judgment. As will appear from the cases about to be noticed, the English Courts do not recognize the right of the Church judicatures to determine matters in which civil rights are concerned to as large an extent as the American Courts; these latter, not uniformly, but for the most part, I think, holding that in cases where the right of property in the Civil Courts is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or Church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the Civil Courts will accept that decision as conclusive, and be governed by it in its application to the case before it; while the English Courts in such cases will examine into doctrines as a matter of fact, for the purpose of determining which party maintains the original principles of the society, and will examine into the Act or judgment of the eccle-

(a) Strong's Lectures, 15 *et seq.*

siastical court for the purpose of determining whether it is in contravention of the fundamental law of the Church, or without authority from it, in which latter case such Act or judgment will be esteemed void, and be disregarded. See *Watson v. Jones* (a)

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Lord Deas, in giving judgment in the Cardross case, cited in *Innes' Creeds of Scotland*, 285-298, vigorously maintains the right and duty of the Civil Courts to investigate the proceedings of ecclesiastical bodies, but only where civil rights are concerned. "It is upon the same ordinary principle that the Court deals with civil interests," that if "no civil interests are involved, we refuse to interfere at all. * * * There are innumerable compacts or arrangements every day entered into, which although not to be compared in importance with compacts or arrangements as to matters of religion, may materially affect the comfort and happiness of society, and in respect of which, nevertheless, so long as they do not involve civil or patrimonial rights, no action will lie, either for implement or damages. Two persons agree to ride together, to dance together, to sing or play together, to travel together; the one breaks his engagement and the other shall have no redress; but if the one has agreed to pay the other for the instruction to be derived in riding, dancing, music, or any other branch of study; or for accompanying him as his *courrier* or *valet de place*, the law will give redress to the party injured by the breach of that agreement. * * * The case is not varied by the introduction of the religious element. A number of persons agree to constitute themselves an association * * * they may call themselves a Church * * * they may assign to certain of their number certain functions; so many to be ministers or office-bearers, * * * and if the labours of the ministers and other office-bearers are undertaken only by those who are rich enough and generous enough to undertake them gratuitously, the

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(a) 13 Wallace's R. 679.

1877. association may enjoy that happy state of freedom in which nobody is bound to anything; but if the association make a compact with certain of its members, and that on condition of the latter going through a long course of study and preparation, and devoting themselves exclusively to the labours of the ministry, they shall be held qualified to be inducted, and accordingly do induct them into the charge of particular congregations, with right to certain emoluments as a means of livelihood, and on the footing that the qualifications thus conferred shall not be taken away except for one or more of certain causes, to be ascertained by certain tribunals, acting in a specified order, then the association, or its members, if they break this compact, may become liable for the consequences, precisely as if the emoluments had been attached to a purely secular qualification and employment. * * * It was stated * * * that the Free Church General Assembly might at any time resolve that any given number of ministers whose names should first be drawn from a ballot-box should be deposed; and that, if the pursuer had been convicted of being sober in place of being intoxicated on Christmas day, 1857, or if the sentence had borne that he was the ablest man and best preacher in the Church, and therefore that he was deposed, there would still have been no legal claim for redress. It may be so, if it can be shewn either, first, that the pursuer bound himself to such conditions, or, second, that the contract involved no matters of civil or patrimonial right. * * * No man in this country has any power over another, in matters either religious or civil, beyond what the civil law itself confers, except by that other's own consent. * * * But such consent, to be effectual, must be clear on the face of the compact. The law will neither presume nor readily infer such consent where civil interests are involved. The liberty of the majority may be the slavery of each individual and of the whole minority. That is not the kind of liberty which the law of this country favours; still less does the

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law favour or even recognize the liberty of one party to a civil contract to break it with impunity or to interpret it in his own favour to the prejudice of the other party. The interpretation of all contracts belongs to the Civil Courts, to the effect, in the first instance, of ascertaining whether they involve civil rights; and in the next place, if they do, of vindicating or giving redress for the violation of these rights; and although every human tribunal must be fallible, history has shewn that nowhere else can these powers be so safely lodged. Rightly viewed, they are, in us, not powers, but duties, which, when required by any of Her Majesty's subjects, be their religion what it may, we have no choice but to perform."

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Of late years the status of the Church of England in the Colonies and in Scotland has been the subject of much consideration. In *Long v. The Bishop of Capetown* (a) Lord Kingsdown, in giving the judgment of the Privy Council, says: "The Church of England, in places where there are no churches established by law, is in the same situation with any other religious body—in no better, but in no worse position—and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them." In that case it was held that Mr. Long had subjected himself to the authority of the Bishop in temporal matters. Mr. Long and the Bishop were to be taken as having contracted that the laws of the Church of England should, as far as applicable there, govern both. It was farther laid down that where any religious association has appointed tribunals to determine whether the rules of the Association have been violated, and what shall be the consequence of the violation, their decision shall be binding when they have acted within the scope of their authority, have observed such forms as the rules require, if any forms be prescribed, and if

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(a) 1 Moo. P. C. N. S., 411-461.

1877. not, have proceeded in a manner consonant with the principles of justice.

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The subsequent case of *Murray v. Burgess* (a) is an example of the mode in which the proceedings of such a voluntary religious association may be investigated and adjudicated upon when a dispute arises concerning them. That case arose from the suspension of a minister of the Dutch Reformed Church in South Africa, which is a voluntary society, constituted and subsisting by mutual agreement. The regulation of its ecclesiastical affairs depends upon contract, and the authority of its governing bodies is derived wholly from the admission and agreement of the members, ecclesiastical and lay, which constitute the Church or Society. By an ordinance of 1843, enacted by the Governor of the Cape of Good Hope, which the Church seems to have asked for and accepted as a constitution, the Synod was organized and made the sole and exclusive tribunal for the trial of charges of false doctrine against ministers. In 1847 an alteration was made by which the jurisdiction of the Synod as a court of first instance was transferred to the Presbytery, with an appeal to the Synod. The Synod determined that there were certain provisions of the ordinances of 1843, which were allowed to remain in 1847, which invest the Synod with a discretionary power of still assuming and exercising in cases of charges against ministers an original primary jurisdiction. A Synodical Commission suspended Mr. *Burgess* on the ground of errors in doctrine. The Supreme Court at Cape Town, and finally the Privy Council, discussed and decided the effect of the ordinances of 1843 and 1847, and held that the transfer of the primary jurisdiction from the Synod to the Presbyteries was clear and positive, and that the Synod had exceeded its powers.

In *re The Lord Bishop of Natal* (b) the status of the Church of England in the colonies is discussed at

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(a) 4 M. o. P. C. N. S. 250.

(b) 3 Moo. P. C. N. S. 115.

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length, and it was, amongst other things, decided that where there was an independent Legislative Assembly in the colony there was no power in the Crown, by virtue of its prerogative (without the provisions of a statute of the Imperial Parliament), to create an ecclesiastical see or corporation, whose status, rights, and authority, the colony could be required to recognize.

In *The Bishop of Natal v. Gladstone* (a), the Master of the Rolls considered the effect of the judgments in *Long v. The Bishop of Capetown* and *In re Bishop of Natal*, and explains them to mean that the appointment of a bishop by the Crown is not nugatory, but that he has the status of a bishop all the world over, and may exercise his functions territorially in his diocese—but that he has no coercive jurisdiction, and must resort to the civil tribunals for that purpose. As in the case of Presbyterians, or Independents, or Wesleyans, or Baptists, or the like, the Court ascertains as a matter of fact, upon proper evidence, what the doctrines, ordinances, and rules are by which the particular sect of religionists is bound, and enforces obedience to them accordingly. Judgment.

In *The Bishop of Capetown v. The Bishop of Natal* (b), the Privy Council decided upon the right to a piece of land granted in 1850, to the appellant and his successors in trust for the English Church, and considered they were not determining anything at variance with the above decisions in concluding that the Letters Patent creating the Bishopric of Cape Town were not wholly void, and that the appellant was by them created a corporation capable of taking and holding land under a grant.

In *Craigdallie v. Aikman* (c) the question was, who were entitled to the use of a chapel, which had been built partly by previous subscription, partly by money received at the door of the chapel after it was built, and partly by money subscribed in several different ways.

(a) L. R. 3 Eq. 1.

(c) 1 Dow 1, 2 Bligh 529.

(b) 6 Moo. P. C. N. S. 203.

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1877. Lord *Eldon* said: "With respect to the doctrine of the English law on this subject, if property was given in trust for A. B. C., etc., forming a congregation for religious worship, if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts* for adhering to the opinions and principles in which the congregation had originally united."

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The Attorney General v. Pearson (a), and the case of *Lady Hewley's Charity (b)*, were cases where the property was said to be perverted from the purposes for which it had originally been given, and declarations were made as to the persons entitled, from their religious belief, to benefit by it.

Judgment. In all these cases the right of property in some shape was involved, either the salary of the clergyman, the salary of the bishop, or money to which he was entitled in that capacity, or the title to property asserted on behalf of the Church or Association; and in such cases it seems to be the rule of the English law that to adjudicate upon the right the Court can and will investigate the proceedings of the Church Courts for the purpose of determining whether they are in contravention of the fundamental law of the Church, or without authority from it, and decide upon matters of faith as facts upon which the right to the property may depend.

The following cases show the current of American authority, with the reasons on which it rests:—*Miller, J.*, in delivering the judgment of the Supreme Court of the U. S. in *Watson v. Jones (c)*, says: "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine,

(a) 8 Mer. 353, 7 Sim. 290.
(c) 13 Wallace R. 679.

(b) 7 Sim. 309, n.

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and to create tribunals for the decision of controverted questions of faith within the Association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general Association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular Courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that these decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organization itself provides for." And he cites with approval decisions of some of the Courts as establishing that principle. Thus, in *Shannon v. Frost (a)*, it is said:—"Our only judicial power in the case arises from the conflicting claims of the parties to the Church property and the use of it. We cannot decide who ought to be members of the Church, nor whether excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the Church. * * * The judicial eye cannot penetrate the veil of the Church for the forbidden purpose of vindicating the alleged wrongs of excised members. When they became members they did so upon the condition of continuing or not, as they and their churches might determine, and they thereby submit to the ecclesiastical power, and cannot now invoke the supervisory power of the civil tribunals." And this language is quoted with approval in *Ferraria v. Vasconelles (b)*.

In *Harman v. Dreher (c)*, a minister claimed certain rights in the use of the Church property, notwithstanding his expulsion from the Synod as one of

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(a) 3 B. Munroe 253 (Kentucky).

(c) 2 Spree, Eq. 187, S. Carolina.

(b) 23 Ill. 456.

1877. its members. *Johnson*, Chancellor, says:—"He stands convicted of the offences alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and by whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of the spiritual court, * * * and I am not to inquire whether the doctrines attributed to Mr. *Dreher* were held by him, or whether, if held, were anti-Lutheran, or whether his conduct was or was not in accordance with the duty he owed the Synod or to his denomination. When a civil right depends on an ecclesiastical matter it is the Civil Court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions, out of which the civil right arises, as it finds them."

And in *Watson v. Farris* (a), the Court held that whether a cause was regularly or irregularly before the Assembly was a question which the Assembly had a right to determine for itself, and no Civil Court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern.

But I apprehend where no civil right or interest is brought in question, the English Courts will not interfere with the decisions of ecclesiastical tribunals of voluntary associations, to determine the status of a member of the body, or investigate the legality or regularity of the proceedings by which he is affected. *Forbes v. Eden* (b) decides this point. The plaintiff was a clergyman of the Scotch Episcopal Church; the defendants were members of a General Synod of the Scotch Episcopal Church, held at Edinburgh in 1863, made defendants in that capacity, and also as individuals. The code of that Church was revised in 1838, when canons were adopted for the future government of the Church. In 1848 Mr. *Forbes* was ordained clergyman of that

(a) 45 Missouri 18'.

(b) L. R., 1 Sc. & Div. App. 568.

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Church, and in 1850 was inducted to the pastoral charge of Burntisland, in Fifeshire, where he built a house, a school, and part of a chapel out of his private funds, receiving from his congregation £40 per annum as stipend. In 1863 a new body of canons was issued by the General Ecclesiastical Synod. The Synod established the Book of Common Prayer of the Church of England and Ireland as the Book of Common Prayer of the Episcopal Church of Scotland. Mr. *Forbes* conceived that this new code involved the breach of an indissoluble contract with him, inasmuch as he had accepted his ordination and induction under the code of 1838, from which the new code involved, in his judgment, unwarrantable deviations. He therefore instituted a suit, calling upon the Synod to rescind certain portions of the code of 1863. The defendants relied upon the principle that courts of civil jurisdiction will not take cognizance of questions as to religious doctrine or discipline, except for the purpose of enforcing civil rights or redressing civil wrongs, *Chelmsford, C.*, says Judgment.

"The ground of action laid by the appellant is, that the General Synod in making alterations in the code of canons have departed from the recognized constitution and acknowledged practice of the Scotch Episcopal Church, and have therefore violated the contract into which he entered by subscribing the code of 1838. And he alleges that he cannot conscientiously obey this new code, and in consequence may become liable to penalties, even to the degradation from his office of Minister of the Scotch Episcopal Church, and thereby be deprived of all the temporal advantages he derives from his office of minister of the congregation of Burntisland, which is a damage and injury of which the civil Courts can take cognizance. The appellant does not allege any actual damage which he has sustained except with regard to the refusal to license his curate, but he founds his action upon the possibility of his sustaining damage hereafter by a conscientious adherence to his own views of his

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1877. obligations." It was a mere abstract question involving religious dogmas, and resulting in no civil consequences which could justify the interposition of a civil Court. He then refers to the Cardross case, and points out that in it "there were actual sentences of suspension and deposition, from which the loss of the Pursuer's emoluments as minister of the Free Church of Cardross followed as a consequence. The appellant has not been disturbed, either in his charge of the congregation of Burntisland, or in his legal position as a member of the Scotch Episcopal Church. If he had been, though in the latter respect only, the Chancellor would have considered with the Lord Justice Clerk that 'the possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law will recognise as a patrimonial interest, and that no one can be deprived of its possession by the unauthorized or illegal act of another without having a legal remedy.' "

Judgment. Lord *Cranworth*, in the same case, says that, "Save for the due disposal and administration of property, there is no authority in the Courts, either of England or Scotland, to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs. If funds are settled to be disposed of amongst members of a voluntary association, according to their rules and regulations, the Court must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to the funds. * * The appellant contends that he was ordained under the canons of 1838, and was entitled to exercise his functions of a clergyman under those canons. And he complains that the effect of the canons of 1863 has been to impose on him the maintenance of doctrines and the adoption of practices different from those to which he bound himself on his ordination under the prior canons. But assuming that to be so, and that the Synod of 1863 had no power, according to the constitution of 1838, to make these alterations

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of which the appellant complains, that of itself gives no jurisdiction to the Superior Court. There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or, indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose. The only remedy which a member of a voluntary association has when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If, connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house, or land, or chapel, or a school, then incidentally the Court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it."

Lord Colonsay says, "A Court of law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine when not necessary to do so in reference to civil interests." The demand of the appellant "rests entirely on the allegation that he is exposed to pecuniary consequences in respect of the position in which he is placed with reference to the refusal of a license to his curate. That is a question which may yet have to be tried between him and his curate if either of them fails to fulfil the contract which has been entered into between them, but at present we cannot go into that question."

I have quoted this case at considerable length, as it appears to establish a principle that governs the present.

The first paragraphs of the bill are introductory to the sixth and following paragraphs, which contain the gravamen of the charge; that the plaintiff was elected a member of the Synod of the Diocese of Ontario, and lay delegate or representative for Christ Church in the Synod for three years; that by the

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1877. rules of the Synod lay representatives are required to communicate annually on pain of forfeiture of their office; that by the canons of the Church each member is required to partake of the Lord's Supper three times a year, and that the defendant has refused to permit the plaintiff to partake of the Lord's Supper; that the defendant assumed to suspend plaintiff from his right of membership, and to excommunicate him from being a member, on a frivolous charge, and sought to injure the plaintiff by reading a libellous paper, which he declared to be the ecclesiastical sentence against him, during Divine service.

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In all this I do not find the defendant charged with the invasion of any civil right of the plaintiff. There is not said to be any emolument attached to the position of lay representative; the status is not a civil but an ecclesiastical one. The position of member of the Church and the right to participate in the ordinances of the Church are also purely ecclesiastical; and though there may be a remedy in England, as in *Jenkins v. Cook* (a), where the Church is established and Ecclesiastical Courts appointed to administer it, there is no such jurisdiction here (b). If there be any civil remedy for reading the libellous paper, it could only be on the ground of damage to character or standing, and none such is alleged to have been sustained, and no relief is asked for in regard to it.

The cases to which I was referred as justifying the interposition of the Court were such as arise from refusal to administer the Sacrament at a time when this was a necessary qualification for holding civil offices, such as *Clovell v. Cardinall* (c), or for refusing to register a dissenting chapel, as in *Rex v. Justices of Derby* (d), or where a trust was created and the Court was held entitled to see to its proper administration, and to that end might inquire if a minister were properly dismissed,

(a) L. R. 1 Prob. D. 80.

(b) Strong's Lect. 38.

(c) 1 Sid. Rep. 34.

(d) 4 Burr. 1991.

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as in *Daugars v. Rivaz* (a), but in all these civil rights were involved. The counsel for the plaintiff stated that the plaintiff only sought to enforce his civil right as a member of the Synod of the Diocese of Ontario.

I am unable to find that any civil rights, as distinguished from ecclesiastical rights, are conferred upon the members of Synod. The 19 & 20 Vict., c. 141, recites that doubts existed whether the members of the Church of England and Ireland, in this Province, had the power of regulating the affairs of their Church in matters relating to discipline and necessary to order and good government, and it was just that such doubts should be removed in order that they might be permitted to exercise the same rights of self-government that are enjoyed by other religious communities; and enacted that the bishops, clergy, and laity, &c., might meet in their several dioceses, and in such manner and by such proceedings as they shall adopt, frame constitutions and make regulations for enforcing discipline in the Church, for the appointment, deposition, deprivation, or removal of any person bearing office therein of whatever order or degree, and for the convenient and orderly management of the property, affairs, and interests of the Church in matters relating to, and affecting only, the said Church and the officers and members thereof; and it was provided that nothing in that Act should authorize the imposition of a rate or tax upon any person, or the infliction of any fine or punishment except suspension or removal from office.

These powers of the Synod carefully exclude the idea of anything relating to secular matters except in regard to the management of Church property, and that is only in regard to matters affecting the Church, its officers and members. The statute constitutes the Synod an Ecclesiastical Parliament, but the right to sit as a member of the House can in no proper sense be deemed a

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(a) 28 Beav. 238.

1877. civil right. It is an ecclesiastical right, depending, so far as the laity are concerned, upon the result of an election by the members of the Church of England and Ireland. The 22 Vict., c. 139, explaining the last Act in regard to the representation of the laity, does not alter the nature of the constitution.

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The special Act incorporating the Diocese of Ontario (26 Vict., c. 86) the See in question in this case, while containing a number of provisions in regard to the management and control of the property of the Church, does not alter in any essential particular the constitution of the Synod. The Act is based upon those already cited. If any question should arise as to the title to the property of the Church, recourse would be had to the Civil Courts, and the Church would be protected in the enjoyment of it. But the right to hold property and to use it does not convert an ecclesiastical into a secular body. If any salary, or any privilege to be estimated by a pecuniary equivalent, were attached to the office of a member of the Synod, there would arise a civil right. But in the absence of that, or of some question relating to property, I do not see what right the Civil Courts have to investigate the constitution or the proceedings of this ecclesiastical body. (*Strong's Lectures, 61 et. seq.*) The plaintiff does not impeach the constitution of the Synod, or its title to its property, or the regularity of any of its proceedings in regard to it. Should such a case occur it may be found that the Civil Courts have jurisdiction. But that would arise from the title of the property being called in question. And to this ground, as well as others arising under the Temporalities Act, may be referred such cases as *Tully v. Farrell (a)*, where the validity of the election of a churchwarden was in question.

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As to the costs, the general rule no doubt is, that the losing party pays the costs, but this is not so inflexible as not

(a) 23 Grant 49.

to yield to the discretion of the Court in a proper case ; and I might perhaps content myself with saying that I do not think it, from the nature of the case and from its being the first of its class, a proper case to make the plaintiff pay costs. But lest the defendant should imagine I had refused him costs in the exercise merely of an arbitrary discretion, while his defence had not been considered on its merits, I think it right to say that but for the question of jurisdiction the plaintiff seems to me entitled to a decree. His conduct throughout seems to have been proper enough. As, soon after he learned that his want of confirmation was to be alleged as a ground for refusing him the Sacrament, he expressed his readiness to be confirmed, and thus brought himself entirely within the rubrics. The rubric at the close of the Order of Confirmation directs that none shall be admitted to the Holy Communion until such time as he be confirmed or be ready and desirous to be confirmed. And I see nothing to lead me to believe that the plaintiff was insincere in the expression of such a desire. I have also very considerable hesitation in believing that the want of confirmation was the true reason for the defendant's course of conduct. It was not till the 30th November, 1875, that the objection was sprung upon the plaintiff, and in saying so the language is not too harsh, seeing that the plaintiff had been a communicant for eleven years in the Church, when he was informed by the defendant that as the plaintiff had refused, on account of his unreasonable variances with defendant, to perform one of the first duties of church membership, viz. : to contribute to the support of the Church according to his means, the defendant begged to inform him that the suffrance by which hitherto the plaintiff had enjoyed the privilege of membership without the prescribed qualification could not any longer be accorded to him. It thus seems that if the plaintiff had continued to contribute according to the defendant's idea of his ability, he might have continued to communicate without confirmation.

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1877. The defendant in his answer does not say in terms that the plaintiff was refused permission to participate in the ordinance on that ground; but that he did not consider him, according to the canons and rubrics, entitled. This is immediately followed by an enumeration of matters in which the plaintiff had contravened the canons and rubrics, in which this finds no place. And, in the paper which the defendant read in the church suspending the plaintiff, he informs the congregation that if the defendant had acknowledged his fault (creating disturbance), and promised for the future to be a peaceable and law-abiding member of the Church, he would gladly have welcomed him again to the Lord's Supper—and this apparently without confirmation.

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Fornell.

I should suppose from the procedure of the defendant that he does not attach much importance to a strict compliance with the rubrics in matters of this description, whatever he may do in regard to others.

Judgment. The other defences, that the plaintiff is a notorious depraver of the Book of Common Prayer, and is a schismatic, and has maliciously and openly contended with the defendant and others, and has refused to be reconciled to them, do not seem to me sustained in evidence. The difficulties between the parties arose from the defendant introducing certain innovations in worship and church furniture, which the plaintiff resisted, and rather harsh terms entered into the correspondence on both sides. The plaintiff considers the defendant a ritualist. The defendant retorts that the plaintiff is a schismatic; and if opposition to the defendant's wishes in the matter of having a Sunday School on the Plains in opposition to the Sunday School of the parish constitutes schism, the plaintiff is undoubtedly guilty. In no other respect does he seem to me liable to the odious charge. The plaintiff being a notorious depraver of the Book of Common Prayer rests upon the fact of his desiring to have a revision of the book, and his having circulated a tract by the Rev. *E. Nangle*, and other tracts, in

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favour of revision. The defendant admits that he has said privately that if the question were opened he himself would have liked to see some things changed, and has said so to the plaintiff; but as the defendant does not think the question an open one, he charges the plaintiff with being a depraver of the book. It is admitted on both sides that there is some authority which has power to revise the book. It cannot, therefore, be a crime or a sin in the plaintiff to take steps to have the authority set in motion to change what (we may suppose) the defendant himself would have liked to see changed. There is no charge that the changes desired by the plaintiff are in any way improper.

The defence upon all grounds, except that as to the jurisdiction of the Court, having signally failed, I think the defendant must bear his own costs.

SOLICITORS.—*Hodgins and Spragge*, for the plaintiff; *Murray, Barwick, and Lyon*, for the defendant.

1877.

Dunnet
v.
Formerl.

Judgment.

1877.

MILLER V. MILLER.

Will, construction of—Interest on legacies—Lunacy of testator

A testator by his will dated 30th June, 1863, gave one half of his farm to his widow during her widowhood for the maintenance of herself and children, "and with regard to the stock on the said lot at the time of the decease of my said wife, with any other personal effects or property in her possession, she is hereby empowered to make such distribution as to her shall seem best." In July of the following year the testator became insane, a committee of his person and estate was appointed who, under an order in lunacy, leased the lands and sold the farm stock and implements:

Held, that the order in lunacy and sale thereunder operated as an redemption of the legacy to the wife, so far as the farming stock and implements were concerned; but that under the power of distribution given by the will, she was empowered to make such distribution of the personal effects bequeathed to her as to her should seem best: not only as to the amounts to be distributed, but also as to the objects of the distribution.

The testator devised a lot of land to his son *John*, his heirs and assigns for ever.

Held, notwithstanding the subsequent lunacy of the testator, the devisee was not entitled to the rents of the estate prior to the decease of the testator.

The testator devised to another son another portion of his farm, with a direction that the rents thereof should be set apart from the date of the will until the son attained the age of twenty-one to enable him to erect suitable buildings thereon. The Court, in order to carry out the manifest intention of the testator, clearly expressed in his will, directed an allowance to be made to the son, out of the surplus handed over by the committee to the executors, of a sum equal to the amount of such rents from the date of the will until the son attained twenty-one; and directed a reference, if necessary, to ascertain the amount.

The testator gave legacies of \$1,000 each to two of his daughters, payable in seven years from the date of the will:

Held, that they were not entitled to interest from the expiration of such seven years, but only interest as in an ordinary case.

He also gave a legacy to another daughter in these words, "I give and bequeath to my daughter *E. M.* the sum of \$1,200, such sum to be invested by my executors seven years from the date hereof, until the said *E. M.* attains the age of twenty-one years, which said sum of \$1,200 and the interest accrued thereon, shall be paid over for her benefit when she attains the age of twenty-one years as aforesaid."

Held, that she was entitled to interest from the death of the testator only.

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This was a suit instituted for the purpose of obtaining a construction by the Court of the will of *Peter Miller*, deceased. The questions raised upon the pleadings and evidence are clearly stated in the judgment of the Court.

1877.

Miller
v.
Miller.

Mr. *Laidlaw*, for the plaintiffs.

Mr. *Beaty*, Q.C., for the defendants *John Miller* and *Peter Miller*.

Mr. *Hoskin*, Q.C., for the defendants *Andrew Miller* and *James Miller*.

Mr. *J. C. Hamilton* and Mr. *W. Cassels*, for the other defendants.

SPRAGGE, C.—This bill is filed by the executors of *Peter Miller*, late a farmer of the township of Esquesing, for the interpretation of his will. The will is, in some respects, a peculiar one, and its interpretation is asked under somewhat peculiar circumstances. The will is dated 30th June, 1863. He was declared lunatic by order of the Court in 1864, and a committee of his person and estate appointed, and he died, still a lunatic, in 1876, possessed of considerable real and personal estate. Several questions are raised upon the pleadings.

The first provision in his will deals with the farm on which he lived—the homestead—and the stock and other effects thereupon.

“In the first place it is my will and wish that my wife shall occupy and enjoy the south half of lot No. 13 in the 8th concession of Esquesing, so long as she remains my widow, for the maintenance of herself and my children, who will still be minors seven years hence from the date hereof; and after her death the said lot No. 13 (south half) in the 8th concession of Esquesing aforesaid, I give and bequeath to my son *Andrew Miller*, his heirs and assigns, for ever. And with regard to the stock on the said lot at the time of the decease of my said wife, with any other personal effects or property in her possession, she is hereby empowered to make such distribution as to her shall seem best of the same.”

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v.
Miller.

Under an order in lunacy, the committee of the estate leased the lands of the lunatic, and sold the farm stock and farming implements upon the homestead, and the plaintiffs have received from them in moneys and securities of the testator's estate \$11,230.

The widow claims to be entitled in her own right absolutely to the proceeds of the farm stock and farming implements. On the other hand, it is contended that the order in lunacy operated as an ademption of the legacy, so far as the farming stock and implements sold under it were concerned.

The point seems to be concluded by authority. It is thus put by Lord *Plunkett* in *Newcombe v. Newcombe* (a): "The law attributes the same effect to acts of this nature, done for persons labouring under disability, as if it had been done by themselves; and no distinction has ever been drawn on that account."

The like question came before Lord *St. Leonards*, when Lord Chancellor of Ireland, in Lord *Leitrim v. Emery* (b). Lord *St. Leonards* approved of the decision in *Newcombe v. Newcombe*, and decided the question in the same way. The question in each of these cases was between the parties entitled to the land and those entitled to the personalty.

The case of *Jones v. Green*, (c), was between a legatee of certain shares in a company, and parties entitled to the residue. The shares were sold under an order in lunacy, and the proceeds invested in consols; and this was held to be an ademption of the legacy. The decision was that section 119 of the Lunacy Regulation Act, providing that the surplus of moneys raised under it shall be of the same nature as what was sold, applied only to land, and not (through a probable inadvertence) to personalty.

It is contended that our Act is different (d). It is different, certainly, in its arrangement, and a little

(a) 8 Ir. Eq. at p. 424

(b) 6 Ir. Eq. 357.

(c) L. R. 5 Eq. 555.

(d) C. S. U. C. ch. 12, secs. 38, 39, 40.

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different in its phraseology; but its provision, so far as this point is concerned, is substantially the same. It authorizes the mortgage, lease, or sale of the real estate of a lunatic whenever his personal estate is not sufficient for the payment of his debts; and its mortgage or sale when the personal estate and the rents and profits of the real estate are insufficient for his maintenance, and that of his family, and the education of his children. Then comes the provision, sec. 40, similar in terms and effect to section 119 of the Imperial Act, and the provision is made to apply only to cases of mortgage, lease, or sale. The section runs thus: "In case of any mortgage, lease, or sale being made, the lunatic and his heirs next of kin, devisees, legatees, executors, administrators, and assigns, shall have the like interest in the surplus of the money raised, as he or they would have in the estate if no mortgage, lease, or sale had been made; and such money shall be of the same nature and character as the estate mortgaged, leased, or sold."

It is true that this clause does not say "in case of Judgment. any such mortgage, lease or sale," but mortgages, leases, and sales of such estate are the only ones dealt with by the Act, and are the only mortgages, &c., upon which money is authorized to be raised by the Act. The use of the words "next of kin, legatees, executors, and administrators" might furnish some argument for the application of the provision to personalty, but the same words are used in the like provision in the Imperial Act; and the provision was held in *Jones v. Green* not to extend to personalty.

Section 119 is certainly in one respect more explicit than section 40 in our Act, for it says, "On any moneys being raised by sale, mortgage, charge, or other disposition of land made," &c.; but I think the provision is as much confined to real estate as if the word "land" had been used in section 40. By the interpretation clause of the Imperial Act the word land is made to comprehend real property of whatever tenure. There

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is nothing in our Act to make the term real estate apply to any other than real estate in its proper legal sense. I would gladly apply section 40 to personality as well as realty if I thought it could be done without doing violence to the language of the Act and contravening the case of *Jones v. Green*. The point stands shortly thus. Without some such provision as is contained in section 119 of the Imperial Act, and section 40 of our Act, the sale under the order in lunacy operates as an ademption. Those sections applying only to land. There is nothing to prevent the application of the principle of ademption in this case. I can only say I regret that it should be so.

Judgment.

A claim is made on behalf of the children of the testator that they are entitled to a distributive share of the proceeds of the stock and other personalty bequeathed to the wife. But the will empowers her to make such distribution thereof as to her shall seem best; and this, I apprehend, applies not only to the amounts to be distributed, but to the objects of the distribution. The will does not limit the power of appointment in either respect. It defines to whose maintenance the fund is to be applied, but not the persons among whom it is to be distributed. But if the sale under an order in lunacy operates as an ademption, this question also does not arise.

A question is raised upon the devise to *John*, a son of the testator. The devise is simply of a parcel of land, the east half of 26, 4th concession Esquesing, to him, his heirs and assigns for ever. He claims the rents received for this land from the date of the will. I think there is no ground for this contention. Up to the death of the testator, the rents were received by the committee of his estate, and were personalty, applicable to his support, and, for all that appears, were so applied.

The west half of the same lot is devised to another son, *Peter*, with a direction ("It is also my will and

wish") that the rent thereof "shall be set apart from the date thereof until *Peter* attains the age of twenty-one years, to enable *Peter* to erect suitable buildings" thereupon. He is now of the age of thirty-one, and claims the rent from the date of the will.

If the testator had remained of sound mind, and had himself received the rents of this parcel of land, it is clear that the devisee could not have claimed them from the estate of the testator. That would have been in effect an ademption. Is the effect the same when the rents were received by the committee? If he had himself appointed a trustee to receive and set apart these rents, I see no sufficient reason why his will, in regard to them, should not take effect. This devisee was then about fifteen years of age. It was the manifest intention of the testator to provide a fund for his benefit for the purpose specified in his will. It is to be assumed that he had calculated the amount that would be necessary for that purpose, and had estimated that so many years' rent would be a proper sum. If this provision be held to be inoperative, the intention of the testator to provide a fund for buildings on the land devised will be frustrated. If he had named a specific sum for that purpose, it would, of course, have been good. Is not his directing this setting apart and application of rents only another mode of doing the same thing? There is certainly a strangeness in a man saying in his will "It is my will and wish" that certain rents be set apart for a purpose that he specifies, he himself living and being able to do it himself. And there is this anomaly in such a direction: directing the thing to be done, and naming executors, he directs the thing to be done by the executors, and there could be no executors until his death. But, if this will had been made upon his death-bed, if he had died the same day—a thing not infrequent in the making of wills—or if suffering under an illness from which he expected almost immediate death, there would

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Judgment.

1877. be no strangeness and scarcely any anomaly in such a provision. And, certainly, strangeness and anomaly in the provisions of a will are not *per se* grounds upon which the Court refuses to carry them out.

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It may be that the testator intended himself to set apart these rents while he should be living, and that his executors should do the like after his death. It is alleged in the bill, and admitted by the answers of all the defendants capable of making admissions, that the testator, at the time of making his will, *i. e.*, 30th June, 1863, was of sound mind, but that "he soon afterwards became of weak and unsound mind," and that he was declared lunatic by order of this Court of 27th July, 1864. This unsoundness of mind may have developed itself before any rents were received from this land; and, even if he had received rent, and did not set it apart, it amounts to no more than this, that he did not himself do that which by his will he had declared that it was his "will and wish" should be done.

Judgment.

It is not suggested that these rents and profits were required and were applied to the support and maintenance of the lunatic or of his family. It is to be assumed that they formed part of the general fund which came to the hands of the committee, out of which the lunatic and his family have during the lunacy been supported, the surplus of \$11,230 having been paid over by the committee to the executors. The rents in question it follows form part of the surplus. Effect should be given to this provision if it can be done. I have dealt with such difficulties as have been suggested, or have occurred to me to exist, and they do not appear to me to be insuperable. They ought not, I think to outweigh the manifest intention of the testator clearly expressed in the will. At the same time the amount to which he is entitled is limited by the terms of the will. He claims the rents from the date of the will to the present time; but the direction of the will is, that they should be set apart until he should attain

the age of twenty-one. What I consider him entitled to, is, rents received by the committee accruing between the date of the will and the majority of the devisee, *i. e.*, such proportion of the rent of the whole lot, the whole having been let together, as is properly due to the west half, which, according to the 12th paragraph of the bill, is somewhat less than half of the whole rental. There may be a reference to ascertain the amount.

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There are legacies to daughters, upon which also questions are raised. The legacy to *Mary* is of \$1000, "to be paid to her in seven years from the date hereof." And there is a legacy to *Sarah* of the same amount in the same terms. Each claims interest on her legacy from the date at which it is made payable. The will is silent as to interest upon these legacies; and there was, of course, no bequest until the death of the testator. I think it probable that the testator contemplated that his own death would occur before the expiry of the seven years, (the terms of his legacy to *Elizabeth*, Judgment. which I will shortly notice, confirm this), and that he postponed the payment of the legacies in view of what he expected to be the then condition of his estate, and its ability to meet them. There is nothing to indicate an intention that his estate should pay interest upon them; and the reason, upon which is founded the rule that legacies bear interest at all, does not apply. The legacies could not be paid before the death of the testator, or rather, they were not legacies before that event, and no delay in their payment by the executors after that event is alleged. In my opinion the claim for interest upon these legacies is not sustainable. They can only have such interest as is allowed in an ordinary case.

There is a legacy to another daughter in somewhat different terms: "I give and bequeath to my daughter *Elizabeth Miller* the sum of \$1,200, such sum to be invested by my executors seven years from the date

1877. hereof, until the said *Elizabeth Miller* attains the age of twenty-one years, which said sum of \$1,200, and the interest accrued thereon, shall be paid over for her benefit when she attains the age of twenty-one years, as aforesaid."

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From the language of this bequest it is evident that the testator contemplated his own death within seven years, for he directs something to be done *by his executors* at the expiration of that time. *Elizabeth* was then very young, about three years old; so the testator contemplated an investment lasting about eleven years; but still an investment by executors after his death. If he had not become insane, he might have himself invested, if so minded. In the events that have occurred, there could be no investment until his death. So that event did not occur upon which, according to the terms of the will, the investment was to be made.

Judgment. The learned counsel, representing *Elizabeth*, admits that the claim for interest cannot be sustained. The claim is not without some show of reason; but, for the reasons that I have given, I agree that it is not sustainable. She is entitled to interest from the death of the testator, the earliest time at which the provision of the investment could be carried into effect. The case of *Pickwick v. Gibbes* (a) supports this.

The points upon which I have given my opinion are all upon which the opinion of the Court is asked.

The costs will be paid out of the estate.

(a) 1 Beav. 271.

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ATTORNEY-GENERAL V. WALKER.

1877.

Pleading—Practice—Jurisdiction—Rights of the Crown—Inland Revenue Act.

Where the Crown seeks to enforce a claim for dues fraudulently withheld, proceedings for that purpose may be instituted by the Attorney-General in this Court, although there are no peculiar equitable circumstances connected with the demand requiring the interposition of a Court of Equity.

The Crown, though not named in the Administration of Justice Act, is entitled to avail itself of the benefit of its provisions to the same extent as a subject can do so.

The Inland Revenue Act, 31 Vict. ch. 8, sec. 44, cl. 6, provides for inquiries being instituted for any period not more than one year before the inquiry is commenced, for the purpose of testing the truth of the returns made by distillers to the Government: *Held*, that this did not prevent proceedings at the instance of the Attorney General being instituted afterwards, on the discovery of frauds having been perpetrated in making such returns.

This was a suit instituted by *The Attorney-General* ^{Statement} of the Dominion against the defendants, to enforce payment of the sum of \$200,000 alleged to have been fraudulently retained by them, instead of having paid the same into the treasury of the Dominion for excise duties upon spirits manufactured by the defendants, and by them secretly disposed of. The defendants filed a demurrer for want of equity, contending that the proper Court for the *Attorney-General* to sue in was a Court of law, this being a legal demand, and there being no equitable circumstances connected with the claim in question requiring him to come into this Court.

Mr. *S. Richards*, Q.C., and Mr. *M. C. Cameron*, Q.C., for the demurrer.

Mr. *Bethune*, Q.C., and Mr. *Hoylec*, contra.

BLAKE, V. C.—Apart from the Administration of ^{Judgment} Justice Act, I should be bound to hold on authority that the Crown is entitled, in this Court, to the relief it demands by the information filed in this cause. At page 244, Mr. *Chitty* says, citing authority for the

1877. proposition: "In the first place, though his subjects are, in many instances, under the necessity of suing in particular Courts, the King has the undoubted privilege of suing in any Court he pleases," and at page 245. "Although the King choose a common law action, he may, by virtue of the prerogative we have just noticed, commence it in any Court." In *The Attorney-General v. The Mayor of Galway* (a), the Lord Chancellor says, "As to the proper course being at law, I have no doubt whatever on that point. It is the privilege of the *Attorney General*, acting on behalf of the public, to come into this Court, even for a legal demand."

Attorney-
General
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In *The Corporation of London v. Attorney General* (b), the counsel for the Crown thus refers to this case: "Then as to the prayer for an account. It is admitted that the Corporation has received different sums of money in respect of these licenses. These sums have been received in consequence of a breach of duty. In a case of that kind, the rights of the Crown are well stated by Sir *Anthony Hart*, in the *Attorney-General v. The Corporation of Galway*. It was insisted that the information which had been filed in that case could not be supported, because the matter in dispute was properly the subject of a legal demand; but Sir *Anthony Hart* said: "It cannot be an objection to an information that there is a remedy at law. The *Attorney-General*, acting on behalf of the public, has the right to sue in this Court, even for a legal demand. * * * The Crown may call on the subject to come into any of the Courts. Of course I do not mean to say that trusts may be enforced in the King's Bench, or ejections maintained in Chancery." And in answer, the *Chancellor* says: "That is just the line where the distinction is drawn." The learned counsel continues: "It is so. The general principle of the Crown to sue, in any of its Courts, is clear, but the principle may be subject in its application to the necessity of proceeding in a particular manner"—and when.

(a) 1 Moll. 95, 103.

(b) 1 H. L. 440, 460.

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the *Chancellor* asks, "Then would you say that the Crown might bring a case of law into a Court of Equity, but not a case of Equity into a Court of law?"

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Thus it seems that the only limitation is caused by the inability of the Court to work out by its ordinary practice the remedy to which the Crown is entitled. In the present case this presents no difficulty in the way of relief being given to the Crown. I do not think there is anything in the argument that the Crown, not being mentioned in the administration of Justice Act, cannot take the benefit of its provisions. Mr. *Maxwell's* conclusion in this matter is most reasonable, and is abundantly supported by authority (a): "Where neither its prerogative, rights, nor property were in question, it would seem that the Crown would not be considered as excluded from the operation of a statute. Thus the 11 Geo. 4 and 1 Wm. 4, ch. 70, which was passed for the better administration of justice, and enacted that writs of error upon judgments given in any of the superior Courts should be returned to the Exchequer Chamber, was held to apply to a judgment on an indictment, and on a petition of right; although the Crown was not named or referred to in the Act. No prerogative was affected by this construction. Besides, this Act would be classed as one for the advancement of justice, and therefore binding on the Crown, though not naming it." I think, therefore, that supposing this were a claim prior to the Administration of Justice Act, 1873, "exclusively or properly cognizable in a Court of law," on this objection being taken, the *Attorney-General* can claim the benefit of the 32nd section of that Act. It is not necessary to consider whether this, as a matter of accident, comes within *Falls v. Powell* (b).

The information alleges that there were certain duties payable by the defendants to Her Majesty on the spirits manufactured by them from the 1st of January, 1864, to the 1st of January, 1869, that they, from time to time,

(a) *Maxwell*, p. 118.

(b) 20 Gr. 454.

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made certain returns of the quantities manufactured, but that during the above period the defendants manufactured at their distillery very much larger quantities of spirits than those mentioned in the returns, which were removed and shipped, and the duties thereon were unpaid; that false entries were made which concealed from the officers whose duty it was to inspect the distillery the true quantities of spirits on hand; that the defendants drew such spirits off without the knowledge of such officers; that there is due from the defendants for excise duties, in respect of such spirits, on the 20th of June, 1867, \$100,000, and since that date another sum of \$100,000; that the particulars of the spirits sold without payment of duties are very numerous, but they are well known to the defendants; and the information claims \$200,000 as a debt due from the defendants to Her Majesty, and asks payment, and if necessary an account.

Judgment. Sec. 44, 31 Vict. ch. 8, prescribes the method of computing the duty under section 43; of ascertaining the quantity of spirits sold or removed from the distillery; and points out the means whereby the Inspector of Inland Revenues is to inquire in case of doubt, and the period to which his inquiries may extend.

I do not think these clauses of the Act, which provide a simple means for the Inspector in certain cases investigating matters which may not be satisfactory to him in connection with a distillery under his charge, preclude the Crown from proceeding under sec. 155 of the same Act. "Any duties of excise and license duties, or fees payable under this Act, shall be recoverable at any time after the same ought to have been accounted for and paid, whether an account of the quantity of spirits, malt, tobacco, drugs, or other goods or commodities, has or has not been rendered as herein required; or whether a true return of the utensils, tools, and apparatus on which such duty or license fees are payable, has or has not been made as herein required; and all such duties and license fees shall be recoverable with full costs of suit as a debt

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due to Her Majesty, in any Court of competent civil jurisdiction." Under this section I think it is clear the Crown is entitled to call the defendants to an account, and that this may be done at any time after the duties ought to have been accounted for, whether the account has or has not been rendered. See *Regina v. Taylor (a)*.

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It is not necessary to consider whether the Crown can recover by the present proceedings all that is claimed or not. The House of Lords has laid down in the case already referred to that "If there is any part of the case which would entitle the parties to a decree upon the facts stated, the demurrer cannot be supported. A demurrer to a bill or information, therefore, challenges the plaintiff to shew that he is entitled to some portion of the relief prayed according to the facts stated."

I think the demurrer should be overruled with costs.

The defendants re-heard the order over-ruling the demurrer.

Mr. *S. Richards*, Q.C., Mr. *M. C. Cameron*, Q.C., and Mr. *Fitzgerald*, Q.C., in support of the demurrer.
Mr. *Bethune*, Q.C., and Mr. *Hoyles*, contra.

The judgment of the Court was delivered by

SPRAGGE, C.—There are two principal questions raised by the party demurring. One that the Court of Chancery is not the proper, or a proper forum, the other that the Statute of 1867, 31 Vic. ch. 8, points out a summary mode of proceeding, and that that is the only remedy. As to the first, that this Court is not a proper forum. There is as a general principle that the Crown may choose its own forum. Judgment.

It may be taken with this qualification, that the course of procedure in the forum chosen is not inappropriate,

(a) 36 Q. B. 189.

1877. but is fitted for the entertaining and disposition of the suit instituted by the Crown.

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Walker.

In *Bacon's Abr. tit. Prerogative (a)*, it is said, "It is a rule of the Common Law that the King by his prerogative may sue in what Court he pleases," and by the annotator under the same head (*b*), "The King, though the chief and head of the kingdom, may redress any injuries he may receive from his subjects by such usual common law actions as are consistent with the royal prerogative and dignity. He may too sue in Chancery for a matter in equity." Sir *William Blackstone*, after speaking of certain suits which cannot be brought by the Crown because not consistent with the royal prerogative and dignity, adds, "But the Crown may bring *a quare impedit* * * and may prosecute this suit like every other, as well in the Queen's Bench as the Common Pleas or in whatever Court he pleases." So in *Chitty's Prerogative of the Crown (c)*: "In the first place, though his subjects are in many instances under the necessity of suing in particular Courts, the King has the undoubted privilege of suing in any Court he pleases." In *Comyn's Digest vol. 6, p. 73*, it is said, "The King by his prerogative may sue in what Court he pleases."

Judgment.

In *The Attorney-General v. The Mayor of Galway (d)*, which was an information in relation to the application of certain tolls, Sir *Anthony Hart* said, "As to the proper course being at law, I have no doubt whatever upon that point. It is the privilege of the Attorney-General acting on behalf of the public to come into this Court even for a legal demand."

Some cases have been referred to which arose upon the construction of 5 Vict. ch. 5, whether the equitable jurisdiction of the Court of Exchequer in revenue cases was transferred to the Court of Chancery, or whether jurisdiction in such cases was conferred upon that Court concurrently with the Court of Exchequer. The proper solution of that question, whatever it may be,

(a) p. 472.

(b) p. 467.

(c) p. 245.

(d) 1 Mol. 95.

does not touch this case. The same equitable jurisdiction in matters of revenue as was possessed by the Court of Exchequer in England was conferred upon this Court by 28 Viet. ch. 15. The cases may have been referred to for the enunciation of the doctrine that the Crown is not affected by legislation unless named, or by necessary intendment. This doctrine is not denied, but its application is, as a rule, to legislation whereby the rights of the Crown are narrowed or the prerogative in some way affected. It leaves intact the rule that the Crown may choose its own forum.

Independently then of the Administration of Justice Act, 1873, I am of opinion that it was competent to the Attorney-General, for the Crown, to file an information in this Court for the purpose for which this information is filed. But the Administration of Justice Act makes it clear if its provisions as to institution of suits may be availed of by the Crown as well as by the subject. Section 32 is sufficient for the purpose "No objection shall be allowed on demurrer, or upon the hearing of ^{Judgment.} any cause in the Court of Chancery, upon the ground that the subject matter of the suit or other proceeding is exclusively or properly cognizable in a Court of law." And in the Revised Statutes of Ontario, which may be taken as a legislative interpretation of the Act of 1873, we find in ch. 40 sec. 86, "The Court of Chancery shall also have jurisdiction in all matters which would be cognizable in a Court of law," and in ch. 49 sec. 21 "the Court of Chancery in any suit or other proceeding instituted in that Court shall have jurisdiction in all matters which would be cognizable in a Court of law." This recent legislation gives to the subject, with some few exceptions, that choice of forum which before was the prerogative of the Crown, and it is quite clear that a suit for an account, analogous in its nature to that which is the subject of this information, might now be brought either in a common law Court or in this Court. But it is denied that the Crown has this privilege,

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1877. because it is not named in these Acts. I think such a position utterly untenable and should have thought so if there had been no decisions against it; but there are. The Imperial Act 11 Geo. IV., 1 Wm. IV., ch. 70, provided for the return before the Judges in the Exchequer Chamber of writs of error upon judgments given in the King's Bench, Common Pleas, and Exchequer, and it was a question in *The King v. Wright (a)*, whether this applied to indictments by the Crown. The objection is thus disposed of by Sir *Nicholas Tindal*, who delivered the judgment of the Court:—

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“The Act itself is entitled ‘An Act for the more effectual administration of justice in *England and Wales*,’ and the preamble of the Act declares its intention to be ‘to make more effectual provision for the administration of justice in *England and Wales*.’ And again, the eighth section, by which this Court is constituted, is expressed in terms the most general and ample, ‘That writs of error, upon *any* judgment given by *any* of the said Courts, shall hereafter be made returnable only before the Judges or Judges and Barons, as the case may be, of the other two Courts, in the Exchequer Chamber.’ In the case therefore of an Act of Parliament passed expressly for the further advancement of justice, and in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases, upon the ground that the King, as the public prosecutor, is not expressly mentioned in the Act.”

Judgment.

Baron De Bode v. The Queen (b), on a petition of right, was the converse of the last case; and it was held that the same statute applied to the Crown. I extract a passage or two from the judgment. Referring to *The Attorney-General v. Allgood (c)* it is said, “A difference is there remarked on between statutes which name parties, plaintiffs or defendants, which do not in

(a) 1 A. & E. 431. (b) 13 Q. B. 364. (c) Parker's Rep. 1.

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words apply to the Crown, and statutes which use words sufficiently large to include the Crown, which is the present case, and where the Crown is to be taken out of the statute by construction." Referring to the Act being passed expressly for the more effectual administration of justice, the judgment proceeds: "If any special prerogative of the Crown were thereby taken away—as, for instance, if there should be any special tribunal for the decision of writs of error brought by the Crown, or where the Crown was a party, or the Crown had the option, which a subject had not, to have a writ of error against a judgment in its favour in any Court that it should elect—doubtless such a prerogative would not be taken away, according to 2 Inst. p. 191, and *Attorney-General v. Allgood (a)*. But this is not such a prerogative; and, in cases of writs of error, the Crown and the subject are, as to the Court to which they are to be brought by the Common Law, on the same footing."

These authorities effectually dispose of the objection that the Crown (coming into this Court as it does in this case) is not within the purview of the Administration of Justice Act. Judgment.

It is not necessary, in my judgment to shew upon this information, any further than it is shewn, that the defendant is an accounting party to the Crown. If, indeed, this suit were by a subject instead of by the Crown, and if we had no Administration of Justice Act upon our Statute Book, (a thing I should very much regret,) I should think, as I thought in *Falls v. Powell (b)*, that this Court had jurisdiction; as it is, the jurisdiction appears to me to be very clear. I have examined all the cases to which we were referred in the argument, but there are several of them to which I have not considered it necessary to refer in my judgment. I must be permitted to add that I hardly

(a) Parker's Rep. 1.

(b) 20 Gr. 454, 465, 466.

1877. expected at this day to see principles of the law, long regarded in the Courts as well settled, now brought into question.

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As to the points raised by Mr. *Cameron* they are in effect that no questions are now open in respect of the false returns and defalcations alleged in the bill: that a mode of dealing with them is provided by the Act—the Inland Revenue Act of 1867—and that the time for so dealing with them has elapsed.

The Act is very carefully framed in order to provide that excise duties upon all the articles to which it relates shall be paid: that none be evaded: that every precaution shall be taken against evasion and for the detection of those who attempt it. The Act deals with distilleries, breweries, and tobacco manufactories. Some of the clauses of the Act apply to these classes of business separately, others to the three classes together. Upon this information we have only to deal with so much of the Act as relates to distilleries.

Judgment. Section 38 provides that the distiller shall keep books in which he shall enter day by day certain particulars.

Section 40 provides for the keeping "further" of stock books, and prescribes what particulars shall be entered therein.

Section 43 prescribes several modes of computing the amount of duties payable, the one apparently as a test of the other, and section 44 prescribes how these different modes of computation shall be worked out. It is upon this section of the Act, and especially the sixth clause of it, that the argument of Mr. *Cameron* is based.

To take the first, fifth, and sixth clauses of this section, one of the particulars required to be entered in the books, and which is one of the tests of the quantity of spirits distilled, is the quantity of grain weighed into the mashes; and the provision is, that for the purpose of computing the duty payable, "the quantity of grain

shall be the quantity actually weighed into the meshes and recorded in the books kept under the requirements of the Act." But, inasmuch as the quantity recorded might not be the true quantity, the clause goes on to provide for the conducting of an inquiry by an officer of inland revenue, who is invested for that purpose with the power of examining witnesses upon oath, and of making particular inquiries into matters that may throw light upon the subject of his inquiry; and he is empowered to determine, as nearly as may be, the actual quantity of grain consumed in the distillery; and then it is provided that the duty may be assessed and levied on the quantity of grain so determined in a certain proportion of proof spirit to so many pounds of grain.

A similar provision is made by the fifth clause in regard to the quantity of spirits sold or removed from a distillery, and it prescribes what evidence shall be receivable upon the inquiry, and the result is to determine the amount of duty payable.

Judgment.

Then comes the 6th clause, which provides that these inquiries "may be made for any period not more than one year before the time when the inquiry is commenced."

The seventh clause is, that if the determination of the officer conducting the inquiry be disputed, the proof of the error or wrong shall rest with the party alleging it. I do not find that the Act points out what officer or forum is to decide the dispute. There are officers of inland revenue, who are the superiors, as I gather from the Act, of the officers conducting such inquiries; and that the Commissioner of Inland Revenue is the deputy head of the department of inland revenue. The matter in dispute would naturally be carried from the subordinate to the superior officer.

The provision by clause 4 as to the quantity of spirits passing from the tail of the worm into the close receiver, is only that it shall be ascertained and deter-

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Walker.</sup> mined by gauging the quantity and testing the strength in such mode as may be directed from time to time by departmental regulation. There is no provision for testing the accuracy of the entries in the distillery books, as there is in the other clauses to which I have referred.

The information alleges in paragraph four that the defendants carried on their distillery from 1864 to 1869: that they made returns from time to time of the quantities they pretended to have manufactured, and paid duties upon the quantities returned: that, in fact, the defendants manufactured very much larger quantities than they returned; and that the quantities of spirits not shewn upon their returns were from time to time removed from the distillery and shipped, and the duties not paid. It is not alleged that the returns made differed from the entries in the distillery stock books. It is to be assumed that they agreed; nor is it alleged that the inspector of inland revenue having cause to doubt the correctness of those entries instituted an inquiry under the 5th clause of section 44. In the absence of any such allegations the inference is, that the entries in the books passed unchallenged until, so far as appears, challenged by this information. Then what says the Act: "The duty upon spirits shall be charged and computed as follows," then follow the methods of computation. The fifth being "Upon the quantity of spirits sold or removed from any distillery by the distiller," &c. Then section 44, for the purpose of computing the duty by these several methods *inter alia* upon the quantity of spirits sold or removed (clause 5), enacts that the quantity shall be the quantity recorded in the distillery books, subject to alteration upon the inquiry provided by that clause; and it concludes: And the difference between the quantity shewn by such inquiry to have been sold and removed, and the quantity of duty paid spirits brought into the distillery, "shall be held to be the quantity liable to duty under this Act."

Judgment:

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Section 155 is, however, very explicit, that "any duties of excise or license duties, or fees payable under this Act, shall be recoverable at any time after the same ought to have been accounted for and paid, whether an account of the quantity of spirits * * * has or has not been rendered as herein required." And there are, besides the allegations in paragraph 4, other allegations in the information to which it cannot be answered that they are met by the provisions in secs. 43 and 44 to which I have adverted.

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It is alleged in paragraph 5 that the defendants made false entries in the book which they were required to keep, which concealed from the officers of excise the true quantities of spirits which the defendants from time to time had on hand; and paragraph 6 alleges that the defendants drew off large quantities of spirits in the absence of, and without the knowledge of, the officers whose duty it was to superintend the removal of the spirits.

Judgment.

The clauses of sec. 44 to which I have referred are only tests—among other tests—of the quantity of spirits manufactured; and paragraphs 5 and 6 contain allegations which, if true, as they must be taken to be for the purposes of this demurrer, entitle the Crown to recover for duties on spirits manufactured and not accounted for.

The order overruling the demurrer is affirmed, with costs.

SOLICITORS.—*McMahon, Gibbons, and McNab*, London, for *The Attorney General*; *Cameron and Caswell*, for the defendants.

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LING V. SMITH.

Will, construction of—Bequest to a class—Inaccurate description of legatees—Costs.

A testator, after making sundry dispositions of his estate, devised a portion of it to executors to sell, and the proceeds, after payment of debts, "to divide equally between my said son *C. W. S.* and my daughters by my first marriage." The testator had been thrice married. Of the first marriage there was no issue, male or female, living at the date of the will—several years after the death of his first wife. By the second marriage he had issue, one son, *C. W. S.*, and four daughters, all surviving. By his third wife, who survived him, he had issue, one son, *J. S.*, and four daughters.

Held, that the daughters by the second marriage sufficiently answered the description in the will, who, with their brother (*C. W. S.*), were entitled *per capita*; not that *C. W. S.* was entitled to one moiety, and the daughters, as a class, to the other moiety; that so far as the suit was rendered necessary,—by the ambiguity arising out of the inaccurate description of the class the testator intended to benefit,—the costs of all parties should be borne out by the estate; but that *C. W. S.* must bear the costs incurred by him in asserting his claim adversely to his sisters.

This was a suit to obtain a construction of the will of the late *Thomas Smith*, the provisions of which, and the contentions raised thereon, are clearly stated in the judgment.

Mr. *Fitzgerald*, Q.C., and Mr. *Fralick*, for the plaintiff.

Mr. *Moss*, for the defendants *Charles W. Smith* and the executors.

Mr. *Hoskin*, Q.C., Mr. *Wells*, and Mr. *W. M. Hall*, for the other defendants.

Judgment. SPRAGGE, C.—*Thomas Smith*, by his will dated 16th June, 1873—after the bequest to his son *John* of his stock and farming implements; to his wife of his household furniture, and a devise to his wife during widowhood of that part of lot 20, 5th concession of Murray, lying south of the Gravel road, with remainder upon

an event specified, or upon the death of his wife, to his son *John* in fee—devises that part of the same lot lying north of the Gravel road to his executors in trust to sell the same, and after payment of the testator's debts out of the proceeds thereof, "to divide the remainder equally between my said son *Charles W. Smith*, and my daughters by my first marriage."

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Smith.

There is some extrinsic evidence, the substance of which is, that the testator was three times married. First to one *Jane Simmons*, by whom he had no issue, male or female, living at the time of his making his will, and that at that date she had been many years dead. That his second wife was *Hannah Simmons*, by whom he had issue, one son, *Charles W. Smith*, and four daughters living at the time of his making his will, and all of whom are still living. His third wife *Maria*, by whom he had issue, one son, *John Smith*, and four daughters. His third wife survives him.

The bill is by one of the daughters by the second marriage, the other daughters and the son by the same marriage; the daughters and son by the third marriage are made defendants. Judgment.

The first and principal question is, whether the daughters by the second marriage can take under the devise expressed to be in favour of the daughters by the "first marriage."

There are some admitted axioms in the construction of wills which may assist in the solution of this question.

One is, that it is not essential to the validity of a devise or bequest that all the particulars which the testator has included in his description of the subject or object of his gift should be accurate, that there need only be enough of correspondence to afford the means of identifying both. Another is, that the Court will, if it reasonably can, so construe a will as to avoid an intestacy; admitting for that purpose evidence of what falls under the general term of "surrounding

1877. circumstances." Lord *Hatherley*, when Vice-Chancellor, put this very strongly in *Bernasconi v. Atkinson (a)*,
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Ling
v.
Smith. "The question in this case is, whether there is to be an intestacy declared from the impossibility of determining what the testator's intention was, who should take. Now an intestacy is the very last resort which the Court will be driven to adopt."

The cases which have been decided under these canons of construction are extremely numerous. To review them all would occupy great time and space, and would not be a very profitable employment of either; that they are rules of construction constantly applied is indisputable.

One thing that appears to me to be very clear upon the face of the will of this testator is, that he meant one class of daughters to take—not the two classes of daughters by both venters. Then can we find out from the terms of the will and the surrounding circumstances, for which of the two classes of daughters he intended his devise. Could it be the daughters of his wife then living? It is not contended that he could have meant them, and I think it very certain that he did not. The words "first wife," there having in fact been previous wives, negatives the application of the words to his then present wife. The circumstance that a testator could not have meant one person or one class, claimants under a will, is often in the cases given as a reason in conjunction with other circumstances for the conclusion that he must have meant another person or class also claimants under the same will. See *Wilkinson v. Adam (b)*, before Lord *Eldon*.

The contention of the daughters by the then living wife is, that there is no class of daughters answering the description of daughters in the will, and that the devise fails, or that it is too uncertain what class of daughters was intended, and that for that reason the

(a) 17 Jurist, p. 128, also in 10 Hare 348. (b) 1 V. & B. 422, 468.

devise fails. There is certainly no class of daughters answering with complete accuracy the description in the will, but such inaccuracies have occurred in many cases.

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It was so in *Newman v. Piercey* (a), in *Bernasconi v. Atkinson*, in *Newbolt v. Pryce* (b), and in a great many other cases. Then is it too uncertain? It appears to me that the testator in this case made what is called by Sir *William Grant*, in *Garvey v. Hibbert*, (c), a mere slip in expression. I think the conclusion that he did so is irresistible. He did mean a class of daughters; daughters by the first wife he could not mean, for there were none; daughters by the then living wife he could not mean for the term used negatives that class. What class then did he mean for it is certain that he did mean one class? It could be no other than the daughters by his former wife, by whom he had daughters, and whom by a mere slip in expression, his first wife having been many years dead, he called his first, instead of his former wife. I think, to use the language of Lord *Hatherley*, there is no impossibility of determining what was the testator's intention who should take, and that we are not driven to that which the Court always very unwillingly adopts, intestacy.

Judgment.

A point is made by *Charles W. Smith*, (who is a son by the second marriage) between himself and his sisters. The direction to the executors is, after payment of debts, "to divide the remainder equally between my said son, *Charles W. Smith*, and my daughters by my first marriage." *Charles* claims to be entitled to a moiety, the daughters as a class being entitled to the other moiety. The daughters claim that they are entitled with *Charles per capita*, and I think that they are clearly right.

One of the oldest cases upon this point is *Blackler*

(a) L. R. 4 Ch. Div. 41.

(b) 14 Sim. 354.

(c) 19 Ves. 125.

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v. Webb (a). The testator bequeathed the surplus of his personal estate equally to his son *James*, and to his son *Peter's* children, and to his daughter *Franisa*, and to his daughter *Nellie's* children, and his daughter *Margaret*. The son and two daughters claimed that the division should be *per stirpes*; but it was held that the grand-children were entitled to take *per capita* with the son and daughters of the testator.

Mr. *Moss* contended that the word "between" indicated an intention on the part of the testator that *Charles* should have half: that if he had intended that he should take in common with his sisters, the direction would have been a division amongst them all; but the word "between" was used in two cases, in one where the direction was between two persons named and the children of a person named, this was *Butler v. Stratton (b)*, and the children were held entitled with the two named *per capita*.

The other case is *Williams v. Yates (c)*, where the testator directed a sum of £400 to be held by his executors in trust to divide the same equally between his son *David* and the children of his son *Robert*. It appears that the children of *Robert* were seven in number. They were held entitled *per capita* with *David*.

Judgment.

In *Dowling v. Smith (d)*, the words were, "and then the residue of the property do devolve to my niece (naming her) and to the children of Mr. *John Stockdale*, to be equally divided." Lord *Langdale* felt a difficulty at first from the word "to" being prefixed to the class after the bequest to the niece, but observed in giving judgment that he could not read the expression differently than he should if the direction had been to divide between the niece and the children of *John Stockdale* in equal shares.

I have referred to the cases cited upon this point by

(a) 2 P. Wms. 383.

(c) C. P. Coop. 177.

(b) 3 B. C. C. 367.

(d) 3 Beav. 541.

Mr. *Moss*, but they are upon the question who of a class are entitled. They seem to be those living at the death of the testator. This question does not arise, as all the daughters of this class were living at the time of the making of the will and are still living.

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Ling
v.
Smith.

Upon the different points of the will to be construed, the result is, that in my opinion there is not an intestacy as to the part of lot 20 lying north of the gravel road; and that the plaintiff with her sisters and their brother *Charles W. Smith* are entitled equally, under the devise to the executors to sell and dispose of the proceeds.

With respect to the costs. So far as this suit has been rendered proper by the ambiguity arising out of the inaccurate description by the testator of the class, whom in my judgment he intended to be the objects of his bounty, the general rule should apply that all necessary and proper costs should be borne by the estate. But the estate should not be burthened with any costs unnecessarily incurred. Primarily as the suit is for the benefit of several having a common interest, they should have joined as co-plaintiffs. The bill is by one only of the four, with the allegation that the other three had refused to join as plaintiffs. When I inquired as to this in Court, the counsel representing one of them, *Catharine M. Nelson*, and her only, denied that she had been asked to join as a co-plaintiff. However this may be, and whether or not the other two sisters have been asked and refused, the estate should be operated with only such costs as would have been incurred if all had been co-plaintiffs.

The defendant *Charles W. Smith* is not entitled out of the estate to his costs of making the claim adversely to his sisters, in which he has failed. There is not, in my judgment, any ambiguity in respect to the position he occupied relatively to them: he must himself bear the costs which he has so incurred. He is, however, properly made a party with his co-executors, and he was

Judgment.

1877. interested in common with his sisters in maintaining that there was no intestacy as to the parcel of land which I have held is devised to them and him, inasmuch as his share would be less in the case of an intestacy than in the case of the devise being sustained, with his sisters the class who are the objects of it.

Ling
v.
Smith.

Judgment.

The cause was set down on bill and answer. This was an error as there were infants parties, but counsel for all parties being present, and there being no dispute upon the facts alleged in the bill, I heard the case argued, as if it had been on motion for decree. The decree, however, cannot be drawn up until the facts alleged in the bill are duly verified upon oath. Something was said of the terms upon which the testator and the children by the third marriage stood; and that the case of the plaintiff and her sisters might be strengthened by such evidence; but such evidence could only be admissible upon the case being carried down to a hearing in the ordinary way, and if any such evidence has been prepared it cannot be allowed against the estate.

The plaintiff and her sisters are entitled to an account of the dealings of the executors with the estate.

Costs subsequent to the decree are reserved.

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REES V. FRASER.

1877.

Will, construction of—Heirs-at-law and next of kin.

A testator by the residuary clause in his will gave and bequeathed "all the remainder of my real and personal estate whatsoever of which I may die possessed or be in any way entitled to, to my dear wife *Ann*, and on her decease the same to go [to] my heirs and next of kin."

Held, that the son of a deceased daughter, who had predeceased the testator was entitled to a share in such residue (personal as well as real), notwithstanding the fact that under the will such grandson was entitled to a legacy of \$4,000.

By his will, dated the 10th of November 1870, *Edward H. Hardy* gave a number of pecuniary legacies, amongst these was one to his grandson, *Francis Hardy Fraser*, of \$4,000, to be paid when he attained twenty-one years of age, and if he should die before arriving at that age, the sum bequeathed to him was to revert to the testator's residuary estate. This was followed by a specific legacy of furniture to the wife. The residuary clause was as follows:—

"I give and bequeath all the remainder of my real Statement. and personal estate, whatsoever, of which I may die possessed, or be in any way entitled to, to my dear wife *Ann*, and on her decease the same to go [*sic*] my heirs and next of kin."

The testator died in the following month, leaving no father or mother surviving him, and no child but the plaintiff, who was his daughter. He left the defendant, *Francis Hardy Fraser*, an infant, his grandson, the only child of a daughter who predeceased him. The wife of the testator survived him, but was dead at the date of the filing of the bill.

The plaintiff claimed the personal estate as being next of kin to the testator. The grandson claimed to share equally with the plaintiff. There was no dispute as to the real estate, the plaintiff admitting the grandson to be equally entitled with her as an heir of the testator.

The cause came on to be heard at Kingston.

1877.

Rees
v.
Fraser.

Mr. *R. Walkem*, for the plaintiff.
Mr. *Rogers*, for the defendant the executor.
Mr. *G. Macdonnell*, for the infant defendant.
Mr. *Machar*, for the husband of the plaintiff.

PROUDFOOT, V. C.—The persons answering the description of heirs-at-law and next of kin are to be ascertained at the death of the testator: *Bullock v. Downes (a)*.

It is also a general rule that a bequest to *next of kin* simply, without reference to intestacy or to the Statute of Distributions, is interpreted to mean the nearest in blood: *Withy v. Mangles, (b)*, *Halton v. Foster, (c)*.

The plaintiff contends that the heirs under this devise take the real estate, and the next of kin, *i. e.* the nearest in blood, the personal estate. That *qua* heir he can only take real estate, and the next of kin, in that capacity, only personal estate. This assumes that they take in their representative capacity. But if so, the same results would follow as in case of intestacy, and the next of kin would be such as would take in that event—a proposition destructive of the plaintiff's claim, as the next of kin to take in such case would be the daughter and her nephew, the grandson.

Judgment.

There is nothing, however, to prevent the heirs taking personal property as *personae designatae*, nor the *next of kin* real estate in the same way. Here the gift is direct to these two classes of persons, and not by way of substitution to the devisee or legatee. And the case of *DeBeauvoir v. DeBeauvoir, (d)*, shews that if the testator gives a legacy to his heir, the proper sense of the word, meaning the heir-at-law, is not necessarily to be changed, because the subject of the bequest is personal estate. But if the gift is to the heirs in substitution for the legatee in the event of his dying before

(a) 9 H. L. C. 1.

(c) L. R. 3 Chy. 505.

(b) 10 C. & F. 215.

(d) 3 H. L. C. 524.

the period for payment, it is inferred that by the word heir, the testator meant such person as would inherit not the real, but the personal estate: *Doody v. Higgins*, (a).

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Rees
v.
Fraser.

There are two modes of reading the words heirs-at-law and next of kin: in one, the next of kin are such as are heirs-at-law, and in the other, the heirs-at-law, are such as are next of kin. If the construction is to be shut up to these two then the devise would be void for uncertainty: *Lowndes v. Stone*, (b). But there is another by which effect is given to every word used, viz., to give to both, and that, I think, is the true construction. The effect is, no doubt, the same as if the words, next of kin, were struck out, but that only shews that the testator has described the same person in two characters, while it is wholly insufficient to exclude one of the heirs from a share of the personalty. Judgment.

The argument from the presumed intention not to benefit the grandson beyond the \$4,000, because he directs it to fall into the residue if the grandson did not reach twenty-one, is not of much value, for it would exclude the grandson from a share in the residuary real estate also, which is not contended for.

The costs of this hearing must be borne by the infant. The case was adjourned to enable him to put in a defence of acquiescence, in which he has wholly failed.

(a) 9 Hare App. 32.

(b) 4 Ves. 649.

1877.

LEEMING V. SMITH.

Pleading—Demurrer—Surety—Indemnity—Parties.

The bill alleged the purchase by the plaintiff of certain land which at the time was subject to a mortgage not then due, and which the vendor agreed to pay off; and having conveyed the land to the plaintiff by a deed containing covenants for quiet enjoyment and freedom from incumbrances, he, with a surety, executed a bond to the plaintiff "conditioned to indemnify and save her harmless from the said mortgage;" that the mortgage had since become due and payable; and the plaintiff prayed that the defendants (the vendor and his surety) might be ordered to pay it off. The bill, however, did not contain any allegation that the plaintiff had been disturbed in her possession or hindered in the enjoyment of the premises, neither did it allege any demand of payment by the mortgagees.

A demurrer by the surety for want of equity was allowed with costs.

DEMURRER by the defendant, *Jesse Smith*, for want of equity.

Mr. *E. Martin*, Q.C., for the demurrer.

Mr. *W. Cussels*, contra.

The statements of the bill are set forth in the judgment of

Judgment. SPRAGGE, C.—The case made by the bill is, that the plaintiff was the purchaser of certain lands from the defendant *James Smith*, has paid the purchase money in full, and received a conveyance with a covenant for quiet enjoyment, free from incumbrances: that the land was subject to a mortgage not then due and payable; and it is alleged in paragraph two that the vendor agreed with her to pay off the mortgage moneys as they should become due and payable; and that he should execute a bond with a good and sufficient security for the due performance of such agreement. So far there is nothing to which *Jesse*, the demurring defendant, is a party. His liability is alleged in para-

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graph three. In pursuance of such agreement, the defendants *James* and *Jesse* executed their joint and several bond to the plaintiff, "conditioned to indemnify and save her harmless from the said mortgage."

1877.

Leeming
v.
Smith.

The mortgage has since become due and payable. The prayer is, that the two defendants be ordered to pay off the mortgage.

There is no allegation of disturbance of possession, or hindrance of enjoyment, or of demand of payment by the mortgagees. The allegation is, that they delay to enforce or to require payment from the defendants.

It might be a question, if this were a case of first impression, whether such a covenant would be satisfied by anything less than the removal of the mortgage out of the way: whether, as long as it stands as an incumbrance upon the owner's estate and is past due, he is indemnified and saved harmless from it. But the point seems to be determined the other way by authority.

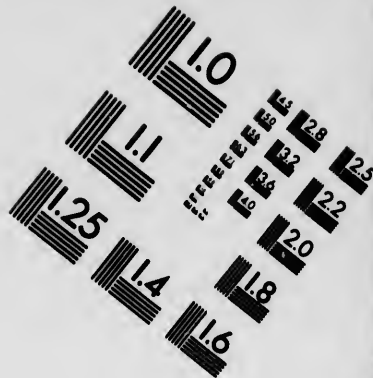
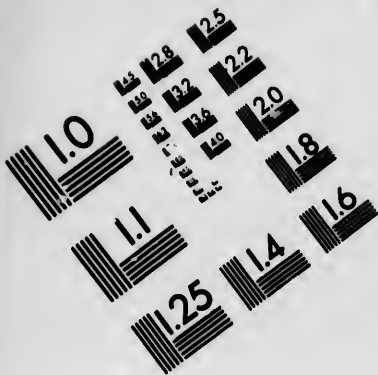
The old case of *Vane v. Lord Barnard* (a) is a case in point, where the Lord Chancellor, Lord *Cowper*, said: "The covenant in the deed of settlement is not to be, Judgment. that the estate is free from incumbrances, but that the trustee shall enjoy free from incumbrances; which so long as they do, the covenant is not broke."

This case is referred to in *Platt on Covenants*, p. 331, in sec. 4, under the head "of the covenant for indemnity against incumbrances." The learned author says:—

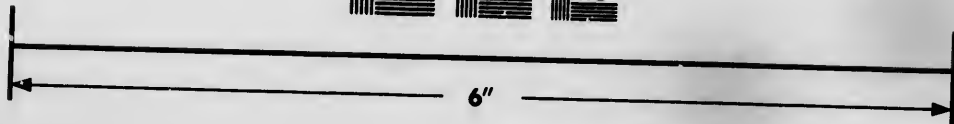
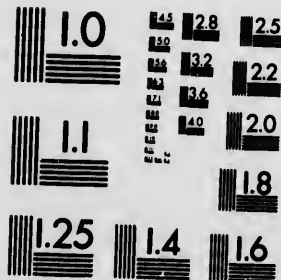
"It is not a covenant that the estate is free, and shall remain free from incumbrances, but that the purchaser shall enjoy it free from such incumbrances. It was the opinion of Lord Chancellor *Cowper* that there was a difference between a covenant that the estate was free from incumbrances, and a covenant that the party should enjoy free from incumbrances; as, in the latter case, the covenant was not broken, notwithstanding the existence of incumbrances, so long as undisturbed

(a) Gilbert 7.





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1877. possession was enjoyed. The consequence is, that in order to justify legal proceedings on this covenant against incumbrances, it is requisite that an actual interruption, claim or demand, be made on the purchaser; some hindrance or prevention of enjoyment proved; for the chance alone of his being disturbed, and his liability to satisfy claimants, or, in other words, the mere existence of outstanding incumbrances, unless they prevent entry and enjoyment, as in the case of a prior unexpired lease, will not constitute an immediate breach."

Leeming
v.
Smith.

The pleadings at law, and the decisions upon them, are in affirmance of the same rule. In *Sedgwick on Damages (a)*, it is said: "Where the defendant agrees to discharge the plaintiff from any bond or other particular thing, there, the defendant having agreed to do a particular act, cannot plead *non damnificatus*; but where the condition is to discharge the plaintiff from damage by reason of any particular thing, or to indemnify and save harmless, there the damage must be shewn, and consequently *non damnificatus* is a good plea."

Judgment.

So in Mr. Justice *Williams's* notes to *Saunders's* reports, vol. i., ed. of 1871: "But in all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*, and if there be any damage the plaintiff must reply it," and for this, several cases, to which I have referred, are cited. The note next puts that, which upon this bill is the case of *James Smith*, "This plea, however, cannot be pleaded where the condition is to discharge or acquit the plaintiff from such a bond or other particular thing, for there the defendant must set forth affirmatively the special manner of performance. * * But," he goes on to say, "it is otherwise where the condition is to discharge and acquit the plaintiff from any damage by reason of such bond or particular thing; for that is in truth the same thing with a condition to indemnify and save

(a) p. 309.

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harmless." And thus is put very explicitly the difference between the engagement of *James*, the vendor in the second paragraph of the bill; and of *Jesse* as a surety to indemnify, in the third paragraph.

The same point was considered also in *Kennedy v. Solomon (a)*, and the case of *Antrobus v. Davidson (b)*, is a decision in the same direction.

I would refer also to *Rawle* on Covenants for Title, p. 89, and to *Mayne* on Damages, p. 237.

The demurrer of *Jesse Smith* is allowed, with costs.

1877.
 Leeming
 v.
 Smith.

CRAIG V. MILNE.

Sureties for assignee in insolvency—Injunction—Practice.

This Court will not interfere by injunction to restrain proceedings instituted against the sureties of a defaulting assignee in insolvency, notwithstanding several actions may have been brought against them, and the aggregate amount sought to be recovered greatly exceeds the amounts for which they had become security. The proper mode of proceeding in such circumstances is as pointed out in *Sinclair v. Baby*, 2 Prac. R. 117.

Motion for injunction to restrain proceedings at law under the circumstances stated in the judgment.

Mr. *W. Cassels*, in support of the motion.

Mr. *G. C. Gibbons*, contra.

SPRAGGE, C.—The plaintiffs are sureties of a defaulting assignee in insolvency. The defendant is assignee appointed in his place, and has brought four actions Judgment.

(a) 14 U. C. R. 623.

(b) 3 Mer. 569.

1877. at law against the plaintiffs, and they allege that actions at law have been brought by creditors, and that more are threatened. They also set up certain equities upon which they conceive themselves entitled to relief. The sums claimed in the actions at law largely exceed the amount for which they are sureties.

Craig
v.
Illino.

Sec. 28 of the Insolvency Act of 1875 provides that the amount for which an assignee may be in default may be recovered from his sureties by adopting such proceedings as are required to recover from the sureties of a sheriff, or other public officer.

Such proceedings would ordinarily be by action at law, and the proper course for the sureties of a defaulting sheriff to take, where, as in this case, the amount claimed is larger than the amount for which the defendants are sureties, is pointed out in a case in the U. C. Practice Reports, *Sinclair v. Baby* (a), which was not cited to me upon this application by counsel for defendants.

Judgment. I do not know of any instance of this Court interfering with actions brought against the sureties of the sheriff, or of assignees in insolvency; and since the passing of the Administration of Justice Act there is less reason than ever for such interference.

What this Court would have done if a bill had been filed by creditors, or by the new assignee, it is unnecessary to say. What the Court is asked to do by this bill is, to withdraw the matters in litigation from the cognizance of a Court of Law; and this I am of opinion cannot properly be done, either by reason of there being some alleged equitable ground of defence by the sureties; or upon any other ground stated by the bill.

The application is refused, and with costs, as it is not a case upon which the plaintiffs can succeed at the hearing if I am right in refusing this application.

(a) Vol. 2, 117.

If the plaintiffs do not desire to rehear or appeal they will do well to consent that the order be for a dismissal of their bill: it will be a saving of costs.

1877.

Craig
v.
Milne.

CANADA GUARANTEE CO. V. MILNE.

SPRAGGE, C.—The circumstances of this case are the same as in *Craig v. Milne*.

The judgment will be the same.

SOLICITORS.—*Ball, Mathieson, and Ball*, Woodstock, for the plaintiffs; *MacMahon, Gibbons, and McNab*, London, for the defendants.

RE JOHNSTON—JOHNSTON V. HOGG.

Administration suit—Liability of executors for negligence—Costs.

Quære, whether the Act of Ontario (cap. 37 of 1869) alters the law, as to the liability of executors for assets of an estate lost by their negligence: but the fact of merely allowing a debt to remain outstanding is not *per se* negligence. Therefore, where in an administration suit it was shewn that stock in a gravel road company amounting to \$260 and promissory notes to the amount of \$748 had been left outstanding and unrealized by the executor, and there was no suggestion that there was any danger to the fund caused thereby, and the matter in respect of which the executor was called in question was small, except the claim of the plaintiff as a creditor in respect of which he had failed, the Court, on further directions, refused relief to the plaintiff, and dismissed his bill, with costs, but without prejudice to his right to institute another suit in the event of any future mal-administration of the estate.

Hearing on further directions.

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

Mr. *Bethune*, Q.C., and Mr. *Moss*, for the defendants.

an administration suit can only be justified where every possible means of avoiding the suit had been exhausted before the suit was brought," and he made the next friend of the infant plaintiff pay the costs. The estate now in question was not a small estate, but the matter in respect of which the executor is called in question was small, with the exception of the plaintiff's claim as a creditor, upon which he failed.

The plaintiff, in his affidavit upon which he obtained the administration order, gives no reason for bringing his suit, except his desire that the estate should be administered by this Court. He complains of nothing, and does not make a case of danger to the estate if administered by the executor. The co-residuary legatee and devisee does not join in the application for administration, and the executor in his affidavit filed upon that application states that the widow, who is also made a defendant, objects to it.

On further directions it was pointed out that among the assets is stock in a gravel road company to the amount of \$260, and it is suggested that it ought to be realized; but I do not see that it belongs to a class of securities that ought as a matter of course to be realized by an executor, and no special reason is shewn for it. It is also pointed out that there are promissory notes outstanding to the amount of \$748. The Master's report is silent in regard to them, beyond stating the fact. The Act of 1869, ch. 37, makes it lawful for executors to allow any time for payment of debts due to the testator, as they shall think fit. It is not necessary to say whether this provision alters the law as to assets lost by the negligence of executors; but the mere allowing a debt to remain outstanding is not, I take it, *per se* negligence; and there is in this case no suggestion that there is danger to the fund by the notes not being realized. If the non-realization of the road stock or of these notes was to be put forward as furnishing a ground for instituting this suit, it should

1877.

Re Johnston
v.
Hogg.

Judgment.

1877. *Re Johnston v. Hogg.* have been shewn that the executor failed in his duty in not calling them in. I cannot assume that the estate is prejudiced, or put in peril, by leaving them outstanding. I desire to be understood that I am not saying that the executor is right in this matter; he may be running a risk, but it is not shewn that he is wrong.

As the case stands, upon the affidavits filed on the application for administration, and upon the Master's report, there appears no good reason whatever for the institution of this suit. The estate has been put to costs unnecessarily by its being instituted, and those costs have been increased by the plaintiff not prosecuting it as he should have done, and thereby throwing the burthen and cost of its prosecution upon the estate. As between the plaintiff and the estate, which ought to bear the cost of this unnecessary litigation? I do not think the justice of the case will be answered by merely refusing the plaintiff his costs, or by anything short of making him pay the costs of the defendant.

Judgment.

There is no reason for taking the administration of the estate out of the hands of the executor, and there is no direction to be made upon the Master's report. I therefore dismiss the bill with costs; but inasmuch as there may possibly be future mal-administration of the estate, I dismiss it without prejudice to any bill that may be filed in respect of its future administration. This reservation is probably unnecessary, but the plaintiff may have it in that shape, if so advised.

SOLICITORS.—*Sidney Smith*, Cobourg, for the plaintiff; *J. W. Kerr*, Cobourg, and *W. L. Payne*, Colborne, for the defendants.

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BRYSON V. HUNTINGTON.

1877.

Mortgage—Lands in Ontario and Quebec—Practice.

Where in a suit on a mortgage covering lands in the Province of Ontario, and also in Quebec, the defendant (the mortgagor) waived his right to claim a sale of the property and elected to have a decree of foreclosure pronounced, the Court on further directions ordered, in the event of default being made in payment, that the defendant should execute to the plaintiff such a conveyance as would vest in him all the estate or interest of the defendant in the lands in Quebec. Where in a suit to foreclose, the defendant improperly resists the claim of the plaintiff, the costs occasioned thereby will be ordered to be paid to the plaintiff whether the defendant redeems or not.

HEARING on further directions.

Mr. *Moss*, for the plaintiff.

Mr. *W. Cassels*, for the defendant.

SPRAGGE, C.—The plaintiff is the holder of certain securities charged upon lands of the defendant, some of which are in the Province of Quebec, and the residue in Ontario; and upon which the Master by his report of 17th of March, 1877, has found to be due for principal and interest the sum of \$7,828.50. Judgment.

The decree contains this provision, stated in the decree to be by consent, that in the event of the defendant not asking for a sale of the land on further directions, the plaintiff will ask for a foreclosure, and upon an order for foreclosure being granted, the plaintiff will waive any claim for a personal order against the defendant in respect of any deficiency; but that in case the defendant ask for a sale of the lands, then the question as to the right of the plaintiff to a personal order against the defendant in respect of any deficiency, was reserved. The defendant now asks that the order be for foreclosure in case of default, and the plaintiff does not object.

Some questions were raised and disposed of upon appeal from the Master's report, and the report stands confirmed.

1877.
 Bryson
 v.
 Huntington.

The plaintiff now asks that the decree, on further directions, contain a direction that in the event of default in payment by the defendant, he do execute to the plaintiff such a conveyance of the lands in the Province of Quebec as will be effectual to vest the title to those lands in the plaintiff, and will be capable of registration in that Province. Assuming that the title to lands in that Province is capable of registration (which I do not know judicially), I think that what is asked is reasonable and proper. It may be open to some question whether the legal effect of the dealings and transactions stated in the pleadings and evidence, and inquired of in the Master's office, and followed by the decretal order and an order for final foreclosure, will, according to the laws of Quebec in relation to real property, vest an absolute and indefeasible title in the plaintiff; and the existence of a question upon this point would make the plaintiff's title less marketable.

It is now settled that foreclosure is to be the consequence of default, not a sale with an order for deficiency. Judgment. The defendant asks for that alternative relief; and asking for it, it is right that he should do whatever may be necessary to make the foreclosure effectual and unquestionable. The cost of it, however, should be borne by the plaintiff.

It is suggested by defendant's counsel that it does not appear what was the title of the defendant to the Quebec lands. It seems to have been assumed on all sides that he was entitled in fee; but no question need arise upon that point; whatever title he had has become vested in the plaintiff, and all that is asked, as I understand, is, not that any new liability should be created by the conveyance to be made in the event of default, but that whatever title the defendant may have in that event vested absolutely in the plaintiff.

The plaintiff asks further that the costs to which he has been put by the defendant's resistance to his claim, beyond the costs of an ordinary suit for foreclosure

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upon the transactions stated in the bill, be paid to him in any event, whether the defendant redeem or not.

This seems reasonable. It is only the converse of the rule where on a bill to redeem the defendant improperly resists redemption; and the case of *Tildesley v. Lodge* (a) is an authority in support of it.

1877.
Bryson
v.
Huntington.

SOLICITORS.—*Bethune, Osler, and Moss*, agents for *O'Connor and Hogg, Ottawa*, for the plaintiff; *Blake, Kerr, and Boyd*, for the defendants.

Coy v. Coy.

Trust deed—Trustee and cestui que trust—Discretion of trustee.

J. C., the elder, by deed of 30th of January, 1862, conveyed the lands in question in the cause to his daughter, *S. C.*: "In trust from and after the death of the grantor until the youngest child of *J. C.* shall arrive at the age of twenty-one years, the proceeds arising from the use of the land shall be applied for the use and benefit of the said *J. C.* and his family, so far and in such a way as to the said *S. C.*, her heirs or executors, shall seem right and proper; and after the said youngest child shall so arrive at the age of twenty-one years, it shall be the duty of the said *S. C.*, her heirs or executors, to either divide the land between the said *J. C.* and his children, or sell and dispose of the same, and the proceeds of such sale to apply for the benefit of them, the said *J. C.* and his children, in such way or manner as to her or them may seem right and proper." Held, that under the deed, *S. C.* was a trustee to apply the proceeds of the land till the youngest child of *J. C.*, living at the death of the grantor, attained twenty-one, for the use and benefit of *J. C.* and his family, to the extent and in the manner *S. C.* might deem right and proper, the amount and mode of application being left entirely in her discretion; and after such child attained twenty-one either to divide the land amongst *J. C.* and his family, or to sell the same and apply the proceeds for the benefit of *J. C.* and his children, in such manner as to her should seem right and proper; but she was not at liberty to select one child and give the whole proceeds to such one; the discretion vested in the trustee being as to the amount and mode of application—not as to the persons to be benefited; and this discretion within these limits the Court would not control.

(a) 3 Jur. N. S., 1000.

1877.

Coy
v.
Coy.

The bill in this case was filed by *John Coy*, the younger, and *Sarah Coy*, against *John Coy*, father of the plaintiff *John Coy*, and his other children, two of whom were infants, and *Henry Coy*, a brother of the defendant *John Coy*, and one *Stack*, who was the purchaser of *John Coy's* interest under a sale in this Court in a suit of *Turner v. Coy*. The prayer of the bill was, that it might be determined whether the property was affected by the trusts of a deed or will set out in the pleadings; and that the trusts might be declared and construed.

John Coy, the elder, the grandfather of the plaintiff *John Coy*, and the father of the plaintiff *Sarah Coy*, and the defendant *John Coy*, on the 30th of January, 1862, by indenture, conveyed the land in question to the plaintiff *Sarah Coy*: "In trust from and after the death of the grantor, until the youngest child (then living) of *John Coy* (the defendant) shall arrive at the age of twenty-one years; the proceeds arising from the use of the land shall be applied for the use and benefit of the said *John Coy*, the defendant, and his family, so far and in such way as to the said *Sarah Coy*, her heirs or executors, shall seem right and proper; and after the said youngest child shall so arrive at the age of twenty-one years, it shall be the duty of the said *Sarah Coy*, her heirs or executors, to either divide the land between the said *John Coy* and his children, or sell and dispose of the same, and the proceeds of such sale to apply for the benefit of them, the said *John Coy* and his children, in such way or manner as to her or them shall seem right and proper."

Statement.

At the same time another indenture was executed by which *Sarah Coy* re-conveyed the premises to *John Coy*, the elder, for the term of his natural life.

John Coy, the elder, remained in possession of the property till his death on the 19th July, 1871, having, by his will dated the 19th July, 1869, assumed to devise the same to *Sarah Coy* and the defendant *Henry Coy*, by a devise in the following words: "I

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will and direct that my farm and all the stock, &c., thereon, shall be held by my said son *Henry* and daughter *Sarah*, in trust for my son *John Coy* and his family, with power to sell or divide the same as to them may appear prudent and advantageous."

1877.

Coy
v.
Coy.

Some of the defendants submitted their rights to the Court,—others denied that the deed was ever executed or delivered,—and others set up that *Sarah Coy* joined in taking probate of the will, and had thereby waived the deed if it were executed.

This cause came to be heard at the sittings of the Court at Kingston, in October, 1877.

Mr. R. Walkem, for the plaintiffs.

Mr. Machar, *Mr. Smyth*, *Mr. Kirkpatrick*, *Mr. G. McDonnell*, and *Mr. H. J. McDonuld*, for the defendants.

PROUDFOOT, V.C.—At the hearing at Kingston on the 12th October last (1877), the evidence clearly established the execution and delivery of the deed,—and, whatever might have been the effect of *Sarah* proving the will, had the deed conveyed an estate or interest to herself, I think it clear that no such act of hers would affect the trust created by the deed; that she could not affect the interests of the *cestuis que trust* under the deed by taking probate of the will,—and the want of a consideration for the deed is of no importance here, for the legal estate was conveyed, and the trusts declared. There is no pretence of any undue influence having been exercised to procure the deed, and had there been the evidence would have disproved it.

Judgment.

The only questions reserved were, as to the construction of the deed.

I apprehend that *Sarah Coy* is a trustee under this deed to apply the proceeds of the land until the youngest child of *John Coy*, living at the death of the grantor, shall attain twenty-one years of age, for the use and benefit of *John Coy* and his family, to the

1877.

Coy
v.
Coy.

extent and in the manner *Sarah* may deem right and proper,—leaving the amount and mode of application entirely in her discretion. And, after the said youngest child, *i. e.*, the youngest at the death of the grantor, shall arrive at twenty-one years of age, to divide the land between *John Coy* and his children, which would make them tenants in common; or to sell and to apply the proceeds for the benefit of *John Coy* and his children, in such manner as to her shall seem right and proper. At that time, when the youngest of the children living at the grantor's death shall attain twenty-one years of age, *John Coy* and all his said children will be entitled to the land or the proceeds, with a discretion in *Sarah* as to the mode of applying them for their benefit, but not so as to affect their right to have the land or proceeds applied for their benefit, and as tenants in common.

Judgment.

I think it plain that the trustee has a discretion in regard to the proceeds from the use of the land, extending both to the amount and the mode of applying it,—she may either pay the proceeds to *John Coy*, to be by him applied for the benefit of the family, or she may so apply it herself; but it is a trust for the family, not for the individuals of which it is composed. She may determine not to apply any of it for the use of *John* and the family; but if she choose to apply any of it for that purpose, the application must be for the benefit of *John* and the whole family; and family means children; *McDonald v. McDonald (a)*. She would not be at liberty to select one child and give the whole proceeds to him, the discretion is as to the amount and mode of application, not as to the persons to be benefited. And this discretion within these limits will not be controlled by the Court. *Thomas v. Dering (b)*. And that it only applies to the children of *John*,

(a) 84 U. C. R. 369.

(b) 1 Keen 729, Lewin on Trusts, 3rd Ed., 538.

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living at the death of the grantor, would seem to be apparent from the language of the deed, and is further confirmed by the cases on wills, which have always received a more liberal interpretation than deeds. Thus in *Parkinson's Trusts (a)*, a testator gave a residuary personal estate in trust on the death or the second marriage of his wife, to divide it share and share alike among his five sisters and their respective families, if any, and it was held that each sister and her children, living at the testator's death, were entitled. See also *Woods v. Woods (b)*.

1877.

Coy
v.
Coy.

When the youngest shall attain twenty-one years of age, it will be the duty of the trustee to divide or sell, with a discretion as to the proceeds in case of a sale, of applying them for the benefit of *John Coy* and his children, in such way or manner as to her shall seem right and proper. The trustee has a discretion to divide or to sell—if she sell, she has a discretion as to the mode of applying the proceeds, but none as to the persons entitled. See *Rose v. Edsall (c)*, *Shaw v. Thomas (d)*.

Judgment.

In regard to the land or the proceeds of the sale, the trustee has not merely a power of appointment, but there is a trust which she is bound to carry into effect (*e*): *Brown v. Higgs (f)*. It is a case of a mixture of trust and power, the trustee is bound to divide the land or the proceeds, with a discretion as to the mode of applying the proceeds (*g*). The question, to some extent discussed at the hearing, whether any share given by her would satisfy the power, under the Statute in regard to illusory appointments. (Imp. Stat. 1 Wm. 4, ch. 46,) does not arise.

If the trustee shall not exercise her discretion by selling, there is no conversion, and the property will

(a) 1 Sim. N. S., 242.

(c) 19 Gr. 544.

(e) Wilmot 23.

(g) Lewin, 5th ed., 19.

(b) 1 M. & C. 401.

(d) Ib. 489.

(f) 8 Ves. at 574.

1877. retain its character of realty, and *John Coy* and his children will take as tenants in common: *Polley v. Seymour (a)*, *Yates v. Yates (b)*. I do not think there is any language in the deed sufficient to establish an intention on the part of the grantor that the interests of the beneficiaries was to be of a different nature in the proceeds of the sale of the land from what it was in the land itself. And language in a deed shewing an intention to give a separate interest, will create a tenancy in common, as in the case of a will. *Fisher v. Wigg (c)*, *Rigden v. Vallier (d)*.

I must remark, however, that the sale of "the interest" of *John Coy*, in the suit of *Turner v. Coy*, without any attempt to ascertain what the interest was, was such an improvident proceeding, that it ought not to be carried out.

It will be declared that the lands are subject to the trusts of the deed: that these trusts are as stated above;—the plaintiff will pay the infants' costs and have them and her own out of the estate—the defendants *Stark* and *Case* will also have their costs out of the estate, but the other defendants, having denied the validity of the deed, will have no costs.

So much of the land as necessary to pay costs, may be sold.

Judgment.

(a) 2 Y. & C. 708.
(c) 1 P. W. 14.

(b) 28 Bea. 687; C. S. U. C. c. 82, s. 10.
(d) 2 Ves. 252.

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McCORMICK V. BULLIVANT.

1877.

Mechanic's lien—Demurrer.

Held, that a sub-contractor, though entitled to a lien upon property for the construction of which he has furnished material to an original contractor or another sub-contractor, must, under the provisions of the Act of 1874, in order to enforce such lien, institute proceedings for that purpose within thirty days after the material furnished; the lien in such case arising from the furnishing of the material or the doing of the work, not from registration as under the Act of 1873.

The defendants *Nasmith* and *Denison* were contractors for the construction of the Lake Simcoe Junction Railway, and sub-let the contract for the building of all the bridges required by the railway to the defendant *Bullivant*. The plaintiffs, in January, 1877, made a contract with *Bullivant* to supply him with lumber and materials for the construction of the bridges in the townships of Whitchurch and East Gwillimbury. On the 10th of May the plaintiffs completed their contract, and there was a balance then due to them of about \$600. On the 26th of March the plaintiffs registered their lien upon the said bridges under the Mechanics' Lien Acts of 1873 and 1874. The term of credit the plaintiff gave to *Bullivant* expired some weeks after the completion of the work. *Bullivant* became insolvent, and the defendant *Shaw* was his assignee. This bill was filed on the 14th of July, 1877. The bill prayed that an account might be taken of the amount due by *Bullivant* or his estate to the plaintiffs, and that they might be paid the same; and for accounts of what was due by *Nasmith* and *Denison* to *Bullivant* or his estate, and by the railway company to *Nasmith* and *Denison*; and that, in default of payment of what should be found due to the plaintiffs, the bridges and lands occupied thereby might be sold; and for further relief.

The defendant *Shaw* demurred for want of equity, assigning as a reason that the proceedings were not

1877. instituted within the time fixed by the Mechanics' Lien Act of 1874 to realize the plaintiffs' claim, viz, thirty days after the material furnished and the work completed by them.

McCormick
v.
Bullivant.

Mr. *Ferguson*, Q.C., for the demurrer.

Mr. *Moss*, contra.

January 30,
1878.

PROUDFOOT, V. C.—The plaintiff furnished goods to a sub-contractor for the work in question. Under the Act of 1873 a sub-contractor himself had no lien upon the land; he might notify the owner of his claim against a lien holder and obtain a charge upon the sum that might be payable to him, and a person furnishing supplies to him could be in no higher position. That Act gave a lien upon the property for work done or materials provided for buildings, &c., at the request of and upon credit given to the owner (sec. 1); but persons furnishing supplies to contractors or sub-contractors do not furnish goods or do the work at the instance of or upon the credit of the owner, but of the person with whom they deal.

Judgment.

The Act of 1874, however, gives a lien to these persons as well as to the original contractors. The lien arises from doing the work, not from registration as under the former Act, and the claim has to be enforced by instituting proceedings within thirty days. This has not been done.

The plaintiff contends, however, that the Act of 1874 having given him a lien he may take proceedings to enforce it in the mode prescribed by the Act of 1873. This does not seem to me to be warranted by the construction of these Acts. Assuming that the former Act was not repealed by the later one, and that the two are to be construed together, as in *pari materia*, there is nothing in the terms of the later to enlarge the operations of the former by extending it to a class not named in it, or to shew that sub-contractors

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tors were to be considered as written in it. Any one claiming a lien under the Act of 1874, who did not possess it before, must, I think, pursue the terms of that Act, and institute proceedings within thirty days after the completion of the work or the furnishing the materials. Full effect is given to every word of the Statutes, reading them together, and yet restricting persons in the position of the plaintiffs and sub-contractors to the right and the mode of enforcing it given by the Act of 1874.

1877.
McCormick
v.
Bullivant.

A new class of persons is introduced, to whom new rights are given, and a special mode of preserving and enforcing them; but there is not one word said as to giving them rights conferred at an earlier period upon a different class and with a different mode of enforcing them. Then the 14th sec. of the Act of 1874 enacts that every lien shall cease after thirty days, unless in the meantime proceedings be taken *under this Act* to realize it.

In *Walker v. Walton* (a), the Court of Appeal have held that every lien here means every lien under the Act of 1874; for otherwise the lien under the former Act would be abrogated, as it did not require to be enforced within thirty days. It is clear that the plaintiffs had no lien under the former Act, their only lien is under the latter, and that is limited by this section.

No cases were cited on the argument except *Walker v. Walton*, and I have found none others myself that throw much light on the question. But the construction placed upon the Acts in *Walker v. Walton* seems to me sufficient for the decision of this case.

Demurrer allowed with costs.

Leave to amend within a fortnight.

SOLICITORS.—*Jarvis*, for the plaintiffs; *Ferguson, Bain, and Meyers*, for the defendants.

(a) 1 App. R. 579.

1877.

RE ROBERTSON—ROBERTSON V. ROBERTSON.

Dower, value of.

Held, on appeal from the report of the Master, that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in valuing such dower the value of the whole estate is the basis of computation—not the amount of surplus after discharging the claim of the mortgagee.

Dawson v. The Bank of Whitehaven, L. R. 6 Ch. D. 218, observed upon and distinguished.

Appeal from the subsequent report of the Master on the ground of the excessive value placed on the dower of the widow of the late *Donald Robertson*, The circumstances giving rise to the suit and this appeal appear in the former report of the case, *ante* volume xxiv, p. 442, and the judgment.

Mr. *W. Cassels*, for the appeal.

Mr. *P. McCarthy*, and Mr. *Ewart*, contra.

January 30,
1878.

Judgment.

PROUDFOOT, V. C.—In pursuance of the order made upon the appeal from the Master's former report (a), the Master has now ascertained the value of the widow's dower upon the principle there laid down.

The plaintiff appeals from the report because that principle is erroneous, not authorized by the authorities on which it assumes to be based, and overturned in the case of *Dawson v. Bank of Whitehaven* (b), reversing the decree of *Bacon*, V. C. in L. R. 4 Ch. D. 639. Upon the appeal from the former report of the Master; *Dawson v. Bank of Whitehaven*, at the hearing before the Vice-Chancellor, had not been reported, so that I had not the advantage of the opinion of the learned Vice-Chancellor, and the conclusion at which I arrived was in no way affected

(a) 24 Grant 442.

(b) L. R. 6 Ch. D. 218.

(a) Amb.

by his decision. The reversal of his decree, therefore, does not necessarily prove my order to have been wrong. If the cases were identical, in the nature of the facts, and in the law applicable to them, I would of course be bound to follow the decision of the Court of Chancery Appeal.

1877.
Re
Robertson.

It is true that I did refer to the cases of *Jackson v. Parker (a)* and *Innes v. Jackson (b)*, and put a construction upon them very much similar to that of the learned Vice-Chancellor, and that construction has been determined to be erroneous, when the law to be applied was that in operation before dower in equitable estates was given.

But in the case before me, under our law, dower exists in equitable estates, and it was to that state of circumstances I considered the cases of *Jackson v. Parker* and *Innes v. Jackson* applicable; and had this case been before the Court of Chancery Appeal, I apprehend they would have thought my application was correct.

Judgment.

In *Dawson v. Bank of Whitehaven*, the marriage took place in 1831, and therefore before there was dower in equitable estates, and the fact that the widow had no such dower was the leading feature in the decision. The Master of the Rolls says, "There was no dower out of an equitable estate. In all other cases there was a similar estate in equity to that which there was at law, but that rule did not apply to dower. We must recollect that in discussing the question which we have to consider. That being so, the husband and wife's fine destroyed her dower by changing the seisin, because the use of the fine was to the mortgagee in fee, and consequently the dower was absolutely gone at law. Where is the equity in the widow to set it up again? She voluntarily destroyed the dower at law. She voluntarily changed her husband's estate from a legal estate

(a) Amb. 587.

(b) 1 Bligh, at 126.

1877. to an equitable estate, viz., the equity of redemption
 She knew, or must be taken to have known, that one
 of the incidents to a legal estate, the inchoate right to
 dower, did not attach to an equitable estate. Conse-
 quently, by changing the character of the estate she
 lost the benefit of that which was incident to the legal
 estate. Why she should be entitled in equity to re-
 cover it I do not understand, when we recollect there
 was no right to dower out of an equitable estate.
 Such a title could not be founded on contract, for there
 was no contract. That being so, it seems to me that,
 unless there is some authority to the contrary, we
 must hold that, as the plaintiff had extinguished the
 dower at law, that extinguishment operates as an ex-
 tinguishment in equity also, because it did not exist in
 equity at all."

The Master of the Rolls then examines the cases of
Jackson v. Parker, and *Innes v. Jackson*, and proceeds :
 " I have not forgotten the two other arguments used
 on behalf of the plaintiff. One was, that, even if the
 right to dower was extinguished, she would still have
 the ordinary right of a surety. That argument I am
 not able to follow. If the right to dower is extin-
 guished, she had no property to pledge as to which the
 question of suretyship could arise."

James, L. J., and *Cotton, L. J.*, concur in these views.
James, L. J., as to the question of suretyship says,
 " With regard to the view suggested that the case
 should be dealt with as one of suretyship, that is to
 say, that the wife is supposed to give up her property,
 or right to property, to enable her husband to make a
 mortgage, it seems to me that there is no place for
 that argument, unless, as a matter of fact, there is pro-
 perty of the wife recognized in the Court of Chancery
 which she parts with. When once she has joined in
 extinguishing her right to dower, and in converting or
 enabling her husband to convert his legal estate into
 an equitable one, she has done it for all purposes. The

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dower which was an incident of the legal estate fell with it, and no incident could be raised in respect of the equitable estate different from that which a Court of Equity always attached to equitable estates." 1877.

Re
Robertson.

Not one word of this need be questioned, yet it would form no rule to determine the case before me. The widow here had something besides the incident to the legal estate; she had her dower in the equitable estate,—an interest recognized in a Court of Equity, and therefore she had something to pledge as a security for her husband's debt. The incident to the legal estate was not an estate indeed, but a right that might ripen into an estate,—it was at least a possibility coupled with an interest, and after joining in the mortgage she had an interest of the same nature in the equity of redemption,—and she can, under our statutes, convey such a right. It can be operated on by a deed of conveyance as well as by a simple release. She is then in a position which the widow in *Dawson v. Bank of Whitehaven* did not occupy, and which had she occupied the decision, according to the *ratio decidendi*, would have been otherwise. Judgment.

The case being clearly distinguishable on this ground, it is perhaps not necessary to point out other differences, which it seems to me would materially affect the application of it to the one before me. In that case the mortgage provided that upon payment a reconveyance was to be taken to the husband, *or as he might direct*. The husband made a second mortgage to the bank, which might well enough be considered as a direction or appointment by him within the power. There was no surplus after payment of the second mortgage, and the contest was between the dowress and the second mortgagee, not between the dowress and her husband's estate. There also there was a power of sale which was exercised in the husband's life time, and the land converted into money. Here, however, the mortgage was in the statutory form and the proviso in that case

1877. is, that upon payment the mortgage shall be void, and did not authorize any direction by the husband as to a reconveyance. The power of sale here was never exercised, but the mortgaged property was sold by order of the Court, after his death; and the contest is not with any subsequent incumbrancer, but with the general creditors of the husband.

But I am told that my decision is inconsistent with *Moffatt v. Thomson*, (a) in this Court, where it was held that a wife joining with her husband in a mortgage to bar her dower, is not a necessary party to a foreclosure suit during the husband's life, which she would be if she were a surety. I do not see any inconsistency. Her right in the equity of redemption, and it is from her having that right she is to be regarded as a surety, is contingent upon her husband dying seised. If during the life of the husband a foreclosure suit be prosecuted to completion, the equity of redemption is barred and he does not die seised. But if he is dead before bill filed, *Saunderson v. Caston* (b), or if he should die during the progress of the suit, she would be a necessary party to it. And very possibly if the husband were to convey the equity of redemption, or if a sale were ordered by the Court in his life time, the wife might have no right at all. See *Forrest v. Laycock* (c), *Moore v. Shinnors* (d). But this power in the husband does not, by its existence merely, prejudice the right of the wife; any more than the power of the husband in the English law to put an end to the right of dower by his conveyance, prejudices the right of the wife. In both cases it is the exercise of the right that affects her. Where not exercised, she is not injured; and here I am not dealing with probabilities, but with facts; the husband did not alien,—he died seised, and the wife survived.

Judgment.

(a) 3 Gr. 111.
(c) 18 Gr. 611.

(b) 1 Gr. 349.
(d) 1 Chy. Ch. R. 59.

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With regard to the other cases that I cited on the former occasion, I have reconsidered them, but do not see any reason to alter or modify the construction I then placed on them. 1877.

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Re
Robertson.

I think the Master has computed the dower on the correct principle, and that it ought not to be confined to one-third of the surplus. The value of her dower in the whole estate was to be ascertained.

I have referred to the case of *Hawley v. Bradford* (a). But it is difficult to determine how much value to attach to the decision without a more intimate acquaintance with the law of New York than I possess. The report is very short, and the *ratio decidendi* is in part, at least, not applicable in Ontario. The learned Chancellor *Walworth*, whose decisions are entitled to the highest respect, says the wife has no interest in the lands of her husband during his life, which is capable of being mortgaged or pledged for the payment of his debt. Now I think there is no doubt that under our statutes she has such an interest—See *Miller v. Wiley*, (b)—and the decision of the Chancellor in *Hawley v. Bradford* ought not to influence the decision here. Judgment.

I think the appeal must be dismissed, with costs.

SOLICITORS. — *Mowat, MacLennan, and Downey*, agents for *Brown and Brown*, St. Catharines, for the plaintiffs; *Boswell and Robertson*, agents for *Miller and Miller*, St. Catharines, for the creditors; *McCarthy, Hoskin, Plum, and Creelman*, agents for *Robertson and Robertson*, Hamilton, for the widow.

(a) 9 Paige 199.

(b) 16 C. P. U. C. 529.

1877.

WORSWICK V. CANADA FIRE AND MARINE INSURANCE
COMPANY.

Fire insurance—Condition—Warranty.

The plaintiff, who resided at a distance, and held a mechanic's lien on a mill, applied to the agent of the defendants to effect an insurance thereon to the amount of \$3,000. One of the questions put to the applicant was, if a watchman was kept on the premises during the night? His answer thereto was, "The building is never left alone, there being always a watchman left in the building when not running." In the policy issued thereon special reference was made to the application of the assured as "which is his warranty and part hereof." When the application was made there was a watchman kept on the premises and continued to be so kept until a month thereafter and about nine days after the issue of the policy, when, without the knowledge of, the plaintiff, such watch was discontinued; and in about five weeks thereafter the premises were destroyed by fire. *Held*, that the answer of the plaintiff, though by a condition of the policy amounting to a warranty, was under the circumstances to be considered as amounting to a representation only, and one which he could not be held bound to make good; the terms of the policy being that the parties had agreed that alterations to avoid the policy must be within the control or with the knowledge of the assured, of which control or knowledge in this case there was not any evidence.

Examination of witnesses and hearing at the sittings of the Court at Guelph, in the Autumn of 1877.

Mr. *W. Cassels* and Mr. *McLean*, for the plaintiff.
Mr. *G. E. Patterson*, for the defendants.

The facts and cases relied on are clearly stated in the judgment.

January 16,
1878.
Judgment. PPOUDFOOT, V. C.—The plaintiff had a mechanics' lien for machinery, engine, belting, stones, and wood-work, furnished by him to one *Slaght* for a steam grist mill in Woodstock. The plaintiff resided at Guelph, where Messrs. *Higinbotham* and *Maclagan* were the agents of the defendants. In November, 1876, the plaintiff applied to the agents for an insurance on the

machinery furnished by him, as the holder of a mechanic's lien, for \$3,000. The evidence establishes that the plaintiff told the agents what he wanted, and they said they would fix it. The agents sent to the head office at Hamilton, and from there directions were sent to the agent of the defendants at Woodstock to have the application filled up. Mr. *Beard*, the Woodstock agent, applied to *Slayht* for the materials to fill up the application, and filled it up. The papers were returned to the agents at Guelph, who presented the application to the plaintiff, and he signed it, assuming it to be all correct. At the head of the questions in the application it is printed that "The applicant will answer the following questions, and sign the same as a description on which the insurance is to be predicated." And at the end of the questions, just above the signature of the applicant, there is printed a covenant as follows: "And the said applicant hereby covenants and agrees with the said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as they are known to the applicant, and material of the risk. Dated, Guelph, 27th November, 1876."

1877.
Worswick
v.
Canada Fire
and Marine
Ins. Co.

Judgment.

Question 32 inquired if a watch were kept upon the premises during the night. The answer to this is: "The building is never left alone, there being always a watchman left in the building when not running."

A policy was issued on this application, dated 18th December, 1876, insuring the property for one year from the 27th November, 1876, according to the terms and conditions printed on the back of the policy. And in the body, after describing the property insured, it is said, "special reference being made to the assured's application, No. 232, which is his warranty and a part hereof."

At the time of the application a watchman was kept upon the property, and so continued till the 27th of

1877. December, when he was discontinued. The fire took place on the 4th of February, 1877.

Worswick
v.
Canada Fire
and Marine
Ins. Co.

So far the case is clearer on behalf of the defendants than in the case of *Whitlaw v. The Phoenix Ins. Co.* (a), in reference to the same mill, as in this case the application was made a part of the policy and a warranty, which does not seem to have been the case there. And while in that case the statement was "there is a watchman kept on the place," here it is said, "There being *always* a watchman," &c.; and there is less difficulty in construing that to mean a promise to keep a watchman continually than in so construing the former. In that case, however, the application was prepared by *Slaght* himself, while here the plaintiff not being able to give the necessary information, it was filled up by the agent of the defendants, with the knowledge and by the direction of the head office. But I do not mean to discuss how far that should affect the case, and I assume the law to be accurately stated in the case cited, that such a representation or warranty is material to the risk, and it commends itself to every one as being a reasonable stipulation, the presence or absence of which might have a considerable influence upon an insurance company either incurring the risk at all, or as affecting the rate of premium that would be charged.

Judgment.

The argument for the plaintiff turned chiefly upon the effect of the third condition indorsed upon the policy, that "any change, material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change be promptly notified in writing to the company or its local agent," &c. Here there was no pretence for saying that the change was known to the assured, who did not live near the property, and who is not suggested to have had any knowledge of it—

(a) 28 U. C. C. P. 53.

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who was so little acquainted with the property as to have to get the defendants, through their agent in Woodstock, to fill up the application. Nor, it was said, had the plaintiff any control over the keeping of a watchman. He had no right to enter on the premises, nor to employ any one else to do so.

1877.
 Worawick
 v.
 Canada Fire
 and Marine
 Ins. Co.

The defendants contended that the statement as to a watchman was a warranty and must be strictly performed, and that though the conditions might control the effect of representations it could not control a warranty, that the third condition only applied in the absence of a warranty. *Abrahams v. The Agricultural Ins. Co. (a)*, was referred to, as were also *Hopkins v. The Provincial Ins. Co. (b)*, *Garrett v. The Provincial Ins. Co. (c)*, and *Sillem v. Thornton (d)*, and several American cases.

I have not found much in the cases referred to to guide me in coming to a decision. The distinction between a warranty and a representation is well known; that in the former case it must be literally true and strictly complied with, while in the latter, though erroneous, if not fraudulent, or if the insurers knew the truth, it would not prevent the assured from recovering: *Anderson v. Fitzgerald (e)*, *Stokes v. Cox (f)*.

Judgment.

But I do not know of anything to prevent a warranty being subject to a condition as well as the insurance itself. In this case the application is expressly made a warranty and embodied in the policy. The conditions indorsed are the conditions of insurance, and whether the alteration be of a matter covered by the warranty or not, it is equally affected by the condition. In *Kuntz v. Niagara District Ins. Co. (g)*, the condition.

(a) 40 U. C. R. 175.

(e) 20 U. C. R. 200.

(c) 4 H. L. C. 484.

(g) 16 C. P. 131, 573.

(b) 18 C. P. U. C. at 80.

(d) 3 E. & B. 538.

(f) 3 Jur. N. S. 45; 1 H. & N. 533.

1877. provided that any alteration should avoid the policy unless notified to the company, without any qualification as to its being with the knowledge or within the control of the assured. And Wilson, J., remarks: "It can make no difference to the defendants by whom the erection was put up; their liability should not be altered without their consent. The plaintiff should not have allowed the erection to have been made, or if he could not prevent it, he should either have guarded against its being made by the occupier without his consent, or he should have provided with the company against its defeating the policy, in case it was done without his consent or knowledge." In the present policy that seems to me to be provided for by the condition avoiding the policy only if the alteration be made with his knowledge or in a matter subject to his control and not notified. The condition is the statutory one, and the company have not chosen to qualify it in any way. The circumstances under which the insurance was effected, the nature of the lien and the distant residence of the plaintiff, shew the propriety of such a condition.

Judgment.

In *Abrahams v. The Agricultural Ins. Co. (a)*, the conditions of the policy against a house being left unoccupied were absolute, and although the plaintiff was ignorant of it he was held entitled to no relief. But can it be supposed the result would have been the same under a condition such as this? I think not.

Hopkins v. The Provincial Ins. Co. (b), was a case where a lessée represented himself as owner, and there was a proviso in the policy that if any material fact were not fairly represented in the application the policy should be void. And it was held that if the plaintiff used the word owner in *good faith*, he ought not to suffer. The decision itself has no application here, and

(a) 40 U. C. R. 175.

(b) 18 U. C. C. P. 74.

(c) 2 H. & N. 533, 3 Jur. N. S. 45.

I suppose it was only referred to for the statement of 1877.
 the nature of a representation and warranty.

Stokes v. Cox, (c), is an express authority that a
 warranty may be controlled by the conditions. The
 policy was "upon a range of buildings of three stories
 all communicating, situate in Walsall, comprising offices,
 warehouses, currier's shops, and drying room, part of
 the lower storey of the said buildings being used as
 stables, coach-house, and boiler-house. *No steam-engine
 employed on the premises*—the steam for the said
 boiler being used for heating water and warming the
 shops.—N.B., the process of melting tallow by steam in
 the said boiler, and the use of two pipe-stoves in the
 said building is hereby allowed: but it being warranted
 that no oil be boiled, nor any process of japanning
 leather be carried on therein, or in any building adjoining
 thereto." The material condition was, "If after the
 insurance shall have been effected, the risk shall have
 been increased by any alteration of the materials com-
 prising the buildings, or by any erection of any stove,
 kiln, furnace, or the like, or the introduction of any
 hazardous process, the depositing of any hazardous
 goods, the making of any hazardous communications,
 or by any other alteration of circumstances, and the
 particulars of the same shall not be indorsed on the
 policy by the secretary or some other authorized agent
 of the company, and a proportional higher rate paid, if
 required, such insurance shall have no force." A steam
 engine and bark mill were subsequently erected, the
 engine being supplied with steam from a boiler pre-
 viously on the premises; but the jury found the risk
 was not increased, and the plaintiffs were held entitled
 to recover. In the Court below the description of the
 property was held to amount to a warranty. In error,
 the Court say: "We consider it unnecessary to say
 what would be the rule of law as to the effect of a des-
 cription, in a policy of insurance, which did not contain
 such a condition as the seventh condition here. The

Worwick
 v.
 Canada Fire
 and Marine
 Ins. Co.

Judgment

1877. effect of that condition is, to restrict the alteration to circumstances where the risk is increased."

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v.
Canada Fire
and Marine
Ins. Co.

In this policy the parties have agreed that alterations, to avoid the policy, must be within the control or with the knowledge of the assured, and there is no evidence of any such control or knowledge.

The decree must therefore be for the plaintiff, with costs. It is referred to the Master at Guelph to take an account of the amount due to the plaintiff on his lien, and of the amount due upon the policy, and the defendants will pay to the plaintiff the latter sum, or so much as may be necessary to pay the plaintiff what is due to him on his lien, within a month after report.

SOLICITORS.—*Lemon, Peterson, and McLean*, for the plaintiff; *Laidlaw and Patterson*. for the defendants.

DOUGLAS V. CHAMBERLAIN.

Mechanic's lien against a mortgagee—Pleading.

The Revised Statutes of Ontario (ch. 120, sec. 7) gives a contractor a lien for work done and materials furnished upon land subject to a mortgage, in priority to the mortgagee, on the amount by which the selling value of the property has been increased by the work and materials of the party furnishing the same, but a bill filed for the purpose of enforcing such a claim, must state distinctly the dates of the incumbrances having been created.

This was a bill to enforce a mechanic's lien. The defendants were *Chamberlain*, the owner of the property, and *The Trust and Loan Co.*, the mortgagees in five mortgages made by *Chamberlain*; and *Stinson*, a mortgagee in another mortgage made by *Chamberlain*. The plaintiff claimed priority to the mortgagees

on the amount by which the selling value of the property had been increased by the work and materials of the plaintiff. 1877.

The mortgages to *The Trust and Loan Co.*, were all made on or about the 2nd of May, 1877, and that to *Stinson* on or about the 22nd of September, 1877. Douglas Chamberlain

The bill had been taken *pro confesso*.

Mr. *W. Mulock*, for the plaintiffs, asked a decree in the terms of the prayer of the bill.

PROUDFOOT, V. C.—The Revised Statutes of Ontario, Feb. 19, 1878, ch. 120, sec. 7, gives the plaintiff the right to such priority in case the land "is incumbered by a mortgage or other charge existing or created before the commencement of the work or the placing of the materials or machinery upon the land."

The bill states that *in or about* the month of May, 1877, the plaintiffs agreed with *Chamberlain* to perform the work and furnish the materials, and that they did so and completed the same on or about the 27th of September, 1877. That the mortgages to *The Trust and Loan Co.*, bear date *on or about* the 2nd of May, 1877, and that to *Stinson* *on or about* the 22nd September, 1877. Judgment.

I think that, in the absence of any distinct allegation that the mortgages were on the land before the commencing of the work or placing of the materials thereon, the plaintiffs are not entitled to the priority they claim against the mortgagees by virtue of this statute. The dates are not stated positively, but it seems certain that the *Stinson* mortgage, and probable that the other mortgages were all created subsequent to the commencement of the work.

If the plaintiffs desire to claim priority by reason of an equity arising from the mortgagees having notice of the work or of their lien, such notice ought to be charged. I desire to say nothing as to what the effect of such

1877. notice might be. If the lien arises from doing the work, it seems not to have been completed till the 27th of September, and if from registration, it was not registered till the 28th of September, and it would seem questionable whether mortgagees under deeds executed during the progress of the work would be affected by any notice.

Douglas
v.
Chamberlain

But upon the record as at present framed the plaintiffs are not entitled to the priority sought, and the mortgagees would seem to be unnecessary parties. The plaintiffs may if they choose take a decree affecting the equity of redemption only, or they may amend the bill as they may be advised.

SOLICITORS.—*Mulock and Campbell*, for the plaintiff.

BROUGHTON V. SMALLPIECE.

Mechanics' Lien Act—Increase of value of land.

Where buildings or other improvements are placed upon land subject to a mortgage, by reason of which the value of the land is increased, the contractor is only entitled to a lien on the property to the extent of such increase in the value of the land, irrespective of the buildings or other improvements, or of the amount expended in their construction. Therefore, where property was sold under a decree of this Court for \$1,000, and the Master certified the value without the improvements to be \$600, a contractor who held a lien under the Act was restricted to his proportionate share (with other lien holders) of the \$400 increase in value, and that although it was shewn that the contract price for the buildings had been \$1,950.

Appeal from the report of the Master.

Mr. *J. H. McDonald*, for the appeal.

Mr. *Black*, contra.

Feb. 19, 1878.
Judgment.

PROUDFOOT, V. C.—In this appeal, from the report of the Master, the question arises as to the respective

rights of a mortgagee and a holder of a lien under the Mechanics' Lien Act. 1877.

The Master has found *William Elkin*, the lien holder, entitled to a lien for the amount due to him upon \$400, the increased value of the premises caused by certain buildings having been erected on them, in priority to the mortgagee.

Broughton
v.
Smallpiece.

The property has been sold under a decree in this suit, brought by the mortgagee, and has realised \$1,000. The Master certifies the value, without improvements, to be \$600. The contract price for the buildings was \$1,950, but they seem only to have bettered the land to the extent of \$400. *Elkin* was a plasterer and performed the plasterers' work, but it does not appear how much of the \$1,950 was composed of the price of the plastering. There is a balance due to *Elkin* of \$102.86. The price for which the premises sold is not sufficient to pay the sum due to the mortgagee.

The mortgagee appeals 1. Because *Elkin* is not entitled to priority over the mortgage in respect of the improvements. 2. And if entitled to priority it should only be so in the proportion that his work bore to the whole cost of the buildings. Judgment.

The first ground of appeal rests upon the construction of the Mechanics' Lien Act R. S. Ont. ch. 120, sec. 7, which enacts that a prior mortgagee shall not be entitled to priority over the lien to any greater extent than the sum by which the selling value of the land with such work, &c., exceeds the sum by which such selling value thereof has been actually increased by the improvements.

The language is confused and involved, but it seems to be susceptible of an intelligible construction. Suppose the selling value of the land with the improvements to be \$1,000, the improvements which raised it to that sum, \$400, then the selling value of the land with the improvements exceeds the sum by which such selling value has been increased by the improvements by the difference between these sums, or \$600.

1877. The Master thinks the language does not seem at all intelligible, for he says: "What can be the sum by which 'the selling value of the land,' &c., exceeds the sum by which 'such selling value'" (*i. e.*, the selling value of the land with the work, &c.), "has been increased by the improvements?" But in the mode I have pointed out, effect would seem to be given to every word of the clause. The *increase* does not necessarily mean a sum beyond the selling value with the improvements, but the value of the improvements bringing it up to that sum. The obscurity would not be removed by reading *the*, instead of *such*, preceding the last phrase "selling value." If the clause be not capable of the construction I have indicated, then I agree in the conclusion arrived at by the Master on a purview of the statute, which leads to the same result.

But with the other finding of the Master, that *Elkin* is entitled to a lien on the whole improvements for his claim, in priority to the mortgagee, I am unable to agree. The contract price for the work was \$1,950, but it only increased the value of the land \$400. If all the workmen had liens, they would only have priority to the extent of the \$400, and each would have to abate in the proportion the work of each bore to the whole, and from the amount so ascertained would have to be deducted sums paid on account of the work; and in this way it is possible that *Elkin* may not be entitled to any priority. Suppose his work was one quarter of the whole, say $(\$1950 \div 4) \487.50 , then he would be entitled to priority on one fourth of the \$400, or \$100; and he has been paid all but \$102 of his claim, thus he has received \$385, nearly four times more than the sum by which his work increased the selling value. As the whole property is not sufficient to pay the mortgage, it would not be just to pay the mechanic out of the mortgagee's pocket. When the owner paid the other mechanics, as I assume he has done, as no other lien has been set up, he must be

Broughton
v.
Smallpiece.

Judgment.

taken to have done so for the benefit of the mortgagee. 1877.
 And the statute does not appear to intend to give any
 one mechanic a right to priority in respect of another
 mechanic's work.

Broughton
 v.
 Smallpiece.

I dismiss the first ground of appeal, and allow the second, without costs. It will be referred back to the Master to ascertain the sums and adjust the accounts.

SOLICITORS.—*Rose, McDonald, and Merritt*, for the plaintiff; *Delamere, Black, and Reesor*, for the defendant.

LIDLAW V. JACKES.

Will, construction of—Dower—Election by widow—After-acquired lands.

Held, that a bequest by a testator to his widow of the annual income from the real and personal estate during her widowhood and until the eldest son attained his majority, for the support of herself and the maintenance, education, and support of all the children during their minority; and after the eldest attained 21, and as each reached that age, the income to be paid to them proportionally after making ample provision for the support of the widow during her widowhood, did not indicate an intention on the part of the testator to give her this in lieu of dower.

Although a widow is bound to bring her action for dower within 20 years from the death of her husband, the statute limiting that time does not apply where the widow is brought unwillingly before the Court, and she only seeks to reduce the amount of rents charged against her by setting off what she is entitled to as dowress.

The testator gave his sons the option of purchasing the shares of his daughters in the real estate after marriage or death of the widow for the sum of £500 each.

Held, that the fact of the sons having, during the life time of the widow, joined in leases naming all the children, sons as well as daughters, as lessors—some of the sons being then infants—was not such an act as deprived the sons of afterwards exercising the right or option of purchasing the interests of the daughters.

Where a testator makes a bequest to his wife which he expresses to be in lieu of dower, the presumption is that this applies only to lands he then owned; not to lands subsequently acquired by him.

1877. This case at the hearing is reported *ante* vol. xxii. page 171, where the will is set out at length.

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v.
Jackes.

In pursuance of the inquiries then directed, the Master made his report, finding, among other things, that the widow was entitled to dower, and that the sons had not lost the right, given to them by the will, of purchasing the shares of their sisters.

The plaintiff appealed from both of these findings, insisting that by the provisions of the will the widow was put to her election, and had exercised it by accepting the provisions; and, if not so bound to elect, that the right had been extinguished by the Statute of Limitations; and that the sons had acted in such a manner as to put an end to their right to purchase their sisters' shares.

Mr. *Ferguson*, Q.C., Mr. *Bain*, and Mr. *Moss*, for the appeal.

Mr. *Maclennan*, Q.C., and Mr. *George Murray*, contra.

Jan. 30, 1878. PROUDFOOT, V. C.—The provisions for the widow in the will are not expressed to be in lieu of dower; and if she is to be put to her election it must be on the ground that these provisions are inconsistent with the assertion of her right to dower: *Roadley v. Dixon* (a), *Parker v. Sowerby* (b).

Judgment.

There is no doubt the testator intended to dispose of all the property he owned at the date of the will. He purports to dispose of all the real and personal estate wherewith a kind and merciful Providence had blessed him. But it has been long held that the use of such language does not indicate an intention to dispose of what was not his—his wife's right of dower: *Thompson v. Nelson* (c), *Dowson v. Bell* (d), *Harrison v. Harrison* (e).

(a) 3 Russ. 192, 200.

(c) 1 Cox 447.

(e) 1 Keen 765.

(b) 4 D. M. & G. 321.

(d) 1 Keen 761.

The bequest to the widow of a part of the personal property absolutely, in the absence of any express declaration, can have no effect in determining whether she is bound to elect or not, as that can in no manner be inconsistent with her dower.

1877.

Laidlaw
v.
Jackson.

But it was urged that the bequest of the annual income from real and personal estate to the widow during her widowhood, and until the eldest son attained his majority, for the support of herself and the maintenance, education, and support of all the children during their minority; and that after the eldest attained twenty-one, and as each reached that age, the income was to be paid to them proportionally, after making ample provision for the support of the widow during her widowhood, indicated an intention on the part of the testator to give her this in lieu of dower.

The principles that govern cases of this description have been often stated, and perhaps never more clearly than by Vice Chancellor *Kindersley*, in *Gibson v. Gibson* (a): "Unless it be clear and beyond reasonable doubt that the testator intended to make such a disposition of the real estate, that the assertion by the widow of her right to dower would prevent the giving full effect to his intentions, the widow shall not be put to her election. It is not enough to say that upon the whole will it is fairly to be inferred that the testator did not intend that the widow should have her dower; in order to justify the Court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from dower, either expressed or clearly implied, that the intention to exclude the wife from dower must be apparent on the face of the will itself."

Judgment.

Or, as stated in another case by Lord *Cranworth*, *Parker v. Sowerby* (b): "It is not, I think, quite correct to state the general rule of law as being, that to raise

(a) 1 Drew. 42, 52.

(b) 4 D. M. & G. 321.

1877. a case of election against the wife, the will must show that the testator had in his mind her right to dower, and that he meant to exclude it. The rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with his wife's right to dower." And see *Patrick v. Shaver* (a).

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v.
Jackes.

In *Becker v. Hammond* (b), the present Chancellor, after some doubt and hesitation, put the widow to her election, upon the particular provision made for her by the will, and the circumstance of the estate being insufficient to satisfy that provision and also to answer her dower. One of the provisions was, that the widow was to have the use of the dwelling in which she resided together with the yard as then enclosed, together with the fruit then growing thereon, during her life. This seems to me a sufficient indication of the testator's intention to exclude dower,—the specific mode of occupation implying that no other mode would be resorted to. But I desire not to be considered as assenting to the other ground upon which the decision is rested, the insufficiency of the estate. Upon that point I express no opinion.

Judgment.

McLennan v. Grant (c), was decided upon the ground that the testator manifested an intention of personal occupation by, and for the benefit of, the various objects of the testator's bounty. *Hutchinson v. Sargent* (d), proceeded upon the same ground, and so did *Stewart v. Hunter* (e), and *Colman v. Glanville* (f).

A direction to lease the lands devised has been held inconsistent with the claim to dower, and to this ground may be referred *Armstrong v. Armstrong* (g), and *Patrick v. Shaver* (h), and a devise of the land to be equally divided between the widow and the testator's

(a) 21 Gr. 123.
(c) 15 Grant, 65.
(e) 2 Ch. Ch. 336.
(g) 21 Gr. 351.

(b) 12 Gr. 485.
(d) 16 Gr. 78.
(f) 18 Gr. 42.
(h) 21 Gr. 123.

mother has also been held to put the widow to her election: *McGregor v. McGregor* (a).

But where a testator by his will, after making a provision for his widow, directed certain lands to be sold at the expiration of a then existing lease, and the proceeds to be divided among his three daughters, and that in the meantime the rent was to be divided among them, it was held not a case for election: *Fairweather v. Armstrong* (b).

In the present case there is nothing pointing to the enjoyment of the property in specie to bring it within the rule acted upon in these cases.

But it is said that the executors have a power to lease, which is within the authorities cited on that point. I think it probable that the executors take the legal estate by implication. The direction to them to pay the annual income of the real and personal estate, though not specifying rents, must, I apprehend, be taken to include them, and being thus made agents in the application of the rents, an estate will be implied in them, even though they are directed to do nothing but pay. *Doe v. Homfray* (c), *Doe v. Biggs* (d). The parties themselves seem to have conceived that it was necessary for the children to join in the leases, as five leases have been produced in which they are lessors. But what estate is to be implied as devised to them? If the testator had given them an express estate in fee it would have been subject to the wife's dower. Can any greater estate be deemed to pass by implication? I think not. If it was only the estate subject to dower that passed, then the implied power to lease arising from the implied estate, must also be subject to the dower. All the cases, where powers of leasing have been held to raise a case of election, have been cases of express powers, and proceeded upon the ground

1877.

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v.
Jackes.

Judgment.

(a) 20 Gr. 450.

(b) 15 Gr. 255.

(c) 6 A. & E. 206.

(d) 2 Taunt 109.

1877. *Laidlaw v. Jacken.* that they indicated an intention in the testator that his executors or trustees should exercise them, not only over his estate, but also over that of his wife. It is difficult to understand why any greater efficacy should be given to a power of this description than to a power of sale, which does not exclude dower: *Patrick v. Shaver* (a); but at all events the reasoning does not apply to this implied power, which is only an incident to the implied estate, and that, I think, is subject to dower. It will not be presumed under these circumstances that the testator intended to confer a power over property which was not his, the wife's dower; but only intended that the executors should deal with his property, that is the land subject to the dower. See *Fairweather v. Archibald* (b).

Judgment. Mr. *Jarman*, (c) discusses the cases in regard to whether an annuity or a rent charge is to be considered in lieu of dower, and concludes that neither has that effect. The payment of the rents, or a portion of them, to the widow, does not put her to her election, as we have seen in *Fairweather v. Archibald* (d). And to the same purport is *Harrison v. Harrison*. (e) This subject has attracted the attention of American jurists, who think the English cases are reconcilable on this ground, that the distinction upon which the cases have gone, is, between a rent charge, or an annuity in the nature of a rent charge, issuing out of the specific land in which dower is claimed, and chargeable on no other fund, and an annuity, which, though chargeable on the land, is primarily payable out of some other fund. And the American cases support this distinction, that an annual provision for the widow, payable out of personal and real estate, is not a bar to dower in that real estate; but such a provision issuing out of real

(a) 21 Gr. 123.
(c) Wills, 1. 488.
(e) 1 Keen 765.

(b) 15 Gr. 255.
(d) 15 Gr. 255.

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estate only, is. In *Smith v. Kniskern*, (a) a testator gave his wife several legacies, and her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors, and the privilege and use of one room in his dwelling-house during all such time as she should continue to be his widow, and no longer. It was held there was nothing repugnant in the claim of dower, and the assertion of the right of dower would not disturb or defeat any provisions of the will. While in *White v. White* (b), where a testator ordered that his wife should have one room in his dwelling-house, and a comfortable maintenance out of his real estate during her natural life or widowhood, this provision was held to be in lieu of dower. Whatever may be the correct conclusion from the English cases on the latter point, the former is quite clear, and governs this case, for the provision here is to be out of the annual income from both real and personal estate, which is held not to be in lieu of dower.

1877.

Lalldlaw
v.
Jackes.

Judgment.

Another question arises from the fact that the testator had purchased some lands after the date of his will, which did not pass by it. And it was argued that if the widow were excluded from dower in the devised lands, she would be so also in those which descended. *Miall v. Brain*, (c) and *Roadley v. Dixon*, (d) were relied upon, as was also *Davidson v. Boomer*. (e) But none of these cases decided any such point. *Miall v. Brain*, and *Roadley v. Dixon*, decided that where the lands passed by one devise and a direction given as to part that shewed an intention it was not to be subject to dower, and as the whole was conveyed by one devise, it followed that it was not the intention that any portion of it should be subject to dower. In *Stewart*

(a) 4 Johns. Chy. 9.

(c) 4 Madd. at 125.

(e) 18 Gr. 475.

(b) 1 Harrison 202, 211.

(d) 3 Russ. 192.

1877. *v. Hunter (a), Mowat, V. C.*, treats these cases and *O'Hara v. Chaine (b)*, and *Parker v. Sowerby (c)*, as inconsistent with *Birmingham v. Kirwan (d)*; but he seems to have overlooked the fact that *Miull v. Brain* and *Roadley v. Dixon*, were strictly confined to property passing by the one devise, while in *Birmingham v. Kirwan* the devises were distinct, and it was held that the exclusion of dower in the one, did not prevent it being asserted in the other. In *O'Hara v. Chaine* there was but one devise of the whole; but in that, and in *Parker v. Sowerby*, the decisions went upon the power to lease. I conceive, therefore, that *Birmingham v. Kirwan* is still good law. And if in such a case the exclusion of dower from one property does not exclude it from the other, *a fortiori*, it will not be excluded from lands that do not pass by the will at all. In *Davidson v. Boomer (e)* there was an express bequest in lieu of dower, and it was held to mean dower in all his estate. In *Hall v. Hall (f)* a testator made a provision in his will and declared that it should be taken in lieu and bar of all claim of dower, inheritance, or any other claim on her part. It was held that the presumption was, that he referred only to the estate he then had, and did not apply to after-acquired lands, and that the widow was not bound to elect in regard to the after-acquired lands. In *Davidson v. Boomer* I assume that the testator acquired no lands after his will, but owned all that devolved on his death at the date of the will. The will, in the present case, makes no reference to after-acquired lands, and had there been an express bequest in lieu of dower, the presumption would be that it only applied to what he then had. But as I have held the widow was not excluded from dower in any of the lands, this discussion is perhaps unnecessary.

Judgment.

(a) 2 Chy. Ch. 336.

(c) 4 D. M. & G. 321.

(e) 18 Gr. 475.

(b) 1 J. & L. 665.

(d) 2 S. & L. 444.

(f) 2 McCord's Chy. 260, 299.

Supposing her to have been originally entitled to dower, it is argued that it has been extinguished by the Statute of Limitations. The testator died in 1852. The widow was entitled exclusively to the rents until the eldest son attained twenty-one years of age, and after that, as an executrix, she was entitled jointly with the executor to the rents during her widowhood,—and has received them in these capacities all along, and she still lives unmarried.

The 4 Wm. IV. ch. 1, C. S. U. C. ch. 88, was the statute limiting actions for the recovery of land in force at the testator's death, and down to 1868, (32 Vict. ch. 7, O.,) for the Act of 1863, 24 Vic. ch. 40, did not apply to cases where dower was consummate before the passing of the Act, (sec. 16.) By the Consol. Stat. U. C., ch. 88, sec. 16, when the time for bringing an action was suffered to elapse, the right was extinguished; and by sec. 31, no suit in equity could be brought but within the time an action at law might have been brought. None of the disabilities provided for by this Act apply to the present case (sec. 45). Dower was held to be within this Act, in *German v. Grooms* (a), *McDonald v. McIntosh* (b), and *Begley v. St. Patrick, &c.*, (c), and a like conclusion was arrived at under a similar English Statute in *Marshall v. Smith* (d). The case of *McDonald v. McIntosh* is further remarkable from the fact that the widow had been long in possession, and though it seemed absurd that she should be held to have forborne her remedy when she had no occasion to resort to any, not being kept out of the estate, and when her bringing the action would only have had the effect of circumscribing what she was actually enjoying, yet she was barred. These cases, I think, must be taken as indubitably establishing that a widow must bring her action for dower under that statute within twenty years.

Judgment

1877.

Lalldlaw
v.
Jackes.

(a) 6 U. C. R. 414.

(c) 23 U. C. R. 395.

(b) 8 U. C. R. 388.

(d) 5 Giff. 37.

1877.
 Laidlaw
 v.
 Jackson.

from the death of her husband;—and that the same rule must apply where, as in this case, the testator had mortgaged the lands, and the widow had no right to bring her action against the mortgagees, (who are the tenants of the freehold *Cummins v. Alguire* (a), until the mortgage was paid off,—and although she is in possession as devisee, or with a power to receive rents.

The 22 Vict. ch. 7, 1868, O., by sec. 2, provides that all actions of writ of right of dower or of dower *unde nihil habet* are to be brought under that Act,—(these are the only actions for dower (C. S. U. C., ch. 27, sec. 78)—and by section 22 no action is to be brought but within twenty years from the death of her husband, and by section 42 this part of the Act applies to all cases where dower is claimed. There is no clause extinguishing the right as in section 16 of C. S. U. C., ch. 88. It is probable this is the only Act now regulating limitation as to dower, and if so, then only the remedy is barred, and if the widow could get hold of anything by which she could pay herself without action, she might do so. *Courtenay v. Williams* (b), *Coates v. Coates* (c).

Judgment.

But however that may be, I am of opinion that the Stat. of Wm. IV. only applies where she is bringing an action or suit for the recovery of dower, but was not intended to include the case of a widow brought unwillingly before the Court, and only seeking to reduce the amount of rents charged against her by setting off what she was entitled to as dowress,—which is all that is sought in the present case. In *Laing v. Avery* (d) the present Chancellor held that a dowress, summoned in a proceeding for quieting title, was not in any sense to be considered as bringing an action so as to enable her to save the Statute of Limitations. Again a person called upon to account for rents, as a mortgagee, or

(a) 12 U. C. R. 330.
 (c) 33 Beav. 249.

(b) 3 Hare 539, s. 89.
 (d) 14 Gr. 82.

trustee, is entitled to just allowances in the management of the estate, for its preservation and protection, *e. g.* for redemption of the land tax, for renewal of leases, for head rent, or for protection of the title: 2 *Fisher* on Mortgage, 883, 2nd. ed.; *Lewin* on Trusts, 3rd. ed., 752; *Howell v. Howell*. (a)

1877.

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And as I think the testator only devised his estate, and not that of his wife, she was only accountable for the rents of his estate, or, in other words, she is at liberty in accounting for the rents to take credit for the part attributable to her dower: *Hamilton v. Mohun*; (b) and so long as she continues in possession, it seems to me she retains that right: although were it necessary for her to attempt to enforce her claim by suit, she would be barred.

The last subject of appeal was, because the Master had reported that the sons had not lost their right to purchase their sisters' shares. The sole ground upon which it is contended that the report in this respect is erroneous, is, that the sons have executed, or joined in executing, leases in which the rent is reserved to the executors during the life of the widow, and after her death to the sons and daughters, their heirs, executors, administrators, or assigns. The *reddendum* varies in some of them. In one, made the 20th March, 1868, pursuant to a covenant of renewal in a former lease, and which was sanctioned by an order of this Court, the rent is reserved to the executor and executrix during the minority of the infant parties to it, and during the lifetime and widowhood of the widow, and then to the other lessors, their heirs or assigns. In one made 25th August, 1855, made between the executor and executrix of the first part, the children who had attained their majority of the second part, the children then as yet infants of the third part, and the lessees of the fourth part, the parties of the first, second, and

Judgment.

(a) 2 M. & C. 478.

(b) 1 P. W. 118.

1877. *Laidlaw v. Jackes.* third part purport to lease the premises to the lessees for 15 years; the rent is reserved to the parties of the first, second, and third parts, or to some or one of them, their heirs and assigns. The covenants are by the parties of the first and second parts.

In another, made 1st October, 1870, the executors and the children are parties of the first part, the husbands of the daughters of the second part, and the parties of these two parts are termed the lessors; the rent is reserved to the lessors, their heirs and assigns.

In another made the 7th June, 1873, the executor and executrix and the children are parties of the first part, and are named the *lessors*, the husbands of the daughters are parties of the second part, and the rent is reserved to the executors during the lifetime of the widow, and after her death to the others of the lessors.

In another lease of 8th October, 1873, to two of the family, the executors and executrix and the children, other than the lessees, are described as the lessors, and the rent is reserved as in the last lease.

The youngest child came of age in 1873. At the time of the lease of 1855, nine children, of whom six were sons, were infants. At the date of the lease of 1868, four children, of whom three were sons, were infants.

There is no evidence of any of the parties intending to affect the right of purchase, except what may be inferred from the leases themselves. The sons have, by the will as interpreted by the decree, till the marriage or death of the widow to exercise the right, unless they have lost it. I apprehend that nothing contained in the leases can be construed into anything binding on infant parties to them.

I need not discuss the question much pressed in argument that none of the children could bar their right until the period for exercising it had come,—for I do not think that any of these leases establish any release, waiver or abandonment of the right. Had the parties

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intended to leave matters without reference to this right, the leases would have been just as they are, as it might be that the sons would not choose to exercise the right, and the rent was therefore properly reserved according to the provisions of the will. In some of the leases not even the widowhood of the widow is specified as a limit, but the rent is reserved generally to all the lessors, including the widow, as in that of 1855 and 1870. That of 1868, executed under the order of the Court, expresses the proper *reddendum*. The two executed in 1873, reserve the rent to the executors during the lifetime of the widow, not noticing the limitation as to her widowhood. If these leases would have been proper expressions of the intention of the parties, leaving the exercise of the right until the time for exercising it should arise, as I think they were, it seems to me to put an end to the question, as by no legitimate reasoning could an intention to abandon or release the right be inferred from them. As soon as the option is exercised, the rents are payable to the purchasers,—it is just the case of a purchase of an estate in lease,—the purchasers, as reversioners, are entitled the rents. *Moss v. Bartin* (a), is a case involving the consideration of what acts will be considered as a waiver of an option. There the plaintiff leased from defendant's testator a house, for three years, and the lessor agreed to give him a lease for 5, 7, 14, or 21 years, from the expiration of the former, at the same rent. The lessor died before the expiration of the three years.

The defendants contended he had waived his option by applying for a lease for similar terms at a reduced rent, and by charging for repairs which, if he intended to be a lessee, he should have made at his own cost. But it was held these were no waiver, and a decree for specific performance was made with costs.

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(a) L. R. 1 Eq. 474.

1877. Besides, to operate as a waiver, the act must have been done with the intention of waiving. Just as acts relied upon as an exercise of the option must have been done with that design. *Sopwith v. Maughan* (a), *Wake v. Wake* (b), and with insufficient information, or in entire ignorance, the acts will not bind.

I think the appeal has entirely failed upon both grounds, and must be dismissed, with costs.

Judgment. The American cases I have quoted, I take from the Am. ed. of *White & Tudor's* L. C. ed., 1876, vol. i., 503, notes to *Noys v. Mordaunt* and *Streatfield v. Streatfield*.

SOLICITORS.—*Ferguson, Bain, and Myers*, for the plaintiff; *George Murray*, for the defendants.

ALLEN V. EDINBURGH LIFE ASSURANCE COMPANY.

Dower, sale of under fi. fa.

Since the passing of the Statute 40 Vict., ch. 8, O., which is retro-active in its operation, the right of a woman to dower, as well during the life of her husband as after his death, is such an interest in lands as can be sold under a *fi. fa.* at law.

THIS was a motion to dissolve the injunction issued on the 2nd November, 1872, restraining the defendants from proceeding to sell the plaintiff's right of or estate in dower, as reported ante vol. xix, page 248.

Mr. *Kingstone*, in support of the motion.
Mr. *Hodgins*, Q. C., contra.

(a) 30 Beav. 235.

(b) 1 Ves. Jr. 335.

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PROUDFOOT, V. C.—At the time when this injunction issued *McAnnany v. Turnbull* (a), was supposed to have established that until dower was assigned it could not be sold under a common law execution, and this writ was granted upon the authority of that case. *Allen v. Edinburgh Life Assurance Co.* (b)

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The statute in force when *McAnnany v. Turnbull* was decided, was the Consol. Stat. of U. C., ch. 90, sec. 11, or rather 25 Vict. ch. 21, sec. 8, which repealed sec. 11 and re-enacted it, leaving out the language applicable to registered judgments. But the 40 Vict. ch. 8, sec. 37, O., revives the 24 Vict. ch. 41, (which had been repealed by 29 Vict. ch. 24, sec. 2), and makes an addition to it. The 24 Vict. ch. 41, sec. 8, as revived and added to, enacts that any estate, right, title or interest in land which, under sec. 5 of Consol. Stat. U. C., ch. 90, may be conveyed or assigned by any party, or over which such party has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution, &c.

Judgment.

The defendants move to dissolve, because they say that the interest they were restrained from selling under the law as it then stood, has, by the recent statute, become saleable; and that this statute is retroactive so as to affect rights which had accrued before its passing.

The history of the decisions on this subject is somewhat remarkable. The Act found in the Consol. Stat. U. C ch. 90, was passed in 1851, (14 and 15 Vict. c. 7). In 1852, *Rose v. Simmerman*, (c) decided that dower before assignment might be transferred in equity, but no reference was made to this then recent statute. In 1863, *McAnnany v. Turnbull* (d) was disposed of, without referring to *Rose v. Simmerman*. In 1866,

(a) 10 Gr. 298.

(c) 3 Gr. 593.

(b) 19 Gr. 248.

(d) 10 Gr. 298.

1877. *Miller v. Wiley* (a) was decided, in which reference was made to *Rose v. Simmerman*, but not to *McAnnany v. Turnbull*. In 1872, the present Chancellor, in *Allen v. Edinburgh Life Assurance Co.* (b), decided upon the authority of *McAnnany v. Turnbull*, without noticing *Rose v. Simmerman*. And in 1877, the same learned Judge in *Williams v. Reynolds* (c), refers to these two cases, but does not notice *Allen v. Edinburgh Life Assurance Co.*, or *Miller v. Wiley*. How any of these decisions might have been modified or varied, had the Judges been referred to the others, it is impossible now to say; but as they are not all in harmony, it leaves the subject open, to a considerable extent, for discussion upon principle.

Judgment.

The Consol. Stat. U. C., ch. 90, sec. 4, enacts that a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be, or be not, ascertained; also a right of entry, whether immediate or future, and whether vested or contingent, into, or upon any land, may be disposed of by deed, &c. And the 40 Vict. ch. 8, sec. 37, O., enacts that any estate, &c., that might, under the 5th sec. of the Consol. Stat., be conveyed or assigned, or over which any party has a disposing power that he may exercise for his own benefit, without the assent of any other person, may be sold on execution, &c.]

In *Rose v. Simmerman*, the assignment to the plaintiff was made after the death of the husband, and had the statute been referred to the decision would have been a determination that this was not an interest covered by the statute, for it is there held that the assignment was only valid in equity; while if the statute applied it would have been operative at law. But the statute not having been referred to, no such effect can

(a) 16 U. C. C. P. 529.

(b) 19 Gr. 248.

(c) Ante p. 49.

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be given to the decision, and all that it determines is, that independently of the statute dower, before assignment, may be conveyed in equity.

In *McAnnany v. Turnbull*, the Sheriff's sale, I apprehend, was after the husband's death, before dower was assigned, and it was held that nothing passed: that the right to dower was neither a contingent, an executory, nor a future interest, nor a possibility coupled with an interest; if an interest at all it was a present interest,—that it was not contingent or executory, in the sense these words are used by the Legislature, as it was only because the exercise of the right depended on her own will that it was contingent,—it was not a possibility coupled with an interest, nor was it a right of entry.

In *Miller v. Wiley*, on the other hand, the Court of Common Pleas quote *Park on Dower*, 192, as shewing that the inchoate right of dower was an interest attaching on his land by the marriage and seisin, and say they are inclined to think that under the Consol. Stat. ch. 90, a woman may, before assignment of dower, convey her claim to it to any person, for it is *an interest though not an estate in the land*, and so within the statute. Judgment.

Allen v. Edinburgh Life Assurance Co. (a) followed *MacAnnany v. Turnbull*, and though *Miller v. Wiley* seems to have been cited in argument, it is not referred to in the judgment.

In *Williams v. Reynolds* (b), the Chancellor thinks the Act of last session (40 Vict. ch. 8, sec. 37), to be retroactive, but the point was not argued, and considers that, however the matter might have stood under *Rose v. Simmerman*, and *McAnnany v. Turnbull*, the 40 Vict. ch. 8, sec. 37, is more comprehensive than the 24 Vict. ch. 41, sec. 8, and says, "The added words were evidently intended to embrace, and I should say do

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(a) 19 Gr. 248.

(b) Ante p. 49.

1877. embrace any and every interest which the execution debtor may possess for his own benefit disposable by himself." And he adds, "if that be so, it may be reached under section 37 of the Act of last session (assuming that it may not be reached directly by *fi. fa.*) and if so, may be reached in this Court."

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I do not understand what is meant to be conveyed by the sentence within the parenthesis, for if reached under section 37, it is reached directly by *fi. fa.*,—the object of that section being to make the interests affected by it saleable under *fi. fa.*

The Imperial Statute, 1 & 2 Vict. ch. 110, sec. 13, made a judgment a charge upon all the lands of the debtor in which he had any estate at law or in equity, or over which he had any disposing power which he might, without the assent of any other person, exercise for his own benefit,—language which has apparently been copied in our statute. In the case of *Bawan v. The Earl of Oxford (a)*, the effect of this statute was considered, and Lord Justice Turner says, at p. 529, "I think, however, that the words 'disposing power,' must be construed according to their ordinary interpretation. This is the general rule of construction, and here the context proves that it was so intended, because the statute distinguishes between powers of different descriptions, as between a power which a person may have and exercise for his own benefit, and one which he cannot exercise without the assent of other persons. Now, a conveyance which defeats a voluntary settlement under the Statute of Elizabeth, does not operate by way of execution of any power. It operates as a conveyance of the estate which the settlor had before the voluntary settlement. It is the statute and not the act of the settlor that avoids the voluntary settlement, so that the conveyance which is made for value operates on the estate which the party who made the

Judgment.

(a) 6 D. M. G. 507.

voluntary settlement had before that settlement was made, and the statute puts the settlement out of the way so that it shall not affect the conveyance which is made to the purchaser."

If that be the true construction of these words "disposing power," then the Act of last session cannot have the effect attributed to it, and, applying it to the subject now discussed, the conveyance by the wife is not, by way of execution, of any power. It conveys a vested right or interest, just as in the case of the deed avoiding a voluntary settlement; and the statute, by these words, confers no greater authority in conveying estates or rights vested in the conveying party than he had before. *Beavan v. Oxford* was not cited in *Williams v. Reynolds*, and had the latter case been the deliberate and considered opinion of the Chancellor after argument, I would have followed it, and left the parties to seek redress in a higher Court; but the Chancellor, as I understand, had not a full argument of the case before him, and expresses rather the inclination of his opinion, than his decision.

Judgment.

I think, therefore, that I must assume *Beavan v. Oxford*, to state the rule of construction correctly, and therefore that the case must be decided, practically, upon the construction of the Consol. Stat. U. C. ch. 90, if the late Act is to be deemed to have a retroactive operation. This revives a former Act, and does not declare the meaning of it as in *McEvoy v. Clune (a)*. Between 1865 and 1877, therefore, the Consol. Stat. ch. 90, sec. 11, and the 24 Vict. ch. 41, sec. 8, were not in operation at all. And there seems nothing in the phraseology of the Act of 1877 to shew an intention on the part of the Legislature to apply it to past transactions. If it is to have a retroactive operation, it must therefore, if at all, be upon the ground suggested by the Chancellor, that it relates to procedure, and he

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(a) 21 Gr. 515.

1877. quotes Chancellor *Kent* (Comm. 1, sec. 455), to the effect that remedial statutes may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations—or translating into the phraseology of our law, the affecting vested rights would be a reason for holding it not retrospective—and says that where what is enacted is in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations, he saw no reason why it should not apply to pending suits—it is not open to any of the objections which, in principle, apply to retroactive legislation. And upon this ground I concur with the Chancellor's view that this statute does operate retroactively. Its operation is simply to make a larger class of property liable to execution, than was previously the case, and here the right still remains the property of the widow,—she has not parted with it, and the retroactive power invoked is only for the purpose of retaining the benefit of the writs of execution that have been issued. It is no farther affecting vested interests than every statute authorizing seizure of property does affect them, and although the debtor may have owned the property long before the statute, it was never contended that it could not be reached by the execution.

Judgment.

Then what is the effect of the Consol. Stat. U. C. ch. 90, sec. 5, and does it render transferable the interest of the widow as dowress before assignment of dower. Before the death of the husband the interest of the wife, if it cannot be described as “a contingent, an executory, or a future interest,” is, at all events, “a possibility coupled with an interest.” Mere or naked possibilities, not coupled with any interest, are such as the expectancy of an heir at law to succeed to the estate of his ancestor—the prospect of taking under

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the will of a person then living, or under a power of appointment that may or may not be exercised. Possibilities coupled with an interest, under this statute, probably include gifts to the survivor of several persons—to children who may be living at the death of their surviving parents—besides many cases of contingent remainders, or limitations by way of executory devise, or springing or shifting uses in favour of ascertained persons. *Leith's R. P. Stat.*, 68, *Roe v. Jones (a)*, *Helps v. Hereford (b)*, *Poole v. Haskey (c)*, *Fearne on Remainders*, 370, *Smith on Real and Personal Property*, 192.

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In *Lampet's Case (d)*, Lord *Coke*, after quoting cases in the Year Books, 6 & 19 Ed. II., which had held that a fine levied by husband and wife was no bar to dower, because until the death of the husband the wife had but a possibility of dower, and she could bring no action, goes on to say, "But at this day the said books of 6 & 19 Ed. II., are not held for law; for now no question is made, but that if the husband and wife levy a fine, the wife is barred of her dower for two reasons: 1. Because the intermarriage and seisin are the fundamental causes of dower, and the death of the husband but as an execution thereof. 2. All those who have estate or title, or claim, join in the assurance, and therefore in such case, if the husband and wife have granted a rent by fine out of the lease, or have made a lease for years, rendering rent to the husband and his heirs, and afterwards the wife recovers dower, she shall hold it charged with the rent, and with the term according to the maxim which *Littleton* puts." And in *Bingham's Case (e)*, after quoting a case in 4 H. 8, that if the husband levies a fine with proclamations, and dies, and five years pass after his death, the wife

Judgment.

(a) 1 H. Bl. 80, S. C. 3 T. R. 88.

(c) O. Bridg. 365.

(e) 2 Rep. 93 a.

(b) 2 B. & Al. 242.

(d) 10 Rep. 46 b, 49 a.

1877. is barred of her dower, he says, "For although to the consummation of dower three things are requisite, that is to say, marriage, seisin, and the death of the husband; and although at the time of the fine levied, her title was not consummate, yet the law respects the first and original cases, scil. marriage and seisin."

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It thus appears that marriage and seisin give an interest, not a mere possibility, for a mere possibility was not then capable of being conveyed, and the fine operated upon that interest.

But it is clear that till assignment the widow has no estate in the land, the freehold descends to the heir: Crui. Dig. Dower, ch. 3, sec. 1. In *Brown v. Meredith* (a) Lord Langdale, M. R., says, "Until the lands to be held in dower are assigned, the widow has no estate in the lands of her deceased husband. She has a right to have her dower assigned, but she has no estate in the lands." And *Bell on Property of Husband and Wife*, 292, says, "The vesting of the estate is suspended till assignment."

Judgment.

When Lord Coke says the death of the husband is but as an execution of dower, he can mean nothing further than that the right to dower is consummate, not that by the death alone the estate is vested in her. She is then in a position to bring her action, or take an assignment; but till the assignment she cannot even enter on the lands, without being liable to be treated as a trespasser. In *Tomkins v. Fonda* (b), it is said that a widow's right of dower before assignment is a mere chose in action, and not an estate or freehold in the land. And in *McAnnany v. Turnbull* (c), the Chancellor says that till assignment, the widow merely has a right to procure something, *i. e.*, dower. And again, looking at the character of the inchoate interest which a widow has before assignment, if it is an interest at all, it is not a future but a present interest.

(a) 2 Keen, 527.

(b) 4 Paige C. R. 448.

(c) 10 Gr. 298.

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In all these instances there is no distinction drawn between the nature of the right before the husband's death and after it. In each case it is spoken of as an inchoate right. The right of action has indeed become perfected, but the interest in the estate is the same. And I think it is manifest that prior to the death she had a possibility coupled with an interest; the possibility is not terminated by the death and turned into an estate, it is still contingent on surviving till dower is assigned. After the death she has some right before she is vested with the estate, the right she had before the death is not extinguished, it is not satisfied, nor barred, nor merged, nor is it perfected till assignment; then what is this interest? I think it cannot be better described than as a continuation of her interest; and as that might have been defeated by her death before her husband, so this may be defeated by her death before assignment. It has not ceased to be a possibility coupled with an interest, and being assignable before the husband's death under the statute, it continues to be so. There is not only the contingency of her wishing to assert her right, which, in *McAnnany v. Turnbull*, is said to be the only contingency, and which I agree is not such as contemplated by the statute, but the further contingency of surviving the assignment. Even the right to damages is gone at law by the death of the tenant, or of the widow before judgment: *Bell, Ib.*, 322. Her right survives to no one.

In this respect *Rose v. Simmerman* is important. The assignment there was after the death of the husband; but no distinction is attempted to be drawn between the nature of the right before the death and after the death of the husband, but before dower assigned. The cases referred to, and the whole reasoning of the Court, proceed upon the assumption of identity.

Mr. *Leith*, in his learned work on the Real Property Statutes, p. 69, n. C., and in the argument in this

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Judgment.

1877. case 19 Gr., insisted upon a distinction between the right of the wife before the death of the husband, and of the widow after it, apparently with the view in the one instance of reconciling the cases, and in the other because it was then the interest of his clients—the interests of these clients is now the other way, and the argument was pressed against them, but I do not think it maintainable. It was denied by the Chancellor, who reasoned that if the wife had no assignable interest after the death, she had none before it, and I reverse the process and say that since she has such an interest as may be assigned before the death, she continues to have it after. And the cases of *Miller v. Wiley (a)*, and *Rose v. Simmerman (b)*, appear to me to lead to that result.

The decision in this case reported in 19 Grant was perfectly accurate, as the motion for the injunction was made in May, 1869, but it escaped the notice of the counsel and the Court that the statute had been repealed Judgment. in 1865, and the right could not be sold at law. It is of course entitled to the highest respect as containing the opinion of the Chancellor, but it is not a decision on the statute.

If I am wrong, however, in the view I have taken, and that "disposing power" will cover such an interest as this, the conclusion is the same, and in either event the injunction must be dissolved. But where so much difference of opinion existed, and seeing that it was right when issued, it will be dissolved without costs.

SOLICITORS.—*Hodgins and Spragge*, for the plaintiff;
Leith, Kingstone, and Brough, for the defendants.

(a) 16 C. P. U. C. 529.

(b) 3 Gr. 599.

SMITH V. SMITH.

1878.

Administration—Injunction.

Where the evidence adduced leaves it doubtful as to whom a trading concern belongs, the Court will not, at the instance of a party claiming an interest in the funds invested therein, restrain the carrying on of the business, but will direct an account of the dealings thereof to be kept.

J. W. S. was killed by a railway disaster in the State of Ohio, and the defendant, his widow, while residing in the State of New York, took out administration to his estate there, and instituted proceedings in the Courts of the State of New York against the railway company, which was incorporated in both States, to recover damages. This action was compromised by the company paying to the widow in New York \$4,000. Part of that money she brought to this country, a portion of which, it was alleged, she invested in business, another portion being deposited in a bank. Under these circumstances, *J. W. S.* having died childless, the father of the deceased claimed to be entitled to one-half of the sum received from the railway company, and filed a bill seeking to restrain the withdrawal of the money from the bank, and the further carrying on of the business, which, however, the widow denied being hers. The evidence of experts—lawyers practising in the States of Ohio and New York respectively—as to what was the proper distribution of the fund was contradictory, as was also the evidence as to the ownership of the business.

Under these circumstances the Court refused to restrain the carrying on of the business, but directed the defendants to keep an account of the dealings thereof, and continued an interim injunction obtained *ex parte*, restraining the withdrawal of the money from the bank.

Motion for injunction to restrain the defendants from carrying on business in Toronto or withdrawing certain moneys claimed by the plaintiff from the bank in which they were deposited; and for the appointment of a receiver in order to wind up the business. The facts are stated in the judgment Statement.

Mr. *Hagel*, for the motion. The affidavits filed shew that if the funds are left in the hands of the defendants there is great danger of their being squandered, and the plaintiff be thereby deprived of what he is

1878. legally entitled to. Under these circumstances he submitted that the Court would feel called upon to protect the fund by granting the injunction and receiver.

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Smith.

Mr. *Monkman*, contra.

February 6. SPRAGGE, C.—The principal question is, to whom a sum of \$4000 received by the defendant *Maryetta Smith*, as administratrix of the estate of *John Wesley Smith*, from the Lake Shore and Michigan Southern Railway Company belongs. *John Wesley Smith* was killed by an accident on the railway occasioned by the negligence of the company; *Maryetta Smith* is his widow; the plaintiff in this suit is his father. The contention of the widow is, that she is entitled to the whole of the money; and she is so (with a qualification which I shall notice presently) if the laws of the State of Ohio apply to the case; while the father is entitled to one-half of the money if the laws of the State of New York apply. Each of these States gives an action to the administrator of a person killed under these circumstances—where they differ is as to who is entitled to the money recovered. The accident, and the death resulting from it, occurred in Ohio. The widow took out administration, and prosecuted her action in New York, and the suit was compromised by the payment in New York, by the company, of the sum I have named—the company is incorporated by both States. The money, or a portion of it, has been brought here by the widow, and the father, in this suit, complains of the application of it.

Judgment.

The question is one of foreign law, and foreign law being a question of fact, the parties have produced before me the evidence of experts, *i. e.*, of counsellors and attorneys at law practising in those States. These gentlemen differ entirely as to the laws of which State apply. I have the affidavits of several gentlemen who state accurately the facts; and say that upon those facts the laws of the State of New York apply. On

the other hand, gentlemen practising in Ohio say that the laws of their State apply, and further, that the Courts of New York had no jurisdiction in the matter; and that the money not having been recovered in the action, but paid by the company to the widow, it is to be taken as paid to her directly by the company under the laws of Ohio. The action is brought under an Act of the Legislature of Ohio.

This conflicting evidence leaves the law very uncertain. I should, however, at least doubt whether it is competent to the widow, she having prosecuted and then compromised her action in the State of New York, to set up that the Courts of that State had not jurisdiction to entertain her suit, and it does not appear to me necessarily to follow from her alleging in her "complaint" in the New York Court, that by the laws of Ohio she would be entitled to the whole of the damages recovered, that she would be so entitled where she chooses as her forum a Court of the State of New York.

If, in the conflict of evidence that is before me, I resort to the presumption that the foreign law is the same as the law in this country, I am met with the difficulty, that while in this country an action would lie under the like circumstances, the damages are with us apportioned by the jury or Judge trying the cause, and so, differently from the laws of either New York or Ohio, as sworn to by all the foreign witnesses. But as to the Courts of New York having jurisdiction, a point upon which the foreign witnesses differ; if I presume the foreign law to be the same as ours, I should feel no difficulty in holding in favour of the jurisdiction: *Scott v. Seymour (a)*, is an authority in its favor, and several cases referred to in that case fully bear out the proposition. In that case counsel in argument (b) remarked: "In *Story's Conflict of Laws*, chapter xiv.,

Judgment.

1878.

Smith
v.
Smith.

(a) 1 H. & C. 219.

(b) Page 224.

1878. section 554, it is said, 'that by the common law personal actions, being transitory, may be brought in any place where the party defending can be found; that real actions must be brought in the *forum rei sitæ*, and that mixed actions are properly referable to the same jurisdiction.' That distinction was recognized so long ago as the year 1665, in a case of *Skinner v. The East India Company* (a), where the twelve Judges certified that the Courts of Westminster could give relief for trespasses to the person and personal property notwithstanding they were committed beyond the seas, but for trespass to the realty there was no relief in those Courts. In *Pisani v. Lawson*, (b), *Tindal*, C. J., in the course of the argument, said: 'Suppose an Englishman beats a Frenchman at Boulogne, and then comes to England, would not the Frenchman have a right to sue for the assault in our Courts?' In *Rafael v. Verelst* (c) it was held that trespass would lie for procuring, by awe, fear, and threats, an independent native prince to imprison the plaintiff in his dominions in India. The same law prevails in America. *Smith v. Bull* (d). Formerly it was necessary to allege that the trespasses were committed 'against the peace of our lady the now Queen?' but that was a mere fiction of law, and need not have been proved."

Judgment.

In one of the affidavits put in on behalf of the defendants, that of *George S. Kain*, attorney and counsellor, practising at Cleveland, in the State of Ohio, the law of that State as to the rights of the widow, is stated; not as giving the widow the whole amount recovered absolutely but for life only, during the lifetime of the father of the person killed, the father being, as it is put, not entitled unless he survive the widow, but that she is entitled to the whole thereof during her natural life. There are also collateral rela-

(a). Cited in *Mostyn v. Fabrigas*, Cowp. 167, 168.

(b) 6 Bingh. N. C. 90-94.

(c) 2 W. Black, 983-1055.

(d) 17 Wendell, 323.

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Smith
v.
Smith.

tions, and as between them and the widow, according to Mr. *Kain*, she is entitled only for life. His affidavit states: "If a person's death is caused by such wrongful act, neglect or default within the said State of Ohio, and such person leave a widow surviving him but no child or children or descendants of any child or children surviving him, his said widow is entitled to the whole of any damages which are recovered for any such wrongful acts, neglects or defaults for the term of her natural life by the law of the said State of Ohio, and after the death of his said widow, the collateral relations of the said person whose death is so caused who are living at the time of the death of the said widow are entitled to inherit the same by the law of the said State. In case any person whose death is so caused leaves a father and widow surviving him, but leaves no child or children, or descendants of any child or children surviving, the father will not be and is not entitled to any share in such damages unless he survives such widow but she is entitled to the whole thereof for the term of her natural life. The law as stated in the second, third, and fourth paragraphs of this, my affidavit has been the law of the said State of Ohio for more than two years prior to this date."

Judgment.

If this be so, the widow is tenant for life of the sum of money if, as she contends, the law of Ohio applies to it. Then comes the question whether she can use it without giving security that it shall be forthcoming.

The law in England, in case of tenant for life of personalty under a will where the fund is shewn to be in peril, requires the tenant for life to give security for the safety of the fund: the case before me, it is true, is not under a will, but the reasons, except the one of confidence reposed by the testator in the tenant for life, seem to apply.

This statement of the law of Ohio was not brought under my notice—and the rights of the parties were not argued.

1878.

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v.
Smith.

With regard to the business carried on in this city the evidence leaves it uncertain whether it is the business of the widow carried on in the name of *Joseph*, or the business of *Joseph* himself; and further, it is doubtful whether the moneys, or a portion of them received by the widow in her suit in New York, can be traced into that business. I am not free from suspicion that it is so; but what I am asked to do in relation to it, is a very serious matter. It is to stop the further carrying on of that business. This would be doing an irremediable act; and it might be an irremediable wrong. I think I ought not to do more than to direct the keeping of an account of the dealings in the business between this and the hearing. The sittings in Toronto will be held next month.

The injunction as to the moneys in the Bank, will be continued to the hearing. Costs reserved.

RITCHIE V. DRAIN.

Pleading—Demurrer.

The plaintiff purchased from one *C*, a mill privilege with a right to over-flow land belonging to the defendant, and abstained at the instance of the defendant from obtaining from *C* an assignment of a bond securing the right so to flood defendant's land. In a proceeding afterwards taken by plaintiff to compel defendant specifically to perform the contract contained in the bond: *Held*, that the want of a formal assignment of the bond could not be raised as an objection to plaintiff's right to recover.

Statement. The bill in this case was filed by *Thomas Ritchie*, of Dummer, against *Hugh Drain*, setting forth (1) that plaintiff was the owner of parts of lots three and four in the 5th concession of Dummer, aforesaid, on which was erected a saw mill driven by water, and which had been in existence and owned by plaintiff, and those through whom he claimed title, for fifteen years and upwards; (2) that when the mill was erected the defendant was

owner of the west half of the said lot 4, and sold to plaintiff five acres off the south-west corner thereof for the purpose of erecting the mill, and the right to flood so much of said lot as was necessary for the proper use of the privilege, and the defendant afterwards, and on the 14th of June, 1861, at the request of plaintiff, conveyed the said five acres to one *William J. Corrigan*, to whom plaintiff had agreed to sell the same; but by mutual mistake the deed did not contain a grant in express terms of any land beyond the five acres so necessarily flooded by the use of the said mill privilege, and in order to correct the mistake, and for the further consideration of \$100 the defendant, on the 18th of July, 1861, at the request of the plaintiff, executed a bond in favor of the said *Corrigan*, conditioned to make and execute a deed of so much of the said west half lot as then was or might thereafter be covered by water from the then erection of a dam by *Corrigan*, raised no higher than the same then was. (3) That *Corrigan* on the 3rd of April, 1863, conveyed to plaintiff the said five acres, and the adjoining land, being the whole of the said mill property, and the privileges appertaining thereto, also the right to overflow any portion of the said lot that might have water backed on it; the defendant being present at the making of the agreement between *Corrigan* and the plaintiff, and at the execution of the said conveyance and the plaintiff charged "that under the circumstances hereinbefore stated, all the right and interest of the said *Corrigan* under the said bond, passed to and became vested in" the plaintiff, and further alleged that at the time of the execution of the said conveyance it was proposed and intended to make and execute an express assignment of the said bond to the plaintiff from *Corrigan*, but the same was prevented by the defendant then assuring the plaintiff and *Corrigan* that no such assignment was necessary as the bond was not then registered, and that he would give the plaintiff a deed according to its terms as soon as the sum of \$100 mentioned in the

1878.

Ritchie
v.
Drain.

Statement.

1878. bond was paid. (4) That plaintiff afterwards paid the defendant the said sum of \$100 in full, and had ever since the date of the said conveyance by *Corrigan* to himself been in possession of the said property; had used the mill and had flooded a portion of the said west half of lot 4, by the waters raised by the said dam in the necessary use of the said privilege, and to the extent mentioned in such bond; the land so flooded comprising about eleven and one-third acres. The plaintiff therefore submitted that he had acquired the right so to do by the uninterrupted use and enjoyment of the said land for that purpose as well as by the documents, agreements, and circumstances therein set forth. (5) That on the 15th of November, 1873, the defendant had sold and conveyed all the said lot (except the five acres) to one *Alpheus Darling* who had instituted proceedings against the defendant for the purpose of obtaining an abatement of purchase money on account of plaintiff's said rights as to the eleven and one-third acres, to which the defendant submitted, and then procured from *Darling* a release and conveyance to himself of the said eleven and one-third acres, and which were then defined as the parcel of land so flooded, and covered by the terms of the bond, and the defendant thereupon became and was the owner thereof. (6) That plaintiff had applied to defendant to execute for a conveyance of the said land in pursuance of such bond; but defendant refused to do so, alleging that plaintiff had not any right thereto.

Statement.

The bill prayed a specific performance of the agreement contained in the bond, and that the defendant might be ordered to convey the land so flooded (eleven and one-third acres) to the plaintiff, and for further relief.

The defendant demurred for want of equity.

Mr. Mr. J. A. Boyd, Q.C., in support of the demurrer

Mr. Marsh, contra.

BLAKE, V. C.—The allegation in clause three of the bill which closes with the words, “your complainant charges that by the said conveyance, or under the circumstances hereinbefore stated, all the right and interest of the said *Corrigan* under the said bond passed to and became vested in your complainant,” are to my mind sufficiently definite to sustain the bill against a demurrer. I think the proper conclusion from this portion of the pleading, is that what was necessary to put the plaintiff in the position of his vendor so as to give the grantee the rights of the grantor had been done. Then follow the words which shew that this is not the case—that although it was intended to place the plaintiff in this position, yet by the representation of the defendant this was not carried out. The bill states “the same was prevented by the defendant then assuring your complainant and the said *Corrigan* that no such assignment was necessary, as the said bond was not then registered, and that he would give your complainant a deed according to its terms as soon as the sum of \$100 therein mentioned was paid. That your complainant afterwards paid the said defendant the said sum of \$100 in full,” and has ever since remained in possession. The fair reading of the bill is that the plaintiff is the vendee and grantee of all the land in question, and would have taken an assignment of the land but that the defendant stated it was unnecessary, and undertook on payment of \$100 to convey the premises to the plaintiff. I think the Court would now grant relief on the bond being forthcoming, and that the absence of an assignment of it to the plaintiff is under the circumstances no bar to the relief prayed. I must overrule the demurrer, allowing the defendant to answer if he desires. The defendant is trustee of the premises for the plaintiff, who has been in possession ever since the date of the agreement, and therefore I do not see that the case can be within the Statute of Limitations.

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Ritchie
v.
Drain.

April 3rd.

Judgment.

1878.

GAMBLE V. LEE.

Trustee and cestui que trust—Money impressed with trust.

Money was advanced by the plaintiff for the express purpose of being deposited in a bank in order to meet a cheque of *L. & C.*, given by their agent *J. H. C.* This cheque never was paid or presented after such deposit, and the amount remained in the bank to the credit of *L. & C.*, who were trustees, claiming no beneficial interest in the money. On a bill filed for that purpose the Court declared that the estate of *J. H. C.*, who had since died, had not any claim or interest in the fund, and ordered the amount together with the interest allowed on the deposit to be paid to the plaintiff.

Hearing on motion for decree, under the circumstances stated in the judgment.

April 3rd.

Mr. *Henry Gamble*, for the plaintiff, referred, amongst other cases to *Ex parte Frere (a)*, *Ashall v. Smithers (b)*, *Re Clarke (c)*, to shew that where money is paid for a special purpose and thus impressed with a trust, if not so applied the party making the payment is entitled to recover it back.

Mr. *Huson Murray* for *Lee* and *Cameron*.

Mr. *A. Howell* for *H. L. Hime*, administrator of *J. H. Cameron*.

April 10th.

Judgment.

SPRAGGE, C.—The facts are shortly, that a cheque for \$12,500 was given by the defendants *Lee & Cameron* as trustees of *Mrs. Ellen M. De B. Cameron*, upon the Canadian Bank of Commerce, payable to the Synod of Toronto; the cheque was given by the late *J. H. Cameron*, the duly authorized agent of the trustees for that purpose. The Bank refused payment of the cheque for the want of sufficient funds of the trust in its hands to meet it.

It was expected that the cheque would be presented a second time by the Synod to the Bank; and efforts

(a) 1 M. & McA. 263. (b) 12 Ves. 119. (c) L. R. 4 Ch. Div. 155.

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were made, it is not said by whom except by the plaintiff, to place sufficient funds in the Bank to the credit of the trustees to meet the cheque when presented a second time.

Towards raising funds for that purpose the plaintiff paid into the Bank to the credit of the trustees the sum of \$1,500.

The cheque in favour of the Synod was not a second time presented to the Bank, and the above sum has since stood to the credit of the trustees in the Bank.

The plaintiff's allegation as set forth in paragraph nine of this bill is,

"The said sum of fifteen hundred dollars was so advanced by your complainant for the sole purpose of assisting to pay the said cheque of the said defendants, *Stephen S. Lee* and *Alan Cameron*, and it was so expressly stipulated and understood at the time of advance and it was deposited in the Bank of Commerce for that purpose."

The trustees by their answer admit the truth of this and the other allegations in the bill; and the administrator of the estate of the late *J. H. Cameron* says in his answer, that from inquiries made he believes them to be true.

Upon these facts, taking them to be true, this \$1,500 reached the hands of *Lee & Cameron*, by being placed to their credit at the Bank, for a specific purpose, and so impressed with a trust to be applied to that purpose; and clearly it was not competent to the trustees to apply it to any other purpose. It was not applied to that purpose, and the Synod taking the course that it did, it could not be so applied. The purpose failed, and *Lee & Cameron* became dry trustees of the money. This principle is well established by many cases, among them *Zinck v. Walker* (a), *Hassall v. Smithers* (b), *In re Clarke* (c), and commends itself by its obvious justice and propriety.

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Gamble
v.
Lee.

Judgment.

(a) Sir W. Bla. 1154.

(b) 12 Ves. 118.

(c) 4 Chy. Div. 515.

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Gamble
v.
Lee.

Lee & Cameron trustees, do not indeed claim to hold and retain this money for the purposes of the trust, or for any purpose; but having been notified by the administrator of the estate of *J. H. Cameron* that it was claimed as a part of his estate, the trustees apprehended that they might incur personal liability if they paid back the money to the plaintiff. Hence this suit.

I do not see how this money can form part of the assets of the estate of *J. H. Cameron*. It does not appear before me that he had anything to do with the cheque given by *Lee & Cameron* trustees to the Synod, otherwise than as their agent. But assuming that he had, and that the cheque given was in or towards payment of a debt due by him to the Synod, the principle to which I have referred would apply; and would apply if the plaintiff had given his cheque or paid the money direct to *Mr. Cameron*; it would apply, because it would have reached *Mr. Cameron* impressed with a trust, which failed.

Judgment.

Mr. Howell, representing the administrator of the estate of *Mr. Cameron* says, very properly, that the money in question having been advanced by the plaintiff for a purpose which has failed, he conceives that it cannot form a part of the assets of *Mr. Cameron's* estate, and can see no ground for resisting the prayer of the bill. I think the case a clear one for granting it.

The decree will declare the plaintiff entitled, and direct payment, and he is of course entitled to interest if interest is allowed by the Bank to *Lee & Cameron*. No parties ask for costs.

SOLICITORS.—*C. & H. D. Gamble*, for the plaintiff; *Murray, Barwick* and *Lyon*, for the defendants *Lee* and *Cameron*; *Edgar, Ritchie* and *Howell*, for the defendant *Hime*.

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NELLES V. ELLIOT.

1878.

Will, construction of—Devise, absolute or in trust.

J. K., by his will devised all his estate—real and personal—to his wife “for her own use and disposal, trusting that she will make such disposition thereof as shall be just and proper among my children.”
Held, that this operated as an absolute devise to the widow who had the power of conveying such a title to the lands as a purchaser under her vendee was bound to accept.

This was a special case settled between the parties thereto, *Henry E. Nelles*, assignee of the estate of *Thomas C. Kearns*, an insolvent, (plaintiff) and *Thomas Elliott*, (defendant) and stated (1) that one *Joseph Sifton*, who died in March, 1874, possessed several parcels of land, which he disposed of by his will, made in the words and figures following: that is to say:—

“IN THE NAME OF GOD. AMEN.”

I, *Joseph Sifton*, of the Township of London, County of Middlesex, Province of Ontario and Dominion of Canada, being in sound mind and memory, but knowing the uncertainty of life, make this my last will and testament in manner following, that is to say: First of all—All my lawful debts to be paid, and \$100 be paid for my funeral expenses, and \$200 be paid for inclosing the burying place and putting up headstones on each person that has been buried in the enclosure. The enclosure is to be of iron, such as a plan that I will leave; and \$200 to be given to *William B. Bernard* for services that he has done in collecting my debts and rents so long as I may live, and for settling the business and arranging the business between my children. According to this my last will he will be one of my executors. I further bequeath to my grandchild, *Joseph William Taylor*, lot number 19 in the 8th concession, north half, containing 100 acres, be the same more or less, to him and his heirs forever. I further bequeath to my grandchild, *Charles Taylor*, lot number 17 in the 14th concession of the Township of London, south half—only one acre on the south-easterly corner of said lot—to him and his heirs forever; 100 acres, more or less. The following landed property I bequeath to my three children, namely, *Charles Wright Sifton*, *Rebecca Elizabeth Taylor*, and *Bainet Esdros Sifton*, which is as follows: 20 acres of the north half of the south half of lot number 17 in the 7th concession of the Township of London, and one acre on said lot being the south-easterly corner in the village of *St. John's*; lot number 29 in the

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v.
Elliot.

reserved plan of Port Sarnia, in the County of Kent; lot number 28 in the 1st concession of the Township of Warwick, north of the Egremont road, being one acre on the south-easterly corner; lots numbers 11 and 12 in Wellington street, in the city of London; lot number 1 on the corner of Ridout street in the Village of Napier; and part of lot number 16 in the Township of London, north part, containing by admeasurement 48 acres, be the same more or less, there being two acres off the north-west corner. All the above mentioned landed property, and all that I may own at my death, with all the money, mortgages, stock in the bank and shares in the bank, property of all kinds; all debts due me by notes of hand or otherwise, shall be equally divided between my three children, named as aforesaid.

I further bequeath to my son *Joseph Bradshaw Sifton* \$5. I further state that out of *Rebecca Elizabeth Taylor's* dividend \$1,000, and given to *Rebecca Jane Taylor*, her daughter, with interest at six per cent. from the date of these presents; and out of *Bainlet Esdros Sifton's* dividend there shall be \$1,000, and given to *Prudence Sifton*, his daughter, with six per cent. from the date hereof. I further state that there is to be taken out of *Charles Wright Sifton's* dividend \$1,000 and given to *Catherine Sifton*, his daughter, with interest at six per cent. from the date hereof; and out of his, *C. W. Sifton's*, dividend there is to be taken \$1,300 and given to *Joseph William Taylor* and *Charles Taylor*, equally divided between them both, with interest from the date of this will at six per cent. till paid.

Statement. I further state that all the above amounts that I have ordered to be deducted from my three children's dividend and given to my grandchildren, the interest is to be added to the principal at the end of each year, and it is to bear interest till they come of the age of twenty-one, and if any of them dies before they come of age, the then amount is to be divided amongst their brothers and sisters or their children. I further state that if I dispose of or accumulate any property, all will be disposed of in the same manner as above stated, either added or taken from.

Finally, I nominate and appoint *James Ferguson, Charles Wright Sifton, and Wm. B. Bernard*, my executors to this my last will and testament; do set my hand and seal this 1st day of January, in the year of our Lord 1872.

If my above named three children, *Charles W. Sifton, Rebecca E. Taylor, and Bainlet Esdros Sifton*, cannot agree to divide the said property and all other things that I have bequeathed to them, I empower my executors to sell or divide among them as they may think best.

The clause in the margin above, "If my above named three children, *Charles W. Sifton, Rebecca E. Taylor, and Bainlet Esdros Sifton*, cannot agree to divide the said property and all other things that I shall

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bequeath to them, I empower my executors to sell or divide among them as they may think best," is in the same position as above in the original will.

2. Subsequent to the death of the said *Joseph Sifton* (*James Ferguson* in the said will named having renounced), an agreement for the sale of the said lands was entered into by and between *Charles Wright Sifton* and *William B. Bernard*, the executors to whom probate of the said will was granted, and one *John Kearns*, by which the said *Charles Wright Sifton* and *William B. Bernard*, as such executors aforesaid, and in pursuance of the power of sale contained in the said will, agreed for the consideration therein mentioned to convey the said lands to the said *John Kearns*.

3. The said *John Kearns* died on the 2nd day of February, leaving a will in the words following:—

"I, *John Kearns*, of the Township of London, make this my last will and testament in manner following. I give, devise and bequeath to my beloved wife *Jane* all the estate, both real and personal, of which I am now seized and possessed, for her own use and disposal, trusting that she will make such a disposition thereof as shall be just and proper among my children. Lastly, I hereby nominate and appoint *Henry Arnott*, of the Township of London, physician, and *Crowell Willson*, of the same place, Esquire, to be executors of this my last will and testament." Statement.

"In witness," &c.

4. The said *Charles W. Sifton* and *William B. Bernard*, as such executors as aforesaid, and *Bainlet Esdros Sifton* and *Rebecca Elizabeth Taylor*, devisees in the said will mentioned, in pursuance of the said agreement and of the power of sale contained in the said will of the said *Joseph Sifton* and of the said *John Kearns*, by deed in fee simple granted and conveyed the said lands to the said *Jane Kearns*, the devisee mentioned in the will of the said *John Kearns*, and the wives of the said *Charles W. Sifton* and *Bainlet E. Sifton* did thereby bar their dower in the said lands.

5. The said *Charles W. Sifton* and *William B. Bernard*, as such executors as aforesaid, filed their petition

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to quiet their title to the said lands, and did on the 8th of June, 1875, obtain a certificate from the Court of Chancery in pursuance of the Act intituled "An Act for quieting titles to real estate in Upper Canada (now Ontario)," which said certificate as set out in the special case was in the usual form, but expressed to be "Subject to the trusts declared of and concerning the same in and by the said last will and testament of *Joseph Sifton*, late of the said Township of London, deceased, dated the 1st day of January, 1872; and subject to the reservations mentioned in the 17th section of the said Act, and therein numbered respectively 1, 2, 3, and 4; and to the taxes payable or to become payable on the said parcel of land for the current year; and subject, also, to the rights of *Jane Kearns*, widow and devisee of *John Kearns*, late of the said township of London, commission merchant, deceased, under an agreement for the purchase of that part of the said land which is described as follows: commencing at the south-east corner of said lot number 17, running thence northerly along the proof line 100 feet to a post, thence westerly parallel to the concession 132 feet, thence southerly parallel with the proof line road 100 feet, to the road allowance between the 6th and 7th concessions; thence easterly along the said road allowance 132 feet to the place of beginning; and which said agreement is dated the 29th day of August, 1874, and made between *Charles Wright Sifton* and *William Bandon Bernard* and the said *John Kearns*, deceased; but free from all other rights, interests, claims, and demands whatever."

Statement.

6. That the said *John Kearns* at the time of his death was seized in fee of the following lands, of the value set opposite to each, viz. :—

Fifteen acres in the Township of London,	
valued at.....	\$3,000 00
A lot in the Village of Exeter.....	1,015 00
A lot in the Village of St. John's.....	250 00

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7. And left the following seven [sic] lawful children him surviving, that is to say, *William Kearns, Thomas C. Kearns, Ellen Kearns, John Kearns, Samuel Kearns,* and *George Kearns.*

8. The said *Jane Kearns* did, on or about the 19th day of July, 1876, grant the said lands to the said *Thomas C. Kearns* for the sum of \$2,100, by a deed in fee simple purporting to be made in pursuance of the Act respecting short forms of Conveyances, which said deed is in the statutory form and contains the usual statutory covenants, and was duly executed by the said *Jane Kearns*, and a copy thereof was annexed to the case.

9. That the said *Thomas C. Kearns* is one of the children of the said *John Kearns* referred to in the said will.

10. That the said plaintiff is the assignee in insolvency of the said *Thomas C. Kearns* under the said Act, under and by virtue of a deed of assignment dated the 22nd day of September last, which was duly executed by the said insolvent in pursuance of said Act. Statement.

11. That the following lands, viz., all and singular that certain parcel or tract of land and premises situate, lying and being in the Township of London, in the County of Middlesex, being composed of part of lot number 17 in the 7th concession of the said Township of London, described as follows: * * * were on the 16th day of February last duly sold to the said *Elliott* for a valuable consideration, and the said *Elliott* signed an agreement for the completion of the said purchase.

The question submitted for the opinion of the Court was, whether under the said will of the said *Joseph Sifton*, the agreement of sale to the said *John Kearns*; the certificate quieting title to the said lands; the will

1878. of the said *John Kearns*; the said deed to the said *Jane Kearns*, and the deed from the said *Jane Kearns* to the said *Thomas C. Kearns*—did the said *Thomas C. Kearns* become seized of an indefeasible estate in fee simple in the said lands; and whether the Court was of opinion that the said *Elliott* should be compelled to carry out the said agreement by accepting the title to the said property.

April 3rd. Mr. *G. C. Gibbons*, for the plaintiff, referred to *Webb v. Woods* (a), and *Lambe v. Eames* (b), to shew that the devise here was absolute to Mrs. *Kearns*, although her husband would appear to repose full confidence in her disposing of the estate devised for the benefit of herself and children, but this without imposing any such trust or obligation as this Court could be called upon to enforce.

Mr. *J. H. Ferguson*, for the defendant, referred to *Ware v. Mallard* (c), and *Cholmondeley v. Cholmondeley* (d), to shew that the devise here vested at most only a life estate in the widow with a power of appointment among her children.

Judgment. SPRAGGE, C.—I think it is clear that a good title passed to *Jane Kearns*. The trustees under the will of *Sifton* conveyed to her, and the *cestuis que trust* joined in the conveyance, and it was in pursuance of a provision in the will that if the *cestuis que trust* did not agree to divide the property devised, the executors should sell or divide among them as they, the executors, might think best. They sold to *John Kearns*, and the *cestuis que trust* joining in the conveyance, concludes them from objecting that the sale was not in pursuance of the devise. The conveyance to *Jane Kearns* was to her as devisee of *John Kearns*. The devise to her was in very few words: "I give, devise and bequeath to my beloved wife *Jane*, all the estate, both real and personal, of which I am now seized and possessed, for her own use and disposal,

(a) 2 Sim. N. S. 267.

(b) L. R. 10 Eq. 271.

(c) 21 L. J. Ch. 355.

(d) 14 Sim. 590.

trusting that she will make such a disposition as shall be just and proper among my children."

The case states that *John Kearns* died seized in fee of several properties, and entitled to a conveyance of the property in question. The properties are set forth with a value opposite to each, the aggregate of which is \$6,865. The value of the property in question is stated at \$2,100. He is stated to have left seven children; the names given would make them six.

The case states as follows: "The said *Jane Kearns* did, on or about the 19th day of July, 1876, grant the said lands to the said *Thomas C. Kearns* for the sum of \$2,100 by a deed in fee simple," &c. A copy of the deed is annexed. This statement imports a sale for value, and for full value, the consideration being the amount stated as the value of the property in the list of properties devised. If this be so, no one can complain. It is not said that there was any misapplication of purchase money; and the purchaser, at any rate, would not be bound to see to its application. A good title would be vested in *Thomas C. Kearns*, which would pass to his assignee in insolvency, who in turn could make a good title to a purchaser. Judgment.

It is argued that the words used in this will create a trust. It is rather a nice question whether they do or not. According to some of the older authorities, I incline to think they do; according to the more recent ones, it would be at least doubtful. Mr. *Jarman*, in his treatise on Wills (a), after an elaborate review of the cases upon the point, well observes:

"Such then is the long train of decisions arising from the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation, and those which are intended merely to inculcate the discharge of a moral duty (or point out the motive of the gift). At one period the Courts seem to have been

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(a) 3 Ed. 374.

1878. so astute in detecting an intention to create a trust when wrapped in the disguise of vague and ambiguous expressions, as almost to take from a testator the power of intimating a wish without creating an obligation, unless, indeed, by the use of words distinctly negating the contrary construction."

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The language of L. J. James, in *Lambe v. Eames* (a), is opposite in this connection :

"Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise."

Judgment.

I do not, however, think it necessary to the decision in this case to determine whether the devise in this case was in trust. I incline to think that it is not; but assuming that a trust is created, the disposition made by the devisee of this piece of property does not appear to be in contravention, but in execution of it.

In the judgment of V. C. Malins, in *Lambe v. Eames* (b), he puts the case of a sale by the devisee, who was in this case the wife of the testator. The words relied upon in that case in creating a trust were "the whole of the aforesaid property to be at her disposal in any way she may think best for the benefit of herself and family." The learned Vice-Chancellor said:—

"I suggested whether she could not have sold the

(a) H. R. 6 Chy. at 599.

(b) 10 Eq. 271.

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house, and whether any purchaser to whom she had sold the house could have objected to the title on the ground that she was not tenant in fee. The defendant's counsel admitted that it was impossible that any such objection could have been made to the title, because she had the fee simple vested in her, and she was to dispose of it in any way she thought best for the benefit of herself and family, and if she thought it best for the benefit of herself and family to dispose of the house and personal property, she might do so."

In that case it was held that there was no trust, and this was affirmed on appeal in the case in 6th Chancery Appeals to which I have referred.

Now, what there was in this case was a sale by the devisee for value: in the case before the Vice-Chancellor a sale to a stranger; in this case a sale to one of the sons of the testator and his wife—a strong case for holding what was done a good execution of the trust, a disposition of the property of which the other *cestuis que trust* could have no possible reason to complain.

According to the special case there was, as I have said, a sale for value; but if there was not a sale for value, but a gift, and still assuming that there was a trust, a gift to the grantee in this conveyance would be within the trust. The devise is to the wife, "for her own use and disposal, trusting that she will make such a disposition thereof as shall be just and proper among the children." The trust (if there be a trust) is not to make an equal division among the children. An equal division might or might not be just and proper. The language used imports the giving a discretion to the wife, to exercise her own judgment as to what would be a just and proper disposition of the property among the children.

In my opinion the title is one which the purchaser from the assignee is bound to accept; *Thomas C. Kearns* having, in any view of the case, a good and indisputable title.

1878. SOLICITORS.—*MacMahon, Gibbons, and McNab*, London, for the plaintiff; *McMillan and Taylor*, London, for the defendant.

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IN RE CURRIE.—GILLELAND V. WADSWORTH.

Solicitor—Mal-practice.

C., a solicitor, held a mortgage against *B.*, which he agreed to release and take a mortgage on another lot conveyed on exchange of lots by *W.* to *B.*, all the conveyances being prepared by *C.* *C.* never did discharge the first mortgage, although *B.* paid the full amount thereof and obtained a discharge of the second mortgage. Several years afterwards, and after the death of *W.*, his representatives were called upon by the representatives of one *J.*, to whom the first mortgage had been assigned, to pay the same, and, in a suit brought thereon, the lands so conveyed by *B.* to *W.* were ordered to be sold. On a proceeding to strike *C.* off the roll of solicitors for mal-practice: *Held*, (1) that *C.*, in the transactions, acted professionally for *W.* and *B.*; his being the holder of the mortgage from *B.* was an accident which did not affect the professional character in which he acted; (2) that whether he was acting professionally or not in the matter he was, being a solicitor, amenable to the summary jurisdiction of the Court, and, under the circumstances, an order was made to strike him off the roll of solicitors, and pay the costs of the proceedings against him for that purpose.

Statement.

THIS was a motion made in pursuance of the direction given by the Chancellor, in disposing of the case, as reported, *ante* volume xxiii., at page 552. The facts appearing on that occasion, as mentioned in the judgment, were, that "*Brown*, being the owner of lot *A.* by mortgage of 26th of September, 1862, mortgaged the same to one *Currie* to secure payment of \$900; and *Currie* by indenture of 3rd of November in the same year, assigned the same for the same sum to one *Junkin*, *Currie* covenanting with *Junkin* for the payment of the mortgage money. The assignment of the mortgage was through an agent of the assignee, who, as he stated in his evidence, relied upon the covenant. He did

not give notice of the assignment to the mortgagor. At a later date, 7th December, 1863, *Brown* and the defendant *Wadsworth*, who was the owner of lot *B*, agreed to make an even exchange of their respective lots. *Wadsworth* was informed by *Brown* of the mortgage to *Currie*, and *Brown* agreed that he would procure the mortgage to be transferred from lot *A* to lot *B*. *Currie* assented to this, and the arrangement was carried out by conveyances between the parties, *Brown* conveying lot *A* to *Wadsworth* and *Wadsworth* conveying lot *B* to *Brown*, and a mortgage from *Brown* to *Currie* for the same amount, \$900, payable at the same time and upon the same terms, was given on lot *B* as had been given on lot *A*. All this was done in the office of *Currie*, and the papers were left with him for registration. The assignment from *Currie* to *Junkin* was by the former not disclosed to the parties. They assumed that he was still holder of the mortgage on lot *A*, but omitted to obtain from him a release or discharge of it. *Brown* continued to pay the interest to *Currie*, and eventually paid off the principal and obtained a discharge, *Currie* at the same time paying the interest on the assigned mortgage to *Junkin* up to 1st of October, 1874, when he ceased to pay interest; and *Junkin* then for the first time notified *Wadsworth*, never having notified *Brown*, of the assignment to himself of the mortgage on lot *A*. No part of the principal money secured by the mortgage was paid by *Currie* to *Junkin*. The rule is well settled that payments made by a mortgagor to a mortgagee in ignorance of an assignment are good payments upon the mortgage against the assignee. Mr. *Cooté* says, 'The concurrence of the mortgagor in the assignment of a mortgage consequently should, if possible, never be dispensed with; and in cases in which, from unavoidable circumstances, an assignment is taken from the mortgagee only, the precaution should be had of obtaining a covenant from the mortgagee, that the money alleged to be owing is

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Statement.

1878. actually due; and notice of the assignment should be given to the mortgagor with the least practicable delay.' If *Brown* had continued to pay *Currie* the interest and eventually the principal of the mortgage in ignorance of the assignment, there can be no doubt that the mortgage debt would have been effectually discharged. As between *Wadsworth* and *Currie* there could of course be no room for doubt, the question is, whether the assignee of *Currie* stands in a better position as against *Wadsworth* than *Currie* himself. It is contended that he does; that *Wadsworth* must be taken to have had notice of the assignment to *Junkin* by its being known to *Currie*, who, from his drawing the instruments by which the arrangement between *Brown* and *Wadsworth* was carried out, was the solicitor of both parties. The point was argued at the hearing, and I held that the case of *Kennedy v. Green* (a) applied; and I still think so, after examining more closely than I could do at the time the cases of *Hewitt v.*

Statement. *Loosemore* (b), *Rolland v. Hart* (c), and *Atterbury v. Wallis* (d). I think it a proper conclusion, an almost irresistible inference, that there was at the time, on the 7th December, 1863, on the part of Mr. *Currie*, an intent to keep alive both mortgages, that he conceived that idea, upon the proposed arrangement between *Brown* and *Wadsworth* being made known to him; the concealment of the assignment to *Junkin*, which it was his plain duty to disclose, is cogent evidence of this. I can conceive no motive for this *suppressio veri* except an intent to carry out the scheme concocted in his own mind at the time and acted upon in his subsequent dealings with these mortgages. To disclose the assignment would have been to defeat this scheme; hence the concealment and hence the application of *Kennedy v. Green*. To assume that *Currie* did his duty as a solici-

(a) 3 M. & K. 699.

(c) L. R. 6 Ch. 768.

(b) 9 Hare 449.

(d) 8 D. M. & G. 464.

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tor of *Wadsworth*, and disclosed to him the assignment to *Junkin*, would be to negative *Kennedy v. Green*. I cannot at all accede to the argument that the non-disclosure of the assignment may have been innocent at the time, and that what fraud there was consisted in not discharging the mortgage made by *Brown*. It was not in his hands to discharge, and he, of course knew it. His first impulse, apart from fraudulent intent, would have been to say, the mortgage is in other hands; but he concealed the fact, and his dealing with the mortgage afterwards shews plainly why he concealed it."

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Mr. *Hoskin*, Q.C., for the application.

Mr. *Bethune*, Q.C., contra.

SPRAGGE, C.—In giving judgment in the cause, I stated the principal facts of the case shortly thus: [His Lordship here briefly stated the facts as above set forth.] Mr. *Currie* does not dispute that the facts were as I have stated them, but in the affidavit that he has filed, he denies the inference that I drew from them, viz., that there was at the time of the exchange of properties between *Brown* and *Wadsworth* an intent on the part of Mr. *Currie* to keep alive both mortgages: that he conceived that idea upon the occasion of the parties being in his office, and acted upon it afterwards.

It does not appear from the evidence in what language exactly, Mr. *Currie* stated to the parties that he still was holder of the mortgage made to him by *Brown*; he says in his own affidavit, that he did not inform the parties that he had assigned it; and *Brown* in his evidence says, that he informed him that he, *Brown*, was to give a mortgage on the *Wadsworth* lot in lieu of the mortgage which he had given to *Currie*, and *Currie* said "he was willing to exchange his mortgage from one farm to the other." This certainly involved an allegation that it

Judgment.

1878. was his to exchange, and inasmuch as he had parted with it, it was not his, and the allegation was untrue.

In re
Currie.

The reason given by Mr. *Currie* for not informing the parties that he had already assigned the mortgage is, that he took it for granted that *Junkin*, the assignee, would accept the new mortgage instead. The reason is not satisfactory; but assuming it to be true, he leaves wholly unexplained how it was that when shortly afterwards *Junkin*, as he says, refused his application to make the exchange, he still withheld from *Brown* and from *Wadsworth* the knowledge that he had assigned the mortgage. Each time that *Brown* made to him a payment of interest, an occasion presented itself on which it was his plain duty to inform him of the fact. The mortgage fell due 1st of October, 1867, and was paid before that date by *Brown*. *Brown* made all these payments in the belief that there was but one mortgage debt; that each payment reduced it, and that the payment of the principal discharged it, and Mr. *Currie* knew perfectly well that all these payments were made by *Brown* in that belief. The receipt by him of each payment that came to his hands was a virtual allegation that he was entitled to receive it. He received these payments in his own right, and as he had no right, and knew perfectly well that he had not, it follows irresistibly that he held himself out in a false character to the person from whom he received them.

Judgment.

I do not lose sight of the fact that the mortgage given by *Brown* to *Currie* on the occasion of the exchange of lots, was on the lot which *Brown* received in exchange from *Wadsworth*, and that the payments made from time to time by *Brown* to *Currie* did go in discharge of that mortgage; but that does not make the case any the better for *Currie*, for it was, and he knew that it was, an essential part of the agreement between *Brown* and *Wadsworth* that the previous mortgage should be removed; that the incumbrance should be transferred to the lot conveyed by *Wadsworth* to *Brown*; *Currie* was

indeed in effect a party to that agreement for all that remained to be done after the giving of the mortgage when the exchange was made, was to be done by him.

It is to be presumed that if *Currie* had informed *Brown* when he was making payments on the mortgage, of how the facts really stood, he would have made those payments to the assignee *Junkin* instead of *Currie*. This is to be presumed, because it was at once the interest and the duty of *Brown* to see that they were so made; his interest in order to relieve himself so far as he could, under the circumstances in which he found himself placed of his obligation to *Wadsworth*; and his duty to *Wadsworth* in order that the lot conveyed to him, should be relieved of the incumbrance created by the former mortgage. *Wadsworth* indeed was entitled to have it relieved from that mortgage immediately, without waiting for the time the mortgage had to run. It may be, certainly, that *Junkin* would have declined to receive payment before the mortgage became due; but that abstract right, which might have been exercised or might not, could be no excuse to *Currie* for the suppression of the truth, of which he was so repeatedly guilty. He owed to *Wadsworth* as well as to *Brown* an honest disclosure of the facts.

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In re
Currie.

Judgment.

He kept down the interest on the mortgage assigned to *Junkin* until it fell due 1st of October, 1867; and, as he says, for seven years thereafter, *i. e.*, for over seven years after he had been paid the principal by *Brown*; *Junkin*, as he says, not requiring payment of the principal. *Junkin* was the third person left in ignorance of the truth. The crowning dereliction of duty on the part of *Currie* was, receiving the principal money due on the mortgage and putting it in his own pocket, in violation of his duty and his engagements to both *Brown* and *Wadsworth*.

His affidavit contains these passages, "I never intended to wrong either Mr. *Junkin* or Mr. *Brown*, and fully intend to pay Mr. *Junkin* the full amount of his

1878. mortgage as soon as I am able to do so. * * * at any time during the last eight years previous to the 1st of July, 1875, I could have paid the mortgage, had Mr. *Junkin* desired me to do so." This last passage ignores the rights and interests of *Brown* and *Wadsworth*, and the previous one is silent as to the wrong done to *Wadsworth*. The question may well be asked if during the eight years to which he refers he could have paid *Junkin*, why he did not do so. *Junkin's* not desiring him to do so, is no answer at all.

This conduct of Mr. *Currie* has been a cruel wrong to *Wadsworth*, or rather to his family, for he is dead. The bill in this case is filed by the representative of *Junkin* against the widow and children of *Wadsworth*, for the recovery of the mortgage debt; and a decree has been made for sale of the farm mortgaged to secure it, unless the mortgage debt once paid by *Brown* to *Currie* be paid by the *Wadsworths* to the executors of *Junkin*. Mr. *Currie* says in his affidavit that he could have averted this. I give his own words, "I have never denied my liability to pay the amount due upon such mortgage, and just before the hearing of the said cause I offered to pay the same to the plaintiff's solicitor, and the further sum of \$40 towards the infant's costs, but declined to pay the costs of this suit as they were unnecessarily incurred." The costs unnecessarily incurred appear to be those referred to in a previous paragraph. "Last year Mr. *Junkin* called upon me two or three times for the interest of the mortgage, but neither he nor any one on his behalf asked me for the amount of the mortgage before he put it in suit." How or why this could be a reason for allowing the suit to go on against the *Wadsworths*, I fail to see. The reasoning is, the holder of the mortgage put it in suit without giving me notice as he ought to have done; and although I am the party to pay, and to stand between the *Wadsworths* and harm, I leave them to bear the consequences. This is bad logic and bad morality.

In re
Currie.

Judgment.

Looking at the conduct of Mr. *Currie* throughout this transaction, I cannot think that the inference I drew in giving judgment in the cause, that there was in his mind, an intent to keep alive both mortgages was an erroneous one. His conduct and dealings at the time of the exchange of the properties, and ever since, square with this they are just those of a person who conceived such a project in his mind at the time. The fact may be otherwise, but the inference was a proper one, and if not denied upon oath, I should still say an almost irresistible one. But if I accept Mr. *Currie's* denial upon that point, it leaves the case still a case of gross misconduct. I have pointed out how in my judgment it is so. At the same time I think it extremely probable that Mr. *Currie* contemplated and intended all along a making good of this money to the parties eventually. I need not say how often such good intentions have existed, while gross professional and other misconduct, and even criminal offences have been perpetrated; and how impossible it is to admit them to be an excuse.

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In re
Currie.

Judgment.

In the transaction in question Mr. *Currie* acted professionally for *Wadsworth* and *Brown*. His being, or having been the holder of a mortgage made to him by *Brown* was an accident, which did not affect the professional character in which he acted. But whether he was acting professionally or not in this matter he is, being a solicitor, amenable to the summary jurisdiction of this Court, and the Court may properly look at the whole of his conduct and dealings in this matter from first to last.

The question that I have to decide is whether Mr. *Currie* having acted in this matter in the way that I have described, ought to be left upon the Roll of Solicitors. While he is so, he is accredited by the Court as a fit person to be entrusted professionally with the interests of others. I can come to no other conclusion than that he has proved himself unfit for the trust, and my sentence therefore, a sentence which is pronounced with

1873. the greatest reluctance and regret, is, that he be struck off the Roll of Solicitors of this Court, and that he pay the costs of this proceeding against him.

In re
Currie.

THE ATTORNEY-GENERAL ET AL. V. CONTOIS ET AL.

Crown patent.—Public Lands' Act—Improvident grant.

It is the duty of this Court to give as large and liberal an interpretation to the provisions of the Public Lands' Act as they will justly bear, otherwise many cases of flagrant wrong will go unredressed.

A party, on applying to the Crown Lands Department for the grant of a lot of land belonging to the Crown, represented that the same "was not valuable for its pine timber." This was incorrect to the knowledge of the applicant, and at that time the lot was embraced in a timber license to *B.*, but, in ignorance of that fact, the Commissioner of Crown Lands granted the application, and a patent for the lot was prepared on the 12th of March, 1873, but, before its issue, the fact as to *B.*'s license comprising this lot was discovered, and thereupon the Commissioner caused to be indorsed upon the patent a memorandum that "*These letters patent are subject to the renewal of the timber license for one year from the 30th April, 1873.*" In an action brought by a purchaser of the timber from the patentee it was decided that the reservation of the timber so made was unauthorized and invalid.

Held, under these circumstances, that *The Attorney-General* was entitled to proceed in this Court for a repeal of the patent, on the ground that the same had been issued improvidently.

THIS was a suit instituted by *The Attorney-General* of Ontario and *James Bonfield* against *Cyrille Contois* and *John Frederick*; seeking to set aside a patent for a lot of land in the township of Wilberforce.

The facts giving rise to the suit are sufficiently stated in the judgment; and are fully set forth in the reports of the case of *Contois v. Bonfield*, in the Court of

Common Pleas, in the 25th Vol. of the Reports of that Court, page 39; and in Appeal in 27 C. P. U. C., page 84. Upon the latter decision being given, *Bonfield* instituted this suit, and moved for an injunction to restrain the proceedings in that action to enforce the payment of the amount of the verdict rendered against him, when, by arrangement, the injunction was granted to the hearing, on the plaintiff paying into Court the amount of the verdict, which he accordingly did.

1878.
Attorney-
General et al.
v.
Contois et al.

The cause subsequently came on for hearing before the Chancellor.

Mr. *Moss*, for the plaintiff. To shew that plaintiff is entitled to recover, it is only necessary to state the facts of the case as they appear on the evidence. From these it would appear that just as the patent was about to issue it was discovered by the Commissioner of Crown Lands that the lot was a timber lot; and directions were then given to reserve the timber for a year, by indorsing a statement to that effect on the patent which had already been prepared: this indorsement, however, has been since held by the Court of Common Pleas and affirmed by the Court of Appeal, to have been improperly made and was of no effect in the way of limiting or controlling the grant in the patent itself. In *The Attorney-General v. McNulty* (a), it was held that this Court could set aside the patent, although all the facts and circumstances were known by the department. See also the language of the Court of Appeal in *Contois v. Bonfield* (b). There Mr. Justice *Burton*, while concurring in the judgment of the Court dismissing the appeal by *Bonfield*, is reported as having said (c), "I very reluctantly concur in the judgment, not that I have any doubt of its correctness, but because the claim is so inequitable that I

Argument.

(a) 11 Gr. 28.

(b) 27 U. C. O. P. 84.

(c) p. 21.

1878. was desirous of taking time to consider whether, under the law as recently amended or in some other way, the *Attorney-General*, on behalf of the Crown, could not interfere and prevent the payment to the plaintiff of the proceeds of the timber, the subject of this suit, to which he has no just or equitable title. * * *

Attorney-
General et al.
v.
Contois et al.

Stripped of the fiction of its being a grant from Her Majesty, I can see no good reason why a contract made with a purchaser of part of the public domain from an officer entrusted with the superintendence of such matters, should not come to be dealt with like any other contract, and I feel much less concern with the assumed lowering of the dignity of the Crown, by accepting the verbal promise of the subject in derogation of the rights of Her Majesty's title by record, than I do in seeing the aid of this Court invoked by that subject to enforce what appears to be a most dishonest claim, and the Court powerless to resist and bound by law to decide in his favor. Upon this record I can see no way of assisting the defendant, but I trust that means may be found to prevent the enforcement of the plaintiff's claim."

Argument

It may be here, attempted to argue that *Contois* stands in a better position than *Frederick*, the patentee, from whom he purchased the right to cut this timber; but clearly *Contois* cannot assert any beneficial interest in the judgment, as against the Crown, and here the Crown is willing to waive the judgment, but *Contois*, who is in reality trustee for the Crown, refuses to do so, and therefore we are forced to come here in order to compel the trustee to act in that respect as he ought to do.

Under the circumstances now existing it will not, for the protection of *Bonfield*, be necessary to rescind the patent to *Frederick*, as all the protection *Bonfield* now desires can be obtained by simply restraining any further action on the Judgment.

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Mr. *W. Cassels*, for the defendants. The real object of this suit may shortly be stated as being one to enforce an agreement entered into between Mr. *Scott*, the Commissioner of Crown Lands, and *Frederick*. The decision of the Court of Common Pleas was a maturely considered judgment and clearly expresses the rule of law on the subject. The Crown, in fact, had not any right to reserve the timber as was attempted to be done in this case, even in the body of the patent, much less can it do so by a mere indorsement on the back of that instrument, as was attempted to be done here. In *Anderson v. The Muskoka Mill and Lumber Co.* (a), it was distinctly held that after the issue of a patent for lands in the free grant territory, a licensee to cut timber cannot continue to do so even during the year that the license was granted for. Another point that defendant desires to urge is, that after location the beneficial interest in the timber no longer belongs to the Crown, and the Government has no longer any right to remove it. This is manifest from the whole scope of the Act, although the timber remains in the Crown, it does so for the benefit of the locatee. Suppose the patent to be now set aside, in what position will *Contois* be placed as respects his Judgment? As to that, it is contended his Court is not called upon to interfere with this right to enforce payment of the amount for which he has recovered Judgment.

In any view of the case, *Contois* is entitled to his costs of the proceedings at law, according to the decision in *Haynes v. Gillen* (b).

Mr. *Moss*, in reply.

SPRAGGE, C.—This is an information, by the Attorney-General and a bill by *James Bonfield*. *Bonfield* was a licensee of timber limits which comprised lot 21 in the 22nd concession of Wilberforce. A patent for this lot

(a) 27 U. C. C. P. 180.

(b) 21 Gr. 20.

1878. was issued to *John Frederick*, describing him as a "free grant settler." *Bonfield's* license had then been issued, and would expire on the 30th of April following. It had been renewed year by year since 1872.

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Frederick applied for a grant in November, 1872, being then resident, though not located, for a period of five years. In his application he stated, by affidavit, that the land was not valuable chiefly for its mines, minerals, or pine timber; and in an affidavit of men named *Kruger*, used by him upon his application, it is stated "that the lot was not valuable for its pine timber." This was untrue, and was so to the knowledge of *Frederick*, and if the patent were issued without its untruth being discovered, the false representation would have been a fraud upon which the patent could have been avoided.

The fiat for a patent to issue is dated 8th March, 1873. The grant was out of the ordinary course, the applicant not having been located for five years. It was applied for, advocated and pressed by Mr. *Deacon*, who acted for *Frederick* in this matter. At the date of the patent it appears not to have been known to the Commissioner or Assistant Commissioner that this lot was comprised in the license to *Bonfield*. That fact was made known to the Commissioner by a telegram from *Bonfield*, dated 13th March, 1873. The patent had then been prepared. It is dated the 12th. Upon receiving the telegram the Commissioner communicated with Mr. *Deacon*, and the result was, that he consented that the patent might still issue, but with what he calls a reservation, which he put into the shape of an indorsement on the patent, in these words: "These letters patent are subject to the renewal of the timber license for one year from the 30th April, 1873." The Commissioner says, in his evidence, that Mr. *Deacon* accepted the patent on behalf of *Frederick*, subject to this reservation, and he says, and reiterates, that he would not have issued the patent except subject to that condition. What occurred he states

Judgment.

thus: "There was a mistake made in the first order. The first order was made by Mr. Johnson, under the belief that it was not under license: it was then absolutely stopped, and then it was only allowed to go upon the understanding that the licentiate, *i. e.*, *Bonfield*, should have it for another year. It was perfectly clear and simple." The Commission gives evidence as to what was his information, and his belief as to there being timber on the lot as follows:

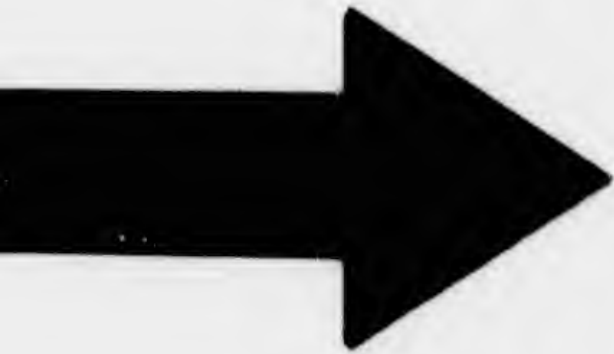
1878.
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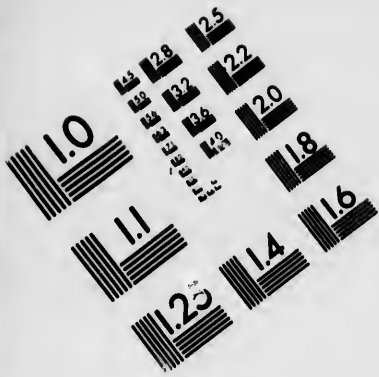
"Q. I suppose you were not aware at the time you issued this patent whether or not there was much timber on the lot? A. No, I would rather assume there was not, seeing it was a comparatively old settled lot. Q. Mr. *Bonfield's* telegram did not supply any information as to the quantity? A. No, I suppose he heard applications were made for these patents. The affidavit states that the land is not being desired for the timber and that would lead to the conclusion that there was not much timber. Q. If, as a matter of fact, you had known that it was a lot valuable for timber would you have issued the patent in any way under the circumstances even if Mr. *Bonfield* had not a license? A. No; it should not have been issued at all. Q. Even irrespective of Mr. *Bonfield* having a claim if you had known this lot was valuable for timber would you under the circumstances have issued it? A. No, I would not, and the reason is this, there is a constant struggle made by parties to settle on land valuable for timber and the department had to be specially watchful to prevent frauds being perpetrated, and patents were very often set aside on account of frauds being discovered. By the Court.—The fraud consisting in what? A. In selling the timber after the patent issued, then the Crown is precluded from getting its dues: Frauds are constantly cropping up in the office and we have to be very watchful. Q. As I understand you would not have issued this patent until the statute had been complied with in every respect. A. No."

Judgment.

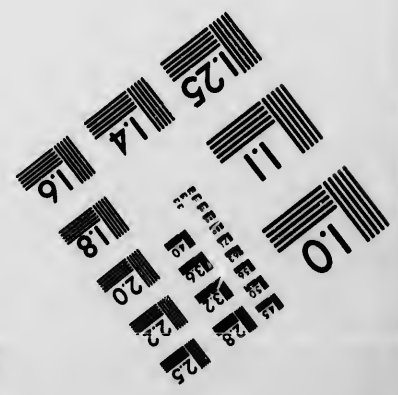
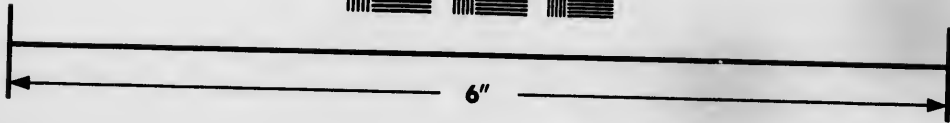
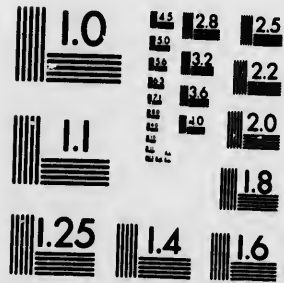
How gross was the mis-statement appears from the fact of the large verdict recovered for timber cut by *Bonfield*, and his evidence that after all he did not cut more than one-fifth of the timber that was on the land. It would have been well if the Commissioner had withheld the patent, as I apprehend he might legally have done, as it did not become matter of record till the 28th, and the applicant certainly did not deserve the grace of his case being an exceptional one in his favor. The Commissioner says he is unable to say whether when the patent







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1878. was issued he had learned of there being timber on the lot. He might probably have inferred from the telegram received by him from *Bonfield* that such was the case. I have referred to his evidence upon that point.

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General et al.
v.
Contois et al.

The license to *Bonfield* was renewed in the following June, to continue to the 30th of April following. After this, timber was cut by him upon the lot and thereupon an action was brought by *Contois*, purchaser of the timber from *Frederick*, against *Bonfield* in which action a verdict was rendered against *Bonfield* for the timber cut on that and other lands, for \$2,379.

In the action brought by *Contois* against *Bonfield*, it was determined that the reservation indorsed by the Commissioner on the patent was ineffectual to limit the legal effect of the grant. The question now comes before me upon this information and bill, the practical question being, whether this patent should not be avoided in this Court under the Public Lands' Act, 16 Vict. ch. 159 (a), as issued "through fraud, or in error, or improvidence." In the original act the words were, "through fraud, or in error, or mistake, or improvidence." The word "mistake" should, I think, have been preserved, but the words used must, I have no doubt, be taken to comprehend cases of mistake.

Judgment.

If the fact of this land being timbered land did not come to the knowledge of the Commissioner before the issue of the patent, but the patent was issued upon the representation of *Frederick*, to which I have adverted, and in the belief that that representation was true, the case would be a very simple one. The patent, in that case, would be declared void because obtained by the fraud of the patentee; and I incline to think that the patent is voidable on that ground alone. The case upon that point stands thus:—There was a false representation as to a material fact, which, if truly represented, would

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have prevented the patent being at that time issued to the locatee. The onus then is cast upon the patentee to shew that the officer of the Crown, with full knowledge that this material fact had been untruly represented, still deliberately determined that the patent should issue. I think this has not been shewn by the defendants, and as they have to countervail the effect of a false and fraudulent representation, it behoves them to shew it clearly, and not to leave it to rest upon the inference that might be drawn from a telegram, or the want of recollection one way or the other of the officers of the Crown; and this is all the more incumbent upon the defendants, as it is quite certain that there was no setting right of the official by the applicant for the patent.

Another ground upon which it is sought to avoid the patent, and the one principally argued, is, that it was issued improvidently: that it was issued in the belief that the Crown could reserve the timber in case it should be seen fit to grant a license to cut it. The reservation indorsed on the patent did not do this effectually, but it may be looked at for another purpose, and it is cogent evidence; and there is abundant evidence that it was the intention of the Crown to reserve that right. It was well observed by Mr. *Moss*, in answer to the argument, that such right could not legally be reserved after patent; that, if so, it was manifestly improvident in the Crown to put it out of its power to do that which it certainly had in contemplation, viz., to grant, or to renew, a license to cut timber.

This branch of the case imputes to the Crown, or, in reality, to the officer, a mistake in law. In the great majority of cases the mistake is one of fact, arising generally from the Crown being misinformed; but I see no ground in reason why an improvidence which leads to wrong should not be relieved against, alike, whether it be the result of mistake in law or of fact; and I find that such was my opinion in *Attorney-General v.*

1878. *Garbutt (a)*. The ordinary meaning of the word is comprehensive enough to include both: that given by the Imperial dictionary is "want of providence or forecast, neglect of foresight, or of the measures which foresight might dictate for safety or advantage." From the same work, to "forecast" is to foresee, to provide against. Here, there was a neglect of the measure which a wise foresight would have dictated, that measure being a care, and an acting upon that care, that the applicant for the patent should be so dealt with that he should not have it in his power to defeat the intentions of the Crown. It was improvident not to see that the Crown was sufficiently protected in law; that the Crown was not fettered in the discretion that it was intended should be exercised through its Commissioner; and that the public revenue derivable from timber licenses should not be intercepted by a grant to a subject; and it was improvident not to forecast that the patentee might take a dishonest advantage of the loose way in which the interest of the Crown was supposed to be protected. I can conceive no reason for restricting the meaning of the word to improvidences arising of misinformation as to facts. The statute contemplated that patents might be issued through improvidence as well as through fraud or error, and I think we shall best effectuate the intention of the statute by so interpreting it as to meet all cases of improvidence, however arising, where it is just that the patent should be avoided. I agree entirely in the comments upon this section of the statute of the late excellent Vice Chancellor, Mr. *Esten*, in *The Attorney-General v. McNulty (b)*: "The Act of Parliament under which the proceeding is instituted * * is remarkable in its phraseology, which indicates anxiety on the part of the Legislature to include every case that could possibly occur. First, it mentions all patents obtained by fraud,—a large class of cases. Second, all

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Judgment.

(a) 5 Gr. 186.

(b) 11 Gr. 292.

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patents issued in error which would seem to cover all other cases, for if a patent be improperly issued, it must be, it would seem, through fraud or through mistake without fraud. But the Legislature advances a step further, and includes all patents issued in improvidence. That is, as I understand the expression, patents issued not through fraud nor in mistake, but hastily, incautiously, unadvisedly, to the injury of its own rights, or the rights of the subject. It is, I apprehend, quite clear that the Legislature, in enacting this provision, introduced no new law. The Crown always had the power to repeal its letters patent under such circumstances."

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Attorney-
General et al
v.
Contois et al.

It is, perhaps, scarcely necessary to dwell so much upon this patent having been issued improvidently, for it was, as it appears to me, certainly issued in error, which to adopt the view of the late Vice-Chancellor, would cover all cases, for if a patent be improperly issued it must be, as he says through fraud, or through mistake without fraud.

Judgment.

The language of Sir *Nicholas Tindal*, in *Gledstones v. The Earl of Sandwich* (a), has been referred to, where he enumerates the classes of cases in which a grant from the Crown may be avoided. The report says, "by reason of any misdescription or mistake thereon." If by this is meant, may be avoided for any reason, it is, I venture to think, fairly open to question, as well as open to the remark often made, that it is better not to give definitions where they are not, as in that case they were not, necessary to the decision of the case. I find in *Barwick's Case* (b), a much larger enumeration, which is stated thus, "And it is a maxim that if the consideration, which is for the benefit of the Queen, be it executed or executory, or be it on record or not on record, be not true or not duly performed, or if prejudice may accrue to the Queen by reason of non-performance of it,

(a) 4 M. & G. at 1028.

(b) 5 Rep. 94.

1878. the letters patent are void." This maxim is quite comprehensive enough to include such a case as this. It is apparent from other parts of the case that the word consideration is used in it as denoting reason or motive, as well as in its ordinary legal meaning.

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I desire to add that, in my opinion, it is the duty of this Court to give as large and liberal an interpretation to the provisions of the Public Lands' Act, which I have quoted as they will justly bear; otherwise many cases of flagrant wrong—and of that class is the case before me—will go unredressed.

There are, I incline to think, other grounds also upon which relief could properly be afforded, as they would be afforded in equity between subject and subject. One is, that the applicant for the patent obtained it upon the faith of its being left open to the grantor of the patent to grant a license to cut timber, and that being so it was a fraud on his part to do anything in contravention of that, on the faith of which he obtained it. See Judgment. *Clarke v. Eby (a)*.

Another ground, and one akin to that I have just stated is, that the patentee made an unconscientious use of the patent, in using it for a purpose at variance with that, and beyond that, for which it was granted to him.

These grounds, however, would have been open to *Bonfield* upon an equitable plea in the action at law; whether open to him upon the equitable plea pleaded by him at law it is not necessary to determine.

The ordinary decree upon the case, made and proved in this suit, would be to declare the patent void. But this is not pressed, but the lesser relief is asked, that the money paid into Court by *Bonfield*, upon the obtaining of the injunction, be not paid to the plaintiff at law, but paid back to *Bonfield*; and that will be the decree in this case.

(a) 11 Grant. 98, 101.

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It is not without reluctance that I follow in this case the rule as to costs laid down by the Lords Justices in *Watson v. Alcock* (a), and followed in this Court by my brother *Blake* in *Haynes v. Gillen* (b). The confidence felt by the defendant's counsel at law, that he had a good defence by the equitable plea pleaded, is no reason at all, and I cannot say that he had reason for such confidence,—if that would make any difference, for the judgment in the Common Pleas and in Appeal are both against him. The decree as to costs will be that the Attorney-General, and the plaintiff have their costs of this suit. The plaintiff at law is entitled to his costs at law subsequent to the declaration, and if the costs at law exceed the costs in this Court, as probably they do, the difference must be paid to the plaintiff at law out of the money paid into Court. I suppose there is no necessity for making any provision for the costs of the Attorney-General, separately from those of the plaintiff. If the Attorney-General has costs separately from the plaintiff, they should be paid out of the money in Court.

1878.
Attorney-
General et al
v.
Contois et al.

Judgment.

SOLICITORS.—*Bethune, Osler, and Moss*, for *The Attorney General and Bonfield*; *Blake, Kerr, and Boyd*, agents for *Loucks and Burrill, Pcm broke*, for the defendants.

(a) 4 D. M. & G. 247.

(b) 21 Gr. 20.

1878.

PHILLIPS V. THE ROYAL NIAGARA HOTEL CO.

Pleading.—Prayer for general relief.—Practice.

This Court will grant a decree for an account of the dealings of an incorporated trading company, at the instance of a shareholder therein, although there is not any allegation that the company is insolvent.

Where a bill states facts which shew the plaintiff entitled to some relief, although not that specially prayed, the Court will, under the general prayer, grant such relief as the bill shews the plaintiff entitled to.

The bill in this case were filed by *Joseph Phillips*, against *The Royal Niagara Hotel Company*, *Duncan Bell*, and *John McMurrich*, executors of *Thomas Dick*, and *Agnes Dick*, setting forth the fact of the incorporation by Act of the Legislature of Ontario of the Hotel Company, with a capital of \$50,000; that the Act directed that the stock and management of the affairs of the company should be under the control of a board of ten directors; that plaintiff became a shareholder in such company, and continued to hold stock therein to the extent of thirty shares: that the corporation had purchased a parcel of land in the town of Niagara, upon which the company erected a building for the purposes of an hotel, and which they continued to use and enjoy as such.

Statement.

The bill then went on to state the election of a president, vice-president, and secretary of the company in July, 1868, since which time the then existing board had not been replaced by any other election, and the fact of the death of all the members of that board; and that *Thomas Dick*, deceased, had during his lifetime purchased all the stock of the several shareholders in the company, including that of the town of Niagara, and at the time of his death held all such stock with the exception of that held by the plaintiff; that *Dick* devised all his estate, real and personal, to the defendant *Agnes Dick*, and appointed the defen-

dants *Bell* and *McMurrich*, his executors, who duly proved the bill, and the three last named defendants had entered into and retained possession of all the property of the hotel company. The bill further alleged that the plaintiff never had been able to obtain a statement of the affairs of the company from the secretary or from *Thomas Dick*, or his representatives: that *Dick* made large profits out of the hotel property, and plaintiff was entitled to a large dividend upon his stock but that no dividend was ever declared or paid to him; and that there were now not sufficient stockholders to form a board according to the terms of the Act of Incorporation, and that *Dick* in his life-time, and the defendants, since his decease, had refused to give any account of the dealings of the company to the plaintiff. The prayer was, that the affairs of the company might be wound up by this Court: that the property of the company might be sold and applied to pay the stock and dividends on stock to the holders thereof, or that the defendants *Bell*, *McMurrich*, and *Dick*, might be decreed to account to the plaintiff as a shareholder in respect of the dealings of the said *Thomas Dick*, or of them, the said defendants, with the said property, and that a meeting of the stockholders might be convened in pursuance of the statute and the company be directed to be carried on in pursuance of the terms of the statute.

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v.
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Niagara
Hotel Co.

Statement.

The defendants demurred for want of equity.

Mr. *W. Cassels*, for the demurrer by *Dick's* representatives. The only question here is, that of the jurisdiction of the Court to grant the relief prayed. The bill, it is true, alleges profits to have been made, and that the plaintiff has been unable to obtain any account thereof. But that alone will not confer jurisdiction where, as here, the company is an incorporated company, and by its charter corporate powers are conferred upon it. If the company has forfeited its charter the plaintiff

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Phillips
v.
The Royal
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Hotel Co.

must proceed for that purpose in a proper manner upon the necessary proceeding for that purpose: it cannot be done collaterally: *Angell & Ames*, on Corporations, 777, *The City of London v. Vanacre* (a), *The Attorney-General v. Reynolds* (b), *The King v. Pasmore* (c), shew that a proceeding by *quo warranto* is the proper course to adopt. He also referred to *Grant* on Corporations, page 296; *Kidd* on Corporations, 448. In *Harris v. The Dry Dock Co.* (d), the bill by a creditor—a member of the company, was sustained on the ground of the company being insolvent.

Mr. *Bethune*, Q. C., contra. Where the object and purpose for which a company has been incorporated cannot be carried out then the Court will interfere. In this case ten directors are required by the Act to manage the affairs of this company. Here that is impossible on the statements contained in the bill which, for the purposes of this argument, must be taken to be true, and which in reality are true. The plaintiff's object is not to work a forfeiture of the charter, he wants merely to apply the funds of the company for the benefit of the shareholders. *Wood v. Dummer* (e), *Clements v. Bowes* (f). But if the proper and only proper mode of proceeding is by way of *quo warranto*, then it is contended that since the Administration of Justice Act a party may proceed in this Court for that purpose. *Nokes v. Fish* (g). *Lewis* on Pleading, p. 170. Here there is a prayer for general relief, this will entitle the plaintiff to the general ordinary relief such as the facts will warrant the Court in granting. In this case clearly an account of the profits is warranted, as well by the facts stated as the prayer of the bill. Asking for too much relief will certainly not dis-

(a) 12 Mod. 371.

(c) 3 T. R. at 244.

(e) 3 Mason 308.

(g) 3 Drew 735.

(b) 1 Eq. Cas. Ab. 131, Pl. 10.

(d) 7 Grant 450.

(f) 17 Sim. 167.

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entitle a plaintiff to any relief. *Cockerell v. Dickens* (a), 1878.
Story's Equity Pleading sec. 40.

Mr. *Cussels*, in reply. All the cited cases were bills of creditors of the same class as *Brooke v. The Bank of Upper Canada* (b), where the bill was filed merely for the purpose of ascertaining what assets of the corporation were in existence. Where a company is insolvent winding up powers may be resorted to, but here on the contrary the bill alleges the position of this company to be good, and a large amount of profits made. The Attorney-General is the only party who could take proceedings to wind up the affairs of this company, and a *quo warranto* also can only be applied for by him. The only argument advanced for the plaintiff being entitled to relief is the fact that the bill contains a prayer for general relief, but this is only applicable to cases where relief of a character analogous to that asked for by the bill is sought at the hearing; here the relief now suggested is not analogous. The company in fact, according to the ruling in *McMurray v. The Northern R. W. Co.* (c), is the only plaintiff that could sue here.

Argument.

The demurrer put in by the company was argued at the same time by Mr. *W. A. Foster*.

BLAKE, V.C.—After considering the cases of *Glass v. Hope* (d), *Wilson v. U. C. Building Soc.* (e), *Harris v. The Toronto Dry Dock Co.* (f), *Armstrong v. The Church Soc.* (g), *Jones v. Charlemont* (h), and *Clements v. Bowes* (i), I think it would be difficult to conclude that the Court could not in a proper case on a bill filed by a shareholder, take the accounts of a company and deal with its assets for the benefit of those

(a) 3 Moo. P. C. 98.

(c) 24 Gr. 134.

(e) 12 Gr. 206.

(g) 18 Gr. 552.

(i) 1 Drew. 684.

(b) 17 Gr. 301.

(d) 14 Gr. 448.

(f) 7 Gr. 450.

(h) 16 Sim. 271.

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 v.
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 Hotel Co.

interested in them. It is not however necessary to go so far as that in the present case. The bill alleges that *Thomas Dick*, now deceased, in his lifetime possessed himself of all the stock of the company except that held by the plaintiff; that *Dick* made large profits out of the said company, but no dividend ever was declared, and the plaintiff cannot get an account. It is true that the specific relief appropriate to such a state of matters may not be prayed for; but the above facts are set out, and a prayer for general relief is found, and under these circumstances the Court can and should mould the decree so as to answer the case presented by the bill. This view is sustained by the Privy Council (a). On this point *Graham v. Chalmers* (b) in this Court, approves of *Wilkinson v. Beal* (c), and *Hiern v. Mill* (d). I overrule the demurrer, with costs, giving the defendants leave to answer on the usual terms.

Judgment.

SOLICITORS.—*Crowther, Tilt, and McArthur*, for the plaintiff; *Foster and McWilliams*, for the *Hotel Company*; *Blake, Kerr, and Boyd*, for the other defendants.

(a) 8 Moo. 135.

(c) 13 Ves. 119

(b) 9 Gr. 289.

(d) 4 Mad. 408.

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SLATER V. THE CANADA CENTRAL R. W. Co.

1878.

Railway company, compulsory powers of—Ejectment—Sale in default of payment of compensation.

When lands are taken possession of by a railway company under the company's powers conferred upon them by the Act, this Court will not order possession to be restored in case of default in payment of the amount of compensation awarded to the owners: Under such circumstances the proper remedy is a sale of the land, and this will be granted under the prayer for general relief, though not asked for by the bill. See also as to this *Phillips v. The Royal Niagara Hotel Co.*, ante p. 358.

This was a hearing *pro confesso*.

Mr. Fitzgerald, Q. C., for the plaintiffs, asked for a decree in the terms of the prayer of the bill, which was that the defendants might be ordered to pay to the plaintiffs the sums of \$6,600 and \$1,420 with interest, from the date of the award of the arbitrators appointed to arbitrate as to the value of the lands of the plaintiffs, taken possession of by the defendants for the construction of the railway, and in default that possession of the lands might be delivered up to the plaintiffs, and for that purpose that a writ of *habere facias possessionem* might issue to put the plaintiffs into peaceable and quiet possession thereof; and "such further and other relief as may be necessary."

April 10.

The other facts are stated in the judgment.

After taking time to look into the authorities, SPRAGGE, C., remarked to the effect that the plaintiffs were the owners of certain land taken by the Railway Company for railway purposes under their compulsory powers. The bill, as was stated by Mr. Fitzgerald when he moved the case, is substantially an ejectment bill. What the plaintiffs ask for is a writ of *habere facias possessionem*, in order that possession may be delivered to them, and I was referred to a

April 17.

Judgment.

1878. case of *Galt v. The Erie and Niagara R. W. Co. (a)*, as an authority for that relief being granted. That case was similar to this in some respects, unlike however in others, and was disposed of upon special circumstances. There the possession had been taken under no compulsory powers, on the contrary there had been a contract for sale, and a conveyance made to the railway company who for the purpose of securing the price of the land gave a mortgage back. The defence raised on behalf of the company was that the mortgage so given by them was *ultra vires*, and that their giving a mortgage on their road-bed was in contravention of public policy. That question was discussed in these terms, by the Chief Justice, who at page 358 is reported as having said, "It does not seem necessary to notice the state of the title prior to the ownership by the Bank of Upper Canada. On the 19th of March, 1866, the Bank conveyed the premises to the Erie and Niagara R. W. Co. by deed in fee for \$40,963. On the negotiations for the purchase, the Company not being able to pay cash, it was agreed that the Bank should convey to them, and that they should execute a mortgage in fee to the Bank." At page 360 he says, "It would seem under the Railway Consolidated Act that when the Company borrows money they may mortgage their lands, tolls and revenue. If they do so, I do not see how Lord *Eldon's* view of the consequences must not be the correct one, and it would be fatal to the main argument of the defendants against alienation of the property of the Corporation. If the Company had borrowed the price of this land from the plaintiffs; bought the land therewith for their railway, and then mortgaged it to them, I hardly see how the clause above cited would not apply (b). It would be a singular state of the law if the assignees of plaintiffs who sold the land to the Company to lay their track upon it, on the express agreement to have the purchase money secured

Slater
v.
The Canada
Central
R. W. Co.

Judgment.

(a) 19 U. C. C. P., p. 357.

(b) Sec. 7, sub-sec. 11.

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by mortgage thereon, should be in a worse position than the mere lenders of money under clause 11, 'for the completing, maintaining or working of the railway,' and then he speaks of the legal title being in the plaintiffs in that case.

Slater
v.
The Canada
Central
R. W. Co.

And Mr. Justice *Gwynne* is reported as having made this remark (a), "If it was *ultra vires* in the defendants to execute effectually their portion of the agreement, justice would seem to require, and the seat of justice is not confined to Courts of Equity, that they should not hold that which they only acquired upon the faith of that agreement and upon the faith of its having been perfected by the instruments executed to give it effect."

I find no instance of ejectment being maintained where the land taken was so taken under the compulsory powers of the Company, and *Hagarty*, C. J., seems to assume that to be the case. He says (p. 358), "When land is entered on and taken by a railway company under the compulsory clauses, the price to be ascertained by arbitration or assessment by a compensation jury, or when it is paid into Court under any of the powers given by Judgment. the Imperial or Provincial Statutes, it appears that ejectment cannot be maintained by the owner, in the event of any difficulty arising, but the compensation must be worked out as the law provides." And he then refers to the cases of *Doe Armistead v. North Stafford Co.* (b), *Doe Hudson v. Leeds and Bradford Co.* (c), and *Rankin v. Great Western Railway Co.* (d).

In the first of these cases a deposit was paid, and the effect of the deposit was to entitle the defendants to possession. The question was, whether they could be treated as trespassers. If they could be treated as trespassers then ejectment would lie, but unless they could ejectment would not lie; and it was observed by Mr.

(a) At page 363.

(c) 16 Q. B. 796.

(b) 16 Q. B. 526.

(d) 4 U. C. C. P. 463.

1878. Justice *Patteson*, who delivered the judgment of the Court in that case (page 587), "We are therefore clearly of opinion that if the original entry was lawful the present possession is lawful, and that this ejection cannot be sustained." In the other case in the same volume, possession was taken by agreement.

Slater
v.
The Canada
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R. W. Co.

In the case of *Rankin v. The Great Western R. W. Co. Macaulay*, C. J., who delivered the judgment of the Court, says (page 476), "The first question that presents itself is, whether the defendants were by the statutes empowered to enter into and retain permanent possession of plaintiffs' land without agreement for the price or arbitrament. It appears to me that the 4 Wm. IV., ch. 29, authorizes the defendants to make use of the lands of private individuals on the line of the route of the railroad. First, by permanently assuming them, to form portions of the line of road, stations, &c. Secondly, temporarily, for working grounds in making the railroad; or partially, in taking timber, earth, &c., off the same for the purposes of the road. That they have a right to enter, to make surveys, and set out and ascertain the lands they should think necessary and proper for the railroad, or to enter lands not required but convenient to be made a temporary use of, or to be partially taken or incumbered without previous contract with the owners, and without previous payment or arbitrament respecting the same: but they have not the right to enter upon and assume lands, to be permanently appropriated to the uses of the railroad, without the permission first had and obtained either by consent of the owners thereof, or by virtue of reference authorised by the statute. The application of real estate to such purposes I consider interfering with and encroaching upon the fee simple or right, or private easement, as the case may be."

Judgment.

In that case, however, there was an agreement that they might have possession. In this case nothing is said as to whether there was an agreement or not, neither consent nor dissent is alleged. The first paragraph of

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the bill, which is not very long, is in these words: 1878.
 "Sometime in the summer of 1870, the above-named
 plaintiffs *Esther Slater, Mary Wright* and one *Nicholas*
Sparks (since deceased), were the owners in fee simple
 in possession as tenants in common of the lands herein-
 after mentioned, and the defendants *The Canada Cen-*
tral Railway Company, under the powers conferred upon
 them by the various statutes in that behalf, filed in the
 proper office, a map or plan and book of reference re-
 specting the said land, and entered and took possession
 of the said lands in pretended pursuance of the powers
 conferred upon them by the said several statutes, and
 have ever since trespassed thereon, continued in posses-
 sion thereof, and have built a railway track and loco-
 motive house thereon."

Slater
 v.
 The Canada
 Central
 R. W. Co.

Now, there is no allegation in any paragraph of the
 bill that this has been done without the consent of the
 vendors. The words, "in pretended pursuance of the
 powers conferred upon them," does not supply that
 omission. "Pretended," would really mean "assumed
 pursuance," and not under the authority of the powers
 conferred upon them. The using of the word in
 "pursuance thereof" is not merely a designation of the
 acts done by them, but means that the Act authorized
 them to go into possession thereof, which they in pur-
 suance of the powers conferred did, and under that
 authority they did construct a railway track, and also
 erect a locomotive house thereon, and there is no allega-
 tion that this was forbidden by the owners of the land,
 or that it was done without their consent. If the
 plaintiffs looked on and saw the construction of these
 works, and the erection of the building in progress,
 they cannot now treat the *Company* as trespassers.
 In fact from this acquiescence a consent to the *Com-*
pany taking possession might be presumed; and cer-
 tainly *Galt v. The Erie and Niagara Railway Co.* is
 not an authority for this case; on the contrary, *Hagarty,*
 C. J., was of opinion that where the possession was

Judgment.

1878. under the compulsory powers of the Railway Act no ejectment could be maintained. Still, though I think the proper conclusion is that the parties are not entitled to have a writ of ejectment, they are not without a remedy.

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The Canadian
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The case of *Wing v. The Grand Junction R. W. Co.* (a) settled the question that where there is a vendor's lien the parties are entitled to enforce it in the way any other lien can be enforced, that is to say by sale. That being the proper remedy it should have been asked for in this case, and the question is whether on this bill, if the parties cannot have ejectment they can have any other remedy. I think they can. They pray primarily for ejectment, but they also pray for "further and other relief," and if on the facts that they allege their proper relief is to have a sale they are entitled to that.

A large sum has been awarded to the plaintiffs, \$6,600 to one, and \$1,420 to another; and it is said that the Company have approved of the award.

Judgment. I think the proper decree is, that they pay within a month, or, in default, that the land be sold.

SOLICITORS.—*Pinhey, Christie, and Hill*, for the plaintiffs.

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BROCK V. CAMERON.

1878.

Trustee—Breach of trust—Claim against estate—Property and Trusts' Act.

The fact that a claim against the estate of a deceased party arose in consequence, or by means of a breach of duty as a trustee, affords no ground for giving such claim a preference over other creditors of the estate, as under the Property and Trusts' Act the claimant can only rank *pari passu* with other creditors.

The bill set forth that certain moneys amounting to £6,720 stg., had, in 1857, been placed by the plaintiffs, who resided in England, in the hands of the defendant *Cameron* for investment in safe securities in Canada; the securities taken; the payment of interest up to 1872; that the securities taken for, or given to the plaintiffs by *Cameron* were insufficient:—one of those securities being an assignment from *Cameron* by way of mortgage of his leasehold interest, for twenty-one years renewable, in certain real estate in Toronto for securing £5,600, upon which the plaintiffs had realized £3,057, paid by the lessor *Richardson*, for improvements made by *Cameron*, leaving a balance of £3,662 with interest unsecured; that the plaintiffs were without security except the personal covenant of *Cameron* as to a large portion of said moneys; charged that *Cameron* was trustee for the plaintiffs of the moneys, and was bound to invest safely, and became personally liable to make good so much thereof, as he had not safely invested, and to account for and pay to the plaintiffs so much thereof as had been loaned to himself. The prayer of the bill was, that it might be declared that *Cameron* was a trustee and liable as above stated, and for an account; and that he might be declared personally liable and be ordered to pay the amount to be found due.

The answer of the defendant *Cameron* set up that the moneys referred to were invested in Canada, in the lifetime of Major *Brock*—husband of the plaintiff *Elizabeth Brock*—by his son *George Brock*, then residing in Canada,

1678. *Brock v. Cameron.* and that a large portion of the money was held by him, the defendant, on his personal bond in the life-time of Major Brock and George Brock; that part of the money had been repaid; that the whole amount secured by the mortgage of his leasehold interest referred to, could have been realized thereon, had he obtained a renewal which he was entitled to by the terms of the lease, but that his position was prejudiced by the course pursued by the plaintiffs so that he lost his right of renewal; denied that he was trustee; and denied also the insufficiency of the value of the lands on which security had been taken.

The defendant Lovell answered that he was the husband of one of the plaintiffs, and submitted to such decree as the Court should see fit to make.

After issue joined, the suit became abated by the death of Cameron, (14th Nov., 1875,) and was revived in the name of his personal representative the defendant H. L. Hime, administrator *cum testamento annexo*.

The cause came on for examination of witnesses and hearing at the Spring Sittings, 1876, in Toronto.

Statement.

It was stated on behalf of the defendant, that an action of debt had been instituted in the Queen's Bench, by one George Schrieber, a creditor of the estate, against the administrator, who following the course pointed out in *Re Shipman (a)*, set up by way of equitable plea,—deficiency of assets; whereupon an administration order was made in that action referring it to the Master in Chancery to take the accounts and make the inquiries usual in administration suits in this Court. Counsel for the plaintiffs admitted having been served with notice of this order on the 27th of April.

Mr. A. Crooks, Q.C. and Mr. Symons for the plaintiffs, submitted that they were entitled to a decree against the administrator for the balance due and that the claim was entitled to preference as it arose from a breach of trust, and that the account should be taken with rests.

(a) 24 Gr. 177.

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Mr. *A. Howell*, for the defendant the administrator. 1878.

The Act to amend the law of evidence, (1873,) sec. 6, provides that in a suit against the administrator of a deceased person, an opposite or interested party to the suit shall not obtain a judgment on his own evidence unless such evidence is corroborated by some other material evidence. None of the plaintiffs are put upon oath to prove their case; and the evidence adduced is such as would be corroborative only of the plaintiffs' own evidence which is wanting.

Brock
v.
Cameron.

Mr. *Cameron* was not in the position of a trustee at the time of his death; the relation of trustee and *cestui que trust*, if it ever had existed between the plaintiffs and himself, had become changed into that of borrower and lender; the plaintiffs had full knowledge of the circumstances and the dealings of Mr. *Cameron* with the moneys. And where there has been concurrence or acquiescence by the *cestui que trust* in that which is a breach of trust, with knowledge of the circumstances, it will release the trustee.—*Brice v. Stokes* (a), *Walker v. Symonds* (b).

Statement.

The plaintiffs must prove under the administration order, and rank equally with other creditors on the estate. They are not entitled to preference even though they could establish the trusteeship.

By sec. 28 of the "Property and Trusts' Act,"* where there is a deficiency of assets all the testator's or intestate's debts "shall be paid *pari passu* without any preference or priority of debts of one rank or nature over those of another." All payments beyond *pro rata* payments are a misapplication of funds. *Taylor v. Brodie* (c), *Willis v. Willis* (d), *Bank, B. N. A. v. Mallory* (e), *Carsons v. Gooding* (f), *Wilson v. Paul* (g), *Michelson v. Piper* (h).

(a) 2 Lead. Cas. Eq. 865.

(c) 21 Gr. 607.

(e) 17 Gr. 102.

(g) 8 Sim. 63.

(b) 3 Swans, at 64.

(d) 20 Gr. 400.

(f) 33 U. C. R. 499.

(h) 8 Sim. 64.

* See Rev. Stat. Ont., p. 1029.

1878.

Brock
v.
Cameron.

SPRAGGE, C.—The chief question argued was, whether Mr. *Cameron*, was a borrower of money from the plaintiffs, or an investor of moneys as a trustee for them. There are only two sums upon which any question can arise— one a sum of £1,000 sterling, received for investment, and purported to be lent to *Edward Shortis* on his mortgage. I gather from the evidence that this money was not lent to *Shortis* but was used by *Cameron*, and that the land was the land of Mr. *Cameron*; that would be a breach of trust, and Mr. *Cameron* would have to make good the loss; the land was valued at the instance of Mr. *Cameron* at \$800; anything due on that mortgage beyond what the land may realize in a suit now pending for foreclosure or sale, must be made good by the estate of of Mr. *Cameron*. The other item is a sum of £2,300 appearing in the statement in two sums of £2,000 and £800, as to which I had to refer to letters from Mr. *Cameron* which are put in; and referring to those letters I have come to the conclusion that these and the statement furnished by Mr. *Cameron* and signed by him, dated the 5th January, 1857, prove that the moneys in question were remitted to and received by Mr. *Cameron* for investment.

Judgment.

As to the balance it was received in sums set forth in this state for investment, and spoken of in letters from Mr. *Cameron* to Mr. *Brock* as invested. It appeared for the first time by Mr. *Cameron's* letter of September, 1857, that there was no other investment than by an assignment from Mr. *Cameron* to his principals of a leasehold interest held by himself on property in Toronto, the lease of which would expire in 1872.

Upon the expiry of that lease we find that the lessor refused to renew in the terms of the lease, and paid compensation for the improvements made by the lessee. The question raised by the answer as to Mr. *Cameron* having been prejudiced by the conduct of the plaintiffs was not argued, and does not call for any further remark upon it.

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The question as to moneys remitted and received, other than the sum of £1,000, sterling, represented by the *Shortis* mortgage to which I have already referred, whether received for investment or by way of loan to Mr. *Cameron* does not seem to be material now since the death of Mr. *Cameron*, as under the Property and Trusts' Act these plaintiffs can only rank *pari passu* with other creditors, and they are creditors for all except the £1,000 under the personal covenant of Mr. *Cameron*. The question could only be material if it afforded a ground for charging Mr. *Cameron* or his estate with rests. The cases cited do not appear to me to warrant this. The decree must be with costs.

1878.
Brock
v.
Cameron.

SOLICITORS.—*Crooks, Kingsmill, and Cattnach*, for the plaintiffs; *Edgar, Ritchie, and Howell*, for the defendants.

CLARKSON V. SCOTT.

Purchase of equity of redemption—Covenant to pay off mortgage—Privity.

Although a purchaser from the mortgagor of the equity of redemption, covenants with him to pay off the mortgage debt, this, owing to the want of privity, affords no ground for the mortgagee proceeding against the purchaser either at law or in equity, to compel him to perform his covenant.

Hearing on motion for decree.

The plaintiff was assignee of a mortgage made 24th of December, 1874, by the defendant *Scott* to one *W. F. Munro*. *Scott* conveyed on the 21st of May, 1875, to one *Mary B. Griffith*, who on the 30th of August, 1877, conveyed to the defendant *William N. Griffith*, who thereby became entitled to the equity of redemption, and was so at the time of filing the bill. This conveyance which was executed by both the parties thereto, was expressed to be "in consideration of the assumption by the grantee of the incumbrances

Statement.

1878. *Clarkson v. Scott.* thereinafter mentioned, and in consideration of five hundred dollars," and to be made "subject to certain mortgages" therein particularly set forth (*inter alia* the plaintiff's mortgage)—"all of which the grantee hereby assumes and covenants to satisfy and discharge." The prayer of the bill was for the usual remedies in mortgage cases, including a personal order against the purchaser, as well as against the mortgagor. The bill was *pro confesso* against the mortgagor.

The defendant *Griffith* answered, admitting the mortgage and assignment to plaintiff, and the conveyance to himself, but stated that it was never intended or agreed that he should become personally liable to any one other than *Mary B. Griffith* (his grantor), for the amount of the plaintiff's mortgage, but on the contrary that it was distinctly understood that he was purchasing the interest of *Mary B. Griffith* in the premises, and assuming the incumbrances only to the extent to which the land purchased should be sufficient to satisfy the same.

Mr. *A. Howell*, for the plaintiff.

Mr. *A. Galt*, for the defendant *Griffith*.

Re Cozier—Glover v. Parker (a), and *Nichols v. Watson* (b), were cited.

Judgment. SPRAGGE, C.—The question that arises is, upon the direct liability of *Griffith*, the purchaser from the mortgagor of the equity of redemption to the mortgagee.

This can be founded only on the covenant by the purchaser to the mortgagor, that he will pay off the mortgage. The mortgagee's position is, that this creates a direct liability from the purchaser to him—

(a) 24 Gr. 587.

(b) 28 Gr. 606.

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self. Would an action of covenant at law by the mortgagee lie upon this covenant? The difficulty is the want of privity.—*Re Cozier—Glover v. Parker* (a), is quoted as authority for the position, but that decision proceeded, in part at least, upon parol evidence, and the fact of a payment by the purchaser to the mortgagee as creating a privity between them.

1878.

Clarkson
v.
Scott.

I had previously to consider a case involving the same principle, *Nichols v. Watson* (b), which was not cited in *Glover v. Parker*; and I there held that the absence of privity had prevented any direct liability, and to that view I adhere.

As to costs: the plaintiff should have costs only as of a bill noted *pro confesso*. The defendant *Griffith*, the purchaser, is entitled to his costs of resisting this ^{Judgment} claim of the mortgagee, *i.e.*, costs of his answer and of the hearing.

SOLICITORS.—*Edgar, Ritchie, and Howell*, for the plaintiff; *Custon and Galt*, for the defendant.

(a) 24 Gr.

(b) 23 Gr. 606,

1878.

RE CHARTERIS.

Lunacy.

Funds were bequeathed to trustees, and one of the *cestuis que trust*, it was stated, had been declared a lunatic in Scotland, and a *curator de bonis* of the estate of the lunatic was appointed. The lunatic was not absolutely entitled to the fund, and the trustees applied to the Court for liberty or instructions to remit the fund to the curator. The Court, under the circumstances, refused to make such direction, and ordered a reference "to the Master to inquire and report (1) whether *M. A. C.* in the petition mentioned has been found and adjudged a lunatic according to the law of Scotland; (2) whether *A. S.*, in the petition named, has been appointed *curator de bonis* of the estate of the said *M. A. C.*, and if so, whether he has given security for the proper application of any moneys of the said *M. A. C.*, and the nature and amount of such security."

This was a petition for advice under the Act 29 Vic. cap. 28, sec. 31.

The facts appeared to be as follows:—

Alexander Charteris made his will whereby, after making certain specific devises and bequests, he devised and bequeathed to his widow, *Hannah Charteris*, a proportion equal to one-third of the residue of his real and personal estate, wherein he might be interested in Canada at the time of his decease, and the remaining two-thirds as well as all his estate situate out of Canada, he gave to his brother in Scotland on certain trusts for the benefit of his two sisters in Scotland. The brother so appointed a trustee predeceased the testator, and an application having been made to this Court for the purpose, the petitioners *Edward Robinson* and *William S. Ireland* were appointed trustees of the will in the place of the deceased trustee. It further appeared that one of the testator's sisters, *Mary Ann Charteris*, was a person of unsound mind, and that one *Archibald Stewart*, resident in Edinburgh, had been appointed by the Scotch Courts *curator bonis* to her. *Archibald Stewart* made a demand on the petitioners requiring them to remit the share of the lunatic sister to him at Edinburgh. The petitioners therefore requested advice

Statement.

as to whether they should accede to this demand and transmit the share of the lunatic to the curator, or whether they should invest the *corpus* of the fund and transmit only the income. 1878.

In re
Charteris.

Mr. Kingstone, for the petitioners.

SPRAGGE, C.—The petitioners ought not, in my opinion, to remit to the *curator bonis* of *Mary Ann Charteris*, lunatic, the funds belonging to the lunatic asked for by him, without first ascertaining that he, the curator, is entitled to receive them. The office of *curator bonis* is probably analogous to that of committee of the estate by our law. His authority may be greater or less. He may be entitled to have the whole estate of the lunatic placed in his hands, or it may be that he is entitled only to the income or it may be to only a portion of the income. His authority to receive may be defined by the order of the Court appointing him, or by orders made from time to time in the matter of the lunacy; and his authority to receive may be upon giving security, or upon terms expressed in some order. What he asks for is, that the *corpus* of the estate of the lunatic may be sent to him. He may be entitled to it by the law of Scotland applying to such cases, or by some order made in the matter of the lunacy by the Scottish Courts, or he may not. A case somewhat resembling this is that of *Elias (a)*, a lunatic resident in Holland; but the application there was by the curator appointed according to the law of Holland, not by trustees applying for direction or advice under the statute. There an inquiry was directed as to whether the curator was entitled, under the law of Holland, to have the funds of the lunatic in England remitted to him, and the Master reported that he was.

Judgment.

In my opinion, it is not proper that I should direct or

(a) 3 Mac. & G. 234.

1878. advise the petitioners to remit the funds in question to the *curator bonis* in Scotland without being first fully satisfied of his title to receive them.

In re
Charteris.

I should not disapprove of the petitioners making answer to the application of the curator, that they have failed to obtain my direction or advice to transfer the funds in question to him, they can inform him of the grounds of my declining to give such direction and advice; and they may suggest to him to make application to this Court as was done in the matter of *Elias*, a lunatic.

I may add that in case such application is made, it would, in my opinion, be proper, before the trustees are directed to remit any money to the curator beyond such amount as may be sufficient for the comfortable maintenance of *Mary Ann Charteris*, to refer it to the Master to inquire and report (1.) Whether *Mary Ann Charteris*, in the petition named, has been found and adjudged lunatic according to the law of Scotland. (2.) Whether *Archibald Stewart* in the petition also named, has been appointed *curator bonis* of the estate of the said *Mary Ann Charteris*, and (3.) Whether if so he has given security for the proper application of any moneys of the said *Mary Ann Charteris*, and the nature and amount of such security

Judgment.

I doubt if in any event the *corpus* of the share of *Mary Ann Charteris* should be remitted to the curator. The testator seems to have left it in the discretion of the trustee named by him to distribute the *corpus*, or apply the proceeds thereof for the benefit of his sisters. That trustee died before the testator. It may be questioned whether the large discretion of appropriating the *corpus* is exercisable by the petitioners, who are trustees substituted by the Court.

It would appear at any rate (if there were discretion exercisable) to be a proper exercise of discretion to apply only the proceeds of this lady's share for her benefit, and this probably would have been the course pursued by the trustee named if he had lived in the

event which has happened—the lunacy of this sister of the testator. 1878.

In re
Charteris.

If indeed it should be made to appear that more than the annual income is necessary in order to the fitting maintenance and comfort of this lady, application should be made for a further allowance.

There appears to be no gift over, and *semble*, any unexpended moneys would go to the next of kin.

No reason is suggested why the *corpus* of this lady's provisional share in the testator's estate should go into the hands of this curator. Under the will it does not become hers absolutely. If it did, an inquiry as to the amount of security given would be of still greater consequence than it is now, and further an inquiry into the law of Scotland in relation to lunatics' estates would be proper. The proper course in that case would probably be, to have the fund paid into Court in Scotland, or in some way placed at the disposal of the Scotch Courts, to be dealt with according to the law and practice of the Courts in such cases in Scotland. Judgment.

DOUGLAS V. ATLANTIC MUTUAL LIFE INSURANCE
COMPANY OF ALBANY, NEW YORK.

Life insurance—Foreign insurance company—Insolvency.

A fire insurance company incorporated in the State of New York and carrying on business in this Province, cannot be allowed to do so after proceedings have been taken, according to the law of its domicile with a view of winding up the affairs of the company, and that irrespective of what the result of the proceedings may be as to solvency or insolvency of the company.

This was a petition presented by *George Douglas* on behalf of himself and other creditors, praying for a declaration of insolvency of the company, and the appointment of an assignee.

It appeared that the petitioner was the holder of a matured claim against the company upon a policy on

1878.
 }
 Douglas
 v.
 Atlantic
 Mutual Life
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the life of himself and his wife, and the present application was made on the ground of non-payment of the claim, and also on the ground that under the insurance laws of the State of New York, wherein the company had its head office, a receiver had been appointed in that State, and that the company was therefore declared insolvent in New York State.

Mr. *J. S. Ewart*, for the petitioner.

Mr. *J. H. Macdonald*, for the Company, did not admit the claim of the petitioner, and resisted the application on that ground, and on the ground that by the insurance laws of New York State the appointment of a receiver was not in effect a declaration of insolvency, but was a proceeding taken to protect the policy holders against a possible insolvency; that under the laws of that State, upon the appointment of a receiver, the affairs of a company were to be investigated by an actuary who was to make a report as to the affairs of the company; that it was contemplated by the insurance laws of the State that this report might shew solvency or insolvency; that the final report of the actuary had not been made, and he applied for an adjournment until the report of the actuary should be made.

Argument.

Mr. *Moss*, for the Minister of Finance, also objected to an order being made on the application of the petitioner on the ground that his claim being disputed, he did not sufficiently represent the policy holders of the company, and contended that his claim should first be established.

After taking time to look into authorities :

SPRAGGE, C.—Remarked this was a petition presented by *George Douglas* on behalf of himself and all others, creditors of the defendants. The object of the petition is to have a receiver appointed on the ground

of the insolvency of the company. The company
 desires to postpone the application for, say—three
 weeks. 1878.

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What is asked for by this petition can only be
 granted in case the company is insolvent. The mean-
 ing of the term "insolvent," as here used, is not
 such as is technically used in speaking of a trading
 company, insurance companies being among those
 excepted from the operation of the Insolvency Laws.

There may be insolvency of Fire and Inland Marine
 Insurance Companies, but a question may exist if
 Life Insurance Companies do not stand upon their
 own peculiar footing.

This is a foreign corporation governed by the laws
 of the State of New York, and proceedings have been
 already taken in the Supreme Court of that State;
 and these proceedings are now before me with an affi-
 davit from an expert, who refers to the Statute of
 New York governing such cases; and our Act would
 seem to have been modelled upon it.

Judgment..

It further appears that an order was made by the
 Supreme Court of New York on the 21st July, 1877,
 which appointed a receiver, and directed the affairs
 of the company to be investigated by an actuary.

Mr. *Macdonald*, on behalf of the company, contended,
 that the insolvency is contingent upon the report of
 the actuary and its confirmation by that Court. He
 puts it as if, in the event of a favourable report from
 the actuary, the company might resume operations
 and continue its business. If he is right, there may
 in the event be no insolvency in any sense of the
 word. But is he right—as to this see sections 7 and
 8 of the Act of New York.

What then is the state of the company in any event?
 In any event can it resume business? As to this see
 section 8.

The meaning of the term "Insolvent," is "unable to
 pay debts according to usage of trade."

1878. It is true there is the provision as to re-insuring
 “in some *solvent* company,” but in my view, after the
 adjudication in the Supreme Court of New York this
 company cannot be permitted to continue business in
 Canada.

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It would seem that there would be no danger to the
 assured if the time for payment of the premium should
 arrive and there is no hand to receive, as in that case
 there could be no default. Provision is made for such
 a case.

If in the event of a favourable report the company
 could resume business it might be a reason for a post-
 ponement of the motion; but if not it would be simply
 waiting for an event, which, whatever it might be
 cannot influence, one way or the other, the course to
 be taken.

Then is the company insolvent in the sense attached
 to the term in this case, of this foreign insurance
 company according to the law of its domicile?

Judgment. It would certainly seem that it is, and irrevocably so.
 In my opinion the order for receiver should go.

[This finding of the Chancellor was affirmed on re-
 hearing by the full Court, 27th of February, 1878.*]

*The report of the actuary, referred to in the judgment, was
 subsequently made, and found the company to be insolvent.

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SMITH V. MERIAM ET AL.

1878.

Will, revocation or alteration of—Attestation.

Any alteration or revocation made in or of the provisions of a will after the first of January, 1874, to be effectual, must be attested in the same manner as a will requires to be attested; and that notwithstanding the will was made anterior to that date.

The bill in this case was filed by *Alexander Mortimer Smith* against *Margaret Meriam, Cyrus Meriam Alexander McBean, Isabella Hynulman, William McBean, James McBean, Margaret McIntaggart, Angus McIntaggart, Alexander McBean the younger, William McBean the younger, Elizabeth McBean, Cyrus McBean, George McBean, Jean McBean, Margaret Fredericks, Samuel D. Fredericks, Eliza McBean, John Hillock, Frank Hillock, and The Trustees of Knox College*, seeking the construction of the will of *John McBean*, deceased, probate whereof had been granted by the Surrogate Court of the County of York to the plaintiff and the defendants, *Frank Hillock and Eliza McBean*: a *fac simile* copy of such will being set forth in the bill, and which was in the words and figures following:—

Statement.

“This is the last Will and Testament of me, John McBean, of the City of Toronto, Gentleman.

“I appoint my wife *Eliza McBean*, *Alexander M. Smith*, of the City of Toronto, Merchant, and *Frank Hillock*, of the same place, lumber merchant, to be executrix, executors and trustees of my will, with a legacy of two hundred dollars to each of my said executors and trustees, *Alexander M. Smith* and *Frank Hillock* as such executors and trustees, in lieu of any other compensation they or either of them would be entitled to receive under any law now in force in the Province of Ontario as such executors and trustees.

“And I devise unto my said executors and trustees, and their heirs, all the hereditaments which at my decease shall be vested in me upon any trust or by way of mortgage.

“I give to my wife absolutely all my household furniture, books, articles of jewellery, household linen, plate, china, glass, pictures, and other articles of like nature. And also all my stocks standing

1878. in my name in the following companies in the Province of Ontario; The Dominion Bank, The Royal Canadian Bank, Imperial Building Savings and Investment Company, The Union Permanent Building and Savings Society, The Freehold Permanent Building and Savings Society, The Western Assurance Company of Toronto.

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"I also give to my wife during her life my dwelling houses and land, situate on the east and west sides of Jarvis Street, being part of park lot number six formerly in the township of York, now in the city of Toronto, to hold the same unto my said wife during her life, and from and after her decease I give, devise, and bequeath the same unto the Trustees of Knox's College, Toronto, their successors and assigns for the purpose of endowing a chair in the said University or College.

"I give and devise all my house and land situate on the south side of Walton street in the said city, being houses numbered thirty-nine and forty-one on said street, with the land thereunto belonging, and being part of lot number — on said south side of said street, unto and to the use of my sister Janet McBean, (dead*) wife of William McBean, during her life without impeachment of waste, and for her separate use, and after her decease I devise the same to any surviving husband of my said sister for his life, and subject thereto to the use of such child or children of my said sister as shall attain the age of twenty-one years, if more than one in equal shares and his, her, or their heirs and assigns for ever as tenants in common, and if there be no such children, then as to the said hereditaments to the use of the said right heirs of the said Janet McBean in fee simple absolute.

Statement.

I devise all my house and land situate on the west side of Yonge street in the said city, being houses numbered 368 and 368½ on said street, with the land thereunto attached, and being part of lot number six on said street (Walton's plan), unto and to the use of my brother Alexander McBean during his life, without impeachment of waste, and after his decease to such uses and upon such trusts for the benefit of any surviving wife of my said brother, as to all or any part of the said hereditaments, and for any period not exceeding the term of her life as my said brother shall by deed or will appoint, and subject thereto to such uses and upon such trusts and in such manner for the benefit of any child or children or other issue of my said brother born in his lifetime as he shall at any time or times by deed revocably or irrevocably or by will appoint, and subject thereto to the use of such child or children of my said brother as shall attain to age of twenty-one years; if more than one in equal shares, and his, her, or their

* Underneath this name the testator had interlined the word "dead."

* The word but were not

heirs and assigns for ever as tenants in common. And if there be no such child then as to the said hereditaments to the right heirs of my said brother in fee simple absolute.

1878.
Emith
Meriam et al.

"I give and devise all my house and land situate on the south side of Walton street aforesaid, being house numbered forty-three on said street, with the land thereunto attached, and being part of lot number — on the said side of said street unto and to the use of *my niece Margaret Sutherland her heirs and assigns* forever.

"I give and devise all my house and land situate on said south side of said Walton street, being house numbered forty-five on said side of said street, with the land thereunto attached, and being part of lot number — on said side of said street unto and to the use of Isabella Hymen, wife of Peter Hymen, of the county of Middlesex, Ontario, during her life without impeachment of waste and for her separate use, and after her decease to and upon such or the like uses and trusts as are hereinbefore limited of my hereditaments herein devised to my *sister Janet McBean*.

"I give and devise all my house and land situated on the said south side of said Walton street, being houses numbered thirty-five and thirty-seven on said side of said street with the land thereunto attached, and being part of lot — on said side of said street, unto and to the use of Mary Forsyth, wife of John Forsyth of the township of York, Gentleman, during her life without any impeachment of waste, and for her separate use and after her decease to and upon such or the like uses and trusts as are hereinbefore limited of my hereditaments herein devised to my *sister Janet McBean*.

Statement.

"I give and devise all my house and land situate on north side of *Albert street in the said city, being house numbered forty-four on said street, with the land thereunto attached, and being part of lot — on said side of said street, unto and to the use of John Hillock and Frank Hillock, both of the said city, their heirs and assigns for ever as tenants in common.*"

"I give, devise, and bequeath all my leasehold hereditaments situate on the north-east corner of Richmond and Bay streets in the said city unto my adopted daughter Jane McCracken, to hold the same unto her for all such estate and interest as I at the time of my decease shall have therein. I give and devise all my lands in the village of Carlton, in the township of York, being lot number fifty as laid down on Dennis' plan, dated 28th December, one thousand eight hundred and fifty-five, unto the Reverend William Withrow, his heirs and assigns for ever.

"I give and devise all my house and land situate on the south

* The words throughout the will printed in Italics were struck out by the testator, but were not attested in any way.

1878. side of Walton street aforesaid, being house numbered forty-seven on said street, with the land thereunto attached, and being part of lot number — on said side of said street, unto and to the use of ^{Smith} Margaret Percy, wife of Gilbert Percy of the said city of Toronto, during her life, without impeachment of waste, and after her decease and upon or the like uses and trusts as are hereinbefore limited of my hereditaments devised to my sister *Janet McBean*.

“I give and bequeath unto my brother-in-law, Wm. R. Sutherland and sister Margaret Meriam, the sum of five hundred dollars each, to be paid to them respectively without interest within six months after my decease. To my cousin Janet McBean, of Archlach, Scotland, the sum of four hundred dollars, to be paid at the times and manner before mentioned.

“To my friend Mrs. McClelland the wife of David McClelland, the sum of four hundred dollars payable as before mentioned.

“I devise and appoint all the hereditaments of whatsoever tenure over which I have any disposing power and not hereinbefore or otherwise disposed of by my will, and I give and bequeath all my leasehold and personal estate, not otherwise or hereinbefore disposed of by my said will, unto my said trustees, their heirs, executors, administrators, and assigns respectively, upon the following trusts.

Statement. “I authorize my said trustees or trustee at any time or times if they or he should think fit to sell all or any part of said residuary real estate in such manner and at such times as they shall think fit, and also to sell and convert into money all of my said residuary personal estate, and after payment of my funeral, testamentary and trust expenses, debts and legacies hereinbefore bequeathed by me to pay:—

“First, Home Mission Canada Presbyterian Church....	\$2,000
“Second, Widow and Orphan's Fund	1,000
“Third, Aged and Infirm Minister's Fund.....	1,000
“Fourth, Foreign Missions.....	1,000
“Fifth, Sabbath School towards erecting a building therefor on Knox church ground, and in connection with said church.....	1,000
“Sixth, Bible and Tract Society.....	1,000
“Seventh, House of Industry, Toronto.....	400
“Eighth, Girls' and Boys' Home.....	400
“Ninth, News Boys' Lodging.....	100
“Tenth, Duchess street Mission Sabbath School, Knox Church.....	400
“Eleventh, Extension of Canada Presbyterian Church in Toronto, in connection with Knox Church.....	1,500

\$9,800

"And in the event of my said residuary real and personal estate being insufficient to pay the said several last eleven bequests in full then it is my will and desire that the same be reduced pro rata.

1878.

"And I declare that no trustee of my will shall be answerable for any co-trustee, or for any banker, broker, or other agent, or for any money which he shall not actually receive, or for any involuntary loss. And that each trustee may retain and allow to his co-trustees out of any moneys which may come to his hands, all expenses to be incurred in the execution of the trusts of my will.

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"In witness whereof I have hereunto set my hand and seal this third day of June, A.D. one thousand eight hundred and seventy-one,

JOHN McBEAN. [L.S.]

"Signed by the said John McBean in the joint presence of us, who in his presence and in the presence of each other have hereunto set our hands as witnesses the third day of June, A.D. one thousand eight hundred and seventy-one.

"The words and other corrections to which the initials [J.C.] are set opposite made before execution.

J. CROWTHER."

JAMES TILT.

The bill further stated that the real estate situate on the east and west sides of Jarvis street, in the city of Toronto, except the house occupied by the said defendant *Eliza McBean*, which the testator devised to his wife, the defendant *Eliza McBean*, for life, and after her decease to the defendants the trustees of Knox College, Toronto, for the purposes therein set forth, he sold; and granted the same to the purchasers thereof, and took back from *John D. Irwin*, one of the said purchasers, a mortgage on the said real estate for the sum of \$3,000, which mortgage the defendant *Eliza McBean* claimed, was substituted for the land in the said devise to her, and that there was due and owing on the said mortgage the sum of \$3,000 for principal; that the *Janet McBean*, wife of *William McBean* in the said will named, who was a sister of the testator, died on the 13th day of June, 1871, intestate, and leaving her surviving her husband the said defendant *William McBean*, and issue of her marriage the said defendants *James McBean*, *Margaret McIntaggart*, *Alexander McBean*, the younger, *William McBean*, the

Statement.

1878. *Smith* } younger, *Elizabeth McBean*, *Cyrus McBean*, *George*
Meriam et al. } *McBean*, and *Jean McBean*, her only heirs and heir-
 esses at law; that the testator erased the clause de-
 vising certain property to the said *Janet McBean*
 shortly after her death; that the reasons which in-
 duced the testator to erase the whole clause in his
 said will affecting his brother, the defendant *Alexander*
McBean, were, that he had been unsuccessful at farm-
 ing, and had at various times contracted considerable
 debts and was unable to meet them, and was pressed
 for payment when he applied to the testator for as-
 sistance, who at various times and on different occa-
 sions, both prior and subsequently to the making of
 his said will, advanced to or for him large sums of
 money, and the testator believing he had done suffi-
 cient for the said *Alexander McBean*, erased the said
 devise to him as appears by his said will.

Statement. That the *Isabella Hymen*, wife of *Peter Hymen*, in
 the said will named, is the same person as the defend-
 ant *Isabella Hyndman*: that the testator after the
 making of his said will, acquired considerable real and
 personal estate, and more than sufficient to pay all
 legacies contained in the said will. The testator did
 not make any disposition of the surplus thereof by his
 said will; that the father and mother of the testator
 predeceased him many years; that the testator had
 the following brothers and sisters and no others, viz.,
Janet, since deceased, *Margaret*, *Alexander*, *Isabella*,
 and *Elizabeth*, since deceased; that *Margaret McBean*
 intermarried with and became the wife of the defendant
Cyrus Meriam prior to the year 1872, without having
 any marriage settlement or contract made for her; that
Isabella McBean intermarried with and became the wife
 of one *Peter Hyndman*, who predeceased the said testa-
 tor; that *Elizabeth McBean* intermarried with and be-
 came the wife of one *William R. Sutherland* on the 12th
 day of June, 1849, and she died on the 3rd day of
 July, 1857, intestate, leaving issue of her said marriage

four children, all of whom died during infancy except the defendant *Margaret Fredericks*, who intermarried and became the wife of the defendant *Samuel D. Fredericks* on the 12th day of September, 1876; and that the defendant *Margaret McIntaggart*, one of the daughters of the testator's sister *Janet*, intermarried with the defendant *Angus McIntaggart* on the 1st day of February, 1854.

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Mr. *McArthur*, for the plaintiff.

Mr. *Ferguson*, Q. C., for the defendants *Alexander McBean*, Sr., and *Fredericks*.

Mr. *Beaty*, Q. C., and Mr. *J. C. Hamilton*, for Mrs. *Meriam* and *William McBean's* family.

Mr. *Moss*, for *Isabella Hyndman*.

Mr. *W. A. Foster*, for the defendants *Hillocks*.

Mr. *W. Mulock*, for the widow *Eliza McBean*.

Mr. *W. M. Clark*, for Knox College.

The evidence given at the hearing went to shew that the testator made the alterations, erasures and cancellations after the 1st day of January, 1874, the widow in her evidence swearing that she was, after that date, passing through the library, and saw the testator with his will before him on his desk, when the testator said to her, "that *he was* making alterations in his will." She further swore that prior to that occasion she had never seen the testator making alterations in his will, neither had he ever spoken to her of having done so or of intending to do so. There was evidence that the testator had informed some persons that he made some alterations, but no time was stated, nor was the character of the alterations stated.

Argument.

The principal questions argued by counsel were: (1) Were the alterations, erasures, and cancellations to be held as inoperative? (2) Was the widow entitled to dower in the testator's lands in addition to the specific devises to her?

1878. It was admitted by counsel for the plaintiff that there was ample personal estate to pay the legacies mentioned in the will without resorting to the real estate, so that no question was raised as to the legality or illegality of the bequests.

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v.
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Mr. *Ferguson*, Mr. *Clarke*, and Mr. *Foster*, urged that the will should be read without reference to the alterations. It was admitted by counsel, seeking to have the alterations, &c., declared inoperative, that if the Wills' Act of 1868 or the present one, did not apply to the case, the alterations would have to be declared to be operative; if not held to be merely deliberative.—*Re Hall (a)*, *Williams* on Executors.

Counsel also urged that it was not correct to say that the alterations are presumed to have been made at one time or another, but the true rule only casts the onus on the party seeking to derive advantage to adduce evidence from which the date of the alterations may be inferred.—

Argument. *Williams v. Ashton (b)*.

Mr. *Ferguson* also contended that the 5th section of the Wills Act of 1868 applied, notwithstanding that sec. 20 of 1 Vic. chap. 26 (of which ours is an exact transcript) had been held not to apply to a partial revocation of a will, but to a total revocation; because sec. 21 of 1 Vic., ch. 26, provided for a partial revocation, whereas our Act of 1898, had not any similar provision. The Legislature, when it passed the Act of 1868, had knowledge that a testator could alter his will without attestation, and that there was provision in the English Act for a partial revocation; the conclusion was irresistible that the Legislature intended that a will once executed could only be revoked in the manner provided for by the 5th section of the Act of 1868. He further contended that the Wills Act of 1873 must in any event be held to apply, notwithstanding that the 1st section declared that the Act was not to affect any will executed

(a) 2 Pro. & D. 256.

(b) 1 J. & H. 115.

before the 1st day of January, 1874, citing *Brooks v. Kent* 1878. (a), and the will not being attested as provided therein, the alterations, &c., must be held to be inoperative.

Mr. *Beaty*, Q.C., and Mr. *Moss*, insisted that, in the absence of evidence to the contrary, the Court presumes that any alterations, erasures or cancellations appearing in a will have been made prior to the passing of the Act.—*Jarman* on Wills, 124, 132, and 134; *Cooper v. Bockett* (a). The evidence given here is indefinite, not positive; and the Court will not on such slight evidence, hold that the alterations were made after the 1st of January, 1874; especially so when the Wills Act of 1873 expressly declared that Act was not to affect any will made prior to the Act.

The Wills Act of 1868 cannot apply, because a similar provision in the English Act has in numerous instances been held not to apply to cases of partial revocation.

Mr. *Beaty* further contended, that the widow was bound to elect whether she would take under or against the will.

At the conclusion of the argument,

BLAKE, V. C.—I think I should hold that the alterations were made at the time stated in the evidence. The widow swears that she was informed of the will and its contents; and the probabilities are in favour of her knowing what her husband was doing. This being so, I do not think that I can hold that the alterations so made are not within the Act. Judgment.

I am clearly of opinion that the widow is not put to elect between the provision made for her by the will and her dower; and that the will as propounded without the alterations has been established as the last will of the testator; and that the devise thereunder in favour of *Knox College* is valid.

(a) 3 Moore, 316.

(b) 4 Moore, P. C. 419.

1878. The circumstances of this case are such as, following the usual practice when the suit is caused by the uncertainty created by the wording of the will, entitle all parties to their costs out of the estate.

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v.
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MURDOCH V. O'SULLIVAN.

Pleading—Parties—Insolvent.

In proceeding to set aside a deed to a married woman on the ground that the same was made to her as the appointee of her husband, who was insolvent, and was so made in order to defeat his creditors, it is not proper to make the husband a party,

This was a bill by an assignee in insolvency against a married woman and her husband, impeaching a conveyance made to the wife upon the appointment of the husband, as void under the Statute of Elizabeth; and it alleged that the fraudulent design was shared in, and the fraudulent acts done, with the knowledge and consent of the wife. The husband demurred on the ground that he was not a proper party.

Statement.

Mr. W. Cassels, for the demurrer, referred to *McFarlane v. Murphy* (a), as establishing the position that the husband here was not a necessary or proper party.

Mr. W. N. Miller, contra.

SPRAGGE, C.—If the conveyance impeached had been to a third party, and upon the appointment of a person not an insolvent, *i. e.*, not put into insolvency, the appointor would be a proper party for one reason, and one reason only; viz., that being *particeps fraudis* he may be chargeable with costs. Here the bill is by the assignee

(a) 21 Gr. 80.

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of the insolvent against the insolvent himself. Is such a suit proper where the only object is to charge the insolvent with costs; the whole estate of the insolvent being in the assignee. 1878.

Murdoch
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The appointor would be a proper party if his estate were not in insolvency, and some interest of his in the property conveyed could be reached by means of the suit; but in this case he being an insolvent the answer is the same, his whole estate is in the assignee; and that being so it is an idle and useless inquiry so far as he individually is concerned, whether or not he is tenant by the courtesy or has any other interest in the property conveyed; any interest of his that could be reached in this suit being vested in his assignee, the plaintiff.

McFarlane v. Murphy (a) is, as far as it goes, an authority against making the husband a party. It differed, however, from this case, in this very material point, that the husband of the woman the conveyance to whom was impeached, was not himself the insolvent, as is the case here. Judgment.

In *Boustead v. Whitmore (b)*, a conveyance was sought from a married woman, and the question was, whether the husband would be a necessary party to such conveyance, and he was made a party defendant upon the assumption that he would be so—unnecessarily as my brother *Proudfoot* thought—as it was not alleged that the marriage was before the passing of the Married Woman's Property Act of 1872, 35 Vic., ch. 15.

In this case no conveyance from the husband and wife, or from the wife alone, is necessary in order to the relief to which the plaintiff may be entitled. The conveyance, if void as against creditors, is void only so far as is necessary to satisfy the debts of the creditors. It is true that the bill prays that the defendant, the married woman, may be declared a trustee for the creditors, and may be ordered to convey to the plaintiff;

(a) 21. Gr. 80.

(b) 22 Gr. 222.

1878.
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 Murdoch
 v.
 O'Sullivan.

but that is asking too much, and the bill cannot be the less demurrable on that account; and even if the married woman were bound to convey, it would be no reason (as has indeed been already observed) for making the husband a party, as his interest, if he had any, is already vested in the plaintiff as his assignee.

In my opinion the husband is not a proper party, and his demurrer therefore is allowed, with costs.

THE QUEEN INSURANCE COMPANY V. DEVINNEY.

Compromise of claim—Fraud—Fire Insurance—Arson.

In order to prevent a compromise of a disputed claim being set aside, there must have been a matter of doubt to be settled, and there must be no fraud on either side: Where, therefore, on the destruction of a house by fire which had been insured, application was made to the Insurance Company for payment, who, after investigating the matter so far as the facts within their knowledge enabled them to do so, compromised with the assured by paying a portion of the sum insured; and some months afterwards the Company having received information which satisfied them that a fraud had been committed upon them, and that the assured had himself feloniously caused the fire, instituted proceedings to compel repayment when the Court, being satisfied that the act as charged had been committed, made the decree as asked, with costs.

This was a suit instituted by *The Queen Insurance Company* against *Hugh Devinney* and *James Stollery*, to recover back from the defendant *Devinney* the sum of \$875, paid by the plaintiffs to him in liquidation of his claim against the Company upon a policy of insurance against fire upon a dwelling house used by *Devinney* as an hotel, and the furniture contained therein; and which had been destroyed by fire, the bill alleging that after the payment of the amount the plaintiffs had been informed that *Devinney* himself had feloniously caused the destruction of the property, and charging that *Stollery* had aided and assisted in carrying out his fraudulent intentions against the *Company*.

Statement.

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The cause came on for the examination of witnesses and hearing at the sittings of the Court at Cobourg, on the 5th of April, 1878.

1878.

The Queen
Ins. Co.
v.
Devinney.

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

Mr. *Bethune*, Q. C., and Mr. *W. Kerr*, for the defendant *Devinney*.

The other defendant did not appear at the hearing.

The facts of the case and the points relied on by counsel appear in the judgment of the Court.

BLAKE, V. C.—According to the evidence of the witness *William Cummings* the defendant *Devinney* set fire to the premises, the subject of the insurance in question, and admitted the fact to him. If the statements of *Cummings* were uncorroborated it would not be safe to act on his testimony. He produces, however, four letters, written it is said by the defendant *Devinney*, which read as follows :

November 14, 1876, Judgment.

Sir—I have just received the first letter that I have seen from you since you left I have not got my insurance yet but would have had it but for you if you keep quiet i will send you the rest of the money when I get the insurance and all is settled up right if you dont keep quiet i might as well fight you out one time as another—but i have always behaved myself as a gentleman to you which you cant say for me but the authoritys are watChing closely for you. Mr. Dumble gets his information from Stanton and that they are trying to indite you and them they could take you wherever they find you and also they are watChing the post office letters so be careful.

December 4th, 1876.

F. DUNCAN.—Sir, I have just received a letter and telegraph from you and ama little surprised at your being in such a hurry about that matter I have told you often enough that it would be all right in time I have not got the insurance yet and am short of money Just now but will send the thing as soon as I can But you are mistaken about the money that you got you got \$7.88 and you are owing me \$24 for rent and Beer and Beef which i intend to deduct and also 10 dollars discount that I had to pay 788, 27, 10—820 So that leaves coming to you \$180—which I will send you as soon as i can.

Your

F. DUNCAN.

1878.

The Queen
Ins. Co.
v.
Devinney.

Wednesday 29—

Bill you are very unreasonable and very impatient I think you are not doing anything but wright to me I told you Before that if you keep quiet until I got my Buisness settled with the insurance the Ballance of the money is all sure But if you like to come home and get the thing straightoun up I would still give your the moneyif you conduct the thing wright i would not have the Bail to pay then But i have no other security from you that you will keep quiet only the Ballance of the money that I hold you are very impatient i think you need not be in such a hurry there is plenty of time yet you dont give me time to get settled but I will do as i agreed if you do as you agreed but you must wait till all is settled as i said in the first place destroy this as soon as read as i have done with yours

F. DUNCAN.

Cobourg, Dec. 76

Bil inclosed you will find twenty dollars that is all hugh can spare gust now as he is short of money will send rest soon he has got his insurance so that part is settled.

Pim Stollery.

The following are copies of specimens of defendant's writing done at the hearing of the cause.

F. DUNCAN,

Judgment.

HUGH DEVINEY—If you keep quiet until I get my Buisness settled with the insurance the Balance of the money If you conduct the thing right Being one month's rent do as you agreed i received a Telegrahm. That leaves coming to you i will send as soon as can Cobourg Nov 14 | 76.

HUGH DEVINEY—Inclosed please to find \$17 My Hotel is Lensed to a good Tenant I find i am short o money to clear me up Let me know immediately I hear that you are short of funds I agreed to pay you and I will do so yet if you are carfull d keep quiet The authorities are watChing and will indite you yet If I give out and inform and i intend to if do not what is right I received your telegrahm I will settle as soon as I get the insurance money.

That leaves comming to you \$180 i told you Before if you kept quiet uatill I get my buisness settled with the insurance the Balance of the money will be paid on Wednesday. I always intended to pay you. You tell me they are watChing us.

F. DUNKIN—DUNCAN.

The following telegram and a draft were also produced:

Buffalo, Nov. 29, 1876.

Hugh Deviney, Cobourg, Canada.-- What are you going to do, answer. F. Duncan.

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Cobourg, Dec. 27, 1876.

Wanted from the Bank of Toronto a draft on H O in favor of F. Duncan, for \$130. No. 1958. \$130.

Applicant _____ Exchange 32. \$130 32.

No. 1748.

Bank of Toronto.

\$130 x
T00

Canada, Cobourg, Ontario, December 27, 1876.

On demand, for value received, pay to the order of F. Duncan one hundred and thirty dollars, which charge with or without advice to WILLIAM HENDERSON, Manager.

To the Bank of Toronto, Toronto.

Indorsed F. Duncan, pay James and Philip Brown, or order, for collection for account of Wright's Exchange Bank, Buffalo, N. Y., and commission.

JAMES & PHILIP BROWN.

To these *Cummings* refers as proof of the truth of his story, while *Devinney* stoutly denies any knowledge of these documents. This defendant in the witness box, and the learned counsel who acted for him, saw how inevitably these documents must compromise the defendant, if he were in any way connected with them, and so the position was taken that the evidence of *Cummings* was wholly manufactured, as also were these letters; and the defence was rested, not upon the proposition that these papers, if traced home to *Devinney* could in any manner be explained away but, on the verbal and documentary evidence being a fabrication of *Cummings*. These letters are directed to "*F. Duncan*." This, it is alleged, is the name that, by the arrangement made to conceal his whereabouts *Cummings* was to use during his absence. The handwriting in these letters when compared with that of *Devinney* bears a strong resemblance to it. The defendant was put to this test—portions of these letters were read to him, and from this dictation he wrote at the time of his examination some words which, I think throw much light on this question. I was not surprised to find the words "buisness," "aggreed," "untill," and other words so spelled; but it is remarkable that on both occasions the word telegram was spelled "telegraphm"—and that the word watching was spelled "WatChing."

1878.

The Queen
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Judgment.

1878. }
 The Queen }
 Ins. Co. }
 v. }
 Devinney.

These peculiarities cannot, I think, be overlooked in forming an opinion as to who was the writer of the letters. The evidence of the bank clerk tells very strongly also against the defendant. He remembered *Devinney* coming to the bank, and buying the draft for \$130. He remembered also that he asked him the Christian name of *Duncan*, and that he could only give him the initial letter. The use of the name "*Duncan*" in the draft would have to a certain extent involved *Devinney* with the letters in which the same name was used, and so it was, as a matter of precaution, necessary to deny all knowledge of this draft. But the clerk was entirely unshaken in his cross-examination. He produced the requisition for the draft. He accounted for all the other requisitions. He remembered the occurrence. He recognised *Devinney* as a customer of the bank whom he knew, and proved conclusively that on the 27th of December *Devinney* applied for a draft; that he had it made payable to the order of "*F. Duncan*"; that (as the full Christian name was not settled between *Cummings* and *Devinney*) *Devinney* furnished him with all that *Cummings* had given him—the initial letter. The clerk in the Post Office Department proved that on the 9th and 27th of December, 1876, registered letters were sent from the post office to "*F. Duncan*;" no person but the defendants knew that *Cummings* was going to take the name of *Duncan*; and it was not, even in argument, attempted to be shewn any source from which these letters and this draft could have come, if not from *Devinney*.

Judgment.

I think that, in the first instance, *Cummings* did not know of any circumstance to connect *Devinney* with the origin of the fire; that he artfully made such representations to *Devinney* that the latter suspected he had information, which, if used against him, would be fatal to his claim for the insurance money, and might end in criminal proceedings being taken against him; that *Cummings* so worked on him that he at length made a confidant of him, and arranged to buy him off and send him out

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of the country; that the co-defendant, the brother-in-law assisted in the scheme; that a considerable sum of money was then paid *Cummings*; and subsequently further sums including the \$130; that *Cummings* was to assume the name of *Duncan*; that under this name *Devinney* corresponded with him, and ultimately *Cummings* returned to Canada, and gave the Insurance Company the information to which he deposed when in the witness box. There are so many circumstances which sustain the evidence of *Cummings* and entirely negative the statement of *Devinney*, that I cannot but believe the story of *Cummings* and conclude that *Devinney* did burn down the premises in question; and that he paid the money to *Cummings* to buy his silence. It is not a case in which any theory for the defence has been set up, but the position has been distinctly taken, and the defence is rested on the falsity of the evidence of *Cummings*. There were no dealings between *Devinney* and *Cummings* to account for the payment of the moneys received; and therefore it was that the defendant's only ground of defence rested on the denial of the payment by him. This then is a case in which the defendant having burnt down his house presents a claim to the insurance company, which, after some delay and an investigation, of such facts as they could ascertain connected with the case, and on the representations by *Devinney* of his good faith in the matter, they pay him a portion of his claim and accept a release in full. The defendant now resists the claim of the Company for repayment of this amount; first, by denying any fraud on his part; and secondly, on the ground that the claim having been compromised by the company, the amount paid cannot be recovered back. This is not the case of the compromise of a doubtful claim. *Devinney* could have had no doubt, but that he had no claim against the Insurance Company, excepting that which might arise from a sense of gratitude in their not setting matters in motion to send him to the peni-

1878.

The Queen
Ins. Co.
v.
Devinney.

Judgment.

1878.
 The Queen
 Ins. Co.
 v.
 Devlinney.

1878. tentiary for arson. The question is, can a defendant, who, by an act of personal fraud has caused a state of matters which gives him an apparent claim against a plaintiff in pursuance of which a sum of money is paid retain it, when, promptly after the fraud has been discovered and before the position of the parties has been changed, proceedings are commenced to recover back the money thus obtained? I should have regretted to have found any authority which would have obliged me under such circumstances to have denied the plaintiffs the right to recover back money so paid. In *Goodman v. Sayers (a)*, Sir Thomas Plumer says, "There might be instances where a party paying inadvertently, while ignorant that a fraud had been committed on him, would not be precluded from investigating the matter before another tribunal." In *Brooke v. Mostyn (b)*, Sir George Turner uses the following language: "A compromise of doubtful rights between adult parties cannot, as I conceive, be set aside on any other ground [than fraud.] If there be no fraud, and equal knowledge, on both sides, the compromise cannot be disturbed; but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts, in the view of a Court of Equity, to fraud." Many of the cases bearing on this question are found in *Smith's Leading Cases*, Vol. 2, p. 405, under *Marriott v. Hampton*: and all through there are found expressions which favour the plaintiffs' right here. In *Milnes v. Duncan (a)*, Mr. Justice *Holroyd* says, "If the money had been paid after proceedings actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back." These two propositions laid down by Mr. Justice *Patteson*, in the *Duke de Cadaval v. Collins, (c)*, seem to be approved

Judgment.

(a) 2 J. & W. at 262.

(b) 2 Deg. J. & Sm. 378, 416.

(c) 6 B. & C. at 679.

of, "I admit in general that money paid under compulsion of law cannot be recovered back as money had and received; and further, when there is *bona fides* and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." In *White & Tudor's Cases* Am. ed. 1877, p. 1675, under the head *Stapilton v. Stapilton*, there is a large number of English and American authorities collected. At p. 1724 there is this note: "Good faith and the existence of an honest doubt which is shared by both parties are, nevertheless not less essential to the validity of a compromise after suit brought than before."—*Wade v. Simeon (a)*, and in this instance it was held to be a sufficient answer, to a suit on such a contract that the plaintiff at the time of instituting the original proceedings, and thence until the making of the promise in the declaration mentioned knew, that he had no cause of action against the defendant. Various grounds were assigned for the judgment; but the true reason seems to have been given by Chief Justice *Tindal*, "that it is *contra bonos mores*, and certainly contrary to all principles of natural justice, that a man should institute proceedings against another when he is conscious that his demand is without foundation." The same principle seems to underlie the American decisions; that which prevents a compromise or settlement binding when attacked is, as stated in one of the cases, where "the facts now newly discovered by the defendants had been known to the plaintiffs at the time of the compromise, and had been designedly concealed by them; or if they had been personally implicated in relation to them."—*Boston v. Ocean Ins. Co. (b)*. See also *Hartford v. Matthews (c)*, *Mutual Ins. Co. v. Wagner (d)*.

I think the plaintiffs are entitled to a decree for

(a) 1 C. B. 610; 2 C. B. 548.

(c) 102 Mass. 221.

(b) 4 Met. 274.

(d) 27 Barb. 354.

1878. repayment against the defendant *Devinney* with interest and costs of suit. I see no ground for relief against *Stollery*. He is sufficiently mixed up in the matter, however, to prevent him getting costs.

The Queen
Ins. Co.
v.
Devinney.

RICHARDS v. CHAMBERLAIN.

Mortgage—Mechanics' lien—Advances from time to time.

The owner of land created incumbrances thereon for \$20,000 to be advanced from time to time as certain buildings, then in course of erection thereon, were proceeded with:

Held, that a mechanic who had performed work upon the buildings and supplied material therefor, was not entitled to any lien in respect thereof in priority to the mortgage, although part of the mortgage money was advanced to the mortgagor after the execution of the work, in respect of which such lien was claimed, but without notice of such claim.

Statement.

The bill in this case was filed by *Henry Richards* and *Alfred Richards* against *Charles Chamberlain* and *The Trust and Loan Company of Canada*, setting forth that *Chamberlain* was owner of a certain parcel of land and premises in the City of Toronto, and particularly described in the bill, upon which he had lately erected several dwelling houses; that the plaintiffs, were plumbers, and had contracted with *Chamberlain* to perform all the plumbing and gas-fitting, and supply all the materials for such work, in and about said buildings for \$900; any extra work and materials to be paid for at regular trade prices; and that they had completed their contract on the 13th of November, 1877, and had performed extra work, and supplied material outside thereof to the value of \$62.43, and nothing had been paid to them on account of their demand; and the plaintiffs submitted they were entitled to a lien upon the said houses and land for their demand, and prayed relief accordingly.

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The bill further stated that the defendants *The Trust and Loan Company* held several mortgages made by *Chamberlain*, amounting in all to \$20,000, and registered in May, 1877, part of the moneys secured thereby having been advanced by the company after the lien of the plaintiffs had attached, of which the company were cognizant.

1878.
Richards
 v.
Chamberlain

The defendants *The Trust and Loan Company* answered the bill denying all notice, actual or otherwise, of the claim of the plaintiffs until after the company had advanced to the amount of \$19,816 25.

The cause came on to be heard by way of motion for decree as against the defendants *The Trust and Loan Company*.

The bill was taken *pro confesso* as against the defendants *Chamberlain*.

Mr. *McArthur*, for the plaintiffs, submitted that the plaintiffs were entitled to a lien on the property in priority to the claim of *The Trust and Loan Company* for all moneys advanced subsequent to the placing of the work and material of the plaintiffs on the houses.

March 6th.

Mr. *Marsh*, contra. The lien of the plaintiffs can only attach on the interest of the owner in the estate, and it must therefore be a subsequent charge to a prior mortgage; unless a case is made out as coming within the 7th section of the Act, and upon the authority of *Douglas v. Chamberlain* (a) such a case is not established; and even that section does not apply to a case like the present where money is advanced on the property as improved; but only to a case where the whole mortgage transaction is completed, and then the improvements are made. Here the money was advanced from time to time, the mortgages being really in the nature of a continuing security; and each advance was in effect a fresh mortgage. The company are in fact

Argument.

(a) Ante p. 288.

1878. purchasers *pro tanto* for value without notice; and each advance was made not on the lands only, but on the buildings and lands. They are also within the protection of the registry laws, as they registered their mortgages before the claim of the plaintiffs arose, and advanced their money without any notice thereof. The fact that the company knew that the buildings were in the course of erection cannot possibly be construed into a notice of any lien.

Richards
v.
Chamberlain

March 27th. SPRAGGE, C.—This is a Bill under the Mechanics' Lien Acts, by contractors with the owner of certain land, upon which buildings are now erected, against the owner and a mortgagee. The mortgages, four in number are each for \$5,000, all bearing the same date, 2nd May, 1877, and were registered on the 5th of the same month. The buildings were in course of erection at the date of the mortgages. The mortgage money was not advanced at the date of the mortgages, but as the Bill and answer both state, was advanced from time to time during the progress of the erection of the buildings. The answer states the sum advanced to be \$19,816.25, and that the same was without actual or any notice of the plaintiffs' claim or of the plaintiffs' rights if any in the premises.

Judgment.

The plaintiffs' contract with the owner was to do the plumbing and gas-fitting work, supplying materials, the price being \$900; they claim that the work is done and that they are entitled besides, to \$62 for extra work. The plaintiffs do not allege when their contract with the owner was entered into, or when their work was commenced; they allege that it was completed on 13th Nov. 1877. The bill was filed on the 15th of the same month, and the answer of the mortgagees on 21st Jan. following. The answer states that the advances were made from time to time as the work progressed in good faith, upon the security of the lands and the buildings so erected thereon having in them the work and material

in the Bill mentioned; and the mortgagees allege that they would not have advanced upon the security of the lands alone, so large a sum of money as they actually did advance.

1873.

Richardson
v.
Chamberlain

The Bill alleges that some portions of the mortgage moneys were advanced to the owner of the land after the plaintiffs' lien had attached adding, which is denied by the answer, "of which the said company (the mortgagees,) were aware."

The plaintiffs claim under sec. 4, of the Act of 1874. That section relates to mortgages, "existing or created before the commencement of the work, or of the placing of the materials or machinery upon the land;" and the first question is, whether this section applies to the case of mortgages made after the commencement of buildings, and while they are in progress. Going back to sec. 2, we find that "every mechanic, &c., doing work upon or furnishing materials to be used in the construction of any building * * * shall by virtue of being so employed or furnishing, have a lien." To apply these provisions to the circumstances of this case, we see upon the pleadings, that the buildings were in progress when the mortgage was given, that mortgage moneys were from time to time advanced while they were in progress; and that some of these advances were, before the plaintiffs commenced work or did any act which gave them a lien; for so I interpret the allegation in the Bill that some portions were advanced after their lien attached. It is not necessary to determine that sec. 4 does not apply to such a case. It would seem from its phraseology to have been intended primarily at least, to meet the case of a mortgage upon vacant land, and of buildings erected upon the land afterwards; but it may apply to the case of work, commenced as in this case after the creation of the mortgage upon a building in course of erection at the date of the mortgage being given. Assume that it does so apply, the argument for the plaintiffs is, that the mortgagees saw this work being done, and the materials

Judgment.

1878.

 Richardson
 v.
 Chamberlain

for it furnished by them, and must be taken to have known that thereupon a lien attached in favour of the plaintiffs; and should have seen to the application of their further advances, *i.e.*, should have paid the plaintiffs, or have seen that the owner of the land did so. But this would be holding the mortgagees to a very strict course; would be holding them bound to be very vigilant, while they, the contractors, the parties to receive the money, were very supine. By the registration of the mortgages they had notice of their existence; and from the allegations in the bill as to the advances from time to time, I infer that they were not uninformed that the moneys were to be so advanced. Yet they took no steps for their own protection. They might, under the Act of 1873, have registered a statement of claim before or during the progress of their work. The effect given to such registration is, that the person registering is deemed a purchaser, *pro tanto*, and is within the provisions of the Registry Act.

Judgment.

There is also a clause in the Act of 1874 which has a bearing upon their case. Sec. 5, runs thus: "All payments made in good faith by the owner to the contractor, or by the contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before notice, in writing, by the person claiming the lien, shall have been given to such owner, contractor, or sub-contractor, as the case may be, of the claim of such person shall operate as a discharge, *pro tanto*, of the lien created by this Act," (provided such payment be not made for the purpose of defeating a lien).

This does not apply in terms to the case of advances by a mortgagee, but is material in this, that parties having payments to make are not affected with notice of a lien from the mere fact of knowing that work is being done, or materials furnished. The ordinary course is to pay for work to the party with whom the contract is made for doing the work and this pay can only be intercepted by notice in writing by the claimant of

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the lien. The spirit of this provision applies with as much force to the case of these mortgagees, as it does to the several persons enumerated in the Act, and is all important in the principle involved in it that a payment is a good payment although there be a lien, unless the claimant of the lien, give notice in writing to the party, who but for the lien would be entitled to receive payment.

The plaintiffs' bill is based upon this, that the mortgagees paid, *i. e.*, advanced to the "owner" moneys which, to the extent of \$962, they ought to have paid to them and they ask that they be decreed to pay that amount over again. In my opinion they have no claim legal or equitable to the relief they ask for.

The Bill is dismissed with costs as against *The Trust and Loan Company*.

SOLICITORS.—*Crowther, Tilt, and McArthur*, for the plaintiffs; *McDonald and Patton*, for the defendants *The Trust and Loan Company*.

1878.
R chards
Chamberlain

Judgment.

ROBSON V. ARGUE.

Mortgages—Lis pendens.

L. created a second mortgage after a bill had been filed to foreclose a prior incumbrance on the same land.

Held, that the mortgagee in such second mortgage took subject to the *lis pendens*, even though service of the bill had then not been effected; and a bill filed by him to redeem the prior incumbrancer, after a final foreclosure in such suit, was dismissed with costs.

The bill in this cause was filed 23rd August, 1875, by *John J. Robson* against *Henry Argue* and *John Crickmore*, setting forth that by indenture bearing date 30th November, 1867, and made between one *Joseph Little* and wife of the first and second parts, and the plaintiff of the third part, the plaintiff was mortgagee of certain lands; being lot No. 10, in the 3rd concession of the township of Manvers, for securing \$400 and interest,

1878. which was duly registered 21st December, 1867, and that no part of the principal or interest had been paid.

Robson
v.
Argue.

The bill further alleged that on the 15th of March, 1865, *Little* and his wife had executed a mortgage on the same premises in favour of the defendant *Crickmore* for securing a sum of \$400 and interest, and that *Crickmore* on the 30th of October, 1867, filed a bill to foreclose his said mortgage; that plaintiff was not made a party to such suit, either by the bill or by proceedings in the Master's office; neither did he receive the usual or any notice of the decree made in that suit, in which on the 14th of January, 1869, a final order of foreclosure was obtained.

The bill further stated that in January, 1860, *Joseph Little*, and his wife joined in creating a mortgage on the south half of the said lot in favour of one *John Little* for securing £298 7s, 4d., which security *John Little* on the 4th of June, 1866, assigned to one *Robert Dodds*, who filed a bill, and in May obtained a final order of foreclosure, to which suit the plaintiff and one *Edward Johnson* were duly made parties in the Master's office; and they, with the other defendants, were by such final order absolutely debarred and foreclosed from all right of redemption of in and to the said south half of said lot No. 10.

Statement.

The bill further stated that on the 17th of December, 1873, the defendant *Crickmore* conveyed the north half of the said lot in fee to the defendant *Argue*, who thereupon became the sole owner thereof, subject to the plaintiff's mortgage, and *Crickmore* received from *Argue* a mortgage of the same property to secure a portion of the purchase money.

The prayer of the bill was for payment of plaintiff's mortgage, interest, and costs, or in default foreclosure; or that plaintiff might be let in to redeem the mortgage to *Crickmore*, and that upon payment *Crickmore* should convey and assign the north half of the said lot to plaintiff; and for further and other relief.

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The defendants severally answered the bill, admitting substantially the statements thereof, but submitting under the facts stated, that the defendant *Argue* was entitled to the premises free from all claim or interest of the plaintiff.

1878.

Robson
v.
Argue.

The cause came on to be heard on bill and answer.

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

Mr. *Crickmore*, for the defendants.

SPRAGGE, C.—*Robson* and *Crickmore* were mortgagees from *Little* and wife, of lot 10, 8th concession Manvers. There was a previous mortgage by *Little* and wife of the south half of the lot. That half is not in question in this suit, but the north half only.

The mortgage *Little* to *Crickmore* is dated the 15th March, 1865. Defendant *Crickmore* says in his answer that plaintiff had notice by its registration; implying that its registration was prior in date to the mortgage to the plaintiff, but the date is not given in the pleadings in this suit. Judgment.

The mortgage *Little* to plaintiff is dated the 30th November, 1867, registered 21st December, 1867.—*Crickmore* filed his bill of foreclosure against *Little*, 30th October, 1867, consequently before the mortgage to plaintiff.

Plaintiff states that service of the bill was not effected before the execution of the mortgage to himself, but long afterwards; that *lis pendens* was not registered, and that he plaintiff was not made a party in the Master's office.

The bill alleges that proceedings were taken in the foreclosure suit, and that a final order for foreclosure was made 14th January, 1869.

From this it is to be inferred that service of the bill was effected *i. e.*, upon *Little* and wife the only defendants, and that it was after the execution of the mort-

1878. gage to the plaintiff. The bill says long after, but does not say that it was after the registration of that mortgage, if that would make any difference.

Robson
v.
Argue.

The conveyance was made by *Crickmore* to the defendant *Argue*, 17th December, 1873. Plaintiff now claims to be redeemed.

Crickmore offers himself to be redeemed, but does not state that *Argue* consents. *Argue* claims to hold his purchase, setting up the proceedings in the foreclosure suit and conveyance to himself, and at any rate if the plaintiff is not bound by those proceedings he claims in priority to plaintiff.

One question is whether the plaintiff purchased—i. e., took his mortgage, *pendente lite*—or whether there was no *lis pendens* by reason of the bill being at that date only filed—not served.

Upon that see *Tylee v. Strachan (a)*, *Myers v. Myers (b)*. The legal title to the half lot in question was in *Crickmore*; what was acquired by the plaintiff, was an equitable title. If *lis pendens*, it would not be necessary to make him a party, and he would be bound by proceedings in the foreclosure suit, and *Argue's* title would be absolute. If not, the question of priority arises between the plaintiff and the defendants—both defendants being represented by one counsel, Mr. *Crickmore*. The question is, does *Argue* insist upon holding his purchase, assuming that he is entitled. If he does, and if plaintiff is not entitled to priority, but still entitled to redeem another question arises: *Crickmore* is not in a position to restore his pledge, and is so by his own act. He cannot, of course, disappoint the plaintiff of his right to redeem without making it good to him. His right would be to retain and to hold the land against the mortgagor till redeemed by him. Nothing appears before me as to the value of the land. I must assume it to be of

(a) 1 Ch. Cham. 319.

(b) 19 Gr. 541.

sufficient value to answer both mortgages in the absence of anything to the contrary, and *Crickmore* having disabled the second incumbrancer from exercising his right to redeem, and to be redeemed over by *Little*, I do not see how I can do less than direct that he do what the mortgagor was bound to do, viz. pay the mortgage debt to the plaintiff.

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v.
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In this view of the case *Crickmore* would have priority as between him and the plaintiff. I think it reasonable to give him an opportunity to place himself in a position, if he can, to restore the pledge upon redemption, to the plaintiff, and I would give him, say, three months for that purpose.

Crickmore's position at the present time would appear to be—assuming that the plaintiff has a right to redeem—that under a misapprehension of his rights he dealt with the property as his own. It is not, I think, a case in which the doctrine of merger applies. He merely ignored the rights of the plaintiff in the belief that if they existed at all, they ceased to exist when the final order was made in the foreclosure suit. If this was a mistake, the only necessary, and I should say the only proper consequence would be that they stood unaffected by the proceedings in that suit, not that a *puisne* incumbrancer was thereby converted into a prior incumbrancer. Before the sale and conveyance to *Argue* there was nothing to work such a change. I have already dealt with the position of the parties after that sale and conveyance.

Judgment.

The position of the parties is shortly this:—The rights of the plaintiff as second mortgagee were or were not extinguished by the proceedings in the foreclosure suit. If they were, there is an end of his suit. If they continued to subsist, they subsisted as they were before—the priorities as before—then came the sale to *Argue* as to which I have nothing to add.

In the foregoing (written at my house when confined to it by illness) the case is dealt with in the several

1878. aspects in which it is presented by the pleadings, but lies after all in a very small compass. If there was *lis pendens* when the mortgage was made to the plaintiff, he is bound, though not made a party to the suit. That was the principal point decided in *The Bishop of Winchester v. Paine* (a), where, in the course of his judgment, Sir Wm. Grant remarked (b): "Ordinarily, it is true, the decree of the Court binds only the parties to the suit. But he who purchases during the pendency of the suit, is bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, suits would be indeterminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship upon those who purchase without actual notice, yet general convenience requires its adoption; and a mortgage, taken *pendente lite*, cannot be exempted from its operation."

Judgment.

There is not in this case the hardship adverted to as sometimes occurring, for the plaintiff had notice of *Crickmore's* mortgage by its registration, and his denial of notice of the suit is only that he did not receive notice.

"This is not the case of the legal estate acquired during the pendency of the suit, in which instance it might be necessary, in order to avoid it, to have recourse to a new suit; but this is a mere equity, to be pursued only in equity, and there it cannot be pursued with effect." (c).

Then the only question is was there *lis pendens*? There was but the one suit. That suit was commenced before the mortgage to the plaintiff, and resulted in a final order of foreclosure. How was it then not pending? The suggestion is that it was not pending

(a) 11 Ves. 194.

(b) At p. 197.

(c) S. C., at p. 198.

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because the bill had not, at that date, been served. There is no authority for that position. It might be that it would be out of Court under the orders of 6th February, 1865, if not served within the time thereby limited; but the suit was prosecuted to a decree, and it is to be assumed that there was a valid service. To see how that was, I have sent for the papers in that suit, and find that service was allowed under order 96. See *Taylor's Orders*, 92-96, p. 168.

The plaintiff is therefore bound by the proceedings in that suit, and his bill is dismissed, with costs.

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Robson
v.
Argue.

KIRCHHOFFER V. STANBURY.

Riparian proprietor—Grant reserving waters of a river—Description.

A grant from the Crown was made "exclusive of the waters of the river Trent, which are hereby reserved, together with the free access to the shores thereof for all vessels, boats and persons." *Semble* that this would operate as a reservation of the bed of the river, though the *waters* only are reserved: And therefore the erection of a dam in that river by persons claiming under the patentee, without authority, was an intrusion on the rights of the Crown.

Persons claiming under the patentee conveyed to the defendants a portion of the land granted by such patent "extending to the river," reserving the right to the grantors "to raise the dam one foot, and overflow accordingly."

Held, that the words of such conveyance purported to convey to the centre of the bed of the river; and that after the reservation of the right to raise the dam in the river, the grantors could not be heard to say that they had not the right to convey to the centre of the river.

Although a conveyance describing land as "extending to a river" extends to the centre of the bed of the stream, this does not confer on the grantee the right to use it as land uncovered by water may ordinarily be used: Therefore where the grantee under such a conveyance constructs a wall extending into the bed of the stream, the onus of shewing that such erection is not an injurious obstruction, is cast upon the party making it.

The grantee in a patent reserving the waters of a river running through the lands granted, has no right to file a bill complaining of an obstruction created in the river by other parties; the patentee

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In such case not having conferred on him the ordinary rights of a riparian proprietor; and where under such circumstances a bill was dismissed, it was without prejudice to a new bill being filed in the event of the Crown making a grant free from such reservation; and in that case the defendants being clearly in the wrong, although the parties complaining had not any right to sue, the Court in refusing the relief, did so, without costs.

This was a bill filed by *Nesbitt Kirchhoffer, James Cockburn, and Robert Cockburn*, against *Henry Stanbury and Barnet M. Frederick*, setting forth that the plaintiffs were owners of certain town lots, water lots, and premises, in the village of Campbellford, situate on both sides of the River Trent, in the said village, extending above and below the bridge across the said river, and certain mills, factories, dam, sluices, and mill privileges, all thereof situate on township lots Nos. 10 & 11, in the 6th concession of Seymour, which said lots had been conveyed in fee simple to the plaintiffs by the grantee of the Crown, one Major *Campbell*, in the year 1856; that the dam was situated in the river below the said bridge, and was put up in 1857 by the plaintiffs for the purpose of penning back and retaining the waters of the said river in order to improve the water-powers and privileges belonging to the plaintiffs; and subsequently strengthened, improved, and increased in height, so that in 1864 it had become and continued to be a permanent structure, extending across the river; that plaintiffs subsequently (December, 1854,) sold and conveyed a lot known as lot No. 1 on the east side of George Street, north of Bridge Street, and so represented on a plan of the property, to one *Milo A. Hawley*; that the plaintiffs did not sell or intend to sell and convey to *Hawley* any greater depth than such lot (No. 1) was represented on the plan to contain, *i.e.*, to the bank of the river Trent: the bed of the said river being at all times, other than very dry weather, full to its banks as represented on said plan; that shortly afterwards *Hawley* built on said lot (one) the rear wall of the structure, being placed

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on the rear limit of said lot, having an abutment of over a foot in thickness to protect the building from the current of the river; that during the months of July and August, 1868, the waters of the river were so low that the river receded from its west bank, and left a space in the bed of the river comparatively dry, extending a considerable distance from the easterly or rear boundary of the lot one towards the middle of the stream, upon which space the defendants, under some alleged leave or license from *Hawley*, commenced to build, and had jointly constructed thereon a large stone foundation for one or more buildings, and were about to proceed with and complete the same in such a manner as to have access thereto from the said bridge; that the effect of this structure was to fill up and contract the waters of the river from flowing in their natural course, and of diverting the water from the flumes of the weirs of the plaintiffs' mill, and materially injuring and destroying the said mill and water privileges, and that the plaintiffs had, as soon as they became aware of the commencement of such wall, forbidden the defendants proceeding therewith.

The prayer of the bill was, that the defendants might be restrained from proceeding with such buildings, and from continuing or allowing the said stone foundation and buildings to continue, and for further and other relief.

The defendants answered the bill setting up the sale of portions of the said town lot, one to the defendant *Frederick*, and another to the wife of the defendant *Stanbury*; submitting that *Mrs. Stanbury* should have been made a party, and insisting on the right of the purchasers from *Stanbury* to continue the construction of such wall, and the continued use thereof.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Cobourg, in the Autumn of 1868.

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v.
Stanbury.

Statement.

1878. Mr. *Strong*, Q. C., and Mr. *Armour*, Q. C., for the plaintiffs.
 Kirchhoffer
 v.
 Stanbury.

March 27th.

SPRAGGE, C.—I have taken up this case for the third time, having on two previous occasions, after entering upon its consideration, found that maps referred to in the evidence were not among the papers. The papers are still in that respect very defective.

The plan E (registered) of the water lots is not before me. I do not know whether it shews the water lots as extending from George Street eastward to the main stream, or to the minor stream between what is called the Island and George Street. Plan D, the registered plan of the village is not before me, a tracing of it is put in. It shews no island between George Street and the river.

The evidence refers to a plan shewing the dam, flume, and mill, or factory buildings, below the bridge. No such map is before me.

Judgment.

The evidence of *J. H. Dumble*, civil engineer, shews that consequences prejudicial to the plaintiffs would be the probable result of the erection of the walls put up by the defendants, for the staying of the erection of which, and for their removal so far as built, this suit is brought.

The position of the plaintiffs is a peculiar one. The patent to Major *David Campbell*, which is put in by the plaintiffs, is of land in the township of Seymour, "exclusive of the waters of the River Trent, which are hereby reserved, together with free access to the shores thereof for all vessels, boats, and persons." Not a very accurate mode of reservation—it would, however, probably operate though the *waters* only are reserved as a reservation of the bed of the river. The erection of the dam has been without any license from the Crown; what has been done in that way and in erections and using the waters as riparian proprietors has been

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without authority, and consequently an intrusion upon the rights of the Crown.

The defendants claim *ad medium filum aquæ*, and so assume that the plaintiffs had title to that extent, and for that reason it may be, do not deny the plaintiffs' title. On the other hand the plaintiffs upon their own shewing have it not, while they have contracted with the defendants as if they possessed it, and now sue in one of the Queen's Courts upon the footing of possessing it. Their bill is framed upon that assertion.

Have they a *locus standi* if their rights are only such as are granted by, and limited by their patent. No question is raised upon this point by either party, and I pass it for the present.

The plaintiffs claim under a conveyance from Major *Campbell*. The defendants through a conveyance from the grantees of Major *Campbell* to one *Milo A. Hawley*, dated 1st of January, 1865. The lot conveyed is described as "in the village of Campbellford, on the west side of the River Trent, in the township of Seymour, in the county of Northumberland, being lot one on the east side of George Street and north of Bridge Street, containing a frontage on George Street of sixty feet, south limit Bridge Street; north limit parallel therewith, extending to the river. Reserving however to the parties of the first part the right to raise the dam one foot, and to overflow accordingly."

By the plan put in George Street appears to run nearly north and south, and generally parallel with the river, and it is to be observed that the distance from George Street to the river is not given. Bridge Street is at about right angles with George Street. Upon the large map put in the space between George Street and the river is marked as a "Reserve." It is opposite some fifteen town lots on the westerly side of George Street. The lots between George Street and the river (of which this in question is one) are spoken of in the evidence as water lots, and I infer from the evi-

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v.
Stanbury.

Judgment.

1878. dence that they are depicted as such in some map of the village that is not before me.

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Stanbury.

As a general rule a conveyance of land in the terms of this conveyance "extending to the river," is construed to extend to the centre of the bed of the river. This has been established in many cases, and was fully recognized in a late case in the Court of Appeal, *Robertson v. Watson*. It lies upon the plaintiffs therefore to shew that the general rule does not apply to this case.

I think it probable from the conduct of the parties that all of them, plaintiffs as well as defendants, supposed that the land conveyed extended only to the bank of the river, but the bill does not make a case of mistake, and ask for its rectification; it assumes that the land conveyed as a matter of law upon the construction of the conveyance extends only to the bank of the river, and I by no means mean to say that a bill for the rectification of the conveyance would be sustained.

Judgment.

The map before me shews the river as the eastern boundary of the reserve, and the map shewing the water lots, I suppose I may assume shews the river as the eastern boundary of the water lots, as it certainly is the eastern boundary of the lot in question. If the conveyance had been of a farm lot, one of the boundaries being as this is "extending to the river:" or if the whole river frontage marked "Reserve" had been conveyed by the like description in each of such cases it would be clear, I think, that the conveyance would comprehend *ad medium filum aquæ*. I see no ground upon which I can hold that a conveyance of a village water lot should receive a different construction.

The plaintiffs cannot set up, that a conveyance *ad medium filum aquæ* was not theirs to grant, and that it is to be assumed that they were not doing that which would be an intrusion upon the rights of the Crown. Whatever weight might be attached

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to such position in the mouth of a defendant, it can be of no weight in the mouth of the plaintiffs. By the reservation of right to raise the dam contained in the conveyance to the defendants, they assert rights in the bed of the river, and farther; the position would be suicidal, for if they have not rights in the bed of the river they have no *locus standi* in Court.

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Stanbury.

The case then would stand thus: the plaintiffs conveyed to *Milo Hawley* a piece of land sixty feet wide, extending from *George Street* to the middle thread of the river, and *Hawley* became thereby a riparian proprietor, with the ordinary rights of a riparian proprietor as between himself and the plaintiffs, and the like rights have devolved upon the defendants by the conveyance from *Hawley* to them of a portion of this piece of land, and the question now is whether in what they have done they have exceeded what they had a right to do as riparian proprietors.

They had a right to use the land conveyed, while in their use of it, the maxim would apply *sic utere tuo ut non alienum laedas*. The right of the plaintiffs is to the use of the running water, and that the defendants should so exercise their rights in the land and in the water as not to prejudice them; this prejudice to another in the exercise of the right being with the qualifications expressed in *Wood v. Waul*(a), and other cases of that class.

Judgment.

What the defendants have done has been to erect brick or stone walls, built parallel with the river for the support of buildings over the water, not building any walls across the stream. There does not appear to be any "water-power" on the defendant's land, or that the erections of the defendants are with a view to the use of the water for manufacturing purposes, but that I apprehend makes no difference. The soil as between them and the plaintiffs belongs to them.

(a) 3 Exch. 779.

1878. and the only right of the plaintiffs is to the use of the water not improperly obstructed by the defendants in the exercise of their rights as *riparian* proprietors.

Kirchofffer
7.
Stanbury.

The rights of *riparian* proprietors in the bed of a stream were the subject of elaborate judgments in the House of Lords in the leading case of *Bickett v. Morris* (a). Lord Westbury in his usual clear and terse style defined them thus, "When, however, it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property, '*usque ad medium filum*,' it does not, by any means, follow that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used; but it must be used in such a manner as not to affect the interest of *riparian* proprietors in the stream. Now the interest of a *riparian* proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor." And he laid down as the proper rule the following, "that even though immediate danger cannot be described, even though the actual loss cannot be predicated, yet if an obstruction be made to the current of the stream that obstruction is one which constitutes an injury, which the Courts will take as notice of an encroachment which adjacent proprietors have a right to have removed."

Judgment.

Lord Cranworth said, "The appellant contended that as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think

(a) L. R. 1 Sch. Appi. 47.

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that this is a true exposition of the law. Rivers are liable, at times, to swell enormously, from sudden floods and rains, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so as to divert or obstruct its natural course."

The Lord Chancellor, Lord *Chelmsford* quoted with approval the opinions of the Scotch Judges whose decision was before the Lords upon appeal. At page 55 his Lordship says:—

"The result of the opinions of the Judges of the Second Division appears to be, that a riparian proprietor has no right to erect any building *in alveo fluminis*; and if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial, but of a substantial description it must, always involve some risk of injury. Lord *Benholme* said, 'Without my consent,' (*i. e.* the consent of the proprietor of the other side of the river,) 'you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result no human being with certainty knows, but it is my right to prevent your doing it; and when you do it, you do me an injury, whether I can qualify damage or not,' and Lord *Neaves* said, 'Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question.' These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of a river have a common in-

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v.
Stanbury.

Judgment.

1878. *Kirchhoffer v. Stanbury.* terest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water."

And he thus defines the position of the parties, "In this case mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences, upon the principle of *sic utere tuo ut alienum non laedas*. But any operation extending into the stream itself is an interference with the common interests of the opposite riparian proprietor, and therefore the act being *prima facie* an encroachment, the onus seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction."

Judgment. The onus being upon the defendants to shew that what they have done is not an injurious obstruction—injurious that is, in the sense in which an obstruction in the bed of a stream may be injurious, as put by Lords *Cranworth* and *Westbury*, as well as by the Chancellor; have they shewn that it is not so injurious? The evidence has been given as if the onus was upon the plaintiffs instead of the defendants, and but little evidence upon the point has been offered by the latter. To put the evidence upon this point, at the lowest, it is shewn that, to say nothing of present injury, prospective injury is at least probable; drift-wood, logs, and ice accumulating against these walls is the danger pointed at. The answer to this that if they do not accumulate there they would accumulate against the bents of the bridge just below, is not a good one, especially in view of the fact that if the bridge were constructed of one span, as Mr. *Ramsey* suggests it might be; the walls in question would be the only obstruction to the free passage past of these drifts. The case as a

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case of at least probable injury is in my opinion brought within *Bickett v. Morris*.

I have referred at some length to this case as now the leading one upon this point. It was preceded by some other decisions in the same direction, among which are *Sampson v. Hoddinot*, (*a*), and *Embrey v. Owen* (*b*), and has been followed by Lord *Norbury v. Kitchen* (*c*), and other cases, most of which were referred to in *Beamish v. Barrett*, in appeal (*d*).

In dealing with this matter I have taken it as proved that there is a natural flow of water where the walls in question are built. I deal with the matter with less certainty from the absence of the maps which are constantly referred to in the evidence. Still, looking at all the evidence that is before me, I think it must be so; and I am confirmed in this from a piece of evidence given by *Milo Hawley*. He says, that Mr. *Robert Ackman* told him he might build walls parallel with the stream (as he says he has done), but not across the stream. This evidence was given in order to shew license. It implies that there was a stream of water in which, or partly in which the walls were built.

One witness has an idea, which I do not find shared in by any others, that the water in which these walls are built is not fed by the River Trent, unless indeed artificially, but has or had its source elsewhere, but this was not urged in argument, and is probably a mistake.

As far as I can make out from the evidence, and from the small and imperfect maps that are before me, the part of the river in question flows through two channels, which are divided by a narrow strip of land which is sometimes submerged; the main channel flowing to the east of the strip of land, and a very much smaller stream forming the head-race of the plaintiffs'

(*a*) 1 C. B. N. S. 599.

(*c*) 15 L. T. N. S. 501.

(*b*) 6 Exch. 369.

(*d*) 16 Gr. 318.

Kirchhoffer
v.
Stanbury.

Judgment.

1878.
Kirchhoff
v.
Stanbury.

mills flowing to the west of it, and that it is in the waters of this smaller channel that the walls complained of have been erected.

The plaintiffs in the frame of their bill have, as it appears to me, misconceived their position. The position taken by their bill is, that the description in their conveyance does not extend beyond the literal banks of the river—not to the middle of the stream. But it appears to me to make no difference in the cause; because taking them to be wrong, as in my opinion they are, and taking it that the conveyance operates to the conveyance of land to the middle of the stream, *i.e.*, to the middle of the main channel of the river, the defendants have made erections in the bed of the stream which under *Bicket v. Morris* are an encroachment upon the rights of the plaintiffs.

Judgment.

I have stated what I conceive to be the rights of the parties as between themselves, or rather what would be the rights of the plaintiffs as against the defendants, if the plaintiffs had the ordinary rights of riparian proprietors in the bed of the river, but I cannot see my way to getting over the difficulty created by the reservation contained in the patent to Major *Campbell*. If it could be said that the waters, not the bed of the river, are reserved, it would not better the plaintiffs' case, because it is an obstruction to the flow of the waters of the river that is complained of by the plaintiffs.

But for that difficulty I should have directed the issue of a mandatory injunction for the removal, but I should have made the decree without costs to either party. I should not give costs to the plaintiffs because they fail upon the case really made by their bill, and by the absence of maps which ought to have been before me, have disabled me from disposing of the case with that certainty as to the facts, which if the maps were before me I should, I suppose, possess. I should give no costs to defendants, because as between them and the plaintiffs they are in the wrong.

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The bill should be dismissed for the reason that I have stated, but being dismissed for that reason it should be without prejudice to their filing a new bill in the event of their obtaining from the Crown a grant free from the reservation contained in the patent to Major *Campbell*.

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The dismissal of the bill is without costs.

PATTERSON V. KINGSLEY.

Fraudulent preference—Chattel mortgage—Equitable assignment.

A debtor had executed several chattel mortgages to secure indorsers of his paper, and afterwards a power of attorney to their appointee to sell and pay the mortgage debts. The validity of the mortgages under the Act for the registration of chattel mortgages was disputed and not decided, it being,

Held, that the power was in effect an equitable assignment; that the transaction was neither a mortgage nor a sale; that the instrument did not require registration; and that it was a valid assignment under the Insolvent Law, on the ground of having been executed to give effect to what was intended by the mortgages as understood by the parties thereto.

This was a bill by *William John Patterson* (official assignee) against *William Kingsley, Thomas A. W. Gordon, Charles Kay, James Watt, Hugh McQueen,* and *Joseph Thompson*, praying to have the chattel mortgages in the pleadings mentioned declared invalid as against the creditors of *James Simpson*, on the ground that the same were not duly re-registered according to the provisions of the Statute in that behalf, and that an assignment might be declared null and void as against the creditors of said *Simpson*; that an account might be taken of the estate and effects come to the hands of the defendants or any one on their behalf under the said assignment; and pay-

1878. ment of the amount found due to the plaintiff for the benefit of the estate of the said *Simpson*, who had, since the execution of those documents, become insolvent.

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The facts appear in the judgment.

Mr. *Attorney-General Mowat*, for the plaintiff.

Mr. *Ferguson, Q. C.*, for the defendants.

SPRAGGE, C.—This is a bill by an assignee in insolvency to set aside three several chattel mortgages to secure the sum of \$500 each, given by *Simpson*, the insolvent, to the defendants or some of them, and an instrument of 1st April, 1874, in the shape of a power of attorney to *Kingsley*.

Judgment. Formal objections are taken to the three mortgages, *i.e.*, for irregularities. The first is dated 5th February, 1873, and is to *Gordon & Kay*. The second is dated 23rd March, and registered 1st April, so not within five days as required by statute.—Consol. Stat. U. C., p. 452, s. 1. The third mortgage has been satisfied by sale by the mortgagees of chattels, but if the mortgages are not regular the mortgagees may have to account. These mortgages are not impeached by the bill, as void under the insolvency law, but as invalid securities on grounds set out in the bill. The instrument of 1st of April, is impeached as void under the insolvency law, and also as an invalid instrument.

What is the real nature of that instrument? It is in form a power of attorney given by *Simpson* to *Kingsley*, describing the attorney only as of such a place, Esquire. *Kingsley* was in fact agent of the Merchants' Bank at Fergus. The paper on which *Simpson* was primarily liable was held by that Bank, and the other defendants were indorsers; *Kingsley* had pressed for payment or reduction, though satisfied with the security of the indorsers. The indorsers themselves were dissatisfied, bearing that logs and lumber were sold by *Simpson* which had been mortgaged to them, and they wished this in-

strument given; and it was drawn it would seem by their solicitor, who got it executed by *Simpson* and carried it to *Kingsley*; and *Watt*, one of the creditors, and *Kingsley* acted upon it. It appoints *Kingsley* to be "my true, lawful, and irrevocable attorney until the second of the trusts hereinafter mentioned is fully and completely performed; for me, and in my name, place and stead, to take and retain possession, &c., of saw mill, logs, lumber," &c. There are several trusts expressed. The second is, "in trust to pay off all and every claim or claims that the Merchants' Bank of Canada may have against me, whether now due or hereafter accruing due in respect to advances made to me by the said Bank, heretofore and up to the date of these presents." Was the Merchants' Bank a *cestui que trust*? If so, was it not an equitable assignment in trust? Was it an instrument of management revocable, though expressed to be otherwise? It seems more than an instrument of management. *Kingsley* was more than an agent of *Simpson*. He was already the agent of the Bank. Further, the application of the funds to the second trust would necessarily enure to the benefit of the indorsers, and they more than had notice and assented, for the thing itself was done with their procurement. See *Story's Equity Jurisprudence*, sec. 1014, treating of choses in action.

Such is the instrument and such the surrounding circumstances, *i.e.*, the circumstances under which and to whom it was given.

I incline to think that this instrument is an equitable assignment, though the word assign, or transfer, or any equivalent expression is not in it; and clearly it is not necessary that it should be. Then is it a "mortgage or conveyance intended to operate as a mortgage," to bring it within the Act. Or is it a sale within the 4th section of the Act? This is material, because what is required by the Act was not complied with. Not a mortgage of the chattels, *i.e.*, not of the saw logs and

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1878. lumber, for they were not to be redeemed. They are the only chattels:—the machinery *semble* not chattels.

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Was it a sale of these things to *Kingsley*? *Semble*, not. He was an agent, a trustee to sell, a trustee for *Simpson*: *Semble* also for the Bank and for *Simpson's* indorsers, but there was no sale to him; *Kingsley* was not purchaser or "bargainee;" the latter is the word in the Act.

If this be so the instrument is not within the Act, and so is valid unless impeachable under the Insolvency Law. If impeachable under the Insolvency Law the indorsers are thrown back upon their chattel mortgages.

It was not argued that the indorsers are not entitled to the benefit of the trusts of the instrument.

If these queries are answered in favour of the defendants, as in my opinion they must be, was this dealing void under the Insolvency Law. If not it is not necessary to go back to the chattel mortgages: If yea, it is necessary to go back to them.

Judgment.

A question is made whether the second mortgage, which was of horses, waggon, and harness, was an act of insolvency as putting an end to the further carrying on by *Simpson* of his business. I incline to think not. It was a mortgage not a sale; the articles remained in *Simpson's* possession, who continued to use them in his business, and it does not appear that these comprised the whole of the articles of the same kind used by *Simpson* in his business.

Then what was *Simpson's* position and business standing at the time of the giving of this instrument, 1st of April, 1874?

He had sustained a heavy loss by the burning of his mill on or about the 14th of February, 1873, and the stoppage of his business during its re-erection. The first two chattel mortgages were given before the burning of the mill, the other two afterwards. But little work was done at the restored mill until early in the spring of 1874. When the chattel mortgages were given.

there were at the mill logs and lumber of about the value of \$4,000. I think from the evidence and their enumeration in the chattel mortgages that sum is not an over-estimate. When the instrument of 1st of April was given the logs and lumber then at the mill were of somewhere about the same value; perhaps not quite so much, but the difference was not great; there were also at the mill, horses, waggons, sleighs, and such like appliances, for carrying on business. He had debts due to him of the nominal value of about \$1,100; their real value probably considerably less; some few store goods and some furniture. He had also a farm worth from \$1,500 to \$2,000, and there was the mill estimated to be worth \$10,000, but which was sold for less than the incumbrance upon it. I believe from the evidence that it was honestly valued by *Simpson* and his indorsers at some \$2,000 or \$3,000 beyond the incumbrance. For the present I put the mill and the incumbrance upon it out of the case. *Simpson* owed the Bank, the defendants being his indorsers, about \$3,300. Of general debts, he owed about \$1,350, and to one *Abell* for machinery, the cost of which was \$2,400, a balance of about \$1,400 as I understand from the evidence of *Gordon*. A portion of this debt was to be taken out in lumber. Two of his creditors had pressed him for payment, one soon after the burning of the mill, and one had sued him; the amount of these debts is not shewn in the evidence.

The occasion of giving the instrument of April, 1874, is thus explained. The indorsers believed, and to some extent with reason, that *Simpson* after commencing work at the restored mill was not applying the whole of the proceeds of lumber sawn from logs comprised in their chattel mortgages to the reduction of the debt at the Bank; and *Simpson* in his evidence says, that of logs got in December, January and February, a few were paid for in lumber sawn at the mill from logs comprised in the two first chattel mortgages. The Bank manager was not satisfied at the notes not being reduced, and complained

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1878. to the indorsers, and they complained to *Simpson* of the proceeds of the sawn lumber being diverted as they conceived to other purposes than the reduction of the Bank debt.

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Hence the instrument of April. It was to ensure the proceeds of lumber not being diverted from their proper channel, and not as I am satisfied to defeat other creditors. The Bank agent required the chattel mortgages to be given before he would make advances on the notes, and it was the view of the indorsers and of the Bank agent, acquiesced in by *Simpson* himself, that he was bound to apply the proceeds of lumber sawn from the mortgaged logs to the reduction of the Bank debt.

Judgment. The Attorney-General impeaches the instrument of April as null and void under sec. 89 of the Insolvent Act of 1869. That section enacts that "if any sale, deposit, pledge, or transfer, be made of any property real or personal by any person in contemplation of insolvency by way of security for payment to any creditor * * * whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, &c., shall be null and void." Under this section two things must concur—what is done by the debtor must be in contemplation of insolvency, and the creditor in whose favour it is done must thereby obtain an unjust preference over the other creditors.—*Hunt v. Mortimer* (a). Looking at the state of *Simpson's* affairs at the time, and the circumstances under which the instrument in question was made, I think the proper conclusion is, that it was not made in contemplation of insolvency. *Simpson* had been unfortunate in the destruction of his mill by fire, and again in delays in its restoration; but at this time it was going again, and it would be hard to say that the prospect before him was inevitable, or even probable insolvency. He had, I should say from the evidence, a *bond fide* hope and expectation that his

(a) 10 B. & C. 44.

starting afresh in business would not end in insolvency. 1878.
See *Gibson v. Boutts* (a).

I have considered whether section 86 might possibly not apply, but I think that the defendants neither knew of any inability, nor had probable cause for believing in the inability of *Simpson* to meet his engagements, and that no such inability was public and notorious, nor do I see from the evidence any reason to conclude that *Simpson* believed in such inability himself.

There is also a distinct principle upon which I conceive this transaction may be sustained. It is founded upon the chattel mortgages given by *Simpson* to the defendants; and the principle applies whether they were at the time valid securities or not. In the valuable treatise of Messrs. *Griffith* and *Holmes*, founded on Mr. *Archbold's* book on the law of Bankruptcy, the principle is thus stated: Speaking first of a return by a trader of goods sent to him, they say, p. 431: "If there be a precedent duty, either by contract or otherwise, to make an assignment or return of the specific goods to the creditor, such an assignment or return can never be construed to be a fraudulent preference." For this several cases are cited which are most of them cases of trust. The learned writers proceed, "Or even if the debtor believe that he is under a legal obligation to assign, though such belief be not well founded, evidence of this will suffice to rebut the presumption of fraudulent intent," and for this *Bills v. Smith* (b) is cited, which fully bears out the principle stated. I quote another passage from the same treatise, p. 1097: "If there is any contract to give security to a given creditor, or anything in the nature of a duty pre-existing, then the mere fact of impending bankruptcy will not render it fraudulent."

Harris v. Rickett (c), proceeded upon that principle.

(a) 3 Scott, 229.

(b) 84 L. J. Q. B. 63.

(c) 4 H & N. 1.

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1878. The bankrupt had executed a bill of sale of all his property, which being for an antecedent debt was *prima facie* an act of bankruptcy, and therefore void. But it appeared that the bill of sale was given in pursuance of a promise that it should be given when the debt was contracted, and the bill of sale was therefore held not to be an act of bankruptcy. *Hutton v. Crutwell* (a), referred to in that case, was decided upon the same ground.—See also *Allan v. Clarkson* in this Court (b).

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Judgment.

In the case before me the two \$500 notes were made to raise money for the purchase of logs; this was before the fire. The notes amounting in the aggregate to \$1,500, were given after the fire to assist *Simpson* in rebuilding. There was therefore a propriety in the indorsers being secured, as it was intended that they should be, and as was required by the Bank agent, upon the logs and lumber; and it was to secure them that the chattel mortgages were executed. When the instrument of April was executed it was assumed by all parties that the chattel mortgages were in force. The agreement was that the logs should be sawn into lumber and the lumber be sold for the benefit of the indorsers. *Simpson* had no right to use the lumber for any other purpose. A trust attached to it to use it for that purpose as in the class of cases referred to in Messrs. *Griffith and Holmes* book (p. 431), and it was to insure the carrying out of that agreement that the instrument of April was executed. That instrument, given under the circumstances, did not in my opinion give an unjust preference to the indorsers over the other creditors of *Simpson*.

It may be that the chattel mortgages were not, or that some of them were not in April, 1874, valid securities under the Chattel Mortgage Acts. I do not think it necessary to examine whether they were so or not.

(a) 1 E. & B. 15.

(b) 17 Gr. 570.

Assuming that they were not, I think the instrument of April, 1874, was not impeachable by the assignee. 1878.

I will refer to only one of the cases cited in the argument upon the validity of the chattel mortgages, that of *Walker v. Niles* (a), decided by the late V. C. Mowat, and which the learned Attorney-General thought might be open to question. Upon reading the case I noted in my book that I thought it rightly decided, and I find that the Court of Queen's Bench, in a very recent case, *Barber v. Maughan* (b), has come to the same conclusion, preferring the decision to the opposing decisions in the Common Pleas of *O'Halloran v. Sills* (c), and *Reynolds v. Williamson* (d).

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I do not know whether the plaintiff desires an account in order to see whether the defendants, the indorsers, have been overpaid. They quite properly submit to account for their dealings with the property while in their hands or the hands of *Kingsley*. The defendants are in any event entitled to their costs up to the hearing. If the plaintiff desires an account further directions and subsequent costs will be reserved. Judgment.

(a) 18 Gr. 210.

(b) 42 U. C. R. 189.

(c) 12 C. P. 451.

(d) 25 C. P. 49.

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JOHNSON V. SOVEREIGN.

Lost deed, evidence of—Defect of title—Prowling assignee—Cloud on title.

Lands had been sold pursuant to an order of this Court in a proceeding (under the 12 Vic. ch. 72,) for the sale of infants' estate; and the purchaser thereof sold and took back a mortgage for purchase money, upon which a decree of foreclosure had been obtained. The conveyance from the original patentee was alleged to have been destroyed in an extensive fire at Chicago, without being registered. The defendant in the foreclosure suit subsequently procured a deed from the heirs of the patentee, and instituted proceedings to set aside the mortgage as a cloud on his title; but, the Court being of opinion that the evidence sufficiently established the existence at one time of the missing deed, and that the conduct of the plaintiff had been too much that of a prowling assignee, refused the relief sought and dismissed his bill, with costs.

Statement.

The bill in this cause was filed by *William Graham Johnson* against *Henry Sovereign*, setting forth that the plaintiff claimed to be entitled to the lot 1 in the 3rd concession west of Hurontario street, in the township of Mulmur, containing 200 acres, less about twenty acres theretofore sold for taxes, under and by virtue of a deed thereof from one *George Carley*: that by indenture of mortgage dated 7th July, 1868, *William H. Thompson*, and one *Thomas Thompson*, (who claimed to be the owners of the said land by virtue of a deed of conveyance thereof from one *Henry Sovereign* to them, dated 7th July, 1868, and registered 14th November following), purported to mortgage these lands to the defendant to secure \$1,620, and which mortgage was duly registered on the 22nd April, 1869: that by indenture of assignment, dated 19th April, 1869, the defendant assigned the said alleged mortgage, and all his interest in the said lands, and the moneys purported to be secured thereby, to one *Freeman Sovereign*, who by an assignment, dated 31st July, 1873, re-assigned the same to the defendant, who claimed to be mortgagee of the said lands and premises in fee for securing \$1,620; and that he

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had commenced proceedings in this Court thereon, and was prosecuting the same against the plaintiff, who submitted that such mortgage formed no lien or charge upon the said lands, but that the same was a cloud upon the title of the plaintiff thereto, and that the same ought to be ordered to be cancelled.

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The defendant answered the bill admitting the statements therein as to the mortgage, the assignment and re-assignment thereof, and the institution of the suit thereon for foreclosure, which was defended by the plaintiff, on the ground that the mortgage formed no lien or charge upon the lands, but that, notwithstanding such defence, a decree was made therein in favour of the defendant who claimed to be mortgagee of such lands as follows: The Crown granted the same to one *Allan Robinet* in fee on the 14th of June, 1823, who executed a conveyance thereof to one *Lewis Horning*, which conveyance had been lost: that *Lewis Horning* by deed, dated 5th November, 1849, granted and conveyed the same lands in fee to one *Michael Devine*, who died seized thereof, having first made and published his last will and testament, which was set forth in full in the answer, the fifth paragraph thereof being: "I will and bequeath to my two daughters, *Mary* and *Ellen*, to be equally divided between them, lot 1 in the 3rd concession of Mulmur, in the district of Barry, containing 200 acres."

Statement.

The answer further stated that the devisees, *Mary* and *Ellen*, died before attaining majority, and thereupon *Michael Devine*, *James Devine*, and *Jane Devine*, infants and children of the testator, filed their petition in this Court, praying that the said lands might be sold, and such proceedings were thereupon had that the said lands were sold and conveyed to the said defendant in fee, under the direction of the Court, by an indenture bearing date the 4th of April, 1866, and made between *Dennis Devine*, the said *James Devine*, *Michael Devine*, and *Jane Devine*, the only surviving children of the testator,

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of the first part : *Sarah Devine* and *Catherine Devine*, the respective wives of the said *Dennis Devine* and *James Devine*, of the second part, and the defendant himself of the third part : and that subsequently by a deed of the 7th May, 1868, he, the defendant, conveyed the said lands to *William H. Thompson* and *Thomas C. Thompson*, in the bill mentioned, who thereupon executed the mortgage above referred to. The defendant by his answer further set up, that the plaintiff by his answer in the suit of *Sovereign v. Johnson*, claimed title to the said lands, under a conveyance from the executors of the testator, *Michael Devine* to one *John Evans*, dated 25th October, 1860, who subsequently pretended to convey the same to one *Malcolm McCallum*, a law student, who thereupon pretended to convey the same to the plaintiff : but the defendant submitted that no title to or estate in the said lands passed to the said *John Evans*, under such pretended conveyance from the executors, as they had not power to sell the same. The answer further alleged that this suit had been instituted at the instigation of the said *McCallum*, who was confederating with the plaintiff to deprive the defendant of his said mortgage debt, and that in order the better to accomplish his designs, *McCallum* purchased the equity of redemption in the lands in question from the said *Thompsons*, and thereupon conveyed to the plaintiff : that the plaintiff in his answer, in *Sovereign v. Johnson*, alleged that one *George Carley*—being the *George Carley* above referred to—claimed the said land under a conveyance thereof from the heirs-at-law of the patentee, *Robinet*, and had conveyed the same to the plaintiff, but the defendant submitted that no title passed under either of these conveyances.

Amongst the exhibits produced at the hearing of the cause was the following abstract of title to the lot in question, obtained from the registry office of the county of Simcoe :—

Register No.	The Nature of this Instrument.	The Date.	The Date of Conveyance.	Name, Residence and Occupation of Grantor.	Name, Residence and Occupation of Grantee.	Consul.

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Referred No of the Instrument.	The Nature of the Instrument.	The Date.	The Date of Registry.	Name, Residence and Addition, of Grantor, Lessor, Devisor, or Plaintiff, mentioned in said Instrument.	Name, Residence and addition, of Grantee, Lessee, Devisee, or Defendant, mentioned in the Instrument.	Con- sideration in Money.	The part of said Lot mentioned in the Instrument. and Remarks.
8788	Patent.	June 14, 1822		Crown	Allan Robinet.		All 200 acres.
8801	B. & S.	5 Nov., 1848	31 Oct., 1849	Lewis Homing, of Nelson.	Michael Devine, of Nelson.	£50	" " to be equally divided.
18083	WILL.	22 Oct., 1848	19 Nov., 1849	Michael Devine, of Nelson.	Mary and Ellen daughters of Devisee.		South part of E ¹ / ₂ 20 acres.
29736	Tex Deed.	24 Decr., 1853	19 Nov., 1856	Sheriff of County of Simcoe.	William Hall, of Amaranth.	£4 98 3/4	" " to be equally divided.
29745	B. & S.	25 Oct., 1860	29 Oct., 1860	Patrick Moore and Dennis Keeler, Ex-ecutors of Michael Devine's estate.	John Evans, of Watertown.	\$350	All 200 acres except 20 acres sold for Taxes.
50824	Mortg.	4 April, 1866	30 Oct., 1869	John Evans, of Watertown.	Patrick Moore, of Hinton.	\$150	" " " " " "
50825	B. & S.	7 July, 1868	"	James H. Devine et al., surviving de-ceses of Michael Devine.	Henry Sovereign, of Nelson.	\$800	" " " " " "
53164	Mortg.	"	22 April, 1869	Henry Sovereign, of Nelson.	Wm. Thompson, and Thos. Caldwell Thompson, of Erin.	\$1620	" " " " " "
53165	Assent of M.	19 April, 1869	22 April, 1869	Wm. H. Thompson and Thos. C. Thompson of Erin.	Henry Sovereign, of Nelson.	31620	" " " " " "
66195	B. & S.	27 June, 1871	2 Feby., 1871	Henry Sovereign, of Nelson.	Freeman Sovereign, of Burford.	\$1524	" " " " " "
68753	D. of M.	10 Oct., 1872	11 Oct., 1872	Edward F. Bowes, Ex. of Rosemont.	Job Pearson, of Mulmur.	\$1300	W ¹ / ₄ of E ¹ / ₂ 50 acres (dead end) by whither W. or East of H. Street therefore abstracted on both.)
68754	B. & S.	9 Oct., 1872	11 Oct., 1872	Patrick Moore, of W. J. Kingston Square, Executor of will of Michael Devine.	John Evans of Watertown.		All 200 acres except 20 acres sold for Taxes, and charge of No. 29745.
71601	B. & S.	19 Feby., 1873	3 March, 1873	John Evans, of Wamboro East.	Malcolm McCallum, of Toronto.	\$603	All 200 acres except 20 acres sold for Taxes.
73070	B. & S.	May 1, 1873	July 12, 1873	William Henry Thompson, of Mulmur et al.	Malcolm McCallum, of Toronto.		" " " " " "
73440	Assent of M.	3 July 21, 1873	Aug. 14, 1873	Wm. H. Thompson, of Mulmur, et al.	William G. Johnston, of Toronto.	\$4000	All less 20 acres sold for Taxes.
				Freeman Sovereign, of Burford.	Henry Sovereign, of W. Flamboro.	\$1624	" " " " " "

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The answer also stated that the plaintiff before intermeddling with the land in question had actual notice of the defendant's mortgage, and that the plaintiff, on his examination in the suit of *Sovereign v. Johnson*, admitted that *McCallum* was to have half the profits when the property in question was sold; and the defendant set up that the present litigation was a joint enterprise on the part of the plaintiff and *McCallum*, and formed part of a conspiracy to defraud him out of his said mortgage debt, and that the plaintiff insisted that *Carley* in obtaining the conveyance from the heirs of *Robinet* did so as trustee for him, and for which the defendant alleged no consideration was to be paid unless the plaintiff succeeded in this suit.

The examination of witnesses took place at the sittings of the Court at Hamilton, when the argument was adjourned to Toronto, and came on to be heard before the Chancellor, on the 11th June, 1877.

Mr. *W. Cassels* for the plaintiff.

Argument.

The defendant, in order to resist the plaintiff's claim for the relief he asks, must prove satisfactorily the existence and subsequent loss or destruction of the deed from the patentee *Robinet* to *Horning*, and this it is submitted he has not done. *Lottridge's* evidence on this point is clearly insufficient; this witness proves he was one of the executors of *Lewis Horning*, that *Horning's* papers came into his hands, and that he had a list of the deeds, and that "there was one purporting to be from *Allan Robinet* to *Lewis Horning*. * * * I delivered the deed referred to to *Patrick Moore*." *Patrick Moore* proved that he knew *Michael Devine*, and was his executor. "I sold that land at one time. I got the deed from Mr. *Lottridge*. I got it to make a title. *Evans* gave me a mortgage. I brought the deed to *James Dunn's* office, then a lawyer in Hamilton—it was read over by *Evans*, and then the papers were made, and then I left the deed in *Dunn's* office for *Evans*. * *

I never saw it since. * * I got no paper from *Lott-ridge*. It was a deed I got. I read part of it. * * 1878.
 All I read was to see if it was a deed from *Robinet* to *Johnson v. Sovereign*.
Horning. I did not hear it read." And *Evans* on being re-called swore that on consideration he was satisfied that it was the deed of *Horning* to *Devine* that he had seen in *Dunn's* office. All this does not satisfactorily establish the existence of the deed from *Robinet* of the land in question. Neither is there any evidence of the deed from *Horning* to *Devine*. As to what is necessary to be shewn under such circumstances, see *Gough v. McBride* (a), *Dickson v. McFarlane* (b), *Covert v. Robinson* (c), In re *Bell* (d).

The evidence of *W. H. Thompson* shews that the objection to the title arising out of the non-production of any deed from *Robinet* had been taken by intending purchasers years ago, and that one *Murphy* had been allowed to withdraw from his agreement to purchase on that account. "I agreed to sell to *Murphy* before I sold to *Johnson*, but *Murphy* objected that there was no deed from *Robinet*; that was the first I heard of that, but *Murphy* refused on this account to take the land. Then I thought that the heirs of *Robinet* had the title. I got back from *Sovereign* what I paid him. I refused to pay him because he had not given me a saleable title." The defendant's only title is really under the mortgage from *Thompson*, and on that *Thompson's* evidence shews nothing to be due. Plaintiff now claims under a title paramount, and the decree in the converse suit is not therefore *res judicata* between the parties. Argument.

As to the rule now as to what constitutes a cloud on title, see *Truesdell v. Cook* (e), *Ross v. Harvey* (f), *Hurd v. Billington* (g), *Shaw v. Ledyard* (h), *Buchanan Campbell* (i), *McGregor v. Robertson* (j).

(a) 10 U. C. C. P. 166.

(b) 22 U. C. R. 539.

(c) 24 J. C. R. 282.

(d) 3 Ch. Cham. 239.

(e) 18 Gr. 532.

(f) 3 Gr. 649.

(g) 6 Gr. 145.

(A) 12 Ib. 382.

(i) 14 Ib. 163.

(j) 15 Ib. 543.

1878. Mr. T. Robertson, Q.C., and Mr. Beverley Robertson
for the defendant.

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Judgment.

The evidence sufficiently establishes the existence of a deed at one time from *Robinet* to *Horning*. This bill is founded entirely on the auxiliary jurisdiction of the Court of Equity. The plaintiff moreover occupies the position of the *Thompsons'*, and cannot be heard to impeach the title of his mortgagee. Having acquired the dry equitable estate of *Thompson*, and having discovered what he deemed a flaw in the title of the defendant, the plaintiff has hunted up the heirs of *Robinet*, now resident in the United States, and obtained from them a quit claim deed of their interest, whatever that might amount to, and now attempts to impeach the title of the defendant who purchased under the sanction of an order of this Court, and paid the fair value of the property. *William P. Robinet*, the eldest son of *Allan Robinet*, gives evidence that he had heard his "father say that he had transactions with *Lewis Horning*; that he had transferred real estate to him." The same witness also proves that *Johnson*, although the person applying to him to sell and agreeing to pay \$1,400 or \$1,600, took the deed to one *Carley*, of whom the witness knew nothing, and had never seen. "I cannot say why the words in the deed are 'all our estate, right, title and interest in the land'—that was what we contracted for. We did not agree to give a warrantee deed. We only sold what interest we had in the land. He offered us the amount for our signatures to the deed. * * * His object in getting our deed was, that we had an interest or right in the lots as heirs that he wanted. He claimed to have bought the lot, and I think it was from *Thompson*. He did not tell me he had a good title or that my father had conveyed, and that the deed was lost."

The patent to *Robinet* was for several thousand acres as compensation for his services as surveyor, and at the time he conveyed to *Horning* it was not necessary in order to the validity of the vendee's title that he

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should register his conveyance. The description in the memorial of the deed from *Horning* to *Devine* corresponds exactly with that in the patent, and there is no suggestion anywhere that the patent was ever in the hands of any one to prepare that conveyance from. In order to induce the Court to interfere in favour of this plaintiff, he must establish his title clearly; and he must shew that his conduct has been meritorious throughout to entitle him to come to this Court to remove an alleged cloud from his title; but here the evidence clearly establishes that the defendant's claim is not merely a cloud; and the whole case of the plaintiff savours of maintenance. 2 *White* and *Tudor's* L. C., Am. ed., p. 1602; *Hilton v. Woods* (a).

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Sovereign.

The other points relied on appear in the judgment.

SPRAGGE, C.—This is a bill to remove a cloud upon title. When this bill was filed, a suit was pending, the position of the parties being the converse of what it is in this suit. That suit was for the foreclosure of a mortgage by persons named *Thompson* to the defendant in this suit for \$1,620 purchase money on a sale of the land in question in this suit by *Sovereign*, plaintiff in that suit, defendant in this, to the *Thompsons*. *Johnson*, defendant in that suit, plaintiff in this, acquired from the *Thompsons* their title. Judgment..

Both parties, *Johnson* and *Sovereign*, claim title under one *Allan Robinet*, who was the patentee of the Crown. The lot in question is lot 1 in the 3rd concession, west of Hurontario street, in the township of Mulmer. This lot, with a number of others, was patented to *Robinet* in compensation for his services to the Crown as a surveyor.

Sovereign's case in both suits is, that *Robinet* conveyed to one *Lewis Horning* by a conveyance which has been lost: that *Horning* by deed of 5th November, 1849, conveyed to *Michael Devine*, who died seised.

(a) L. R. 4 Eq. 432.

1878. The will of *Devine*, which is dated 22nd October, 1848, is before the Court. It professes to dispose of the land in question, "I will and bequeath to my two daughters *Mary* and *Ellen* to be equally divided between them lot No. 1 in the 3rd concession in the township of Mulmer," &c. It contains also this provision, "I further will that in case of the death of any one or more of my children previous to their becoming of age, that anything here willed to them be sold or equally divided among the surviving children." He appointed *Patrick Moore*, *Richard Tobin*, and *Dennis Kellicher*, his executors, "my executors." Both parties in their pleadings allege that the daughters *Ellen* and *Mary* died under age. Upon that there are two lines of title—that of *Sovereign* is as purchaser at a sale made under an order of this Court upon the petition of the infant children of the testator, at which sale he was the purchaser, and that he afterwards sold to the *Thompsons* and took the mortgage for purchase money, upon which he filed his bill for foreclosure.

Judgment.

Johnson, in his answer to that bill, claimed also through *Devine* and the provisions in his will which I have quoted. His case was that the executors of *Devine's* will, acting in pursuance of the provision for sale in the event of the death of the daughters, sold to one *John Evans*, and by deed of 5th October, 1860, conveyed to him the land in question: that *Evans*, by deed of 9th October, 1872, sold and conveyed to one *Malcolm McCallum*; that *McCallum* purchased for *Johnson* as his trustee and was to have a certain interest, then agreed upon between them, in the land in question. The answer also states that one *George Carley* claims to be owner of the lands under a deed from the heirs of *Robinet*.

The foreclosure suit was heard before the late V. C. *Strong* upon the pleadings and evidence, and hearing counsel; and a decree was pronounced directing that all necessary inquiries be made, accounts taken, costs

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taxed, and proceedings had for redemption or foreclosure; the cause being referred to the Master at Hamilton for that purpose.

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v.
Sovereign.

It is now contended for *Johnson* that the question between him and *Sovereign* was not *res judicata* in that suit. But certainly the decree that was made could not properly have been made, unless the Court had decided in favour of the title derived through the proceedings had in this Court, and the conveyance made to *Sovereign* in pursuance thereof, in preference to the title derived from the executors of *Devine*.

In this suit the plaintiff claims under a different title from that upon which he defended the foreclosure suit. He claims under a deed from *George Carley*, dated 20th January, 1874, the same *George Carley* who is mentioned in his answer in the foreclosure suit.

A deed is produced from the heirs of *Robinet* to *George Carley*, dated 1st October, 1873. The evidence shews that *Johnson* was the real purchaser, and *Carley* only his appointee and trustee.

Judgment.

It thus becomes a cardinal point in the case whether there was any conveyance to *Lewis Horning* and any conveyance from him to *Michael Devine*, both of which formed links in the chain of title under which *Johnson* as well as *Sovereign* claimed, until *Johnson* shifted his ground, claiming directly from *Robinet* and denying the conveyances under which he in common with *Sovereign* had previously derived title.

First, as to the conveyance from *Allan Robinet* to *Lewis Horning*. It is proved that there was in existence a conveyance from *Allan Robinet* to *Lewis Horning* of some land—200 acres—in the township of Mulmer. Upon the death of *Robinet* a number of deeds passed into the hands of *Thomas Lottridge*, one of his executors. *Lottridge* made an inventory of them in a small book which is produced. Among them is the entry, "deed of bargain and sale, *A. Robinet* to *Lewis Horning*, of 200 acres of land in the township of

1878. Mulmur." *Lottridge*, in his evidence, verifies the contents of this book, and says he thinks that the deed was of "lot 1, 3rd concession"; but his memory upon that point is hardly to be trusted, for he thinks also that the numbers of the lot and concession are stated in the book, which they are not.

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This conveyance, of whatever land it may be, was not registered; but at that time the registry law did not apply until after a registration.

The next and principal question is, as to the identity of the land conveyed by the above deed with the land in question. So far, we have got no further than the parties and the township. The first point is, that it is the only conveyance between the parties of land in Mulmur, while there are several of land in Melancthon and other townships; but that does not go very far in the way of identification. There is, however, other evidence upon this point much more cogent. This is furnished by the evidence of *Lottridge* and of *Patrick Moore*, the latter being one of the executors (the acting executor) of the will of *Michael Devine*; by another entry in the small book I have referred to, and by other evidence.

Judgment.

The conveyance to which I have already referred from the executors of *Devine* to *John Evans*, and a mortgage for purchase money from *Evans* to *Patrick Moore*, one of the executors, were drawn by one *James Dunn*, then a practising solicitor in Hamilton. From the evidence of *Lottridge*, *Moore*, and *Evans*, it appears that upon the sale by the executors of *Devine* to *Evans*, the conveyance from *Robinet* to *Horning* was called for, and *Patrick Moore* in order to shew his title applied to *Lottridge* for that deed. It is clear that it was a deed of lot 1 in concession 3 that *Moore* applied for to *Lottridge*, for that lot was specified by number, concession, and township, in *Devine's* will, and was the only one authorized by his will to be sold; and that lot was the subject of contract of sale from the execu-

tors of *Devine* to *Evans*. The conveyance in the hands of *Lottridge* was by him handed to *Moore*; and a receipt for it was given in the following terms:—

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Sovereign.

“BARTON, October 2, 1860.

“Received of *Thomas Lottridge* a deed of 200 acres of land, in the township of Mulmur, deeded from *Allen Robinet* to *Lewis Horning*.

“P. MOORE.”

This same deed was taken by *Moore* to Mr. *Dunn*, and as *Moore* says, “He (*Dunn*) copied the deed I got from *Lottridge* for the description; I did not give him any abstract of title.” A mortgage on the same land from *Evans* to *Moore* was drawn by *Dunn* and executed by *Evans*. That mortgage we have, and it is of lot 1, 3rd concession of Mulmur. If the witness be correct upon these points there is no room to doubt that the conveyance from *Robinet* to *Horning* of 200 acres in Mulmur was of lot 1, in the 3rd concession.

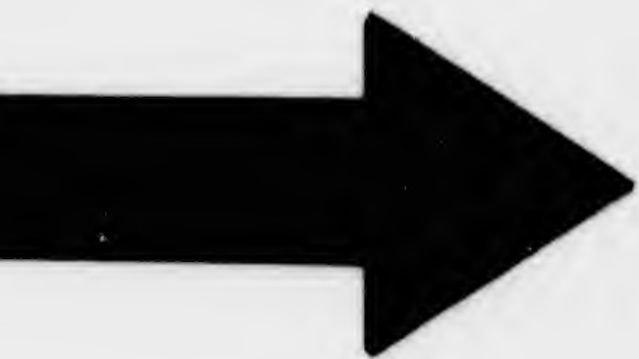
Upon cross-examination by Mr. *Blake*, *Moore* was led to entertain some doubt whether it was not from the deed *Horning* to *Devine* that the deed to *Evans* was prepared, and *Evans* upon being recalled by *Johnson* was of the same opinion. On the other hand *Lottridge* is positive that he never had the deed from *Horning* to *Devine*, and has no doubt that the deed *Moore* got from him was the deed from *Robinet* to *Horning*.

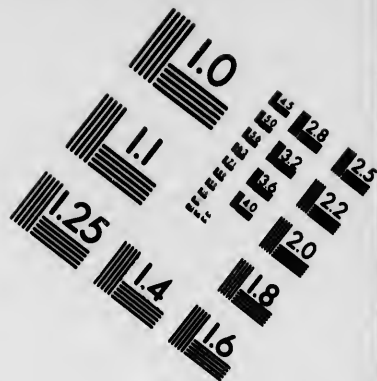
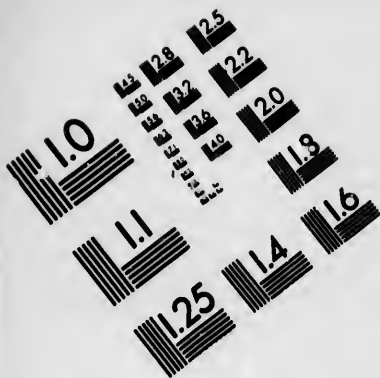
Judgment.

He could indeed have got from him no other deed, for *Lottridge* had that deed, and would not have, and says as a fact that he had not, the deed from *Horning* to *Devine*. I do not myself upon the evidence feel any doubt that the conveyance from which *Dunn* drew the conveyance to *Evans* and the mortgage from *Evans*, was the conveyance obtained by *Moore* from *Lottridge*, and finding that the conveyance and mortgage are of lot 1, 3rd concession of Mulmur, the inference is that the deed from *Robinet* to *Horning* was of that lot.

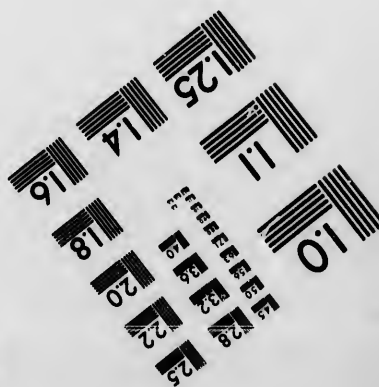
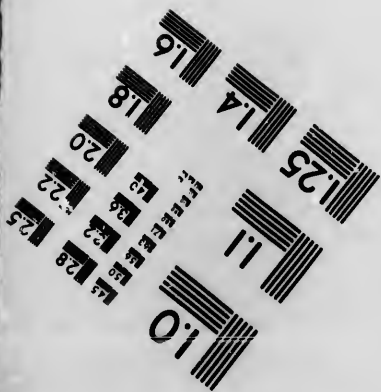
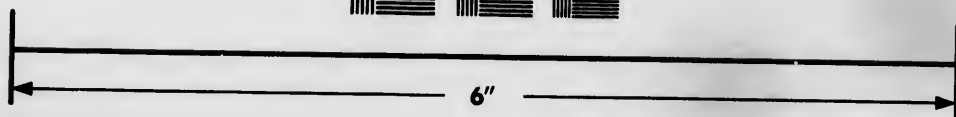
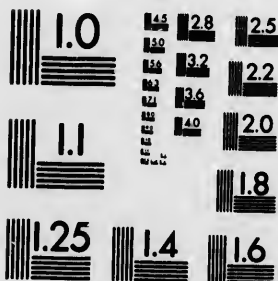
That conveyance is traced into the hands of *Dunn*.







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1878. It was left in his hands by *Moore* for *Evans* as he says, he thinking that *Evans* was the proper person to have it. In that he was mistaken, as the mortgagees were the proper persons to have it, and so probably *Mr. Dunn*, as a lawyer, thought, for he appears not to have handed the deed to *Evans*; and *Moore* deposes that he has it not; and, thinking, as he did, that *Evans* was the proper person to have it, he would naturally not ask *Dunn* for it. *Dunn* afterwards removed to Chicago and died there; and his widow has since been examined upon commission, in order to see if the missing deed could be found. Her evidence is that her husband's office and papers were consumed in the great fire in Chicago some years ago. The absence of that deed is, in my opinion, sufficiently accounted for, and I am satisfied from the evidence that a conveyance of lot 1, 3rd concession of Mulmur, was made by *Robinet* to *Horning*.

Judgment. It is next objected that there is no evidence, or no sufficient evidence, of the conveyance from *Horning* to *Devine* of the lot in question. A memorial of such conveyance is produced.

The absence of the conveyance from *Horning* to *Devine* was never made a difficulty until very recently, not, I think, until the argument of this cause. On the conveyance to *Evans* the only difficulty made was, the absence of the deed from *Robinet* to *Horning*, and upon that being produced the title was to be considered as perfected. Whether the deed to *Devine* was before *Mr. Dunn* is doubtful upon the evidence. *Evans* evidently thought it was, for he thought that from it was taken the description contained in the deed to himself; and *Moore* was doubtful. I do not myself doubt that the deed from *Robinet* was there, and that *Dunn* took the description from it; but *Evans* may be correct in believing that the deed from *Horning* to *Devine* was also in *Dunn's* office. If it was, and was not delivered to *Evans*, (and it seems not to have been), the in-

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v.
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ference is that it was destroyed with other papers in the Chicago fire. Or it may have been, and still may be, in the hands of *Devine's* widow or her representative. *Moore* speaks as if the deeds to *Devine* were retained by his widow.

Further, in the dealings between *McCallum* and *Evans*, the only missing link in title spoken of by either party was, the deed *Robinet* to *Horning*, and it was assumed between them that if that were supplied the title would be perfected.

Whether strictly legal evidence of the conveyance to *Devine* can be given by the defendant may be doubtful; but he is not bringing ejectionment or asserting adverse title. This suit is brought on the ground that the mortgage held by the defendant *Sovereign* against the *Thompsons* is a cloud upon the plaintiff's title, *i. e.* his title acquired from the heirs of *Allan Robinet*. That title was obtained in order to cut out the title of *Sovereign*, obtained under the order of this Court. *Robinet* the ancestor having already conveyed, the conveyance to *Johnson* by his heirs was tortious, and is not a title which entitles him to the aid of this Court to defeat a title honestly acquired by *Sovereign*—that title was acquired through this Court in 1866, and his conveyance registered in 1868. *McCallum's* negotiations with *Evans* began about 1872. There has been so much of the character of the prowling assignee in the conduct and dealing of both *McCallum* and *Johnson* as to prevent them from receiving the aid of a Court of Equity. The only imperfect link of *Sovereign's* title is, the conveyance from *Horning* to *Devine*, and I have, from the evidence, every reason to believe that such a conveyance was made.

The principle upon which Courts of Equity direct the delivery up of conveyances or other instruments is very clearly stated by Mr. Justice *Story* (*u*). He says,

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Sovereign.

Judgment.

(a) Eq. Jur. §. 700.

1878. "The decisions upon the point are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost, or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment. * * *

Judgment. The whole doctrine of Courts of Equity on this subject is referable to the general jurisdiction which it exercises in favour of a party *quia timet*."

It is very clear that the doctrine upon which Courts of Equity proceed in such cases has no application to such a case as the one between these parties. It is not at all against conscience that *Sovereign* should retain and use the instrument, the delivery up of which is sought by this bill. The plaintiff has not even a better equity. On the contrary, the equity of the case is altogether with *Sovereign*.

I would refer also to the case of *Ryan v. Mackmath* (a), and the cases cited in the notes. There are also several cases cited in the notes to *Davis v. The Duke of Marlborough* (b), which are an affirmation of the doctrine as stated by Mr. Justice *Story*. There is also a case before Vice-Chancellor *Knight Bruce*

(a) 5 B. C. C. 15.

(b) 2 Swan. at p. 157.

which, in some of its circumstances, resembles the one before me. The head note sufficiently sets out the points in the case to which I refer :—

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v.
Sovereign.

“By an indenture dated in April, 1810, an annuity was granted to *S.*, charged upon real estate, and by an indenture dated in April, 1820, the same property was charged by the same parties with an annuity payable to *A.* This annuity was void for want of a proper memorial, but until the filing of the bill it had been always treated as a valid annuity, and in September, 1821, *A.*, under a proviso in his annuity deed, entered into possession and receipt of the rents and profits of the estate, and remained in undisturbed possession of them till his death in 1829, when his personal representative took possession. In 1835, *S.* died, and in November, 1839, his personal representative filed his bill to set aside *A.*'s annuity, and to establish his own. The bill alleged that *S.* had received payment of his annuity down to October, 1820, and that *A.* had obtained possession of the premises under misrepresentation. These allegations, however, were not proved against *A.*, nor was it proved that he ever had notice of *S.*'s title, but the allegation of payment was admitted by the grantors of the annuity who were co-defendants with *A.* in the suit. Under these circumstances, and considering that *S.* had never been in possession of the property:—*Held*, that notwithstanding the infirmity of *A.*'s title, the plaintiff was not entitled to the relief prayed by his bill.”

Judgment.

I have referred to the cases cited by Mr. *Cassell*. They relate to the doctrine of ordering the delivery up of instruments by reason of their being clouds upon title; but they do not touch the question upon which my judgment in this case proceeds.

The plaintiff's bill is dismissed, with costs.

1878.

BAIN V. MEARNS.

Will, construction of—Discretion given to executors.

A testator directed his residuary estate to be realized, and the proceeds to be divided equally between his three children on his daughter attaining 21. As to one—his eldest son, *G.*—the testator empowered his executors in their discretion to withhold his bequest, and pay him £10 within one year after the testator's death. And in case of the death of any of the legatees, before the time for payment, the share or shares of the party so dying to go to the survivor or survivors; "but it is to be understood, however, that in case either of my children should die other than *G.*, that it is not my will or desire that he should have any share of the deceased party's portion, unless my said executors shall deem it expedient to give it to him; and that it is my will and desire that he should not receive any part of my property under any circumstances other than the £10 before mentioned, unless my executors think it advisable to give it to him."

Held, that the executors were not put to an election whether they would pay only the £10 in one year after the testator's death; but that they could at any time withhold any further payment to *G.*, notwithstanding they had already paid him a larger sum than the £10.

THIS was a suit instituted by *John Bain* against *George Mearns* and the Hon. *John Simpson* seeking to compel the last named defendant to render to him, the plaintiff, an account of his dealings with the estate of one *James Mearns*, deceased, who died in the year 1844, after having duly made and published his last will and testament, bearing date the 15th day of June, 1844, whereby he appointed the defendant *Simpson* and two other persons, since deceased, executors and trustees. After making sundry specific bequests the testator directed all his property of every kind and description to be sold, and after payment of a legacy of £25, he directed the proceeds to be invested, and the "amount so invested as well as the interest or profit arising therefrom, "I hereby will and bequeath as follows:—One-third of the said amount I will and bequeath to my son *George* to be paid to him when my daughter *Helen* will be of the age of twenty-one years: Provided, neverthe-

Statement.

1878:

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less, that if my said executors do not consider that the giving of such amount, or one-third as aforesaid, to my said son *George* would be of service to him, or if they think he would not make a good use of it, I hereby empower them to withhold the said amount, or one-third of the sum invested, from my said son *George*, and in lieu thereof I will and bequeath unto him, my said son *George*, the sum of £10 to be paid to him within one year after my death." Of the other two-thirds he gave one to his daughter *Helen* on attaining twenty-one years, and the other to his son *James*, to be paid to him on his sister *Helen* attaining, or at such time as in case of her death she would have attained twenty-one had she survived. "And in case either of my said children should die before the time arrives when they are to receive their separate portions, I desire in such case that the portion belonging, or which should have been paid to the deceased had he or she lived, may be divided equally between the survivors, and if two of my said children should die before the time arrives when they would be entitled to receive their separate portions, then I desire that the portions of the two deceased may go to the survivor." And in the event of the death of all his children before the time appointed for payment, the testator directed the fund remaining in hand to be equally divided between his brother *Thomas Mearns* and his sister *Ann Smart*; "but it is to be understood, however, that in case either of my children should die other than my son *George*, that it is not my will or desire that he should have any share of the deceased party's portion, unless my said executors should deem it expedient to give it to him; and that it is my will and desire that he should not receive any part of my property in any circumstances other than the £10 before mentioned, unless my executors think it advisable to give it to him."

Statement.

The bill further stated that the testator's son *James* died shortly after the death of the testator at about five years of age: that *Helen* attained majority in or about

1878. 1850, and received her share of the fund, and afterwards died intestate and without issue.

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Mearns.

The bill also alleged that the executors had paid to the defendant *George Mearns* a portion of the moneys bequeathed to him under the said will, and had otherwise recognized his right to the legacy bequeathed to him, and that the other defendant had expressed his willingness to pay the residue of the fund in his hands to the defendant *George Mearns* or to the plaintiff, if declared entitled thereto.

It further appeared that the defendant *Mearns*, after the death of his brother and sister, had assigned his interest in the fund to one *Robert Armour*, who subsequently sold and transferred the same to the plaintiff.

The defendant *Simpson* answered the bill expressing his readiness to account as the Court should direct, and submitting that the defendant *George Mearns* was not, and that the plaintiff was not entitled to call upon him for any account of, or share in the fund, notwithstanding the fact that the executors might have paid to the defendant *George Mearns* a larger sum than the £10.

Statement.

The bill was taken *pro confesso* against *George Mearns*.

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

Mr. *Attorney General Mowat* for the defendant, *Simpson*.

The other defendant did not appear.

SPRAGGE, C.—The will is dated 15th June, 1844, in which, or the following year, the testator died. By the provisions of the will no part of the property is divisible until the coming of age of the daughter *Helen*, who attained majority in 1852. By the will the bulk of the testator's property is to be divided into thirds, one of which is to be paid to each of the testator's two sons, *James* and *George*, and his daughter *Helen*. As to one of these third shares, that is the one-third bequeathed to

George Mearns, the eldest son, a wide discretion is, by the terms of the will, given to the executors. [His Lordship here read the clause of the will above set forth, giving the executors power to pay him £10 only.]

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Bala
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Mearns.

It is probable that nothing may turn upon that, as the executors seem to have paid *George* all that would be coming to him, if no such discretion was vested in them, or if the discretion were exercised in his favour.

The *Attorney General* relies upon the provision in the will as to survivorship, which is, that in case of the death of either of the testator's children, "other than my son *George*, that it is not my will or desire that he should have any share of the deceased party's portion. * * * And that it is my will and desire that he should not receive any part of my property under any circumstances other than the ten pounds before mentioned, unless my executors think it advisable to give it to him."

The plaintiff's contention upon both these clauses is, that the discretion of the executors is to be exercised once for all; that if they go beyond the £10 the legatee becomes absolutely entitled.

Judgment.

Can it be contended that the discretion is gone, unless £10 be paid within twelve months from death? the meaning, *Semble*, that he is to have £10 at any rate; and that the discretion remains to be exercised first when *Helen* comes of age, secondly upon the event of death and survivorship.

Discretion upon second occasion is, by the terms of the will wider than upon the first occasion. This provision would seem to be divisible: 1st, that *George* should have nothing by survivorship, unless "executors should deem it expedient to give it to him;" 2nd, "that he should not receive any part of my property *under any circumstances*, other than the £10 before mentioned, unless my executors think it advisable to give it to him." The words "under any circumstances" seem to apply the discretion given by this clause to the previous clauses. We must consider what is the meaning of the words "should not receive any

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part of my property * * unless my executors think it advisable to give it to him." Think it advisable to give what to him? Any part of my property. Does not that mean that part of my property, and only that part that my executors think it advisable to give. None, if they think it advisable to give none, and if any, only so much; that part that they may think it advisable to give. A construction that would make it necessary to give all or nothing would fetter the discretion, which the testator plainly intended the executors to exercise. The larger discretion contended for would certainly best effectuate his intention, which evidently was to impose a salutary check upon his son, and to prevent his property passing into unworthy hands. There would be no reason in putting the executors to a sort of election. One cannot conceive the testator intending it, and it would not answer the purposes he had in view.

Judgment.

If this be the proper construction of the will, as I think it is, the plaintiff has no *locus standi* in Court. The bill must therefore be dismissed, with costs.

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FULLER V. MACKLEM.

Will, construction of—Interest on legacy.

A testator made several pecuniary bequests payable twelve months after his decease, and in the event of any of the legatees being then not of age, he directed their legacies to be invested and the accumulations paid to them on their attaining majority. By an alteration of the draft will, he directed one legacy of £25,000, not to be paid to the legatee until he attained the age of 23, "and being desirous that provision should be made for his support and maintenance after he attains the age of twenty-one years, and until he arrives at the age of twenty-three years, I will and direct that my executors shall pay him after he so attains the age of twenty-one years, and until he arrives at the age of twenty-three years, the annual interest, dividend, and income of the sum of twenty-five thousand pounds, which they are to invest and keep invested for that purpose."

Held, that the legatee was entitled to the accumulations of interest from one year after the death of the testator, and not from the time of his attaining 21 only.

Bill for the purpose of obtaining a construction of the will of *Thomas C. Street*, so far as regards the bequest in favour of *Sutherland Macklem*, one of the legatees named therein.

The cause was heard on bill and answer.

Mr *J. A. Boyd*, Q. C., for the plaintiff.

Mr. *Street*, for the legatees.

Pearson v. Pearson, (a), *Webster v. Hale* (b), *Benson v. Maud* (c), *Sitwell v. Bernard* (d), *Child v. Elsworth* (e), *Earle v. Bellingham* (f), *Hearle v. Greenbank* (g), *Donovan v. Needham* (h), *Lord v. Lord* (i), *Crickett v. Dolby* (j), *In re goods of Thompson* (k), *Roper 1257-8*, were referred to.

(a) 1 Sch. & L. 10.

(d) 6 Ves. 520.

(g) 3 Atk. at 716.

(j) 3 Ves 10.

(b) 8 Ves. 410.

(e) 2 D. M. & G. 679.

(h) 9 Beav. 164.

(k) L. R. 1 P. & D. 8.

(c) 4 Madd. 15

(f) 24 Beav. 48.

(i) L. R. 2 Ch. 782.

1878. **SPRAGGE, C.**—As the draft of the will stood before the alteration postponing the payment of the legacy of £25,000 to *Sutherland Macklem* until he should attain the age of twenty-three years, it was made payable to him in the same way as were other legacies mentioned in the previous part of the will. The direction is as follows: "All the said legacies or sums of money I direct to be paid over or assigned to the several legatees respectively, if of age, within twelve months after my decease, but if the said legatees, or any of them, be not of age, then not until such legatee as may be under age shall have attained his or her majority; my said trustees in the meantime to keep the said legacies or legacy, as the case may be, invested in good and safe securities drawing interest, for the benefit of the said legatees respectively, and to pay over and assign to them along with the principal moneys the accumulated interest or dividends as they severally attain their majority."

Judgment. The testator died on the 6th of September, 1872; *Sutherland Macklem* came of age on the 27th of June, 1874, and if the will had not postponed the payment of his legacy he would have been entitled to receive it with the accumulated interest or dividend accrued between the 6th of September, 1873, and 27th of June, 1874. The postponement of the day of payment was plainly a change of intention. This is clear from the striking out of words signifying coming of age, and inserting "his attaining the age of twenty-three years," or equivalent expressions, in the first, second, and nineteenth clauses, as well as in the thirteenth, the clause in which the legacy is given; and in the use near the end of the will of this language: "And whereas in my wisdom and discretion I have now seen fit to direct and declare that my nephew *Sutherland Macklem* shall not come into possession of his legacies or bequests until he attains the age of twenty-three years, and being desirous that provision should be made for his support and maintenance after he attains the age of twenty-one years,

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and until he arrives at the age of twenty-three years, I will and direct that my executors shall pay him after he so attains the age of twenty-one years, and until he arrives at the age of twenty-three years, the annual interest, dividend, and income of the sum of twenty-five thousand pounds, which they are to invest and keep invested for that purpose."

1878.

Fuller
v.
Macklem.

The first clause of the will contains provisions (which were not brought under my notice in the argument) which appear to me to have some bearing upon the question before me. The Mansion House and grounds of Clark Hill are devised to the testator's mother for life, and after her death to *Sutherland Macklem*, with the proviso that in case of his mother's death before *Sutherland Macklem* attains the age of twenty-one—altered to twenty-three—he shall not have possession until he attains the latter age. In the same way he devised what the testator calls "all my equal undivided shares, estate and interest, held jointly with my father's estate, in and to," two certain farms which he calls the *Judgment*. *Bridgewater* and *Pell* farms, and describes as containing upwards of 700 acres. He then proceeds to deal with what he calls "the said share," which I take to be the same as he had previously called "shares," as no other share or shares are mentioned; but whether the same or not is not very material. This share was to be managed by the trustees, and improved and put out to interest, with power to the trustees to sell the same for the benefit of *Sutherland Macklem*; and the will proceeds thus; (and this is the provision that I think material) "and the proceeds of such sales to be placed out at interest to accumulate till he the said *Sutherland Macklem* shall attain his majority, (altered to "the said age of twenty-three years") when the said share, with the accumulations thereof, shall, by my said trustees, be made over and assigned to him in accordance with the intention of this my will." The point is this, that in relation to this property, the

1878. direction is that the accumulations of interest are to be paid over with the principal to *Sutherland Macklem*, on his attaining twenty-three years of age, and this direction continued after the change from twenty-one to twenty-three years of age, is evidently, from the juxta position of the words, not an oversight.

Fuller
v.
Macklem.

This idea of paying to legatees accumulations of interest along with payment of the principal of their legacies, is carried out in the passage I have just quoted from the will, and was intended to apply to *Sutherland Macklem*, beyond a question, before the postponement of the time for payment of his legacy. The passage is general, applying to all preceding legacies, of which that to *Sutherland Macklem* was one. The doubt is created by the concluding words "as they severally attain their majority" literally correct as to this legacy as well as others before the alteration as to time of payment, but not literally correct afterwards as these accumulations of interest were payable "along with the principal moneys," at majority. The words "as they severally attain their majority," are words of surplusage. The principal moneys had been made payable at majority, and the sentence would have been complete if it had been "and pay over or assign to them along with the principal moneys, the accumulated interest or dividends."

Judgment.

In construing the will, I must, as to this legacy, discard these concluding words, "as they severally attain their majority," or I must, as to it, discard the word "all," with which the paragraph commences. I think I shall best interpret the intention of the testator by holding the provisions of that paragraph to apply to the legacy in question. To do otherwise, would deprive the legatee of that which was at first given to him. I see no indication of intention to take back any thing: but only to postpone its enjoyment for two years beyond the time originally intended. To hold otherwise, would make this legacy an exception to all others included in the same category, and would also place it upon a differ-

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ent footing from the bequest to the same legatee in the first clause of the will. The probability is, that in going over the will and making alterations in it for the purpose of postponing the enjoyment of what was devised and bequeathed to *Sutherland Macklem*, this paragraph and its application to him were overlooked.

1878.
Fuller
v.
Macklem.

I have examined the cases cited to me. The conclusion at which I arrive does not contravene any of them. I hold *Sutherland Macklem* entitled to what he claims, viz., interest on his legacy from one year after the death of the testator until his coming of age; the interest after he attained his majority is made payable to him by the will, and that with the principal of the legacy he has received.

Judgment.

The costs are to come out of the estate.

1878.

GILDERSLEEVE V. COWAN.

Practice—Costs.

One principle upon which this Court has steadily acted is, that where two courses of proceeding are open, one less expensive than the other, and a party can with equal advantage to himself adopt either, and he takes the more expensive one, he does so at the peril of costs. Where, therefore, a woman, after the death of her husband, was joined as a party defendant in a suit upon a mortgage created by her late husband, in which she had not joined, and instead of demurring put in an answer, the Court at the hearing dismissed the bill as against her, without costs.

The case of *Bush v. The Trowbridge Water Works Company*, L. R. 10, Ch. 459, considered, distinguished and not followed: *Saunders v. Stull*, ante vol xviii., p. 590, approved of and followed.

THIS was a suit to foreclose a mortgage created by the deceased husband of the defendant *Ann Cowan*, in which she had not joined to bar her dower, and she answered setting up this fact as an objection to any relief being obtained against her. The cause having been put at issue was brought to a hearing at the sittings of the Court at Belleville.

Mr. *Moss* and Mr. *Flint*, for the plaintiff.

Mr. *Fitzgerald*, Q. C., for the infant defendants.

Mr. *Alcorn*, for the defendant *Duffin*.

Mr. *Robertson*, for defendants *O'Neill* and *Ann Cowan*.

The point raised and cases cited are clearly stated in the judgment of

Judgment. SPRAGGE, C.—The only point left undisposed of at the hearing was, whether the defendant, *Ann Cowan*, was entitled to her costs. She had not joined in the mortgage given by her husband, which is in question in the suit, and ought not to have been made a party. It was conceded by counsel for the plaintiff that as to her the

bill must be dismissed, but, as they contend, without costs, as she ought to have demurred; and they cited *Saunders v. Stull*, (a) in this Court as establishing the rule that where a bill is demurrable it ought to be demurred to, and that the defendant is not at liberty to answer, or does so at the peril of not getting his costs even when fraud is charged against him in the bill; and this decision is supported by English authorities which are referred to in the judgment.

1878.
Gildersleeve
v.
Cowan

Against this is cited the case of *Bush v. The Trowbridge Water Works Co.*, (b) heard before Lords Justices *James* and *Mellish*, upon appeal from the Master of the Rolls, whose judgment dismissing the plaintiff's bill with costs was affirmed. Upon the appeal, it was contended that at all events the plaintiff ought not to have been ordered to pay the costs of bringing the cause to a hearing, as there was no question as to the facts, and the question in the cause might have been raised by demurrer. Upon this the language of *James, L. J.*, is: "A great many cases have been referred to where the Court was of opinion that there was some technical objection, or that there was some other point which might have been raised, and ought to have been raised, if the parties had acted reasonably, by way of simple demurrer, which would have rendered the continuance of the suit unnecessary, and that the Court may take that into consideration in dealing with the costs of the suit. But the Master of the Rolls did, in this case, exercise his judicial discretion, and it is not the practice of this Court to interfere with the exercise of a judicial discretion, especially in a case like this, in which it has always been the custom to convert all these matters, which would otherwise come on upon interlocutory motions, as rapidly as possible into the stage of final hearing, so as to have the whole thing brought to a conclusion as quickly as possible, and so as to have only one appeal instead of two."

Judgment.

(a) 18 Gr. 590.

(b) 10 Ch. App. 459.

1878.
 Glidderleeve
 v.
 Cowan.

It is clear that the language of the Lord Justice does not apply to the very simple case of this defendant, as to whom it was so obviously a mistake to make her a party at all that she ought to have demurred; or, what would have been still better, have intimated to the plaintiffs, through her solicitor, that, not having joined in the mortgage, her rights could not be brought in question in the suit.

The decision of the Lords Justices proceeded upon this, that it was a case in which the Master of the Rolls might properly exercise, and had exercised, a judicial discretion as to the costs; and also that the course taken might prevent a double appeal: and it is not at all applicable to a plain and simple case like this.

This Court has steadily acted upon the principle that where there are two courses open to a party—the one more, the other less, expensive—and the party can with equal advantage to himself take the less expensive course, and he takes the more expensive one, he does so at the peril of costs, in such a case as this—a stronger case for the application of the rule than *Saunders v. Stull*—by the bill being dismissed, without costs. The case before the Lords Justices is an authority that it is not in every case where a bill may be demurrable and a party answers, and the bill is dismissed at the hearing, it must be dismissed without costs; but, on the other hand, it is not an authority that in a simple case where the bill is clearly demurrable, and a defendant answers, and the bill is dismissed at the hearing, it will not be dismissed without costs.

The bill, as against the defendant *Ann Cowan*, is dismissed without costs.

KIELY V. KIELY.

1878.

Corporation—Parties—Demurrer—Pleading.

A corporation consisted of three shareholders. The Act of incorporation provided that there should not be less than three directors, and that in case of a vacancy the remaining directors should supply the vacancy for the remainder of the year: *Held*, that one of the directors refusing to concur in the appointment, the vacancy could not be filled: and that a bill by such director against the other two shareholders and the corporation, to restrain the third shareholder from acting as a director, was properly framed.

Although the Interpretation Act requires statutes, declared to be public Acts, to be judicially noticed without being specially pleaded a defendant on demurrer cannot avail himself of the provisions thereof unless they appear in the bill.

THIS bill was filed by *George W. Kiely* against *William. T. Kiely, Elizabeth Grattan Smyth*, and the Toronto Street Railway Company. It stated that the defendants the Toronto Street Railway Company were a corporation duly incorporated under the Acts in force in this Province. That the shares of the Company amounted to 2,000, of \$100 each, the capital of the Company amounting to \$200,000. That of these shares 999 were owned by the plaintiff, 999 by the defendant *W. T. Kiely*, and two were claimed by the defendant *E. G. Smyth*. That prior to the death of the plaintiff's father, *Maurice Kiely*, in March, 1876, he was the holder of the two shares held and claimed by the defendant *E. G. Smyth*, which shares he bequeathed to her. That prior to his death the directors of the Company were the said *Maurice Kiely*, the defendant *W. T. Kiely* and the plaintiff. That since the death of *Maurice Kiely* no appointment of another director was made until the 7th of March last (1878), when a meeting was called for the purpose of supplying the vacancy caused by the death of the said *Maurice Kiely*. That on the 7th of March, 1878, the plaintiff and the defendant *W. T. Kiely* were the only

1878. directors of the said Company, and under the provisions of the Acts in force relating to the said railway the plaintiff and the said *W. T. Kiely* had the only power to appoint another director to fill the vacancy caused by the death of *Maurice Kiely*. That at the said meeting it was proposed by the defendant *W. T. Kiely* that the defendant *E. G. Smyth* should be named as a director in the place of the said *Maurice Kiely*, to which proposition the plaintiff objected; and refused to agree or consent to such appointment. That notwithstanding the plaintiff's objection as aforesaid, the said *W. T. Kiely* declared the said *E. G. Smyth* duly elected as a director, and caused her name to be inserted in the books of the Company as a director; and since the said pretended election the said *E. G. Smyth* had been acting as a director of the Company, and the defendants *W. T. Kiely* and *E. G. Smyth* had been acting as if the said election was valid, and had been managing the affairs of the Company against the will of the plaintiff, and had been incurring liabilities and expending moneys of the Company contrary to the express objections and dissent of the plaintiff. That lately, and on the 17th of April, 1878, the said *W. T. Kiely* and the said *E. G. Smyth* held a meeting as directors, at which a resolution was carried by them, whereby the board of directors authorized the president, who was the said *W. T. Kiely*, to buy the material and to proceed with the building of the north-west route and the Sherbourne street extension of the railway, and to purchase cars and other equipments. That pursuant to the said resolution, *W. T. Kiely* was proceeding to incur large expense and was rendering the Company liable therefor. The bill further stated that the defendant *E. G. Smyth* was under the control of *W. T. Kiely*, and that *W. T. Kiely* controlled the said Company and the seal thereof, and had the custody and possession thereof, and any application to use the name of the Company for the purposes of this

Statement.

Kiely
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suit would be futile, and the delay involved thereby would be prejudicial to the plaintiff. The plaintiff submitted that *E. G. Smyth* should be restrained from acting as a director of the company, and that *W. T. Kiely* and *E. G. Smyth* should be restrained from acting as a board of directors, and that they should be restrained from pledging the credit of the company; and that, if necessary, a receiver should be appointed. The bill prayed that the election of *E. G. Smyth* as a director might be declared invalid: that *W. T. Kiely* and *E. G. Smyth* might be restrained from acting as a board of directors of the company and from pledging the credit and otherwise dealing with the assets of the company: that, if necessary, a receiver might be appointed; and for further relief.

1878.
Kiely
v.
Kiely.

The company demurred for want of equity.

Mr. Attorney-General Mowat and Mr. Biggar, for the demurrer.

Mr. Blake, Q. C., and Mr. Boyd, Q. C., contra.

McDougal v. Gardiner (a), *Cass v. Ottawa, &c.* (b), *McMurray v. The Northern Railway Co.* (c), *Pender v. Lushington* (d), *Gray v. Lewis* (e), *Davidson v. Grange* (f), *Bailey v. Birkenhead* (g), *Cuddon v. Tite* (h), were referred to and commented on by counsel. The other points relied on appear in the judgment.

PROUDFOOT, V. C.—For the company it was argued that the allegation in the bill that the plaintiff and the defendant *W. T. Kiely* alone had the right to appoint a director in the place of *Maurice Kiely*

June 18th.
Judgment.

- (a) L. R. 1 Ch. D. 13; S. C. L. R. 20 Eq. 383, and L. R. 10 Ch. 606.
 (b) 22 Gr. 512. (c) 22 Gr. 476; 23 Gr. 173.
 (d) L. R. 6 Ch. D. 70. (e) L. R. 8 Ch. D. 1035.
 (f) 4 Gr. 382, 395. (g) 12 Beav. 443.
 (h) 1 Giff. 395.

1878. was a mistake, and counsel were proceeding to shew that the statutes incorporating the company placed that power in the body of shareholders. It was objected by the counsel for the plaintiff that the statutes could not be referred to: that the statement of the enactments in the bill was all that the defendants must rest their case upon. I think this objection valid. *Bailey v. Birkenhead* (a) is an express decision to that effect. The *Attorney-General* contended that the law was altered now by the Interpretation Act, Consol. Stat. C. ch. 5, sec. 6, sub-sec. 27, which provides that if any Act of the Parliament, &c., be declared to be a public Act, such declaration shall be construed as an enactment that such Act shall be judicially noticed, &c., without being specially pleaded. But a clause to that effect was inserted in the Act in question in *Bailey v. Birkenhead*, which, however, did not aid the demurrer.

Judgment. Assuming that the case must depend on the statements in the bill, it appears that the power to appoint another director was vested only in the plaintiff and the defendant *W. T. Kiely*, and that when *W. T. Kiely* nominated Mrs. *Smyth*, and the plaintiff objected, there could not be a valid appointment. It was a deadlock, and, unless the parties chose to come to some compromise, there could be no appointment.

The case was also discussed as if the statutes could be properly referred to, but it does not seem to me the conclusion can be otherwise.

The 24 Vict. ch. 83, the Act incorporating the company, enacts (sec. 7) that the affairs of the company shall be under the control of managers and conducted by a board of directors of not less than three nor more than seven, each of whom shall be a stockholder to an amount of not less than \$100, and shall be elected on the first day of October in any year, and all such elections shall be by ballot by a plurality of the votes.

(a) 12 B. 443.

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of the stockholders present, each share to have one vote, and the directors so chosen shall elect one of their number to be president, which president and directors shall continue in office one year, and until others shall be chosen to fill their places; and if any vacancy shall at any time happen of the president or directors, the remaining directors shall supply such vacancy for the remainder of the year. By section 11 if the election of directors be not made on the day appointed by this Act, the company shall not be for that reason dissolved, but the stockholders may hold the election on any other day in the manner provided for by any by-law passed for that purpose.

1878.

Kieley
v.
Kieley.

Under the 11th section I presume a special meeting of the shareholders might be summoned for the election of a board of directors on any other day than the first of October, if there be a by-law provided for the purpose. But that is not the meeting described in the bill. The bill alleges that the meeting was one of surviving directors to fill a vacancy caused by the death of a director, not a meeting to elect a board of directors, and therefore it comes under the 7th section of the statute, and it is only the remaining directors who have that power. The shareholders, *qua* shareholders, have nothing to do with it. It is true that two periods for annual meetings had elapsed since the vacancy occurred; but the president and directors once appointed continue in office until others shall be chosen to fill their places, and I see no reason to construe the Act so as to put an end to this one of their powers, that of supplying a vacancy, because the year of their election had expired. They are to continue in office, which can only mean that they are to retain the powers attached to their office, till a new election be had. When there are only two persons capable of exercising a power, and they cannot agree as to the mode of doing so, the result must be that the power cannot be put in operation; the directors must remain in office till the period for the annual meeting, or

Judgment.

1878. until a meeting of shareholders specially called for the purpose has put an end to the difficulty by the election of a new board. It is impossible to suppose that one of the two may exercise the power and fill the vacancy at his pleasure. The appointment is not within the competency of one, and the exercise of it in that way is *ultra vires*.

Kiely
v.
Kiely.

It was said that the plaintiff was violating his duty in endeavouring to prevent the office being filled by Mrs. *Smyth*, who was the only other shareholder of the company, and therefore the only person competent to fill the vacancy. I do not know that there was any duty in the plaintiff to permit his interests to be placed entirely in the control of *W. T. Kiely*, and that is the case alleged by the bill. It was a matter which should have been compromised, and there were many ways of doing so.

The powers conferred on the shareholders are nowhere stated in the bill, and I do not think I can import them into it. And it is only when these powers are brought into consideration that there is any room for the argument that the nomination is capable of confirmation. But it seems to me doubtful, on referring to the statute, that the shareholders could confirm the filling of this vacancy. They could indeed change the whole Board of directors at a meeting for the purpose, and they might elect Mrs. *Smyth* to be one of them; but that would be an independent act, not a confirmation of an act, or ratification of an act that was beyond the power of the directors to do. The question of confirmation, however, is only important in regard to the persons who ought to be plaintiffs. The great stress of the argument for the demurrer was, that the company should have been the plaintiffs: that the wrong done, if any, was an injury to the company, and one that the company should seek to redress.

There is no question about the general rule that the company should be plaintiffs in such a case. But there are several exceptions which are now as well recognized

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as the rule itself. One of these is where the corporation is controlled by the evil-doer, and would not allow its name to be used as plaintiff in the suit. It is not necessary that the corporation should absolutely refuse to vote at the general meeting, if it can be shewn that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting. In such a case the individual corporator may maintain the suit. *Atwool v. Merryweather*, (a) *Russell v. Wakefield, &c.*, Co. (b)

1878.

Kiely
v.
Kiely.

The bill in this case alleges that Mrs. *Smyth* is under the control of *W. T. Kiely*, and that he controls the company and the seal of it, and has the custody and possession of the seal, and any application to use the name of the company for the purposes of this suit would be futile. This is by the demurrer admitted to be true, and brings the case within the decision in *Atwool v. Merryweather*.

It appears from the case of *Pender v. Lushington*, (c) that a shareholder may sue for himself and other shareholders, and name the company as a plaintiff, where the matter is urgent and the interference of the Court is necessary; but that does not deprive the shareholder in a proper case of the right to sue in his own name. And the case of *Duckett v. Gover*, (d) shews that where the company is improperly made a defendant, the only result under the new practice in England, and it would be the same under our Administration of Justice Act, would be a question as to who should pay the costs of the demurrer, for the plaintiff would be permitted to amend.

Judgment..

One important reason for the rule requiring the company to be plaintiffs, as stated in *Gray v. Lewis*, (e) is to avoid oppressive litigation: "The shareholder who first

(a) L. R. 5 Eq. 464, n.

(c) L. R. 6 Chy. D. 70.

(e) L. R. 8 Chy. at 1051.

(b) L. R. 20 Eq. 474, 482.

(d) L. R. 6 Chy. D. 82.

1878.

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v.
Kieley.

filed a bill might dismiss it, and if he was a poor man the defendant would be unable to obtain his costs; then another shareholder might file a bill, and so on. It was also stated in the course of the argument that even after the plaintiff had dismissed his bill against a particular defendant, a fresh bill might be filed against the defendant and dismissed. Therefore there might be as many bills as there are shareholders multiplied into the number of the defendants. The result would be fearful, and I think the defendant has a right to have the case made against him by the real body who are entitled to complain of what he has done." But in a case like this these are imaginary evils. There are but two, or at the most three, shareholders, and all of them as well as the Company are parties to the suit.

Upon any view of the case then, whether the statutes are to be considered as imported into the case or not, this demurrer must be overruled. Upon the bill alone it is a perfectly clear case; and upon the bill and Judgment. statutes, as I do not think it necessary to determine whether the Act be capable of confirmation or not, because though the company might be the proper plaintiffs, yet under the circumstances of the case it would be futile to endeavour to get the company to consent to become plaintiffs, it seems to me equally clear the result must be the same.

Demurrer overruled, with costs. Leave to answer in a fortnight. See *Cass v. Ottawa, &c., Co.* (a).

(a) 22 Gr. 512.

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1878.

MARTIN V. HALL AND NICHOLS.

Assignment of lease as security—Postponing of action—Principal and surety—Mortgagees selling.

The lessee of a mill assigned his term, less one day, to certain of his creditors as a security against his indebtedness, and who it was intended should send him wheat to grind, receiving the flour therefrom, it being agreed that a settlement should take place at the end of each year, and that the balance, if any, coming to him should be paid to him :

Held, that this arrangement had not the effect of preventing the creditors from realizing their security before the expiration of the year, and that the arrangement did not discharge a surety of the debtor

Where mortgagees sold the mortgaged premises without notice to a surety for part of the debt :

Held, that they were liable as between themselves and the surety for the full value of the property.

Examination of witnesses and hearing at Peterborough.
The facts of the case appear sufficiently in the judgment.

Mr. *W. H. Scott*, Q.C., for the plaintiffs, contended Argument. that the facts clearly established a case of suretyship. Here it is shewn that in addition to the assignment of the leasehold interest the defendants had obtained from *Martyn Martin* a conveyance in fee of certain lands. These the defendants, it is established in evidence, had thought proper to sell, without consultation with or the consent of the surety : under such circumstances this operated as a discharge of the liability of the surety : *Wulff v. Jay* (a), *De Colyar* 326, 438, and cases there cited. But if not, clearly the surety's estate was entitled to receive credit in respect of the liability on the note in which he joined as a surety. Counsel also contended that by the arrangement between the parties the rights of the surety were placed in abeyance from year to year ;

(a) L. R. 7 Q. B. 756.

1878. and that after the receipt by the defendants of wheat for
 the purpose of being ground they, the defendants, could
 not close at any moment it might suit them to do so.

Martin
 v.
 Hall et al.

Mr. *Boyd*, Q.C., and Mr. *Poussette*, for the defendants. It is not shewn that at any time the creditors had tied their hands by any arrangements into which they had entered with the principal debtor. There was really no giving of time by them. The assignment evidently contemplated further advances from time to time by the creditors, and was a course of dealing sanctioned by the plaintiff: *Howell v. Jones (a)*, *DeCollgar* 320-1. Here the surety is simply entitled to the value of the property sold if sold *bona fide* and for value: *Capel v. Butler (b)*, *Montreal Bank v. Davy (c)*, *DeColyar* 331.

Judgment. SPRAGGE, C.—The plaintiffs represent *John H. C. Martin*, deceased, who was surety to the defendants for one *Martyn Martin*, and claim that certain lands pledged by the deceased to the defendants to secure the debt of *Martyn Martin* should be released.

The suretyship was created by the giving to the defendants by the deceased and the principal debtor, of a joint and several promissory note for \$4,181.64, dated 1st January, 1861, payable six months after date.

The principal debtor was lessee of certain mill property under indenture of lease of 30th April, 1862, for a term of fourteen years and six months, from the 1st of May of that year, and by indenture of 13th August in the same year, the lessee demised the same to the defendants for the residue of the term less one day, the last of the term, by way of security for a debt due by the lessee to the defendants for \$3,261.85, for the above promissory note, and for future advances by the defendants to the lessee. On the demise to the defendants is indorsed a consent signed by the lessee and the surety

(a) 1 C. M. & R. 97. (b) 2 S. & S. 457. (c) 21 U. C. C. P. 179.

that the note was not to be thereby merged, but to be still held by the defendants, who should be at liberty to sue upon and collect the same as if the demise had not been made.

1878.

Martin
v.
Hall et al.

The principal debtor was a miller, and the defendants had dealt with him before the giving of the note, and continued to deal with him afterwards; sending to the mill grain to be ground, and making advances to him from time to time.

One of the grounds upon which the plaintiffs claim that the surety was discharged arose out of these dealings. The dealing in question is thus described by Mr. *Hall*, one of the creditors, in his evidence: "It was the intention on our part that *Martyn Martin* should continue to do grinding for us. The arrangement as to that was, that he (*Martyn*) should give us a certain quantity of flour for the wheat which we delivered to him. This arrangement was at one time somewhat changed. It was then understood that we should have all the flour that the wheat sent in by us should yield, and that we were to advance what might be necessary to pay wages and carry on the operations of the mill, and that at the end of the year if there were any balance coming to *Martyn* he should be paid it. This arrangement only existed a short time, I think for not over one year, and I think there was never any settlement of accounts between us under that arrangement."

Judgment.

The mill in relation to the working of which so far as the dealings between these parties were concerned, was one of the securities held by the defendant for the payment, *inter alia*, of the note upon which *John H. C. Martin* was surety; and the contention is, that under the changed arrangement described by *Hall*, the creditors disabled themselves, for one year at any rate, from realizing that security. It all turns upon the effect of the provision that at the end of the year if there were any balance coming to *Martyn* he should be paid it. The question appears to be whether that arrangement

1878. disabled the creditors from taking possession of the mill at any time—whether supposing the surety to have paid the debt, the creditors could have assigned to him the lease of the mill with right of possession. Apart from the provision that at the end of the year the balance, if any, in favour of the debtor should be paid to him, there was nothing to tie the hands of the creditors. They might choose at any time to abstain from sending in any more wheat; and it would only be a question as to the money payment to be made to the debtor in respect to the balance, if any, due to him. I have considered the point a great deal, and think that the right conclusion is, that the creditors did not, by the arrangement in question, disable themselves from enforcing their security upon the leasehold premises.

Martin
v.
Hall et al.

The objection is a purely technical one, especially when it is considered that what the surety would have to pay to entitle him to that security would be not only the debt for which he was surety, but the whole amount due from the debtor to his creditors, which, as it appears by the evidence, was constantly growing until it reached at last to somewhere about \$40,000.

Judgment.

It was also contended that as these premises, being leasehold, became of less value year by year, the creditors should have realized upon them. The law is, that if a security is lost through the negligence of a principal creditor, the surety is discharged. *Wulff v. Jay* (a) is a leading case upon that point, and the older case of *Capel v. Butler* (b), before Sir John Leach, is an authority for the same position. Here the security was not lost, nor can I say that there was negligence. The creditors did what in their judgment was best for their own interest in dealing with this security. I do not see that it was obligatory upon them to realize it (c): and this material fact is in evidence, that the surety himself was constantly about the mill—employed

(a) L. R. 7 Q. B. 756.

(b) 2 S. & S. 457.

(c) *The Montreal Bank v. Davy*, 21 U. C. C. P. 179.

there as I understood—and so necessarily cognizant of the mode of user by debtor and creditors.

1878.
Martin
v.
Hall et al.

I think there can be no question as to the rights of the parties in respect of the parcel of land which was held by the creditors as collateral security and sold by them. They do not appear ever to have denied the right of the surety to have the proceeds credited upon the note. The plaintiffs claim more; their contention is, that the land having been sold without notice to the surety he was entitled to be discharged absolutely.

Where a security is lost through the negligence of the creditor, he is bound simply to make it good. This was decided in *Strange v. Fooks* (a), as appears by the inquiry directed, and the same was evidently the view of the Court in *Wulff v. Jay*; any other rule would be most unreasonable, and the same rule must, I think, apply where a creditor has realized a security. As he realized without notice he ought to answer for the full value, but there would be no reason in giving to the act of the creditor such an effect as is contended for.

Judgment.

There have been large dealings between the parties; advances and receipts from time to time. It has not been contended that the effect has been to discharge the note by appropriation of payments. It has probably been considered that the effect of the indorsement on the lease given by way of security by the debtor to the creditors, and to which indorsement the surety is a party, prevents the operation of the rule upon that subject in this case.

If an inquiry is desired by the plaintiffs as to the value of the security realized, the bill will be retained for that purpose, otherwise it must be dismissed and with costs; unless, indeed, the plaintiffs desire to argue the point as to appropriation of payments and receipts. What I have said upon that point has not been said with a view to encourage an argument upon it.

(a) 4 Giff. 408, 416.

1878.

BOLCKOW V. FOSTER.

Firm—Pleading—Parties—Demurrer—Surviving partners.

Where a sale of railway stock and bonds was effected by a partnership, a mortgage being taken back to secure part of the purchase money, and one of the partners subsequently died; it was held on rehearing, (affirming the decision as reported *ante* volume xxiv., page 333), that the right to enforce payment of the unpaid purchase money remained in the surviving partner, and that the representative of the deceased partner was an unnecessary party to the bill.

Held, on demurrer to a bill, that the word "firm" meant a partnership; and that property alleged to belong to a firm must be taken as belonging to its members as partners, and not as tenants in common.

This was a rehearing, at the instance of the defendant, of the order pronounced on the argument of the demurrer, as reported *ante* vol. xxiv., page 333.

Mr. *Bethune*, Q. C., and Mr. *Boyd*, Q. C., for the defendant.

Mr. *Crooks*, Q. C., and Mr. *Creelman*, contra.

Judgment.

SPRAGGE, C.—I have read the very carefully considered judgment of my brother *Proudfoot* in this case (a). I agree entirely with his comments upon the case of *Sykes v. Brockville and Ottawa Railway Co.* (b), and the case of *Forsyth v. Drake* (c), referred to in that case.

Haig v. Gray (d), is an authority for the position, that upon the death of a partner the survivor or survivors, in a suit for the recovery of a debt due to the partnership, need not make the representatives of the deceased partner parties, and that is the rule in suits in equity as well as law.

I do not know that the defendants seriously controvert this position, but they say that this is a case of

(a) 24 Gr. 333.

(b) 9 Gr. 9.

(c) 1 Gr. 223.

(d) 3 DeG. & S. 741.

a sale of chattels; and *Buckley v. Barber* (a), and *Rathwell v. Rathwell* (b), are referred to for the position that as to chattels the property of a partnership, the partners are entitled as tenants in common, and consequently that there is no right of survivorship. But as is pointed out in the judgment of my learned brother, the property sold to *Foster* was sold during the partnership, not by the surviving partner; and that what remained to the partners was a right of action to recover the purchase money with a lien upon the evidences of title. And as my learned brother goes on to shew the agreement was, not that the firm should retain them, but that the plaintiff should do so, though he would, I apprehend, retain them on behalf of the firm.

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Bolckow
v.
Foster.

Another objection is, that it does not appear on the face of the bill that the securities sold to *Foster* were partnership property; that for all that appears *Bolckow* and *Vaughan* may have been joint owners, as was the case in *Vickers v. Cowell* (c), and as, for all that appears on the bill in *Forsyth v. Drake*, was the case there. It is to be conceded that the fact of *Bolckow* and *Vaughan* being owners of these securities as partners is not so distinctly stated as it might have been, but I incline to think it sufficiently stated. The allegation that *Bolckow* and *Vaughan* were partners, and that the securities sold were partnership property, appears distinctly enough, if we place the 12th paragraph at the head of the bill, which is as follows:—

Judgment.

“The firm of *Bolckow* and *Vaughan* was composed of the plaintiff and one *John Vaughan*, who subsequently to the date of the agreement of the 31st day of May, 1871, departed this life, leaving the plaintiff sole surviving partner of the said firm, and the plaintiff is now solely entitled to all the interest of

(a) 6 Ex. 164.

(c) 26 U. C. R. 179.

(b) 1 Beav. 529.

1878. the said firm, under the said agreement with the defendant *Foster*."

Bolckow
v.
Foster.

The 1st paragraph is as follows:—

"Under and by virtue of an agreement made the 31st day of May, A.D., 1871, the plaintiff, as well on his own behalf as on that of the firm of *Bolckow and Vaughan*, sold to the defendant *Foster*, and the defendant *Foster* purchased from the plaintiff and the said firm all the right, title, and interest of the plaintiff, and the said firm in the following securities." And the securities are then set out.

It is quite competent for the parties, as it is for the Court, so to transpose the allegations in the bill if doing so does not do violence to the sense. See as to this, *Corporation of London v. Attorney General (a)*, where the Lord Chancellor (*Cottenham*), says: "It is said by the learned counsel for the appellants that you must not pick out of the information a passage here and there, and put them together, but look to the main subject of the information. Now, I conceive that a party is entitled to pick out particular parts of the information to make out his case; that upon the information as it stands, admitting all the facts to be true as stated, when the party comes to a hearing of such allegation he may, upon the face of the information, select such facts as are admitted, and as will entitle him to relief. It is quite immaterial in what part of the information you find this ground for relief, provided it is to be found there, the facts being so admitted, and the Court being called upon to give effect to the information."

Judgment.

The word "firm" has a recognized legal signification. It is used in treatises on the law of partnership as synonymous with partnership. *Wharton's* definition is, "The name or names under which any house of trade is established." The allegation as to what was sold is

(a) 1 H. L. C. at p. 466.

all the right, title, and interest of the plaintiff, and of the firm, that is, of the partnership, and that the sale was by the plaintiff on his own behalf and on behalf of the firm. Assume that *Bolskow* had an interest of his own, besides his interest as a partner; that forms no objection, as he is plaintiff in any and every capacity. It may even be assumed also that *Vaughan* had an interest, besides his interest as a partner, though there is nothing to warrant such assumption, still it would be no objection because such interest was not sold. I think the inference is excluded that *Vaughan* had any interest other than as a partner in the thing sold, and which was the subject of the sale.

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Bolskow
v.
Foster.

I do not know that it is necessary to resort to the rule of construction of pleadings propounded in *Grant v. Eddy* (a); but the bill in this case is at any rate, in my opinion, sufficient under that rule of construction. I think the order overruling the demurrer should be affirmed, with costs.

Judgment.

BLAKE, V. C., and PROUDFOOT, V. C., concurred.

(a) 21 Gr. 568.

1878.

IN RE CAMPBELL.

Practice—Evidence—Dower.

Upon an application under the Statute to dispense with the execution of a conveyance by the wife of the grantor, alleging that she had been living apart from her husband (the petitioner) for two years in consequence of her adulterous conduct, the respondent denied the adultery and other misconduct charged. The petitioner produced as evidence the decree in a suit for alimony, in which he had set up her adultery as a defence. The decree dismissed the bill, and did not state the ground of dismissal:

Held, that such decree was not sufficient, and the application was refused.

This was a renewal of the application as reported *ante* page 187.

Mr. *Bethune*, Q. C., in support of the petition, submitted that the allegations thereof shewing the reasons for the respondent living apart from her husband were sufficiently established by the production of the decree dismissing the suit for alimony, as reported *ante* volume 22, page 326, to warrant the Court in granting the order now asked for.

Mr. *W. McDougall*, *contra*.

Judgment. SPRAGGE, C.—This is a petition by *Robert Campbell*, the husband of *Eliza Maria Campbell*, presented under sec. 10 of ch. 126, of the Revised Statutes of Ontario—the Dower Act.

This section prescribes a course of proceeding under which a husband may in a certain state of circumstances be permitted, with the approval of a Judge of one of the Superior Courts, to sell and convey land, free from the inchoate right of dower of his wife, without the concurrence of the wife, for the purpose of barring her dower. The state of circumstances under which this may be done is thus defined: "Where the wife of an owner of

land has been living apart from him for two years, under such circumstances as by law disentitles her to alimony." It is not, "under such circumstances as would if her husband were dead disentitle her by law to dower," and therefore the law under the statute of Westminster the 2nd, and the more recent decisions upon it, are not material to a decision upon this petition.

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Campbell.

The petitioner's case, as put in argument upon the hearing of his petition, is, that his wife was guilty of adultery in 1873, and that she has ceased to live with him from that time to this; he does not state under what circumstances she ceased to live with him, except what may be inferred from his reference to legal proceedings. She, in her affidavit filed in answer to the petition, states that she never willingly left her husband; but that he forcibly expelled her from his house, and has refused to receive her back. If in fact she was guilty of adultery her adultery would by law disentitle her to alimony, and her expulsion by her husband from his house would make no difference in her favour. Her living apart would be living apart under such circumstances as would disentitle her to alimony. The statute makes a living apart for two years necessary for the operation of the clause respecting dower; this, probably may be looking to the possibility of reconciliation.

Judgment.

The word used in the statute in respect to the approval by a Judge of the application of the husband is "may," but I do not apprehend that it was intended to be left to the discretion of the Judge to refuse the application, if adultery were proved against the wife. Adultery is not mentioned at all in the statute, and the living apart may have been under circumstances other than criminal; still such as would disentitle the wife to alimony, but not such as in the opinion of the Judge ought to work a forfeiture of her dower. It is, I apprehend, under such circumstances, if at all, that the Judge is at liberty to exercise a discretion.

I come now to the all-important question, whether the

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alleged adultery of the wife is established in evidence before me. Mr. *Bethune* puts it that it is *res judicata*. If so, it should appear as matter of record, and if, as put by Mr. *Bethune*, not to be controverted, it should in strictness be alleged by way of estoppel. But assuming that in a summary proceeding such as this, such strictness as a matter of pleading is not necessary—which, however, I do not concede—when we look at the record what does it shew? The only matter of record between these parties is the decree, put in as a decree in the suit for alimony; and that does not shew what were the pleadings, or whether adultery by the wife was alleged in the answer. It does not indeed appear upon the face of that record that it was in a suit for alimony. All that appears upon the face of the record is, that it is a suit by *Eliza Maria Campbell*, against *Robert Campbell*, and that her bill was dismissed. The pleadings in the suit are not put in, but they are no doubt a bill by the wife alleging desertion, and praying alimony, and an answer by the husband setting up adultery by the wife, as an answer to her bill. The report of the case in *22 Grant*, at p. 326, states such to be the bill and answer. Taking such to be the pleadings, and looking at them as I think I may properly do, and reading them with the decree, they do not establish as *matter of record* the adultery of the wife. Her bill is dismissed. It may be because she did not prove legal desertion; failing to prove which, the onus of proving it being upon her, her bill would necessarily be dismissed. There is nothing of *record* to shew that it was not dismissed for that reason.

Judgment.

I am of course dealing only with the petitioner's position, that the fact of adultery is proved by matter of record. I am not at liberty upon this dry point to look at the evidence, or the conclusion drawn from the evidence by the learned Judge before whom the cause was heard, to see the *ratio decidendi*. The decree might have contained a declaration that the adultery alleged in the

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answer was established by the evidence, and in that case the fact would be established by matter of record, but the decree being as it is, the fact is not in my opinion so established.

1878.

In re
Campbell.

The exemplification of judgment in *Campbell v. Gordon* is not a matter of record affecting the petitioner's wife, as she was not a party to that record; and there is no other evidence before me to establish the fact of adultery. The only other evidence upon that point is that of the wife; and by her the alleged fact is denied. The affidavit of the husband does not establish the fact, —properly so—as he was not I assume personally cognizant of the facts; and his affidavit does not, any more than the decree itself, state that the bill was dismissed on the ground of adultery being proved against the wife, or that he had set up her adultery in his answer.

My conclusion is, that there is not legal evidence of the fact of adultery by the wife, and in the absence of such proof it is not made to appear that she has been living apart from her husband under circumstances to which the statute would apply. Judgment.

The respondent, after denying the adultery, and referring to her action against *James Campbell* for slander, to which I need not further allude, gives a narrative of the proceedings in the Senate of the Dominion upon the petition for a divorce. She states that the Senate after hearing evidence for several days, refused to pass a bill for divorce, on the ground that the petitioner had failed to prove adultery by his wife, and she goes on to say, in the 7th, 8th, 9th, and 10th paragraphs of her affidavit:—

"(7). While my husband was prosecuting his case before the select committee appointed to take the evidence, I petitioned the Senate for a divorce *a mensa et thoro*, from my husband on the ground of cruelty, desertion, and refusal to provide me with the means of support suitable to my condition. (8). The Senate after further evidence was taken in support of my charges, found the same to

1878. be true; and therupon amended the bill of my husband so that it would operate as a bill of divorce from bed and board, with provision for my support and the support of my youngest child. (9). In consequence of objection being taken in the House of Commons, to the sufficiency of notice of the said amended bill, it could not be passed by that house during the last session (10). I have petitioned Parliament this session in *forma pauperis*, to dispense with further notice to my husband in respect of the said bill, and I have every reason to believe that my petition will be entertained, and that the House of Commons will ultimately pass the bill as amended and passed by the Senate."

In re
Campbell.

In my view of the evidence it is not really necessary to consider the state of circumstances thus put forth by the respondent, and I only refer to it because it may have some bearing upon the proper course to be pursued. Mr. *Bethune* contends that such an act as the wife has prayed for would be *ultra vires* of the Dominion Parliament. I think I ought not to take upon me to decide so nice a question unless it should be absolutely necessary to do so. By the British North America Act exclusive legislative authority is conferred upon the Parliament of Canada in, among other matters, "marriage and divorce," while among the exclusive powers conferred upon Provincial Legislatures, is "the solemnization of marriage in the Province." It may be that the Act which the respondent hopes to see passed, may not be passed by the Dominion Legislature. If it is not, there will be one difficulty the less in the petitioner's way. Proceedings are now pending before the Dominion Parliament, and while they are so it would be unseemly, and I think improper, to make such an order as is prayed for in this petition.

The order that I think it is proper for me to make is, that this petition be dismissed without prejudice to the filing of another petition, as the petitioner may be advised.

Since the argument of this case in the early part of

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this month, the Legislature has by an enactment which received the Royal assent a few days ago, amended the clause in the Dower Act under which this application is made. This has been brought under my notice after I had written the greater part of the judgment, that I have just pronounced. It makes no difference in what I conceive the proper conclusion in the case, but it may make a difference as to the petitioner being entitled to relief upon his proving—if he does prove—the allegation in his answer in the suit for alimony. I abstain however from expressing any opinion on the point. *

1878.

In re
Campbell.

Judgment

* The enactment here referred to is sec. 13 of Ch. 8 of 1878, (41 Vict.) which amends the Revised Statute Ch. 126, sec. 10, by inserting between the word "dower" and the word "and" in the tenth line, the words, "And he shall (unless the wife has been so living apart from her husband under such circumstances as disentitle her to dower) ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or be secured otherwise for the wife's benefit, or to be paid and applied for her benefit, as he deems best."

1878.

ROBERTSON V. ROBERTSON.

Dower, value of.

Held, on rehearing, [affirming the order of *PROUDFOOT*, V. C., as reported *ante* p. 276,] that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in ascertaining such dower the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee. [*BLAKE*, V. C., dissenting, who was of opinion that the amount of the surplus, after paying the mortgagee the full amount of debt, interest and costs, was the proper sum to compute the value of the dower upon].

Dawson v. The Bank of Whitehaven, L. R. 6 Ch. D. 218, observed upon and distinguished.

February 26. This was a rehearing at the instance of creditors of the estate of the late *Donald Robertson*, of the order pronounced by *Proudfoot*, V. C., as reported *ante* page 276, where, and in a previous report, *ante* vol. xxiv., p. 442, the facts are clearly stated.

Mr. *W. Cassels*, for the creditors, who rehear.

Mr. *P. McCarthy* and Mr. *Ewart*, contra.

June 27th. *SPRAGGE*, C.—Before and at the time of the making of the mortgage in this case, the husband was seized in fee simple by legal title in the whole of the lands mortgaged. As an incident to that title, the wife had an inchoate right to dower, which also was a legal right,—an interest recognized by the law, and over which the husband could by law exercise no control. The interest of the wife, while of a different nature, was co-extensive with that of the husband, *i.e.*, embracing the whole of the land, and could not be affected without her formal consent, by anything done or suffered by the husband.

Money was borrowed by the husband, and to secure its re-payment, a mortgage upon this land was given. The Master finds that the wife did not receive to her

own use any portion of the money; and without such finding the law would imply that as the money passed into the hands of the husband, he used it for his own purposes. This would be inferred if it were money borrowed on the security of the wife's property, *a fortiori* would it be inferred when borrowed on the security of the husband's own property: *Kinnoul v. Money* (a). The wife participating in the benefits accruing from the use of the money—where the fact is so—can make no difference.

1878.

Robertson
v.
Robertson.

The substance of what is done upon such a transaction, and of what was done upon this occasion was, that the husband pledged his estate in certain land; and the wife pledged her interest in the same land to secure the payment of money advanced by the pledgee to the husband, or the payment of a debt, it matters not which, due to the pledgee by the husband. All the difficulty that is in the case arises from the legal effect of what was done being to convert the legal estate of the husband and the legal interest of the wife into an equitable estate and interest respectively. Judgment.

The right to redeem is reserved to the husband, and the covenant to pay is by him, but we are all agreed that in the event of redemption by the husband, the circumstance of the right to redeem being reserved to him would not affect the rights of the wife. The instrument would become void, and she would be in as of her old estate, and a re-conveyance to the husband would be with the same incident, the right of the wife to dower.

In *Wood v. Wood* (b) the wife, who was entitled under her marriage settlement to a rent charge upon certain lands, joined with her husband in a mortgage to secure, money borrowed by him; and the land was conveyed "discharged and released" from the jointure of the wife subject to redemption by the husband. Lord *Langdale* held the right of the wife not extinguished, observing

(a) 3 Sw. 202.

(b) 7 Beav. 183.

1878. "It is established law that where an estate is mortgaged, the equity of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses, or to the trusts of the original settlement."

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It would seem to follow from what is the nature of an equity of redemption, that it would continue to subsist in those who, before the creation of the mortgage, had title. Mr. *Crabbe*, in his treatise on Real Property, says "An equity of redemption descends to or is vested in such persons as would have been entitled to the land if there had been no incumbrance," and Mr. *Cooté* thus defines it: "An equity of redemption then is in equity the ancient estate in the land without change of ownership." Now, after the late case of *Dawson v. Bank of Whitehaven* (a), we must add the qualification that it be not incompatible with the estate created by the mortgage; or into which the previous estate is converted by the mortgage.

If the wife were dowable generally of the equitable estate of the husband, and not only as she is by the law, where he dies seized of an equitable estate, the widow would be entitled to dower just as she is entitled, where the title of the husband is a legal title; and her having joined with the husband in a mortgage to bar her dower, could make no difference as to her title to dower. The law, as it is, makes necessarily only this difference that the husband must die seized. There is the contingency that he may not die seized; but if he does die seized, then, in land held by the husband by any equitable title other than an equity of redemption, the widow is dowable.

I have heard, and I can see, no reason why an equity of redemption should be an exception. Looking at what an equity of redemption is described to be in the passages I have quoted, from Mr. *Crabbe* and Mr. *Cooté*, there is every reason for the dower of the wife standing upon the same footing in regard to the equity of redemption as to any other equitable estate of the husband.

(a) 6 Ch. Div. 218.

If it were not for the distinction between legal and equitable estates there would be no difficulty, the wife would be dowable as of course; then what is the distinction as to dower? only this, that the husband must die seized, there is that contingency. If the contingency happens in favour of the wife the distinction is annulled. To deny dower to the wife in such a case would be simply arbitrary, and I think illogical. It would be making an exception to a general rule without any reason for such exception; and that against a class which is favoured by the law. This Court has, I think rightly, from its creation, held the widow of a mortgagor who has died seized, entitled to redeem a mortgage in which she has joined, for the purposes of the mortgage in barring her dower.

1878.
Robertson
v.
Robertson.

There remains that which is the most serious question in this case, whether the widow is dowable out of the whole value of the land sold, or only out of the value of the equity of redemption? That which the husband had at his death was certainly only an equity of redemption; and it seems to be necessary to resort to the doctrine of suretyship to give to the widow the larger right. There are two cases bearing upon this point decided by Chancellor *Walworth*. In the earlier case, *Neimcewicz v. Gahn* (a), a mortgage was made by husband and wife of the property of the wife to secure a debt of the husband; and the learned Chancellor in an admirably reasoned judgment, held the doctrine of suretyship to apply. In the later case, *Hawley v. Bradford* (b), the mortgage made by husband and wife was of the husband's lands, and the wife was held dowable (the mortgaged premises having been sold under the mortgage) only of the surplus remaining over and above the mortgage debt. The learned Chancellor defining the interest of a wife, which we call inchoate right of dower, said: "Strictly speaking the wife has no estate or interest in

(a) 8 Paige, 614-640.

(b) 9 Paige 200.

1878.
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the land of her husband during his life which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage therefore merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband; but without impairing her contingent right of dower in the equity of redemption." And he concludes that there is no suretyship; but without any reason for his conclusion beyond the nature of that which existed in the wife when she joined with her husband in the mortgage. With the highest possible respect for the opinion of the learned Chancellor, I am unable to see what the nature of that which existed in the wife, provided it be something which is recognized by the law, has to do with the question of suretyship. There was a pledge, created by contract, between the wife and the mortgagee as well as between the husband and the mortgagee. There could not be a pledge without something being pledged, whether that something be an interest or right, or inchoate right or claim, or whatever it be, it is a something which may be, and in this instance was the subject of contract; and is recognized by the law as a thing of substantial value, in some cases of great value, in others of but little, its value depending upon a variety of circumstances. I take it to be in the nature of (though of course not literally) a marital right existing in the wife independently of the control of her husband. If any person other than a wife, having an interest in land contingent or otherwise, join in a mortgage with a person having the principal interest to secure the debt of the latter the relation of principal and surety would arise. I fail to see upon what principle a wife can be an exception.

Judgment.

The wife pledges that which is hers, not her husband's, to secure the debt of the husband. That, and no more, is the contract. It is true that much is thereby placed in the power of the husband, more in most cases than is contemplated by the wife, even to the extinction

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of her right altogether; but that does not alter the case where the husband abstains as he did in this case from exercising such power. As a matter of reasoning, therefore, I should arrive at the conclusion that the relation of suretyship was, upon the execution of the mortgage, constituted between the wife and the husband; and that it subsisted at the death of the latter.

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I do not think that *Dawson v. The Bank of Whitehaven* touches this case in any of its aspects. The mortgage in that case was made before the passing of the Act giving dower in equitable estates, and the judgment proceeds, as put by the Master of the Rolls, "upon the plain principle that the legal right to dower was extinguished, and that the right to dower, not being an incident to an equitable estate, cannot afterwards exist for any purpose which can be recognised in this Court." There is the obvious distinction between that case and this, that by our law the wife joining her husband in a mortgage, her right to dower is not thereby "extinguished." It is only converted from a legal to an equitable right, which, though the husband may by some subsequent act of his extinguish it, continues to subsist unless he does such act; and in this case he did no such act.

The question of suretyship was thus dealt with by the Master of the Rolls: "If the right to dower is extinguished, she (the wife) had no property to pledge, as to which the question of suretyship could arise, nor did she become personally liable for the mortgage debt so as to raise any question of personal suretyship." By Lord Justice *James*, "When once she has joined in extinguishing her right to dower, and in converting, or enabling the husband to convert his legal estate into an equitable one, she has done it for all purposes. The dower, which was an incident of the legal estate, fell with it, and no incident could be raised in respect of the equitable estate different from that which a Court of Equity always attached to equitable estates.

Judgment.

1878. In *Neimcewicz v. Gahn* Chancellor *Walworth* said this: "If the lien for the whole mortgage money and

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interest still remained as a charge upon the wife's estate in the premises, there would be a plain and manifest equity in her favour to have her husband's estate in the mortgaged premises first sold, and the proceeds thereof applied towards the payment of the debt, for which the property of the principal debtor is first liable in equity."

Reading this with the passages I have just quoted from the Master of the Rolls and the Lord Justice, I take the meaning to be that where there is still existing an estate in the wife on which a lien for the mortgage debt can attach, or a personal covenant by her, the doctrine of suretyship will apply: where there is neither, that it will not apply. In the events that have happened in this case, there is an estate in the wife to which the lien or charge of the mortgage debt attaches. The doctrine that where the mortgage is of the wife's lands, she is to be considered as parting with it solely for the purposes

Judgment.

of the mortgage, was not questioned in the English case, and was affirmed in terms by Lord Justice *Cotton*; and as an incident there would, I apprehend, necessarily follow the doctrine of suretyship. The only really substantial difference between such a case and this is, that in this the property is not that of the wife in the primary sense of the term, but she had, at the giving of the mortgage, an inchoate right which has ripened into an absolute right of dower, and that difference is not, in my opinion, a difference in principle. The wife has--what was wanting in *Dawson v. The Bank*—that upon which the mortgage debt can and does attach.

My learned brothers, before my return from circuit, prepared judgments which I have had the advantage of seeing, and which have rendered it unnecessary for me to go as fully into the case as I otherwise might have done. I have thought it right, however, as I have found myself unable to agree with my brother *Blake*, to indicate the grounds upon which I conceive the dowress entitled to the larger right which she claims.

My brother *Proudfoot* is probably right, in his judgment upon the appeal from the Master in this case (a), as to the grounds upon which in *Moffatt v. Thompson* (b), the Court held the wife not a proper party during the life of the husband to a bill of foreclosure.

1878.

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v.
Robertson.

It certainly never was intended to be held that in the event of the husband dying seized, and the wife surviving him, she was not entitled as dowress to redeem; as it has been the constant practice to recognize such right in the practical way of making her a party to bills to foreclose or to redeem.

In my opinion the order of my brother *Proudfoot* should be affirmed.

BLAKE, V. C.—The clause “and the said (A.B.) wife of the said mortgagor hereby bars her dower in the said lands,” as the mortgage was made in pursuance of “the Act respecting short forms of mortgages,” is to be construed as if it contained the words following: “and the said (A. B.) wife of the said mortgagor, for and in consideration of the sum of _____ of lawful money of Canada, to her in hand paid by the said mortgagee, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release, unto the said mortgagee, his heirs and assigns, all her dower, and right and title, which, in the event of her surviving her said husband she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.” These words are wide enough to embrace any present as well as prospective right, interest, or estate of the wife in the lands the subject of the mortgage. They deal not only with the interest of the wife as it stands the day the mortgage is executed, but dispose of her “right and title, which in the event of her surviving her husband she might have

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(a) 25 Gr. at 280.

(b) 3 Gr. 111.

1878.
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to dower." If this clause appeared in an absolute conveyance the wife's right to dower would doubtless have thereby absolutely passed to the grantee. But in the present case the mortgagee has not contracted either with the husband or the wife for the wife's dower absolutely. If this clause be read as an unconditional parting with the wife's right to dower, then the mortgagee might claim that in any event her estate or interest might be held by him. If the mortgagee cannot hold it, then the husband might say on redemption by him, the wife's interest, which passed to the mortgagee is transmitted to him. But it is equally clear that no agreement was made between the parties whereby any such result was to follow on satisfaction of the mortgage money. Then follows the proviso which, although it only refers to payment by the "mortgagor, his heirs, executors, administrators, or assigns, or any of them," causes this result, to flow from payment; "then these presents and everything in the same contained shall be absolutely null and void;" and the mortgagor covenants with the mortgagee that he will fulfil this agreement. So that by the instrument in question in case the husband fulfils the covenants entered into by him, the mortgage becomes void, and the wife's right of dower revives. For over twenty-five years this Court has held, that as between the mortgagee and the wife, the effect of such a mortgage is not to necessitate the addition of the wife as a party defendant during the lifetime of the husband, in a bill to foreclose. It has however been the practice to acknowledge the right of the wife to this extent, that when the husband dies it is necessary to add her in taking proceedings to foreclose. It is not necessary to discuss the authorities referred to, as they have been carefully considered by my brother *Proudfoot* in the two judgments he has delivered in this matter. It does not seem possible by any process of reasoning to reconcile them or the text writers on the point in question. I think it is reasonably clear that under the mortgage

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executed by the wife in this case, she did not part absolutely with her interest or estate in the land in question.

1878.

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In *Dawson v. Bank of Whitehaven*, the Court paid much attention to the views of the text writers as expounding the practice of conveyancers on the subject, and I think the practice in the Court for nearly thirty years is entitled to much consideration. Looking at the rule thus laid down, I think we should hold, that, as between the mortgagee and the wife, the effect of the mortgage is such as not to give the wife a right to redeem during the lifetime of the husband, but that, upon his death, a right arises in respect of her estate as dowress which gives her the right to redeem, and in respect of which no effectual foreclosure can be had without her presence. The wife is placed in this position: during the lifetime of the husband she has not the right to redeem, and in case the equity of redemption goes from the husband in his lifetime voluntarily or involuntarily, the wife's right to redeem is absolutely lost to her. But in case the husband dies possessed of the equity of redemption, then the wife has, as dowress, the right to redeem—as the husband has the right to dispose of the equity of redemption, so he has the right to incur it, and the wife takes dower in this estate of the husband as she finds it at his death.

Judgment.

The next matter for consideration is the extent of the claim of the widow. Has she the right, on the death of the husband, to redeem and hold the premises until payment to her of dower out of the whole of the premises, and of the amount paid on the mortgage, or only of the amount paid on the mortgage and dower in the value of the premises after satisfaction of the mortgage. I do not see how I can hold that she has the greater right without also holding that she had the general right to redeem, which would involve the result, that having this claim, no foreclosure is effectual which does not bring her before the Court to establish it if she pleases. I think that the principle acted upon in the past is correctly stated by

1878. Chancellor *Walworth* in *Hawley v. Bradford* (a),
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 "Strictly speaking the wife has no estate or interest in the lands of her husband, during his life, which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage, therefore, merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband; but without impairing her contingent right of dower in the equity of redemption." I am of opinion that the rights of the wife, under circumstances such as appear in the present case, are to dower in the equity of redemption, that in respect of her interest in that estate, and of that alone, she has the right to redeem, and that her claim must be confined to the value of such interest. I think the order should be modified, and that this should be done without costs. Many of the authorities are collected and reviewed in *White and Tudor's Lea. Ca.* (ed. 1877) p. 1922, under the case of *Huntingdon v. Huntingdon*.

Judgment. If the wife is held entitled to a larger measure of relief on the ground that she occupied the position of surety, it must be because of the position she was placed in on the day she executed the mortgage; if ever, she then became surety for the husband and could demand the ordinary right of a surety,—the right to redeem the premises. Our Court has, however negatived this position, for it has held that foreclosures are good although such sureties are not parties to the proceedings. I accept and follow this conclusion, and believe it places the wife in her true position, not of a surety for the debt, or as one that pledges an estate for the husband, but of one who abandons her then contingent interest and places herself in this position; if the husband discharge the debt then I obtain my dower out of the estate thus released to him; if the husband do not discharge the debt and he die possessed of the equity of

redemption, then I have my dower in such equitable estate or interest as is in my husband subject to the mortgage, in favour of which I abandoned my dower, and as against which I cannot therefore now make a claim; if the husband do not die possessed then I have lost my contingent right which I imperilled when I executed the mortgage.

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I do not think it according either to reason or authority to place the wife in the same position as if she had not joined in the mortgage, and to give to her the same rights, even between her husband and herself, as if she had refused to interfere with her claim as to dower by signing the mortgage deed; or to add clauses and limitations in favour of the wife, to the instrument that expresses the bargain between the parties, which, so far as we know anything about the bargain, the wife never contended for or thought of.

PROUDFOOT, V. C.—The case of *Campbell v. Royal Canadian Bank* (a), and in appeal but not reported, is frequently referred to on questions of this kind that I have thought it convenient to ascertain what was really decided in that case, and what was the effect of the decision in appeal. Judgment.

One of the plaintiffs in that case was the widow, and the other was the only son of *Patrick Campbell*, who died intestate in July, 1856. He had purchased a small piece of land for £300, and at the request of the vendor had executed a mortgage in fee for the whole purchase money in favour of trustees for the defendant Mrs. *Elmslie*, payable by instalments, the last of which fell due on the 16th of October, 1856, about three months after the mortgagor's death. No part of the mortgage money or interest had been paid. The plaintiff, the widow, joined in the mortgage in order to bar her dower.

(a) 19 Gr. 334.

1878.
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 v.
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In September, 1856, a bill was filed against the heir at law alone, who was then an infant, to foreclose the mortgage. Various proceedings were had, a sale of the property attempted, when it was bought in by one *R. Elmslie* in trust for the mortgagee, and at length an order was made the 16th of March, 1871, substituting one *W. Thomson* as purchaser instead of *R. Elmslie*, at the price of \$2,000. The mortgagee agreeing to forego the interest upon the mortgage and to accept the principal of \$1,200, and \$360 for her costs in full of her claims.

Thomson had bought for the Royal Canadian Bank, and Mrs. *Campbell* and her son filed their bill to have the sale set aside, and to have the order of 16th March, 1871, if necessary, also set aside, and to be let in to redeem the premises, upon the ground that the price of \$2,000 was greatly below the value of the property; and that facts material in guiding the judgment of the Court and enabling it to exercise a sound discretion, were withheld from the knowledge of the Court.

Judgment.

The bill was not filed for dower, but the dowress claimed a right to redeem. The Chancellor held that the sale was not successfully impeached. He also held that the mortgage had been satisfied and that there was nothing to redeem. He suggested, however, with the view of saving further litigation, that she was entitled to dower in the surplus proceeds of the sale after satisfying the mortgage. But upon the bill as framed he could not order it, and if either party objected the bill was to be dismissed. And it was finally dismissed.

The appeal by the plaintiffs from that decree was rested, among other reasons, upon the widow's right to redeem in respect of her dower.

The judgment of the late distinguished Chief Justice of Appeal is occupied almost entirely in discussing whether she had that right. But I apprehend this was really not a question in issue, unless the sale under the order of the Court had been set aside. The produce of the

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sale had been in fact applied in satisfying the mortgage, it was out of the way, had no longer an existence, and not expressly or by implication to be considered as kept on foot. The Chief Justice assented to the Chancellor's decision that the validity and propriety of the sale had not been successfully impeached. Unless that had been set aside there was no need for discussing her right to redeem, and the arguments on that subject were *obiter*.

The opinion of the Chief Justice was adverse to the widow's right to redeem, he considered that the bar of dower in the mortgage operated equally upon the legal and equitable estate, and that it was a complete protection to the mortgagees and those claiming under them. But this conclusion is opposed to a long course of decision in this Court, beginning with *Thibodo v. Collar* (a); and those cases which recognise the widow's right though in the surplus proceeds of the sale only, are based upon her right to redeem. For if her right to redeem were extinguished by the release she could have no right at all, in the land, or in the proceeds of its sale. I do not think these decisions can be considered to be overruled by what took place in that case in appeal.

Judgment.

The retention of the right to redeem, notwithstanding the release, does not seem to me irrational or illogical. Before the execution of the mortgage the husband is seized of the entire estate. Upon the execution of the mortgage the legal estate vests in the mortgagee freed from the dower of the wife by her joining in the mortgage, and the bar of dower operates for the benefit of the mortgagee upon the estate that passes to him; but the statute then applies and gives to the wife, what she had not before, a dower in the equity of redemption. This is nothing adverse to the mortgagee, nothing of which he has a right to complain, she can enforce no right of dower paramount to his mortgage. The right to redeem does not impair his

(a) 1 Gr. 147.

1878. security; if she seek to redeem she must pay the whole charge, a right which can in no sense be considered as opposed to the mortgagee's right. The form used in the bar of dower is the same as was used before dower in equitable estates was given, and it does not seem any strained construction to give it only the same effect it then had.

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Robertson.

I venture also to think that Mr. *Fisher* (2nd ed. 307) is quoted by the learned Chief Justice of Appeal for what is not to be found in his work, viz., that the wife has no right to dower now in an equity of redemption where a mortgage in fee is executed prior to the marriage. Mr. *Fisher* adds, nor can she redeem mortgages made subsequent to her marriage where she had barred her dower. But Mr. *Fisher* is not there stating the law applicable to dower since the Act giving dower in equitable estates. He is stating what the law was in regard to women married before the 31st of December, 1833, when there was no dower in equitable
Judgment. estates.

Where the husband executes a second mortgage, and therefore necessarily of the equity of redemption, the wife is bound by the incumbrance, not by virtue of the bar of dower in the first mortgage, but by virtue of the statute which gives her dower in that equitable estate only of which the husband dies seized. If he had chosen to alien the entire equity she would have no dower, and if he mortgages, it is a partial alienation, which doubtless for that reason would effectually bind her.

"It cannot be denied that an absolute alienation would defeat the wife's dower, because in that case the husband would not die seized. If this is so a partial alienation must have the same effect so far as it goes." Per *Esten*, V. C., in *Smith v. Smith* (a).

Assuming then that the widow has dower in the equity of redemption, although she may have executed the

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mortgage for the purpose of barring dower, it remains to consider the extent and measure of her interest.

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Where the mortgage has been given for the purchase money of the land, it is quite reasonable that the widow should only have dower in the value of the land after deducting the amount of the mortgage, for that was the extent of the beneficial interest of the husband. That was the case in *Campbell v. The Royal Canadian Bank*. The price of the land was \$1,200, and it produced when sold \$2,000, and after deducting the mortgagee's debt and costs, a surplus of \$440 was left. To give the widow dower in such a case calculated on \$2,000, would obviously be inequitable and unjust.

But the case is very different when the land had been entirely the property of the husband, the dower of the wife had attached legally and equitably to the whole, and the mortgage was made to secure money borrowed by the husband, which he applied for his own purposes. And accordingly in *Doan v. Davis* (a), we find the Chancellor, the same Judge before whom *Campbell v. Royal Canadian Bank* came, holding the widow "dowable out of the whole value of the mortgaged premises, and not only of the value beyond the mortgage debt."

Judgment.

It has long been established that when the wife's estate has been mortgaged for the husband's benefit, his estate shall first be applied to exonerate it, unless a special case occur. And Lord *Camden* held that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use. This Court *prima facie* considers it a pledge for the husband's debts. *Earl of Kinnoul v. Money* (b). *Fisher on Mortgages*, 2nd. ed., 304. The wife stands in the position of a surety.

And in *Parke on Dower*, 251, it is said, "A dowress, like an heir or devisee, has of course a right to have the personal estate of her husband, as far as it will go, ap-

(a) 23 Gr. 207.

(b) 3 Sw. 262 n.

1878. *Robertson v. Robertson.* plied in discharge of mortgage and other debts contracted by the husband which are charges upon the lands which she holds in dower; and even where the personal estate is insufficient to discharge the debt, it would seem that in some cases, if not in all, she has the privilege of having the lands which remain in the heir charged therewith, in exoneration of the land assigned to her in dower." In *Sheppard v. Sheppard (a)*, Chancellor *VanKoughnet* says, "I think the widow may call upon the husband's estate left by her deceased husband to remove the charges which he created, and procured her consent to, for his own purposes."

I am unable to perceive any distinction in principle when the estate pledged is the wife's absolutely, and when the pledge is of a right in the husband's estate which may ripen into an estate in her after his death. Her interest as dowress in her husband's lands during his life is a valuable interest. If she refuse to join in a sale, the purchaser is entitled to a deduction from the purchase money.

Judgment.

"It is quite clear that there is in all cases a possibility and in some a high degree of probability that the wife may outlive her husband, and that she may become entitled to a life estate; and this chance that she may outlive her husband and become entitled to a life estate is a substantial interest, capable of valuation, and has a material effect upon the value of the estate before the contingency happens, and quite irrespective of it; an effect more or less material according to the circumstances of each case." Per *Blake, C.*, *VanNorman v. Beaupre (b)*. See *Wilson v. Williams (c)*, *Gamble v. Gummerson (d)* *Kendrew v. Shewan (e)*. And in a proceeding for partition her inchoate right of dower is to be valued. Revised Statute, Ont. ch. 101, sec.

(a) 14 Gr. 174.

(c) 8 Jur. N. S. 810.

(e) 4 Gr. 578.

(b) 5 Gr. 602.

(d) 9 Gr. 198.

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49, 2. Why in the one case is she to be considered in the light of a surety, and not in the other? It is her property in both cases that is pledged. Without her bar of dower in the mortgage, the husband would either not have been able to raise the money at all, or would not have done so on such favourable terms. His estate receives the benefit, and in equity ought to repay it. And in the case now before us we are not left to the presumption of the husband receiving the benefit, for the Master expressly finds that the wife did not receive to her own use any portion of the money procured upon the security.

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Spyer v Hyatt (a) decides that as between the widow and creditors she is dowable in priority to them. Nor is *Jones v. Jones* (b) at variance with this. That was a case under the Dower Act in England, which places dower entirely under the control of the husband. He may sell free from dower by a declaration to that effect, and all charges created by him, and all debts to which his land is liable, have priority over the dower. The intestate had mortgaged his freehold estates, and the Chief Clerk reported that she was entitled to dower subject to the mortgage. And the Vice-Chancellor (afterwards Lord *Hatherley*) confirmed the certificate. Referring to *Spyer v. Hyatt*, he says: "All that the Master of the Rolls there decided was, that where there is no charge of debts in the lifetime of the deceased, the widow's right to dower has priority. With the decision in that case I quite concur." The mere liability to have the lands taken in execution was not such a charge as to postpone the dower. That case was between the dowress and the heir, and was decided against the dowress only because the statute had enabled the husband to charge the land paramount to the dower. But I venture to think it ought to have no weight in the discussion here, where no statute puts such a power in the hands of the husband.

Judgment.

(a) 20 B. 621.

(b) 4 K. & J. 361.

1878. Here she has the position of surety, and can call upon the husband's estate to perform his covenant to pay the mortgage money, and thus exonerate her dower from the charge.

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Robertson.

The right of the wife may be presented in another light. The equity of redemption, in which she is dowable, is not the remainder of the estate after deducting the mortgage debt. It is the estate itself. "The person having the equity of redemption is considered as owner of the land, and the mortgagee is entitled only to retain it as a security or a pledge for a debt." Per Lord *Hardwicke*, *Casburne v. Inglis* (a). It is true that in *Paget v. Ede* (b), Sir *James Bacon* says, "It is by a figure of speech only that it can be called an estate." But *Casburne v. Inglis* does not seem to have been brought to his recollection. In our own Court the authority of Lord *Hardwicke* has been too uniformly followed on this subject to permit me to doubt it. In *Chisholm v. Sheldon* (c), *Blake, C.*, cites *Pawlett v. Attorney-General* (d), where Lord *Hale* treated an equity of redemption as not a mere trust but "a title in equity," and Lord *Hardwicke's* expression in *Casburne v. Scarf* (e) that "an equity of redemption has always been considered as an estate in the land," and Sir *T. Clarke* in *Burgess v. Wheate* (f), affirming the language of Lord *Hale*, and concludes that the equity of redemption is an estate in the land. *Chisholm v. Sheldon* (g), was reversed on appeal, but nothing was said indicating any dissent from this conclusion, and that has always been considered law in this Court. The wife then is dowable in equity of the estate, the whole estate. It is indeed subject to the incumbrance of the debt charged upon it, and if the wife is liable to pay this debt she must take subject to it. So far as the mortgagee is con-

(a) 2 J. & W. 194.

(c) 2 Gr. 178, 186.

(e) 1 Atk. 605.

(g) 3 Gr. 655.

(b) L. R. 18 Eq. 118, 125.

(d) Hard. at 467.

(f) 1 W. B. 145.

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cerned she must always take subject to it by having barred her dower for his benefit. But when the question arises, as in this case, between the dowress and the debtor's estate, the debtor having covenanted to pay the debt, she is entitled to require his estate to discharge the debt, and thus leave the mortgaged property clear for her title of dower. This is a question that can never arise during the husband's lifetime, for unless he dies seized of the equity of redemption it can never arise at all. And, as I apprehend, a mortgage by the husband of the equity of redemption, being a partial alienation, would bind the wife, as to that extent he would die seized of an incumbered equity of redemption, the question can only arise between her and her husband's estate. And there seems no reason to imagine that it will give occasion to more doubtful and intricate questions than arise every day in the administration of the estates of deceased persons.

It does not seem to me that the wife by executing the mortgage can reasonably be considered as having made a gift of her dower to the husband. The common law, which treated marriage as a gift of all the wife's personal property to her husband, and the creation in him of certain interests in her real estate,—on the other hand conferred upon the surviving wife an estate in one-third of the husband's real estate for life. These reciprocal rights will not be considered as abandoned or parted with in the absence of clear and conclusive evidence of an intention to do so: *Parteriche v. Powlet* (a). And although a husband may make a gift to the wife, or the wife to the husband, it will not be assumed there was any such design from the mode of dealing between them and third parties. For in a mortgage of the wife's estate and third parties. For in a mortgage of the wife's estate reserved to the husband, this does not alter the nature of the wife's right—the estate still remains hers. *Jackson v. Parker* (b), and the evidence of the

1878.

Robertson
v.
Robertson.

Judgment.

(a) 2 Atk. 334.

(b) Amb. 687.

1878. intention to give must be very clear when the wife claims under an alleged gift of her husband's chattels. *Grant v. Grant (a)*.

Robertson
v.
Robertson.

Nor does it seem to me that the source from which the mortgage is paid should affect the question,—whether it is paid out of the general estate of the husband, or by a sale of the mortgaged property itself. The debt is the husband's, and may be liquidated out of any of his property. If he has other property than the mortgaged land, the case is clear. If he has only that land the same principle applies. It is *his interest* in the land that ought to satisfy his debt. By giving the widow dower only in the surplus, it is in effect making her pay a portion of the debt out of her property. And in the absence of evidence of an intention to make a present to her husband, this, I think, cannot be done. If the husband had exercised his power of redemption, could it be doubted that his estate would have been the same as before, he would have been *in* of his old estate, and his wife would have been dowable out of it. Can it make any difference that the redemption has to be made out of his estate, that the Court has done what he ought to have done himself,—paid the debt out of his assets, and thus left the estate clear for the dowress.

Judgment.

To assume the wife's rights to be what I think they are, does not enable her to raise any questions in regard to the legal estate vested in the mortgagee except for the purpose of redeeming him. She has parted with all interest in the legal estate. The only rights remaining to her spring from the equity of redemption. If the husband does not die seized, if he exercises the power of alienation the law gives him, the wife cannot on his death make any claim against his estate in respect of the dower she has barred. She cannot ask that the mortgage be paid off, for there would be no estate left to benefit her by the discharge.

(a) 34 Beav. 625.

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The dowress has always had the favourable consideration of the Courts, both of law and equity, except in this one particular of dower in equitable estates, and when the Legislature interfered in her favour, by removing the anomaly, which permitted curtesy and not dower in such estates, it ought to be the care of the Court to see that the provision is not illusory.

I retain the opinion: I have already expressed that, at least to the extent of the surplus money arising from the sale of the mortgaged property, the widow is entitled to dower calculated upon the whole value of the property.

1878.

Robertson
v.
Robertson.

CREDIT VALLEY RAILWAY COMPANY V. GREAT WESTERN
RAILWAY COMPANY.

Railway crossing.

Where it is necessary for a Provincial Railway in Ontario to cross a Dominion Railway, the Company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the Railway Companies cannot, by arrangement, waive this provision.

Demurrer for want of equity.

Mr. *M. C. Cameron*, Q. C., and Mr. *A. Hoskin*, for the demurrer.

Mr. *Boyd*, Q. C., and Mr. *Wells*, contra.

PROUDFOOT, V. C.—A motion for an injunction in this case was intercepted by a demurrer to the Bill. June 29th.

The demurrer raises the question whether, where a Provincial Railway in Ontario crosses a Dominion Railway, it is necessary to procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council Judgment.

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 Credit Valley
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of the Dominion:—and also, if that be so, whether the companies can waive this provision:—and lastly, if they can waive it, have they done so in this case.

By the Dom. Act of 1872 (35 Vic. c. 65, s. 5), the Great Western Railway Works were declared to be for the general advantage of Canada and subject to the 130th sec. of ch. 66 of the Con. Stat. of Canada, which prohibited it from availing itself of crossing powers over other railways without getting the approval of the Board of Railway Commissioners, for whom the Railway Committee of the Privy Council was substituted by sec. 23 of the Act of 1868 (31 Vic. ch. 68, sec. 23, *et seq.* D.)

By an Act of 1877 (40 Vic. c. 45), the powers as to crossings in the Act of 1868 were extended to Railways incorporated under Provincial Acts, in any case in which it is proposed that they should cross a Railway under the Legislative control of Canada.

I apprehend there can be no question that this Act of 1877 is quite within the competence of the Dominion Parliament, as necessary and essential for the protection of the Dominion Railways within their control: so that the approval of the Railway Committee is requisite before such a crossing can be enforced.

By the Rev. Stat. of Ontario, ch. 165, sec. 9, subs. 16, no Railway Company shall avail itself of the crossing powers (in subs. 15) without the approval of the Commissioner of Public Works; and by sec. 4, the Act applies to any Railway subject to the Legislative authority of the Province. The Credit Valley Railway Co. was incorporated by the Ont. Stat. 34 Vic. c. 38, and is therefore subject to this provision.

Hence it would seem that where a Provincial Railway crosses a Dominion Railway the approval both of the Railway Committee of the Privy Council, and of the Commissioner of Public Works must first be had.

The control exercised by the Legislature over Railway companies is not merely for the benefit of the companies themselves, it is also for the protection of the public.

Judgment.

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The numerous provisions in the Railway Act of 1868, 1878. *e. g.*:—Preventing the opening of a Railway till after a month's notice to the Railway Committee of intention to open it, (s. 25).—For the examination of the Railway prior to opening, (s. 27).—For condemnation of a dangerous Railway, (s. 30).—Powers to require permanent bridges for movable ones, (s. 35).—Powers in regard to the crossing of highways, (s. 36).—Requiring notice of accidents, &c. to be given, (s. 39).—shew that regard for the public safety is a material ingredient in considering applications by one Railway to cross the line of another, and that it is not merely a question of comparative cost or inconvenience to the companies. The provision requiring the approval of the authorities vested with these powers and duties is therefore not one that can be dispensed with by any agreement, express or implied, of the companies affected.

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It is true that these provisions of the Railway Act of 1868, which applies to Dominion roads, do not seem to be repeated in the Rev. Stat. of Ontario; but I have only referred to them as shewing what kind of consideration must necessarily be involved in any application to the Commissioner of Public Works,—not only the price of the crossing, and arrangements connected with its maintenance, but also the supreme question, the security and safety of the public. June 22nd.

It may be said that the approval of all the Railway Committee affords all the protection requisite for the public safety. Perhaps it does, but the Legislature have thought fit to require the additional protection of the sanction of another officer.

No objection was taken to referring to the statutes, thought not set out in the bill, and I have treated the question on the broad ground on which it was discussed; though possible, upon demurrer, I might otherwise have been confined within the four corners of the record: *Kiely v. Kiely (a)*.

(a) *Ante* page, 463.

1878. Being of the opinion that the approval of the Commissioner of Public Works cannot be dispensed with, there is no need to examine whether the acts of the companies amount to a waiver.

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R. W. Co.

Had I come to a different conclusion, however, it does not seem to me that the Acts relied upon by the plaintiffs amount to a waiver of procuring this approval. Opposing the proposed railway crossing before the Railway Committee cannot have this effect. When the approval of two officers is required, the endeavour to prevent the approval of one can in no sense be deemed an assent to dispensing with that of the other. The opposition of the defendants to the application of the plaintiffs to the Privy Council cannot prejudice their right to oppose it also before the Commissioner of Public Works. They may be able to convince him of the injury to the public likely to arise from the crossing. And his sanction may be of much more value than that of a body situated at one extremity of the Province, at a distance from the locality, and whose means of information cannot be assumed to be as good as his.

Judgment.

The most serious acts from which waiver might be inferred are, the appearance before the arbitrators, and the notice to set aside a portion of the award, leaving the remainder in force. Rev. Stat. ch. 165-sec. 9, sub-s. 16, says, that *when* the approval of the Commissioner is obtained the parties may proceed to arbitration in regard to the compensation to be awarded. But this is a provision in which the companies only are concerned. The public are not interested in the amount the one may have to pay, or the other to receive; and the parties interested may either ascertain the compensation on the supposition that the approval of the officer will be obtained, or wait until approval before proceeding to determine the price of the privilege. It is a provision that may be altered or modified to suit the convenience of the parties concerned. It will receive full effect by applying it to compulsory arbitration. Neither company can be *forced* to arbitrate until the approval be procured.

(a)
(b)
(c)

To this ground also may be referred such cases 1878. as *Andrews v. Elliott* (a), *Tyerman v. Smith* (b), and *Palmer v. Metropolitan R. W. Co.* (c), where the provisions of the Railway Act in regard to the time of making awards, &c., might be varied by the consent of the parties. No one is interested in such questions but the parties to the award, and it is reasonable enough to hold that they may alter or modify them.

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R. W. Co.
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R. W. Co.

Bell v. The Midland R. W. Co., (d), contains some expressions that the Act in question there gave the Court no power to interfere on the ground of danger to the public. The Act in that case gave power to the owners of adjoining lands to lay down branches to communicate with the railway; but all the openings were to be made at such places as might be most convenient for all the parties interested, and was not to endanger the safety of persons travelling on the railway; and in case of difference as to the proper places for openings they were to be determined by two justices of the peace. The company assented to an opening being made by the plaintiff in 1839, the plaintiff formed his land into a wharf, laid down rails on it, and erected weighing machines, a warehouse, and stables. Seventeen years after the company gave notice that they would cease to provide engine power for the conveyance of waggons to and from the plaintiff's wharf. They attempted to support their act on the ground that the exercise of the plaintiff's right would be attended with the utmost danger to the public. It was in these circumstances that *Turner, L. J.*, said: "An argument was attempted to be founded on the ground of the danger which it was said may arise to the public from the continued use of this opening. But it has been used for seventeen years and no danger has hitherto arisen, or, indeed, been apprehended from its use. It is sufficient to say upon this subject that the

Judgment.

(a) 5 Ell. & Bl. 502; S. C. 6 Ell. & Bl. 338.

(b) 6 Ell. & Bl. 719.

(c) 31 L. J. Q. B. 259.

(d) 3 D. & J. 673.

1878. Act gives the Court no power to interfere on the ground of danger to the public. If there be danger to the public there are authorities to which application may be made on that subject. Whether the application should be made to the Railway Commissioners or to the Attorney-General it is not necessary to say; but this appears to me to be quite clear, that we cannot at the instance of the company, on the ground of alleged danger to the public from this communication, take away a right which the Act of Parliament has actually given to the persons who are entitled to use the private railway."

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I do not think any principle can be deduced from that case to govern the present. The plaintiff had legitimately acquired a crossing. The Act appointed no one to have a care of the public safety. It contained indeed a general statement that the crossings were to be made so as not to endanger travellers, the violation of which might subject the parties to indictment, but the observance of it was not a preliminary to the right to a crossing. The magistrates had power to adjudicate on the places only for a crossing in case of difference.

Judgment.

Here no crossing has been acquired. A public body, and a public officer, are required to approve, in the interest of the public, as I read the Act, and until such approval no crossing can be made. The right is contingent upon obtaining the approval: it is a condition precedent, and not one that can be dispensed with.

For a similar reason the motion to set aside the award in part, or the appeal from the award, are all compatible with requiring the approval of the Commissioner before the crossing be actually carried into effect.

The payment of the money and the letters of Mr. *Broughton*, the General Manager of the defendants, are susceptible of the same explanation.

I think the demurrer must be allowed, with costs, with leave to amend in a fortnight.

The motion for an injunction is not brought on. The defendants are entitled to the costs of an abandoned motion.

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MOLSON'S BANK V. BLAKENEY AND McCRAE.

1878.

Indorsements—Insolvency—Mortgage.

R. created a mortgage on certain lands in favour of *M. & B.*, with a proviso to be "void on payment of \$20,000 or such other sum or sums as might be due, and owing to *M. & B.*, by reason of their having to pay, take up, or retire any notes or bills indorsed or accepted by them for *R.*" *M. & B.* indorsed notes for *R.*'s accommodation which were discounted by the plaintiffs' bank, and while several of them, amounting in all to \$24,400, were outstanding, *R.*, as also *M. & B.*, became insolvent.

Held, that to the extent of such accommodation paper as the bank held, they were entitled to the benefit of the mortgage, and to have it realized, and the proceeds applied to retire the notes, in priority to other creditors; but, that in respect of any notes held by the bank, which had been given to *M. & B.* in liquidation of debts due them, the bank could only prove against the estates of the insolvents.

Ex parte Waring, 19 Ves. 345, approved of and followed.

The bill filed in this case stated that one *Robert Rae* was the owner in fee of certain lands, and had applied to *McGregor & Brother*, partners as bankers, to indorse notes for his accommodation, which they agreed to do, and they accordingly did indorse certain notes and bills for *Rae's* accommodation, and *Rae* agreed to secure the payment of these notes and any future notes or bills which they should thereafter so indorse for him by mortgage on those lands. Statement.

That on the 18th January, 1872, *Rae* mortgaged to the *McGregors* these lands subject to a proviso to be void on payment of \$20,000, or such other sum or sums as might be due and owing to the *McGregors* by reason of their having to pay, take up, or retire any notes or bills indorsed or accepted by them for *Rae*. In 1877, the *McGregors* indorsed for *Rae's* accommodation, seven several notes amounting in all to \$24,500, made by *Rae*, and were by them indorsed to the plaintiffs who continued to be the holders for value, the same being renewals of notes to the same amount made by *Rae* to the *McGregors*, and indorsed by them to the plaintiffs who advanced to

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v.
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et al.*

Rae the full value thereof. The bill further stated that it was agreed between *Rae* and the *McGregors* that the mortgage should be a security for these notes, and at the time the plaintiffs became the holders they were informed that the *McGregors* held the mortgage as such security. That on the 15th June, 1877, a writ of attachment under the Insolvent Act of 1875, issued against the *McGregors*, and the defendant, *McCrae* was their assignee, and their estate would pay to their creditors but a small portion of their claims. That on the 11th July, 1877, *Rae* became insolvent, and the defendant *Blakeney* was his assignee, and his estate would pay but a small dividend. The plaintiffs submitted that the mortgaged premises were liable for and should be applied to the payment of the said notes. *McCrae*, in his answer, stated that the plaintiffs had proved upon the estate of the *McGregors* for the whole amount of the notes, and claimed that the mortgage was an asset in his hands to the extent of the liability of the *McGregor* estate upon the notes. He submitted that their estate should not be ordered to assign or give up the mortgage until the estate was freed from all liability upon the notes.

Statement.

Blakeney, the assignee of *Rae*, by his answer, alleged that the security was intended to be and was a security to the *McGregors* from loss by reason of their indorsations only. He also said, "I am willing, and hereby offer to secure the estate of the said *McGregor & Bro.* against the plaintiffs' claim on the said notes." That the *McGregors* had not taken up or retired any notes or bills which they had indorsed or accepted for *Rae*. That the plaintiffs had filed their claim on each estate, and had therein declared that they held no security, and had thus waived any claim upon the mortgage.

The mortgage recited that *Rae* in order to carry on his business as distiller had required, and might still require the indorsement of the *McGregors* on his paper to the extent of \$20,000, and in order to secure them

against the payment of any promissory notes or bills of exchange which they might indorse or accept for *Rae*, had agreed to execute that indenture. The proviso was in the following terms; "Provided this mortgage to be void on payment of \$20,000 of lawful money of Canada, or of such other sum or sums as may be due and owing to the said mortgagees by reason of their having to pay, take up, or retire any promissory note or notes or bills of exchange, which they may have indorsed or accepted for the said mortgagor, together with all costs, charges, and expenses, connected therewith, and interest thereon at the rate of ten per centum per annum, from the time of such payment, and taxes and performance of statute labour."

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Statement.

The cause having been put at issue came on for the examination of witnesses and hearing at the sittings of the Court, at London, in the spring of 1878.

- Mr. *Magee*, for the plaintiffs.
- Mr. *Bayly*, for defendant *McCrae*.
- Mr. *Gibbons*, for defendant *Blakeney*.

William McGregor was the only witness examined. He proved the seven notes, one of them for \$500 was for a debt due to the *McGregors*. That the transactions began in 1872, the notes having been renewed from time to time as they fell due. He thought the plaintiffs were aware of the mortgage being in existence. Mr. *Grasett*, the manager, asked him about it, Mr. *Rae* told him that the Bank was aware of it; that was about 1873. He recollected Mr. *Grasett* speaking to him about it at his own office. About the time he got *Rae's* account he spoke of the security.

The plaintiffs relied upon *Ex parte Waring (a)*, as expressly in point, and entitling them to have the security realised and applied in payment of the notes.

(a) 19 Ves. 345; 2 Rose, 182; 12 G. & J. 404.

1878. For *Rae's* assignee it was argued that *Ex parte Waring* did not apply; that the security was not for payment of the notes, but only for such sums as the *McGregors* might have to pay in retiring them. That they had not paid the notes, and that the sums the plaintiffs might receive in dividends from their estate was all that was secured by the mortgage; and that the defendants' offer to secure the *McGregors'* estate against the plaintiffs' claim on the notes, put an end to any equity that might otherwise exist between the estates, and which alone could invoke the application of *Ex parte Waring*.

The other cases cited are mentioned in the judgment.

June 20th. PROUDFOOT, V. C.—The question turns upon what is the true construction of the mortgage. If it should appear that the mortgage was specifically appropriated to the payment of the notes, then *Ex parte Waring* applies; and it would not be doing justice as between the two estates to accept the offer of *Rae's* assignee, an offer similar to what was made in *Ex parte Waring (a)* for the liability of the *McGregors* was incurred upon the faith of this security, and dividends are claimed from this estate upon the notes indorsed by them.

Judgment. The right of the plaintiffs is an equity independent of contract, and they claim not on account of any special lien they have upon the property, but because the *McGregors*, from whom they hold, have a security, which cannot be taken away until all liability upon the notes is at an end: *City Bank v. Luckie (b)*, *Allchin v. Buffalo (c)*.

After a good deal of consideration I think that *Ex parte Waring* governs this case.

The mortgage recites that it was intended to secure the *McGregors* against the payment of any promissory notes or bills of exchange they might indorse or accept

(a) See the report in 2 G. & J.

(b) L. R. 5 Chy, 773, 777.

(c) 23 Gr. 411, 423.

for *Rae*, and the proviso, though not very clearly expressed, seems to me to carry out that intention,

The equities of the parties are to be determined at the date of the insolvency: *Ex parte Carrick (a)*, *Allchin v. Buffalo (b)*. Immediately preceding the insolvency of the *McGregors*, I think it would have been impossible for *Rae* to reclaim the security without paying the notes. The answer would have been complete—"We are liable to pay them. You procured the money by discounts on the credit of our name, and you cannot have back the mortgage without taking up the notes and relieving us from all liability upon them." If that was the position of the matter, then the mortgage was a security for the whole amount of the notes. It is not as if it had been given for one of the notes, upon payment of which the security would have terminated. But the indorsers were entitled to hold it as a security for the whole of them. This right would not be affected by the supervening insolvency: *Ex parte Carrick (c)*. *Rae* having also become insolvent he cannot entitle himself to the security by paying the notes, the *McGregors* cannot pay and come upon the security,—it is the case of a dead lock to be solved by realizing the security and paying the notes.

In *The City Bank v. Luckie (d)*, *Lord Hatherley* states the law very intelligibly: "If a person gives a security for the payment of any debt constituted, amongst other things, by bills upon which his creditor has made himself liable in order to advance money to the debtor, then, in the case of both parties becoming insolvent, the question arises which *Lord Eldon* solved in *Ex parte Waring*, namely, whether the estate of a person who, by becoming insolvent was not able to pay the bills, could claim the benefit of the security, the bills remaining unpaid. The holders of the bills of course would say, that they were in the position of the holder of the security, though.

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Judgment.

(a) 2 D. & J. 208.

(c) 2 D. & J. 208, 216.

(b) *Supra* p. 425.

(d) L. R. 5 Ch. 776.

1878. *Molson's Bank v. Blakeney et al.* not by virtue of any contract with him, because there was no contract in respect of the bills, for as long as both parties were solvent he who gave the security, and he who received the security, might deal with the security just as they pleased, without any regard to who might be the bill-holders. But when there came to be a question whether the bills were to be paid or not, it was impossible for the estate, which claimed the value of the security, subject to the charge, to get back the security, unless all the duties that attached to it had been fulfilled. On the other hand, the other estate was not in a condition to make payment of the bills, and thus to come upon the security for indemnity. Therefore matters stood at a dead lock, and nothing could be done on one side or the other."

See also *Banner v. Johnston (a)*, *Allchin v. Buffalo (b)*.

I think the plaintiffs are entitled to the relief they seek as far as the \$24,000 is concerned, with costs. But as to the note for the \$500, it was a debt due from *Rae* to the *McGregors*, not secured by the mortgage, and for that they must rely upon their proof against the estates.

There is nothing in the objection that the plaintiffs have waived their right, by filing claims in insolvency, stating they hold no security. They have no security on this mortgage, they succeed in getting the benefit of it through the equities between the two estates.

I do not know that the plaintiffs acquire any right from the fact of proving that the sureties held security; if they do I think it established that they did know of it, and it seems to have been an element in the discounting of the notes.

(a) L. R. 5 H. & C. 168, 174.

(b) 23 Gr. 411.

McCRAE V. MOLSON'S BANK.

1878.

Warehouse receipts—Banks—Consent to extend security—34 Vict. ch. 5, D.

The consent required by sec. 50 of 34 Vict. ch. 5, D., to extend the time for which the transfer of a warehouse receipt in security to a bank shall remain valid, may be given at any time after incurring the debt or liability to the bank; and, *Semble*, that such consent need not be in writing.

Examination of witnesses and hearing at Sandwich, in the Spring of 1878.

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

Mr. *Bethune*, Q.C., and Mr. *Killam*, for the defendants.

The facts appear in the judgment.

SPRAGGE, C.—At the close of the argument of this June 29th. case at Sandwich I gave judgment in favour of the defendants upon the question in respect of the mortgage. As to the warehouse receipt of the 17th of November, 1875, given to secure an advance by the Bank to *Bourke* (the insolvent) of \$7,000, my opinion was also in favour of the defendants. As to the warehouse receipts of the 14th of December, 1875, and of the 7th of December, 1876, I wished before disposing of the question arising upon them to examine the authorities to which I was referred. Judgment. The receipt of December, 1875, is for "7,000 gallons of spirits, viz., about 2,500 gallons in bond in the distillery warehouse, and 4,500 gallons of duty paid spirits in the distillery buildings, both manufactured and in process of manufacture, all situated in Sandwich, Ontario," and they are expressed to be "received in store on account of the *Molson's Bank*." The receipt is marked A, and is signed by *Bourke*. Across the face of the receipt is written, without date, "Spirits in bond are removed from my distillery, bonded warehouse No. 9, to Customs' bonded warehouse No. 4, in Windsor, O. *Bourke*." Of the same

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date as the receipt is a written consent by *Bourke* that the receipt and goods therein mentioned shall be held in pledge by the Bank beyond six months from its date, and until the note for which it was given and its renewal should be paid. Mr. *Maclennan's* contention is, that such consent is not a valid extension of the period of six months, under 34 Vict. ch. 5.

The warehouse receipt of the 7th of December, 1876, expresses that there is received into store in Customs' bonded warehouse number 4, in Windsor, forty-four casks of high wines, called flavouring spirits, being 2,609 $\frac{2}{3}$ proof gallons, to be delivered pursuant to his order, &c., and across its face is written: "These are the same spirits as those mentioned in warehouse receipt marked 'A,' and dated at Sandwich the 14th of December, 1876, and is given to secure an advance by the *Molson Bank* of the sum of \$5,000, according to promissory note for that amount attached to original warehouse receipt." And this writing is signed *O. Bourke*.

Judgment.

It appears from *Bourke's* evidence that about 800 gallons of the spirits mentioned in the earlier of these two receipts were taken out to flavour spirits subsequently manufactured; from which class I do not understand. A quantity of that sort in bond was sent to Toronto by the Bank, and disposed of, and that is out of the question: all that is in question upon these receipts is, the quantity transferred to the Customs' bonded warehouse in Windsor, as expressed in the writing across the face of the earlier receipt, and in the body of the later receipt. It is clear from the evidence that the spirits mentioned in the later receipt are a portion of those for which the earlier receipt was given, and that both were given to secure the same debt to the Bank.

Mr. *Maclennan* contends, that the six months limited by section 80 of the Act referred to, has not been validly extended, that under the Act warehouse receipts can only be given for a contemporaneous advance, and that the receipt of the 7th of December, 1876, not having:

been so given, but for the old debt, is not within the Act.

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Bank.

These points were considered in the judgment of the Court of Queen's Bench in the *Royal Canadian Bank v. Ross* (a). In that case the Bank had agreed to make, and did make an advance to a firm of *Simpson & Co.*, to enable them to purchase coal and iron, the firm agreeing to secure the Bank by bills of lading and warehouse receipts on the articles when received; and on the 5th of December, 1873, the warehouse receipt in question was given. The date of the advance is not given in the report; but the warehouse receipt was given after the advance; and it was held a sufficient compliance with the provisions of section 47, it being made upon the "understanding," that the receipt would be transferred to the Bank.

In the case of an advance by a Bank without any agreement or understanding for the giving or transferring of a warehouse receipt; and a receipt given afterwards without any such previous understanding, I apprehend that such receipt could not be supported, but here there was an advance contemporaneously with the receipt of December, 1875, and there was the contemporaneous agreement to which I have referred. If before the giving of the warehouse receipt of December, 1876, there had been an agreement that it should be given, it would be within the Act as interpreted in *Royal Canadian Bank v. Ross*. The Chief Justice says, "The statute not only enables the Bank to accept the transfer of a warehouse receipt as collateral security for the due payment of a bill or note at the time discounted, but for any debt which may become due to the Bank upon any credit opened, *i. e.* previously opened; or for any debt or liability incurred *i. e.* previously incurred." A warehouse receipt then would be good where given for a debt previously incurred, provided it was

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(a) 40 U. C. R. 466.

1878. agreed or understood when the debt was incurred that a warehouse receipt should be given. Here, clearly enough, it was so understood when the money was advanced on the note.

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Bank.

The language of section 50 is, that no cereal grains, &c., shall be held in pledge by the Bank for a period exceeding six months, except by consent of the person pledging the same. Section 47 provides that the note given to, or debt due to the Bank may be renewed, or the time for the payment thereof extended without affecting such security. There is no limit as to the number of renewals or extension of time for payment, the only limit of time is, that the articles specified in the warehouse receipt shall be only held in pledge for six months, unless by consent of the party pledging. The Act is silent as to when the consent may be given, and as to that branch of section 50 it is not required to be in writing.

The written consent of the 14th of December, 1875, is evident from its terms, contemplated renewals extending beyond the period of six months, it runs, that the receipts and the goods therein mentioned shall be held in pledge for a period exceeding six months from its date, *and* until the note is paid. If that is a good consent under the Act, the Bank does not require the aid of the receipt of the 7th of December, 1876; but assuming that it is not within the Act, we have in the consent an understanding contemporaneous with the giving of the original note that a warehouse receipt should be given as collateral security for its due payment; that understanding continued to subsist, as it was certainly intended to continue after the expiry of the six months, and it was in substance that a *valid* warehouse receipt given contemporaneously had been imperfect, and a good and valid one had been given in its place, I apprehend the substituted one would have been valid. Here, assuming that the one first given had run out, the

Judgment.

understanding still subsisting, the one secondly given may be taken as given in pursuance of the understanding, and therefore valid. It must however be conceded, I think, that the statute did not contemplate so great a lapse of time between the entering into the understanding and its fulfilment; at the same time the Legislature has not seen fit to limit any time. It may be argued that limiting six months for the duration (unless extended by consent) of a warehouse receipt actually given it could not be intended that a mere understanding should be effectual for a longer period; and there is much force in that position. Still the Act fixes no limit. If the Bank be content with an agreement or understanding that a warehouse receipt shall be given, and it is afterwards given, though after a considerable interval of time; I am not prepared to say that it is invalid, though I do not pronounce with any great confidence in favour of its validity.

I have been considering the case upon the assumption of the first receipt being invalid after the expiry of six months from its date. Without the contemporaneous consent it would be so, the goods shall not be longer held in pledge except by consent of the person pledging. The consent given was sufficient unless we can say that it cannot be given at the same time as the pledge. It may be given say on the day of the expiry of the six months, or of five months, or of one, and if so, may it not be contemporaneous—then may not the consent be that the pledge shall hold for a longer period than six months from its date. Unless so, this consent though expressed to be otherwise, would be in effect only a reiteration of the warehouse receipt. The provision in the Act does not necessarily import more than this, that a warehouse receipt defining no time for holding the goods in pledge, shall not *per se* hold them in pledge beyond six months, but by consent of the person pledging, they may be held for a longer period, and may then and there be agreed to be held for a longer period. Such a

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v.
Molson's
Bank.

Judgment.

1878. construction does no violence to the language of the Act, and whether or not against the policy of the Act as is contended, I am really unable to say. If it were a contract between individuals, there would, I apprehend, be no doubt as to its validity.

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Bank.

As to the contention that the consent must limit a time for the goods being held in pledge, it limits the time by an event, the payment of the note or of renewals thereof.

Upon the whole, though I confess not without some doubt, I think the first and second warehouse receipts not invalid. It is sufficient for the purposes of the Bank if either is so. *Bourke* became insolvent 17th March, 1877.

Judgment. The plaintiff is entitled to an account of what is due upon the mortgages, and to redeem; in default a sale as prayed by the defendants.

I understand the defendants have realized upon all the goods pledged by the warehouse receipts except those specified in the receipt of the 7th of December, 1876. The plaintiff is entitled to anything they may produce beyond the debt for which they are pledged.

The defendants are entitled to costs.

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1878.

SOVEREIGN V. FREEMAN.

Administration—Executors—Costs—Interest.

A legatee gave to a creditor an order on the executors for payment of her share of the estate, which order was accepted by them and certain payments made on account. The executors denied having funds in their hands sufficient for the payment of the order and properly applicable thereto; but on taking the accounts in this Court it appeared that since 1860 the executors had sufficient funds for that purpose. On a petition filed by the creditor, the Court, under these circumstances, ordered the amount in Court to be paid out to him, and directed the executors to pay the costs of the application and to make good to the legatee the interest accrued since 1860, until the executors paid the money into Court.

This was a petition for payment out of Court of the fund standing to the credit of this cause, under the circumstances stated in the judgment, and came on for hearing at the sittings of the Court at Simcoe in June, 1877.

Mr. J. E. Barber, for the petitioner.

Mr. H. C. Kerr, for the plaintiff.

Mr. Watt, for the executors.

In support of the petition, it was contended that the order operated as an equitable assignment of the party's interest in the estate, and that the delay in taking proceedings to compel payment could not be set up as a defence by the executors. On the other side it was objected that the contract here relied on was one entered into with a married woman as far back as 1852, where it was shewn she had not any separate estate. Here the petitioner, though claiming to be entitled from that date, allowed proceedings in the Master's office to be taken for winding up this estate without ever making any claim in respect of the interest of Mrs. *Sovereign*, which he now says was assigned to him more than fifteen years ago. Under these circumstances it was urged that the

Argument.

1878. executors were discharged from all liability to the petitioner: *McFadden v. Jenkyns* (a), *Oakes v. Smith* (b), *Smith v. Bonnisteel* (c), *Allan v. Newman* (d), *L'Estrange v. L'Estrange* (e), *Royal Canadian Bank Mitchell* (f), were cited.

Jan. 14th. BLAKE, V. C.—A perusal of the evidence given in this case, and of the papers in the Master's office, and with the Clerk of Records and Writs, leads me to the conclusion that there has not been shewn sufficient to absolve the executors from the payment of the amount claimed by the petitioner to the extent of the funds found in their hands coming to *Sidna Sovereign*, who, with her husband, gave the order in question. This paper given by *Sidna Sovereign* and her husband, and accepted by the then executors, Messrs. *Freeman* and *Walsh*, constituted an equitable assignment of her interest in favour of her creditor the present petitioner.

Judgment. After the lapse of sixteen years, and after a payment of \$132.23 on account on the 4th of January, 1865, and of \$210 on the 8th of July, 1868, it is impossible to hold that the evidence given on behalf of the respondents is sufficient to invalidate this paper. The petitioner demanded a further payment from the executors, to which request they answered that there were no funds of the estate out of which this debt could be paid. The accounts have since been taken in this Court, and the result shews that from January, 1860, there were moneys properly applicable to the discharge of this claim. If then paid, the exorbitant interest covered by the order, would have ceased to run; the funds the executors then had in their hands applicable to the share of *Sidna Sovereign*, were sufficient to have paid the amount due the petitioner in full; they were bound by their acceptance of the order to have applied them in.

(a) 1 Ph. 153.

(c) 13 Gr. 19.

(e) 13 Beav. 281.

(b) 17 Gr. 660.

(d) 13 Gr. 364.

(f) 14 Gr. 412.

that way, the result of which dealing with the estate would have been to obviate the necessity of this application. I do not see on what ground I can absolve the executors from payment of the interest which, if the moneys properly applicable to this claim had been so applied, would have ceased. The petitioner is entitled to an order for payment to him of the amount in Court, as the balance due him exceeds that sum; the executors must pay to *Sidna Sovereign* the extra interest at the rate of 19 per cent. from the 1st of January, 1860, until payment into Court, and the costs of the application and of the examination and hearing. This interest and these costs would not have been payable had the executors properly applied the moneys according to their undertaking.

1878.

Sovereign
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1878.

BECHER v. MILLER.

Will, construction of—Absolute interest—Power of appointment.

A testator by his will, after making sundry devises and bequests, directed the residue of his estate to be applied by his trustees, "unto and to the uses following: First. In case my dear mother survives me and my nephew *S. M.* attains the age of twenty-three years, then all my residuary estate is to be valued by my executors, and divided into five equal shares, and one equal share is to be paid to my mother, or in case of her death before such division, then to be paid over or transferred to such person or persons or in such manner as she may by her last will and testament direct." The testator's mother survived him, but died before the estate had been divided or valued:

Held, that she took an absolute interest in the property so thereby given to her, and not a power of appointment merely; and that the same passed under the residuary clause in her will.

APPEAL from the Master at Hamilton by the infant defendants *Robertson*, under the circumstances stated in the judgment.

May 13th. Mr. *Bethune*, Q.C., and Mr. *Ewart*, for the appeal.
Mr. *Blake*, Q.C., and Mr. *D. McCarthy*, Q.C., for the executors of *T. C. Street*.
Mr. *C. Robinson*, Q.C., for the executors of Mrs. *Street*.

July 18th. PROUDFOOT, V. C.—*Thomas Clark Street* died on the
Judgment. 6th of September, 1872, having by his will, dated 2nd of September, 1872, devised, among other things, as follows:—

"And lastly, as to the rest and residue of my said estate, upon the further trust, after paying for or providing for the payment of my just debts, funeral and testamentary expenses, and the legacies hereby given and bequeathed, and after retaining what in the judgment and opinion of my said trustees will be amply sufficient to pay and satisfy all the other charges herein directed to be borne by my estate, and to meet any loss or contingency that may befall or happen to my said estate and property, to divide, pay, apply, assign, convey, and assure all the rest and residue of the said trust

funds and property, unto and to the uses following: 1878.
 First. In case my dear mother survives me, and my nephew *Sutherland Macklem* attains the said age of twenty-three years, then all my residuary estate is to be valued by my executors, and divided into five equal shares, and one equal share is to be paid to my mother, or in case of her death before such division, then to be paid over or transferred to such person or persons or in such manner as she may by her last will and testament direct. One share to be paid to my sister *Cynthia Fuller*, one share to my sister *Julia Ann Macklem*, one share to be divided, share and share alike, amongst the children of my late sister *Elizabeth Plumb*, then living; and the other or remaining fifth share I direct my said trustees to deduct the sum of twenty-five thousand pounds thereout and therefrom, and the balance of such share, after such deduction, to pay and transfer to my sister *Caroline Robertson*, and the said twenty-five thousand pounds to divide as follows: one-fifth thereof to my mother, or as she may will and direct; one-fifth to my sister *Cynthia Fuller*; one-fifth to my sister *Julia Ann Macklem*, and one-fifth to the children of my late sister *Elizabeth*, share and share alike; and one-fifth to my daughter **Caroline*; but in case my dear mother does not survive me, and in case my nephew *Sutherland Macklem* attains the said age of twenty-three years, then it is my will, and I direct that my residuary estate be divided into four shares, and still deduct out of my sister *Caroline's* share the said sum of twenty-five thousand pounds and divide as follows: One-fourth of said residue, and one-fourth of said twenty-five thousand pounds, to my sister *Cynthia Fuller*; one-fourth of said residue, and one-fourth of said twenty-five thousand pounds, to my sister *Julia Ann Macklem*; one-fourth of said residue, and one-fourth of said twenty-five thousand pounds, share and share alike, to the children of my late sister, *Elizabeth Plumb*, and the balance of said residue, and one-fourth of said sum of twenty-five thousand pounds, (less the said sum of twenty-five thousand pounds,) to my sister *Caroline*. The said sum of twenty-five thousand pounds being so deducted, inasmuch as I have specifically devised that sum to my said sister *Caroline's* son, *Sutherland*. If, however, my said nephew, *Sutherland*, should

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* This error appears in the probate copy of will.
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not attain the said age of twenty-three years, so as to receive the said sum of twenty-five thousand pounds, then I will and direct that the said sum of twenty-five thousand pounds be not deducted from *Caroline's* share, but that she do receive one-fifth, or one-fourth share, as the case may be, without any deduction, and the devise of the twenty-five thousand pounds so deducted, as aforesaid, be treated as cancelled. And further, it is my will that in case any of my sisters should die before such division, or before me, that the legacy to such one, or more so dying, shall not lapse, but shall go to her or their personal representatives, or as she or they may by will direct."

Mrs. *Street*, the mother of the testator, survived him a few days, but died before the residuary estate had been valued or divided. By her will, dated 9th September, 1872, she devised, among other things, as follows:—

Judgment.

"And all the rest and residue of my real and personal estate of every nature and kind, I give and bequeath to my executors hereinafter named, upon trust; in the first place, to sell and dispose of so much or such portion thereof as my said executors may deem necessary for the purpose of carrying out fully the intention of this my will and paying or securing funds for the payment of any legacies by me herein bequeathed; and in the second place, to divide the same into four equal shares, one of which I give and bequeath to my daughter *C. Fuller*, or her personal representative, or as she may by will direct; another of which shares I give and bequeath to my daughter *J. A. Macklem*, or her personal representatives, or as she may by will direct; another of said shares I give and bequeath to my daughter *C. Robertson*, or her personal representatives, or as she may by will direct; and the other of said shares I give and bequeath to my son-in-law, *J. B. Plumb*, as the representative of my daughter *Elizabeth*, now deceased, or his personal representatives, or as he may by will direct. And I will and declare that in case any of my daughters or my son-in-law, *J. B. Plumb*, die before me, it is not my intention that said legacies shall lapse, but that the children of the one so dying shall take the parent's share, or that it shall be distributed as she or he may by will direct."

Sutherland Macklem has attained the age of twenty-three years.

A decree has been made for the administration of *T. C. Street's* estate.

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Miller.

In proceeding under that decree, the Master at Ham-
ilton, at the request of the parties, has certified "that
the said *Abigail Hyde Street* (testator's mother), after
the death of the said testator *T. C. Street*, and with a
knowledge of the said bequest in her favour, made and
published her last will, dated the 9th of September, 1872,
and executed the same in due form to pass real and personal
estate, and thereby bequeathed and disposed of the
said one-fifth share of the said *T. C. Street's* residuary
estate so bequeathed to her as aforesaid, and that under
the surrounding circumstances (not in this certificate set
forth in detail) the said one-fifth share of the said *T. C.
Street's* residuary estate passed under the said will of the
said *Abigail Hyde Street*, and that her will operated as
a valid appointment as to the said one-fifth share."

Certain infants interested have appealed from this judgment.
certificate of the Master.

Parol evidence was taken before the Master, subject
to objections to its admissibility, which, if admissible,
clearly shewed that Mrs. *Street* had in her mind the
bequest made to her by her son, and intended to dispose
of it by her will.

Upon the argument of the appeal, it was not contended
that parol evidence of intention was admissible, and the
case was discussed upon the construction of the wills,
without reference to it.

It is a cardinal rule of construction, adopted for rea-
sons of family convenience and public policy, that
interests are to be vested as soon as they can be con-
sistently with what the testator has said; or, as it is
sometimes expressed, the law favours the vesting of
estates. And the presumption of vesting is much
stronger when the bequest or devise is residuary, so as
to prevent an intestacy: 1 *Jarman on Wills*, 758; *Re*

1878. *Ridge's Trusts* (a), *Jones v. Mackilwain* (b), *Leeming v. Sherratt* (c).

Becher
v.
Miller.

In the present case the valuation and division of the property was to be made when *Sutherland Macklem* attained the age of twenty-three years; but the interest of the mother was not to be contingent upon her surviving till that time, as is shewn by the provision that if she died before the division her share was to be paid to such persons as she might by her will direct. The postponement of payment also appears to have been for the convenience of the fund or property, and in such case the vesting is not deferred (d). There is no devise over in case of the death of the devisee without appointment, which is a strong reason for inferring a vested interest. There is no prohibition against aliening otherwise than by will. The power to appoint by will is one incident of property, but conferring that power is not an implication that no other is to be used. The first devise of "one equal share to be paid to my mother" is absolute, and its effect will not be cut down unless language as clear be employed.

Judgment.

In *Bradley v. Westcott* (e), Sir *W. Grant* says:—"The distinction is perhaps slight, which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established, that in the latter case the property vests. A gift to A., and to such person as he shall appoint, is absolute property in A. without an appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to anything."

With regard to the absence of a gift over, in a case where money was bequeathed to *James Maxwell* for life

(a) L. R. 7 Chy. 665, 698.

(b) 1 Russ. 220.

(c) 2 Haro 14, 23.

(d) 1 Jarm. 798.

(e) 18 Ves. 445, 453.

and then to his children, but if he should die without lawful issue, to be disposed of as he should think proper, Sir John Romilly says: "If there had been a gift over, I should hold it to be a power, because this would clearly import that a disposition of the property should be made, and, in default, that it should go over": *In re Maxwell's Will* (a).

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v.
Miller.

I do not think the argument from the clause against lapse being confined to the shares of the sisters is conclusive. It is quite clear that the shares of the sisters were vested, and the provision that their shares should not lapse, in case of death before division, is inoperative. That part preventing lapse in case of their death before the testator was a proper and necessary provision; but, in the event, it is equally useless, as the sisters survived the testator. But the testator had already provided for the case of his mother's death before him, and directed that his residuary estate should in that event be divided into four instead of five shares, so that it would have been unnecessary to have included her in the clause as to lapse by death before him. This express provision in case of his mother predeceasing him is indicative of an intention that it was only in that event she should not share in the estate, and over-balances any inference to the contrary from the omission of her name in the clause as to lapse before division. And, besides, he had in such an event expressly provided for the continuance of her interest in one specified mode of disposition without prohibiting others.

Judgment.

On the whole, I think the mother took an absolute interest in the property given to her by her son's will, not merely a power of appointment; and therefore the other question, whether her will was an effectual execution of the power, does not arise.

The appeal will therefore be dismissed. The costs of all parties will come out of the estate.

(a) 24 Beav. 246, 250.

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RUTHVEN V. RUTHVEN.

Will, ambiguity in—Extrinsic evidence—Contingent bequest—Numerical mistake.

The rule as to the reception of parol or extrinsic evidence, to rebut a presumption raised, or explain an ambiguity created by a will, considered and acted on.

A testator, by his will, bequeathed "the sum of \$500 to each of the four children of my brother *G. R.*, on their attaining their twenty-first year." At the date of this will, *G. R.* had five children—one son and four daughters—which fact was known to the testator, who had been heard to say that he would provide for the daughters, but that *G.* himself must provide for the son. By a previous will the testator had bequeathed the sum of \$500 to each of the four "daughters" of his brother *G. R.*; and the person who drew the will proved that the testator in giving him instructions therefor, said that "he wished to leave \$500 to each of *G.'s* four children the same as in the old will."

Held, (1) that evidence of the instructions so given was properly admissible for the purpose of rebutting any presumption of any change of mind of the testator, and thus shewing which four of *G. R.'s* children were intended to be benefited by the bequest, and (2) that the bequest was contingent upon the legatees respectively attaining their majority.

EXAMINATION of witnesses and hearing at sittings of the Court at Barrie, in the Spring of 1878.

Mr. *Moss* and Mr. *Mulock*, for the plaintiff.

Mr. *D. McCarthy*, Q. C., Mr. *Lount*, Q. C., and Mr. *Rye*, for the defendants.

The points raised and authorities referred to, are stated in the judgment.

June 29th. SPRAGGE, C.—The will which I have to construe is that of *William Ruthven*. The will is dated the 22nd of June, 1873. He died on the 23rd of the same month, the following day.

The questions mooted arise upon this clause of the will, "I give and bequeath the sum of five hundred dollars to each of the four children of my brother *George Ruthven*, on their attaining their twenty-first year."

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George in fact had five children, four daughters and one son; and this was known to the testator: and one contention is, that the gift is void for uncertainty. I have examined the authorities cited for this position, and in my opinion they do not support it.

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Ruthven.

The settled rule now I take to be, *prima facie*, to interpret the intention of the testator to have been to benefit the class; and to assume that, by some slip or omission he has mistaken the number, and where the class embraces a larger number, to hold it to apply to the whole. This is established by a large number of cases, and it is also established that the fact of the testator knowing the true number of the children makes no difference. *Daniell v. Daniell* (a) was a strong instance of this.

Mr. *McCarthy* contended that it was open to him to shew by parol evidence that by the term "the four children," the testator meant the four daughters of his brother *George*. I received the evidence with doubt and hesitation, because I conceived it went beyond what I have always held clearly admissible, *i.e.*, evidence of the surrounding circumstances. The case of *Newman v. Piercey* (b), and the principles laid down by the Master of the Rolls in that case certainly go some way in support of Mr. *McCarthy's* contention. Quoting from *Yeats v. Yeats* (c), the following passage, the law of which he approves: "The principle on which this Court acts is well settled by authority. Where a testator gives a legacy between a class of persons or separate and distinct legacies to each of a class, if the Court finds there are more of the class than those specified by the testator, it endeavours to find which of them were really meant; and if it is unable to discover them, then, in order that the legacy may not fail altogether, it infers or presumes that the testator intended to include all the class, not-

Judgment.

(a) 3 D. & S. 337.
(c) 16 Beav. 170.

(b) 4 Ch. Div. 41.

1878.
 Ruthven
 v.
 Ruthven.

withstanding the numerical error," Sir *George Jessel* in the principal case goes on to say: "So that the principle is this, that the Court only resorts to striking out the number, which is a strong measure at all times with regard to a will or any other instrument, when it altogether fails to discover who is meant, that is, to discover who is meant, both from the wording of the will and the extrinsic evidence properly admissible." In another passage, "First you must consider that the will meant the children of a particular person. * * If the rest of the evidence is sufficient to enable the Court to infer who are meant, the Court is bound to do so; and, after all, it is only a presumption of a mistake on which the Court acts, which is rebutted by evidence which will raise the contrary presumption. The rule itself can be got rid of by that kind of evidence which fairly shews that that is not the right presumption, if you can reconcile the words of the will with the state of circumstances at the time, by leaving out a member of the class, or defining the class of persons who were intended to take by the will." The Master of the Rolls stops short of declaring what evidence would in his judgment be admissible to rebut the presumption; he only says "Extrinsic evidence properly admissible," and in the case before him there was no evidence of instructions for a will or of declarations of intention. I felt difficulty in acceding to the proposition that you may shew by parol evidence other than of surrounding circumstances, who were meant and who were not meant by way of rebutting the presumption that all were meant, and thus establish affirmatively who were meant.

Judgment.

The cases have certainly gone very far in admitting parol evidence to rebut presumptions arising from latent ambiguities in a will.

In *Delmare v. Robello* (a), Lord *Thurlow* stated broadly, "From the moment that latent ambiguity is

(a) 1 Ves. Jr. 415.

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produced in the only way in which it can be produced, namely, by parol evidence, it must be dissolved in the same way, which has always been the governing principle." Still, I apprehend, that even for the purpose of rebutting presumptions so arising, it is not every kind of parol evidence that is admissible. Thus, although there have been dicta to the contrary, *e. g.*, by Lord *Coke* in Lord *Cheney's Case* (a), it is now held that declarations of intention, and instructions for the making of a will, are not admissible for the purpose of pointing out who were the intended objects of the testator's bounty: *Doe v. Hiscocks* (b), *Stringer v. Gardiner* (c), at the Rolls; and in Appeal (d).

Any circumstances and almost any expressions, other than instructions and declarations of intention, used by a testator tending to shew what persons were intended to be designated by his will, have been held admissible under the cases, where the ambiguity as to who is meant is raised by extrinsic evidence. As instances, I would refer to *Jones v. Newman* (e), *Reynolds v. Whelan* (f), *Doe Gord v. Needs* (g), *Doe Allen v. Allen* (h). Judgment.

I am referred to Mr. *Theobald's* book on Wills for the position that in the case of a bequest to a class, and error shewn in the number stated in the will, evidence is not admissible to shew that the testator meant certain of the children, or the children of a particular marriage, who may correspond in number with the number mentioned in the will. For this, the learned author cites *Daniell v. Daniell*, in which Sir *J. L. Knight Bruce* abstained advisedly from deciding the point; holding that if admissible, the evidence in that case was insufficient; and I may observe that in the later edition of *Hawkins* on Wills, and *Jarman* on Wills, in which *Daniell v. Daniell* is cited, it is not cited for that position.

(a) 5 Rep. 68, b.

(c) 27 Bea. v. 35.

(e) W. Bl. 60.

(g) 2 M. & W. 129.

(b) 5 M. & W. 368, 371.

(d) 4 D. & J. 468.

(f) 16 L. J. Chy. 434.

(h) 12 A. & E. 461.

1878.
 Ruthven
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Mr. *Theobald* refers also to *Matthews v. Foulshaw* (a), decided by Lord *Hatherley* when Vice-Chancellor. The devise was *inter alia* in trust "for the two children of my son *Joseph*." In fact *Joseph* had four children, two by a first marriage and two by a second. The testator, the report says, knew of the existence of these two children by the second marriage, but had never seen them; and evidence was offered to shew that he had often declared his intention of benefiting the children of the first marriage, and had also said that he knew nothing about *Joseph's* other children. The Vice-Chancellor is reported to have said: "He could not import parol evidence into the case and imply an intention from the external circumstances that *Joseph* had two families by different wives." I do not find the case reported in the regular reports, or in the *Jurist*, or *Law Journal*. The propriety of rejecting the evidence may be questionable, though it may have been insufficient, if received, to exclude the children of *Joseph* by the second marriage.

Judgment. I still think that, under the cases, the presumption of numerical error in the will may be rebutted by proper evidence.

It is in evidence that a former will of the testator contained a clause in the same terms as the one in question, except that the words the four "daughters" were used instead of, as in this will, the four children. The person who drew the will was asked what were the testator's instructions to him. I doubted whether evidence of what instructions were given was admissible, and said so, but received the evidence provisionally. The answer was: "He said he wished to leave \$500 each to *George's* four children, the same as in the old will." It would naturally be argued, and was argued, that the change of word from "daughters" to "children" indicated a change of intention. The testator used the word "children," so the conveyancer said. I think that the

(a) 12 W. R. 1141

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words, "the same as in the old will," used by the testator, are receivable to rebut the presumption of change of intention, or rather that the whole sentence must be taken together. The conveyancer did not know the state of *George's* family, and took four children to be equivalent to four daughters, and the testator on his death bed (he died the following day) did not notice the change; and the conveyancer did not, as with the old will before him he ought to have done, draw his attention to the circumstance that in that will the word "daughters" was used. The new will differed from the old one in several particulars. There is other evidence in favour of the same contention—that of *Christiana Bone*, who had known the testator for a number of years, and deposes that in a conversation with him about two years before his death, he said that *George's* girls were to get each \$500 by his will; that *George's* son was to get his father's property.

James Bone deposes that he heard the former will read over; that it left to the four daughters of *George* Judgment. \$500 each; and that the testator observed that *George* had property, and should provide for his son.

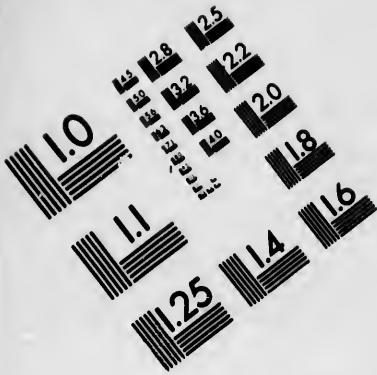
The evidence of *James Mitchell* is to much the same effect. The testator said he would leave *George* to provide for his son, he, the testator, providing for *George's* daughters.

These were all intelligent and, as it appeared to me, truthful witnesses, and it was conceded that their evidence was admissible. The observation upon this evidence was, that the testator may have changed his mind, and that from the substitution of the word children in the last will for daughters in the previous one, it was to be presumed that he had; but that presumption again is rebutted by the evidence of the conveyancer, if it is admissible, that the bequest was to be to the four children, "the same as in the old will," and I think for the purpose of rebutting that presumption, and for that purpose only, it is admissible.

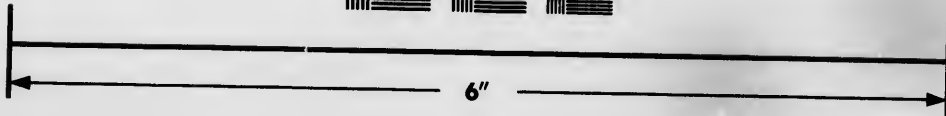
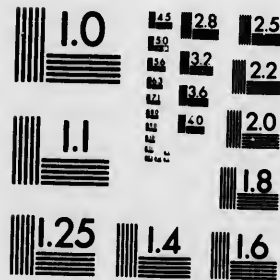
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1878.

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The language of the testator, when his previous will was in existence, is, I think, admissible, in evidence of the regard in which he held the different members of the family of *George*; of the claims of *George's* daughters and his good will towards them, and the distinction which he drew, and his reason for it, between the daughters and the son. If we are to place ourselves in the position of the testator, and look with his eyes upon the objects or supposed objects of his bounty to aid in the interpretation of his will, we cannot discard such evidence; and, as I read the cases, it has been admitted in a number of instances. Taking it to be admissible, it leaves upon my mind no doubt that by the term the four children, the testator intended the four daughters of his brother *George*. The prefix "the" is not without its significance; he knew as well as *George* himself that the number of daughters was four, and the number of children five.

Judgment. I desire to be understood that I at least doubt whether, it being shewn by extrinsic evidence that a testator has misstated the number of children in a class, the door is opened to evidence of any and every kind to rebut the presumption that all in that class are intended. The extrinsic evidence is necessarily evidence of one of the surrounding circumstances; and my impression is, that evidence of a different nature is not properly admissible to rebut the presumption arising from the mistake, though in some of the cases the evidence appears to have taken a wider range.

The plaintiff is an infant, and it is made a question whether the bequest as to her is vested or contingent. There is a gift over after the payment of all debts, charges, and bequests, and I was inclined at the hearing to the opinion that it was vested; but upon looking at the cases, I incline to think it contingent upon the legatees respectively attaining their majority. I thought it might fall within the class of cases where the gift is postponed for the convenience of the fund, on the ground

of the legacies being payable out of rents receivable by the same persons in whose favour is the gift over; but the cases do not seem to bear out this suggestion. The question is of no present practical importance, provided *Robert and Alexander Ruthven*, to whom the property is devised, set apart a sufficiency of the rents, after satisfying the prior charges, to answer the bequest to the plaintiff. In the event of the plaintiff dying under age, a question may arise between her next of kin and those entitled in remainder. It does not appear that there are rents receivable beyond what is necessary to satisfy prior charges. If there are, they should be paid into Court to the extent of the plaintiff's legacy.

1878.
Ruthven
v.
Ruthven.

With regard to the costs. The general rule is, that where a suit is proper in order to the construction of a will, the costs come out of the general estate. There is nothing in this case to take it out of the general rule. If any special direction were given, it could only be that it should be paid by *Robert and Alexander Ruthven* as the parties entitled to the residue. It could not, in the state of the authorities, be directed that they should be paid by *Robert Ruthven*, son of *George*.

Judgment.

1878.

DAGG V. DAGG.

Personal representative—Rents of realty—Commission.

An executor or administrator has no right, as such, to receive the rents of real estate; as to them, he is merely an intermeddler, and will not be entitled to any commission thereon.

HEARING on further directions.

Mr. *W. P. R. Street*, for the plaintiff.

Mr. *W. Cassels*, for the widow and administratrix.

Mr. *Bayly*, for the infant defendants.

Mr. *W. R. Meredith*, for the other defendants.

Judgment. SPRAGGE, C.—I think the costs of the administration should come out of the estate, including the costs of the administratrix, less any costs that may have been incurred by her in respect of the surcharge established against her. An administration was necessary at any rate before a sale under a bill for partition or sale. I do not charge her with the plaintiff's costs of establishing the surcharge, as it does not appear upon what ground she was charged with the amount; whether the circumstances were such that it amounted to a wrong in her not to charge herself with the amount.

I think she may properly be allowed compensation at the rate mentioned in the Master's report to the amount of the personalty with which she charged herself; but against that should be set, any interest and costs that may be charged against the estate upon debts proved in the Master's office, such interest and costs should be charged against her allowance for compensation, because it appears that she had personalty in hand wherewith to pay these debts. She should not be allowed compensation in respect of her receipt of rents. Compensation is authorized by the statute to be allowed for care, pains, trouble, and time expended in or about the executorship, trusteeship, or administration of estates and

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effects vested in an executor or trustee under a will or under letters of administration. This administratrix therefore cannot be entitled to any allowance upon rents received for *quoad* them she was an intermeddler, not an executor or trustee.

1878.

Dagg
v.
Dagg.

No question is raised as to the other costs in the suit. The administratrix is to pay into Court the balance in her hands.

SAMSON V. HAGGART.

Practice—Costs—Charges of fraud not proved.

The plaintiffs claimed to be partners of the defendant, and the defendant in resisting a bill filed for the purpose of enforcing such claim charged the plaintiffs with fraud, but no evidence was adduced either in support or rebuttal thereof, in consequence of the Court expressing the view that the plaintiffs were not entitled to succeed; and as it did not appear that the costs had been increased thereby, the Court, on dismissing the bill, ordered the defendant to be paid his costs.

EXAMINATION of witnesses and hearing at Chatham.

Mr. *Houston*, for the plaintiffs.

Mr. *Boyd*, Q.C., and Mr. *Atkinson*, for the defendants.

In addition to the cases mentioned in the judgment, *Tibbs v. Wilkes* (a), was referred to.

SPRAGGE, C.—In this case each of the two plaintiffs claimed to be a partner with the defendant, when in truth they were not so; and this, I held at the hearing,

(a) *Ante*, vol. 23, p. 439.

1878. justified the defendant in putting an end to the connection that had subsisted between them. They made the same contention by their bill and I therefore held them bound to pay the defendant his costs, unless the charge of fraudulent conduct made against them in his answer should disentitle him. This charge was not proved, but then from the view that I took of the case it was not necessary to prove it, and no evidence was given either in support of or in rebuttal of the charge, and it does not appear that the costs have been thereby increased.

Samson
v.
Haggart.

Judgment.

The case, therefore, falls within the rule laid down in *Staniland v. Willott* (a), that in such a case the costs of the suit ought not to be affected by a charge of fraud being made in the pleadings. It agrees also with the ruling of Sir *Richard Kindersley* in *Bond v. Bell* (b). In that case the bill was dismissed without costs upon the principal ground raised in the cause. Counsel for the defendant asked that other points raised should be considered, contending that if found for the defendant, the bill should be dismissed with costs; but the learned Vice Chancellor refused to go into the other points raised, in order to settle the question of costs.

The defendant is to have costs up to the hearing.

(a) 3 McN. & G. 664.

(b) Jur. N. S. 1292.

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MCKELLAR V. PRANGLEY ET AL.

Executors—Costs—Rectification of decree.

Where executors in good faith unsuccessfully defended a suit on a note given by their testator, the Court, in pronouncing a decree against them, declared them entitled to deduct their costs as between solicitor and client, out of their testator's estate.

Executors having omitted to set up the defence that they had fully administered or had not assets to pay any balance that might be found due, petitioned to have the decree rectified so as to exempt them from liability for a greater amount than the assets come to their hands; the Court made the order as asked, but, under the circumstances, directed the executors to pay the costs of the application.

This was a suit instituted originally in the Court of Queen's Bench, by *James McKellar* against *George Prangley, Duncan McLean, Robert Leathorn, John McDougall, and James Dewar*, to enforce payment of a promissory note given by the late *Alexander McKellar*.

The plaintiff was the administrator of the estate of *John McKellar*, a carriage builder, carrying on business in London, Ont. The promissory note in question was one of two given on the sale by the plaintiff of the stock-in-trade of the intestate to *Alexander McKellar*. The note was drawn by *Alexander McKellar* and *George Prangley* (as was stated in the declaration) in favour of the defendants, *Prangley, McLean, and Leathorn*, and by them indorsed to the plaintiff. The note fell due in October, 1875. *Alexander McKellar* died in March, 1876, and the defendants *McDougall* and *Dewar* were the executors of his will. The suit had been transferred by order under the statute to this Court.

The defence of the executors of *Alexander* was, that the estate of *John* was indebted to the estate of *Alexander* to an amount at least equal to the amount due on the note. The defence of the indorsers was, that the plaintiff admitted to them that the note had been paid,

1878.

McKellar
v.
Prangley
et al.

or that there was sufficient due from *John's* estate to *Alexander* to meet the note, and that he exonerated them from the payment of it. They did not allege that they had changed their position in consequence; and they were duly notified of the dishonour of the note.

The cause came on for the examination of witnesses and hearing at the sittings of the Court in London, in the Autumn of 1876.

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

Mr. *Boyd*, Q. C., and Mr. *Glass*, Q. C., for the defendants.

Cook v. Lister (a), *Foster v. Dawber (b)*, were cited.

June 23rd.

SPRAGGE, C.—Upon the whole of the evidence, my opinion is, that the defence of the executors is not sustained in fact: that at the outside the plaintiff may have given it as his opinion, that it would not be necessary to call upon them for payment, though even this is not satisfactorily made out. But further, if the evidence had sustained their defence as a matter of fact, it would not, in my opinion, be a defence to an action upon the note. It was stated at most as a matter of opinion, not as an ascertained fact, though if stated as a fact it would not, I think, make any difference if the fact turned out to be otherwise.

Judgment.

With regard to the alleged promise not to call upon them for payment and to give them up the note, I remain of the opinion that I expressed at the hearing, that even if made out as a matter of fact it would not be a good defence, inasmuch as the plaintiff did not hold the note in his own right, but as a trustee for the estate, and the estate would not be bound by such a promise. But it is, I think, clear from the evidence that what passed, and which the indorsers have inter-

(a) 13 C. B. N. S. 598.

(b) 6 Ex. 330.

puted as, or wrested into a promise was based upon the assumption that the note was paid, or that there was sufficient due from *John's* estate to *Alexander's* to meet it. There was no idea or understanding between the parties that the note paid or unpaid should be given up to the indorsers.

1878.
 McKellar
 v.
 Prangley
 et al.

As to the credit claimed by all the defendants to be due by the estate of *John* to the estate of *Alexander*, it arises out of an arrangement made by the guardians of the children of *John* with *Alexander*. *Alexander* rented the business premises in which *John* had carried on his business from the guardians, and it was agreed between them that the rental should be at the rate of \$530 a year, and that he should board the infant children of *John* for \$541 a year. The rent was not paid, and it was reasonable under the circumstances that it should not be. Mr. *Street*, solicitor for *John's* estate, says he did not distrain for it, as Mr. *McMillan*, the solicitor for the executors of *Alexander's* estate, objected, and said that if distrained for, the executors would sue for the board of the children; and suggested that as they were mutual debts due in the same right, they should be set off, and this I understand to have been assented to by Mr. *Street*. At all events, he was thereby induced to refrain from distraining.

Judgment.

I do not see how the defendants in this suit can claim that the amount due for the board of *John's* children should be applied in payment of this note. I take it that there is nothing in the will of *Alexander* to help this claim, or it would have been brought under my notice. The position taken by Mr. *McMillan* that the rent should be set off against the board of the children seems founded in good sense and correct in law. Both were due upon contract between the same parties, and so due in the same right, and from what passed as to the necessity of keeping the amount payable for board within such limits that the rent should be sufficient, or nearly sufficient to answer it, leads to the inference

1878. that it was agreed that the one should be set off against the other.

McKellar
v.
Prangley
et al.

A suit is pending in this Court for the administration of the estate of *Alexander*. The remedy of the indorsers is to pay the note and claim against the estate.

The plaintiff is entitled to a decree for payment of the note and interest, with costs against the indorsers; and the executors of *Alexander* are entitled to their costs out of their own estate.

On this judgment the following decree was drawn up and entered :

(1.) "This Court doth declare that the plaintiff is entitled to be paid by the defendants the amount of the promissory note in the pleadings mentioned, together with interest thereon, and doth order and decree the same accordingly ; (2.) And this Court doth further order and decree that it be referred to the Master of this Court at London, to take an account of the amount due on said note, and to compute interest thereon, having regard to the set off referred to in the second paragraph of the plaintiff's bill ; (3.) And this Court doth further order and decree that the defendants do pay to the plaintiff the amount which the said Master shall find to be due, as aforesaid, forthwith after the said Master shall have made his report—the defendants *McDougall* and *Devar* paying whatever proceeds of the estate of the late *Alexander McKellar*, remain in their hands after deducting their costs of this suit when taxed as hereinafter directed ; (4.) And this Court doth further order and decree that the defendants *George Prangley*, *Duncan McLean* and *Robert Leathorn*, do pay to the plaintiff his costs of this suit forthwith after taxation thereof by the said Master ; and that the defendants *John McDougall* and *James Devar* do have liberty to retain out of the estate of the said testator in the pleadings mentioned, their costs of this suit forthwith after the taxation thereof by the said Master, as between solicitor and client."

The executors thereupon presented a petition to this Court, setting forth that since the entry of the decree, they had—

"Discovered that the said decree renders your petitioners liable to the plaintiff jointly with the other defendants in the first instance, whereas your petitioners submit that the defendants, other than your petitioners, should be ordered to pay the claim of the plain-

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tiff; and that after such payment, the said defendants should be allowed to claim the amount so paid against your petitioners as executors of the estate of the late *Alexander McKellar*. That the assets of the estate of the late *Alexander McKellar* amount to about one thousand eight hundred dollars, and the liabilities to about the sum of six thousand dollars."

1878.

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v.
Prangley
et al.

And praying that the decree might be rectified or corrected by striking out paragraph number three in the said decree, and substituting therefor the following:

"And this Court doth further order and decree that the defendants, other than the defendants *McDougall* and *Dewar* do pay to the plaintiffs what the said Master shall find to be due as aforesaid forthwith after the said Master shall have made his report; and that upon such payment, they shall be entitled to a claim against the said *McDougall* and *Dewar*, as executors as aforesaid, for the amount so paid by them to the said plaintiff; and that until such payment, the plaintiff shall [not] be entitled to claim against the said *McDougall* and *Dewar*, as such executors, the amount so found due by the said Master as aforesaid."

Mr. *H. Ferguson*, in support of the petition, urged that as it was shewn that the debts due by their testator were more than three times the amount of assets come to their hands, it would be most unjust that, by a mere slip of the pleader, they should be precluded from shewing the true state of the account.

Mr. *W. P. R. Street*, for the plaintiff, did not object to the relief asked being given, but this could only be given on payment of costs.

Mr. *Hoyles*, for the defendants *Prangley*, *McLean*, and *Leathorn*, the indorsers of the note sued on, opposed the relief being granted, as the effect of so doing, would be to throw upon the indorsers the duty of paying the note, which they had all along been led to believe had been fully paid and discharged, thus rendering them primarily liable to pay it.

SPRAGGE, C.—I am not prepared to say that upon the June 29th, pleadings and evidence the decree as drawn up is erroneous, inasmuch as the defence by the executors was,

Judgment.

1878. that the plaintiff, as administrator of *John McKellar*, was indebted in a larger amount to the estate of *Alexander McKellar* than the estate of *Alexander McKellar* was indebted to the plaintiff as administrator of *John*; omitting to set up that they had fully administered, or that they had not assets to pay any balance that might be found due, if any were found due, from the estate of *Alexander* to the estate of *John*. They ask now by their petition to be allowed to make that defence, and shew that the assets of the estate of *Alexander* amount to about \$1,800 while the liabilities amount to about \$6,000.

Judgment.

The other defendants, indorsers of the note of *Alexander* sued upon, object that what is asked would, if granted, make them primarily liable. But it would not necessarily be so. The estate of *Alexander* is primarily liable; and the petitioners to the extent of assets according to a due course of administration, but only to that extent. The Decree will be rectified accordingly; but, as the further costs of the plaintiff and of the defendants, other than the petitioners, have been occasioned by the omission of the petitioners to set up this defence by answer, they can only obtain relief upon payment of costs.

ADAMSON V. ADAMSON.

Practice—Title acquired after suit.

The plaintiff instituted proceedings to restrain waste and obtain possession of the property, but at the time he had not such a title as would enable him to maintain ejectment, and the evidence failed to establish the waste complained of. The Court, under these circumstances, refused to give effect to a title acquired subsequently, and dismissed the bill, with costs, without prejudice to any other suit.

THIS was a suit by *Alfred Adamson* against *Mary Adamson*, seeking to restrain the commission of waste

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by the defendant on the premises in question, and prayed to be put into possession of the property. At the time of instituting the suit, the title was vested in one *Mitchell* as trustee, who was not joined as a party; but on the 26th of January, 1878, *Mitchell* executed a conveyance of the property to the plaintiff. Under these circumstances, it was insisted that although the plaintiff had failed to shew the fact of waste having been committed, he was entitled to obtain possession.

1878.

Adamson
v.
Adamson.

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

Mr. *Bethune*, Q.C., and Mr. *Moss*, for the defendant.

BLAKE, V.C.—The plaintiff by his bill has made out a case for relief on the ground of waste. The evidence did not sustain this position, and if the only relief asked had been to restrain the defendant from cutting timber the bill must have been dismissed. The bill further asked for possession. The plaintiff, when the bill was filed, was not in a position to recover in ejectment against the defendant. He has since the filing of the bill acquired a title which, it is alleged, entitles him to possession. He has virtually combined a suit to stay waste and an action of ejectment in the same bill. He fails on the first ground on which he seeks relief, for want of evidence, and, on the second ground, because he must stand or fall by the title he had when the bill was filed. His title as it then stood did not entitle him to recover in ejectment. I must dismiss the bill, with costs, without prejudice to any other proceeding the plaintiff may take on his present title.

Judgment.

1878.

DUMBLE V. LARUSH.

Trustee—Agent—Bailiff—Statute of Limitations.

The person claiming to be entitled to land attained majority in 1860, having been for some time previously aware that parties in possession claimed title adversely; and in June, 1875, and June, 1876, after several fruitless attempts to obtain possession she conveyed, for a small consideration, to the plaintiff, who, in 1876, commenced proceedings in this Court to obtain possession:

Held, that "The Real Property Limitation Act," (R. S. C. ch. 108) barred the right to recover, and therefore the bill was dismissed, with costs.

The bill in this case which was by *David William Dumble* against *Joseph Larush* and *Andrew Robertson Larush*, an infant under the age of twenty-one years, and filed on the 13th of March, 1876, set forth that on the 18th of September, 1837, one *Thomas Bailey*, being the grantee of the Crown of the east half of lot 17, in the 2nd concession of Otonabee, executed a bond for the conveyance thereof to one *Andrew Robertson*, on payment of £80, one-half down, balance in two years; that *Robertson* having paid such half of the purchase money entered into possession and so remained in possession until his death, in May, 1830, intestate, leaving surviving him his daughter *Isabella Bell Robertson*, who became the wife of one *Alexander McGregor*, and his widow *Grace Robertson*, who shortly after his death left this Province and went to Scotland, where she gave birth to another daughter, named *Elizabeth Andrewlina*, and that on leaving this country she placed the said parcel of land in the care of one *Adam Stark*, with directions to look after the same until she returned or instructed him what to do with it. The bill further stated that in 1839 *Peter Robertson*, brother of the intestate, accompanied by his sister *Christina Robertson*, came from Scotland to this Province at the request of the widow, in order to take possession of the land, and hold and manage the same for the benefit of her said infant children, and possession.

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thereof was accordingly given to *Peter Robertson* by *Stark*; and that while resident in Scotland the said *Grace Robertson* sent out moneys, which it was alleged she had obtained from the father of her deceased husband on account of the shares of the said two infants in the estate of their grandfather, and the same were applied in payment of the balance of purchase money and interest due upon the land to the said *Thomas Bailey*: that in the year 1850, possession of the said land was delivered by *Peter Robertson* to *Elizabeth Robertson*, grandmother of the said infants, and thenceforward continued with their said grandmother in possession of the said land until her decease in 1854, and that she so occupied and possessed said land with full notice and knowledge of the several facts and circumstances above mentioned, and that the said land in the view of a Court of Equity "was the property of the said *Isabella* and *Elizabeth Andrewlina*, and that the said *Peter Robertson* held the same in trust for them." The bill further stated that on the death of the said *Elizabeth Robertson*, her daughter *Christina Robertson* assumed, under a devise in that behalf contained in the will of the said mother, to occupy and possess the said land in common with the said infants, and shortly thereafter intermarried with the defendant *Joseph Larush*, who with the said *Christina* and the said infants continued to occupy the property until 1860, when the said *Christina* died, leaving her said husband and the infant defendant her son and only child her surviving.

1878.

Dumble
v.
Larush.

Statement.

The bill further alleged, that in July, 1859, the said *Christina* by undue means and improper influence, obtained from the said *Isabella* "a transfer or conveyance of her said equitable estate and interest in the said land, which conveyance was by a decree of this honourable Court, dated the sixth day of October, 1868, set aside," and that on the 18th of June, 1875, the said *Isabella* and her husband by deed, for valuable con-

1878. sideration, bargained and sold, "and as the said parties thereto supposed and intended, duly granted and conveyed her equitable estate and interest in the said lands to the plaintiff." By amendment made in the said bill on the 9th of September, 1875, it was stated that by an error the said conveyance described the land in question as the west half of the lot instead of the east half, and that since the filing of the bill the said *Isabella McGregor* and *Alexander McGregor* by a deed of 12th of June, 1876, corrected such error, and conveyed to the plaintiff the east half of said lot.

The bill further stated that subsequently to the date of the said decree the said *Peter Robertson* assumed to convey the land to the defendants as being entitled thereto under the said *Christina*, but the said defendants paid no consideration therefor, and took with full notice of the facts and of the equitable title and interest of the said *Isabella* and *Elizabeth Andrewlina* and those claiming under them.

The bill then set forth that *Thomas Bailey* having died intestate, his heirs-at-law conveyed the said land to the said *Isabella McGregor* and to one *William H. Scott*, who had purchased the interest of the said *Elizabeth Andrewlina Robertson* therein, by a deed of the 17th of December, 1858, which interest the said *William H. Scott* retained, and that he with the said *Isabella McGregor* had endeavoured to recover possession of the land by ejectment issued out of the Court of Queen's Bench against the defendant *Joseph Larush*, in which action the said Court determined that it could not recognize the equitable right of the plaintiffs in that action to the lands in question, and that as the possession of the said *Peter Robertson* and those claiming under him had continued for more than twenty years as against *Thomas Bailey*—the owner of the said land in the contemplation of a Court of Common Law—and those claiming under him; they, the said *Isabella* and *Scott*, could not recover in the said action of ejectment.

Dumble
v.
Larush.

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The bill then charged that under the circumstances stated the plaintiff was entitled in this Court to an undivided moiety of the said land, and that the defendants were trustees in this Court of any legal estate or interest of them or either of them in said lands.

Under the circumstances as above stated, the plaintiff submitted that *Peter Robertson* entered into possession of the said premises in the character of and as a trustee for, and agent and bailiff of the infants, the heiresses-at-law of the said *Andrew Robertson*; and that one of said infants, the said *Isabella*, went into possession, with and at the same time as the said *Peter Robertson*, and she so remained in possession continuously while the said *Elizabeth Robertson*, *Christina Robertson*, *Joseph Larush*, and his son, were in possession of the said premises; and that all the said persons entered under the said *Peter Robertson*, well knowing that he was the trustee for, and agent and bailiff of the said heiresses-at-law; and that none of them, so in possession under the said *Peter Robertson*, were so in possession otherwise than as trustees for, and agents and bailiffs of the said infants.

The bill further stated that the said *Isabella McGregor* came of age in the year 1860, and the said *Elizabeth Andrewlina*, who had married *John Armour*, came of age in 1862, and was still under coverture.

The prayer was, that plaintiff might be declared entitled to an undivided moiety of said land; that the defendants were trustees thereof for plaintiff, and that they might be advised to deliver up possession thereof to the plaintiff, and for further and other relief.

The defendants answered the bill. *Joseph Larush* denied notice of the claim of *Isabella McGregor* and her sister, and asserted that *Peter Robertson* came from Scotland and took possession of the land in question in his own interest and for his own benefit, and not in any manner under, for, or on behalf of the widow of *Andrew Robertson* or his children, and that he subsequently arranged with *Bailey* as to the same; paid certain

1878.

Dumble
v.
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Statement.

1878. moneys to him, and remained in possession for some years, claiming as beneficial owner thereof, and made valuable improvements thereon; and afterwards sold and conveyed the same to his mother for £200, paid by her to him; alleged that *Isabella Bell Robertson* came of age in 1859, and that until 1869, when she married *Alexander McGregor*, she was not under any disability; and set up the Statute of Limitations as a bar to any relief being given to the plaintiff; and also that several suits and actions had been instituted by the said *Isabella Bell Robertson* and her sister *Elizabeth Andrewlina*, in all of which the plaintiffs failed except in the case mentioned in the bill; and objected that at the time of filing the bill in this cause the plaintiff had not any legal title to the land in question.

The cause came on for the examination of witnesses and hearing at the Sittings in Peterborough, in April, 1878.

Statement.

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

Mr. *Dennistown* and Mr. *Hall*, for the defendants.

Isabella Bell McGregor was examined as a witness for the plaintiff, and swore that she would be forty years of age in May, 1878; that she lived on the place when young with her uncle *Peter*, and aunt *Christina*, who afterwards married the defendant *Joseph Larush*, and had one child, the infant defendant; that she (witness) worked in and out of doors—helped with the crops, and helped to clear the land.

“My home was there; it was always spoken of as my own and *Peter's* land; at one time it was supposed to be mine; it was then thought I was the heir as being the oldest. Aunt *Christina* found she was entitled; I remained on the land till after my aunt died, four months; after that I went on the place at different times; I went to visit my cousin, Mr. *Larush's* son. Sometimes then I spoke of my claim to the place; I was on the place less than two years before I conveyed

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to the plaintiff; I remember when *Peter* made over his rights to my grandmother, in or about 1852; she was to leave me some money; grandmother was to pay £200 * * * Grandmother wanted me to sign my right to her when she lay dying; I was then sixteen or eighteen; she frightened me with that and I did it; she had the property willed to *Christina*, and I made the deed to *Christina* which was set aside. They said now they had my right the only thing would be to get sister's. I went to Scotland after my father's death; I recollect but faintly my crossing; *Peter* and *Christina* had been on the place before we came out; I had crossed to live permanently with mother; I continued to live with grandmother as a member of her family until her death, and afterwards with my aunt; I had legal proceedings taken several times about this lot; I never got possession, and then I went to Mr. *Dumble* and bargained with him. He did not pay me in money for my right in this property. He paid me in property. It was conveyed to my husband and me, a lot in the town, a small town lot; that was our bargain. We put a price on it—\$310—that was the purchase money of my interest in this lot * * when this suit was settled I might have more. This lot is worth more than the town lot.”

1878.

Dumble
v.
Larush.

Argument.

In addition to the cases mentioned in the judgment. *Currant v. Iago* (a), *Barrett v. Crossthwaite* (b), *McGillivray v. McConkey* (c), *Godfrey v. Tucker* (d), *Little v. Hawkins* (e), *Wigle v. Settrington* (f), were referred to, and commented on by counsel.

BLAKE, V.C.—I think, under the authorities, that *Peter Robertson's* possession as shewn before me could not be by him claimed adversely to the plaintiff, so as to mature into a title by possession; although I do not feel clear that even *Peter Robertson* could not make title by possession as against the plaintiff if he retained possession for the statutable period, with notice to *Isabella Bell Robertson* after her majority that he was claiming adversely to her.

(a) 1 Coll. 266.

(b) 9 Gr. 422.

(c) 6 Prao. Rep. 55

(d) Jur. 1863, p. 1188

(e) 19 Gr. 512.

(f) 19 Gr. 267.

1878.
 Dumble
 v.
 Larush.

Isabella Bell Robertson knew of the sale by *Peter Robertson* to *Elizabeth Robertson* who remained in possession until her death, devising the premises to her daughter *Christina Robertson*, who married the defendant *Joseph Larush*. There has been a continuous possession from 1840 up to the present time by *Peter, Elizabeth,* and *Christina Robertson* and the defendants, and before 1859 *Isabella Bell Robertson* knew that this possession was adverse to her, and that the parties then in possession claimed the land as their own. She became of age in 1859 or 1860. The original bill misdescribed the premises, and it was not until the 9th of September, 1876, that the bill as amended set out the property which is the subject matter of the suit as it stands today, so that the later Statute of Limitations is in force as to, and applies to this case. This being so I see no ground on which I can grant the plaintiff the relief he demands. In 1860 the vendor of the plaintiff became of age. At that time there were persons in possession of the premises claiming, with her knowledge, adversely to her, and it was not until September, 1876, that these proceedings were commenced. I do not regret that I cannot assist the plaintiff. The premises are represented as of very considerable value, and after a number of suits as to the property have been brought, the plaintiff conveys a town lot in Peterborough of little value for the interest of the vendor in this much litigated lot, and thereupon proceeds with a litigation of which she appeared weary.

Judgment.

I dismiss the bill, with costs. See *Thomas v. Thomas* (a), *Pelly v. Bascombe* (b), *Quinton v. Frith* (c), *Burrows v. Ellison* (d).

(a) 2 K. & J. 80; 2 Bing. 135; Browne, 115. (b) 4 Giff. 394, 13 W. R.
 (c) Ir. Re. 2 Eq. 414. (d) L. R. 6 Ex. 128.

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(a) 13 Gr.
 (d) 42 U.
 (e) 12 Gr.

CLARK V. BUCHANAN.

1878.

Sale for taxes—Evidence of taxes in arrear—Treasurer's warrant.

Where it is necessary to prove title under a deed given upon a sale of land for taxes, the production of the warrant directing the sale, issued by the treasurer to the sheriff, is sufficient evidence of the taxes having been in arrear for the periods therein mentioned.

This was a suit to set aside a deed obtained by the defendant under a sale for taxes, and came on for hearing at Barrie, on the 7th of June, 1878.

Mr. *Cattanach*, for the plaintiff.

Mr. *D. McCarthy*, Q. C., for defendant.

In support of the defence the deed from the sheriff embracing the land in question, and the warrant of the treasurer directing the sale were produced. For the plaintiff it was contended that these did not establish the fact of taxes being in arrear for such a length of time as entitled the sheriff to sell. Argument.

Jones v. The Bank of Upper Canada (a), *Booth v. Girdwood (b)*, *Ley v. Wright (c)*, *Burgess v. The Bank of Montreal (d)*, *Knaggs v. Ledyard (e)*, *Proudfoot v. Austin (f)*, *Silverthorne v. Campbell (g)*, *Williams v. McColl (h)*.

SPRAGGE, C.—I have examined the cases to which I have been referred by Mr. *Cattanach* since the hearing of this case at Barrie. They do not alter the view that I then expressed in regard to the case. June 29th.
Judgment.

The only point upon which I entertained any doubt was, as to the necessity of proof from the treasurer's books of such taxes being in arrear as would authorize a sale under the Assessment Act. The warrant from

(a) 13 Gr. 74. (b) 27 U. C. R. 23. (c) 27 U. C. C. P. 522.
(d) 42 U. C. R. 212, affirmed on appeal, 25th June, 1878.
(e) 12 Gr. 320. (f) 21 Gr. 566. (g) 24 Gr. 17. (h) 23 U. C. C. P. 189.

1878. the treasurer to the sheriff was proved, and inasmuch as it would have been a breach of duty in the treasurer to have issued his warrant, unless such taxes were in arrear. I thought that, under the maxim, *Omnia præsumuntur rite et solemniter esse acta*, it would be presumed that the necessary taxes were in arrear, until the contrary was shewn.

Clark
v.
Buchanan.

I do not understand that it has ever been held necessary to prove the fact of arrears from the treasurer's books, where, under the old course of proceeding, the treasurer made a "return" of taxes in arrear. The return itself was *prima facie* evidence of the taxes being in arrear: *Doe Bell v. Reaumore (a)*. Under 16 Vict. ch. 182, in pursuance of which the sale in question took place, the Treasurer himself issued the warrant. As was said by the late Chief Justice *Draper*, in *Hall v. Hill (b)*, "His warrant combines the return required by the Stat. 6 Geo. IV., and the writ to be issued thereupon by the clerk of the peace; and it may be open to argument," he goes on to say, "whether his warrant alone is not *prima facie* evidence that the taxes therein mentioned are in arrear." I confess it appears to me to follow that it is so. If his return is evidence of the fact, the instrument that comprehends it cannot be less so because it superadds, as the law requires him to do, a direction and authority to the sheriff to sell the land to satisfy the arrears.

Judgment.

I do not know that the point has been directly decided. In *Cotter v. Sutherland (c)*, Mr. Justice *Wilson*, holding the books of the treasurer to be sufficient evidence of arrears of taxes, added a *quære* whether the warrant would not be sufficient, referring to *Hall v. Hill*. In my opinion, as I have said, it is sufficient; but if the defendant desires to fortify himself by proof from the sheriff's books I shall, as I intimated at the hearing, give him leave to do so by affidavit evidence.

The bill is dismissed, with costs.

(a) 3 U. C. O. S. 243.

(b) 22 U. C. R. 581.

(c) 18 C. P. 357.

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DEDFORD V. BOULTON.

1878.

Statute of Limitations—Adding party after lapse of twenty years—Costs.

A mortgagee took possession of the mortgage premises in order, it was alleged, to pay himself the balance due him by perception of rents and profits, and subsequently sold and assigned his interest. A bill to redeem was afterwards filed against the mortgagee, in ignorance of the transfer, and after the lapse of twenty-years from the time the mortgagee entered, his vendee was added as a party. *Held*, that the vendee was, under the circumstances, entitled to set up the lapse of time as a defence under the statute; and the mortgagee having claimed an amount greatly exceeding the sum actually due, the Court, though unable to afford the plaintiff any relief by reason of the defence of the statute refused the mortgagee his costs.

The original bill in this suit was filed on the 30th of June, 1876, by *Charlotte Dedford* and *Rachel Thomas* against *John Boulton* setting forth that the plaintiffs were the only surviving children of one *Jared Banks*, deceased, who was entitled to the fee simple in a piece of land situate on York street, in the City of Toronto, and being so entitled did on the 14th day of December, 1846, create a mortgage thereon in favour of one *Clarke Gamble*, to secure the payment of £91 10s. and interest; that after the death of *Banks*, intestate, *Gamble* assigned his mortgage security to *Boulton*, who immediately thereafter took possession of the property and entered into receipt of the rents and profits thereof. The bill charged that the rents and profits had fully paid off the security and interest. Statement.

To this bill *Boulton* put in an answer disputing the heirship of the plaintiffs, putting them to the proof thereof, and setting up that in February, 1875, he conveyed the said premises to one *William Kinney Henry Harris* for the sum of \$270, who was thereupon let into possession of the premises; and had ever since continued in such possession; and that *Harris* had since paid to him \$227 of the purchase money, and had made large and valuable improvements on the property.

1878.

Dedford
v.
Boulton.

The answer further alleged that the plaintiffs severally agreed to release to *Harris* their interest in the premises for the sum of \$50 each; and that the plaintiff, *Rachel Thomas*, had executed a release to *Harris*; that *Harris* thereby became entitled to the estate absolutely, subject to the payment of the balance of purchase money, and submitted that *Harris* and the husbands of the plaintiffs were necessary parties.

The plaintiff *Charlotte Dedford*, thereupon on the 19th day of February, 1877, alone filed an amended bill making *Harris* a party defendant thereto, and setting forth that *Harris* had always professed a warm interest in the welfare of the plaintiff and her sister *Rachel*, and applied in 1869, to *Boulton*, for a transfer or release of the mortgage to the plaintiff and her said sister; but the understanding then arrived at was not carried out, and nothing further was done, until 1871, when *Harris* at the suggestion of *Boulton*, determined to become possessed of the property for his own benefit, and the same was accordingly conveyed to him; that during the negotiations between the parties one *James Foy*, was employed as solicitor for the defendant *Harris*, and in that capacity wrote and sent a letter to the plaintiff as follows:—

Statement.

TORONTO, Ont., July the 22nd, 1871.

MADAM—

Without prejudice.

Your father, in 1846, gave a mortgage for \$366 to one *Clarke Gamble*, on a property on York street, in this City near Queen street, and being 40 x 70 feet. Mr. *John Boulton*, is the assignee of this mortgage, and has offered to sell all his interest in half of this property (20 x 70 feet) to Mr. *Wm. K. H. Harris*, for whom I am investigating the title. *Boulton* says he has been in possession of this last piece of land since 1850, and that he has not been paid the amount secured by the mortgage within about \$300. I have advised *Harris* that if what Mr. *Boulton* states to be the facts are true, that *Boulton* can convey the land (20 x 70) absolutely, and that the heirs of your father have now no claim on the land; the mortgagor and all claiming under him being barred by lapse of time, but as the bar of the mort-

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gagor's title does not appear in the registry books, it would be necessary for any one purchasing from *Boulton* to bring the matter before the Court of Chancery, and have his title declared absolute; though without such proceeding the title is really and practically absolute.

The expenses of such a proceeding would be from \$80 to \$100, and Mr. *Harris* is willing to divide \$100 between you and your sister, if she and you will execute a conveyance to him of your interests in this 20 x 70 lot.

Such a conveyance would have the same effect as the suit in Chancery would work, and Mr. *Harris* prefers (if it is agreeable to you) to give you and your sister this money instead of paying it out in law fees. Your sister was in Toronto this week, and has executed the conveyance of her interest, and she has asked me to write this letter explaining the position of the matter, and requesting you to act as you think best in reference to it, and, if you think it advisable, to consult a lawyer.

If you make up your mind to execute the conveyance, you will be good enough to let me know, and I shall have documents prepared and forwarded for your signature. * * *

Yours truly,

JAMES J. FOY.

Statement.

The bill further stated that plaintiff did not comply with the request of *Foy*, but she nevertheless feared it was true as was stated in said letter, that she had lost her right to the property by the length of possession by *Boulton*, and that not having funds to pay the large amount that he represented to be due to him (and which she believed was in fact due) she took no steps to enforce her rights until she filed the bill in this cause in June, 1876. The plaintiff submitted that, under the circumstances her right to the property, which she alleged was worth \$2,000, still subsisted, and prayed that she might be allowed to redeem accordingly.

The defendant *Harris* answered, alleging that he had acted with perfect good faith towards the plaintiff, and alleging that she was well aware of his going into possession, and denied all fraud or fraudulent intention in making the purchase from *Boulton*.

1878.

Dedford
Boulton

1878.

Deaford
v.
Boulton.

The cause came on for the examination of witnesses and hearing at the Sittings at Toronto, when all the parties were examined as witnesses.

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

Mr. *Attorney-General Mowat*, for defendant *Boulton*.

Mr. *Ferguson*, Q. C., for defendant *Harris*.

In addition to the cases mentioned in the judgment, *Gray v. Richford* (a) was cited.

BLAKE, V. C.—The difficulty I had at the hearing of this case was to determine the nature of the position of the defendant *Harris*. A perusal of the pleadings and a reconsideration of the evidence puts this, to my mind, beyond doubt. The bill alleges that the defendant *Boulton* entered into possession to obtain the balance due him by rents and profits; that in 1869, the defendant *Harris* proposed to take a transfer; that in 1871, this was carried out, that no instrument was executed, but that *Harris* went into occupation. *Harris* agreed to buy *Boulton's* interest and to pay \$270 therefor. He went into possession in 1871, and has paid \$227 on account of the purchase money. *Harris* was not made a party to the suit until February, 1877. The possession of *Boulton* had not ripened into a title under the Statute of Limitations at the time of the agreement with *Harris*; but the claim he had by possession passed to *Harris*: *Asher v. Whitlock* (b). The proceedings not having been taken against *Harris* until February, 1877, the possession of *Harris*, together with that of *Boulton*, which right he acquired under his agreement, matured into a title by possession, and defeats the claim of the present plaintiff. *Ryron v. Cooper* (c). Whatever impropriety there may have been in connection with the

(a) 1 App. Rep. 121.

(b) L. R. 1 Q. B. 1.

(c) 11 C. & F. 556.

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letter in which the plaintiff was asked to execute a release of the premises, the case is not one of concealed fraud within the authorities: *Sturgis v. Morse* (a), *Petre v. Petre* (b), *Langley v. Fisher* (c), and cases collected note f, p. 509 of *Brown* on Statute of Limitations, and therefore this statute forms a good defence.

The bill must be dismissed, with costs, as against *Harris*, and as this disentitles the plaintiff to redeem, no relief can be given against *Boulton*. He did not produce, and the bill was noted *pro confesso* against him. He gave information to the solicitor which misled him, and sought by stating a title which he could not claim, to procure a sum of money far exceeding any demand he had on the mortgage: in dismissing the bill against him, for these reasons, I do so, without costs.

1878.

Dedford
v.
Boulton.

EBERTS V. EBERTS.

Administration suit—Costs—Practice.

In an administration suit the plaintiff, in the absence of misconduct, is not justified in filing a bill instead of issuing a summons merely, and does so at the risk of costs.

On the opening of the pleadings in such a cause charging an executor with misconduct, the plaintiff offered to accept a reference to take accounts. The Court, in the absence of evidence shewing whether or not the plaintiff was justified in making the charges, reserved the general costs of the suit, as well as the additional costs caused by the filing of the bill.

Hearing at Chatham, May Sittings, 1878.

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

Mr. *Douglas*, for defendant *Eberts*.

Mr. *Moss*, for defendant *Williams*.

(a) 24 Beav. 541.

(b) 1 Drow. 397.

(c) 9 Beav. 90.

1878. *Sovereign v. Sovereign (a), Re Babcock (b), Hutchinson v. Sargent (c) Taylor's Consolidated Orders 389, were referred to.*

Eberts
v.
Eberts.

June 22nd.

SPRAGGE, C.—The Bill is for the administration of the estate of a testatrix, and charges misconduct in one of the executors in taking and appropriating to his own use moneys of the testatrix to a large amount.

Upon the case being opened, Mr. *Boyd*, for the plaintiff, declared his willingness to take a decree for a reference to take the accounts.

Upon this, Mr. *Moss* claimed against the plaintiff the additional costs occasioned by his proceeding by Bill instead of by an application in Chambers for an administration order.

Judgment. The question is, which proceeding is proper, the rule being, that where there has been misconduct in the executor, the proceeding should be by Bill. I cannot say as yet whether there has been misconduct: all I can say is, if the misconduct consists in not having accounted for moneys, or all the moneys, that he has received, that is misconduct of a nature which would be shewn simply upon the taking of the accounts, and, in my opinion, a Bill would not be necessary, and if it should turn out that that is the only misconduct imputable to the executor and that there are no special circumstances imputable giving to his conduct a graver character in relation to this appropriation of money, the defendants will be entitled to what they ask. A plaintiff, in suits of this nature, always files a Bill at the risk of having to pay such costs as are asked here. I think it better to leave the question until further directions, when it can be dealt with in the light that may be thrown upon it by the Master's report. I might do a wrong to the plaintiff by directing that he should pay costs to the defendants at this stage of the suit. I do no wrong to the

(a) 15 Gr. 559.

(c) 17 Gr. 8.

(b) 8 Gr. 409.

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defendants by only waiting for further light. The Decree may properly reserve in terms the question of these costs now in dispute, which the defendants claim they are entitled to in any event, as well as the other costs in the cause.

1878.

Eberts
v.
Eberts.

SMITH v. McLEAN.

Fraudulent preference—Preferential assignment—Insolvent Act.

Where the Court is satisfied that an arrangement between a creditor and his debtor, is entered into *bona fide*, in order to aid the debtor with the view of enabling him to discharge his obligations, such arrangement will be sustained, notwithstanding that its effect is to give such creditor a preference over other creditors for the full amount of his claim, including a prior indebtedness, and that the debtor became insolvent within thirty days from the time of entering into such arrangement.

In such a case the *onus* of proving the *bona fides* of the transaction is cast upon the creditor claiming the benefit of the security.

This was a rehearing of a decree pronounced by *Blake, V.C.*, dismissing the plaintiff's bill, with costs. It appeared that one *McArthur* was carrying on business, in the course of which he became indebted to the defendant *McLean* in a sum of about \$650, when in June, 1875 *McArthur* applied to him for a further advance to enable him to continue his business. *McLean* then advanced him \$300, which was expended in paying off some debts due by *McArthur*, who executed to *McLean* a mortgage on certain property for the amount so advanced, together with the previous indebtedness, in all \$950. Within thirty days thereafter *McArthur* went into insolvency, and the present suit was instituted by the plaintiff, who was his assignee, to set the transaction aside as having been made "in contemplation of insol-

Statement.

1878. vency," within the 133rd section of the Insolvency Act of 1875, which, as amended by 40 Vict. ch. 41, declares that "If any sale, deposit, pledge, or transfer be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor * * * whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, * * * shall be null and void, and the subject thereof may be recovered back for the benefit of the estate of the assignee," * * * and if insolvency subsequently follows, "it shall be *prima facie* presumed to have been made in contemplation of insolvency."

Smith
v.
McLean.

Mr. C. Robinson, Q. C., for the plaintiff.

Mr. Boyd, Q. C., for the defendant.

Payne v. Hendry (a), Mathers v. Lynch (b), Warren v. Warner (c), Hutton v. Cruttwell (d), Bell v. Simpson (e), Harrison v. Cohen (f), Ex parte Fisher (g), were cited, in addition to the cases mentioned in the judgment.

Judgment.

SPRAGGE, C.—I have read the short note of judgment prepared by my brother *Blake* in this case, and agree with him that the decree should be affirmed, with costs.

The evidence appears to me to shew that the transaction was *bona fide*. An advance of money to pay other creditors is not within the mischief of our Insolvency law. See *Whitmore v. Claridge (h)*.

Ex parte Sheen (i), and *Ex parte King (j)*, were cases in which it was held that a security taken for indebtedness and a further advance, the further advance being a

(a) 20 Gr. 143.

(c) 12 L. C. Jur. 309.

(e) 2 H. & N. 410.

(g) L. R. 7 Ch. 636.

(i) 1 Ch. Div. 560.

(b) 27 U. C. R. 244.

(d) 1 Ell. & B. 15.

(f) 32 L. T. N. S. 717.

(h) 9 L. T. N. S. 451.

(j) 2 Ib. 266.

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substantial one, and made in good faith, were not acts of bankruptcy. The case of *Risk v. Sleeman* (a), was a stronger case for the plaintiff than is the case now before us.

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McLean.

This bill is filed under section 133 of the Insolvent Act of 1875. If the mortgage had been made more than thirty days before the insolvency of the defendant, it would have lain upon the plaintiff to prove that it was made in contemplation of insolvency. Having been made within thirty days, it lies upon the defendant to shew that it was not done in contemplation of insolvency. In my opinion he has succeeded in shewing this. I think the proper conclusion from the evidence is, that the contemporaneous advance was in order to enable *McArthur* to continue his business, applying the money advanced in payment of creditors, and in the belief honestly and reasonably entertained that he would thus be enabled to continue his business.

BLAKE, V. C.—This case was re-heard on the proposition that *Davidson v. Ross* (b), in appeal governed it. I do not think that this is so. In the present case there was a contemporaneous advance and an arrangement entered into which it was supposed would result in enabling the debtor to carry on his business. As the transaction was a *bona fide* one intended to aid a debtor in discharging his liabilities, and to enable him to carry on his business I think it falls within the principle of *Risk v. Sleeman*, and cases of that class, and not within *Davidson v. Ross*, and therefore that the decree should be affirmed, with costs.

Judgment.

PROUDFOOT, V. C., concurred.

(a) 21 Gr. 250.

(b) 24 Gr. 22.

1878.

BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE
SCHOOLS OF BELLEVILLE V. GRAINGER ET AL.

*Roman Catholic School Trustees, Election of—Power of Local Legislature
—Jurisdiction of Court of Equity in school matters.*

Election of School Trustees as well for the Common Schools as the Roman Catholic Separate Schools must be held by the same returning officers, and at the same time and place as the Municipal Councillors are chosen.

In election matters, separate schools have the same right of appeal to a County Judge as public schools have.

Under the British North America Act, Local Legislatures may legislate in regard to separate schools, provided that the legislation is not such as prejudicially affects the rights or privileges theretofore possessed by such schools.

A Court of Equity has jurisdiction to order persons wrongfully claiming to be school trustees, to deliver up the corporate seal and papers to the legal trustees.

This was a suit by *The Board of Trustees of the Roman Catholic Separate Schools for the City of Belleville* against *Michael Joseph Grainger, Frank Flynn, John Fox, James Cummins, Michael Graham, John Tougher and James McGuire*, the bill in which was filed on the 13th of February, 1878, and set forth (1) that the City of Belleville contained seven wards (naming them,) and according to the provisions of the statute in that behalf, the plaintiffs' board was composed of two trustees elected for each ward, each trustee holding office for the period of two years, and one trustee for each ward retiring each year in rotation; (2) that according to the provisions of the said statute, the election of a trustee in each ward to fill the places of the said retiring trustees, should take place on the second Wednesday in the month of January, in each year; (3) that on the said second Wednesday, in the month of January, 1878, due notice having been given, and all proper steps having been taken, the returning officers in each of the said wards duly held an election in each ward in the said city for trustees of the said Roman

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Catholic Separate Schools in the said city, and in each ward, one person duly qualified was duly elected to said office of trustee (setting forth the names of seven persons so elected); and the said returning officers duly made their returns of the said elections, wherein and whereby they certified the said persons to have been duly elected to the office of trustees of the said Roman Catholic Separate Schools, and thereupon the said persons became and were members of the said board; (4) that the plaintiffs' board was composed of the following persons, (naming them,) and the seven persons named in the preceding paragraph; (5) that at the first meeting of the plaintiffs' board, held on the 14th day of January, 1878, *David Holden* was elected chairman, and *Philip P. Lynch* was appointed the plaintiffs' secretary and treasurer, and had given the necessary security for the due performance of the duties of his office; (6) that the defendant *Michael Joseph Grainger*, was the secretary and treasurer of the board for the year 1877, and as such had the custody and control of the books, papers, moneys, and other property of the plaintiffs; (7) that by resolution of the plaintiffs, passed on the said 14th day of January, 1878, the said *Philip P. Lynch* was directed to apply to the defendant *Michael Joseph Grainger* to hand over to him the said books, papers, and other property, and to account for, and pay over to him the moneys in his hands belonging to the plaintiffs, and in pursuance of such resolution the said books, papers, moneys, and other property of the plaintiffs had been demanded of the said defendant, who had refused to hand the same over, or account therefor to the plaintiffs; (8) that the defendants alleged and pretended that they had been elected trustees of the Roman Catholic Separate Schools on the said second Wednesday of January, in the year 1878, and claimed to be entitled to the custody of the said books, papers, moneys, and other property of the plaintiffs, and the other defendants had along with the defendant *Michael Joseph Grainger*

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assumed possession, and they all joined with the defendant *Michael Joseph Grainger* in retaining the custody of the said books, papers, moneys, and other property from the plaintiffs, and they assumed to direct the said defendant *Michael Joseph Grainger* not to deliver or hand over the same to the plaintiffs; the plaintiffs, however, contended that the defendants were not nor was any of them duly elected trustees or trustee of the said Separate Schools, inasmuch as the pretended elections at which they alleged they were elected were not held by the returning officers, by whom the municipal elections for the city of Belleville had been held for the year 1878, nor at the places at which the said municipal elections had been held as required by the provisions of the Statutes in that behalf, but were assumed to be held by other persons assuming to act as returning officers, and at other places than those required by law, and the plaintiffs submitted that the said pretended elections had no force or effect, and that the defendants were not elected to, and could not assume to exercise the duties of the office of trustees of the said Separate Schools; (9) that in consequence of the claim of the defendants that they were elected trustees as aforesaid, the trustees named in the 3rd paragraph caused proceedings to be taken before the Judge of the County Court of the County of Hastings in accordance with the provisions of the statute in that behalf in order to test the question of the right of the defendants, and all the defendants appeared by counsel before the said Judge upon the said proceedings, and after the matters had been twice argued before him on behalf of the defendants, the said Judge decided and adjudged that the said pretended election of the defendants to the office of trustee was wholly illegal and void; and the plaintiffs submitted that the defendants were estopped by the said proceedings, by their taking part and acquiescing therein, and by the judgment of the said Judge thereon, from asserting or pretending that they were elected to the office; (10) that notwithstanding the said decision and

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judgment, the defendants were assuming to deal with the moneys and other property of the plaintiffs, and his co-defendants assumed to direct the defendant *Michael Joseph Grainger* not to deliver up the said books, papers, moneys, and other property of the plaintiffs to them; (11) that the defendants had also taken possession of the corporate seal of the plaintiffs, and were assuming to act as trustees, and to intermeddle with the affairs and business of the schools under the control of the plaintiffs, and they were also endeavouring to collect and get in taxes due and payable to the plaintiffs by ratepayers, supporters of separate schools in the said City of Belleville, and they threatened and intended to, and would, unless restrained, continue such acts to the detriment of the plaintiffs; (12) that the plaintiffs were much embarrassed in the transaction of their affairs and business by the want of the books, papers, moneys, and other property, and the said corporate seal of the plaintiffs, and they had no adequate relief in the premises save in a Court of Equity.

The prayer of the bill was—(a) that the defendants might be restrained from longer retaining the said books, papers, moneys, and other property of the plaintiffs, and the said corporate seal in their custody, and might be ordered to hand over the same to the plaintiffs; (b) that the defendants might also be restrained from assuming to act as trustees of the said separate schools, and that if necessary their said pretended election might be declared illegal and void; (c) that the defendants might also be restrained from further collecting, or endeavouring to collect, any taxes or other moneys due to the plaintiffs, from ratepayers supporting separate schools or any other persons; and for further and other relief.

The plaintiffs thereupon gave notice of motion for an injunction in the terms of the prayer of the bill; which on the motion coming on it was agreed should be treated as a motion for decree.

The affidavits filed corroborated substantially the

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statements of the bill, and further stated that on the 31st day of December, 1877 a meeting of the then board was held, and a majority at such meeting professed to appoint certain persons (naming them) as returning-officers, to hold the elections for separate school trustees for said seven wards, who, at the time and places fixed by the said board, professed to hold an election for the election of one person in each ward as a Roman Catholic Separate School Trustee for the said city, and that the defendants claimed that at such pretended election they were elected trustees. It appeared that in each instance there had not been any opposition to the election of the defendants or of those now constituting part of the plaintiffs' board. It further appeared that the election of the trustees chosen in 1877 had been elected under the authority of resolutions of the school board, and on the present motion counsel for the defendants insisted that the plaintiffs were not in a position to complain of the election of the defendants, not having been themselves legally chosen.

Mr. *Bethune*, Q. C., and Mr. *Moss*, for the plaintiffs.

Mr. *L. Wallbridge*, Q. C., and Mr. *Wells*, for the defendants.

The points relied upon appear in the judgment.

June 22nd. BLAKE, V. C.—By 18 Vict. ch. 131, sec. 9, consolidated
 Judgment. as sec. 26 of ch. 65 C. S. U. C., it is enacted that “The trustees of such separate schools shall remain in office until the 2nd Wednesday of the month of January next, following their election, on which day in each year a meeting shall be held in each such section or ward, commencing at the hour of 10 of the o'clock, in the forenoon, for the election of three trustees for separate schools theretofore established.” By sec. 11 of 26 Vict. ch. 5, it is enacted that “After the establishment of any separate school, the trustees thereof shall hold office for

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the same period, and be elected at the same time in each year that the trustees of common schools are, and all the provisions of the Common School Act relating to the mode and time of election, appointments and duties of chairman and secretary at the annual meetings, term of office, and manner of filling up vacancies, shall be deemed and held to apply to this Act." The Act referred to in the last clause is the "Upper Canada Common School Act," ch. 64 C. S. U. C. Clause 3 of this statute enacts that "The annual meetings for the election of school trustees as hereinafter provided, shall be held in all the cities, towns, townships, and villages in Upper Canada, on the 2nd Wednesday in January in each year, commencing at the hour of 10 of the clock in the forenoon." By sec. 20 it is enacted that "The trustees of each school section shall appoint the place of each annual school meeting of the freeholders and householders of the section, * * * and shall cause notices of the time and place to be posted in three or more public places of such section at least six days before the time of holding such meeting, and shall specify in such notices the object of holding such meeting."

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Sections 62, 63, 64, and 72 of this Act, are as follows :

"For each ward into which any such city or town is divided, there shall be two school trustees, each of whom after the first election of trustees, shall continue in office two years, and until his successor has been elected, and one of such trustees shall retire on the 2nd Wednesday in January, yearly in rotation. On the incorporation of any city or town, and the division thereof into wards, two fit and proper persons shall, at the first election of school trustees, be elected school trustees of each such ward by a majority of the votes of the freeholders and householders thereof; and one of such trustees to be determined by lot at the first meeting of trustees after their election, shall retire from office at the time appointed for the next annual school election, and the other shall continue in office one year

1878. longer and then retire, but each such trustee shall continue in office until his successor has been elected.

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In every city and town at the time prescribed by the 3rd section of this Act, an election shall be held in each ward at the place of the last municipal election, and under the direction of the same returning officer, and conducted in the same manner as an ordinary municipal ward election; but in case of the default of such returning officer, then under the direction of such person as the electors present may choose; and at such election, one fit and proper person to be a trustee, shall be elected by a majority of the votes of the freeholders and householders in and for each such ward respectively, and such trustee shall continue in office for two years, and until his successor has been elected. The Judge of the County Court shall, within twenty days after the election of a common school trustee in any city, town, or incorporated village within his county, receive and investigate any complaint as to the mode of conducting the election, and confirm it or set it aside, and appoint the time and place of holding a new election, as he may judge right."

Judgment.

By section 4 of 23 Vict. ch. 49, this further provision was made. "The poll at every election of a school trustee or trustees shall not close before 11 of the clock in the forenoon, and shall not be kept open later than 4 of the clock in the afternoon: In school sections the poll shall close on the same day the election is commenced; in cities, towns, and incorporated villages, the same time shall be allowed for the election of school trustees which is allowed for the election of municipal councillors in such municipalities."

Looking at the above provisions, I should have thought that, as the law stood on the 5th of May, 1863, that it was clear the election of trustees should "be held in each ward at the place of the last municipal election, and under the directions of the same returning officer, and conducted in the same manner as an ordinary muni-

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cipal ward election." It is to be observed that in the preamble to the Act 26 Vict. ch. 5, one of the objects sought to be attained by the enactment was, "to bring the provisions of the law respecting separate schools more in harmony with the provisions of the law respecting common schools." It is perfectly true that by section 79 of ch. 64, C. S. U. C. sub-sec. 14, it is made "the duty of the board of school trustees of every city, town, and village respectively * * * to call and give notice of annual and special school meetings of the freeholders and householders of the city, town, and village, or of any ward therein, in the manner and under the regulations prescribed in the twentieth section of this Act for the appointment of annual and special meetings in the school sections of townships." If the time, place, and mode of holding the election for trustees had not been defined by sections 3, 62, 63, and 64, of this Act, it would be but reasonable to hold that provision was intended to be made for the holding of this election by the above quoted section, but as a complete and detailed scheme has been already set forth by the Act for the carrying out of this matter, I must hold that the general language of this sub-section must be confined to occasions other than those at which the annual meeting for the holding of the election in cities and towns is had. It may be that under this clause it was the duty of the trustees "to give notice" of the meeting, but it was not even raised on the argument of this motion that the omission of this duty, if cast on the trustees by this clause, would vitiate the election, and so I do not consider this point. Section 79 and sub-section 14, must be read so as not to interfere with the mode of election of trustees for cities and towns set out in the earlier part of the Act, and this can be done without doing violence to the language used by reading it as authorizing the respective trustees of cities, towns, and villages to call and give notice of such meetings as the Act makes it their duty to hold, and further directing them to hold such

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meetings in a certain manner prescribed also by the Act. Thus construing the Act, the special provision made for the calling of the annual meeting for the election of trustees in cities and towns would withdraw such meeting from the effect of sections 7, 9, and 20, so far as the naming of the place and time and other such like incidentals of the elections are concerned, and would confine the duties of the trustees as to this meeting to the giving due notice of its being held.

This election is governed by the law as it stood on the 31st of December, 1877, at which time a material change had taken place in the school law of this Province.

The "Public School Law" had been amended and consolidated by 37 Vict. ch. 28, and the ambiguity as to the above referred to sections 3, 20, 62, 63, 64, and 79, had been removed. The clause of the Separate School Act which governed the election in question appears as section 28 of ch. 206 of the R. S. of Ont., and reads as follows: "After the establishment of any separate school, the trustees thereof shall hold office for the same period, and be elected at the same time each year that the trustees of public schools are, and all the provisions of the Public Schools Act" relating to the mode and time of election, appointments and duties of chairman and secretary at the annual meeting, term of office, and manner of filling up vacancies, shall be deemed and held to apply to this Act." By this clause the mode of procedure as to rural districts set forth in the Public School Acts must be followed in the election of trustees under the Separate School Act in rural districts, and the mode of procedure pointed out as to urban districts in the Public School Acts must be followed in the urban districts under the Separate School Act.

The clause in the "Public Schools Act" to which reference is made is section 59 of ch. 204 R. S. of O., and it is as follows: "In every city and town on the 2nd Wednesday in January, an election shall be held in every ward

Judgment.

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at the place of the last municipal election, and under the direction of the same returning officer and deputy returning officers, and conducted in the same manner as an ordinary municipal ward election; but the voting shall be by open vote, and the provisions of the Acts respecting voting by ballot shall not apply to such elections." The time, place, and manner of holding these elections is thus completely provided for, and those clauses in the Act which caused the ambiguity prior to consolidation, are happily wanting in the enactment as we have it to-day.

It was further argued by the learned counsel for the defendants that the Legislature had no power to pass any law to interfere with the position or mode of election of trustees of separate schools as settled by statute prior to Confederation; and section 93 of "The British North America Act," 1867, was cited in support of this contention. It would be a most unfortunate result of this enactment, if it were found that it precluded the remedying defects in, or improving the machinery for working out the separate school system. The first sub-section of clause 93, says: "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union." It is clear that it was not intended by this sub-section to preclude all legislation; for the 3rd sub-section enacts that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;" and further by clause 4 it is enacted that "In case any such Provincial law as from time to time seems to the Governor-General in Council, requisite for the due execution of the provisions of this section is not

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Judgment.

made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section." So that there is here laid down a system of appeal in case there be legislation by a Province injuriously affecting any right or privilege of the minority in relation to education; and also a system of appeal is awarded in case needed legislation be not had by the Provincial Legislature when required, in relation to education; and power is given to the Parliament of Canada to make remedial laws in such cases. It is therefore clear that the Provincial Legislature has some power to legislate as to denominational schools; and it is scarcely possible to conceive a case in which it could and should more properly interfere than where as here it is asked to remove an ambiguity in the working of the Act, and to give to the Separate Schools the same class of machinery for carrying on its work as is given to the Public Schools—a machinery which, after much thought and many years experience, is found to be the best and simplest we have yet had.

No protest has been lodged against this Act, no appeal has been presented to the Governor-General in Council, and, as on the argument of the motion it could not even be suggested in what manner it could "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province," I cannot conclude but that the statute is constitutional.

The remarks which I have made as to the removal of the ambiguity as to the mode of election, apply also to the removal of the difficulty which exists in dealing with sections 25 and 72 of C. S. U. C. ch. 64, and section 13

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of 23 Vict. ch. 49. The Legislature was as much justified in the one case as in the other in making plain by the subsequent enactment what was meant, and in allowing to Separate Schools the same right of appeal to the County Court Judge as was given to the Public Schools. The defendants appear to have accepted this, as being the true reading of the enactment, for they summoned the plaintiffs before the Judge of the County Court, who investigated the matters presented to him, connected with the election and found in favour of the plaintiffs' election and against the defendants. I assent to the finding of the Judge of the County Court.

In the present case the matters in difference have been presented to the forum chosen by the defendants, who now object to the tribunal they selected, the learned Judge having found against them. This Court is not sitting in review of the conclusion arrived at by the County Court Judge, but is merely applying the auxilliary relief without which the finding of the other tribunal would be nugatory. It is clear that this jurisdiction has not been withdrawn from this Court, wherever the right of appeal, if any there be from the County Court Judge, may lie.

I cannot attach any weight to the argument of Mr. *Wallbridge* that, under the words, "an appeal shall lie to the Governor-General in Council from any * * * decision of any Provincial authority" found in "The British North America Act," 1867, the persons interested in Separate Schools have the right to present such a difficulty as the present to the Governor-General in Council. The meaning to be attributed to the word "decision," is explained by the words which surround it. The word "Act" which precedes the word "decision," and the words "of any Provincial authority," which follow it, shew that the matters contemplated as those which should be presented to the supreme authority, are such as are "Acts," or their equivalents, and not the mere every-day detail of the working of a school.

1878.

Board of
School
Trustees
v.
Grainger
et al.

Judgment.

1878.

Board of
School
Trustees
v.
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I cannot now consider the regularity of the appeal of the seven members of the board elected last year. The time of objecting to the manner of their election, has long since passed. I find that these seven men and the seven elected in the manner objected to by the defendants, compose the Board of Trustees of the Roman Catholic Separate Schools for the City of Belleville, and as such that they are entitled to the seal, books, papers, and property of the Board.

The plaintiffs are entitled to this declaration, and to any order that may be necessary to enforce their recognition as such board.

Both the plaintiffs and defendants seem to have acted in good faith throughout all the proceedings that have been taken, and I believe simply desired the decision of the Court on a point not heretofore determined. This being so, I do not think it a case in which it would be reasonable to charge the defendants with the costs of the litigation. I refer to the costs as the parties have turned the motion for an injunction with a motion for a decree.

Judgment.

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1878.

PETERSON V. KERR.

Will, construction of—Personal property—Chattel property—Intestacy as to balance of personal estate.

The bequest of a testator's chattels, when unrestricted either expressly or by the context of the will, covers all the personal estate; but, where a testator after directing his executors to pay all his just debts and funeral expenscs out of his *personal property*, bequeathed all his *chattel property* to his son, and then made sundry pecuniary bequests payable out of his *personal property*, and it appeared that after deducting the chattels—*i.e.* furniture, farming implements, and movable goods of a like nature—paying all the debts and satisfying the legacies there still remained a balance of personal estate: *Held*, that as to such balance there was an intestacy.

This was a rehearing at the instance of the defendant Statement.
of an order made by Vice-Chancellor *Proudfoot*, upon an appeal from the finding of the Master at St. Catharines, by which it was declared that as to certain personal property remaining in the hands of the executors of the late *William Peterson*, the testator had died intestate.

The clauses of the will upon which the question arose, are stated in the judgment.

Mr. *Attorney-General Mowat*, and Mr. *Ewart*, for the rehearing.

Mr. *P. McCarthy*, and Mr. *W. Cassels*, contra.

BLAKE, C.—The portions of the will material to the consideration of the question reheard in this case are as follows: "I will and order that my just debts and funeral expenses be paid by my executors, hereinafter named out of my personal property. I will and bequeath all my chattel property to my son *James K. Peterson* for the support of his children. * * * I will and bequeath to my grand daughter *Elizabeth Jones Peterson* the sum of one thousand dollars. * * * I will and order that my executors, immediately after my decease take

1878. charge of all my papers, and all and every my property real and personal, and * * * collect in all moneys that are or may be due to me, and out of the same pay to my daughter *Susan Hewitt* the sum of \$2,000, which sum I hereby will to her the said *Susan Hewitt*, out of the proceeds of money so collected * * * by my executors * * * I further will and order that out of moneys due me, and to be collected by my executors, they * * * pay to my grandchildren *Peter, George, and Jane* * * * the sum of \$600 each."

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v.
Kerr.

There is no doubt that the word "chattels," unrestricted either in express terms or by the context of the will, would cover all the personal estate of the testator. The question therefore here is, whether the expression, "all my chattel property," is so far qualified by other portions of the will as that an intention on the part of the testator is thereby manifested, to limit its meaning to those movable articles to which it is at times applied. It is to be observed that in the clause preceding that under which the son *James K. Peterson* claims, the debts and funeral expenses are ordered to be paid "out of my personal property." The words "personal property," are as wide and general in their signification as any that could be used, and is a slight circumstance against the contest of the appellant that as the personalty by the will was first to be taken for the payment of debts, "all my chattel property," could *not* be intended to go to him, if by these words was meant all my personal estate; as the testator had already directed the debts to be paid thereout. But if we take for granted, for the sake of argument, that the testator intended by this second clause in his will to cover all the personalty but what the law would require, to be applied in payment of debts, where no provision for their satisfaction is made, there arise these two difficulties, first that certain bequests are made inconsistent with the notion of all the personalty being passed under the term chattels to *James K. Peterson*, and which could not be satisfied except out-

Judgment.

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of this property, and secondly that the executors are ordered immediately after the decease to take charge "of all my property, real and personal," and out of which personally the executors are to pay certain of the bequests which would otherwise fail. I think it reasonable to presume that the person preparing this will understood that the word "chattels," commonly meant furniture, farming implements, and movable goods of the like nature, where we have been using this term as it were in contradistinction to the expression "personal property;" and that what is mere matter of presumption becomes matter of almost certainty when such a surmise makes the will as a whole consistent. The document begins by charging the personal estate with the debts of the testator. It proceeds to give that portion of it ordinarily termed chattels to the son. It charges the executors with the care of that which is left of the personal property, and because it is not all disposed of, legacies to the extent of \$4,800 are made payable out of it. It is said that after payment of the debts, the deduction of the chattels and the satisfaction of the legacies, there remains some personalty as to which there will be an intestacy on this construction of the will. This residue will not amount to much, and although the Court struggles against finding a testator dying intestate as to any portion of the estate of which he dies possessed, I do not think this should lead us to put a totally different construction on a will otherwise so easy of comprehension as is the present. The testator may have made a mistake as to the value of his assets, as also the amount of his debts; and his circumstances may have changed between the period of his making the will and his death; any of which circumstances explain the reason of the omission in dealing with the whole of the personalty he possessed at his death. I think the order made should be affirmed, with costs.

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v.
Kerr.

Judgment.

SPRAGGE, C., and PROUDFOOT, V.C., concurred.

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DELONG V. MUMFORD.

Loco parentis—Undue influence—Onus of proof.

In suits to set aside instruments on the ground of undue influence it is not necessary that there should be proof of the exercise of influence; it rests upon the party obtaining the benefit to rebut the presumption that arises when such a transaction takes place between a parent and child, or others standing in a position where it is presumed influence may exist on the part of the grantee over the grantor.

J. P. died intestate in England entitled to real and personal estate situate there of considerable value, leaving *C. E.*, an only daughter, his heir-at-law, who came to Canada on her attaining twenty, and went to reside with her mother and stepfather; within one year thereafter, and on her attaining twenty-one she executed an instrument in favour of her stepfather, agreeing to give him one-fourth, share or part of all her real and personal property, "in consideration of my late father dying without making a will, * * and leaving my mother unprovided for." *C. E.* married a few days afterwards, and survived about two years, when she died, leaving an only son, who shortly after attaining twenty-one instituted proceedings, in which his father joined, to set the instrument aside. The Court, in the absence of evidence, other than that of defendant, to rebut the presumption of undue influence decreed a cancellation of the instrument, with costs.

The bill in this case, was by *William Delong* and *Richard John Henry Delong* against *Charles Mumford*, setting forth that one *Richard Bircham*, late of Matching, in the County of Essex, England, devised one-fourth part of certain lands in England to one *John Palmer*, who was lawfully married to one *Sarah Reeve*, and that they had two children, one a boy who died in infancy, the other *Catharine Emma Palmer* born 9th of February, 1833; that *John Palmer* died in England intestate about the year 1835, leaving the said *Sarah Reeve* his widow, and his said daughter his sole heir-at-law him surviving; that shortly after the death of *Palmer* his widow married the defendant when they removed to this Province where they resided together until the death of the said *Sarah*, his wife; that *Catharine Emma Palmer*, remained in England until the year 1853, when she came

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to Canada and rejoined her mother the said *Sarah Mumford*, and her stepfather the defendant, in whose family she continued to reside until February, 1854, when she was married to the plaintiff *William Delong*, and the only issue of such marriage was the plaintiff *Richard John Henry Delong*; and that *Catharine Emma Delong* died intestate in 1856. The bill further stated that no guardian of the person or estate of *Catharine Emma* had been appointed, and she continued to reside with and under the care of the defendant until her marriage, and that he, from his relationship as the husband of her mother, stood to her in the relation of parent; that on her twenty-first birthday, namely the 9th of February, 1854, while so residing in the family of her stepfather, and when her marriage was in immediate contemplation, the defendant induced the said *Catharine Emma Palmer* to sign a document prepared by the defendant in the words following:

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Statement.

“COUNTY OF YORK AND PEEL, }
ONTARIO. }

“Weston, in the township of York, in the county of York, Canada West, North America.

“I, *Catharine Emma Palmer* (spinster), daughter of Mrs. *Sarah Mumford*, Weston, by my late father *John Palmer*, farmer, of Greenstead Green, in the county of Essex, England, I do hereby promise to pay to my stepfather *Charles Mumford*, miller of Weston, in the township of York, in the county of York, Canada West, North America, or his heirs, executors, or assigns, in consideration of my late father dying without making a will, and leaving me his heiress, and leaving my mother unprovided for, I promise to pay my said stepfather *Charles Mumford*, one-fourth part or share of all freehold, copyhold, leasehold, personal or property of any description whatever to which I am entitled to at the death of my aunt Mrs. *Anne Finche*, wife of the Rev. *Thomas Finche*, Harlow, Essex, England, under the will of my late uncle *Richard Bircham*, Esquire, of Matching Green, Essex, and also the will of my aunt, his widow, the present Mrs. *Anne Finche*; the said part or share of the said estate to be paid by me when I receive my part or share of the said estate.

1878. Dated this ninth day of February, one thousand eight hundred and fifty-four."

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Mumford.

The bill charged that this instrument was executed by *Catharine Emma Palmer*, whilst she was under the influence of the defendant, he exercising his influence and control over her, and that the same, under the circumstances, was a fraud on the marital rights of the plaintiff *William*, and that the same was fraudulent and void as against the plaintiffs, and ought to be set aside, and the prayer of the bill was to that effect.

The defendant answered denying all undue influence, and asserting the *bona fides* of the transaction. The cause came on for hearing at the sittings of the Court at Goderich, in the spring of 1878.

Mr. *Macara* and Mr. *Garrow*, for the plaintiffs.

Mr. *McFadden* and Mr. *Scott*, for the defendant.

The other facts and the points raised, appear in the judgment.

Judgment. SPRAGGE, C.—The plaintiff, the son, claims as heir-at-law, and next of kin of *Catharine Emma Delong*.

Sept. 4th.

The defendant married her mother when she, the daughter, was only two years old; this was in England. *Catharine Emma* was born the 9th of February, 1833. Defendant and his wife emigrated to Canada in 1849. *Catharine Emma* remained in England learning the dressmaking business. After she came out she spoke of making a gift to her step-father, the defendant, of a portion, a certain proportion of her fortune. She was then under age, and the defendant stated that as a difficulty, adding that if she continued of the same mind when she came of age he would accept one-fourth, a smaller proportion than she had proposed. She recurred to the subject in the interval. She became engaged to *Delong*, the father.

On the day she came of age the paper impeached was executed—drawn up by defendant.

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The alleged previous proposals rest solely upon the evidence of defendant. She *Catharine Emma* married a few days after the execution of the paper. She died in 1856, leaving one son, the plaintiff. The paper is an engagement by her to pay to her stepfather one-fourth of what she then was, or might thereafter be entitled to receive. It runs thus: One-fourth part or share of all the freehold, &c. The same to be paid upon her receiving the same.

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 }
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 v.
 Mumford.

There is a consideration recited in the paper, "in consideration of my late father dying without making a will, and leaving me his heiress, and leaving my mother unprovided for."

The document is a gift from a step-child to her stepfather of one-fourth of her fortune, present and prospective—he standing to her in *loco parentis*—and made on the day of her coming of age.

Such a transaction is always regarded with extreme jealousy by Courts of Equity. They are presumed to be the result of undue influence, and the presumption is stronger in the case of a gift than of a purchase or lease favourable to the recipient.

Judgment.

This presumption may, however, be rebutted, but in order to do so effectually it must be shewn very clearly that the act is entirely free from undue influence.

The Chancellor here read from the judgment in *Clarke v. Hawke*, ante vol. xi. page 543, commencing with, "The rules which Courts of Equity have laid down," &c., and on page 545, "So a person in *loco parentis* is likely to have a similar influence, and is therefore treated in the same way as a parent."

It appears from the evidence that the young lady was clever and well-educated, and of a good disposition, and, as witnesses say, with a will of her own; circumstances tending to shew that she would not be easily influenced.

There is nothing beyond this of personal character and disposition in support of this gift, beyond what is

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deposed to by the recipient of the gift himself, and a few words uttered by the young lady herself in the presence of a neighbour, called in to witness the paper, to the effect that she was satisfied to make Mr. *Mumford* some return; or as he states it upon cross-examination, she said she was going to make them a present, or to that effect. His recollection seemed imperfect as it well might be, after the lapse of more than twenty years. It is to be observed that the motive for the gift expressed in the presence of this witness is not the same as the consideration expressed in the paper that she was executing, not inconsistent, but still not the same.

Here the party conferring this benefit had no professional advice. In fact no independent advice, professional or otherwise. The neighbour was not called in to bear witness that what she was doing was done of her own free will.

Is there then sufficient to rebut the presumption of undue influence. Can the evidence of the recipient himself be admitted to rebut this presumption. It was refused by Lord *Romilly* in *Walker v. Smith (a)*.

If his evidence be discarded there is nothing but the casual utterance of the young lady herself on the occasion of the execution of the paper, unless it be the circumstance that she was engaged to be married in a few days thereafter. The reason of the rule is, that the parental or *quasi* parental influence is assumed to continue for some time after the young person comes of age, and it might be argued that a young woman engaged to be married in a few days would feel free from parental control, and would feel also that her future husband would probably rather commend than blame her, for keeping instead of parting with a portion of her fortune. If the fear of unpleasant consequences were the only motive probably influencing a young person to make a gift to a parent, or one in *loco parentis*, there

(a) 29 Beav. 398.

would be more in the circumstance of an approaching marriage than I think there is. But there are other and more powerful influences than fear, the influence of the relation of the parties, the habit of deference and submission, the training it may be of the child to regard it as a duty, and a sacred obligation to make in the shape of a gift, some return for education and protection, and what the Judges have called the imperceptible influences growing out of the relation of the parties; and certainly influences of that nature would not be likely to lose their force on the eve of marriage. I do not think that the approaching marriage of the young lady was a circumstance to take the case out of the general rule.

I have referred to the consideration expressed in this paper—her father having died intestate, leaving his daughter his heir, and her mother unprovided for. It would appear from this that she was under a misapprehension of law, ignorant of her mother's rights as dowress, and under the Statute of Distributions. It may be that if she had been correctly informed as to the law she would not have made this gift. Further, it is put in this recital of consideration, as if what she was doing was by way of repairing the omission of her father to provide for her mother, but if such was her intention it is not carried out by the document executed, for the whole gift is not to her mother but to her stepfather. If she had independent advice these things, it is to be assumed, would have been pointed out to her, and it would have been explained that this being a gift to her stepfather it was not in lieu of what her mother might be entitled to, in her own right, but independent and cumulative; so that her mother would have what she would be entitled to, and her stepfather in addition the one-fourth of what she, the donor would be entitled to. It looks like a case of misapprehension and improvidence; but to put it at the lowest it was a gift upon coming of age, and as appears by the evidence, of

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v.
Mumford.

Judgment.

1878. very considerable value, made without the aid of independent advice, and with nothing to rebut what the law presumes from the relation of the parties, the existence of undue influence.

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v.
Mumford.

It is not necessary that there should be proof of the exercise of undue influence. In this instance there may have been none. The rule upon this head of equity rests upon grounds of public policy, and is established in a long series of authorities, many of which are quoted in *Clarke v. Hawke*, to which I have referred, and in another case *Mason v. Seney (a)*, before the same learned Judge.

There is a passage in the judgment of Lord Cairns in a case to which I was referred upon the argument of this case by the plaintiffs' counsel, that at the first blush seems in favour of the defendant's case. The case is *Kempson v. Ashbee (b)*, and the passage is this: "The transaction was therefore this; a young lady scarcely over twenty-one years of age, joins her stepfather as security for the repayment of money, not having received any of the money or any other consideration herself, and security not to come to maturity for six years. There is a marked distinction between this case and another where a person on attaining twenty-one years gives an immediate benefit to his parent, with full knowledge of the value of money, and knowledge that the security may be enforced immediately." Lord Cairns, no doubt, meant to say that the case of a gift, put by him by way of contrast to the case in judgment before the Court, could or might be sustained by the recipient. But, in the first place this passage, while entitled to the highest respect, is no more than a dictum of Lord Cairns, and the other Judges, Lords JJ. James and Mellish, are silent as to the case put; and the case before me differs from the case put in this, that in the case before me the gift was not made with full knowledge of the value of what was given; but as I infer from the evidence, in almost

(a) 11 Gr. 447.

(b) L. R. 10 Chy. 15.

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entire ignorance of its value; and further, I think it is not to be assumed to have been the meaning of Lord *Cairns* that such a gift as is put by him could be sustained in the absence of every thing to rebut the presumption, that it was to be imputed to influence on the part of the parent.

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v.
Mumford.

In my opinion the plaintiffs are entitled to a decree for the cancellation of the instrument which is impeached by the bill. It is not without reluctance that I add that the decree must be with costs, but it cannot be otherwise, as the defendant has resisted the plaintiffs' claim after ample opportunity afforded him of settling the case.

DYNES V. BALES.

Cancellation of deeds—Registration.

The Court will decree the cancellation of deeds which the parties to them have registered, as being a cloud upon title, although the parties executing them are not shewn to have any title to, or interest in the lands embraced in them.

Hurd v. Billington, ante volume vi., page 145, observed upon and distinguished.

The bill in this suit was by *Christopher Dynes* against *John Bales* and *George Henry Briant*, setting forth that on the 26th of November, 1873, one *Henry McPherson* being the owner in fee of lot No. 30, in the 3rd concession of *Melancthon*, sold the same to the plaintiff for valuable consideration, the conveyance of which was registered on the following day; that plaintiff had recently ascertained that the defendant *Bales* had caused to be registered against the said lands an instrument purporting to be a conveyance, dated the 9th of January,

1878. 1874, from one *Jonathan Scott to Bales* of the west half of the said lot; and further that the defendants had caused to be registered against the said lands a mortgage bearing date the 27th of November, 1875, from *Bales* to the defendant *Briant*, to secure the price of certain goods to be thereafter supplied to the defendant *Bales*.

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v.
Bales.

The bill further alleged that at the time of the execution and registry of the instrument of the 9th of January, 1874, the said *Jonathan Scott*, the grantor therein named, had not any title to or estate in the lands thereby assumed to be conveyed, nor had *Bales* any such right or title therein; and in fact at the times mentioned, the plaintiff was, and had ever since continued to be the absolute owner of said lands, of which he had continued in possession ever since the conveyance thereof to him; that the registration of such deed and mortgage formed a cloud on plaintiff's title, and that he was thereby prevented from selling or otherwise dealing with the lands; that he had applied to the defendants to execute proper instruments to remove such cloud on his title, but that they refused to do so, and threatened and intended, unless restrained, still further to incumber the said lands with a view of prejudicing the rights of the plaintiff.

Statement.

The prayer of the bill was, that it might be declared that *Scott* and *Bales* had not any title to, or interest in the lands at the time of the execution by them of the said deed and mortgage; that the same and the registration thereof might be declared to be a cloud on the title of the plaintiff, and that the said instruments might be ordered to be delivered up to be cancelled, and the registration thereof vacated.

The defendants did not answer, and the cause was brought on to be heard against them *pro confesso*.

Sept. 4th.

Mr. *Hoyles*, for the plaintiff, referred to *Truesdell v. Cook* (a), *Harkin v. Rabidon* (b), *Ross v. Harvey* (c), and *McDonald v. The Georgian Bay Lumber Co.* (d),

(a) 18 Gr. 534.
(c) 3 Gr. 649.

(b) 7 Gr. 249.
(d) 24 Gr. 365.

as warranting the Court in making the decree as prayed, notwithstanding the refusal of the Court to make a decree for the same purpose in the case of *Hurd v. Billington* (x), that case simply establishing that, where an instrument is on its face void, the Court will not pronounce a decree for cancellation. Here, however, the conveyances are all apparently good on the face, and having been duly registered, no prudent solicitor could safely pass the title of the plaintiff, in the event of his effecting a sale, with these instruments uncanceled; their registration being notice of any title the defendants might hereafter be able to establish.

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Dynes
v.
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SPRAGGE, C.—After some hesitation I have come to the conclusion that the allegations in the plaintiff's bill are sufficient, the bill being taken *pro confesso* against both defendants, to entitle him to a decree as prayed for by him. He shews title in himself by a duly registered conveyance from one seized in fee; and alleges a subsequent conveyance to the defendant *Bales* from one *Scott*, and that *Scott* had no title; that *Bales* subsequently, having himself no title, mortgaged to *Briant*; that the deed to *Bales* and the mortgage to *Briant* are both registered; that the plaintiff ever since the conveyance to him has been in possession; that the conveyance to *Bales* and mortgage to *Briant* have been actual impediments in the way of his selling his property; that he has applied to the defendants to execute proper instruments to remove these, what he terms, clouds upon his title, and that they have refused; and that they threaten and intend still further to encumber the land in question, unless restrained by injunction, and he prays for a declaration that *Scott* and *Bales* respectively had no title; that the conveyance and mortgage may be declared to be a cloud upon his title, and be delivered up to be cancelled, and their registration vacated.

Judgment.

Sept. 16th.

The case of *Hurd v. Billington*, in this Court, led

1878. me at first to doubt whether the plaintiff had brought his case within the rule as to removing clouds upon title; but upon examining that case, I think that this is distinguishable from it. In that case the conveyance impeached, had been executed in assumed pursuance of a power of attorney, but which the Court held did not confer power to execute it; and the agreed purchase money between the attorney and the purchaser had been paid to the attorney, also in assumed pursuance of the power which did not authorize it. The Court said, "It is understood to be the practice of the Court not to decree the destruction of instruments as forming a cloud upon title, where they are void on the face of them. In the present case reference must necessarily be had to the power of attorney in order to support the deed, and when the power is referred to, it appears that the deed is void." The Court thus holding that a deed which, and the execution of which will be seen upon investigation to be void, stands upon the footing of a deed void upon the face of it.

Judgment.

In this case there would be an apparent defect. It would be in the absence of a link in the chain of title between the grantee in the last registered deed, and the grantor in the next, *i. e.*, *Scott* the grantor to *Bales*; but it would not follow necessarily that *Scott* could not have had title, for he might, *e. g.*, have had it by descent; and if he had, a conveyance from him would of course be good without shewing upon the face of it how he derived his title. An examination of that conveyance would not without more, as was the case in *Hurd v. Billington*, shew that it was void. But even in that case the Court did not simply dismiss the bill, but accompanied the dismissal with a declaration of the reasons for doing so; and as the decree could be registered, it would be probably as effectual for the removal of the cloud upon the title as a direct decree to that effect. The Court observed in that case that a memorial registered might be supposed to form a cloud on the

Dynes
v.
Bales.

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title; but did not think that "this should vary the rule." 1878.

Dynes
v.
Bales.

In an earlier case in this Court, *Ross v. Harvey* (a), there was a conveyance subsequent to the plaintiff's upon the face of it for valuable consideration, but in fact made without consideration, the registration being prior to that of the plaintiff's deed, which was a conveyance for value, it being alleged that such subsequent deed and its prior registration were for the purpose of defrauding the plaintiff; it was held that such deed and its registration were a cloud upon the plaintiff's title.

In later cases the Court has been more disposed than in *Hurd v. Billington* to regard an adverse and unwar- rantable registration as a cloud upon title. In *Harkin v. Rabidon* (b), the judgment upon rehearing was delivered by the late Chancellor, Mr. Blake, he observed: "In this country the registry office is practically the root of every man's title. Now what do we find here. The plaintiff's title has not been registered, but a conveyance from *Thibodo*, the patentee of the Crown, to *Rabidon*, has been placed upon record. Now, would this Court have refused to decree the cancellation of that deed even though it had been established that the plaintiff would prevail at law, and that *Rabidon* had acted in good faith? Would it have been a reasonable answer to such a bill that the plaintiffs could defend themselves at law? Would not the plaintiffs have had a right to say, true we can defend ourselves at law, but we have a right to come into equity for relief, which we cannot have at law—we ask to have that deed cancelled for the purpose of being placed beyond the reach of those dangers and annoyances which the improper use of it would at any moment entail, and for the further and more material purpose of having that removed which forms not only a cloud upon our title, but in effect an incumbrance detracting as it does, most materially from the market value of our property."

Judgment.

(a) 3 Gr. 649.

(b) 7 Gr. 243

1878. In a case several years more recent, *Truesdell v. Cook* (a), Mr. Justice *Strong*, then Vice-Chancellor, held this language: "I find no authority for saying that the existence of an unregistered deed passing no interest, and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner that there would be great want of remedy if this Court could not decree cancellation in such a case." The learned Judge did not think the plaintiff entitled to succeed in that case, and the observation I have quoted is therefore a dictum only, but it places, as I think, the title to relief upon the true ground.

Dynes
v.
Bales.

I think the plaintiff entitled to the decree that he asks, and with costs.

SMITH V. ELLIOTT.

Mortgage—Insolvent—Fi. fa. against insolvent mortgagor.

This Court will not order a *fi. fa.* against an insolvent mortgagor whose estate has, after he has obtained a discharge, been reconveyed to him; although it may be that the mortgagee would be entitled to call upon the mortgagor to release his equity of redemption.

This was a bill by *John C. Smyth* against *George Elliott*, setting forth the fact that in May, 1874, the defendant had created a mortgage in favour of the plaintiff, upon certain lands in the township of Trafalgar, for securing the sum of \$1,500; that subsequently the defendant became insolvent, and the plaintiff agreed that such mortgage should rank as a claim against the insolvent's estate for \$800, and by the advice and with the consent of the assignee of the defendant's estate, the said mortgage was retained as security for the claim against the defendant; but since then the defendant had had his estate conveyed back to him, and was therefore entitled

(a) 18 Gr. 534.

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to the equity of redemption in said lands; and alleged default in the payment of said sum of \$800. The prayer was for an account of what was due plaintiff, and in default of payment foreclosure, and that writs of *feri facias* against the goods and lands of the defendant might issue out of this Court for payment and for further relief.

1878.
 }
 Smith
 v.
 Elliott.

The cause came on to be heard *pro confesso*.

Mr. *McArthur*, for the plaintiff, referred to sections 59, 60, 61, 62, and 84, of the Insolvency Act of 1875, as authorizing the making of a decree in the terms prayed for.

Sept. 4.

SPRAGGE, C.—I have referred to the clauses in the Insolven' Act, which have been cited to me as authorizing the personal remedy by *fi. fa.* against the goods of the mortgagor, prayed by the bill. I find nothing in the Act to warrant this remedy after the discharge in insolvency. I am not referred to any case in which the mortgagee has been adjudged to be entitled to such remedy; and in reason I should take him not to be so entitled.

Sept. 16th.

Judgment.

It may be that he was entitled to a release from the assignee of the equity of redemption, which upon the insolvency was vested in the assignee. If he had taken such release it would have operated as a purchase of the equity of redemption at the price fixed in insolvency as its value, and his mortgage debt would have been thereby satisfied. Instead of this the equity of redemption was, as the bill alleges, conveyed to the insolvent upon his obtaining his discharge; and it may be that the mortgagee is entitled to a release of it from the insolvent; but that is not what he asks for; and however that may be, there is nothing in what has been done to impair the effect of the discharge granted in insolvency, to discharge the insolvent from personal liability.

Upon the bill, as framed, all that the mortgagee is entitled to is, the ordinary decree of foreclosure.

1878.

SMITH V. McDONALD.

Practice—Costs—Objection on rehearing to scale of taxation.

The decree on further directions gave the plaintiff costs to be taxed by the Master who was "to determine the scale under which the same are to be taxed." The original report found \$37 due the plaintiff, viz., \$22.50, in respect of work done, and \$18 for damages, less \$3.50 allowed defendants for damages;—the defendants by their answer having admitted and offered to pay \$22.23 in respect of the work. The taxing officer allowed costs upon the higher scale. On rehearing, which by agreement was also treated as an appeal from the Master, the Court allowed an objection to the taxation and directed costs to be taxed on the lower scale only, without costs to either part of the re-hearing.

This was a bill under the Mechanics' Lien Acts to recover \$227.40, which the plaintiff claimed as the balance of a larger sum due him by the defendants *McDonald & Miller*, sub-contractors, for the building of a portion of the Hamilton and North Western Railway. The Railway Company and the contractor for the section were also made parties. The plaintiff also claimed a sum of \$83.63 for damages, which he alleged he had sustained from the delay of *McDonald & Miller* in furnishing him with materials for the culvert he had contracted to build.

McDonald & Miller answered, admitting an indebtedness on account of work done by the plaintiff to the extent of \$22.23, over and above a certain garnishee summons with which they had been served, and which they afterwards paid, amounting to \$19.50. They contested the claim for damages, and made a cross claim for damages caused by the plaintiff having spoiled certain of their timber.

On the 7th of October, 1877, a consent decree was drawn up, by which the bill was dismissed against the defendants, other than *McDonald & Miller* who had paid a sum of money into a bank to secure the plaintiff, and it was referred to the Master at Barrie to assess the amount due to the plaintiff for his work and damages;

and also the amount due to the defendants for their damages. 1878.

Smith
v.
McDonald.

By his report, dated the 6th of December, 1877, the Master found that \$22.50 was due to the plaintiff for his work, and \$18 for his damages, and that \$3.50 was due to the defendants for their cross damages, leaving a balance of \$37 due to the plaintiff. He also made some special findings which are not material to the questions in issue.

The cause was heard on further directions on the 17th of January, 1878, when Vice-Chancellor *Proudfoot* made an order for payment to the plaintiff of the sum of \$37 and costs, to be taxed by the Master in ordinary, "who is to determine the scale under which the same are to be taxed."

The taxing officer having decided to allow full Superior Court costs, the defendants *McDonald & Miller* re-heard the decree on further directions.

Mr. *Bethune*, Q. C., for the defendants. The Master ^{Sept. 5th.} has treated the clause in the decree as limiting his choice between the higher and lower scales of Chancery costs, and has decided for the higher scale. The ^{Argument.} defendants contend the plaintiff is only entitled to Division Court costs.

[*PROUDFOOT*, V. C.—The Master had the whole question of costs left to him by the decree, and you could have appealed from his ruling.]

If the plaintiff's right to costs was not a statutory right, it is admitted that it would not be cut down to the lower scale of Chancery costs by the Act of 1868, which only relates to such suits as could have been brought in the Court before the passing of that Act, which this could not. But the plaintiff is only entitled to costs under the Mechanics' Lien Acts of 1873-4, and these Acts provide for the Division Court and County Court having jurisdiction either in the usual method or by summary process; in such cases the like

1878.
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 Smith
 v.
 McDonald.

fees are taxable as in other proceedings in those Courts. The plaintiff should not have joined a claim for damages, but have brought a separate suit for it in the Division Court, and as to this, the plaintiff is not entitled to more than Division Court costs. Although the Master finds no tender was made of the amount the defendant admitted was due to the plaintiff, yet the effect of this is done away by the further finding that the plaintiff admitted he would not have accepted the smaller sum. The case is one of much hardship, and the plaintiff's conduct vexatious.

Mr. *Rye*, for the plaintiff, objected that this was simply an appeal on the question of costs alone, and one not to be entertained by the Court.

[BLAKE, V. C.—It is rather a question of construction of the Statute than of the Judge's discretion, and therefore the Court will entertain it.]

The language of the Mechanics' Lien Act of 1874 is optional, not imperative, the words are: "May be brought in the Division Court," &c. Moreover the test is the amount claimed, not the sum recovered, and here the plaintiff *bonâ fide* claimed over \$200. The plaintiff had a right to come to this Court under section 11 of the Act, and to join a claim for damages arising out of the same transactions; and having a double claim, was not bound to discontinue his proceedings on an offer of the amount of the value of the work only. An actual tender was never made of that sum, and there was no continued willingness to pay it, as the Master specially reports that the defendants on argument before him, attempted to evade their liability altogether. There was a necessity for the plaintiff instituting proceedings in this Court as he did not know the number of contractors and sub-contractors, nor the state of their accounts; and discovery could be had more promptly here than under section 12 of the Mechanics' Lien Act.

Mr. *Bethune*, Q. C., in reply. The powers of inquiry given by section 12, are amply sufficient. This Court

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will not insist on the strict legal rule as to tender where it appears a tender would be useless, as it is shown here it would have been. But for the special legislation on this subject the plaintiff's case would fall under the general practice of the Court, and as he recovered so little he would have no costs allowed him at all, in fact the Court would refuse to entertain a suit for so insignificant a sum; the language of the Chancellor in disposing of the case of *Westbrooke v. Browett (a)*, has a very material bearing on this point.

1878.

Smith
v.
McDonald.

SPRAGGE, C.—[After stating the facts above set forth] ^{Sept. 17th.} observed, that he was clearly of opinion that the costs should have been taxed on the lower scale, and that in expressing this view he was not interfering in any degree with the discretion of the learned Judge who had heard the case, as the decree drawn up expressly leaves it to the Master to say upon what scale the costs should be allowed; stating at the same time that it was greatly to be regretted that so much expense should have been incurred in a case where the sum in dispute was of so really trifling an amount.

BLAKE, V. C.—In this case both parties consented ^{Judgment.} that it should be treated not only as a rehearing but also as an appeal from the report of the Master, in order that the Court might, without any technical difficulty, dispose of the matter in difference.

The amount found due by the Master for work done does not exceed that admitted by the answer, but the amount claimed for damages and found by the Master to the extent of \$18, was not admitted, and no sum was paid by the defendants who rehear on account of either the work done or for the damages found in favour of the plaintiff. The plaintiff was therefore justified in taking proceedings for the recovery of these sums, and in prosecuting the suit until payment.

(a) 17 Gr. 336.

1878.
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 Smith
 v.
 McDonald.

The Court has complete control of the costs of this litigation, and full discretion as to the mode of dealing therewith, and as the Master has found due the plaintiff only \$37.00, of which the defendants admitted by their answer \$22.23, I do not think we can allow costs on any higher scale than that of the inferior jurisdiction.

It is much to be regretted that the denial of the amount found for damages should have necessitated these proceedings, and that there should be so much expense involved with a result so slightly beneficial to any but the solicitors. There should be no costs of this rehearing.

The deposit will be returned.

PROUDFOOT, V. C., concurred.

MEIGHEN V. BUELL.

Trustee—Solicitor—Costs

On re-hearing, the order as reported ante vol. xxiv., page 503, disallowing to a solicitor trustee costs other than costs out of pocket in suits to which he was a party reversed. [SPRAGGE, C., *dubitante*, who thought that the rule should be applied to all suits brought by solicitor trustees, and to all costs in those suits.]

This was a re-hearing of the order pronounced on appeal from the Master at Perth, as reported ante vol. xxiv., page 503.

Mr. Moss, for the executors who re-hear.

Mr. W. Cassels, contra.

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SPRAGGE, C.—The question is, whether a trustee appointed under the will of a mortgagee can recover costs against the mortgagor of proceedings in the Master's office taken by him, he being one of a firm of solicitors by whom the proceedings are taken.

1878

Melghen
v.
Buell.

I held the solicitor entitled only to costs out of pocket, and that the mortgagee's estate was entitled to charge against the mortgagor only such costs. The cases to which I referred were only cases where the question was between the solicitor and the estate of which he was trustee; and my brother *Proudfoot*, in *Colonial Trusts Company v. Cameron (a)*, has held that as between a solicitor trustee and third parties the solicitor is entitled to full costs. He may be right, but we are not referred to any case in which a solicitor trustee has been held so entitled, where he is plaintiff in the suit.

The rule that a trustee solicitor cannot charge full costs against the estate is founded upon the principle that he cannot be permitted to make a profit of his office; as well as upon the principle that one who has a duty to perform shall not place himself in a position where his interests may conflict with his duty. The duty here meant is, I agree, primarily at any rate, duty to the estate of which he is trustee. The rule that a trustee cannot be permitted to make a profit of his office may have a wider signification, for he may have a discretion as to bringing or forbearing to bring suits for the estate, "a discretion (to use the language of Lord *Cottenham* in *Craddock v. Piper (b)*), too likely to be influenced by the profits which may accrue to him in respect of costs," and, assuming that he could charge against the estate, only the costs out of pocket, there is still the temptation to unnecessary litigation—the solicitor having the chance—perhaps the great probability of recovering full costs against the defendant in the litigation; and being safe in having the estate to fall back upon for costs out of pocket in any event.

Judgment.

(a) 24 Gr. 546.

(b) 1 McN. & G. 177.

1878. *This, I grant, is a reason of public policy rather than of protection to the estate, though it would operate incidentally for the protection of the estate, i.e., from the solicitor coming upon the estate for costs out of pocket. *Whitney v. Smith* (a), cited in *Colonial Trusts Co. v. Cameron*, is not a case of solicitor and client's costs. Lord Justice Selwyn held in that case that a trustee ought not to be charged with profits, merely because he had lent out some portions of the estate upon mortgage of property which had been used for building purposes, and thus by means of building operations he had been employed as a solicitor, and had made some profits.*

Pince v. Bently (b) was not a case of a solicitor trustee instituting a suit on behalf of an estate of which he was trustee, but of a solicitor defending a suit against himself. In *York v. Brown* (c), a solicitor trustee was made defendant. The decree gave him his costs, and upon the question whether he was entitled to more than costs out of pocket, it was held that he was. There is but little danger of infringing any principle where the trustee solicitor is a defendant.

Judgment.

My brother *Proudfoot* adheres to his judgment in *Colonial Trusts Co. v. Cameron*, and my brother *Blake*, I believe, inclines to agree with him. This leads me to distrust my own conclusion in this case; at the same time I cannot but think it would have been better that the principles to which I have adverted should have been applied to all suits brought by trustees, and to all costs in those suits.

The order is reversed, with costs.

BLAKE, V. C.—It is not without doubt that I come to the conclusion that the authorities support these two propositions laid down by Messrs. *Morgan* and *Davey*, (1) "A solicitor trustee is not allowed, as against his *cestui que trust*, any costs other than those out of pocket

(a) L. R. 4 Ch. 513. (b) 9 Jurist, N. S. 1119. (c) 1 Coll. 265.

in respect of any professional services rendered by him either in the administration of the trust estate out of Court, or in conducting a suit by himself, or his own defence to a suit regarding the trust estate:" p. 279. (2) "The rule depriving a trustee who acts as his own solicitor of profit costs, however, applies only between the trustee and his *cestui que trust*; and, therefore, as against persons unsuccessfully impeaching the trust deed, a trustee in such a position will be entitled to full costs," p. 28 a. I should have thought if the matter were *res integra*, that the sound principle to have evoked was that laid down by Lord *Cranworth* in *Broughton v. Broughton (a)*. "The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them." This reasonable and wholesome rule does not, however, seem to have been extended beyond the case of trustee and *cestui que trust*, and therefore, I think, we must allow this appeal, with costs.

1867.

Melghen
v.
Buell.

Judgment.

Per Curiam.—Order reversed, with costs.

(a) 5 DeG. M. & G. 164.

1878.

MCDONALD V. NOTMAN.

Insolvency—Payments after discharge—Express promise.

The mere fact that an insolvent, after having obtained his final order of discharge, makes a voluntary payment on a claim, existing against him before his insolvency and which is extinguished by such discharge, is not sufficient to revive the debt; for that purpose an express undertaking to pay the amount must be proved.

This was a re-hearing at the instance of the plaintiff, Vice-Chancellor *Proudfoot* having at the hearing of the cause at Simcoe, in the spring of 1878, dismissed the bill, with costs. The suit was instituted by *William McDonald* on behalf of himself and other creditors of one *William Ramsay*, deceased, against *Barbara Ann Notman*, the bill in which stated that in 1857 the plaintiff had lent and advanced *Ramsay*, his uncle, \$100, which *Ramsay* promised to repay with interest at eight per cent., and that *Ramsay* did make some small payments on account, and a statement of their dealings was had in 1864, when it appeared the sum due by *Ramsay* to plaintiff was \$144; and subsequently to the last named date, and within six years before the filing of the bill, *Ramsay* paid other small sums on account. That in April, 1873 *Ramsay* had obtained a final discharge under the Insolvency Act of 1869, but notwithstanding such discharge he, in consideration of such claim having been a continuing debt in conscience, promised to pay the same to plaintiff, who submitted that by reason of such promise *Ramsay* was, and his estate became legally bound to pay the same.

The bill further alleged that in April, 1875, *Ramsay*, with the intent and design of defeating, delaying, and hindering plaintiff and his other creditors, purchased certain properties in the village of Thorold, mentioned in the bill which he had for several years previously occupied under a lease, and took the conveyance thereof, with the intent aforesaid, in the name of *Elizabeth*

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Ramsay, his wife, who became a party thereto for the purpose of assisting her husband in such intent and design, and without any consideration therefor moving from her, and that she, with her husband, on the same day executed a mortgage thereon for \$600, without notice to the mortgagee who accepted the same in good faith, and without notice or knowledge of any fraud, and that the said *Elizabeth Ramsay*, in May, 1876, departed this life, having first made and published her will, whereby she devised the said lands to her husband for life, and after his decease to the defendant; and that in or about the month of April, 1877, he, the said *William Ramsay*, also died, and thereupon the defendant took possession of such lands; and that she took and received the said lands with actual knowledge of the facts alleged, and paid no consideration therefor, and that for these reasons the conveyance to the said *Elizabeth Ramsay* was fraudulent and void as against the plaintiff and the other creditors of *William Ramsay*.

1878.
 McDonald
 v.
 Notman.

The prayer of the bill was, that the conveyance to *Elizabeth Ramsay* might be declared void; that plaintiff might be paid the amount of his demand, or in default, that the premises might be sold and the proceeds applied in payment of plaintiff and the other creditors of *Ramsay*.

Statement.

The defendant answered and denied all the allegations of fraud; set up the *bona fides* of the transaction and claimed the benefit of the Statute of Limitations.

The other facts sufficiently appear in the judgment.

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

Sept. 5th.

Mr. *Spragge*, for the defendant.

The point principally relied on by the plaintiff was, the fact of payments made by *Ramsay* after his discharge in insolvency, and that thereby the debt became revived against him; and his estate having been fraudulently conveyed to his wife, the same was liable in the hands of the defendant, who was a mere volunteer.

1878. SPRAGGE, C.—[After stating the facts, remarked that,] The first thing the plaintiff here must prove is, the existence of his debt, It is shewn that there was a debt due from *William Ramsay* to the plaintiff in and before the year 1865. In 1865 *Ramsay* went into insolvency, and in 1873 he obtained his discharge. It is necessary therefore for the plaintiff to shew his debt revived, and there was some evidence given in order to do this.

McDonald
v.
Notman.
Sept. 17th.

The first ground relied on for this purpose was the fact of payments having been made on account, subsequent to the discharge; and secondly promises having been made by *Ramsay* to pay the demand. As to this Mrs. *McDonald's* evidence is, that *Ramsay* told her that "he intended to have his property arranged so that *Robert* and sister *Margaret* should be paid, and that his wife and Mrs. *Notman* could do nothing. * * * My uncle said that he intended to pay this money to *Robert* and his sister *Margaret*, or he said he never would have lived another year in the house; he said that he thought *Barbara Ann Notman* would do every thing that was proper, just, and right." This evidence, however, does not prove a promise to pay this debt.

Judgment.

The plaintiff also relies upon a letter of the defendant. But there is certainly no express promise to pay contained in it.* As regards this letter the plaintiff in his evidence says, that he had had conversation with the defendant about the debt, and he "wanted to make a settlement, and she acknowledged that the debt ought to be paid, and still she would never come to any conclusion to give any satisfaction;" and that he had received the letter in answer to a statement that he had written down when he put in his account.

* This letter contained the following passage: "I have nothing new to write except that there are bills coming in of payments to be met and no way of getting mousy that I can see at present to meet them * * * I do not intend to ask my husband to pay my father's debts. *John* has paid out a good sum lately. I shall not ask him to pay any more. The rent of the place will not meet the payments this year."

It seems clear, therefore, that there never was any express promise to pay by either *Ramsay* or Mrs. *Notman*.

As to the payments, which it is shewn were made on account: They might, perhaps, be sufficient to revive a debt barred by the Statute of Limitations. There the principle is, "that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue, or the principal as the case may be, just as it does from a simple acknowledgment in writing." *Darby* and *Bosanquet* on the Statute of Limitations, page 70.

The principle of the Statute of Limitations, however, is, that after the expiry of the limited time the debt is presumed to have been satisfied, and an acknowledgment of its continued existence (now required to be in writing) is sufficient.

This principle does not apply to a debt extinguished by insolvency, and from which the debtor has obtained a discharge. It does not continue to exist in that case, and an acknowledgment by the debtor in ever so formal a shape that it remained unpaid, would not give a right of action to the creditor because the law does not from such acknowledgment imply a promise to pay.

There is no instance that I have been able to find of a debt barred by operation of law in insolvency or bankruptcy being revived upon an implied promise to pay. The text books and authorities seem all the other way.

In Mr. *Chitty's* valuable treatise on Contracts, it is stated (a): "It is said, however, that there are cases in which a consideration which is insufficient to raise an implied promise, will, nevertheless, support an express one. These are cases of voidable contracts subsequently ratified; of debts barred by operation of law, subsequently revived; and of equitable and moral obligations which, but for some rule of law, would of themselves

1878.

McDonald
v
Notman.

Judgment.

(a) p. 50, 10th Ed.

1878. ^{McDonald} have been sufficient to raise an implied promise. And ^{v.} so it is said that there are cases in which the party suing ^{Notman.} has suffered a loss or conferred a benefit on the defendant at his request, under circumstances which would not raise any implied promise, but in which the act done at the request of the party charged is held, notwithstanding, to be a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done."

In neither *Chitty*, *Addison*, nor *Pollock*, is a promise to pay a debt discharged in bankruptcy enumerated amongst those where a promise founded on a moral duty is a sufficient consideration for a promise either express or implied.

It has, however, been designated as a moral duty by Lord *Mansfield*, in some cases, and by Lord *Hardwicke*, in *Lewis v. Chace* (a). Lord *Mansfield* is considered to have carried the doctrine of moral duty as a consideration for a promise rather far, and the leaning of the Courts in later years has been to limit it. See *Eastwood v. Kenyon* (b).

The question, however, is, whether the naked point has ever been decided in the affirmative that a promise, even an express promise to pay a debt barred by bankruptcy and discharge, is founded on a good consideration, so as to take it out of the doctrine of *nudum pactum*.* *Trueman v. Fenton* (c), is not such a case, there there was no discharge, and the case itself which came on before Lord *Mansfield* and the other Judges, was decided upon its own peculiar circumstances.

Hawkes v. Saunders (d), was an action against an executrix on an admission of assets, and promise to pay the amount of the plaintiff's legacy. Lord *Mansfield*

(a) 1 P. W. 620.

(b) 11 A. & E. 438.

(c) 2 Cowp. 544.

(d) 1 Cowp. 289.

* In *Adams v. Woodland*, the Court of Appeal, on the 16th September, 1878, determined that such a claim was a good consideration for a promissory note.

there puts the case of such a promise amongst others, "or if a bankrupt in affluent circumstances after his certificate, promises to pay the whole of his debts," having a little earlier in the same judgment remarked: "*A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise." This case, however, must be considered virtually as overruled by the more recent decision in *Eastwood v. Kenyon*.

1878.
 McDonald
 v.
 Notman.

In this latter case a long note in *Wennall v. Adney* (a) is referred to with approbation. In several passages this note is clear upon the point that in the class of cases where moral duty is the consideration, nothing less than an express promise will suffice, and that point is all that is really necessary for the disposition of this case.

The same note, and the case of *Eastwood v. Kenyon*, are referred to in the still later case of *Roscorla v. Thomas* (b) in these terms: "The cases in which it has been held that under certain circumstances a consideration insufficient to raise an implied promise, will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall v. Adney*, and in the case of *Eastwood v. Kenyon*. They are cases of voidable contracts subsequently ratified; of debts barred by operation of law, subsequently revived; and of equitable and moral obligations which, but for some rule of law, would of themselves have been sufficient to raise an implied promise."

Judgment.

I express no opinion upon the other branch of the case, but I feel clear that the plaintiff fails to establish a subsisting debt, without which he has no *locus standi* in Court.

BLAKE, V. C.—In this case *William Ramsay*, the debtor, on the 22nd February, 1870, made an assignment in insolvency. The debt in question was duly

(a) 3 B. & P. 249.

(b) 3 Q. B. 234.

1878.
 McDonald
 v.
 Notman.

placed in the schedule of debts of the insolvent, and on the 8th April, 1873, the insolvent obtained his discharge in insolvency. There is no allegation of fraud in the obtaining of this discharge. There is no statement that the property referred to in the bill was improperly withheld from the assignee, nor is there any statement made to invalidate the discharge in insolvency, nor to shew why the plaintiff, and not the official assignee, filed the present bill. So long as the discharge stands unimpeached, the debt on which this bill is founded, cannot be claimed against the insolvent or his representatives. The plaintiff has not, therefore, any *locus standi* by the present bill. Some small payments were made by the insolvent to this creditor since he obtained his discharge. These payments were made at the earnest solicitation of the creditor. They were not accompanied by any promise of further payment, or with any admission of further or other liability. Under these circumstances there has not been any revivor of the debt. The voluntary payment of a sum, on account of a debt discharged cannot, without anything further, be taken as an admission of liability for the whole debt so as to make the person making such payment liable in an action or suit to discharge the balance alleged to be due. I think the decree should be affirmed with costs.

Judgment.

Per Curiam.—Decree affirmed, with costs.

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1. Where land devised subject to the payment of legacies and to a life estate therein is, after the death of the testator, sold at the instance of a mortgagee, the money remaining after payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatees will be paid ratably after the value of the life estate has been ascertained.

Armson v. Thompson, 138.

2. *Quere*, whether the Act of Ontario (cap. 37 of 1869) alters the law, as to the liability of executors for assets of an estate lost by their negligence: but the fact of merely allowing a debt to remain outstanding is not *per se* negligence. Therefore, where in an administration suit it was shewn that stock in a gravel road company amounting to \$260 and promissory notes to the amount of \$748 had been left outstanding and unrealized by the executor, and there was no suggestion that there was any danger to the fund caused thereby, and the matter in respect of which the executor was called in question was small, except the claim of the plaintiff as a creditor in respect of which he had failed, the Court,

on further directions, refused relief to the plaintiff, and dismissed his bill with costs, but without prejudice to his right to institute another suit in the event of any future mal-administration of the estate.

Re Johnston—Johnston v. Hogg, 261.

3. In an administration suit the plaintiff, in the absence of misconduct, is not justified in filing a bill instead of issuing a summons merely, and does so at the risk of costs.

Eberts v. Eberts, 565.

4. On the opening of the pleadings in such a cause charging an executor with misconduct, the plaintiff offered to accept a reference to take accounts. The Court, in the absence of evidence shewing whether or not the plaintiff was justified in making the charges, reserved the general costs of the suit, as well as the additional costs caused by the filing of the bill. *Id.*

See also "Dower," 2.
 "Executors," 1.
 "Injunction," 3.

AFTER-ACQUIRED LANDS.

Where a testator makes a bequest to his wife which he expresses to be in lieu of dower, the presumption is, that this applies only to lands he then owned; not to lands subsequently acquired by him.

Laidlaw v. Jackes, 293.

AGENT.

See "Statute of Limitations," 1.

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Ruthven v. Ruthven, 534.

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See "Will," &c., 5, 6.

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See "Will," &c., 6.

ARBITRATION.

A reference was by decree of the Court made to *W. H. W.*, one of the local masters, in his individual, not official capacity; the decree expressing the same to be by consent, and that the award should be appealable in the same manner as a Master's report; the reference being of all matters in the suit and also of questions in difference between two defendants:—*Held*, notwithstanding such consent, that the award could not be appealed from, and could only be moved against for cause: the same manner as an award of any other arbitrator; the Statutes 39 Vict. ch. 28, and 40 Vict. ch. 80, not applying to suits in this Court.

Burns v. Chamberlin, 148.

See also "Railway Company," 3.

ARSON.

See "Fire Insurance," 2.

ATTESTATION.

See "Revocation or Alteration of Will."

AWARD, APPEAL FROM.

See "Arbitration."

BAILIFF.

See "Statute of Limitations," 1.

BANKS.

See "Warehouse Receipts."

BAR OF DOWER.

This Court will not, acting under the Revised Statutes of Ontario, ch. 126, sec. 10, order a conveyance free from the dower of a wife living apart from her husband, unless it is shewn that the party moving is unable to serve notice of the intended application upon the wife, or that she has left her husband and has expressed her determination never to return to reside with him.

Re Campbell, 187.

See also "Practice," 7.

BEQUEST, FORFEITURE OF.

See "Renouncing Probate."

BEQUEST TO A CLASS.

See "Will," &c., 13.

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See "Trustee," 3.

BY-LAW.

NECESSARY TO AUTHORIZE ASSIGNMENT OF CORPORATION ASSETS.

See "Corporation Assets."

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The Court will decree the cancellation of deeds which the parties to them have registered, as being a cloud upon title, although the parties executing them are not shewn to have any title to, or interest in, the lands embraced in them.

Dynes v. Bailes, 593.

Hurd v. Billington, ante volume vi., page 145, observed and distinguished. *Ib.*

CAPITAL, INTEREST ON.

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See "Practice," 9.

CHARITABLE BEQUEST.

See "Will," &c., 6.

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See "Fraudulent Preference," 1.

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See "Will," &c., 21.

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See "Will," &c., 13.

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See "Cancellation of Deeds."
"Lost Deed."

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See "Duress."

COMMISSION.

See "Rents of Realty."

COMMUNION.

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See "Fire Insurance," 2.

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"Lands Conveyed," &c.

CONSENT TO EXTEND SECURITY.

See "Warehouse Receipts."

CONTINGENT BEQUEST

See "Will," &c., 20.

CORPORATION.

A corporation consisted of three shareholders. The Act of incorporation provided that there should not be less than three directors, and that in case of a vacancy the remaining directors should supply the vacancy for the remainder of the year: *Held*, that one of the directors refusing to concur in the appointment, the vacancy could not be filled: and that a bill by such director against the other two shareholders and the corporation, to restrain the third shareholder from acting as a director, was properly framed.

Kiely v. Kiely, 463.

CORPORATION, ASSETS OF.

To give legal authority for the alienation of the property of a municipal corporation, it is necessary that a by-law of the corporation should be passed, even though the title thereto has been obtained originally in an informal manner.

The Grand Junction R. W. Co. v. Hastings, 30.

CORPORATION, SALE BY AGENT OF.

See "Specific Performance," 3, 4.

COSTS.

[ON HIGHER OR LOWER SCALE.]

1. *Semble*, that since as well as before the Law Reform Act (1868), which transferred to the Court of Chancery the jurisdiction

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therefore exercised by the County Courts, it is competent to the Master, upon a direction to tax costs generally, to tax upon the higher or lower scale, according to whether or not the subject matter of the suit was or is within the County Court jurisdiction.

Brough v. Brantford, Norfolk, and Port Burwell
R. W. Co., 43.

2. In a suit to enforce the specific performance of an agreement by a railway company for the purchase by them of the right of way over the plaintiff's lands, a decree was made for that purpose and a reference directed to the Master to ascertain the amount due by the defendants in respect of purchase money and interest; and also for damages for not constructing fences and crossings, as agreed upon, and to tax the plaintiff his costs. The Master found due to the plaintiff for purchase money, &c., \$187.24 only. It appeared that the defendants had constructed the fences and crossings after the institution of the suit, and that an interlocutory injunction had been obtained during its progress. Under these circumstances, the Master taxed the plaintiff's costs on the higher scale:

Held, on appeal, that the Master had properly taxed the costs on that scale. *Ib.*

See also "Administration Suit," 1, 2, 3, 4.

"Executors," 1, 3.

"Joint and Several Debts."

"Jurisdiction of Court."

"Practice," 4, 5, 9.

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See "Railway Company," 1.

COUNTY JUDGE, APPEAL TO BY SCHOOL TRUSTEES.

See "Separate Schools," 2.

COVENANT TO PAY OFF MORTGAGE MONEY.

See "Purchase of Equity of Redemption."

CROWN PATENT.

A party, on applying to the Crown Lands Department for the grant of a lot of land belonging to the Crown, represented that

the same "was not valuable for its pine timber." This was incorrect to the knowledge of the applicant, and at that time the lot was embraced in a timber license to *B.*, but, in ignorance of that fact, the Commissioner of Crown Lands granted the application, and a patent for the lot was prepared on the 12th of March, 1873, but, before its issue, the fact as to *B.*'s license comprising this lot was discovered, and thereupon the Commissioner caused to be indorsed upon the patent a memorandum that "*These letters patent are subject to the renewal of the timber license for one year from the 30th April, 1873.*" In an action brought by a purchaser of the timber from the patentee, it was decided that the reservation of the timber so made was unauthorized and invalid.

Held, under these circumstances, that *The Attorney-General* was entitled to proceed in this Court for a repeal of the patent, on the ground that the same had been issued improvidently.

Attorney-General v. Contois, 346.

CROWN, RIGHTS OF.

See "Practice," 2.

DECREE, RECTIFICATION OF.

See "Executors," 3.

DEFECT OF TITLE.

See "Lost Deed."

DEMURRER.

See "Mechanics' Lien," 2.

"Parties," 1.

"Pleading," 1.

DEPOT.

See "Railway Terminus."

DESCRIPTION.

1. Persons claiming under the patentee of the Crown conveyed to the defendants a portion of the land granted by the patent "extending to the river," reserving the right to the grantors "to raise the dam one foot, and overflow accordingly."

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Held, that the words of such conveyance purported to convey to the centre of the bed of the river; and that after the reservation of the right to raise the dam in the river, the grantors could not be heard to say that they had not the right to convey to the centre of the river.

Kirchhoffer v. Stanbury, 413.

2. Although a conveyance describing land as "extending to a river" extends to the centre of the bed of the stream, this does not confer on the grantee the right to use it as land uncovered by water may ordinarily be used: Therefore where the grantee under such a conveyance constructs a wall extending into the bed of the stream the onus of shewing that such erection is not an injurious obstruction, is cast upon the party making it. *Id.*

See also "Riparian Proprietor."

DESCRIPTION OF FUND.

See "Will," &c., 6.

DEVISE, ABSOLUTE OR IN TRUST.

See "Will," &c., 16.

DEVISEES.

See "Will," &c., 7.

DISCRETION GIVEN TO EXECUTORS.

See "Will," &c., 17.

DISCRETION OF TRUSTEE.

See "Trustee," &c., 1.

DOWER.

1. The question, whether the right of a widow to dower, which is not yet assigned to her, is seizable under common law process, or is only so liable in equity, considered and treated of.

Williams v. Reynolds, 49.

See also "Dower," 6.

2. In a suit of administration, it was found that the widow of the testator was indebted to the estate in a considerable amount,

and the plaintiff, a creditor of the estate, sought to set off her indebtedness against the amount which might be found due to her in respect of past as well as of future dower.

Held, that, whether her right to dower was or was not exigible under common law process, the creditors were entitled to this relief; but as part of her indebtedness was composed of rents received by her, she was entitled to retain one third of such rents by way of arrears of dower, and thus reduce the amount of her indebtedness. *Id.*

3. The testator devised as follows: "To my beloved wife *A. M.*, I give and devise a full and sufficient support for her natural life; or in case of any disagreement between her and other members of the family I give and bequeath the north part of my house, with an annuity of eighty dollars in cash, to be paid half-yearly. I give and bequeath to her also the use of the well, to which she must have free access without any hindrance whatever. I give and bequeath also to my beloved wife all the furniture in the north part of the house."

Held, that this had not the effect of putting the widow to elect between her dower and the provision made for her by the will; and that she was entitled to an inquiry as to the sufficiency of the estate to allow her the bequests in her favour, as also her dower; as in the case of *Lapp v. Lapp*, ante vol. xvi., p. 159.

Murphy v. Murphy, 81.

4. *Held*, on appeal from the report of the Master, that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in valuing such dower the value of the whole estate is the basis of computation—not the amount of surplus after discharging the claim of the mortgagee.

Re Robertson—Robertson v. Robertson, 274.

Affirmed on rehearing, 486.

5. Although a widow is bound to bring her action of dower within twenty years from the death of her husband, the statute limiting that time does not apply where the widow is brought unwillingly before the Court, and she only seeks to reduce the amount of rents charged against her by setting off what she is entitled to as dowress.

Laidlaw v. Jackes, 293

6. Since the passing of the Statute 40 Vict., ch. 8, O., which is retroactive in its operation, the right of a woman to dower, as

well during the life of her husband as after his death, is such an interest in lands as can be sold under a *fi. fa.* at law.

Allen v. The Edinburgh Life Assurance Co., 306.

See also "After Acquired Lands."

"Bar of Dower."

"Practice," 7.

DURESS.

The plaintiff, a farmer of about sixty years of age, and unacquainted with legal matters, was taken by the defendant to a lawyer's office, and when there was charged with having defrauded the defendant, by changing the figures in certain weigh tickets for grain, to an amount of about \$500, and was threatened that if he left the office without settling the claim he would be arrested by a detective, who was pointed out to him, in consequence of which the plaintiff executed a mortgage on his farm for the sum of \$600. The Court, on appeal from the Master, found that the mortgage was void as having been obtained by duress and coercion, although the plaintiff, before giving the instrument, had been told that he might leave and go where he pleased, but the party so giving him permission declined to undertake that in case of his leaving he would not be arrested.

Armstrong v. Gage, 1.

EASEMENT.

See "Specific Performance," 6.

EDUCATION.

See "Infant."

EJECTMENT.

See "Railway Company," 4.

ELECTION BY WIDOW.

See "Dower," 3.

"Will," 15.

EQUITABLE ASSIGNMENT.

See "Fraudulent Preference," 1.

EQUITY.

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See "Invalid Sale."

EQUITY OF REDEMPTION, PURCHASE OF.

See "Purchase," &c.

EVIDENCE.

See "Practice," 7.

EVIDENCE OF TAXES IN ARREAR.

See "Sale of land for taxes."

EXECUTION.

See "Dower," 1, 6.

EXECUTORS.

1. A legatee gave to a creditor an order on the executors for payment of her share of the estate, which order was accepted by them and certain payments made on account. The executors denied having funds in their hands sufficient for the payment of the order and properly applicable thereto; but on taking the accounts in this Court it appeared that since 1860 the executors had sufficient funds for that purpose. On a petition filed by the creditor, the Court, under these circumstances, ordered the amount in Court to be paid out to him, and directed the executors to pay the costs of the application and to make good to the legatee the interest accrued since 1860, until the executors paid the money into Court.

Sovereign v. Freeman, 525.

2. Where executors in good faith unsuccessfully defended a suit on a note given by their testator, the Court, in pronouncing a decree against them, declared them entitled to deduct their costs as between solicitor and client, out of their testator's estate.

McKellar v. Prangley et al, 545.

3. Executors having omitted to set up the defence that they had fully administered or had not assets to pay any balance that might be found due, petitioned to have the decree rectified so as to exempt them from liability for a greater amount than the assets come to their hands; the Court made the order as asked,

but, under the circumstances, directed the executors to pay the costs of the application. *Ib.*

See also "Renouncing Probate."

EXECUTORS, LIABILITY OF FOR NEGLIGENCE.

See "Administration Suit," 2.

EXPRESS PROMISE.

See "Payments after Final Order of Discharge."

FI. FA. AGAINST INSOLVENT MORTGAGOR.

See "Insolvent," &c.

FIRE INSURANCE.

1. The plaintiff, who resided at a distance, and held a mechanic's lien on a mill, applied to the agent of the defendants to effect an insurance thereon to the amount of \$3,000. One of the questions put to the applicant was, if a watchman was kept on the premises during the night? His answer thereto was, "The building is never left alone, there being always a watchman left in the building when not running." In the policy issued thereon special reference was made to the application of the assured as "which is his warranty and part hereof." When the application was made there was a watchman kept on the premises and continued to be so kept until a month thereafter and about nine days after the issue of the policy, when, without the knowledge of the plaintiff, such watch was discontinued; and in about five weeks thereafter the premises were destroyed by fire. *Held*, that the answer of the plaintiff, though by a condition of the policy amounting to a warranty, was under the circumstances to be considered as amounting to a representation only, and one which he could not be held bound to make good; the terms of the policy being that the parties had agreed that alterations to avoid the policy must be within the control or with the knowledge of the assured, of which control or knowledge in this case there was not any evidence.

Worswick v. Canada Fire and Marine Ins. Co., 282.

2. In order to prevent a compromise of a disputed claim being set aside, there must have been a matter of doubt to be settled, and there must be no fraud on either side. Where, therefore, on the destruction of a house by fire which had been insured, application was made to the Insurance Company for payment, who, after investigating the matter so far as the facts within their

knowledge enabled them to do so, compromised with the assured by paying a portion of the sum insured; and some months afterwards the company having received information which satisfied them that a fraud had been committed upon them, and that the assured had himself feloniously caused the fire, instituted proceedings to compel repayment when the Court, being satisfied that the act as charged had been committed, made the decree as asked with costs.

The Queen Insurance Co. v. Devinney, 394.

FIRM.

1. Where a sale of railway stock and bonds was effected by a partnership, a mortgage being taken back to secure part of the purchase money, and one of the partners subsequently died; it was held on rehearing, (affirming the decision as reported *ante* volume xxiv., page 333), that the right to enforce payment of the unpaid purchase money remained in the surviving partner, and that the representative of the deceased was an unnecessary party to the bill.

Bolckow v. Foster, 476.

2. *Held*, on demurrer to a bill, that the word "firm" meant a partnership; and that property alleged to belong to a firm must be taken as belonging to its members as partners and not as tenants in commor. *Ib.*

FORECLOSURE.

In a suit to enforce payment of a mortgage security, if the mortgagor consents to a decree for an immediate sale, it is not necessary that subsequent incumbrancers should give their consent thereto; their right only being to be paid out of the surplus after satisfaction of the plaintiffs' claim.

Township of Hamilton v. Stevenson, 199.

FOREIGN INSURANCE COMPANY.

See "Life Insurance."

FORFEITURE OF BEQUEST.

See "Renouncing Probate."

FRAUD.

See "Fire Insurance," 2.
"Practice," 9.

FRAUDULENT CONVEYANCE.

1. In December, 1874, *D.* executed a mortgage for \$2000, in favor of his sons to secure moneys advanced by them for the erection of buildings on the mortgaged premises, and in July following he conveyed the same property, with other lands, to his daughter in trust for his wife, who had advanced \$700 for the same purpose. Subsequently the sons, intending to benefit their mother, executed a statutory discharge of their mortgage. In July, 1876, *D.* having become insolvent, his assignee instituted proceedings impeaching the conveyance to the wife as a fraud upon creditors, and which she admitted on her examination, though denied by her answer, to have been by way of security only. The Court negatived fraud in both transactions, and made a decree for redemption declaring the wife entitled to be paid the two sums of \$700 and \$2000 and her costs.

Smith v. Drew, 188.

2. An assignment of an equity of redemption was made, which the Court held to be void against the creditors of the mortgagor; but it appearing that the sons of the assignee had paid off the mortgage for her benefit, the Court gave relief only on the terms of the amount being paid to the assignee, and

Held, by VAN KOUGHNET, C., and SPRAGGE, V.C., (MOWAT, V.C., dissenting), that the creditors were not entitled to set off the rents the assignee had received, and

Held, also, that in such a case the assignee was not entitled to be allowed for improvements made upon the mortgaged premises; but that if the same were properly allowable then that the rents and profits accrued should be set off against the value of such improvements.

Buchanan v. McMullen, 193 (note).

FRAUDULENT PREFERENCE.

A debtor had executed several chattel mortgages to secure indorsers of his paper, and afterwards a power of attorney to their appointee to sell and pay the mortgage debts. The validity of the mortgages under the Act for the registration of chattel mortgages was disputed and not decided, it being

Held, that the power was in effect an equitable assignment; that the transaction was neither a mortgage nor a sale; that the instrument did not require registration; and that it was a valid assignment under the Insolvent Law, on the ground of having been executed to give effect to what was intended by the mortgages as understood by the parties thereto.

Patterson v. Kingsley, 425.

2. Where the Court is satisfied that an arrangement between a creditor and his debtor, is entered into *bona fide*, in order to aid the debtor with the view of enabling him to discharge his obligations, such arrangement will be sustained, notwithstanding that its effect is to give such creditor a preference over other creditors for the full amount of his claim, including a prior indebtedness, and that the debtor became insolvent within thirty days from the time of entering into such arrangement.

Smith v. McLean, 567.

3. In such a case the *onus* of proving the *bona fides* of the transaction is cast upon the creditor claiming the benefit of the security.

Ib.

GENERAL RELIEF.

See "Pleading," 4.

GRANT RESERVING WATER OF A RIVER.

A grant from the Crown was made "exclusive of the waters of the river Trent, which are hereby reserved, together with the free access to the shores thereof for all vessels, boats and persons." *Semble* that this would operate as a reservation of the bed of the river, though the *waters* only are reserved: And therefore the erection of a dam in that river by persons claiming under the patentee, without authority, was an intrusion on the rights of the Crown.

Kirchhoffer v. Stanbury, 413.

GRANTEE ENTITLED TO REPAYMENT.

See "Fraudulent Conveyance," 2.

HEIRS-AT-LAW AND NEXT OF KIN.

See "Will," &c., 14.

HUSBAND AND WIFE.

See "Bar of Dower."

"Fraudulent Conveyance," 1.

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IGNORANTIA JURIS.

The maxim "*Ignorantia juris neminem excusat*," treated of and explained.

Smith v. Drew, 188.

IMMEDIATE SALE.

See "Foreclosure."

IMPROVEMENTS.

See "Fraudulent Conveyance," 2.

IMPROVIDENT GRANT.

See "Crown Patent."

INACCURATE DESCRIPTION OF LEGATEES.

See "Will," &c., 13.

INCREASE OF VALUE OF LANDS.

See "Mechanics' Lien," 4.

INCUMBRANCES.

See "Foreclosure."

INDEMNITY.

See "Pleading," 1.

INDORSEMENTS.

See "Mortgage," &c., 3.

INFANT.

It is the Duty of the Court to see that an infant is brought up in the faith of his or her father, but the mere fact that an infant was the child of parents belonging to the Presbyterian Church, and that she had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the Master's ruling approving of her being placed and educated at a seminary,

the proprietress of which was a member of the Church of England, it being shewn that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that Church, and the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends and relatives, and there was the probability of a stricter personal supervision by the proprietress, than at a public institution in another part of the country which was in connection with the Presbyterian Church in Canada.

McNabb v. McInnes, 144.

INJUNCTION.

1. This Court will not interfere by injunction to restrain proceedings instituted against the sureties of a defaulting assignee in insolvency, notwithstanding several actions may have been brought against them, and the aggregate amount sought to be recovered greatly exceeds the amounts for which they had become security. The proper mode of proceeding in such circumstances is as pointed out in *Sinclair v. Baber*, 2 Prac. R. 117.

Craig v. Milne, 250.

2. Where the evidence adduced leaves it doubtful as to whom a trading concern belongs, the Court will not, at the instance of a party claiming an interest in the funds invested therein, restrain the carrying on of the business, but will direct an account of the dealings thereof to be kept.

Smith v. Smith, 317.

3. *J. W. S.* was killed by a railway disaster in the State of Ohio, and the defendant, his widow, while residing in the State of New York, took out administration to his estate there, and instituted proceedings in the Courts of the State of New York against the railway company, which was incorporated in both States, to recover damages. This action was compromised by the company paying to the widow in New York \$4,000. Part of that money she brought to this country, a portion of which, it was alleged, she invested in business, another portion being deposited in a bank. Under these circumstances, *J. W. S.* having died childless, the father of the deceased claimed to be entitled to one-half of the sum received from the railway company, and filed a bill seeking to restrain the withdrawal of the money from the bank, and the further carrying on of the business, which, however, the widow denied being hers. The evidence of experts—lawyers practising in the States of Ohio and New York respectively—as to what was the proper distribution of the fund was contradictory, as was also the evidence as to the ownership of the business.

Under these circumstances the Court refused to restrain the carrying on of the business, but directed the defendants to keep an account of the dealings thereof, and continued an interim injunction obtained *ex parte*, restraining the withdrawal of the money from the bank. 16.

INLAND REVENUE ACT.

See "Practice," 3.

INSOLVENCY.

See "Fraudulent Preference," 2.

"Life Insurance,"

"Mortgage," &c., 3.

"Payment after Final Order of Discharge."

INSOLVENT MORTGAGOR.

This Court will not order a *fi. fa.* against an insolvent mortgagor whose estate has, after he has obtained a discharge, been reconveyed to him; although it may be that the mortgagee would be entitled to call upon the mortgagor to release his equity of redemption.

Smith v. Elliott, 598.

INTEREST ON CAPITAL.

See "Partnership," 1.

INTEREST ON LEGACIES.

See "Executors."

"Will," &c., 11, 12, 18.

INTERPLEADER.

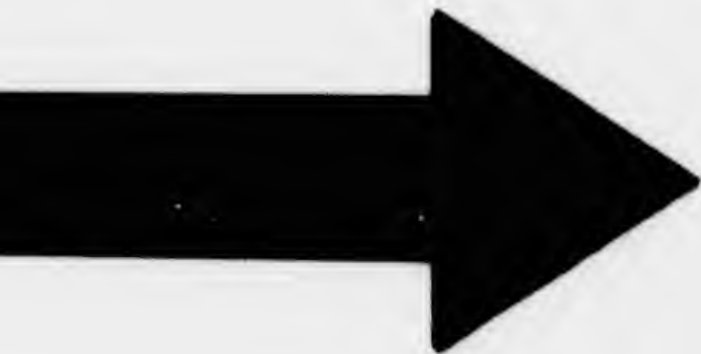
See "Parties," 1.

"Trustees' Relief Act."

INTESTACY AS TO BALANCE OF PERSONAL ESTATE.

See "Will," &c., 21.





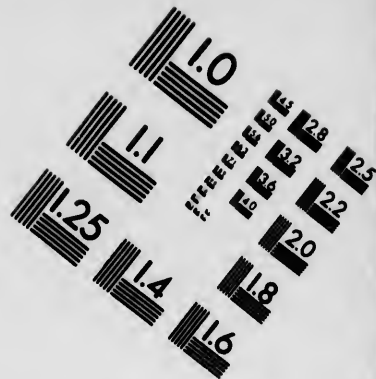
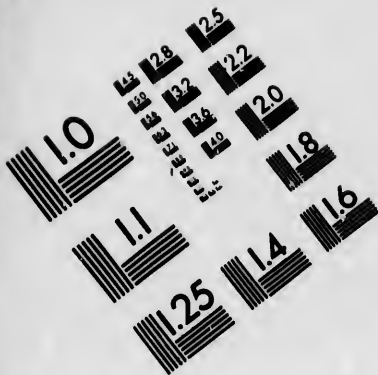
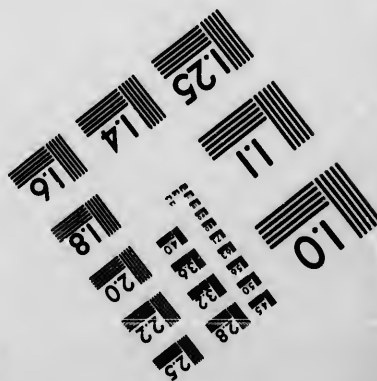
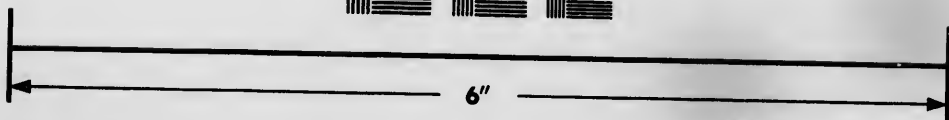
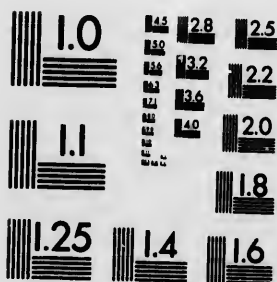


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INVALID SALE.

The maxim, that "he who comes into equity must do equity," applied in a case where the defendant became the purchaser at sheriff's sale of the lands of the plaintiff, paid the amount bid, and obtained a conveyance from the sheriff. In fact such sale was wholly invalid, the lands having been previously sold, under the same execution, to the mother of the defendant, to whom the sheriff had conveyed them, although she had paid only a portion of the amount bid for her, by the defendant as her agent. Such conveyance, however, had been to the knowledge of the defendant treated and intended as a security merely. The defendant's object in purchasing at the second sale was to obtain a title adverse to the plaintiff, and which he set up against the plaintiff, who thereupon filed a bill seeking to redeem on payment of the amount paid on account of the first sale and interest merely, less rents received.

Held, that the payment made by the defendant having enured to the benefit of the plaintiff the defendant was entitled to be repaid the amount, although paid for an improper purpose: and the plaintiff having sought to deprive the defendant of this money on purely technical grounds, the Court, on over-ruling his objections to the claim, did so with costs: *Semble*, that if the plaintiff had not sought to charge the defendant with rents and profits he could not have claimed the amounts he had so paid.

Taylor v. Brown, 53.

JOINT AND SEVERAL DEBTS.

T. purchased a quantity of bricks manufactured by the plaintiffs jointly, against one of whom G. he held a demand which he desired to set off against the price of the bricks; one of the plaintiffs being in fact assignee of a former partner of G. *Held*, that even if the effect of this was to constitute the plaintiffs tenants in common, it afforded no ground for setting off a separate against a joint debt.

Graham and Clemow v. Toms, 184.

Where a building society by their answer stated a sum of money to be in their hands as stakeholders, which was smaller than, at the hearing, they were willing to admit, the Court refused them their costs of the suit. *Ib.*

JURISDICTION OF COURT.

An attendant at an Episcopal Church, and one of the lay members of the Synod therefrom, filed a bill against the incumbent of the Church, praying, amongst other things, that the

defendant might be restrained from refusing to allow the plaintiff to partake of the Lord's Supper, and from suspending or excommunicating the plaintiff as a member of that congregation or church: *Held*, that, although the facts were as alleged by the bill—though denied by the answer—this Court had not any jurisdiction to enforce the claim of the plaintiff, as no civil right of the plaintiff had been invaded—the office of lay representative giving only an ecclesiastical, not a civil status. But the Court being of opinion that all the grounds of defence, other than that of want of jurisdiction, had signally failed, on dismissing the bill, refused the defendant his costs.

Dunnet v. Forneri, 199.

See also "Practice," 1.

"School Matters."

LANDS CONVEYED ON CONDITION.

The plaintiff on the representation of parties (not agents of the company) interested in the location of one of the termini of a railway conveyed to the company a lot of land for the purpose of locating such terminus and depot thereon without any money consideration being paid therefor, the deed reciting that the same was conveyed for the purpose and on the condition that the terminus and depot should be placed there, "and the execution of which condition was the real consideration for this grant." The company did construct the necessary buildings for that purpose, including those for passenger and freight stations, and continued to use them for several years, when they discontinued the use of the passenger station, and were about establishing it in another locality. On a bill filed to restrain such removal: *Held*, that the company were bound to retain the terminus and depot on the properties conveyed to them by the plaintiff and one *H.*, or in default, the land conveyed by the plaintiff should revert in him; and, if the plaintiff desired it, a reference to the Master was directed to ascertain and report whether the condition was performed, the company to pay the plaintiff his costs of suit.

Goyeau v. Great Western Railway Co., 62.

LANDS IN ONTARIO AND QUEBEC.

See "Mortgage," &c., 1.

LEASE, ASSIGNMENT OF, IN SECURITY.

See "Principal and Surety," 1.

LEGATEES.

See "Will," 2, 3, 4, 13.

LESSEE OF RAILWAY.

See "Railway Company," 2.

LIFE INSURANCE.

An insurance company incorporated in the State of New York and carrying on business in this Province, cannot be allowed to do so after proceedings have been taken, according to the law of its domicile with a view of winding up the affairs of the company, and that irrespective of what the result of the proceedings may be as to solvency or insolvency of the company.

Douglas v. Atlantic Mutual Life Insurance Co., of Albany, New York, 379.

LIMITATIONS, STATUTE OF.

1. The person claiming to be entitled to land attained majority in 1860, having been for some time previously aware that parties in possession claimed title adversely; and in June, 1875, and June, 1876, after several fruitless attempts to obtain possession she conveyed, for a small consideration, to the plaintiff, who, in 1876, commenced proceedings in this Court to obtain possession:

Held, that "The Real Property Limitation Act," (R. S. C. ch. 108) barred the right to recover, and therefore the bill was dismissed, with costs.

Dumble v. Larush, 552.

2. A mortgagee took possession of the mortgage premises in order, it was alleged, to pay himself the balance due him by perception of rents and profits, and subsequently sold and assigned his interest. A bill to redeem was afterwards filed against the mortgagee, in ignorance of the transfer, and after the lapse of twenty years from the time the mortgagee entered, his vendee was added as a party.

Held, that the vendee was, under the circumstances, entitled to set up the lapse of time as a defence under the statute; and the mortgagee having claimed an amount greatly exceeding the sum actually due, the Court, though unable to afford the plaintiff any relief by reason of the defence of the statute, refused the mortgagee his costs.

Dedford v. Boulton, 561.

See also "Dower," 5.

LIS PENDENS.

See "Mortgagee," &c., 2.

LOCAL LEGISLATURE, POWERS OF.

See "Separate Schools," 3.

LOCO PARENTIS.

See "Undue Influence."

LOST DEED.

Lands had been sold pursuant to an order of this Court in a proceeding (under the 12 Vic. ch. 72.) for the sale of infants' estate; and the purchaser thereof sold and took back a mortgage for purchase money, upon which a decree of foreclosure had been obtained. The conveyance from the original patentee was alleged to have been destroyed in an extensive fire at Chicago, without being registered. The defendant in the foreclosure suit subsequently procured a deed from the heirs of the patentee, and instituted proceedings to set aside the mortgage as a cloud on his title; but, the Court being of opinion that the evidence sufficiently established the existence at one time of the missing deed, and that the conduct of the plaintiff had been too much that of a prowling assignee, refused the relief sought and dismissed his bill, with costs.

Johnson v. Sovereign, 434.

LUNACY.

Funds were bequeathed to trustees, and one of the *cestuis que trust*, it was stated, had been declared a lunatic in Scotland, and a *curator de bonis* of the estate of the lunatic was appointed. The lunatic was not absolutely entitled to the fund, and the trustees applied to the Court for liberty or instruction to remit the fund to the curator.

The Court, under the circumstances, refused to make such direction, and ordered a reference "to the Master to inquire and report (1) whether *M. A. C.* in the petition mentioned has been found and adjudged a lunatic according to the law of Scotland; (2) whether *A. S.*, in the petition named, has been appointed *curator de bonis* of the estate of the said *M. A. C.*, and if so, whether he has given security for the proper application of any moneys of the said *M. A. C.*, and the nature and amount of such security."

Re Charteris, 376.

LUNACY OF TESTATOR.

See "Will," &c., 8, 9.

MALPRACTICE.

See "Solicitor," 1.

MARRIAGE BY REPUTE.

When it is sought to establish the fact of marriage by repute, it is essential that such repute should be general and uniform; a divided repute will not suffice for that purpose.

Henderson v. Weis, 69.

MECHANICS' LIEN.

1. By the terms of a building contract the work was to be paid for by monthly instalments of 85 per cent. of the work done, and the balance in twenty days after the whole was completed, which was to be done on the 15th of January, and the work was actually finished on the 20th of that month. For the purpose of securing payment the contractors filed a bill to enforce their lien on the 6th February. *Held*, that this proceeding was premature except as to what remained due to them in respect of the monthly payments; as to these they were offered a reference at the risk of costs.

Burritt v. Renihan, 183.

2. *Held*, that a sub-contractor, though entitled to a lien upon property for the construction of which he has furnished material to an original contractor or another sub-contractor, must, under the provisions of the Act of 1874, in order to enforce such lien, institute proceedings for that purpose within thirty days after the material furnished; the lien in such case arising from the furnishing of the material or the doing of the work, not from registration as under the Act of 1873.

McCormick v. Bullivant, 273.

3. The Revised Statute of Ontario (ch. 120, sec. 7) gives a contractor a lien for work done and materials furnished upon land subject to a mortgage, in priority to the mortgagee, on the amount by which the selling value of the property has been increased by the work and materials of the party furnishing the same, but a bill filed for the purpose of enforcing such a claim, must state distinctly the dates of the incumbrances having been created.

Douglas v. Chamberlain, 288.

4. Where buildings or other improvements are placed upon land subject to a mortgage, by reason of which the value of the land is increased, the contractor is only entitled to a lien on the property to the extent of such increase in the value of the land, irrespective of the buildings or other improvements, or of the amount expended in their construction. Therefore, where property was sold under a decree of this Court for \$1,000, and the Master certified the value without the improvements to be \$600, a contractor who held a lien under the Act was restricted to his proportionate share (with other lien holders) of the \$400 increase in value, and that although it was shewn that the contract price for the buildings had been \$1,950.

Broughton v. Smallpiece, 290.

5. The owner of lands created incumbrances thereon for \$20,000 to be advanced from time to time as certain buildings, then in course of erection thereon, were proceeded with :

Held, that a mechanic who had performed work upon the buildings and supplied material therefor, was not entitled to any lien in respect thereof in priority to the mortgage, although part of the mortgage money was advanced to the mortgagor after the execution of the work, in respect of which such lien was claimed, but without notice of such claim.

Richards v. Chamberlain, 402.

MONEY PAID BY A STRANGER.

See "Invalid Sale."

MONEY IMPRESSED WITH A TRUST.

See "Trustee," &c., 2.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. Where in a suit on a mortgage covering lands in the Province of Ontario, and also in Quebec, the defendant (mortgagor) waived his right to claim a sale of the property and elected to have a decree of foreclosure pronounced, the Court on further directions ordered, in the event of default being made in payment, that the defendant should execute to the plaintiff such a conveyance as would vest in him all the estate or interest of the defendant in the lands in Quebec.

Bryson v. Huntington, 265.

2. *L.* created a second mortgage after a bill had been filed to foreclose a prior incumbrance on the same land.

Held, that the mortgagee in such second mortgage took subject to the *lis pendens*, even though the service of the bill had then not been effected; and a bill filed by him to redeem the prior incumbrancer, after a final foreclosure in such suit, was dismissed with costs.

Robson v. Argue, 407.

3. *R.* created a mortgage on certain lands in favour of *M. & B.*, with a proviso to be "void on payment of \$20,000 or such other sum or sums as might be due, and owing to *M. & B.*, by reason of their having to pay, take up, or retire any notes or bills indorsed or accepted by them for *R.*" *M. & B.* indorsed notes for *R.*'s accommodation which were discounted by the plaintiffs' bank, and while several of them, amounting in all to \$24,000, were outstanding, *R.*, as also *M. & B.*, became insolvent.

Held, that to the extent of such accommodation paper as the bank held, they were entitled to the benefit of the mortgage, and to have it realized, and the proceeds applied to retire the notes, in priority to other creditors; but, that in respect of any notes held by the bank, which had been given to *M. & B.* in liquidation of debts due them, the bank could only prove against the estates of the insolvents.

Molson's Bank v. Blakeney and McCrae, 513.

See also "Fraudulent Conveyance."
 "Insolvent Mortgagor."
 "Mechanics' Lien," 5.
 "Principal and Surety," 2.

NOTICE OF MOTION.

See "Bar of Dower."

NUMERICAL MISTAKE.

See "Will," &c., 20.

OBSTRUCTION IN RIVER.

See "Description," 2.

OFFER TO PURCHASE.

See "Specific Performance," 3.

ONUS OF PROOF.

See "Description," 2.

"Undue Influence," 1.

ONUS OF PROOF OF BONA FIDES.

See "Fraudulent Preference," 3.

OPTION OF PURCHASING SHARES OF ESTATE.

The testator gave his sons the option of purchasing the shares of his daughters in the real estate after marriage or death of the widow for the sum of £500 each.

Held, that the fact of the sons having, during the life time of the widow, joined in leases naming all the children, sons as well as daughters, as lessors—some of the sons being then infants—was not such an act as deprived the sons of afterwards exercising the right or option of purchasing the interests of the daughters.

Laidlaw v. Jackes, 293.

OVERRULING MASTER.

1. Where the evidence against the plaintiff could at most only raise a case of suspicion, the Court, on appeal from the Master, overruled his finding, the effect of which was to shew the plaintiff guilty of forgery or other criminal offence.

Armstrong v. Gage, 1.

2. Although the rule of the Court, as stated in *Day v. Brown*, ante vol. xviii. p. 681, is not to overrule the Master upon a question of credibility of evidence, still, where upon a careful examination of the evidence adduced in support of the Master's finding, and that in contradiction of it, it was clear that the Master had erred in the proper weight to be attributed to the evidence, and it did not appear that he had proceeded on the manner or demeanour of the witnesses, the Court reversed the finding of the Master, although upon a question of fact.

Ib.

PAROL EVIDENCE.

See "Specific Performance," 2.

PARTNERSHIP.

1. Parties about to enter into partnership, in Canada, agreed to pay in \$8,000 capital, and one of them omitted to pay in any portion thereof: *Held*, that such omission formed no ground for

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charging the party with interest on his share of the proposed capital.

The same partner, during the continuance of the partnership, drew bills in the name of the firm, the proceeds of which he applied to his own purposes: *Held*, that on these he was liable to be charged interest, although the general rule is, that after a dissolution of partnership interest is never charged against one partner in favor of another.

Wilson v. McCarty, 152.

2. Certain of the parties paid in the amount of their proposed capital in United States securities, mortgages and notes, in respect of which the Master credited them with their value in Canadian currency (\$7,200): *Held*, on appeal, that the agreement must be taken to have meant that the amount each agreed to pay in was that sum in Canadian currency, or its full equivalent in United States currency. *Ib.*

PART PERFORMANCE.

See "Specific Performance," 2.

"PARTY SEEKING EQUITY MUST DO EQUITY."

See "Invalid Sale."

PARTIES.

See "Corporations."

"Firm."

"Pleading," 1, 5.

PAYMENT.

[VOLUNTARY.]

See "Invalid Sale."

PAYMENT AFTER FINAL ORDER OF DISCHARGE.

The mere fact that an insolvent, after having obtained his final order of discharge, makes a voluntary payment on a claim, existing against him before his insolvency and which is extinguished by such discharge, is not sufficient to revive the debt, for that purpose an express undertaking to pay the amount must be proved.

McDonald v. Notman, 608.

PERSONAL PROPERTY.

See "Will," &c., 21.

PERSONAL REPRESENTATIVE.

See " Rents of Realty."

PLEADING.

1. The bill alleged the purchase by the plaintiff of certain land which at the time was subject to a mortgage not then due, and which the vendor agreed to pay off; and having conveyed the land to the plaintiff by a deed containing covenants for quiet enjoyment and freedom from incumbrances, he, with a surety, executed a bond to the plaintiff "conditioned to indemnify and save her harmless from the said mortgage;" that the mortgage had since become due and payable; and the plaintiff prayed that the defendants (the vendor and his surety) might be ordered to pay it off. The bill, however, did not contain any allegation that the plaintiff had been disturbed in her possession or injured in the enjoyment of the premises, neither did it allege any demand of payment by the mortgagees.

A demurrer by the surety for want of equity was allowed with costs.

Leeming v. Smith, 256.

2. The plaintiff purchased from one *C.* a mill privilege, with a right to over-flow land belonging to the defendant, and abstained at the instance of the defendant from obtaining from *C.* an assignment of a bond, securing the right so to flood defendant's land. In a proceeding afterwards taken by plaintiff to compel defendant specifically to perform the contract contained in the bond.

Held, that the want of a formal assignment of the bond could not be raised as an objection to the plaintiff's right to recover.

Ritchie v. Drain, 322.

3. This Court will grant a decree for an account of the dealings of an incorporated trading company, at the instance of a shareholder therein, although there is not any allegation that the company is insolvent.

Phillips v. The Royal Niagara Hotel Co., 358.

4. Where a bill states facts which shew the plaintiff entitled to some relief, although not that specially prayed, the Court will, under the general prayer, grant such relief as the bill shews the plaintiff entitled to. *Id.*

5. In proceeding to set aside a deed to a married woman on the ground that the same was made to her as the appointee of her husband, who was insolvent, and was so made in order to defeat his creditors, it is not proper to make the husband a party.

Murdoch v. O'Sullivan, 392.

6. Although the Interpretation Act requires statutes, declared to be public Acts, to be judicially noticed without being specially pleaded, a defendant on demurrer cannot avail himself of the provisions thereof unless they appear in the bill.

Kiely v. Kiely, 463.

See also "Firm."

"Mechanics' Lien," 3.

POSTPONING OF ACTION.

See "Principal and Surety," 1.

POWER OF APPOINTMENT.

See "Will," &c., 19.

PRACTICE.

1. Where the Crown seeks to enforce a claim for dues fraudulently withheld, proceedings for that purpose may be instituted by the Attorney-General in this Court, although there are no peculiar equitable circumstances connected with the demand requiring the interposition of a Court of Equity.

Attorney-General v. Walker, 233.

2. The Crown, though not named in the Administration of Justice Act, is entitled to avail itself of the benefit of its provisions to the same extent as a subject can do so. *Ib.*

3. The Inland Revenue Act, 31 Vict. ch. 8, sec. 44, cl. 6, provides for inquiries being instituted for any period not more than one year before the inquiry is commenced, for the purpose of testing the truth of the returns made by distillers to the Government: *Held*, that this did not prevent proceedings at the instance of the Attorney-General being instituted afterwards, on the discovery of frauds having been perpetrated in making such returns. *Ib.*

4. Where in a suit of foreclosure, the defendant improperly resists the claim of the plaintiff, the costs occasioned thereby will

be ordered to be paid to the plaintiff whether the defendant redeems or not.

Bryson v. Huntingdon, 265.

5. One principle upon which this Court has steadily acted is, that where two courses of proceeding are open, one less expensive than the other, and a party can, with equal advantage to himself, adopt either, and he takes the more expensive one, he does so at the peril of costs. Where, therefore, a woman, after the death of her husband, was joined as a party defendant in a suit upon a mortgage created by her late husband, in which she had not joined, and instead of demurring put in an answer, the Court at the hearing dismissed the bill as against her without costs.

Gildersleeve v. Cowan, 460.

6. The case of *Bush v. The Trowbridge Water Works Company*, L. R. 10, Ch. 459, considered, distinguished and not followed: *Saunders v. Stull*, ante vol. xviii, p. 590, approved of and followed. *Ib.*

7. Upon an application under the Statute to dispense with the execution of a conveyance by the wife of the grantor, alleging that she had been living apart from her husband (the petitioner) for two years in consequence of her adulterous conduct, the respondent denied the adultery and other misconduct charged. The petitioner produced as evidence the decree in a suit for alimony, in which he had set up her adultery as a defence. The decree dismissed the bill, and did not state the ground of dismissal:

Held, that such decree was not sufficient, and the application was refused.

In Re Campbell, 480.

8. The plaintiffs claimed to be partners of the defendant, and the defendant in resisting a bill filed for the purpose of enforcing such claim charged the plaintiffs with fraud, but no evidence was adduced either in support or rebuttal thereof, in consequence of the Court expressing the view that the plaintiffs were not entitled to succeed; and as it did not appear that the costs had been increased thereby, the Court, on dismissing the bill, ordered the defendant to be paid his costs.

Samson v. Haggart, 543.

9. The plaintiffs instituted proceedings to restrain waste and obtain possession of the property, but at the time he had not such a title as would enable him to maintain ejectment, and the evidence failed to establish the waste complained of. The Court,

under these circumstances, refused to give effect to a title acquired subsequently, and dismissed the bill, with costs, without prejudice to any other suit.

Adamson v. Adamson, 550.

See also "Administration Suit," 3, 4.

"Arbitration."

"Costs on Lower or Higher Scale," 1, 2.

"Injunction," 1.

"Overruling Master."

"Pleading," 4.

"Rehearing."

"Scale of Taxation."

"Weighing Evidence,"

PREFERENTIAL ASSIGNMENT.

See "Fraudulent Preference," 2.

PRINCIPAL AND SURETY.

1. The lessee of a mill assigned his term, less one day, to certain of his creditors as a security against his indebtedness, and who it was intended should send him wheat to grind, receiving the flour therefrom, it being agreed that a settlement should take place at the end of each year, and that the balance, if any, coming to him should be paid to him :

Held, that this arrangement had not the effect of preventing the creditors from realizing their security before the expiration of the year, and that the arrangement did not discharge a surety of the debtor,

Martin v. Hall, 471.

2. Where mortgagees sold the mortgaged premises without notice to a surety for part of the debt :

Held, that they were liable as between themselves and the surety for the full value of the property. *Ib.*

PRIVITY.

See "Purchase of Equity of Redemption."

PROBATE.

See "Renouncing Probate."

PROPERTY AND TRUSTS' ACT.

See "Trustee," &c., 3.

PROWLING ASSIGNEE.

See "Lost Deed."

PUBLIC LANDS' ACT.

It is the duty of this Court to give as large and liberal an interpretation to the provisions of the Public Lands' Act as they will justly bear, otherwise many cases of flagrant wrong will go unredressed,

The Attorney-General et al. v. Contois et al., 346.

PURCHASE OF EQUITY OF REDEMPTION.

Although a purchaser from the mortgagor of the equity of redemption, covenants with him to pay off the mortgage debt, this, owing to the want of privity, affords no ground for the mortgagee proceeding against the purchaser either at law or in equity, to compel him to perform his covenant.

Clarkson v. Scott, 373.

RAILWAY COMPANY.

1. A railway company covenanted with a municipal corporation to erect, keep, and maintain a permanent freight and passenger station at a village named. *Held*, that the erection of buildings, without providing a station master, ticket office, baggage master, or other servants to receive or forward goods, was not a compliance with the covenant.

The Corporation of the Township of Wallace v. The Great Western R. W. Co., 86.

2. After entering into such a covenant, the railway company leased the road to another railway company for 1,000 years, and the latter company agreed to equip, maintain and work the line so leased.

Held, that the covenant with the municipality was binding on the latter corporation, and that the municipality was entitled to a specific performance of the covenant as to the station. *Ib.*

[Affirmed on Appeal, 25th June, 1878.]

3. In treating with the owner of lands for the right to cross the same by a railway, or in proceedings before arbitrators appointed between him and the company, with a view to ascertain the amount of compensation, the solicitor acting for the company at the arbitration, is not qualified to enter into any special agreement binding the company to construct and maintain a crossing.

Wood v. Hamilton and North-Western R. W. Co., 135.

4. When lands are taken possession of by a railway company under the company's powers conferred upon them by the Act, this Court will not order possession to be restored in case of default in payment of the amount of compensation awarded to the owners: Under such circumstances the proper remedy is a sale of the land, and this will be granted under the prayer for general relief, though not asked for by the bill. See also, as to this, *Phillips v. The Royal Niagara Hotel Co.*, ante p. 358.

Slater v. The Canada Central R. W. Co., 363.

RAILWAY CROSSING.

Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the railway companies cannot, by arrangement, waive this provision.

Credit Valley R. W. Co. v. Great Western R. W. Co., 507.

RAILWAY TERMINUS.

The terms railway "station," "terminus," and "depot," considered and defined.

Goyeau v. The Great Western Railway Co., 62.

RECTIFICATION OF DECREE.

See "Executor," 3.

REHEARING.

It is too late to rehear a decree, on the ground of an improper order therein as to the payment of costs, after the parties to the suit have accepted the decree, and acted according to the provisions thereof.

Keith v. Keith, 111.

REGISTRATION.

See "Cancellation of Deeds."

RELIGIOUS FAITH.

See "Infant."

RENOUNCING PROBATE.

A testator devised his estate to *W. P.*, a resident of Scotland, and to two others, residents of Canada, in trust to convert and divide the same; and appointed the same parties executors of his will. To *W. P.*, he bequeathed \$5,500, and to the two others \$1,500 and \$500 respectively, over and above any expense to be incurred in the nature of travelling expenses or expenses incident thereto, and generally in the management of his estate. For the convenience of the other executors, *W. P.* renounced probate of the will.

Held, that by such renunciation he had forfeited the bequest in his favour.

Paton v. Hickson, 102.

RENTS AND PROFITS.

See "Fraudulent Conveyance," 2.

RENTS OF REALTY.

An executor or administrator has no right, as such, to receive the rents of real estate; as to them, he is merely an intermeddler and will not be entitled to any commission thereon.

Dagg v. Dagg, 542.

REPUTE [DIVIDED.]

See "Marriage by Repute."

RESIDUARY CLAUSE.

See "Will," &c., 1.

RIGHT OF WAY.

See "Railway Company," 3.

RIGHTS OF THE CROWN.

See "Practice," 2.

RIPARIAN PROPRIETOR.

The grantee in a patent reserving the waters of a river running through the lands granted, has no right to file a bill complaining of an obstruction created in the river by other parties: the

patentee in such case not having conferred on him the ordinary rights of a riparian proprietor; and where under such circumstances a bill was dismissed, it was without prejudice to a new bill being filed in the event of the Crown making a grant free from such reservation; and in that case the defendants being clearly in the wrong, although the parties complaining had not any right to sue, the Court in refusing the relief, did so, without costs.

Kirchhoffer v. Stanbury, 413.

ROMAN CATHOLIC SCHOOL TRUSTEES.

See "Separate Schools."

SALE BY AGENT OF CORPORATION.

See "Specific Performance," 3.

SALE OF DOWER UNDER FL. FA.

See "Dower," 1, 6.

SALE OF LAND FOR TAXES.

Where it is necessary to prove title under a deed given upon a sale of land for taxes, the production of the warrant directing the sale, issued by the treasurer to the sheriff, is sufficient evidence of the taxes having been in arrear for the periods therein mentioned.

Clark v. Buchanan, 559.

SALE OF LAND WITH WATER PRIVILEGE ATTACHED.

See "Specific Performance," 5.

SALE IN DEFAULT OF COMPENSATION.

See "Railway Company," 4.

SCALE OF TAXATION.

The decree on further directions gave the plaintiff costs to be taxed by the Master who was "to determine the scale under which the same are to be taxed." The original report found \$37 due the plaintiff, viz., \$22.50, in respect of work done, and

\$18 for damages, less \$3.50 allowed defendants for damages; the defendants by their answer having admitted and offered to pay \$22.23 in respect of the work. The taxing officer allowed costs upon the higher scale. On rehearing, which by agreement was also treated as an appeal from the Master, the Court allowed an objection to the taxation, and directed costs to be taxed on the lower scale only, without costs to either part of the rehearing.

Smith v. McDonald, 600.

SCHOOL MATTERS.

A Court of Equity has jurisdiction to order persons wrongfully claiming to be school trustees, to deliver up the corporate seal and papers to the legal trustees.

Board of Trustees of the Separate Schools of Belleville v. Grainger, 570.

SEPARATE SCHOOLS.

1. Election of School Trustees as well for the Common Schools as the Roman Catholic Separate Schools must be held by the same returning officers, and at the same time and place as the Municipal Councillors are chosen.

Board of Trustees of the Roman Catholic Separate Schools of Belleville v. Grainger et al., 570.

2. In election matters, separate schools have the same right of appeal to a County Judge as public schools have. *Ib.*

3. Under the British North America Act, Local Legislatures may legislate in regard to separate schools, provided that the legislation is not such as prejudicially affects the rights or privileges theretofore possessed by such schools. *Ib.*

SET OFF.

See "Joint and Several Debts."

SOLICITOR.

C., a solicitor, held a mortgage against *B.*, which he agreed to release and take a mortgage on another lot conveyed on exchange of lots by *W.* to *B.*, all the conveyances being prepared by *C.* *C.* never did discharge the first mortgage, although *B.* paid the full amount thereof and obtained a discharge of the second mortgage. Several years afterwards, and after the death of *W.*, his repre-

sentatives were called upon by the representatives of one *J.*, to whom the first mortgage had been assigned, to pay the same, and, in a suit brought thereon, the lands so conveyed by *B.* to *W.* were ordered to be sold. On a proceeding to strike *C.* off the roll of solicitors for mal-practice :

Held, (1) that *C.*, in the transactions, acted professionally for *W.* and *B.* ; his being the holder of the mortgage from *B.* was an accident which did not affect the professional character in which he acted ; (2) that whether he was acting professionally or not in the matter, he was, being a solicitor, amenable to the summary jurisdiction of the Court, and, under the circumstances, an order was made to strike him off the roll of solicitors, and pay the costs of the proceedings against him for that purpose.

In re Currie.—Gilleland v. Wadsworth, 338.

SOLICITOR OF RAILWAY CO.

See "Railway Company," 3.

SPECIFIC PERFORMANCE.

1. A written agreement to purchase, in order to satisfy the Statute of Frauds, must specify by name or description who is the vendor.

Cameron v. Spiking and Teed, 116.

2. The plaintiffs agreed to sell certain premises to the defendants, who signed a written contract agreeing to purchase. The writing omitted any mention of the names of the vendors. Possession of the property was taken by the defendants through their agent, who carried on business therein for two days in their names.

Held, a sufficient part performance to let in parol evidence as to who were the vendors. *Ib.*

3. The defendant wrote to the manager, who was verbally authorized to sell certain lands belonging to a bank: "I hereby agree to purchase from the Dominion Bank all," &c, and paid on account of the purchase money \$100. This memorandum was not submitted to the managing board of the bank, nor was it signed by any one acting on their behalf, and the solicitor for the bank refused that it should be put into such a shape as to bind the bank.

Held, that the memorandum amounted to an offer to purchase only, and that before a formal acceptance thereof by the bank authorities the defendant was at liberty to withdraw the same.

Dominion Bank v. Knowlton, 125.

4. And *quære* whether in such a case authority for the purpose of selling the lands of the bank could be conferred by parol. *Ib.*

5. The defendant agreed to purchase a piece of land, "with a water privilege attached," for the avowed purpose of erecting a mill on the land, and storing or booming the logs for his mill in the water adjoining.

Held, that this did not bind the vendor to retain the water in its then state for the purpose of securing to the defendant the benefit of such booming or storage; and that, notwithstanding the loss of the water privilege by reason of one of the dams having fallen into decay, the defendant was bound specifically to perform the agreement.

Hickson v. Clarke, 173.

6. *K.*, the plaintiff, a barrister and solicitor, who had been in the habit of acting professionally for the defendant, purchased from the defendant a "cottage and lot on the south-east corner of Gerard and Jarvis streets, in Toronto"—the conveyance for which was prepared by the plaintiff under the short forms of conveyances' Act, describing the premises by metes and bounds. These premises and a small additional portion of land were occupied by one *L.*, as tenant of the defendant, and at the extreme limit thereof was a water-closet, which had been, and at the time of the conveyance to the plaintiff was used with the premises:

Held, that the water-closet passed as appurtenant to the cottage, although distant nearly two feet from the extreme limit of the land conveyed to the plaintiff, and the defendant swore that he had never intended to convey any interest therein to the plaintiff.

Kerr v. Coghill, 179.

See also "Railway Company," 1.

STATION.

See "Railway Terminus."

COVENANT TO KEEP.

See "Railway Company," 1.

STRANGER.

[MONEY PAID BY.]

See "Invalid Sale."

SURETY.

See "Pleading," 1.

"Injunction," 1.

SURPLUS IN HANDS OF MORTGAGEE ON SELLING
UNDER POWER OF SALE.

See "Trustees' Relief Act."

— — —
SURVIVING PARTNER.

See "Firm."

— — —
TERMINUS.

See "Railway Terminus."

— — —
TITLE ACQUIRED AFTER SUIT.

See "Practice," 10.

— — —
TREASURER'S WARRANT.

See "Sale of Land for Taxes."

— — —
TRUSTEE, AND CESTUI QUE TRUST—TRUSTS.

1. *J. C.*, the elder, by deed of 30th of January, 1862, conveyed the lands in question in the cause to his daughter, *S. C.*: "In trust from and after the death of the grantor until the youngest child of *J. C.* shall arrive at the age of twenty-one years, the proceeds arising from the use of the land shall be applied for the use and benefit of the said *J. C.* and his family, so far and in such a way as to the said *S. C.*, her heirs or executors, shall seem right and proper; and after the said youngest child shall so arrive at the age of twenty-one years, it shall be the duty of the said *S. C.*, her heirs or executors, to either divide the land between the said *J. C.* and his children, or sell and dispose of the same, and the proceeds of such sale to apply for the benefit of them, the said *J. C.* and his children, in such way or manner as to her or them may seem right and proper."

Held, that under the deed, *S. C.* was a trustee to apply the proceeds of the land till the youngest child of *J. C.*, living at the death of the grantor, attained twenty-one, for the use and benefit of *J. C.* and his family, to the extent and in the manner *S. C.* might deem right and proper, the amount and mode of application being left entirely in her discretion; and after such child attained twenty-one, either to divide the land amongst *J. C.* and his family, or to sell the same and apply the proceeds for the benefit of *J. C.* and his children, in such manner as to her should seem right and proper; but she was not at liberty to select one child and give the

whole proceeds to such one; the discretion vested in the trustee being as to the amount and mode of application—not as to the persons to be benefited; and this discretion within these limits the Court would not control.

Coy v. Coy, 267.

2. Money was advanced by the plaintiff for the express purpose of being deposited in a bank in order to meet a cheque of *L. & C.*, given by their agent, *J. H. C.* This cheque never was paid or presented after such deposit, and the amount remained in the bank to the credit of *L. & C.*, who were trustees, claiming no beneficial interest in the money. On a bill filed for that purpose the Court declared that the estate of *J. H. C.*, who had since died, had not any claim or interest in the fund, and ordered the amount together with the interest allowed on the deposit to be paid to the plaintiff.

Gamble v. Lee, 326.

3. The fact that a claim against the estate of a deceased party arose in consequence, or by means of a breach of duty as a trustee, affords no ground for giving such claim a preference over other creditors of the estate, as under the Property and Trusts' Act the claimant can only rank *pari passu* with other creditors.

Brock v. Cameron, 369.

4. On re-hearing the order as reported, ante Vol. XXIV., page 503, disallowing to a solicitor trustee costs other than costs out of pocket in suits to which he was a party reversed. [*SPRAGGE, C.*, *dubitante*, who thought that the rule should be applied to all suits brought by solicitor trustees, and to all costs in those suits.]

Meighen v. Buell, 604.

See also "Limitations, Statute of."

TRUSTEES' RELIEF ACT.

Where a mortgagee proceeds to a sale of the mortgage premises under the power contained in his security, and a surplus of the proceeds remains in his hands after payment of his own claim, and there are adverse claimants to such surplus, he cannot apply under the Trustees' Relief Act to pay such surplus into Court; his proper course is to file a bill of interpleader.

The Western Canada Loan, &c., Co. v. Court, 151.

UNDUE INFLUENCE.

1. In suits to set aside instruments on the ground of undue influence it is not necessary that there should be proof of the exercise of influence; it rests upon the party obtaining the benefit to rebut the presumption that arises when such a transaction takes place between a parent and child, or others standing in a position where it is presumed influence may exist on the part of the grantee over the grantor.

Delong v. Mumford, 586.

2. *J. P.* died intestate in England entitled to real and personal estate situate there of considerable value, leaving *C. E.*, an only daughter, his heir-at-law, who came to Canada on her attaining twenty, and went to reside with her mother and stepfather, within one year thereafter, and on her attaining twenty-one she executed an instrument in favor of her stepfather, agreeing to give him one-fourth share or part of all her real and personal property, "in consideration of my late father dying without making a will, * * and leaving my mother unprovided for." *C. E.* married a few days afterwards, and survived about two years, when she died, leaving an only son, who shortly after attaining twenty-one instituted proceedings, in which his father joined, to set the instrument aside. The Court, in the absence of evidence, other than that of defendant, to rebut the presumption of undue influence decreed a cancellation of the instrument with costs. *Ib.*

UNITED STATES CURRENCY.

See "Partnership," 1.

VALUE OF DOWER.

1. *Held*, on rehearing, [affirming the order of *PROUDFOOT*, V. C., as reported *ante* p. 276.] that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in ascertaining such dower the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee. [*BLAKE*, V. C. dissenting, who was of opinion that the amount of the surplus, after paying the mortgagee the full amount of debt, interest and costs, was the proper sum to compute the value of the dower upon.]

Robertson v. Robertson, 486.

2. *Dawson v. The Bank of Whitehaven*, L. R. 6 Ch. D. 218, observed upon and distinguished. *Ib.*

See also "Dower,"

VENDORS, NAMES OF.

A written agreement to purchase, in order to satisfy the Statute of Frauds, must specify by name or description who is the vendor.

Cameron v. Spiking, 116.

VERBAL AUTHORITY TO SELL.

See "Specific Performance," 4.

VOLUNTARY PAYMENT.

See "Invalid Sale."

WAREHOUSE RECEIPTS.

The consent required by sec. 50 of 34 Vict. ch. 5, D., to extend the time for which the transfer of a warehouse receipt in security to a bank shall remain valid, may be given at any time after incurring the debt or liability to the bank; and, *Semble*, that such consent need not be in writing.

McCrae v. Molson's Bank, 519.

WARRANTY.

See "Fire Insurance," 1.

WATER PRIVILEGE, SALE OF LAND WITH.

See "Specific Performance," 5.

WEIGHING EVIDENCE.

The parties to a cause are entitled, as well on questions of fact as on questions of law, to demand the decision of an Appellate Court, and that Court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own inferences and conclusions, though it will always bear in mind that it has neither seen nor heard the witnesses, and will make due allowance in this respect.

Armstrong v. Gage, 1.

WIDOW, CLAIM OF—IN LIEU OF LIFE ESTATE.

See "Administration Suit," 1.

WIDOW, ELECTION BY.

See "Will," &c., 3.

WILL, CONSTRUCTION OF.

1. A testator, after making sundry dispositions of his real and personal estate, proceeded to dispose of the residue as follows :

"On the death of my said wife I order and direct my said executors and trustees to sell and dispose of all the rest, residue and remainder of all the real and personal estate which I may die seized or possessed of, or in any way entitled, to the best advantage, and out of the proceeds thereof: 1st. To pay *Margaret Hope*, four hundred dollars. 2nd. To pay my nephews *Thomas* and *Joseph Toase*, one thousand dollars each. 3rd. To pay to *Margaret Hulse*, *Robert Ramsay*, *George Ramsay*, *John M. Wood*, and *James W. Wood*, two hundred dollars each. 4. To pay to my nieces *Elizabeth*, *Amelia*, *Matilda*, and *Hannah*, daughters of my said brother *Thomas*, two hundred dollars each. 5th. To invest the sum of six hundred dollars on good security, and pay over the interest thereof to *John Henry Wright*, son of *John Wright*, during his natural life; and at his death I direct my executors to divide the said sum of six hundred dollars equally among the brothers and sisters of the said *John Henry Wright*, who may survive him; and as to all the rest, residue and remainder thereof, I direct the same to be divided equally amongst all the legatees herein mentioned."

Held, (1) that under this residuary bequest, all the legatees named, including *John Henry Wright*, but not his brothers and sisters, were entitled to participate in the residue of the estate; (2) that *John Henry Wright* was entitled to the interest of the \$600 during his life, and that all his brothers and sisters living at his death. (though born after the date of the will,) were entitled to share in the fund of \$600.

Edwards v. Smith, 159.

2. By another clause of the will, the testator bequeathed to *Hannah Wright* for her separate use a mortgage held by the testator against property of her husband, and all moneys secured thereby and unpaid at the testator's death :

Held, that she was a legatee, and as such entitled also to share in the residue.

Ib.

3. The testator directed his executors "to cancel all claims I may have at the time of my death against my nephew, *H. T.* : and to cancel all promissory notes I may have against my nephew, *J. T.* ; and to cancel all claims I may have against *A. H.* : and such cancelling shall in no way be construed as satisfaction or part satisfaction of any legacies hereby given" :

Held, that this constituted these three persons legatees, and as such they were entitled also to share in the residue. *Ib.*

4. The testator gave to *M. E. R.* the household furniture and other chattels remaining after the death of the widow :

Held, that she also as such legatee was entitled to share in the residue. *Ib.*

5. *W. S.* and *J. S.* were entitled to the interest of purchase money invested on the sale of land :

Held, that they were thus annuitants, that as such they fell within the definition of legatees, and therefore were also entitled to share in the residue. *Ib.*

6. The testator, amongst other bequests of personalty, directed his executors, "On the death of my said wife, to pay over to the Wesleyan Methodist Superannuated Ministers' Fund, out of the pure personalty then in their hands, the sum of eight hundred dollars." There was no such charitable institution as the one named in Canada, but there was a society called "The Connexional Society of the Wesleyan Methodist Church," one object of which was the maintenance of a fund called "The Superannuated or Worn-out Preachers' Fund."

Held, that the testator having been resident in Canada, the presumption was, that it was a Canadian society he meant ; that "The Connexional Society" was entitled to receive this bequest, as the one most nearly answering the description given in the will ; that they were thus legatees, and, as such also entitled to share in the residue ; such society being entitled to hold lands to the annual value of £5000, and it was shewn that the land held by the society did not exceed £1000 a year ; and therefore though the residue was composed of both realty and personalty, the Statutes of Mortmain did not apply to prevent the society sharing therein. *Ib.*

7. A devisee of real estate is not a legatee, and therefore where such an one claimed a share in such residue, the Court refused him his costs. *Ib.*

8. A testator by his will dated 30th June, 1863, gave one half of his farm to his widow during her widowhood for the main-

tenance of herself and children, "and with regard to the stock on the said lot at the time of the decease of my said wife, with any other personal effects or property in her possession, she is hereby empowered to make such distribution as to her shall seem best." In July of the following year the testator became insane, a committee of his person and estate was appointed who, under an order in lunacy, leased the lands and sold the farm stock and implements :

Held, that the order in lunacy and sale thereunder operated as an ademption of the legacy to the wife, so far as the farming stock and implements were concerned ; but that under the power of distribution given by the will, she was empowered to make such distribution of the personal effects bequeathed to her as to her should seem best ; not only as to the amounts to be distributed, but also as to the objects of the distribution.

Miller v. Miller, 224.

9. The testator devised a lot of land to his son *John*, his heirs and assigns for ever.

Held, notwithstanding the subsequent lunacy of the testator, the devisee was not entitled to the rents of the estate prior to the decease of the testator. *Ib.*

10. The testator devised to another son another portion of his farm, with a direction that the rents thereof should be set apart from the date of the will until the son attained the age of twenty-one to enable him to erect suitable buildings thereon. The Court, in order to carry out the manifest intention of the testator, clearly expressed in his will, directed an allowance to be made to the son, out of the surplus handed over by the committee to the executors, of a sum equal to the amount of such rents from the date of the will until the son attained twenty-one ; and directed a reference, if necessary, to ascertain the amount. *Ib.*

11. The testator gave legacies of \$1,000 each to two of his daughters, payable in seven years from the date of the will :

Held, that they were not entitled to interest from the expiration of such seven years, but only interest as in an ordinary case. *Ib.*

12. He also gave a legacy to another daughter in these words, "I give and bequeath to my daughter *E. M.* the sum of \$1,200, such sum to be invested by my executors seven years from the date hereof, until the said *E. M.* attains the age of twenty-one years, which said sum of \$1,200 and the interest accrued thereon, shall be paid over for her benefit when she attains the age of twenty-one years as aforesaid."

Held, that she was entitled to interest from the death of the testator only. *Ib.*

13. A testator, after making sundry dispositions of his estate, devised a portion of it to executors to sell, and the proceeds after payment of debts, "to divide equally between my said son *C. W. S.* and my daughters by my first marriage." The testator had been thrice married. Of the first marriage there was no issue, male or female, living at the date of the will—several years after the death of his first wife. By the second marriage he had issue, one son, *C. W. S.*, and four daughters, all surviving. By his third wife, who survived him, he had issue, one son, *J. S.*, and four daughters.

Held, that the daughters by the second marriage sufficiently answered the description in the will, who, with their brother (*C. W. S.*), were entitled *per capita*: not that *C. W. S.* was entitled to one moiety, and the daughters, as a class, to the other moiety; that so far as the suit was rendered necessary, —by the ambiguity arising out of the inaccurate description of the class the testator intended to benefit,—the costs of all parties should be borne by the estate; but that *C. W. S.* must bear the costs incurred by him in asserting his claim adversely to his sisters.

Ling v. Smith, 246.

14. A testator by the residuary clause in his will gave and bequeathed "all the remainder of my real and personal estate whatsoever of which I may die possessed or be in any way entitled to, to my dear wife *Ann*, and on her decease the same to go [to] my heirs and next of kin."

Held, that the son of a deceased daughter, who had predeceased the testator, was entitled to a share in such residue (personal as well as real), notwithstanding the fact that under the will such grandson was entitled to a legacy of \$4000.

Rees v. Fraser, 253.

15. *Held*, that a bequest by a testator to his widow of the annual income from the real and personal estate during her widowhood and until the eldest son attained his majority, for the support of herself and the maintenance, education, and support of all the children during their minority; and after the eldest attained 21, and as each reached that age, the income to be paid to them proportionally after making ample provision for the support of the widow during her widowhood, did not indicate an intention on the part of the testator to give her this in lieu of dower.

Laidlaw v. Jackes, 293.

16. *J. K.*, by his will devised all his estate—real and personal—to his wife “for her own use and disposal, trusting that she will make such disposition thereof as shall be just and proper among my children.”

Held, that this operated as an absolute devise to the widow who had the power of conveying such a title to the lands as a purchaser under her vendee was bound to accept.

Nelles v. Elliott, 329.

17. A testator directed his residuary estate to be realized, and the proceeds to be divided equally between his three children on his daughter attaining 21. As to one—his eldest son, *G.*—the testator empowered his executors in their discretion to withhold his bequest, and pay him £10 within one year after the testator's death. And in case of the death of any of the legatees, before the time for payment, the share or shares of the party so dying to go to the survivor or survivors; “but it is to be understood, however, that in case either of my children should die other than *G.*, that it is not my will or desire that he should have any share of the deceased party's portion, unless my said executors shall deem it expedient to give it to him; and that it is my will and desire that he should not receive any part of my property under any circumstances other than the £10 before mentioned, unless my executors think it advisable to give it to him.”

Held, that the executors were not put to an election whether they would pay only the £10 in one year after the testator's death; but that they could at any time withhold any further payment to *G.*, notwithstanding they had already paid him a larger sum than the £10.

Bain v. Mearns, 450.

18. A testator made several pecuniary bequests payable twelve months after his decease, and in the event of any of the legatees being then not of age, he directed their legacies to be invested and the accumulations paid to them on their attaining majority. By an alteration of the draft will, he directed one legacy of £45,000, not to be paid to the legatee until he attained the age of 23, “and being desirous that provision should be made for his support and maintenance after he attains the age of twenty-one years, and until he arrives at the age of twenty-three years, I will and direct that my executors shall pay him after he so attains the age of twenty-one years, and until he arrives at the age of twenty-threes years, the annual interest, dividend, and income of the sum of twenty-five thousand pounds, which they are to invest and keep invested for that purpose.”

Held, that the legatee was entitled to the accumulations of interest from one year after the death of the testator, and not from his attaining 21 only.

Fuller v. Macklem, 455.

19. A testator by his will, after making sundry devises and bequests, directed the residue of his estate to be applied by his trustees, "unto and to ths uses following: First. In case my dear mother survives me and my nephew *S. M.* attains the age of twenty-three years, then all my residuary estate is to be valued by my executors, and divided into five equal shares, and one equal share is to be paid to my mother, or in case of her death before such division, then to be paid over or transferred to such person or persons or in such manner as she may by her last will and testament direct." The testator's mother survived him, but died before the estate had been divided or valued :

Held, that she took an absolute interest in the property so thereby given to her, and not a power of appointment merely; and that the same passed under the residuary clause in her will.

Becher v. Miller, 528.

20. A testator, by his will, bequeathed "the sum of \$500, to each of the four children of my brother *G. R.*, on their attaining their twenty-first year." At the date of this will, *G. R.* had five children—one son and four daughters—which fact was known to the testator, who had been heard to say that he would provide for the daughters, but that *G.* himself must provide for the son. By a previous will the testator had bequeathed the sum of \$500 to each of the four "daughters" of his brother *G. R.*; and the person who drew the will proved that the testator in giving him instructions therefor, said that "he wished to leave \$500 to each of *G.'s* four children the same as in the old will."

Held, (1) that evidence of the instructions so given was properly admissible for the purpose of rebutting any presumption of any change of mind of the testator, and thus shewing which four of *G. R.'s* children were intended to be benefited by the bequest, and (2) that the bequest was contingent upon the legatees respectively attaining their majority.

Ruthven v. Ruthven, 534.

21. The bequest of a testator's chattels, when unrestricted either expressly or by the context of the will, covers all the personal estate; but, where a testator after directing his executors to pay all his just debts and funeral expenses out of his *personal property*, bequeathed all his *chattel property* to his son, and then made sundry pecuniary bequests payable out of his *personal property*, and it appeared that after deducting the chattels—*i.e.* fur-

niture, farming implements, and movable goods of a like nature—
paying all the debts and satisfying the legacies there still remained
a balance of personal estate.

Held, that as to such balance there was an intestacy.

Peterson v. Kerr, 583.

See also "Ambiguity in Will."

"Dower," 3.

"Revocation or Alteration of Will."

WITHDRAWAL OF OFFER TO PURCHASE.

See "Specific Performance," 3.

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